



Woodrow Wilson  
International  
Center  
for Scholars

*Division of United States Studies*

# Women's Rights in Theory and Practice

*Employment, Violence and Poverty*







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## ***Employment, Violence and Poverty***

Woodrow Wilson International Center for Scholars  
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# Introduction

**Philippa Strum**  
Division of U.S. Studies

**I**n the late 1960s and early 1970s, proponents of gender equality began thinking creatively about how to redefine the legal sphere so as to use it as a tool in eliminating gender discrimination. One aid in this endeavor was an annual National Conference on Women and the Law (1970–1992), which students at a number of law schools organized to articulate the problem and consider the kind of public policies that might address it. The academics contributed their theoretical analyses; the practitioners assessed the theories’ utility as aids to policy-making. Many of the ideas behind both the early work in feminist jurisprudence and subsequent litigation and policy-making in the area of gender equality were honed at the conferences.

Although both public policy and the concerns of equal rights proponents continued to develop in the last years of the twentieth century and the beginning of the twenty-first, practitioners and scholars organized no similar large-scale thinking and strategizing sessions. Many among the new generation of academics working in the gender equality field, some without any background in practice, lack the same kind of ties to practitioners – who in turn are cut off from much stimulating new thinking among scholars. The Division of U.S. Studies therefore decided to bring feminist scholars together with attorneys from organizations such as the ACLU Women’s Rights Project, the National Women’s Law Center, Equal Rights Advocates, NOW LDEF, the National Partnership for Women & Families, the Institute for Women’s Policy Research, the Mexican-American LDEF, and the National Employment Law Project.

The purpose of the conference was to foster communication between academics and practitioners, thereby enriching scholarship and giving liti-

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**Philippa Strum** is director of the Division of U.S. Studies, Woodrow Wilson International Center for Scholars. The conference could not have taken place without the fine work of Susan Nugent, the Division’s Program Assistant. Program Associate Danielle Tarantolo provided major editing and organizational assistance in getting this publication ready for print. Both Susan Nugent and Division intern Aidan Smith furnished invaluable editing and proofreading aid. As with all of the Division’s publications, the credit for publication design goes to Derek Lawlor of the Center’s Outreach and Communications Department.

gators both ideas for courtroom strategies and a network of scholars upon whom to call in the future. A planning committee of scholars and activists decided that the conference should concentrate on three major areas: employment, violence against women, and poverty and welfare. An additional session on the problems for gender equality litigation created by the New Federalism and the promises inherent in international human rights concepts and instruments, which cut across the three major areas, was included. Given the lessons that can be learned from the past, presentations were also scheduled on the litigation that was done during the last three decades of the twentieth century. Supreme Court Justice Ruth Bader Ginsburg graciously agreed to speak about her pioneering litigation before that Court during her days as an advocate.

The proceedings of the conference are printed in the pages that follow. A number of themes run through much of the discussion. One is the continuing necessity for scholars and activists to work across fields. Conference participants referred frequently during and after the sessions, for example, to the importance of having people who work in the area of welfare listen to people whose expertise lies in the domestic violence field, and vice versa, and of having specialists in both those areas interact with employment law experts.

A second theme is the necessity to deal simultaneously with race, ethnicity and gender - referred to in the recent literature as intersectionality - so that all can be addressed more successfully. Clearly, "women of color" is a category separate from "all women," on the one hand, and "all people of color," on the other. The economic situation of women of color who earn particularly low wages - domestic workers in the U.S., for example - results from both their gender and their race. Can the problems of race, ethnicity and gender be treated as one in legal theory and practice, rather than as separate issues, given the constraints of current equal protection law? Is it possible to think outside the box, which in this case implies outside existing legal doctrines, to address problems that cannot be explained by identity alone but are clearly exacerbated if not caused by the combination of race, ethnicity and gender?

The theoretical clash between demands for equal treatment and the recognition of the need for different treatment became a third theme. In saying that there are times that women must be given "different" treatment - when, for example, a police officer becomes pregnant and may have to be given a temporary change of assignment - the question obviously arises, "different" from what? If the theoretical and legal paradigm is a male worker who will neither become pregnant nor bear the major responsibil-



ities of child-rearing, should litigators attempt to work within the paradigm, or perhaps seek to change it? How? Will pleas for different treatment clash negatively with the contention of much gender equality litigation that women are not asking for special treatment? Should/can litigators focus on the need to develop the paradigm of a family-friendly workplace?

Finally, participants referred to the possible need for some reconceptualization of the framework for gender equality litigation. What have been the unforeseen consequences of earlier developments, such as the criminalization of domestic violence and the movement of women into non-traditional jobs? What would be the impact of thinking about civil liberties/civil rights in the context of positive rights?

We cannot claim to have developed firm answers to any of these questions. What we offer here, instead, is an edited version of our conversations, in the hope that it will contribute to the thinking and practical work still to come.

## SESSION I

# Litigating for Gender Equality

## JUSTICE RUTH BADER GINSBURG

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### *Litigating for Gender Equality in the 1970s*

What was the mission in the 1970s? The grand aim was to place women's rights permanently on the human rights agenda. At the ACLU Women's Rights Project, which started up early in 1972, we worked on three fronts: We sought to advance, simultaneously, public understanding, legislative change, and change in judicial doctrine. In one sense, our mission was easy: the targets were well defined. There was nothing subtle about the way things were. Statute books in the States and Nation were riddled with what we then called sex-based differentials. Sex lines in the law were overt and entrenched.

A few typical examples of state laws, among many included in an Appendix to the ACLU's brief for Sally Reed, filed in the summer of 1971. *Reed* was the first of the 1970s gender discrimination/equal protection cases to come before the Court.<sup>1</sup>

Listed in the *Reed* Appendix was the domicile rule that prevailed in many States. Idaho's version, for a typical example, read:

The husband is the head of the family. He may choose any reasonable place or mode of living and the wife must conform thereto.

Another familiar example from the *Reed* Appendix, this one of the birds of a feather (women and children go together) genre: California's Penal Code made it a misdemeanor to use "indecent language within the presence or hearing of women or children."

As to federal legislation, the Solicitor-General provided aid, although perhaps not intentionally. He (the Solicitor-General at the time was former Harvard Law School Dean Erwin Griswold) asked the Supreme Court, in March 1973, to review a decision the ACLU had won in the Court of Appeals, *Charles E. Moritz v. Commissioner of Internal Revenue*.<sup>2</sup> Moritz was a man who had encountered rank sex discrimination in, of all places, the Internal Revenue Code—a provision that allowed single women, but not single men, a deduction for the cost of caring for an elderly parent.

Congress had prospectively changed the law to eliminate the sex line, so there seemed to be no pressing need for High Court review. Take the case nonetheless, the Solicitor-General urged, for the Court of Appeals decision “casts a cloud of unconstitutionality upon the many federal statutes listed in Appendix E.”

What was Appendix E? It was a printout from the Department of Defense’s computer (there were not many around in those ancient pre-PC days). The printout listed, title by title, provisions of the U. S. Code “containing differentiations based upon sex-related criteria.” It was a treasure trove. One could use the Solicitor-General’s list to press for curative legislation and, at the same time, bring to courts contests capable of accelerating the pace of change.

But if our targets were all set out in the law books, our work encountered resistance in this respect. Our starting place was not the same as that of advocates seeking the aid of the courts in the struggle against race discrimination. Judges and legislators in the 1960s and at least at the start of the 1970s regarded differential treatment of men and women not as malign, but as operating benignly in women’s favor. Legislators and judges, in those years, were overwhelmingly white, well-heeled, and male. Men holding elected and appointed offices generally considered themselves good husbands and fathers. Women, they thought, had the best of all possible worlds. Women could work if they wished; they could stay home if they chose. They could avoid jury duty if they were so inclined, or they could serve if they signed up to do so. They could escape military duty or they could enlist.

Our mission was to educate, along with the public, decision-makers in the nation’s legislatures and courts. We tried to convey to them that something was wrong with their perception of the world. As Justice Brennan wrote in a 1973 Supreme Court opinion, a year and a half after the Court had begun to listen: “Traditionally, [differential treatment on the basis of sex] was rationalized by an attitude of ‘romantic paternalism’ which, in practical effect, put women, not on a pedestal, but in a cage.”<sup>3</sup>

Those with whom I was associated kept firmly in mind the importance of knowing the audience and playing to that audience—largely men of a certain age. Speaking to that audience as though addressing one’s “home crowd” could be counterproductive. We sought to spark judges’ and lawmakers’ understanding that their own daughters and granddaughters could be disadvantaged by the way things were.

Before 1971, the Supreme Court had never acted favorably on a woman’s complaint that she had been denied equal protection by any state

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or federal law. To trace the story of when, why, and how women began to count in constitutional adjudication, may I take you back to a prosecution in a Hillsborough County, Florida, courtroom in 1957, some 45 years ago? Gwendolyn Hoyt stood trial there for murdering her husband; the instrument of destruction, a broken baseball bat. Gwendolyn Hoyt was what we would today call a battered woman. Her philandering husband had abused and humiliated her to the breaking point. Beside herself with anger and frustration, she administered the blow that ended the couple's altercation and precipitated the murder prosecution.

Florida placed no women on the jury rolls in those days, out of patriarchal concern for women's place at "the center of home and family life."<sup>4</sup> Gwendolyn Hoyt was convicted of second degree murder by an all-male jury. Her thought was simply this: If women were on the jury, they might have better comprehended her state of mind, casting their ballot, if not for an acquittal, then at least to convict her of the lesser offense of manslaughter.

The Supreme Court, in 1961 (the "liberal" Warren Court), rejected Gwendolyn Hoyt's plea.<sup>5</sup> The Court did so, following an unbroken line of precedent. That precedent reflected the long-prevailing "separate-spheres" mentality, the notion that it was man's lot, because of his nature, to be the breadwinner, the head of household, the representative of the family outside the home; and it was woman's lot, because of her nature, to bear and alone to raise children and keep the house in order. Representative of that thinking, a 1948 decision, *Goesaert v. Cleary*, had upheld Michigan's ban on women working as bartenders, unless the woman's husband or father owned the establishment.<sup>6</sup>

Just ten years after *Hoyt*, in 1971, the Supreme Court turned in a new direction. So did lower courts all over the nation. The turning point case, as I earlier mentioned, was *Reed v. Reed*. *Reed* involved a teenage boy from the State of Idaho, Richard Lynn Reed, who died under tragic circumstances. His parents were long separated. Richard's mother, Sally Reed, unsuccessfully sought sole custody. While Richard was staying in his father's house, he died from a bullet shot from his father's gun. It was an apparent suicide. Sally Reed sought to take charge of her son's few belongings, and so applied to the court to be appointed administrator of Richard's death estate. The father, Cecil Reed, some days later, applied for the same appointment.

The Idaho court rejected Sally Reed's application, although it was first in time, and appointed the father, Cecil Reed, under a state statute that read, as between persons "equally entitled to administer" a decedent's estate, "males must be preferred to females."<sup>7</sup> Sally Reed was not a sophis-

ticated woman. She earned her living by caring for elderly people, taking them into her home. She probably did not think of herself as a feminist, but she had the strong sense that her State's law was unjust. And she prevailed. The Supreme Court unanimously declared Idaho's male preference statute unconstitutional, a plain denial to Sally Reed of the equal protection of the State's law. Sally Reed visited the Court for the first time in June 1999. It was my special pleasure to introduce her then to members of the Supreme Court Historical Society.

Seventeen months after *Reed*, in *Frontiero v. Richardson*, the Court held it unconstitutional to deny female military officers housing and medical benefits covering their husbands on the same automatic basis as those family benefits were accorded to male military officers for their wives.<sup>8</sup> Air Force Lieutenant Sharron Frontiero was the successful challenger. Lt. Frontiero had this clear view: she saw the laws in question as plain denials of equal pay.

In the spring of 1999, Sharron Frontiero (now Cohen) visited the Supreme Court to take some photographs with me and a retired Air Force Major General, Jeanne Holm, an officer who had worked constantly to open opportunities for women in the military. (General Holm was one of the 18 high ranking female military officers who signed a friend of the Court brief supporting admission of women to the Virginia Military Institute.<sup>9</sup>) Like Sally Reed, Sharron (Frontiero) Cohen is not someone you would choose from a crowd as a potential frontrunner. She is an everyday person, uncomfortable with publicity. But she knew she had been shortchanged and she had the courage to complain.

Two years after Sharron Frontiero's victory, the Court declared unconstitutional a state law allowing a parent to stop supporting a daughter once she reached the age of 18, but requiring parental support for a son until he turned 21.<sup>10</sup> That same year, 1975, the Court decided a case very dear to my heart. It began in 1972, when Paula Wiesenfeld, a New Jersey public school teacher, died in childbirth. Her husband, Stephen Wiesenfeld, sought to care for the baby boy (Jason) personally, but was denied child-in-care Social Security benefits then available only to widowed mothers, not to widowed fathers. Stephen Wiesenfeld won a unanimous judgment in the Supreme Court.<sup>11</sup>

In defense of the sex-based differential, the government had argued that the distinction was entirely rational, because widows, *as a class*, are more in need of financial assistance than are widowers. True in general, the Court acknowledged, but laws reflecting the situation of the *average* woman or the *average* man were no longer good enough. Many widows in the United

States had not been dependent on their husbands' earnings, the Court pointed out, and a still small but growing number of fathers like Stephen Wiesenfeld were ready, willing, and able to care personally for their children. Using sex as a convenient shorthand to substitute for financial need or willingness to bring up a baby did not comply with the equal protection principle, as the Court had grown to understand that principle. (As a result of the decision, child care benefits were paid to Stephen Wiesenfeld, who has been an extraordinarily devoted parent. His son Jason graduated from Columbia Law School in 1998 and I had the great pleasure of co-officiating at Jason's wedding ceremony later that year.)

Next, in 1976, the Court's majority acknowledged that it was applying an elevated standard of review—"heightened scrutiny"—to overt gender-based classifications. The case was *Craig v. Boren*, in which the Court struck down an Oklahoma statute that allowed young women to purchase 3.2 percent beer at age 18 but required young men to wait until they turned 21.<sup>12</sup> It was a silly law, mercifully terminated. One might wish the Court had chosen a more weighty case for announcing the "heightened" review standard. (*Women in the Barracks*, I should note, in telling the VMI story, perceptively describes the cases I have just summarized.<sup>13</sup>)

What caused the Court's understanding to dawn and grow? Judges do read the newspapers and are affected, not by the weather of the day, as distinguished Constitutional Law Professor Paul Freund once said, but by the climate of the era. The altered conditions accounting for the different outcomes in Gwendolyn Hoyt's case in 1961, and in the 1970s cases of Sally Reed, Sharron Frontiero, Stephen Wiesenfeld, Curtis Craig, and several others, were these. In the years from 1961 to 1971, women's employment outside the home had expanded rapidly. That expansion was attended by a revived feminist movement, fueled in the United States, in part, by the movement of the 1960s for racial justice, but also, as elsewhere in the world, by the force of new thinking both represented and sparked by Simone de Beauvoir's remarkable 1949 publication, *The Second Sex*.<sup>14</sup> Changing patterns of marriage, access to safer methods of controlling birth, longer life spans, even inflation—all were implicated in a social dynamic that yielded this new reality: in the 1970s, for the first time in the nation's history, the "average" woman in the United States was experiencing most of her adult years in a household not dominated by child care requirements. That development, Columbia University economics professor Eli Ginzberg said in 1977, might well prove "the single most outstanding phenomenon" of the late twentieth century.

Congress, aided by the Department of Justice and a Civil Rights Commission report, eventually weighed in. The legislature eliminated most (but not quite all) of the “differentiations based upon sex-related criteria” on Dean Griswold’s 1973 list.

In sum, the Supreme Court in the 1970s, as I see it, effectively carried on in the gender discrimination cases a dialogue with the political branches of government. The Court wrote modestly; it put forth no grand philosophy. But by impelling legislative and executive branch re-examination of sex-based classifications, the Court helped to ensure that laws and regulations would “catch up with a changed world.”

Most immediately relevant to the VMI litigation about which Professor Strum has written so insightfully, Congress, in the late 1970s, had mooted a court case challenging the exclusion of women from the U.S. military academies – West Point, Annapolis, the Air Force Academy. Congress opened the doors of those academies to women. By the time of the *United States v. Virginia* case, women cadets had graduated from the U.S. academies for over a decade. The Marine Corps had elevated a career female officer to the rank of three-star General in charge of manpower and planning. Women in service were guarding the Tomb of the Unknown Soldier, flying planes, doing so many things once off limits to them.

Public understanding had advanced so that people could perceive that the VMI case was not really about the military. Nor did the Court question the value of single-sex schools. Instead, *VMI* was about a State that invested heavily in a college designed to produce business and civic leaders, that for generations succeeded admirably in the endeavor, and that strictly limited this unparalleled opportunity to men. The case was the culmination of the 1970s endeavor to open doors so that women could aspire and achieve without artificial constraints.

One last story from the 1970s: the case of Captain Susan Struck, an Air Force officer serving as a nurse in Vietnam where, in 1970, she became pregnant. She was offered this choice: Have an abortion on base (in pre-*Roe v. Wade*<sup>15</sup> days, the military, without fanfare, made abortion available to its members and dependents of members) or leave the Service. Captain Struck, a Roman Catholic, would not have an abortion, but she undertook to use no more than her accumulated leave time for the birth, and she had arranged for the baby’s adoption immediately after birth. She sued to fend off the discharge Air Force regulations required. She lost in the District Court, and again on appeal to the Ninth Circuit. But she was well represented, and each month was able to secure a stay of her discharge.

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The Supreme Court agreed to hear her plea. It was an ideal case to argue the sex equality dimension of laws and regulations regarding pregnancy and childbirth. Solicitor-General Erwin Griswold intervened. He saw loss potential for the government. He therefore recommended that the Air Force waive Captain Struck's discharge and abandon its policy of automatically discharging women for pregnancy. The Air Force did so, and Griswold thereupon moved to dismiss the case as moot.<sup>16</sup>

Hoping to keep the case alive, I called Captain Struck and asked if she had been denied anything that could justify our opposition to a mootness dismissal. She was out no pay or allowance, she confirmed. "Isn't there some benefit you wanted and couldn't get?" I inquired. "Of course, she said; "I'd like to become a pilot, but the Air Force doesn't provide flight training for women." That was in 1972. We agreed it was hopeless to attack that occupational exclusion then.

Today, it would be hopeless, I believe, to endeavor to reserve flight training exclusively for men. That is one measure of what the 1970s litigation/legislation/public education efforts achieved.

## **MARCIA GREENBERGER**

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### *Litigating for Gender Equality in the 1980s*

Litigating in the 1980s was very different, thanks to the extraordinary efforts of Justice Ginsburg, than it was during the 1970s. I began working on women's legal rights in the early seventies, so I had the special benefit of watching then-Professor Ginsburg when she was litigating those cases. While she was a teacher in law school, she was a teacher outside the classroom as well, and her example taught me and many other people in this room how to structure cases, how to make the most persuasive arguments, how to keep our eye on the ball and move forward. She left not only a legacy of extraordinary litigation victories and newly recognized legal rights for women but, in addition, a high aspirational standard for those of us who followed her.

The challenge of litigating in the 1980s was to build on the gains of the 1970s: to develop the contours and parameters of the rights that women secured both in the legislatures, especially in Congress, and in the courts. That meant giving the rights real meaning and force, as we sought to apply them to the myriad of real life circumstances confronted by women across the country.

By the end of the 1970s and the early 1980s, two core legal constitutional principles had been secured. The first was that the Equal Protection



clause did provide protection against sex discrimination, as established in the cases that Justice Ginsburg described; the second, that the right to privacy applied to women's reproductive capacity, as established in the landmark *Roe v. Wade* decision in 1973.<sup>17</sup>

There was a lot of dialogue in the eighties between Congress and the courts, as the courts continued to interpret these constitutional principles and anti-discrimination statutes, and as Congress responded and enacted changes when it agreed or disagreed with Supreme Court decisions interpreting the statutes.

Some of the key questions raised in those years were: What exactly is discrimination? How does pregnancy, for example, fit in? How does motherhood or fatherhood change the equation? What is sexual harassment? How do statutes like Title VII, which prohibits employment discrimination on the basis of sex, or Title IX, passed in 1972 to prohibit discrimination in education on the basis of sex, apply?<sup>18</sup> How broad is their scope? What remedies do they include? How do the precedents in race discrimination pertain to sex discrimination? Can separate be equal in a gender context? Is separate and equal even required to avoid illegal sex discrimination or, as some argued and still argue today, is separate and “comparable” enough when gender-based segregation is at issue? What about affirmative steps to overcome the effects of discrimination on the basis of sex or race or national origin? What about the combination of discrimination on the basis of race and gender, or other multiple forms of discrimination? What about affirmative action issues that arise when women are minorities, and which standard—race or gender—should apply to them?

All of these were burning issues in the 1980s. The Supreme Court resolved some and gave guidance in others, but others remain to be resolved two decades later.

While there were many landmark cases in the 1970s that dealt with constitutional equal protection guarantees on the basis of sex, after the early 1980s there were very few cases that elucidated what equal protection meant for women. By 1982 we had seen the last of the major constitutional equal protection cases in that decade, and it was not until almost the middle 1990s that the Supreme Court decided another equal protection case.

But *Mississippi University for Women v. Hogan*, the case decided in 1982 by a slim margin of five to four, was critically important in articulating the equal protection standard still applicable today.<sup>19</sup> The case also illustrated one of the patterns of the 1980s that continued into the 1990s and beyond: an increasing number of Supreme Court decisions that made an enormous difference to women's legal rights but were decided by 5–4 majorities.

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*Mississippi University for Women v. Hogan* was decided just as the drive for the Equal Rights Amendment (ERA) ended. Congress had extended the period of time within which states could ratify the ERA, but the time expired without the necessary number of states providing confirmation. *Hogan* was the first Supreme Court case addressing the issue of the contours of existing constitutional protection against sex discrimination in the absence of the ERA. In that case, Justice Sandra Day O'Connor, writing for the court, amplified the middle tier heightened scrutiny standard that Justice Ginsburg had played such a critical role in establishing in the 1970s. She described it as requiring the government to demonstrate an "exceedingly persuasive justification" in order to uphold sex-based distinctions.

The case arose in the context of a nursing school and, as was true with many of the cases that Justice Ginsburg had argued, was brought on behalf of a man who had suffered as a result of arbitrary distinctions based on sex. He was excluded from an all-female, state-run nursing school. The Court's decision demonstrated that such arbitrary distinctions hurt not only men but women as well. By keeping the nursing school all female, the state was perpetuating gender-based stereotypes that were detrimental to female nurses, as the Court showed by identifying the low wages and poor working conditions of many nurses. The fact that arbitrary, sex-based distinctions hurt both men and women has been a common thread in sex discrimination cases throughout the 1970s, 1980s, and 1990s.

In another legacy of the 1970s, the Supreme Court had held that pregnancy discrimination was not a form of sex discrimination.<sup>20</sup> In response, Congress passed the Pregnancy Discrimination Act, establishing that at least for the purposes of Title VII and its prohibition of sex-based employment discrimination, sex discrimination included discrimination on the basis of pregnancy.<sup>21</sup> The Supreme Court treated that amendment very seriously in the 1980s, handing down a decision holding that the refusal of employers to provide pregnancy health insurance coverage for spouses of male employees was a violation of the Pregnancy Discrimination Act.<sup>22</sup> This is yet another example of a Supreme Court decision in a situation in which arbitrary distinctions hurt both men and women.

In *Grove City College v. Bell*, another statutory interpretation case from the 1980s, the Supreme Court held that Title IX (the federal law that prohibits sex discrimination in federally-funded education programs) covered only the parts of a college or university or school that received direct federal funding.<sup>23</sup> That interpretation of Title IX left whole areas of an institution unprotected against sex discrimination and also called into question

the scope of protections of civil rights laws prohibiting discrimination on the basis of race, national origin, age, and disability.

After four years of effort, Congress passed the Civil Rights Restoration Act of 1987, establishing its clear intent that the Supreme Court interpret these core civil rights laws more broadly in the future.<sup>24</sup> That interplay and dialogue between Congress, acting when Supreme Court interpretations of statutes were overly narrow, and the Supreme Court, responding in turn to Congress' reaction to its own decisions, marked much of the important litigation in the 1980s.

But the 1980s also saw the Supreme Court interpreting some of these statutes in ways that strengthened their effectiveness. For example, the Court began to establish the contours of sexual harassment protections and made clear that employers do have an obligation to protect employees against sexual harassment, both when such harassment creates a hostile environment and when pay or promotions were made contingent on a harasser's demands.<sup>25</sup> There were also holdings providing key protections against discrimination that affected professional women in the workplace, including practices that involved subjective criteria applied by employers that had not received serious review by many lower courts.<sup>26</sup>

Perhaps the mix in outcomes of cases decided in the 1980s, some reflecting strong interpretations of women's legal rights and others reflecting a more cramped reading, was a product of the changing composition of the federal courts generally. In key respects, the courts at every level were retrenching. They were less willing to look expansively at what Congress intended in enacting statutory protections for women, or when interpreting constitutional rights. The dialogue between Congress and the Court was a particularly important one during this period of transition, with Congress correcting some of the narrowest of the Court's interpretations of key statutory rights for women. The consequences of the Court's mixed approach carried forward into the 1990s.

## **MICHAEL MAURER**

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### *Litigating for Gender Equality in the 1990s*

Listening to the stories Justice Ginsburg tells about the 1970s makes it quite clear how far we have come in gender equity litigation. But, because it bears on the cases I will discuss, I would like to read you an excerpt from the opinion by a three-judge panel of the Fourth Circuit Court of Appeals in 1970. The opinion was handed down in a case involving a lawsuit by women to gender-integrate the University of Virginia. In the course of

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**The Virginia Military Institute and The Citadel are publicly funded military colleges that, until recently, refused to admit women. In 1990, after VMI declined to let a woman high school senior submit an application because women were not welcome there, the Justice Department filed suit.**

that litigation the court, which was urged to gender-integrate all of Virginia's public schools, had this to say:

We are urged to go further and to hold that Virginia may not operate any educational institution separated according to the sexes. We decline to do so. Obvious problems beyond our capacity to decide on this record readily occur. One of Virginia's educational institutions is military in character. Are women to be admitted on an equal basis and, if so, are they to wear uniforms and be taught to bear arms?<sup>27</sup>

The Court was referring to the Virginia Military Institute. While we have made some progress since then, the vignettes I want to share with you from the VMI and Citadel cases show that we still have a way to go.<sup>28</sup>

The Virginia Military Institute and The Citadel are publicly funded military colleges that, until recently, refused to admit women. In 1990, after VMI declined to let a woman high school senior submit an application because women were not welcome there, the Justice Department filed suit on her behalf. There was a trial and an appeal to a higher court. That first round of litigation ended in the state of Virginia's being told that it had to open VMI to women or offer them an equivalent. Its response was to establish a separate women's institute at Mary Baldwin College. That proposed remedial plan, "remedial" because it was designed to remediate the wrong done to women by denying them access to a VMI-type of education, was the subject of the second round of litigation.

There was a telling vignette during one of the key depositions in the second round, the deposition of the president of Mary Baldwin College. I was the lawyer doing the questioning for the government. At one point, counsel for VMI interrupted and demanded the answer to the following question: "Is the government's position that it favors androgyny?" While Justice Department lawyers of course follow the directions given us by the people in Washington, I thought for a minute and decided I could answer this one without having to call my supervisors. "No," I replied.

At another point in the litigation, one of VMI's star physical training experts was asked, "You seem to think that men do everything better than women. Is there anything you think women can do as well or better?" He answered that the only thing women could do better than men was make babies.

The justification for having a separate women's school was discussed in Virginia's main brief. It included comments such as that the proposed school for women would incorporate those elements of VMI that were "appropriate to educating women." It said that the plan was to use "educa-

tional methodologies that are appropriate to women.” And it said that it would adapt VMI’s methodology “to meet the distinctive developmental characteristics and educational needs of women.” Finally, it said that VMI’s brutal adversative model was “developmentally unsuitable for the vast majority of female cadets, not conducive to the development of confidence and self-esteem in women.” That was the basis for Virginia determining that women could not go to VMI and that they would have to go elsewhere to obtain an education that was more suitable for them.

Michael Kimmel, one of the government’s witnesses at the remedial trial, is an expert in comparative historical sociology. Prof. Kimmel commented that the Mary Baldwin plan reminded him of a lot of the things that he had read about men’s responses to women’s efforts to achieve gender equality in the nineteenth century, and he pointed out the similarities between some of that century’s ideas about what was appropriate or inappropriate for women and the kind of language in the VMI plan. I was the lawyer who was examining him when we got to trial, and so it was a little disturbing for me when the district court judge interrupted and demanded to know why any of this was relevant to the case. That was when I thought we might have some problems.<sup>29</sup>

My second point is that it is very important for lawyers and for people who support gender equality to think about what their theory is in each of the cases they litigate.

As I have indicated, the VMI case was tried twice. There was a liability phase to determine whether there was anything wrong with VMI excluding women, and a remedial phase to decide whether creating a separate institution for women rather than admitting them to VMI was legally acceptable. During the liability phase, the two sides were very much like ships that pass in the night. The United States argued that this was a state-sponsored exclusion of women from what VMI and Virginia admitted was a unique educational opportunity. VMI, on the other hand, argued that this was not a case about exclusion but one about choice, about diversity, about educational prerogative, about preserving a unique institution. It insisted that VMI’s all-male student body was crucial to its success.

During the remedial phase some of those arguments came back to haunt VMI. All the talk in the first phase about uniqueness was problematic for Virginia the second time around, because it made it impossible to argue at that point that women could get the same unique educational opportunities and benefits at an institution that would lack all of the things, like the military atmosphere and the very tough training, that made

VMI unique. As Judge Diana Gribbon Motz of the Fourth Circuit Court of Appeals and then Justice Ginsburg pointed out in their opinions,<sup>30</sup> if the adversative model was crucial to the VMI experience, then women couldn't possibly derive the same benefits at another institution that lacked it. If, however, the adversative model was not essential to the VMI outcome, then women wouldn't be destroying the Institute if their attending VMI necessitated changes in the adversative method.

So, as VMI's lawyers learned, it is important to think of the ramifications of your theory about a case. The government was consistent in maintaining that this was a matter of excluding women from a unique educational opportunity. We were able to carry that forward the second time around as well, and of course, in the end we won.

My third point is the importance of public education and making people understand what these cases are about. There is a tendency outside the civil rights community to think that all these problems have been resolved. People wonder, "Why do we have race discrimination cases and sex discrimination cases today? Haven't all those issues been dealt with?" One of the challenges for both lawyers and non-lawyers who are interested in these issues is to make clear what is at stake. The first general reaction to the VMI and Citadel cases was, "Who cares? Why should we care whether women are admitted to a school like that? They're small schools. Their combined enrollment is perhaps 2500 or 3000 students; what's the difference? If Virginia and South Carolina want to maintain those schools for men only, let them do so." Attitudes like that make it important for lawyers to try to disabuse people of the notion that discrimination anywhere doesn't matter.

The VMI case was a particular challenge for the government because we did not have a so-called "live" plaintiff. The high school student who sent us a letter of complaint chose to remain anonymous throughout the litigation. That became something of a problem, because there was no "live" plaintiff to explain why being excluded from applying to VMI mattered so much to a woman. The Citadel case, on the other hand, presented different challenges, because of course Shannon Faulkner was a "live" plaintiff and really great burdens were placed on her. She was the victim of the kind of campaign, by people inside and outside The Citadel, that no one should ever have to experience. So we learned that challenges can exist when you have a "live" plaintiff as well as when you don't, even if the specifics of the challenges change.

Last spring I was one of three Justice Department lawyers who visited The Citadel as part of our review of that school's compliance with another

er court's order to it to assimilate women fully. In the course of our visit we had the opportunity to meet with a number of school officials, as well as with a number of female cadets. It was the ultimate vindication for everyone who believed in and worked on these cases. The female cadets we met were truly impressive. Contrary to myth, they did not come to The Citadel to destroy the school. They did not come to the school to make a political statement. They were there because they were the daughters or sisters or nieces or granddaughters of Citadel graduates, and they were interested in attending the school for the same reasons that their fathers and brothers and uncles and grandfathers had. They were there for the challenge, for the prestige, and to make connections that would last long after school. They understood that they had to prove themselves, that they had to be better than the men, that people were going to be watching them especially carefully. They knew that they carried a burden that didn't exist for their male fellow cadets. They knew they had to go the extra mile. They knew they had to show that they were extra tough. But at the same time, they were also intensely loyal to their institution. It was a remarkable thing to see those women, who understood very clearly how tenuous their role at The Citadel was, and who nonetheless had the same sort of Citadel passion as the male cadets. I think that shows that you can preserve traditions and you can replace traditions with other, equally good traditions. The women we met at The Citadel, and the ones at VMI, are demonstrating that over and over again.

**JUSTICE GINSBURG:** There may not have been a named plaintiff in the VMI case but there were many ready, willing, and able to pursue the opportunity, given the chance. The most touching correspondence I received after the VMI case came from a man named Thomas Engleman who wrote, "I graduated from VMI in 1967 and I know a few young women today who are physically, intellectually and emotionally tougher than I was over thirty years ago. If I could make it then, I know they can make it today."

I had further correspondence with that gentleman and some months later I received a letter with an enclosure. Mr. Engleman wrote, "On graduation day, 1967, mothers of the Class of '67 were given cadet pins. The one enclosed was my mother's. She is dead now. We wanted you to have it. In an abstract way you will be the mother of the VMI's first and succeeding women graduates. This pin makes you an adjunct member of the VMI family. I am sure it would have made my mother proud to know it is in your possession."

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## DISCUSSION

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**QUESTION:** Given the holding in *Mississippi University for Women v. Hogan*, why did Virginia use so many taxpayer dollars to take the VMI case all the way to the Supreme Court? Why did Virginia even defend VMI?

**JUSTICE GINSBURG:** There's a song in *Fiddler on the Roof* called "Tradition." Traditions die hard.

**MARCIA GREENBERGER:** As I mentioned, *Hogan* was a five-four decision. Those of us who participated in and watched the case knew that the other side hoped it would be cut back the next time around.

**QUESTION:** A good many members of Congress, spearheaded, if I'm not mistaken, by Louise Slaughter, are trying to reintroduce the Equal Rights Amendment. I wonder if you would comment for those of us who are not lawyers about how badly we need it. Can we live without it?

**MARCIA GREENBERGER:** Legal doctrines are always subject to testing. Fortunately, the Supreme Court did not cut back the holding in *Mississippi University for Women v. Hogan* in the VMI case, but there will always be that kind of testing. The Equal Rights Amendment would provide permanent constitutional protection for women. It would be a powerful statement. And while the Supreme Court underscored in *VMI* that the Constitution includes a heightened level of protection against sex discrimination, it still is not the highest level of protection that is accorded to other groups that have faced discrimination in the country. The Equal Rights Amendment would provide that highest level. It would therefore provide both enhanced protection and permanency.

**JUSTICE GINSBURG:** Even in the days when the Equal Rights Amendment was vibrant, its principal sponsor, Martha Griffiths, said, "There was never a time when at the level of legal doctrine the Supreme Court could not have done what we're asking today." But she and many other women were ardent supporters of the Equal Rights Amendment for what one might call a symbolic reason. If you look at the U.S. Constitution you will find, in the grand Fourteenth Amendment, the word "male," from which it was fair to imply that women were not regarded as equal citizens.<sup>31</sup> At last, in 1920, women gained the vote. But still, something is missing. In every constitution in the world written after World War II, there is a firm statement to the effect that men and women are persons of equal stature before the law. The United States Constitution is now among a minority of the constitutions in the world lacking the clarion statement that it is one of society's fundamental principles that men and women are equal in rights, equal in dignity. I have three granddaughters. I would like



them to see such a statement when they take out their pocket Constitutions.

## NOTES

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1. *Reed v. Reed*, 404 U.S. 71 (1971). The Equal Protection clause of the Fourteenth Amendment to the Constitution states, “No state shall...deny to any person within its jurisdiction the equal protection of the laws.”
2. *Moritz v Commissioner*, 469 F.2d 466 (C.A.10 1972).
3. *Frontiero v. Richardson*, 411 U.S. 677 (1973), at 684.
4. Justice John Marshall Harlan in *Hoyt v. Florida*, 368 U.S. 547 (1961), at 62.
5. *Hoyt v. Florida*, 368 U.S. 547 (1961).
6. *Goesaert v. Cleary*, 335 U.S. 464 (1948).
7. Idaho Code, Section 15-312.
8. *Frontiero v. Richardson*, 411 U.S. 677 (1973).
9. *U.S. v. Virginia*, 518 U.S. 515 (1996).
10. *Stanton v. Stanton*, 421 U.S. 7 (1975).
11. *Weinberger v. Wiesenfeld*, 420 US 636 (1975).
12. *Craig v. Boren*, 429 U.S. 190 (1976).
13. Philippa Strum, *Women in the Barracks: The VMI Case and Equal Rights* (University Press of Kansas, 2002).
14. Simone de Beauvoir, *The Second Sex* (first French edition, 1949; first American edition, ed. H. M. Parshley, 1952).
15. *Roe v. Wade*, 410 U.S. 113 (1973).
16. *Struck v. Secretary of Defense*, 460 F.2d 1372 (9th Cir. 1971), vacated and remanded to consider the issue of mootness, 409 U.S. 1071 (1972).
17. *Roe v. Wade*, 410 U.S. 113 (1973).
18. Title IX, Education Amendments of 1972, 20 U.S.C. §1681-1688.
19. *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982).
20. *Geduldig v. Aiello*, 417 U.S. 484 (1974); *General Electric v. Gilbert*, 429 U.S. 125 (1976).
21. Pregnancy Discrimination Act of 1978, 42 U.S.C. § 2000e(k), amending Title VII of the Civil Rights Act of 1964.
22. *Newport News Shipbuilding and Drydock Co. v. EEOC*, 462 U.S. 669 (1983).
23. *Grove City College v. Bell*, 465 U.S. 555 (1984).
24. Civil Rights Restoration Act of 1987, P.L. 100-259 (1988).
25. *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986).
26. *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).
27. *Kirsten v. Rector and Visitors of University of Virginia*, 309 F. Supp. 184 (E.D. Va. 1970).
28. *United States v. Virginia*, 518 U.S. 515 (1996); *Faulkner v. Jones*, 858 F. Supp. 552 (D.S.C. 1994).
29. The district court judge decided against the Department of Justice in both stages of the case. The United States Supreme Court eventually overruled him, and the federal court of appeals, to hold that Virginia could not deny

women the unique publicly-funded educational opportunities that VMI affords to men.

30. Judge Motz dissented, after a panel of the court of appeals upheld the district court's decision, when her court voted not to rehear the case *en banc* (with the entire court sitting). *United States v. Virginia*, 52 F.3d 90 (1995). Justice Ginsburg wrote the Supreme Court's decision.

31. Section 2 of the Fourteenth Amendment prohibits denying the right to vote to "any of the male inhabitants of [a] state" who are U.S. citizens and twenty-one years old.

**SHEILA THOMAS**

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Equal Rights Advocates (ERA) is a women's rights organization that decided over two years ago to focus on a litigation strategy. One reason for the decision was that litigation had been a catalyst for a number of industries in this country becoming more willing to open up to women. ERA selected me as a litigator in part because I had experience handling class employment discrimination cases alleging race and gender discrimination.

ERA had litigated in the area of pregnancy discrimination in the case of *Geduldig v. Aiello*.<sup>1</sup> Although that case was not successful in the Supreme Court, it led to legislation in which Congress declared what everybody else thought was true: pregnancy discrimination is employment discrimination.<sup>2</sup> ERA has since used class-wide cases to open up doors for women in such places as the San Francisco Fire Department.<sup>3</sup> It is difficult to believe now, but until 1976 it was illegal to hire women as firefighters. The first woman was hired in 1987, not very long ago. The San Francisco case was different from many others involving fire departments because it dealt not only with race discrimination, which was the norm, but also with gender discrimination and particularly with discrimination against women of color. Until then, litigation in this area usually had to do with women or minorities, but not both.

Much of what follows is about changing the litigation paradigm and using litigation as a short-term as well as long-term strategy.

When ERA was deciding what areas to focus on in our developing litigation strategy, we looked at particular industries from which women were being excluded, and realized that the larger issue was that of economic equity. ERA and other groups, particularly in California, began to focus on women in areas of employment with relatively low education requirements. One example is the grocery industry. Jobs in that area are not usually considered economically viable but the reality is that some positions pay substantial amounts of money. Depending on the store's profits, for example, store managers may make as much as \$100,000 a year.

*Stender v. Lucky Stores* became an example of what we were seeing in the area of economic equity.<sup>4</sup> Women had been denied promotion, training, and equal pay by Lucky Stores because of their gender. Women represented fewer than 5% of the managers when the case began. By the time the consent decree was reached after five or six years, 20% of the managers were women. You may have noticed that in grocery stores women frequently are the cashiers but produce section jobs are usually held by men. The latter are among the highest paying jobs.

That kind of situation led us to focus on the retail industry. At the moment, in conjunction with other law firms, we have a nationwide lawsuit pending against Wal-Mart. The claims are essentially the same as in the grocery industry: women are denied pay, training, and promotion, and are retaliated against if they complain. The question of why such jobs are our focus brings me to my next point.

We must concentrate on the kinds of positions that can open doors for women of color and those who were formerly on welfare. The retail and restaurant industries are two of the major industries to which women who were formerly on welfare have turned for work. Unfortunately, jobs in those industries typically pay \$6 or \$7 an hour, which is almost no job for some women. In California, that means you cannot pay for food or housing. Essentially, you are the working poor.

We also wanted to look at some of the non-traditional jobs - the construction trades, for example. That area was of interest to women of color and was one in which they faced barriers, so we began litigating there as well.

We and other women's rights organizations, such as the National Women's Law Center and the NOW Legal Defense Fund, are now trying to develop an overall strategy to deal with the fact that women have largely been excluded from the construction trades, where they have held only between 2 and 2.5% of the jobs available for twenty-five years. The question is why, when those are jobs that actually would allow women to support themselves and their families. Our primary focus remains on low-income women and women of color, who may have a high school diploma but are not thinking about college.

One of the problems we face is a nationwide one: the courts are becoming more and more conservative. We as women must come together to develop an overall litigation strategy to deal with this development in the courts. We have had to strategize about where to file lawsuits, particularly given the New Federalism. It is particularly useful for this conference to have brought academics and practitioners together. As practicing

lawyers, we rely primarily on precedent, but judges tell us that there is a need to come up with legal theories they can utilize in an effort to rule differently. Academics can be very helpful in that process.

## JUDY LICHTMAN

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My remarks focus on the struggles of working women and men to balance their work and family responsibilities. The first draft of the Family and Medical Leave Act (FMLA) was written in our office in 1984.<sup>5</sup> Then, for nine more years, we chaired the coalition that worked to get a rather modest proposal enacted into law: modest, because it did not provide for paid leave. We were trying to enact a public policy that merely provided for unpaid leave.

Over thirty-five million workers have taken family leave since its enactment in 1993. To our surprise, 42% of the people who use it are men. They are not taking it for infant care or child care but, in large part, for their own serious health conditions, because many of them are in workplaces without sick leave. They are also using it for the care of spouses and parents (18% of the people who take it use it for parental leave). We thought it would be our grandchildren's generation, at best, that would see men in significant numbers using Family Leave.

There is still a need for paid leave, and we are attempting to address the huge gaps left in the existing law. Seventy-eight percent of those who needed leave could not afford to take it. Nine percent of leave-takers who received less than their full pay found themselves on public assistance. Forty-five percent of employees cannot take advantage of FMLA because the companies they work for are not covered or those workers are not eligible.

There is enormous support from both women and men for legislative proposals that address these concerns - and, given the fact that men are taking leave in significant numbers, that is not a surprise. Parents support it and voters say they are more likely to favor candidates who back paid leave provisions.

To date, 28 states have offered proposals to provide some kind of paid leave, although the various proposals differ. Forty-five states still do not have temporary disability insurance, which exists only in Hawaii, California, New York, New Jersey, Rhode Island and the Commonwealth of Puerto Rico. If we can expand the reasons for taking temporary disability insurance in those five states to include the FMLA reasons, including the care of newborns, the newly adopted, seriously ill children, and the

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care of spouses or parents, we will have established a way to get income into the hands of the people who need it most.

States are talking about paid family leave benefits and the use of unemployment compensation, but that is a harder conversation to have in difficult economic times when states are facing huge budget shortfalls. Some states are also discussing flexible sick leave, shared leave and at-home infant care. The best examples are Minnesota, Missouri, and Montana, which have enacted programs that allow child care money to be used by women who have recently left welfare for workfare jobs. Rather than having women with newborns pay child care money to third party providers, the state now permits them to stay home and be paid directly.

There are many federal initiatives as well, including one to use FMLA to cover smaller companies. The Act now applies only to companies with 50 or more employees. We are also talking about expanding FMLA an extra twenty-four hours a year to cover doctors' visits, medical emergencies, and parent-teacher conferences - hardly a revolutionary idea. But paid leave is not in any way going to be the answer to everybody's problems. We need a patients' bill of rights as well as affordable quality child care.

Former President Clinton, speaking at an EMILY's List event, spoke of all the time he has spent on the shuttle between Washington and New York. On one of his trips, a flight attendant told him she wanted to thank him for two things. The first, she said, was affirmative action. She was African-American, 52 years old, and she was quite convinced that without affirmative action she would neither have had entry level opportunities nor the promotions that she received. She said she knew that affirmative action had been in jeopardy during his administration and she thanked him for keeping it in place.

The second thing she wanted to talk to him about was FMLA. Her mother suffered from Alzheimer's; her father, from cancer; and they had only herself and her sister as caregivers. But if it hadn't been for FMLA, they would have had nothing. She said those other people talk about family values, but she thought the most important family value is being able to ease your parents' deaths, and she wanted to thank him for making FMLA the first bill he signed.

We did an extraordinary thing in achieving FMLA, but there is clearly a great deal to be done. While many people have heartfelt stories like that of the flight attendant on the US Airways shuttle, there are many more people who still cannot take advantage of the much needed benefits.

## WENDY WILLIAMS

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These issues of work and family were among the first issues I dealt with as a very young, very ignorant but very optimistic attorney for Equal Rights Advocates back in the founding days in the early 1970s. That work, most centrally, consisted of the litigation to get pregnancy discrimination recognized as sex discrimination under both Title VII of the 1964 Civil Rights Act and the Constitution's Equal Protection clause.<sup>6</sup> Later, as a faculty member at Georgetown University, I was part of the group that worked for passage of the Pregnancy Discrimination Act of 1978 (PDA) and the Family and Medical Leave Act of 1993 (FMLA).

The first and central point to be made is that the most compelling work-family problems are addressed inadequately or not at all by the employment discrimination and labor laws we have been discussing, because the people who are the targets of federal employment policy at the moment are the women and families on temporary assistance, struggling at the uneasy border between care of dependents and the paid work world. For those of us in the middle class, the workplace-family conflict is a matter of what kind of rights we can demand, whereas for very poor women and their families the issue appears to be how far they can be pushed around by the state. When we think about employment discrimination and women, we must include those problems in the range of things we call employment and equality issues.

In the early twentieth century the state claimed an explicit stake in women's bodies. In 1908, the Supreme Court declared in *Muller v. Oregon* that "[A]s healthy mothers are essential to vigorous offspring, the physical well-being of women becomes an object of public interest and care in order to preserve the strength and vigor of the race."<sup>7</sup> This "public care" has burdened women as much as it has benefited them. The International Labor Organization made a recommendation in the early part of the century that enlightened employers "protect" women by not employing them in the periods immediately preceding and following childbirth. The United States Women's Bureau picked up on that recommendation, commending it to America's employers. U.S. employers who heeded the recommendation did so by firing women when they became noticeably pregnant.

So as litigators in the early days of Equal Rights Advocates, we found that when women became pregnant, all hell broke loose on the job front. Once their wombs went into action, women were labeled as "home bodies" and treated accordingly. Our focus became the problems that women

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**People get sick, they get hurt, they need to go to the bathroom, they have to eat lunch, they need to sleep. Naturally and obviously, the workplace has had to be structured to take these characteristics of working people into account. But pregnancy also is one of the fundamental ways people are.**

have when workplace needs conflict with family needs, including pregnancy. We turned to the Equal Protection clause for help. This was just after *Reed v. Reed* in 1971.<sup>8</sup> There was a little glimmer there that a more vigorous standard of review in sex discrimination cases might be developing under the Equal Protection clause. And there was Title VII, which had been passed primarily to address racial discrimination in employment but contained a prohibition against sex discrimination as well. In the early days, however, the Equal Employment Opportunity Commission (EEOC) was surprised to find itself inundated with complaints from women claiming sex discrimination. The National Organization for Women was formed primarily to monitor the enforcement of Title VII by a reluctant EEOC.

As I mentioned, we were optimistic. It was something of a new world. Everything was wrong, so perhaps we could make everything right with a few well chosen strokes – and of course that too turned out to be wrong. Nowhere was that made clearer than when the Supreme Court declared in 1976 that pregnancy discrimination was not sex discrimination.<sup>9</sup> After that decision, a coalition formed which worked over the years to enact the PDA and then the FMLA. It is working today to amend and improve FMLA to deal better with the workplace-home problem.

At the center of that effort, first with the PDA and then with the FMLA, there was what might be considered either a philosophical posture or a litigation strategy. We began to think about the problem of pregnant workers in a new way, derived from a recognition that the workplace takes into account all the ways people are. People get sick, they get hurt, they need to go to the bathroom, they have to eat lunch, they need to sleep. Naturally and obviously, the workplace has had to be structured to take these characteristics of working people into account. But pregnancy also is one of the fundamental ways people are, and we believed the workplace should treat pregnancy within that context of accommodations made necessary by the fundamentals of the human condition. Our argument therefore was that discrimination on the basis of pregnancy is in fact sex discrimination and that in the context of the workplace, the existing structures should be made to function well for all characteristics common to workers, including pregnancy.

This was in our minds as we arrived at the language of FMLA. It was very important that in thinking about it, we had people from unions who could speak for labor, gay and lesbian parents, representatives of the community of people with disabilities, child care advocates, and so on.

The first thing we had to recognize was that we were living in a world in which actual practices inside families, at least in heterosexual families,



had changed only marginally. Moreover, the default position for men remains that of the breadwinner, while the default position for women still involves the dual burden of paid work (on the side) and parenting work. The basic stereotype, even though the reality is that it is true only of a minority, was and is of children who are in two parent families with mothers and fathers present. Our basic premise, however, was that we would not compose legislation that assumed that the worker's family needs were only women's needs. The caregiving role, when there are new family members and illnesses of family members, should evolve from the needs of a specific family and its view of the best way to respond.

Second, as Joan Williams points out in her book about the family and work conflict, the problem is structural: how do we create a viable whole of what needs to go on in the workplace and what needs to go on in families?<sup>10</sup> For example, while we have been working on child care for a long time, good public care for children still is not available at a price most people can afford. We continue to lack even the basic structure for caring for children in this country.

I want to leave you with two questions. There has been considerable debate among feminist lawyers on how to think about pregnancy. Does theory matter in this context, or can we answer all the questions by simply looking at what women and families currently suffer? Should theory lead what we do, or should the pain and circumstances of women lead it?

My second question concerns the difference between strategy and theory. Sometimes, when we can't agree on the big theory, we can still agree on the strategy. Can we begin doing that and moving forward on family and work issues?

## **JIM WILLIAMS**

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The National Employment Law Project (NELP) focuses on advocacy for low-wage workers, the vast majority of whom are women. We define advocacy broadly to include litigation, policy advocacy, support for organizing, and public education. Increasingly, we try to create resources to assist us in these efforts by helping to develop other organizations such as mobilization groups, advocacy groups, and other groups that provide direct legal services to people. There is a huge gap in employment law legal services for low-income people. In New York City until this year, for example, none of the Legal Aid Services offices had an employment law unit. Lack of resources limits their work to areas such as public benefits, family law,

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and housing. As a result of September 11 and the recognition of its significant impact on low-income people and immigrants, we were able to get foundation support to create an employment law practice at two Legal Services offices in New York City, but in both the city and throughout the U.S., few low-income people can access employment law legal services.

NELP's definition of employment law advocacy is expansive. It goes beyond traditional employment discrimination or labor law issues. A major part of our work is about enforcing basic employment protections such as minimum wage and overtime laws that still cannot be taken for granted by many workers. That results in a significant amount of work on behalf of undocumented immigrant workers. Before September 11, there was a trend towards amnesty and greater accessibility to various benefits for immigrants. That has since ended, however, and there has been a significant crackdown on immigrant workers in this country.

In addition, the sweatshop, unfortunately, is alive and well, and it exists in many forms. It is not only the garment factory, but also the restaurant, the taxi, and people's private homes, where domestic workers work from before dawn until after dusk doing everything in the household for much less than the minimum wage. Today's sweatshop workers work in laundries and clean rooms in hotels and office buildings. Large numbers of these workers, who are paid less than the minimum wage and receive no overtime, are undocumented workers who are afraid to assert their rights - which is why employers hire them. There is a tremendous amount of advocacy to be done for them. Advocacy strategies have to be creative because, as with all sweatshops, the primary employer attempts to distance itself from responsibility for complying with the law. Work is contracted out to smaller, often undercapitalized entities. This means that advocates have to use "joint employer" theories to ensure that workers receive the wages to which they are entitled.

In addition to representing undocumented immigrant workers and people who work in temporary, "non-standard" and contingent work relationships, NELP does substantial work on behalf of people in transition from welfare to work. We concentrated first on ensuring that people in workfare programs got the same employment rights as other workers, and then the battle became about paid transitional jobs: what type of work experience is most appropriate to ensure that someone can successfully make the transition from welfare to work. NELP worked with a number of organizing groups in New York City to enact legislation to create a paid transitional job program that provides the kind of employment experience, child care assistance, and support services (such as education and training)

that might make it possible for someone actually to find subsequent gainful employment. After the law was enacted, we had to sue the Giuliani administration to implement the program. At the end of the Giuliani era, there was a shift towards providing people with paid transitional jobs. The issue now, however, is which jobs and support services will lead to permanent employment when the transitional jobs end. Much more needs to be done to create entry level jobs that can support workers and their families.

Another NELP focus, involving a significant number of women workers, is unemployment insurance reform. One way that we think of employment law advocacy is as income replacement. We use the Family and Medical Leave Act, for example, to ensure that people don't lose jobs and that the income stream is still there when they are able to work again.

Because public assistance is largely being eliminated, there is a need to focus on other types of temporary income support for people. The unemployment insurance system has been around since the Great Depression but it was designed for a particular type of worker. We must focus on making that system more widely accessible.

As with all employment laws, even when a particularly good provision is enacted by a state, the struggle does not end, because you have to deal with the various agencies that enforce the laws – or, in most cases, fail to enforce them. When I worked at NELP as a law student in 1984, one of my first cases was an unemployment insurance case on behalf of a woman who had to leave her job because of domestic violence. In New York the law was changed only in the 1990s to provide unemployment insurance to workers when they leave their jobs as a direct result of domestic violence. Unfortunately, the New York State Department of Labor continues to require that claimants jump through various hoops to establish that they did everything that they could to protect their jobs before they left, in spite of the fact that the legal standard is merely establishing that the worker left her job because of domestic violence. I recently had to go to the Appellate Division to seek the appropriate interpretation of the law, but the Appellate Division simply granted benefits without clarifying the legal standard. The point is that we have to advocate on a variety of levels to ensure that our clients get what they need and deserve.

There remains a huge amount of work to be done about entry-level employment discrimination cases, but that won't be possible without enormous resources. We also need to develop law school curricula that focus on low-income people, that focus on advocacy strategies that go beyond litigation, and that look even beyond policy advocacy.

## DISCUSSION

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**NAN HUNTER:** This conference is an opportunity to bring together people from a variety of different disciplines and locales and perspectives to focus on questions that, while large, are not so large that they cannot be discussed in a productive manner. The question we have to address here is, what is the most important work that women's rights groups and scholars can do? What is the greatest impact that can be leveraged from the limited resources that we all have, taking into account the different legal venues that have been spoken about, including a strong focus on legislation as well as litigation?

We heard about entry-level positions and the concept of thinking about "women's rights work" in the context of employment as focusing on income continuity. Another focus was legislation on the state level. Finally, there were references to the strategic importance of the interconnectivity of different legal issues, and looking at the whole reality of *all* women's lives, including racial and class differences.

**SUSAN STURM:** I am very interested in the effort to take what sounds like a problem-oriented approach to litigation. When we examine the cases of people who have been excluded from or under-represented in the labor force, primarily immigrant women and women of color, we find that the patterns are not only around deliberate exclusion. The larger problem seems to revolve around creating new infrastructures, and persuading those in positions to hire workers they think can succeed, but there are trust issues, and long-standing patterns of racism.

I would like to hear about the relationship of more traditional forms of advocacy to what sound like expansive, problem-oriented conceptions of advocacy. What is the relationship among these different forms of advocacy, including law, and how do we rethink our litigation strategies as well as our managerial strategies to take account of this complexity?

**SHEILA THOMAS:** We see the litigation strategy as part of dealing with a larger problem. There is, for example, an underlying issue about the role of unions. There have been bridge programs that allow women to train for the trades. The problem is that even if you get into one of those programs, the next step is to get the job in order to finish the apprenticeship and to become what is called a journeyman. In California, the carpenter's union opened up to women only after being sued. That litigation lasted for years. It eventually went up to the Ninth Circuit, which held that goals and timetables were legitimate - which was a victory for affirmative action as well.<sup>11</sup> It is important to collaborate with organizations like unions but sometimes litigation is the leverage.

ERA makes a point of talking to the women who were formerly tradespeople or women who want to go into the trades, in order to learn what issues they might emphasize. For example, we know sexual harassment is a major problem; child care is a problem. There is a bundle of issues tied together, which is why we litigators need help from academics in thinking these problems through.

**WENDY WILLIAMS:** Many laws are not being enforced with respect to certain industries because that is where the so-called illegal workers are. They are in a kind of limbo of nonenforcement and victimization.

**JIM WILLIAMS:** It is not even clear that all policy-makers agree that basic employment law protections should apply to people in welfare programs, so we have to insist that the existing employment law applies in all cases.

**REGINA AUSTIN:** We are having theoretical conversations about reconciling work and family and whether to stay home or not, but that is not an option for low-paid women. The reality is that they have to work not one job but two or three jobs, and they also have to take care of children. We have to think about some way to imagine the experience of undocumented people and others who are locked out of these conversations.

**JUDY LICHTMAN:** I cannot take this theoretical conversation into debates with the elected or appointed officials with whom I deal, nor do I have theoretical conversations with business people when making the case that there is a business reason for responding to low-wage workers. There is a tension between what I do every single day and this conversation.

**NAN HUNTER:** I didn't hear the conversation as being theoretical. However, I think there is a very real problem of translating our goals and positions into an incredibly narrow political vocabulary.

**JUDY LICHTMAN:** And one that thrives on incrementalism, on the lowest common denominator. That is how it works and that is how we who are in the business of enacting or enforcing public policy get forced into an incrementalist mode.

**SHEILA THOMAS:** I understand that politicians want things that are distilled but it seems to me that part of what we want to do is to change the dialogue and not succumb to this fast food way of presenting information.

**JOAN WILLIAMS:** This is a fascinating conversation. I think it is fair to say that we are grateful to have together people who bridge different feminist themes and spheres of action. There is some basic demography to add to the discussion. We've found that the lower the economic class of the mother, the more likely she is to be out of the labor force. This makes perfect sense in a capitalist country where you get what you pay for. If you cannot pay much, you may well be willing to go through hoops of fire to keep care within the

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**It is important to remember that women of all economic levels have severe problems concerning care for their families. The problems manifest differently at \$200,000 a year than they do at \$20,000, but they are there nonetheless.**

family. Census data also reflect that the lower the economic class of the mother, the less likely she is to work full-time. The lowest-income women are probably employed, at least part-time, off the books, which census data do not reflect. But it is important to recognize that two out of three mothers aged 25–44 work less than 40 hours a week, and 92% work less than 50 hours a week. Our family system still relies heavily on family-delivered care.

There is a real racial dimension to this. The group that is most likely to rely on family as opposed to paid care is Latinas. Nearly forty percent of Latina mothers are out of the labor force. It is important to begin looking demographically past some of these assumptions about who takes care of her own children and who relies on paid care.

Since we lack proper subsidies for child care, paid care in this country is often of troubling quality, which is one reason many people are reluctant to rely on it. The people who do it tend to be low-income immigrant women who are leaving their children in countries such as Ecuador to come take care of ours, which is hardly an ideal solution.

It is important to remember that women of all economic levels have severe problems concerning care for their families. The problems manifest differently at \$200,000 a year than they do at \$20,000, but they are there nonetheless. I urge us to think about how we can meld all of those women together around issues of family care instead of going into recycled debates that have separated and divided us and made us unable to forge an effective coalition.

**SUSAN STURM:** To what extent have the national groups worked to try to establish coalitions with other groups that might have potential resources for addressing the issue of poverty and addressing wage discrimination?

**JIM WILLIAMS:** The National Employment Lawyers Association is a group of employment lawyers who practice on behalf of workers. For the most part they are small firm practitioners who are struggling in their practices, representing middle-income or wealthy people in employment discrimination matters, and they just do not have the resources to devote to employment work on behalf of low-income people. Trying to get *pro bono* assistance from larger firms is difficult because one encounters either “client conflicts” or “issue conflicts,” in which the firm is not interested in expansive interpretations of FMLA or even the Fair Labor Standards Act.

Other national organizations have their own dockets of issues. That is why in coalition building, it is important to focus on organizing, public education, and policy advocacy to ensure that there are different ways of addressing a problem rather than just litigation.

**SHEILA THOMAS:** While small firms frequently cannot do this kind of litigation because it brings low damage awards, our experience shows that

there are some law firms interested in doing such cases and willing to work with nonprofits. There are two small firms, a larger firm and two public interest organizations in a current case involving Wal-Mart. That requires, in effect, litigating a case by committee: not always easy, but possible. In California we have litigated with other civil rights organizations in cases concerning garment workers and have also been doing some work around the concept of joint liability.

**JOCELYN SAMUELS:** The National Women's Law Center is actually engaged in a very fruitful collaboration with Equal Rights Advocates around the issue of apprenticeship programs and women in nontraditional jobs and occupations. One of the crucial things that could come out of a discussion like this is a sense of the ways in which advocacy groups and litigators with slightly different areas of expertise could come together and collaborate on joint strategies to address problems that affect women. What the Center brings to the table is experience in litigating about sex discrimination in education that could be used as a way to develop alternative and novel legal strategies.

Similarly, we have worked with Lenora Lapidus and the ACLU Women's Rights Project on questions about pregnancy discrimination, the Virginia Military Institute case, First Amendment rights, and so on. I would like to talk about collaborating with the NAACP Legal Defense Fund in order to focus on low-income women of color to see if we could achieve jointly things that we can't achieve individually.

## NOTES

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1. *Geduldig v. Aiello*, 417 U.S. 484 (1974).
2. Pregnancy Discrimination Act of 1978, 42 U.S.C. § 2000e(k), amending Title VII of 1964 Civil Rights Act.
3. *Davis et al. v. City and County of San Francisco*, 1986 U.S. Dist. LEXIS 23787 (N.D. Cal., June 23, 1986).
4. *Stender v. Lucky Stores*, 803 F. Supp. 259 (N.D. Cal 1992).
5. Family and Medical Leave Act, P.L. 103-3 (1993); 29 U.S.C. 2601.
6. Title VII, 1964 Civil Rights Act: P.L. 88-352, 42 U.S.C. §2000e.
7. *Muller v. Oregon*, 208 U.S. 412 (1908).
8. *Reed v. Reed*, 404 U.S. 71 (1971).
9. *General Electric v. Gilbert*, 429 U.S. 125 (1976).
10. Joan Williams, *Unbending Gender: Why Family and Work Conflict and What to Do About It* (Oxford University Press, 2000).
11. *Eldredge v. Carpenters 46 Northern California Counties Joint Apprenticeship and Training Committee*, 833 F.2d 1334 (9th Cir. 1987).

## SESSION III

# The Dangers of the New Federalism; the Possibilities in International Human Rights Law

**ISABELLE KATZ PINZLER**

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### *The Dangers of the New Federalism*

For approximately the last ten years the Supreme Court, under the leadership of Chief Justice William Rehnquist and by startlingly consistent five to four margins, has brought about tremendous if subtle changes in basic constitutional interpretation and law. These changes are sometimes collectively referred to as the “federalism revolution.” What does that mean? What difference has it made or will it make in the lives of Americans? Specifically, what impact will these decisions have on women’s rights?

Because of the diffuse subject matter of the cases through which the Court has wrought its revolution and because of their esoteric nature and complexity, the Court’s fundamental change in constitutional structure has been effectively “hiding in plain sight.” In order to obtain a full picture of these changes and to begin to address the problems created by the decisions, we must think in broader terms and categories than those to which we are accustomed.

The new federalism has created problems that affect not only the areas of women’s rights and civil rights but the entire progressive liberal agenda: the New Deal, the environmental movement, health and safety regulations, intellectual property, and so on. As a starting point, we must cut through the thicket of rhetoric and stated rationales to see what the Court and its supporters are really doing. To this end, I have identified five possible but not mutually exclusive perspectives from which to view federalism. They are interrelated; each describes a distinct part of the bigger picture.

The first and most obvious interpretation of “federalism” is the elevation of states’ rights over federal power, particularly the federal power to protect human rights, or “vertical federalism.” States’ rights advocates seek a constitutionally mandated devolution of power from the federal government to state governments, and then, presumably, to local governments. This is the substantive justification given by the Supreme Court in its deci-



sions invalidating acts of Congress, illustrated by the *Morrison* decision's insistence that "[t]he Constitution requires a distinction between what is truly national and what is truly local[,]"<sup>1</sup> and the various decisions strengthening the Tenth Amendment's reservation of powers to the states<sup>2</sup> and the Eleventh Amendment's state sovereign immunity.<sup>3</sup>

The states' rights philosophy's peculiar sensibility elevates the power of states over the rights of individuals, professing the need to protect fifty governments from offense to their "dignity." Individuals cannot be allowed to affront that dignity by hauling a state into any court, federal or state, to assert their human rights.

The "states' rights" perspective on federalism also assumes a greater degree of consistency than the overall record of the "federalist five" actually demonstrates. The Rehnquist Court's federalism jurisprudence is not at all consistently favorable to state power; rather, it is more consistent with protecting big business against intrusive regulations, and with hostility to human rights and social justice, than with solicitude for states' rights. The Court's majority evinces concern about states' rights and dignity when it is expedient. As Justice Ruth Bader Ginsburg pointed out in her dissent in *Bush v. Gore*,<sup>4</sup> "Were the other Members of this Court as mindful as they generally are of our system of dual sovereignty, they would affirm the judgment of the Florida Supreme Court."<sup>5</sup>

The second possible interpretation focuses on the realignment of the balance of power within the federal government, or "horizontal federalism." Viewed from this perspective, federalism represents a profoundly anti-democratic shift of power from the elected branches of government at all levels to the Supreme Court.

The recent federalism cases have resulted in the narrowing of Congress' Commerce Clause power for the first time since 1937 and have severely restricted Congressional ability to legislate pursuant to Section 5 of the Fourteenth Amendment.<sup>6</sup> Conservative litigants testing the reach of these new principles are challenging a host of additional important civil rights and progressive statutes, including the Family and Medical Leave Act, the Equal Pay Act, Title VII of the Civil Rights Act of 1964, Titles I and II of the Americans with Disabilities Act, the Social Security Act, the Family Educational Right to Privacy Act, the Bankruptcy Act, and the Clean Air Act.

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by a majority of American citizens who know virtually nothing about how the Supreme Court works, even though polls show that Americans admire the Supreme Court more than the other branches of government.<sup>7</sup> This dangerous combination of lack of information and deference to the judiciary has allowed the Supreme Court to substitute its policy judgments for those of the elected Congress. In the last ten years the Court has invalidated more acts of Congress at a greater rate than it has at any time since the New Deal.

The third perspective on the federalism decisions focuses on the fact that they restrict access to the courts by individuals seeking to enforce their federally protected rights, thus leaving such people as state workers with theoretical rights for which they have no enforceable remedies. The Court has been careful to say that state governments are still prohibited from discriminating against their employees on the basis of age or disability and from violating their rights under federal wage and hour laws. However, if the federal government lacks either the wherewithal or the will to enforce those laws, those affected have no remedy. This has fallen especially hard on people of color, women, the disabled, the elderly, and the poor – in general, those who seek to vindicate their rights but have limited ability to affect the political system.

The list of barriers to litigation erected by the Court is long and becoming both longer and more imposing. The Court has, for example, increased reliance on forced arbitration procedures by discrimination claimants;<sup>8</sup> limited private rights of action;<sup>9</sup> limited court awarded attorneys' fees, making it difficult for all but the most affluent to find attorneys to represent them;<sup>10</sup> limited standing to bring suit;<sup>11</sup> tightened the rules for certifying class action suits which, by making it extremely difficult to use this efficient method to vindicate the rights of a large number of plaintiffs at one time, also makes it less likely that individuals will be able to redress wrongs;<sup>12</sup> limited sources of funding for Legal Services and other groups providing legal assistance to underserved populations;<sup>13</sup> and cut back on various causes of action used to vindicate rights under federal laws.<sup>14</sup>

Justice Ginsburg has spoken about the fact that a number of countries where women clearly lack equal legal or political rights nevertheless have equal rights amendments in what she referred to as their “aspirational constitutions.” The rights enumerated in these constitutions remain purely aspirational as opposed to actual in part because many of these constitutions, unlike ours, provide no private right of enforcement. Without the ability to enforce rights, they remain only aspirations, not realities. Women in this country have managed comparatively well without an equal rights

amendment. But we are gradually losing the private right of enforcement that is indispensable to the preservation of all our rights.

The federalism revolution might be seen from a fourth perspective as a rollback of essential civil rights laws and the imposition of major limitations, if not outright reversals, of the gains of the civil rights, women's rights, and disability rights movements. By restricting Congress's power and flexibility under the Commerce Clause and Section 5 of the Fourteenth Amendment, the Court has seriously undercut two of the three major sources of constitutional authority used to enact civil rights laws. The third, the Spending Power, is also under major assault from ultra-conservative advocates, scholars, and some lower courts. I do not believe this is coincidental. Whether as a result of underlying racism, sexism, discomfort with disabled people and other such tiresome "special interest" groups, or simply because of their commitment to free market principles that favor the entrenched, the political Right perceives civil rights laws to be a relatively easy target. Civil rights, the canary in the coal mine of the new federalism, is its first victim.

As Jed Rubenfeld points out, the new federalism jurisprudence can only be understood, logically, as an anti-antidiscrimination agenda and not as federalism at all. Its result has been to limit severely any antidiscrimination laws which the justices believe have gone too far and which now endanger their version of American values, other than those instances where traditional purposeful discrimination can be shown.<sup>15</sup> The new federalism is really about being opposed to anything beyond the most minimalist version of civil rights. That version does not include disparate impact, nor does it extend protections in the area of racial discrimination to other protected groups such as gays and lesbians and the disabled.

Finally, there is a fifth perspective, one that overcomes the inconsistencies and holes in other approaches: the new federalism is really about unfettered markets and unregulated business, passive government in the face of rampant free-market fundamentalism, and the ability to make money however possible. Viewed in this way, the new federalist movement can be understood as the Right's effort to define and then to enforce a *constitutionally mandated* unfettered free market, anti-regulatory, and pro-big business policy – to use constitutional interpretation to ensure that the federal government cannot take an active stance against *laissez-faire* principles.

Let us put this back in the context of its effect on women's rights. As I mentioned earlier, the FMLA is up for grabs right now under the rubric of federalism. A *certiorari* petition was pending before the Supreme Court at the time of this conference and has now been granted.<sup>16</sup> The question is

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whether the FMLA will continue to be enforceable by state government employees. This will be the first test of whether the new standards used to invalidate Congressional action making states liable for discrimination on the basis of age and disability will also be used against a law that is aimed at preventing sex discrimination, despite the fact that sex discrimination is supposed to be subjected to heightened scrutiny under the Equal Protection clause.

What follows falls under the category of “scary possible future developments that could flow from the new federalism jurisprudence.” Consider, for example, if the FMLA case goes the wrong way (or even if it does not), whether the Pregnancy Discrimination Act will continue to apply to the states. According to *Geduldig v. Aiello*,<sup>17</sup> the Fourteenth Amendment prohibition of sex discrimination under the Equal Protection clause does not include discrimination on the basis of pregnancy. And what about disparate impact analysis? The Supreme Court long ago held that it is not permissible in cases brought pursuant to the Fourteenth Amendment.<sup>18</sup> Under *Boerne* and other federalism decisions, the Supreme Court reserves for itself alone the prerogative to say what the Constitution can and cannot provide, and it will not permit the Congress to expand that coverage.<sup>19</sup>

Then, frighteningly, there is a movement to get sovereign immunity, which currently applies to states and state agencies, applied to local governments. It has already succeeded in some circuits. The 11<sup>th</sup> Circuit has said that under the Georgia constitution, local governmental entities are creatures of the state and therefore state sovereign immunity reaches them.<sup>20</sup> Any state can change its constitution so as to make local governmental entities sovereign for purposes of sovereign immunity.

That is why we need to begin thinking long-term, start thinking cross-cutting, stop thinking in the boxes to which we are accustomed, and begin thinking strategically about the new world of the new federalism.

## **RHONDA COPELON**

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### ***The Possibilities in International Human Rights Law***

This is a critical time in the United States. Every day, we watch fundamental constitutional and statutory rights being stripped away in the name of national security or states' rights. These are dangerous times for women: they threaten to reduce to oblivion our demands for gender, racial and social and economic justice. At the same time, women's human rights movements in the international arena have had a significant impact in the last decade on making women and concerns of gender a priority for the

human rights system. In so doing, feminist advocates have strengthened mechanisms of equality and challenged both the trivialization of violations against women and the public/private distinction in international law that appeared to bar inquiry into private rights-denying conduct. Feminist advocates have also broadened the frame of human rights internationally, examining gender implications of development, environment, free trade, and militarism, and insisting that these concerns be examined from the standpoint of human rights.

In the United States, feminist scholars, litigators and advocates have also begun to incorporate international claims in their work. It is particularly important in these times that there is a universal framework of human rights which has a persuasive effect at least and a binding effect at best on U.S. law.

There are three sources of international law with which feminist litigators can work. The first is treaties that this country has ratified; specifically, the International Covenant on Civil and Political Rights, the Convention Against Torture, and the Convention on the Elimination of All Forms of Race Discrimination. These are binding upon all branches of government. The rights they confer should be directly enforceable in the courts, but the Senate has declared them to be “non-self-executing.” Until this declaration is lifted or successfully challenged, a person cannot sue directly when the treaty is violated but can use the binding treaty norms to support compatible interpretations of our Constitution and laws.

The second pertinent source in international law consists of customary norms that have been developed in the international arena and that are accepted as obligatory by the consensus of nations. Customary norms are automatically incorporated into the “laws” of the United States under Article III (federal judiciary) and Article VI (Supremacy Clause) of the Constitution. These norms are binding on all branches of government and directly enforceable in both federal and state courts.

Because they require the consensus of nations, customary norms tend to concern such serious aspects of human rights as certain due process protections, violence and ill-treatment and, I would argue, deprivation of the minimum core of social and economic rights such as education and adequate means for survival. In addition, peremptory *ius cogens* norms address what are viewed as the most serious and non-derogable violations such as torture, forced labor, slavery, race discrimination and, increasingly, gender discrimination. Even where we have failed to ratify or implement treaties, if the right protected by the treaty is a customary norm, it is binding law. As feminist litigators, we should be able to use these international norms in a variety of forums in this country.

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**There is an important difference between U.S. law and international human rights law, where there is strong substantive support for non-discrimination and social welfare and affirmative action initiatives, and against violence against women.**

Thus, the United States is bound to adhere to ratified treaties and customary norms. In addition, it is bound not to undermine the goals and purposes of treaties the United States has signed but not ratified: the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the Covenant on Economic and Social Rights, the Convention on the Rights of the Child, the American Convention on Human Rights, and the Inter-American Convention for the Prevention, Punishment and Eradication of Violence Against Women. This means that the U.S. should not be able to go backwards (or, in international parlance, “retrogress”), as it has done with the dismantling of affirmative action and the welfare program.

Unfortunately, the United States has also become the first country in history to “unsign” a treaty: the International Criminal Court Treaty, which is a critical source of codified norms against gender violence and persecution as well as a mechanism with the potential for substituting justice for military force. In spite of the increasing contempt the current administration has shown for international obligations, U.S. activists and lawyers must insist on *pacta sunt servanda*: the observance of treaties and the binding effect of customary norms.

There is an important difference between U.S. law and international human rights law, where there is strong substantive support for non-discrimination and social welfare and affirmative action initiatives, and *against* violence against women. In contrast to the Rehnquist Court’s view that the U.S. Constitution is purely negative and imposes no positive obligations on government, the concept of state responsibility in international law is both negative and positive. Whereas the concept of state responsibility is almost never discussed in U.S. constitutional jurisprudence, state responsibility is a positive and foundational element of international law, rooted in human rights treaties. Some scholars speak of the positive obligation to protect and fulfill human rights. That is not to say that the obligation is recognized in practice all over the world, but it is there in principle, and the principle is very important.

This concept of state responsibility in international law is at great risk today. Global economic policies that seek to unfetter markets and eliminate the idea of the state as a protector of human well-being are on a collision course with the positive obligations of states under human rights treaties and norms. In the last few decades, the International Monetary Fund and the World Bank have insisted that debtor countries implement structural adjustment policies in exchange for continued financial support. What we have done through these international agencies, where the U.S. has almost

determinative voting power, is tell other countries, “You should get rid of your hospitals and your doctors. You don’t need so many schoolteachers and you don’t really need any social workers or public health care workers. You must reduce the tax load and protective barriers so that industry can come in to your country without paying taxes. Foreign investment and industrial development will ultimately cause trickle-down wealth and ensure that people get all the things they need.” In other words, these policies would strip down the state and eliminate its protection of rights and human security. In practice, these policies dramatically reduce the social service sector, where women are likely to be the first fired, and place the burden of social services on the backs of women.

Global economic policies that strip away the state’s protective functions are cousin to what is happening in the United States under the “new” federalism: devolution to the states and the stripping away of government power and responsibility. We see this, for example, in the constitutional assault on the commerce and civil rights powers, the legislative repeal of restrictions on business, the privatization of public functions, and the undoing of the federal welfare program.

There is thus a pressing domestic and international need to make human rights a check on global political and economic power. International law condemns what I call the positively irresponsible state. The International Covenant on Political and Civil Rights and the European human rights system recognize that a state has not only an obligation to respect rights and do no harm, but an obligation as well to ensure that people can exercise their rights – even if that requires economic support. A nation has not only a vertical relationship to the people but a horizontal one as well: an obligation to make sure that a private person or entity does not harm another. The state has an obligation, for example, to prevent gender violence, repair its victims, and punish its perpetrators. Gender violence, disproportionately inflicted on women, is an extreme form of discrimination that undermines women’s physical and mental integrity and subjects them to torture or inhuman treatment. The International Covenant and most human rights treaties also mandate judicial or other effective remedies. This focus on judicial remedies is very western, very much a part of our culture, and an essential component of implementation.

Under the international human rights system, the government cannot escape its responsibilities by privatizing essential public functions. It can, however, fulfill its responsibilities in a variety of ways: it can do so itself; it can use nongovernmental organizations (NGOs) and civil society; it can



use private capitalist or non-profit enterprises. But, in contrast to the U.S. constitutional system, the state remains responsible if the private sector fails to ensure the required outcome.

The international law system also addresses the issue of devolution of federal responsibility to states. To the extent that devolution is a process of eliminating protections against discrimination and other human rights, or creating a patchwork quilt of entitlements, devolution violates the international system's fundamental premise that rights in a federal nation must be evenly protected. A federal national system can permit states to shoulder its international responsibilities but remains responsible if the states fail.

The Violence Against Women Act's federal cause of action for violence invalidated in *Brzonkala v. Morrison*<sup>21</sup> was, as the Clinton administration acknowledged, precisely the kind of policy the U.S. is obligated to follow under international human rights obligations. Fifty-one international human rights scholars and experts signed onto an *amicus* brief filed in the case by the City University of New York International Women's Human Rights Law Clinic, explaining why gender violence violates customary international law and relevant treaties. It argued that the Supreme Court can rely on the customary international norm against discrimination and enforce it under Article III, and that VAWA was a perfect example of Congress exercising its power under the Necessary and Proper clause to enforce treaties of the United States. It outlined the constitutional structural foundation for implementation of human rights and, hopefully, will encourage further efforts. Public interest lawyers are turning increasingly to international law in relation to the death penalty, prisons, police abuse, discrimination, and affirmative action.

The human rights framework provides tools to feminist lawyers and legislative and policy advocates. Great strides have been made in the last decade, at least on paper, in positioning gender violence and equality as priority international issues. The international concept that economic and social rights are "indivisible" from and "interdependent" with political and civil rights is particularly important for women who shoulder the burdens of nurturing families and are disproportionately poor. The race and gender conventions prohibit discrimination, whether intentional or the result of disproportionate impact, and recognize additionally the disproportionate impact of intersectional discrimination based on both gender and race. The elimination of *de facto* discrimination is a positive obligation under both anti-discrimination conventions. The obligation to ensure that a person has the wherewithal to exercise civil and political rights undermines the negative state enshrined in *DeShaney* and *Harris v. McRae*.<sup>22</sup> The



United States' having signed the economic and social covenant requires, at least, that we not exacerbate the condition of the poor. And the states' obligations to children, for example, are to ensure protection against discrimination of any kind, such protection and care as is necessary for his or her well being, and the survival and development of the child to the maximum extent possible. All these obligations are critical to the equality and advancement of women.

At the same time, we face numerous obstacles in the attempt to integrate international human rights law into U.S. law. There is ignorance among opinion makers and the public. There is arrogance: "We have the best Constitution in the world, so why do we need international law?" There is fear: "What will it mean if we subordinate our sovereignty to international law?" There is right-wing opposition: "The UN blue helmets will take over the country." And there is the Bush Administration: "Down with multilateralism; we're the Empire." The courts are intrigued but also wary of directly referencing international human rights and Congress tries to preclude or limit enforceability. There is an increasingly problematic Supreme Court.

There are also a growing grassroots movement and a cadre of legal advocates dedicated to bringing the international human rights framework home. As feminist litigators, we should use international law principles strategically and persistently in our litigation and legislative advocacy. Where domestic remedies fail, we can take our issues to the Inter-American Commission on Human Rights and gain domestic and international attention; we can utilize available human rights mechanisms such as tribunals and non-governmental human rights strategies such as reports to examine and critique U.S. policies. We can be educators and advocates by integrating the international human rights framework in our domestic work.

This is a long-term, multi-faceted campaign of building human rights culture, law, and jurisprudence in a hostile context. It is nonetheless, I believe, a critical task of feminist and public interest lawyers to begin to make the international framework of human rights, including the principles of positive state responsibility, applicable here. That is a step in securing the foundations of women's equality in the face of racial, sexual orientation and every other form of discrimination, and in building the real foundations of human security. The international human rights framework invites us to be creative and think out of the box - to imagine a world where all women have human rights - and to build it here.

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**As feminist litigators, we should use international law principles strategically and persistently in our litigation and legislative advocacy. We can be educators and advocates by integrating the international human rights framework in our domestic work.**

## DISCUSSION

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**QUESTION:** Might we think about advocating federal constitutional amendments as a way, for example, to restore access to the courts?

**ISABELLE KATZ PINZLER:** We might look harder at the possibilities to be found in the current Constitution. We have not thought much about arguing that the Equal Protection clause covers economic rights or prohibits discrimination on an economic basis. The usual reaction is, “The Fourteenth Amendment doesn’t do that.” But if we are thinking long-term, that is exactly what we have to talk about.

**QUESTION:** When we are looking for political allies on different levels, we ought to consider local government. The city of Los Angeles passed a resolution several years ago to support CEDAW and follow its principles. I would be interested in hearing about how that kind of effort on the local or state level works.

**RHONDA COPELON:** That kind of effort presents the opportunity to organize in a positive way. One of the problems with the proposed federal Equal Rights Amendment was that not enough people could see something in it for themselves. For them, it was very abstract, and the coalitions that supported it were narrow. CEDAW is not perfect but it is concrete and far-reaching. The last time women’s advocates took CEDAW to Congress, the decision was made not to have a big national campaign about it but to slip it through. That didn’t work. CEDAW is still on the Senate’s table and local initiatives are important. They can be an excellent way to educate, and they can also have a legal effect in so far as local governments have the power to correct inconsistencies.

**ELIZABETH SCHNEIDER:** Rhonda Copelon has pointed out how important it can be to talk to people from other countries who have gone through international human rights campaigns. We can learn, for example, about alternative, non-governmental (NGO) reports about CEDAW, and the links forged in the process of organizing. Think, for example, if we were to have an NGO report that created an alternative to the administration’s idealization of the state of women’s rights in this country versus the situation of women under the Taliban. The process of putting that document together holds potential for organizing and mobilizing.

**QUESTION:** How will ratification of CEDAW change things in the U.S.?

**RHONDA COPELON:** International human rights treaties create obligations. It becomes harder to eliminate rights embodied in them. Today, Title VII is an essential vehicle for enforcing the obligation to combat dis-

crimination in the private sector. But in the absence of CEDAW, why can't Title VII be repealed? CEDAW may not prevail legally over a repeal of Title VII, but if we create broad and active popular support for CEDAW, it could acquire the quasi-constitutional power that it should have in American law. There is no substantial legal change unless people are mobilized behind it.

**COMMENT:** I agree that we need to educate people about the possibilities for good in the public sector. We face that with Social Security privatization as well. The firemen and policemen and a few women who died in the World Trade Center also helped make that case. But we still lack an economic framework in which to make our case, and the international human rights framework is important there.

**RHONDA COPELON:** We have to use CEDAW and the international human rights framework to educate more broadly about the possibilities of rights and about redefining the good. People here and in many other countries are experiencing a level of dislocation in their identities and in their work and livelihood, and it is moving them to the right. The phenomenon is, in part, the impoverishing and threatening trickle-down effect of global economic policies. We must redefine globalization in terms of human security, equity, and rights. Women are critical to that because we are the ones who will lose the most when human rights are ignored and denied.

## NOTES

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1. *United States v. Morrison*, 529 U.S. 598 (2000).
2. *See, e.g., Printz v. United States*, 521 U.S. 898 (1997).
3. *See, e.g., Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996); *Kimel v. Florida Board of Regents*, 528 U.S. 62 (2000); *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356 (2001).
4. *Bush v. Gore*, 531 U.S. 98 (2000).
5. *Id.* at 142-43.
6. Commerce clause: *United States v. Lopez*, 514 U.S. 549 (1995), *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996); Section 5: *City of Boerne v. Flores*, 521 U.S. 507, 519-24 (1997); *Bd. of Trustees of the Univ. of Ala. v. Garrett*, *op. cit.*, at 365.
7. Charles Madigan, "Name Supremes? Not Diana Ross," *Chicago Tribune*, 28 April 2002. *See, e.g.* Derek Bok, *The Trouble With Government* (Harvard University Press, 2001), pp. 3, 64; and <http://www.pollingreport.com/institut.htm> (June 3, 2002).
8. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2000).
9. *Alexander v. Sandoval*, 532 U.S. 275 (2001).

10. *Buckhannon Bd. & Care Home, Inc. v. West Virginia Dep't of Health & Hum. Res.*, 532 U.S. 598 (2001).
11. See, e.g., *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83 (1998); *Raines v. Byrd*, 521 U.S. 811 (1997); *Lewis v. Casey*, 518 U.S. 343 (1996); *Wärth v. Seldin*, 422 U.S. 490 (1975).
12. See, e.g., *Smith v. Texaco*, 263 F.3d 394 (5th Cir. 2001); *Jackson v. Motel 6 Multipurpose, Inc.*, 130 F.3d 999 (11th Cir. 1997); *Lowery v. Circuit City Stores, Inc.*, 158 F.3d 742 (4th Cir. 1998), *vacated on other grounds*, 527 U.S. 1031 (1999).
13. *Phillips v. Washington Legal Foundation*, 524 U.S. 156 (1998); *Washington Legal Foundation v. Texas Equal Access to Justice Found.*, 270 F.3rd 180 (5th Cir. 2001); *Washington Legal Foundation v. Legal Foundation of Washington*, 271 F.3rd 895 (9th Cir. 2001), *cert. granted*, June 10, 2002 (No. 01-1325).
14. E.g., *United States v. Morrison* (private right of action under VAWA); *Alexander v. Sandoval*, 532 U.S. 275 (2001) (disparate impact claims under Title VI); *Gonzaga Univ. v. Doe*, 122 S.Ct. 2268 (2002) (Section 1983); *Westside Mothers v. Haveman*, 132 F. Supp. 2d 549 (E.D. Mich. 2001), *rev'd on appeal*, 289 F.3rd 852 (6th Cir. 2002).
15. Jed Rubenfeld, "The Anti-Antidiscrimination Agenda," 111 *Yale Law Journal* 1141 (March, 2002).
16. *Nevada Dep't of Hum. Resources v. Hibbs*, No. 01-1368 (*cert. granted* June 4, 2002).
17. *Geduldig v. Aiello*, 417 U.S. 484 (1974).
18. *Washington v. Davis*, 426 U.S. 229 (1976).
19. *City of Boerne v. Flores*, 521 U.S. 507 (1997).
20. *Manders v. Peterson*, \_\_\_ F.3d \_\_\_, 2002 U.S. App. LEXIS 4169 (11th Cir. Mar 14, 2002).
21. Violence Against Women Act of 1994: Pub. L. 103-322, § 108 Stat. 1902 (1994); *Brzonkala v. Morrison*, decided with *United States v. Morrison*, 529 U.S. 598 (2000).
22. *DeShaney v. Winnebago*, 489 U.S. 189 (1989), holding that a state has no constitutional obligation to protect a child from severe parental physical abuse, and *Harris v. McRae*, 448 U.S. 297 (1980), holding that Congress can limit the use of any federal funds to reimburse the cost of abortions under the Medicaid program (the Hyde Amendment) and that Title XIX of the Social Security Act does not require a participating State to pay for those medically necessary abortions for which federal reimbursement is unavailable under the Hyde Amendment.

## Violence Against Women

### LESLYE ORLOFF

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The immigrant provisions of the Violence Against Women Act (VAWA) are a good example of how real incremental change can be achieved in this area. The problem is that the change is limited, helping some needy immigrant women without addressing the larger issue. VAWA 1994, the first version of the statute, allowed an immigrant victim of domestic violence who was abused by her U.S. citizen or lawful permanent resident spouse to file her own immigration papers without his knowledge or assistance. That applied to a limited category of people, but it gave the Immigration and Naturalization Service (INS) and other government agencies the idea that they should be helping such victims — an astonishing thing in 1994. In 2000, there was actually support within INS and within senatorial offices such as those of Senators Spencer Abraham, Orrin Hatch and Edward Kennedy for going well beyond what we did in VAWA 1994. Now, many immigrant victims of violent crime, victims of pregnant rape, sexual assault, and domestic violence, have meaningful access to legal immigration status. VAWA is an example of where making early compromises, which we did not like in 1994, set the groundwork for meaningful change later in 2000.<sup>1</sup>

What follows is a discussion of some of the demographic challenges we face and what this means in terms of serving immigrant victims. There are now about 26.2 million immigrants within the United States, a 33% increase since 1990. One in seven marriages has at least one foreign born spouse. Eighteen percent of the U.S. population today consists of immigrants and the children of one immigrant parent (or, in some cases, two). This percentage will increase over the next twenty years to about 27%. While 85% of immigrants in the United States are here legally, a third of them were here illegally at some point. Because of constantly changing immigration law and world events, the ability to attain legal immigration status is also ever-changing. If an immigrant victim of domestic violence cannot attain legal immigration status today, she may well have that option open to her in the future.

The immigrant population in the United States is also increasingly diverse. As the result of changes in U.S. immigration policy, the number of countries with over 100,000 immigrants living in the United States has increased from 20 in 1970 to 41 in 1990, and to many more today. There is now greater diversity in language, countries of origin, and cultural communities, which poses challenges for local justice and social service system reform and for offering meaningful assistance to immigrant victims.

There are huge increases in the number of immigrants in places that did not traditionally have significant immigration populations, such as Kansas, Utah, South Carolina, and Iowa. Small police departments that did not even know that immigrants existed in their communities ten years ago are now faced on a daily basis with the challenge of serving immigrant communities.

It is difficult to design remedies that work in the same way for everyone, given the differences in culture, economic possibilities, and victim needs. It is not enough to focus on one issue or one problem. If the focus is limited to protection orders, for example, then ultimately women immigrant victims of domestic violence will be unable to see their children because they cannot get the legal assistance or the resources they need to fight and win custody battles brought by their abusers, who may be citizens or lawful permanent residents.

In dealing with an immigrant survivor, or any battered woman survivor, we must discover what her needs and fears and concerns are, and then work with her, support her, and empower her to try to come up with culturally appropriate solutions. Attorneys tend to say, “We’re lawyers, not social workers,” but it is insufficient to do only the legal work. The structure of domestic violence services designed to serve white, often middle-class victims of domestic violence, does not necessarily work for immigrant victims. We must create a space where battered immigrants, and battered women generally, can define their own needs within their own cultural contexts, and we must understand that their needs and the remedies open to them are multiple and intertwined. Many women do not want to get divorced for religious and cultural reasons. What happens in a divorce case affects immigration status. What happens in the immigration case affects access to benefits such as work permits. What happens in a criminal case can negate access to legal immigration status, public benefits and, sometimes, custody of children. There are overlaps among immigration, public benefits, and criminal laws, all of them influenced by cultural context and all of them related to economic survival.

While the system likes to put women in boxes, working with immigrant victims demonstrates the intersectionality not only between race and gen-

der but among race, gender, and immigration status. It is impossible for an immigrant woman to experience those pieces of her reality separately from one another because her reality is that they all come together. She encounters systemic barriers on each level as a woman, as a person of color, and as an immigrant. People tend to blame immigrant victims – she is the problem; she is the one who needs to be changed – but in fact the barriers are in the system: they are imbedded in the ways our courts and our social services function. There are domestic violence and homeless shelters in Los Angeles, for example, that ask for green cards before accepting victims, although this is in violation of federal law. INS officers have tried to raid shelters after having been sent by abusers to the shelters, although INS officers are prohibited by federal law from using information provided by abusers against immigrant victims. Battered immigrants in many communities have problems accessing even the most basic services. Systemic reform is needed so that our legal and social services systems will reflect and be responsive to the diversity of women’s needs and experiences.

It is also important to understand when talking about immigrant victims that fear of deportation is the major barrier. At a training meeting in Santa Fe about a year and a half ago, survivors and advocates were working to develop state plans to improve services to immigrant victims. At one point we separated survivors and advocates and asked, “What is the most important issue for immigrant survivors?” The survivors were very clear that the most important issue was fear of deportation. The advocates said, “No, the most important thing for you is safety.” What the survivors had to explain to the advocates is, “I can’t get to safety if I don’t know that I can come to your program without being deported, or that I can go to the shelter or to the health care clinic.” If that issue is not addressed, service providers cannot get anywhere with immigrant victims.

Immigration-related abuse is an important issue. It is seven times higher in relationships where it coexists with physical and sexual abuse than it is in psychologically abusive relationships only. It appears either to corroborate abuse or predict escalation of abuse. The justice system often underestimates this real danger.

We have found that the length of time a domestic violence victim has spent in the United States correlates strongly with a willingness to call the police for help. But no matter how much domestic violence a battered immigrant has experienced, no matter for how long, immigrant victims will not call the police for help unless they have spoken previously to two other people about domestic violence. While immigrant victims today are receiving and seeking services from a variety of service providers, they are

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not talking with those service providers about domestic violence. Fifty percent of immigrant victims are seeing lawyers but only 8.7% of them are talking to the lawyers about domestic violence. Once immigrant victims obtain protection orders, however, they are more willing to call the police. Once they decide to try to use the system, they continue to try to use it.

It is important for the system to offer options to immigrant victims who are not now choosing to separate from their abusers. Many battered immigrant women want to use the justice system to help bring a halt to the domestic violence they are experiencing but want help that does not require that they separate and split up the family. Leaving an abusive husband requires many immigrant women to challenge their culture and, often, their religious beliefs. Our judicial and social service systems must offer help to battered women whether they choose to leave or to continue living with their abusers.

Dual arrest poses innumerable problems for immigrant victims because of the deportation consequences of criminal convictions for domestic violence. Uninformed judges, prosecutors, and defense attorneys encourage battered immigrants to plead guilty because that way they frequently will be given probation or suspended sentences that do not require them to serve any jail time. What the victims are not told is that the consequences of such pleas for immigrants is deportation. Although immigrant victims of domestic violence can now obtain a waiver of mandatory deportation from an immigration judge, the immigration judges have not been trained in these new legal protections, and without a lawyer knowledgeable about legal options for immigrant victims, the chances of getting a waiver are not good. Further, when battered immigrant women are not themselves involved as defendants in the criminal justice system, they face complicated and dangerous decisions about whether they can safely cooperate in their abusers' prosecution. Since domestic violence convictions will lead to the abuser's deportation, battered immigrants need to be able to decide whether deportation will promote safety or enhance danger for the victim and any family members or children she may have who are living abroad. With appropriate services, safety planning and support, many immigrant victims can and will choose to cooperate in the criminal prosecution of their abusers. One of the issues with which the National Network on Behalf of Battered Immigrant Women has been struggling is whether or not we can create a waiver of mandatory deportation for abusers, but we have been unsuccessful in getting immigrants' rights groups, women's rights groups, and domestic violence groups to agree on an approach that will enhance victim safety, hold abusers who are not deported accountable



under the U.S. judicial system, and ensure that those who are deported will first serve their time in the U.S. on domestic violence convictions.

It is important to understand the continuum of violence that immigrant victims experience. Many women experience multiple forms of victimization and oppression – domestic violence, rape, discrimination. Addressing only one of them is not effective.

We cannot overemphasize the importance of community. Immigrant communities themselves need to be part of the solution and to be engaged in the definition and redefinition of community. Many immigrant communities have only male leaders. How do we find ways to support women’s leadership, to support women’s voices in their communities, to support the role immigrant women can play in creating solutions? The domestic violence coalition in Iowa did some significant work with regard to systemic change, making systems more responsive to immigrant victims’ needs, training police, and training shelters about immigrant women’s legal rights and issues. After all the training, with programs ready to serve immigrant victims, nobody came to use the services. Battered immigrants turned to the services only after the Iowa coalition began to work with immigrant survivors to help organize immigrant women in the community, to develop relationships between the women in the community and the service providers, and to develop accountability between the service providers and the women in the community. Working together with immigrant survivors, we can change the system and make it more responsive to their needs.

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### **ELIZABETH SCHNEIDER**

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We are trying today to bring theory and practice together, which is very much what I have been trying to do in the area of women’s rights and domestic violence over the last thirty years. My remarks come out of my attempts to think critically as an insider. When I began to think about where we are, after thirty years of an extraordinary explosion of work and activism in thinking and creativity around issues of domestic violence, the overarching theme I saw was that the work that began thirty years ago was generated by a view of the critical role of domestic violence and intimate violence to women’s equality, and the way in which intimate violence was a reflection of those issues.

As the battered women’s movement developed, as shelters developed, advocates developed, orders of protection and strategies multiplied and raised difficult questions of criminalization and race and class and the

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experience of immigrant women, one of the things that happened was a depoliticization of the field and of the problem that has become known as DV work. The sense of the interrelationship between domestic violence and other gender equality issues such as the increased surveillance of battered women (particularly women of color and immigrant women) that comes as a result of arrest, reproductive rights, child care, welfare, employment, and so on, was lost. Domestic violence is decontextualized, depoliticized, and isolated.

There have been, of course, many, many beneficial developments. Ten years ago, welfare advocates and battered women's advocates barely spoke to each other. That is no longer the case. Some of the most important work that has been done with respect to Temporary Assistance to Needy Families (TANF) has come from those communities talking together.<sup>2</sup> There is now much more affirmative and fruitful joint action by child protective workers and battered women's advocates, and by people who do employment work and domestic violence work.

But, as I argue in *Battered Women & Feminist Law Making* and in *Battered Women and the Law*, depoliticization is a problem.<sup>3</sup> Our work around violence against women must be put back in the broader framework of equality. It is something of an irony that it is the international human rights work around violence against women that has put violence squarely within the broader frameworks of social and economic rights, race and development, reproduction and sexuality. We need, in Rhonda Copelon's words, to "bring Beijing home," by bringing those international human rights insights into our thinking as we address the problem of intimate violence.

In contrast with ten years ago, we understand much more fully today the way in which violence is a constant presence in women's lives and impacts on choices about employment, poverty, child care, reproduction, and so on. We should think about how violence plays a role in it and how violence impacts women earning low wages.

## **SALLY GOLDFARB**

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The Violence Against Women Act of 1994 was the most ambitious federal legislation ever enacted to deal with the epidemic of violence against women in this country. Eight years later, it is clear that the legacy of this legislation is mixed. On the one hand, the statute's civil rights remedy, which many consider to be its most significant provision, has been struck down by the Supreme Court. On the other hand, the principle of a civil

rights remedy for acts of gender-motivated violence, once considered too radical even to be included in mainstream legal discourse, is now widely accepted – even though the concept is not currently enforced at the federal level. Furthermore, all the other provisions of VAWA remain in place. Many of them have had a significant positive impact and some have been further refined and strengthened by subsequent federal legislation.

What are the lessons to be learned from the history of the Violence Against Women Act about the power and limits of federal law as an instrument in the fight against domestic violence, rape, and other forms of violence against women?

VAWA 1994 was passed after more than four years of congressional hearings and after intensive lobbying by the NOW Legal Defense Education Fund and other organizations. It contained dozens of provisions designed to prevent violence against women, provide services to victims and hold perpetrators accountable. It authorized an unprecedented \$1.62 billion in federal funds over six years for research, education, improvement of the legal system, and assistance to victims. That amount was later more than doubled when Congress passed the Violence Against Women Act of 2000.

The most innovative section of the 1994 statute was the civil rights provision, which for the first time declared a federal right to be free from crimes of violence motivated by gender. This provision reconceptualized violence against women as part of a social pattern rather than merely as an isolated crime or personal injury. The approach reflected the insights of feminism about the pervasiveness of male violence in the lives of women and its role in maintaining women's disadvantaged social status. Like other forms of discrimination, gender-motivated violence is a collective injury, a social wrong carried out on an individual level. For the last thirty years the modern battered women's movement and anti-rape movement have emphasized the ways in which individual acts of violence derive from and reinforce an underlying pattern of unequal power between the sexes. The civil rights provision of VAWA grew out of that awareness.

Given the extent to which the civil rights provision constituted a breakthrough in the legal treatment of violence against women, it is not surprising that it triggered enormous resistance. One source of opposition was the judiciary. While VAWA was pending in Congress, representatives of the federal and state judiciary, including Chief Justice William Rehnquist, spoke out against the civil rights provision on the ground that it would force the federal courts to deal with domestic relations matters that they considered to be beneath their notice. The judges reasoned that any claim

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**Congress had painstakingly assembled an unusually exhaustive legislative record demonstrating that gender-motivated violence had a direct and substantial impact on interstate commerce, thus establishing a basis for congressional action.**

involving women, especially violence against women, must be a claim involving the family. Any claim involving the family, they believed, is a private domestic matter and therefore to the extent that it deserves legal attention at all, it must be resolved exclusively by state rather than federal law.

That reasoning contains a number of fallacies. VAWA created a civil rights cause of action, not a domestic relations cause of action. In any event, as even a cursory review of Supreme Court decisions and federal statutes makes clear, domestic relations has never been the province solely of state law.

Congress ultimately neutralized the judicial opposition at the cost of narrowing the civil rights provision significantly, but even after the bill was signed into law judicial hostility to the measure did not disappear. Instead, the judges had another opportunity to express their resistance to the law as cases arose challenging its constitutionality. The culmination, of course, was the Supreme Court's decision in *United States v. Morrison*.<sup>4</sup>

The *Morrison* case arose from Christy Brzonkala's allegation that she had been gang-raped by two male fellow students at Virginia Polytechnic Institute and State University (Virginia Tech) and that the crime against her was committed, to use the words of the VAWA civil rights provision, because of, or on the basis of, her gender and due at least in part to an animus based on her gender. When the case reached the Supreme Court, it struck down the civil rights provision by a vote of 5-4, finding that Congress did not have power to enact it under either the Commerce Clause or Section 5 of the Fourteenth Amendment. Three glaring ironies emerge from the Court's opinion.

First, contrary to the Court's assertion that VAWA stepped over the line between the truly national and the truly local, Congress had painstakingly assembled an unusually exhaustive legislative record demonstrating that gender-motivated violence had a direct and substantial impact on interstate commerce, thus establishing a basis for congressional action under the Commerce Clause, and that the states were routinely denying equal protection of the laws to female victims of violence, thus establishing grounds for action under Section 5 of the Fourteenth Amendment. The Court's unwillingness to accept the significance of those legislative findings reveals not only its lack of respect for Congress but also its continuing adherence to the view that violence against women is intrinsically private and domestic and cannot rise to a level of a constitutional concern.

Second, despite the majority opinion's glib assurance to Christy Brzonkala that she could still obtain a legal remedy under state law, the

Commonwealth of Virginia had already proven itself completely incapable of protecting her legal rights. She had sought a criminal prosecution of her assailants but a Virginia grand jury refused to authorize one. When she complained to Virginia Tech, the university systematically covered up and condoned the crime in order to ensure that her assailants could continue to play on the school's prize-winning football team.

Third, the Court's deference to state autonomy in the *Morrison* decision is all too reminiscent of other periods in history when the federal government deferred to the states on crucial issues implicating inequality, including slavery. Today, just as 150 years ago, arguments for states' rights often conceal opposition to equality for disadvantaged groups in society.

Where does this leave us? The invalidation of VAWA's civil rights provision was a serious blow to the feminist effort to overcome violence against women. The language of federal civil rights has unique power in our society. VAWA's civil rights provision was a statement that the right to be free from gender-motivated violence is a fundamental attribute of national citizenship. The statement had the potential to accelerate social change in the direction of greater equality for women, but that statement no longer exists in the United States Code.

On a more concrete level, the civil rights remedy gave battered and raped women a tool to obtain legal redress that was in many ways superior to other alternatives. For example, it permitted women to avoid the effects of state laws establishing spousal immunity doctrines and restrictive statutes of limitations. Unlike a criminal remedy, it placed control over the litigation in the hands of the individual plaintiff. In many cases that were brought under VAWA between 1994, when the civil rights provision became effective, and 2000, when the Supreme Court struck it down, women succeeded in making a threshold showing of gender-based motivation by alleging facts such as the defendant's use of sexist epithets, the fact that the crime involved unwanted sexual contact, the presence of multiple female victims of the same defendant, and the defendant's use of violence to force women into a stereotypically submissive role. The remedy was proving effective when it was invalidated.

It is important to remember that despite the loss of the civil rights remedy, the rest of VAWA's protections for women remain intact. VAWA makes it a federal crime, for example, to cross state lines in order to commit domestic violence or violate a protection order. It requires states to give full faith and credit to protection orders issued by other states. It authorizes federal grants at unprecedented levels to battered women's shelters, victim services agencies, police, prosecutors, and judges. It reforms

immigration law and provides federal leadership for efforts to expand research and record keeping so as to assemble much-needed information about violence against women.

Clearly, even with the enhancements adopted by Congress in 2000, the legislation does not go far enough. Many of its programs are dependent on sympathetic leadership within the federal administrative agencies and on congressional willingness to appropriate funds. Still, the very breadth of the statute brought about a dramatic change in the way federal law addresses violence against women and thereby opened the door for new possibilities in the future.

Where do we go from here? Obviously, much more legal reform is needed at every level to address the multifaceted problems presented by violence against women. We are increasingly aware that such violence is deeply intertwined with other aspects of women's disempowerment and that we therefore cannot adequately address the issue until women have access to welfare, reproductive choice, child support, child care, employment opportunity, housing and so on.

Let us focus, however, on the question of where we should go specifically with respect to civil rights remedies for violence against women. Identifying violence against women as a deprivation of equality is an immensely important legal development that we ignore or abandon at our peril. Equality claims have always been a major force in the movement for women's rights, and violence against women is no exception. Although the effort to secure a legal right to equality is not and should not be the sole focus of the movement to secure women's freedom from violence, it can play a valuable role. However, we also know that the power of rights claims is limited. Passing a law that gives us a right not to be discriminated against does not end discrimination. The resistance to VAWA's civil rights remedy, both while it was pending in Congress and later when it was subjected to constitutional challenge, demonstrated that the very discriminatory attitudes that VAWA was designed to overcome remain alive and well and ultimately doomed the civil rights remedy itself.

The options open to the women's rights movement at this point include trying to enact a federal civil rights statute that can somehow get over the constitutional hurdles erected by the *Morrison* decision and/or pursuing civil rights legislation at the state and local levels. There are current efforts to proceed along both of those tracks. Each of them has advantages and disadvantages. Regardless of how we proceed, however, two things are clear. First, the legal movement to eliminate violence against women must include a component that explicitly recognizes gender-motivated violence

as a violation of women's right to equality. The international human rights agenda currently expresses that more clearly and forcefully than domestic law does. It is necessary for domestic law to catch up.

Second, any legal measure that makes the statement that gender-motivated violence violates women's right to equality will face enormous resistance and will be very difficult to enact, preserve, and enforce. As the history of the Violence Against Women Act shows, when it comes to combating entrenched gender inequality, there is no such thing as an easy solution.

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## DONNA COKER

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Elizabeth Schneider spoke of the way specialization in the domestic violence field has blurred the larger picture of women's social, economic, and political rights. I will focus on a related problem. As we move to make domestic violence a public problem, we encounter preexisting public institutions that operate as agents of social control for women.

Domestic violence is understood as a public problem in the context of the criminal justice system, the welfare system, and the child protection system, all agents of social control. My work looks at the impact of domestic violence, law reform, and policy reform on women who are marginalized because of their race or their socioeconomic or immigrant status. Domestic violence policies such as mandatory arrest and no-drop prosecution are particularly problematic for such women because they increase the risk of state control.<sup>5</sup> We must add to that the practices of the criminal justice system that evolve from those policies and that create and reinforce the conception of battered women as unable or unwilling to act in their own best interests. The conception of battered women among the police and in other institutions of social control, such as welfare and child welfare, sometimes reinforces preexisting racist, classist, and sexist conceptions of poor mothers.

How do criminalizing policies, particularly mandatory arrest and no-drop prosecution, increase state control of poor women, immigrant women, and women of color? We know that when these policies are enacted, an increased number of women are arrested. We know that a primary aggressor requirement brings those numbers down somewhat but that the number of women who get arrested remains elevated. We know that conviction carries some very serious consequences, the least of which are the criminal punishments. The more significant consequences are those that have to do with child protection and the possibility of los-

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ing one's children. Arrest alone, which is far more likely than arrest and conviction, brings about a number of serious collateral risks. Some police departments are required to call Child Protection Services whenever they find probable cause that domestic violence has occurred. Child Protection Services will also be called if there is a mandatory arrest policy and the mother is arrested.

The other collateral risks result from the woman's continuing involvement with the criminal justice system. Women who are in battering relationships are more vulnerable to drug and alcohol addiction, and drug addiction leads to criminal activity even if it is only possession. Women who are addicted to drugs are also more vulnerable to battering. In addition, battering sometimes has a relationship to prostitution. One of the things that battering men do is force their partners to engage in prostitution. Some women engage in prostitution and sell drugs as a way of getting money that they can hide from the batterer. Some women in battering relationships are particularly vulnerable because of their own criminal activity. A public defender told me about victims coming to him in domestic violence misdemeanor cases and begging him to help them get the charges dropped out of concern that their own criminal activity would be exposed.

Even if we thought mandatory arrest was a good thing, making criminalization policies the focus of our response to domestic violence ought to give us some concern. There is a significant emphasis on crime control in federal funding to deal with violence against women. While some funds go directly to services for victims, by and large these funds are available only for those victims who are working with prosecutors. Crime control responses to domestic violence not only take substantial federal resources but, increasingly, require a great deal of the human capital of the movement as well.

Again, the implementation of these mandatory criminal justice policies reinforces the dangerous idea that battered women are unable to act in their own best interests. I was recently involved in doing VAWA grant reviews. A police officer and I were looking at programs for campus responses to violence. One of the programs would have instituted a kind of no-drop policy on campus. The officer said, "Well, you know, you must have a no-drop policy in domestic violence cases because otherwise nothing would happen." That conception, that "nothing would happen," that battered women are *by definition* simply unable to do anything in their own behalf, is pervasive. In the recent New York class action case on behalf of battered women whose children were removed because they resided in a



home in which domestic violence occurred, the social workers involved assumed that once a woman is hit she is a “battered woman,” and as a “battered woman,” she is unable or unwilling to protect herself.<sup>6</sup> Failure to separate from the batterer is evidence that she is unwilling to protect her children, and thus should be separated from them.

There is an unprecedented amount of money flowing from the federal government for work on domestic violence. One thing we can do to direct that money towards women’s needs is to institute a material resources test. We can begin to push for a requirement that every time federal dollars are going to be spent on domestic violence, every time a law is going to be enacted, every time a policy is being considered, it must be examined to see whether it will put material resources into the hands of battered women. Material resources can be indirect, like education, or direct, as in a cash payment.

The application of a material resources test would, of course, put more resources into the hands of women. Data suggest that inadequate resources leave battered women more vulnerable to violence by making it much harder for them to negotiate safety or try to escape. Research by Chris Sullivan and Deborah Bybee found that when women are given resources, they experience less repeat violence.<sup>7</sup> Women who are given resources experience less violence even when the sample is controlled for the variable of whether or not they continue to live with the man who abused them.

A material resources test would help low-income women, particularly those of color, and correct for the great inattention paid to the particular status of poor women in general and poor women of color in particular. It would also recognize that poverty is not experienced the same way across racial lines. The experience of poverty for urban African-American women, for example, is qualitatively different from the experience of poverty for many white urban women. Poor African-American women in urban areas are much more likely to live in neighborhoods that have higher overall poverty rates. The experience of battering differs there both because of the failure of institutions to address the needs of women of color and because of the lack of resources that exist in those largely racially defined neighborhoods. Therefore, we should make the circumstances of poor women and particularly poor women of color the test for whether a policy, law, or funding decision will enhance women’s access to material resources. A material resources test of this nature allows us to focus on empowering women rather than continuing to increase state intervention in ways that often do not benefit poor women and poor women of color.

## BETH RICHIE

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In some ways this session is a narrative about what happens when we begin a feminist-based social justice movement and find ourselves acting as if we can get the state to respond to our feminist analysis of a social problem in a way that makes sense to us. It is also a narrative about organizing rapidly to try to find ourselves in a better place than we were in twenty years ago with respect to policies about violence against women. A lot of women now are safer and have more access to services, but in other ways we are perhaps worse off than we were twenty years ago because we have relied so heavily on the state to create feminist social change.

I come to this discussion, about the serious disadvantage that our state apparatus around violence against women has caused for low-income women of color, from my work with women in prison. There, by a conservative estimate, at least 80% of the women have experienced violence both as children and as adults, and most from multiple perpetrators. Those perpetrators are not only living with them but controlling them inside institutions.

There is serious over-representation of low-income women in prisons. Most of them have never been employed or benefited from the kinds of programs that we have spent a lot of time creating. Most of them are women of color. In Chicago, where I live, 72% of the women in jail are African-American. All of them I've talked with in the past three years have experienced some form of violence in both the intimate and public spheres. I would argue that some of those women are in prison *because* of the way we have formulated our anti-violence work in this country, assuming that one is either a victim or a perpetrator of a crime but not both. Increasingly, services in this country are not available to anyone with a felony record. For years services were not available to anyone with a problem of addiction, so there are more battered women and sexual assault survivors in jails and prisons instead of in programs that are funded through the Violence Against Women Act.

We have changed violence against women from a private problem into a public one, and now the system has to respond to victims of domestic violence. But at the time we managed to enact the Violence Against Women Act, the country was deeply involved in creating more rigid criminal justice policies. At that particular historical moment, this country was criminalizing everything from poverty to inability to care for one's children, violence against women, low-level drug offenses, and problems of addiction. If we had to pass national domestic violence legislation at a time

when this country was not as invested in criminalizing social problems, we never would have gotten the Violence Against Women Act.

If government policy was really concerned with social justice rather than criminalization, what would it look like? Imagine if federal funding came from somewhere other than the Department of Justice: if it came from the Department of Housing, for example, so that instead of mandatory arrests, we had mandatory apartments. Or mandatory jobs if it came through Labor, or mandatory education. Our over-reliance on the criminal justice system has meant that we have forgotten that women need opportunity: not just opportunity for safety but a chance to live their lives and raise their kids and associate with whom they want, without being discriminated against.

That timing led to the over-representation of low-income women of color, not in services, but in places where the state is sanctioning them in community corrections or punitive job training programs. And what we know about some groups of women who experience some kinds of violence actually skews what we think we know about all women and again leaves some women more vulnerable than ever.

We need to talk about what it means to have moved from thinking about poverty and violence and employment as social justice issues to treating them as legislative or social service problems. What we may have done by highlighting the problems of battered women is to say, in effect, “No matter what you’re going to do with poor women, don’t bother them if they’re battered.” Or, “You can create a child protection system that will destroy families and communities, but just don’t bother battered women as part of that.”

That does two things. It signals to other social justice movements that we care about battered women differently than we do about other poor women. It also implies that violence is an isolated incident for women, not something that is systemic and constant and always about to happen.

At the University of Illinois recently there was a remarkable conference called The Color of Violence Conference. There were 1400 women of color and our allies there, talking about ending violence against women. It was exciting to watch an active movement that understands violence against women as a social justice issue. Most of the people who are doing the grassroots work are women of color who don’t feel as if they’re part of the mainstream anti-violence movement. They link all these issues that we’ve put into different categories for the purposes of agendas: violence against women, economic issues, discrimination, and so on. I wonder to what extent we can find our way back to linking up with that really exciting social justice movement.

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## DISCUSSION

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**SHEILA THOMAS:** One of the things that I found in working with women with low incomes is that domestic violence frequently impacts their ability to participate in our cases. When we were filing our case against Wal-Mart, two women whom we had identified as potential active participants could not testify for fear that if they appeared in public, their partners would find them. Whatever other employment-related issues these women have, they are related to the judicial system, to divorce issues, child support issues, and so on. We must be able to work together more closely if we are to deal with all the issues a woman faces.

**LENORA LAPIDUS:** Here is an example of that kind of networking, which keeps us from having to be experts in everything. The ACLU Women's Right Project (WRP) is launching a project dealing with housing discrimination against victims of domestic violence, focusing on evictions of battered women and on an array of other issues that they face in the housing context. The WRP is based in New York so we have linked up with two organizations, Sanctuary for Families and Safe Horizon, that specialize in the wide range of legal services needed by victims of domestic violence. These organizations often do not cover discrimination issues but now they will be in this partnership with us. When we meet with women to discuss discrimination issues and they say, "I need an order of protection," or "I need help with this custody determination," we will be able to turn to these legal services organizations and work with them to represent the women on all of their issues.

**LUCIE WHITE:** As we move from a simple dichotomized, patriarchy-controlled, perpetrator-victim model to one that examines the context in which pervasive violence is a reality, the challenge is to figure out how to do so without losing any sense of moral or political orientation.

I became involved three years ago with a group of very low-income women in Cambridge, Massachusetts. One of the issues that proved most difficult is that the violence isn't just coming *at* them, it's also coming *from* them in ways that the women's movement has made virtually impossible to articulate. The violence exists in the context of pervasive and very simple inequality. Dealing with it requires a multi-layered political, moral, and justice focus; a larger social movement agenda. We have seen how the fear of deportation affects our attempts to work with domestic violence against undocumented immigrant women. That fear affects everything, including the willingness to seek emergency medical care.

**COMMENT:** Domestic economic development dollars, however limited, should focus on women. Having more dollars going to women would

amount to violence prevention work. The simple fact is that women have few resources with which to deal with battering. When they have more resources, they are better able to deal with it.

**COMMENT:** We have been criticizing the criminalization model but we should not forget its uses. Criminalizing something is our society's strongest statement of condemnation. When you have been convicted of a felony, everybody sees you as having done something wrong, and we need that. The criminal justice process also removes an offender from the community. It tells the offender he's not fit to be among these people and prevents him from repeating the offense. Others are also deterred by the stigmatization. I don't know that we want to give up the salutary effects of the criminal justice process.

At the same time, however, there is the additional problem that only the state can effectuate the criminal model; only the state can arrest and try and label someone a criminal. But different communities have very different relationships to the state. Privileged communities might see state intervention as the act of an ally or protector, but marginalized communities see themselves as under siege by those state forces. The relationship within the marginalized communities between the state actors and the specific community must be taken into account.

One approach might be community-based private enforcers, community-based naming, removal, isolation and perhaps reorientation. That would pluck the bad person out and put him away so he doesn't simply victimize someone else. The problem with moving the victim and her dependents into a shelter means that the bad person is still out there at large, able to victimize someone else.

**BETH RICHIE:** This is exactly the conversation we need to have because it is a question of how we dismantle some of what we worked so hard to build without losing all credibility. We need a much clearer sense of whether or not criminalization has actually decreased violence against women. I would never tell anyone in danger not to call the police. But as an overall strategy to end violence against women, calling the police hasn't worked in some communities.

I had a discussion about violence against women in a male focus group in Harlem. Some of the men had abused their partners; others had not. The discussion was about how easy it is to get arrested for anything these days in Harlem, whether it's jumping the turnstile or selling incense on the street without a license or raping your daughter. For some people, shockingly, raping your daughter has become just another example of how the state punishes everything. Relying solely on law enforcement means that

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the community has no accountability on the issue of violence against women. It sees arrest and prosecution as no more than yet another example of the state's mistreatment of a whole community of people, rather than as something that will lead to gender equality and safety and protection. We must look at what the message has been in communities of color, and low-income communities generally. It is not enough for us to have told women in danger to call the police. For some women, including immigrant women, that has meant that we have merely aligned ourselves with a particular form of state intervention that simply does not work.

We also have to be careful about offering a gender analysis to communities totally without economic development. We must promote economic development in communities where there are no jobs and have been none for a while, and where persistent poverty exists generation after generation. Imagine how useful it would be for us to be able to link economic development with the processes of mass incarceration and then to violence against women.

We must also address defendants' rights, which are not discussed at all in the anti-violence movement because we are so invested in prosecution for crimes of gender violence. Unless we consider defendants' rights, however, we will be unable to set up community-based systems of accountability, whether that means restorative justice or other forms of the community taking responsibility for people who act badly toward other people in it.

**LESLYE ORLOFF:** The whole issue of criminalization and whether or not it is a deterrent for immigrant victims is a complicated one. Protection orders actually work better in those immigrant communities with people who come from countries with repressive governments. The question becomes whether there is 100% enforcement of protection orders and whether that is something we should be striving for. Such orders were designed to be a victim-controlled family court option that battered women could use to protect themselves and their children from ongoing abuse, whether or not the state had brought any criminal action against their abusers. A victim must be able to decide whether to enforce a protection order, evaluating safety and other concerns. Most battered women do not choose to bring enforcement actions or to seek police enforcement for every protection order violation. Government funded research nonetheless indicates that protection orders do have a protective effect for many victims. They can be particularly effective when the abuser is a non-citizen, as a non-citizen's violation of a protection order is a deportable offense. In addition, advocates and attorneys working with immigrant victims have found that protection orders have a particularly deterrent effect

on many foreign-born abusers who came from countries where government officials were to be feared.

Another important point to be made, with regard to the funding that VAWA and the Family Violence Prevention and Services Act provide for programs working to deter violence against women, is that in many instances immigrant victims and women of color victims are not getting full access to the funding on either the state or federal level.<sup>8</sup> This has to do in part with the statutory structure of VAWA and the way that Family Violence Prevention and Services Act funding has been distributed through the states. When VAWA was written, we wanted to force people to work through coalitions, so that there was some victim accountability. But if the state coalition imposing its own view of what battered women need reflects the needs only of poor or middle-class white women, then programs serving immigrant victims or other victims of color do not get full access to the funding.

This can occur in two ways. Under one common scenario, the funding that is given to the states to distribute is awarded primarily or exclusively to programs serving battered women from the majority culture in the community – those which have been receiving this funding for many years. Programs serving immigrant victims may have difficulty accessing funding because they have to compete for the funds with these established agencies, which perceive the competition for funding as a threat. In a second scenario, mainstream programs working in areas with significant immigrant populations decide to seek the funding for serving immigrant victims themselves, and may attempt to do so without collaborating with community groups with expertise or the experience of working with immigrant women. Often the community-based group that has experience working with immigrant victims is the less well-funded organization. The better established organization will go after government funding to serve immigrants and will seek a letter of support from the smaller organization, even though the mainstream organization's proposal will not include fair financial compensation for the work of the collaborating and more experienced organization.

**ELIZABETH SCHNEIDER:** We did anticipate and discuss many of these issues about criminalization twenty years ago. We knew criminalization would have a disparate racial impact and that many women of color would not feel comfortable calling the police. There was discussion and conflict about this within the battered women's movement. What the movement lacked, however, was an understanding of the way information would be misused and lead to dual arrests. In the family law context, evidence about

child witnessing is being developed in order to document the importance of denying custody to batterers. The information is then used both to terminate parental rights and by the criminal justice system. That is a classic example of an advocacy strategy that was developed for one purpose that has been turned against women.

We have to understand how information developed for one purpose can hurt in other contexts. The issue of community-based removal and shelter is very important. Twenty years ago, advocates – some of them in this room – were asking, “Why are we talking about battered women’s shelters, why are we not removing the men from the house so the women can have their home as a shelter?” Fundamental issues of property and equality in that context require continued reexamination.

We also have to think about the defendant’s rights picture. One of the things we did not sufficiently understand was the degree to which people frequently want to remain in relationships, although of course they want the violence to end. That is related to the criminalization issue. If one is faced with deportation, one may place physical safety second. If the batterer is the sole economic support of the family, criminalization is not high on the victim’s list. There is a growing literature about economic dependence and the wage gap between mothers and other adults. A woman with children in a battering situation is typically moving towards economic marginalization and increasing dependence on the batterer. Something that is even less well known is that the wage gap between mothers and others is much wider for single mothers than it is for married mothers.

**BETH RICHIE:** Safety for women is so much more than freedom from violence. Removing someone from home doesn’t work for people who are homeless, have been homeless, or are almost homeless.

Many of the women I recently interviewed in the Cook County Jail, which is demographically like any big urban jail, had been arrested on a domestic violence charge. The charges were not the result of fighting back in the case of an immediate threat but rather of, for example, the situation of a woman who was addicted and using again. Her mother, who wanted her out of the house because she was using up the household’s limited resources, called the police and said, “I’m afraid of her.” Perhaps the mother should have been afraid of her and perhaps the daughter should have been removed from the home, but that is not what we thought about when we began discussing the crime of domestic violence. The daughter needed to get back into treatment, not to get back into a jail where there is no treatment. She will be out soon and using again. Her mother will call the police again, and by that time she will have a prior arrest record. That



is different than women who use violence in self-defense; we have a better handle on that kind of situation. What we don't have a handle on is women who use violence in the way that we understand domestic violence to be used by men: to control, manipulate, coerce someone into particular kinds of behavior, either in their intimate relationships or in their relationships with their children. We do not have good data about that; we don't even know how to ask the right questions.

## NOTES

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1. Violence Against Women Act of 1994, P.L. 103-122; Violence Against Women Act of 2000, P.L. 106-386.
2. The Personal Responsibility and Work Opportunity Reconciliation Act of 1996, P.L. 104-193 (1996), replaced Assistance to Families with Dependent Children and other elements of the welfare system with the Temporary Assistance for Needy Families program (TANF).
3. Elizabeth M. Schneider, *Battered Women & Feminist Law Making* (Yale University Press, 2000); Clare Dalton and Elizabeth M. Schneider, *Battered Women and the Law* (Foundation Press, 2001).
4. *United States v. Morrison*, 529 U.S. 598 (2000).
5. No-drop policies prevent prosecutors from dropping domestic violence charges.
6. *Nicholson v. Scopetta*, [www.nyed.uscourts.gov/00cv2229ldmo3102.pdf](http://www.nyed.uscourts.gov/00cv2229ldmo3102.pdf) (2002).
7. Cris M. Sullivan and Deborah I. Bybee, "Reducing Violence Using Community-Based Advocacy for Women with Abusive Partners," 67 *Journal of Counseling and Clinical Psychology* 23 (1999), p. 43.
8. Family Violence Prevention and Services Act, P.L. 102-295 (1992).

## SESSION V

# Poverty and Welfare

### DOROTHY ROBERTS

The welfare system and the child welfare system have overlapping histories, clients, and philosophies. In fact, the welfare system and the child welfare system are two sides of the same coin, as public aid to poor families and policies dealing with the problems of poor children have always been very much related. They are both currently being addressed in a way that shuns public assistance, services, and support, and emphasizes private remedies instead. For example, as we all know, 1996 brought both an end to the federal guarantee of assistance to poor children and an increasing emphasis on marriage as the solution to poverty. Now the government proposes to spend \$300 million a year on marital counseling for poor couples. The Adoption and Safe Families Act (ASFA), passed in 1997, encourages a private remedy, adoption, as the solution to the overburdened foster care system.<sup>1</sup>

The systems have a connected history. The first welfare laws, passed during the Progressive Era at the beginning of the twentieth century, were designed to prevent poor children from going into asylums and orphanages. The theory was that mothers who were widowed or otherwise had no male breadwinner in the house ought to be able to stay home and take care of their children and not lose them to the child welfare system.

Of course, both systems were designed to impose moral standards and the prevailing social conceptions of the decent mother on the women who received the benefits and whose children either were in the child welfare system or were kept out of it by public assistance. Because of this, most of the beneficiaries were widowed white women. Most poor black women and other women of color were not included at all until the 1960s, when the welfare rights movement successfully made more women, including women of color, eligible for what was then Aid for Families with Dependent Children (AFDC).

The systems also assumed that the mothers' own deficiencies made them unable to take care of their children. The child welfare system assumes that maternal deficits are primarily psychological. Its view is that

children are left at home unattended and sleep on mattresses in apartments infested with roaches and rats because their mothers have a psychological problem that the system has to fix. Similarly, the prevailing welfare philosophy holds that the reason these mothers do not have the money to take care of their children is their bad attitudes about work. If the state can change their attitudes through threats and sanctions, they will be able to take care of their children. Both systems attribute family problems to internal deficiencies rather than those that are societal, structural, and systemic.

Poverty, race and gender all play a critical role in perpetuating the philosophy underlying both these systems. Public assistance is of course for indigent parents; that is a given. But the child welfare system is also designed to address the problems of poor families. While issues of race and poverty are interrelated but distinct, race has historically played a philosophical role in both systems. As black women agitated successfully to get onto the welfare rolls, welfare became stigmatized and burdened with work requirements. Basically, it became a behavior modification system. It was no longer designed to support mothers so that they could care for their children but, on the contrary, a way of enforcing childbearing and marital and parenting norms on what were perceived as deficient women. The philosophy was linked historically and culturally not only to the increased numbers of black mothers on the welfare rolls but, in addition, to the public perception of who was receiving welfare.

The same thing happened in the child welfare system. Black children were not included in the formal child welfare system until World War II. As they began to flow into it, less and less money was spent on services to families and more and more was spent on foster care, so that today the main service that black children receive in the child welfare system is foster care. Most black children who are brought to the attention of the system because their parents are accused of abuse and neglect are put into foster care. That is not, however, the case for white children entering the system. The primary response to them is to provide services to the intact family, leaving the children at home. Today, there are almost 600,000 children in foster care, and although black children make up less than a fifth of the nation's population, more than two-fifths of the children in foster care are African-American.

If you went to a Juvenile Court in a big city like New York, Chicago, or Philadelphia and you had no idea what the purpose of the child welfare system was, you would conclude that it was a system designed to monitor

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**The philosophy of the child welfare system, always punitive toward poor families, became more punitive as black children disproportionately became the beneficiaries of the system.**

and regulate black families. Most of the mothers and children you would see in front of the judges would be black. So the philosophy of the child welfare system, always punitive toward poor families, became more punitive as black children disproportionately became the beneficiaries of the system.

One way of looking at both systems is that they exact a steep price for government support of caregiving. In order to get state support to take care of children in both systems you have to give up your privacy, your autonomy, and your control over both your childbearing and marital decisions. The child welfare system forces many mothers to give up custody of their children in order to get the state assistance needed to care for them.

The Adoption and Safe Families Act is an example of an escalation of these philosophies. It also marked the first time in our history that the federal government required states to give top priority to protecting children but not to providing them with basic economic support. While Congress made protection of children superior to preservation of families under ASFA, it simultaneously eliminated any federal guarantee of assistance to these families under the welfare reform law. The convergence of the two policies was both unprecedented in American history and critical to the relationship between child welfare and public assistance.

One way of measuring the effect of the 1996 welfare reform is to examine its impact on families involved in the child welfare system. We do not yet know if welfare reform will result in a substantial increase in the numbers of children involved in the child welfare system. Because of the association between poverty and child maltreatment, it stands to reason that throwing families deeper into poverty through sanctions or by forcing mothers into unconscionably low-paying jobs is going to send at least some of the families into the child welfare system. ASFA reduces supports that mothers need to avoid the child welfare system.

Welfare reform also places conflicting burdens on women who are involved in both systems. So, for example, the philosophy of welfare reform holds that the mark of respectable parenting is going out and getting a job, but women are told by child welfare agencies that nurturing and protection of children is the mark. Northwestern University sociologist Kathryn Edin has found that mothers in the system are concerned about the impact of work on their ability to care for their children.<sup>2</sup> My own research shows that these mothers are frequently expected to comply with conflicting requirements from welfare case workers and child protection case workers that are literally impossible to reconcile.

## NANCY DUFF CAMPBELL

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The whole development of the welfare system, as Dorothy Roberts has pointed out, is tied to race and gender and to confused feelings about motherhood.

I graduated from law school and went to work at the Welfare Law Center in 1968, when the Aid to Families with Dependent Children (AFDC) program was thirty-three years old. That was also the year in which the Supreme Court decided its first AFDC case, *King v. Smith*, striking down the infamous “man in the house” rule.<sup>3</sup> So the development of the law in this area was taking place at roughly the same time that the law of sex discrimination was being reformed. *King v. Smith*, the growth of legal services for the poor, and, most importantly, the development of a very strong welfare rights movement, all played a part in the success that we had at that time in litigating welfare issues. There was a real burst of litigation before and after *King v. Smith*. Several of these cases have had implications well beyond the welfare context. *Goldberg v. Kelly*, for example, started a due process revolution in the law, though it may now be the only strong due process case left (perhaps it is only welfare recipients who now have due process rights).<sup>4</sup> Then there was *Shapiro v. Thompson*, dealing with residency requirements for welfare recipients, but with broader implications for the right to travel.<sup>5</sup>

We faltered, however, in our attempts to achieve strict scrutiny, based on income, through the courts. We also failed in our efforts to persuade Congress to establish a federally guaranteed minimum income – although, in retrospect, it is amazing how close we came.

While it became evident by the early 1970s that there were not going to be strong constitutional protections to rely on, the parallel effort to strike down restrictive welfare provisions by reliance on the federal statute that created the AFDC program took off.<sup>6</sup> It was very much a synergistic effort, with the welfare rights movement putting pressure on both state and national officials, and increased litigation by many legal services lawyers. For several years, this combination was successful in striking down many restrictive state welfare policies and laws.

By the mid-1970s, however, the mood of the country was growing more conservative. The Nixon administration attacked legal services programs. Both the success of the welfare rights movement and the loss of some of its charismatic leaders diminished its ability to keep the pressure on. Congress began to cut back on the rights that we had won. Since the rights were based on a federal statute, they could be changed by changing

the federal statute. That was done not only through additional work requirements, but through legislation to overturn judicial rulings we had won.

Until 1996, however, the structure of the AFCD program, limited and problematic as it was, remained intact. We had what amounted to an open-ended entitlement of grants to states. Individuals who met the federal requirements were entitled to receive assistance. Although the states set the amount of the grants and determined who met the economic requirements, they did so within federal limits. While the states administered the programs, they ran them with federal supervision.

In 1996, however, when AFDC was scrapped and the Temporary Assistance for Needy Families (TANF) program was enacted, everything changed. The AFDC program was replaced by a fixed block grant to the states. TANF was to run for six years, and expires in 2002 unless reauthorized. The states were essentially allowed to operate programs of their own design, with few limits. There were lifetime limits on the time that someone could receive assistance. There were work participation requirements, not only for individuals but also for the caseload as a whole. This increased the pressure on states to put recipients into jobs, no matter what kind of jobs they were. While there were circumstances under which states could get some supplemental aid, they tended to be based on specific provisions such as the so-called illegitimacy bonus, a provision providing additional money to states that reduced their out of wedlock births without increasing their abortion rates. There were also very restrictive provisions aimed at particular populations, such as the provision denying aid to legal immigrants who entered the country during the previous five years.

The fight around TANF engaged women's rights advocates, but I think it is fair to say that the extent to which we could make gains by making arguments about women, their responsibilities as caregivers, their participation in the workforce, and the kind of support they need to be able to stay in the workforce, was very limited. The increase in work participation requirements led to more money for child care for individuals in work programs, but it was not enough to meet that need, let alone the continued need for child care as individuals move off public assistance. There was very limited recognition that part-time work might be appropriate. The goal was to get people into the workforce, even into make-work activity, and not to provide education and training.

The popular wisdom about the 1996 law is that it worked, in large part because the rolls are down by fifty percent. There has been, however, no real examination of what happened to the people who got off the rolls.

TANF was a deliberate effort not only to change the basic structure of the welfare program but to change much of what remained as its legal underpinnings and even to change basic requirements like data collection. That made it very hard to document the impact of the changes.

When we began a year or so ago to prepare for the TANF reauthorization process this year, we never thought that it would be as difficult as it is. There was a hope that there would be a greater focus on poverty reduction, that more attention might be paid to education and training and to the research that shows that getting people right into the workforce is sometimes successful but that it often has to be supplemented with education and training. There was a hope that we could do something about the effects on immigrants. There was a hope that we could get more money for child care and that we could improve some of the provisions around child support, particularly to make sure that money collected from non-custodial parents goes to children rather than, as is the rule is now, to the state as repayment for the welfare assistance that it has provided. These were hopes for incremental improvements that did not address TANF's basic notions of work or motherhood or marriage.

While the left said, "This should be about poverty," the right said, "Let's make it about marriage." You know who is winning that tug of war so far. We have to a large extent had to work within the parameters of the current law and make our arguments about why the system is not working; why, if you want to promote marriage, you must deal with teen pregnancy; why you need to get jobs for noncustodial fathers, so they can be "marriageable." The focus of the debate, however, continues to be about work. *More* work participation requirements will be added to the law, not fewer. We may make a few inroads, such as by giving the states the option of providing assistance to legal immigrants. But there will be few, if any, additional resources for implementing improvements secured, except perhaps in the area of child care. Perhaps most frightening of all, there may be provisions to give states the authority to waive whatever federal requirements remain, not only in this program but in a whole host of other programs such as food stamps and public housing.

## **LENORA LAPIDUS**

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I began as the Director of the ACLU Women's Rights Project just a little over a year ago, in March, 2001. As you know, the Project was founded in 1971 by Ruth Bader Ginsburg. Under her leadership, the Project and other women's rights organizations established many of the major consti-

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**[Research by Rutgers University shows that] child exclusion policies are intended to and do have the effect of coercing reproductive decision-making by deterring poor women, primarily poor women of color, from having more children.**

tutional and statutory protections for the women’s rights that exist today. That progress continued in the 1980s under the leadership of Isabelle Katz Pinzler.

One of my goals since becoming Director has been to ensure that all women can benefit from the rights established over the last thirty years, which means looking particularly at low-income women, women of color, and marginalized women who may not yet be able to benefit from the rights that exist on the books. Welfare and poverty issues are a major priority for the Project, and what follows is a summary of a few legal challenges to various welfare provisions.

One area we are focusing on is child exclusion policies. Such policies, which now exist in the majority of states, deny any additional benefits to help support a new child if the child is born into a family already receiving welfare. Most challenges have not been successful but we have not given up. As we have done in other such cases we, along with the ACLU of New Jersey, the NOW Legal Defense and Education Fund, and a New Jersey law firm, are challenging New Jersey’s child exclusion policy under the New Jersey Constitution.<sup>7</sup> The New Jersey Supreme Court has interpreted the state constitution much more broadly than the U.S. Supreme Court has interpreted the federal constitution, and we therefore hope that we can prevail by using state constitutional theories of the rights to privacy and equal protection.

The right to privacy argument is that the child exclusion policies are intended to and do have the effect of coercing reproductive decision-making by deterring poor women, primarily poor women of color, from having more children. Research by Rutgers University shows that since the child exclusion policy was enacted, there has been a rise in the abortion rate among low-income women in New Jersey, although the abortion rate has been declining elsewhere and among the general population.

New Jersey has some good case law in the area of abortion rights. We relied initially on a case that involved Medicaid funding for abortion. Even though the U.S. Supreme Court had held that states need not pay or provide Medicaid coverage for poor women seeking abortions,<sup>8</sup> the New Jersey Supreme Court ruled that under the New Jersey Constitution’s right to privacy, Medicaid funds could not be withheld from women seeking abortions if they were provided to women for prenatal care and child-birth services.<sup>9</sup> In the child exclusion challenge, we argue that the state cannot use its power of the purse to coerce women not to have children any more than it can deny women money to deter them from having abortions.



In a more recent decision, the New Jersey Supreme Court struck down a parental notification abortion law, again going far beyond not only the federal Supreme Court but other courts that have addressed parental involvement laws.<sup>10</sup>

Thus far, we have not succeeded in the child exclusion challenge in the trial or appellate courts, but we are now before the New Jersey Supreme Court and we are hopeful that we will be successful there. We are also working with Nebraska Appleseed, NOW LDEF and other organizations in a prospective child exclusion challenge in Nebraska based on a relatively new equal protection clause in that state's constitution. It may be hard to believe but Nebraska had no equal protection clause in its constitution until a few years ago.

The Nebraska litigation has been successful in chipping away at a child exclusion policy in the lower court, in *Mason v. State of Nebraska*.<sup>11</sup> The challenge in that case, now pending before the Nebraska Supreme Court, is to the application of the child exclusion policy to disabled mothers and their children. The argument is that the purpose of the child exclusion policy was to keep women working rather than at home having more children. That makes no sense in any context but it makes even less sense when applied to a group of women who have already been defined as unable to work. We are relatively optimistic about eliminating this provision as applied to disabled mothers. Such a victory would be significant because a large proportion of women on welfare are disabled or have children who are disabled. Thus, in this case, we have the intersection among disability rights, poverty, and race.

Another small success story comes from Indiana in the case of *Williams v. Humphries*.<sup>12</sup> Although children were being excluded pursuant to the child exclusion policies, any parental child support that came in for an excluded child was being taken by the state. Such a policy was clearly illegal and the court held that confiscating the child support constitutes an unconstitutional taking.

A second area in which we have been involved is workfare. The ACLU of Wisconsin recently filed a complaint with the Department of Health and Human Services, alleging violations of the Americans with Disabilities Act and race discrimination in the workfare program as applied to disabled mothers or parents of children with disabilities.<sup>13</sup> Studies and data amassed in Wisconsin demonstrate that the workfare program is being applied discriminatorily.

In California, we are looking into gender steering in workfare programs. Women who come to the programs are being directed toward

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dead-end, low-paying jobs in traditionally female occupations. The men who come through the system are being steered toward higher-paying jobs such as truck driving.

One particular anecdote we heard in California involved a man who sought employment through the workfare office. The only job available at the time was making lamp shades. It required fine motor skills and nimble fingers and the case worker commented, “You’d rather do something like truck driving which pays better and it’s better for men. These jobs are really for women.” The man had previously gone to a demonstration about making lamp shades and thought it seemed interesting. More importantly, it was the only job available and he wanted one immediately, rather than waiting a few weeks until a truck driving job came open. He raised a bit of a fuss and complained to a local advocate but then did not want to pursue it. As we have heard several similar anecdotes, we thought we needed to collect data. We are now doing so through state Freedom of Information Act requests.

The third area we are looking at is the possibility of due process arguments where there have been problems of misinformation being given to welfare recipients and a lack either of notice or of any opportunity to be heard concerning mistakes made by the welfare offices. In all of these cases, we collaborate with community organizers and advocates, people who are not necessarily lawyers, but who are working with the women and discovering the problems. We are also beginning to work with the affected women themselves.

The ACLU is in a particularly good position to do this because we have affiliate offices in virtually every state in the country, and staff in these offices can network with local community organizations and with other national organizations that may not have representatives in all the other states.

## **MARTHA DAVIS**

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From a feminist perspective, the question is how to change the debate about poverty and welfare so that the fact that women are disproportionately poor is recognized as a key factor rather than being viewed as irrelevant or accidental. One way to do this is to focus on litigation strategies designed to expand the law. There are examples of such campaigns having some success. *Brown v. Board of Education* and its successors kept the debate about racial discrimination alive.<sup>14</sup> More recently, gay marriage cases have been brought, strategically, in states whose constitutions have the potential to support such cases.

There are caveats. Any litigation strategy has to be pursued in conjunction with other strategies. It is unlikely that we would win many of these cases, and the main purpose of the litigation would be to stimulate debate, educate the public, and lay the groundwork for legislative reform.

We would focus on state constitutions. In the 1960s and 1970s, welfare litigation focused almost exclusively on the federal courts, and at the time there were good reasons for that. Now, however, there are good reasons to turn to state constitutions instead. One is welfare devolution, which increases the significance of state laws for programs that primarily serve women and families. Second, and perhaps more importantly, federal constitutional doctrine is based largely on negative rights, and the courts have rejected a disparate impact analysis for sex. Federal doctrine has not provided adequate protection in the areas that we care about. State constitutional provisions provide some unique opportunities for establishing positive rights and, potentially, for expanding a disparate impact analysis.

What are positive rights? While there is really not a simple answer, in general they can be defined as rights to government action. When a citizen enforces a positive right, she can compel the government to take action to provide certain services. This contrasts with negative rights, which entail freedom from government action, although there is not a terribly bright line between the two. It becomes fuzzy, for example, in the reproductive rights area, where enforcement of a negative right to be free of discrimination may result in government action in the remedial phase. While the principal argument about Medicaid-funded abortions is that the government cannot act to discriminate, the ultimate result is that unless the government is going to cut back on rights to Medicaid entirely, it has to take positive action to provide Medicaid funding for abortions along with other health needs.

Positive rights to welfare are among the most common positive rights found in state constitutions (see Appendix I). They vary tremendously. Eighteen states have provisions about the rights of the poor, ranging from mandatory provisions for the needy (New York, Alabama, Kansas and Oklahoma) to provisions that relate only to the process for apportioning welfare. The Georgia constitution, for example, contains a procedural provision requiring the welfare system to be administered by a public authority.

Many of these states are developing unique state constitutional interpretations that include positive rights in the poverty area. New York State is indisputably the leader in its construction of Article XVII of its state constitution, which directs the state to provide aid and care to the needy.<sup>15</sup>

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**[We can] look at international and comparative law in interpreting the state constitutions, for two reasons. One is that state courts examining these provisions have no federal analog to draw upon. The closest analog to turn to, in construing positive rights in state constitutions, is international law.**

Most recently, that provision of the constitution was utilized in *Alliessa v. Novello* where article XVII was held to require Medicaid coverage for legal aliens in New York.<sup>16</sup> Often, when state courts look at such poverty provisions, they adopt an equal protection type of analysis. Professor Helen Hershkoff recently argued in a series of articles in the *Harvard Law Review*, however, that when positive rights are involved, the burden should be on the government to show that any welfare program furthers the constitutionally prescribed goals, rather than on the plaintiff to prove that the program violates the constitution.<sup>17</sup> That approach can be used to encourage state courts to view state constitutions as creating positive rights, rather than relying more on an equal protection approach.

Eighteen state constitutional welfare provisions are complemented by eighteen state equal rights amendments. While they are not the same eighteen states, there is some overlap. Although they are worded to extend freedom from discrimination, like the Equal Protection clause, rather than to provide positive rights, they typically trigger a heightened level of scrutiny that is not available under the federal Equal Protection clause. State ERAs can, however, provide an argument for extending benefits and requiring positive governmental action in the remedial phase. Again, Medicaid-funded abortions are an example. Further, whether or not disparate impact analysis is available under the state equal rights amendments is an open question that allows room for creative legal arguments. Some state constitutional decisions, such as in the Maryland case of *Peppin v. Woodside Delicatessen*, have permitted it.<sup>18</sup>

Many state constitutional provisions are more recent than the federal constitution. This is true not only of the western states that adopted their state constitutions when they became states but also of eastern states such as New York, which adopted Article XVII in 1938 during the Depression. Many state equal rights amendments were adopted in the 1970s as part of the campaign to enact the federal ERA. The legislative sources are therefore much more contemporary, enabling litigators and judges to rely on a more current understanding of poverty and women's rights. That also enables us to look at international and comparative law in interpreting the state constitutions, for two reasons. One is that state courts examining these provisions have no federal analog to draw upon. The closest analog to turn to, in construing positive rights in state constitutions, is international law. Second, many of the state constitutional provisions were adopted at a time when other national constitutions with positive rights were already in place, giving state courts a legitimate reason to look at the way those provisions have been interpreted abroad. In *Moore v. Ganim*, while the Connecticut

Supreme Court held that there was no right to welfare under the Connecticut constitution, a very strong dissent relied in part on the Universal Declaration of Human Rights in interpreting the provision.<sup>19</sup>

If we are to think about a state constitution litigation campaign for poor women, we have to begin with strategic filings. Four states—Montana, New Mexico, Pennsylvania and Texas—have both a permissive grant of welfare rights and a state equal rights amendment. Pennsylvania and Montana both have very strong welfare rights organizations. The Kensington Welfare Rights Union in Philadelphia and a community-based group in Montana called WEEL (Working for Equality and Economic Liberation) are very active and would be able to use such a lawsuit to stimulate public debate. We could use these provisions, for example, to attack child exclusion measures and to try to create positive rights to civil rights protections for welfare-to-work participants, to services relating to domestic violence, to government support for child care, to effective child support collection, and to education as part of a welfare-to-work program, on the theory that women are disparately impacted by job market bias that depresses their wages unless they get access to education. A possible first step would be to use a state equal rights amendment to challenge the disparate impact of one of these welfare provisions on women, and then cite the state constitutional welfare provision to argue that extension of benefits is consistent with the articulated state constitutional policy of supporting the poor.

Alternatively, some state constitutional provisions have been interpreted to operate as equal protection type clauses rather than as positive grants. The ERA could bolster arguments for a state version of heightened scrutiny when the challenge is levied against a welfare provision that has a disparate impact on women. Significantly, in most of these punitive programs it is primarily women of color who are affected. Recent data show the racial bias of many of the punitive programs, so heightened scrutiny is arguably also available under race analysis.

This approach obviously is piecemeal, and as noted, there are only eighteen states that have ERAs or positive welfare provisions. Linking them to international law makes this a more universal endeavor, and perhaps this ultimately will have an effect on the federal courts.

## **DISCUSSION**

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**COMMENT:** We've been hearing about a fairly depressing situation with respect to legislative remedies for persistent poverty and the equally per-

sistent inequalities implicit in welfare policy. That highlights the underlying dilemmas we face in dealing with the politics of fighting for women's rights, particularly as we attempt to extend the rights that have been won by some women to all the women in this society.

**MARISA DEMEO:** Latinos in this country now number thirty-five million, which is 12.5% of the U.S. population. The community has a 25% poverty rate. Forty percent of it is foreign born. When the 1996 welfare reform was passed, forty percent of the budgetary savings came on the backs of legal immigrants. These people, who pay taxes and who the government has said have a right to be here for the rest of their lives, are nonetheless denied welfare benefits. Most of those denied welfare rights are immigrant women. The restoration of TANF benefits for legal immigrants is therefore a top priority for the Latino community.

This leads to the question of whether Equal Protection cases are being brought only as gender claims or as race and national origin claims as well. One of the things we have seen since 1996 is that even though the law cut off legal immigrants, the percentage of Latinos on TANF is actually increasing. These people are having a hard time getting into the workplace and getting jobs for a variety of reasons, including language barriers and discrimination. When we talk about equal protection, are we talking not only about gender steering but about racial steering, in which Latina and black women are steered into certain types of jobs and white women into other types of jobs?

Both Title VI and Executive Order 13166 address the issue of national origin discrimination in the provision of federally funded and federally conducted services.<sup>20</sup> This gets at the language barrier issue. Despite all the negative things the Bush administration is doing, it has reinforced Executive Order 13166, and we are working to make sure that it and Title VI are fully implemented.

**NANCY DUFF CAMPBELL:** I think we can win the immigration issue on the state option. President Bush's popularity among Latinos is important to him, and he has said that he would accept a bill with state options.

**MARTHA DAVIS:** When we first challenged New Jersey's child exclusion policy, we filed a federal case that was not pursued beyond the Third Circuit. We, the NAACP Legal Defense Fund, the Puerto Rican Legal Defense Fund and the NOW Legal Defense Fund also filed a complaint with the Department of Health and Human Services' Office of Civil Rights (OCR) on behalf of clients in New Jersey, challenging the child exclusion under Title XI. There was some significant evidence of intent to target African-American women in the statements of state senator Wayne

Bryant, the exclusion's principal sponsor in New Jersey, as well as a lot of evidence of disparate impact. We nevertheless lost before the OCR on the intent claim. On the disparate impact claim, when the Bush administration came in and we learned that OCR was going to rule against us, we were sufficiently concerned about creating bad law under Title VI to withdraw the complaint.<sup>21</sup> The law under Title VI has, of course, changed in recent years so that it is much harder to bring claims under it now.

**RHONDA COPELON:** Some women have been talking about a right to wellness, which is an elaboration of the international understanding of health as a positive state. Women's health advocates here and around the world have developed a broad and encompassing understanding of wellness. The health rights framework is a broad and positive one, and includes the means with which to effectuate one's decisions. There are a number of state constitutions with health provisions that might be used to contribute to an organizing campaign.

**LUCIE WHITE:** Could you imagine a welfare litigation strategy that was framed as a right to care for children? That might change the terms of the public debate.

**COMMENT :** Martha Fineman has noted that we all live subsidized lives. Some subsidies are considered very bad and are subject to sanction, while others, such as corporate subsidies, are considered good. A major subsidy that comes not from the government to the people but from the people to society is the caretaking work done primarily by women. One of the things Fineman would like to see happen is a national dialogue and, for lack of any better reference, she refers to the dialogue on race that President Clinton initiated. That would be a useful way of beginning to think about both the subsidy that women's work creates for society and about the way caretaking is devalued in the context of "welfare reform."

**JOAN WILLIAMS:** There is a very concrete way to make this argument if you start out with the data on mothers' work patterns. If two out of three mothers aged 25 to 44 work less than a forty hour week, why are we making similar welfare mothers work in a different work pattern? The reason those mothers work for pay less than forty hours a week presumably has to do with their very important work taking care of children and elders and others.

**COMMENT:** Representative Patsy Mink offered a bill in the House that included that kind of analysis. It wasn't broad-based. But even someone like Paul Wellstone wasn't willing to sign onto it or introduce a Senate version.



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**We have to attack the idea that poor women, especially poor women of color, do nothing positive for their children, that they are transmitting negative values, that their caregiving is somehow toxic or depraved, and that they should be out working no matter what the conditions.**

**DOROTHY ROBERTS:** The reason these arguments have no traction is that not all caregiving is valued equally. Black women’s caregiving, in particular, is not valued by many people in this country, but the images connected to welfare during the welfare reform debate were primarily of black women. In order to have a movement that is successful, that is based on the value of caregiving, we have to attack the idea that poor women, especially poor women of color, do nothing positive for their children, that they are transmitting negative values, that their caregiving is somehow toxic or depraved, and that they should be out working no matter what the conditions. In many people’s minds, these women are so harmful to their children that whole communities of children should be moved out and placed into better homes.

Another theme to emphasize is dignity. I am involved with the National Black Women’s Health Project, which thinks about wellness in a way that includes human dignity. It is more than just physical health. It includes the ability to decide whether or not to have children and to be able to raise healthy children if you want to have children, as well as your physical health. Wellness and dignity are related. That may not appeal to some members of Congress, but it may appeal to women across cultures and constitute a potential ground for organizing.

**RHONDA COPELON:** The definition of health from the World Health Organization is a positive state of well-being, not merely the absence of sickness or disability. When we think about needs, we ought to connect them to the international system. The rights to health, education, shelter, food, and an adequate standard of living are real rights, based in a universalist framework that has international legitimacy. We should draw upon these concepts.

**COMMENT:** Litigation may not be the only option. Assuming that a welfare agency wants its programs carried out properly may be another strategy. In Chicago, ex-offenders had access to welfare benefits and job training. The Legal Assistance Foundation went to the agencies in charge and offered to monitor the funds’ administration on an individual basis. The implication was that the agency itself wanted it to be done fairly, in a non-gender-adverse way.

**COMMENT:** The reason for success at obtaining entry might be the fact that it was the Legal Assistance Foundation, who they knew might sue them.

**COMMENT:** The Congresswoman from my district in Chicago went to an INS office and stood in line one day. It took her eighteen hours to get relief. Afterwards, she simply told the relevant officials, “I know you want



to do this right. Let me tell you, it's not working properly." They were horrified and went to work on it.

**LASHAWN WARREN:** A word about the legislative process and TANE. We were really fortunate that Congresswoman Lynn C. Woolsey from California was a former welfare recipient.<sup>22</sup> We were able to work with her to get into the bill a provision that makes poverty reduction a goal of TANE. That's a building block for us to use in the future.

I find, whenever I'm on the Hill trying to explain the kinds of people who are on welfare, that there is an incredibly negative image of welfare recipients. I have to respond to stereotypes that are publicly articulated, surprisingly enough, by political officials. A number of them fail to understand that welfare recipients are hard-working people with a serious work ethic but, rather, hold to the view of recipients as lazy people who want to do nothing but produce a lot of children and collect money from the government. It would be helpful if we could reframe the issue and the way welfare is talked about. Perhaps we should not use the term welfare recipients and substitute something like "people who need assistance to help them out of a bad situation."

**LENORA LAPIDUS:** That is why it is important to have people affected by these laws and policies speak in public. It is much easier to retain myths and dismiss realities when the person affected is not in front of you and you are talking about "them." If someone says, "Here I am, this is my story," it is a lot harder for a Congressperson to say, "Oh, but you're lazy."

**COMMENT:** Welfare recipients obviously work hard in many ways. They work hard in jobs, they work hard to secure housing and they work hard at domestic work, all of which are in many ways harder and more intensified for welfare recipients.

Many attitudes about welfare are attitudes about motherhood. Perhaps we need to broaden our discussion in order to get at the roots of the hostility to welfare recipients, returning to some of the issues such as the devaluation of domestic labor that the women's rights movement used to talk about more intensely some years ago. We spoke decades ago about bringing domestic labor under Social Security and placing a dollar value on women's domestic labor when couples divorce. We don't necessarily want to revisit those proposals but might we highlight the issue as one way of getting at the hostility to welfare recipients?

**COMMENT:** There are studies about stereotypes of motherhood and how they disadvantage women. One plots stereotypes on a scale that rates women by competence. It shows that business women are rated as similar in competence to business men, but that housewives are rated as similar in

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**African-American women and other women of color are stereotyped and devalued as caretakers for their own children, but at the same time they are exploited to care for the children of the elite.**

competence - and here I'm using the stigmatized words that the researchers used - to the elderly, blind, retarded, and disabled.

Another study is of low-wage workers, predominantly black women, in Atlanta. If the women in these low-wage jobs worked hard and were very effective, they were seen as being unsuitable workers because they were so desperate. That was why they did good work; that was why they weren't qualified for promotion. But on the other hand, if they had a record of absenteeism, they weren't qualified because they had too many family responsibilities to be responsible workers.

**COMMENT:** The other piece that needs to be put into the picture is the shifting pattern of access to low-wage laborers who do care work for elite people. Historically, particularly in the South, African-American women were very low-wage laborers who raised a group of white children, ironically, at the same time as they were struggling to raise their own children. There's now a demographic shift, at least in some parts of the country. More and more very low-wage care workers are being brought in from southern countries and their rights are violated even more than those of many African-American care workers. The race ideology is so treacherous and horrible. African-American women and other women of color are stereotyped and devalued as caretakers for their own children, but at the same time they are exploited to care for the children of the elite.

**COMMENT:** We have to examine the different impact of the 1996 law on different women of color. A major shift occurred then in the image of the welfare mother. The majority of the welfare women depicted by the print media in 1995 and 1996 were immigrant women, Latina or Asian, depending on what part of the country the newspaper was from. It is no coincidence that 40% of the cuts came on the back of 70% of the former recipients, the documented immigrant welfare recipients. 1996 helped exacerbate the South-North divide.

**BETH RICHIE:** Prison labor should not be only a footnote. There's a really important discussion to be had about the work of people in prisons, especially women. Former women prisoners are not allowed to do various kinds of work, such as that of a beautician, once they're released to the communities, although that is what women often do when they work inside prisons, nor are they permitted to do child care or home care for elderly people. There's the complicated matter of state use of women's care work: the kind of work women are permitted to do when their work benefits the state, as opposed to the work permitted to women who have been under the surveillance of the state.

**COMMENT:** The core employment issues are entry into higher-paid work, equal pay, and access to promotions. Funding is the major problem. We need coalitions to strategize about how to obtain the necessary resources. It is about more than trying to persuade the foundations to give more money, which of course they should do. We can work from strength here because issues such as barriers to entry, equal pay, and access to promotions are not particularly controversial. Even though the federal courts have been hostile to many of our concerns, these employment issues are not ones that, for example, Sandra Day O'Connor is likely to be against. She's had a fairly good record on employment discrimination issues, including affirmative action programs and skilled craft workers.

Equal Protection analysis can be used in the area of prison tracking. I was involved in a lawsuit in the early 1980s because women prisoners were tracked into beautician work but men were tracked into skilled craft work. We successfully attacked that under both Title IX and the Equal Protection clause.

**LENORA LAPIDUS:** One thing the ACLU has been looking at is girls in juvenile detention. We argue that Title IX is violated if there are differences in the kind of vocational education provided to girls and boys in juvenile detention.

**MARTHA DAVIS:** It is not just women's reproductive labor that is devalued; it is women's productive labor as well. One of the factors contributing to women's disproportionate presence on welfare is the wage gap.

**REGINA AUSTIN:** I wonder if we shouldn't start thinking about a strategy which would create work for women, particularly in the communities where they live, which would give them resources that are not dependent upon an economy that is uninterested in including these people in anybody's version of the good life. This means national community development.

**COMMENT:** There are groups that have been working on job creation for a long time. They came out of the civil rights movement and often are headed by women. One of the groups is the Federation of Southern Cooperatives, led by a woman named Shirley Sherrod, which has been developing markets for black farmers, particularly women. It is creating cooperatives, working in rural areas, working with welfare recipients. In Atlanta, for example, it is bringing produce from the farms into the city so welfare recipients can sell it. There are interesting bottom-up models, where people have been using an integrated approach to dealing with these problems rather than segmenting by gender, race, or ethnicity. Many of those movements are led by women of color.

## NOTES

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1. Adoption and Safe Families Act, P.L. 105-89 (1997).
2. See, e.g., Kathryn Edin and Laura Lein, *Making Ends Meet: How Single Mothers Survive Welfare and Low-Wage Work* (Russell Sage, 1997); Kathryn Edin, E. Scott, A. London and J. Mazelis, “Children First: Welfare-Reliant Women’s Post-TANF View of Work-Family Tradeoffs, Neighborhoods, and Marriage” in Greg J. Duncan and P. Lindsay Chase-Lansdale, eds., *For Better and For Worse: Welfare Reform and the Well-Being of Children and Families* (Russell Sage, 2001).
3. *King v. Smith*, 392 U.S. 309 (1968).
4. *Goldberg v. Kelly*, 397 U.S. 254 (1970).
5. *Shapiro v. Thompson*, 394 U.S. 618 (1969)
6. AFDC was originally provided for in Title IV of the Social Security Act of 1935, P.L. 74-271.
7. *Sojourner A. v. New Jersey Dep’t of Human Servs.*, 794 A.2d 822 (N.J. Super. Ct. App. Div. 2002), *cert granted*, 803 A.2d 1165 (N.J. 2002).
8. *Harris v. McRae*, 448 U.S. 297 (1980).
9. *Right to Choose v. Byrne*, 450 A.2d 925 (N.J. 1982).
10. *Planned Parenthood v. Farmer*, 762 A.2d 620 (N.J. 2000).
11. Order, Case No. CI 00-3389 (Neb. Dist. Ct. Oct. 26, 2001).
12. Complaint on file with ACLU Women’s Rights Project.
13. Americans with Disabilities Act, P.L. 101-336 (1990).
14. *Brown v. Board of Education*, 347 U.S. 483 (1954).
15. “The aid, care and support of the needy are public concerns and shall be provided by the state and by such of its subdivisions, and in such manner and by such means, as the legislature may from time to time determine.” New York State Constitution, Article XVII, Section 1.
16. *Aliessa v. Novello*, 96 N.Y. 2d 418, 754 N.E. 2d 1085 (2001).
17. Helen Herschkoff, “State Courts and the ‘Passive Virtues’: Rethinking the Judicial Function,” 114 *Harvard Law Review* 1833 (2001); “Positive Rights and State Constitutions: The Limits of Federal Rationality Review,” 112 *Harvard Law Review* 1131 (1999).
18. *Peppin v. Woodside Delicatessen*, 67 Md. App. 39, 506 A.2d 263 (1986).
19. *Moore v. Ganim*, 233 Conn. 557, 660 A.2d 742 (1995).
20. Executive Order 13166, “Improving Access to Services for Persons with Limited English Proficiency,” requires federal agencies to examine the services they provide, identify any need for services to those with limited English proficiency, and develop and implement a system so that people with limited English proficiency can have meaningful access to those services. It was signed by President Clinton on August 11, 2000.

21. Title VI of the Civil Rights Act of 1964, P.L. 88-352, prohibits discrimination on the basis of race, color, and national origin in programs and activities receiving federal financial assistance.

22. <http://woolsey.house.gov/Biography/asp>

## APPENDIX I

# State Constitutional Provisions Relating to Welfare

### ALABAMA

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Ala. Const. art. IV, 88.

It shall be the duty of the legislature to require the several counties of this state to make adequate provision for the maintenance of the poor.

Ala. Const. art. XI, 217 (property tax exemption for charitable organizations).

### ALASKA

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Alaska Const. art. VII, 5 (Public Welfare).

The legislature shall provide for public welfare.

Alaska Const. art. IX, 4 (property tax exemption for charitable organizations).

### ARIZONA

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Ariz. Const. art. XXII, 15.

Reformatory and penal institutions, and institutions for the benefit of the insane, blind, deaf, and mute, and such other institutions as the public good may require, shall be established and supported by the State in such manner as may be prescribed by law.

Ariz. Const. art. XI, 1.

The Legislature shall also enact such laws as shall provide for the education and care of the deaf, dumb, and blind.

### ARKANSAS

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Ark. Const. art. XIX, 19.

It shall be the duty of the General Assembly to provide by law for the support of institutions for the education of the deaf and dumb and the blind, and also for the treatment of the insane.

Ark. Const. art. XVI, 5(b) (property tax exemption for charitable organizations).

## **CALIFORNIA**

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Cal. Const. art. XVI, 11.

The Legislature has plenary power to provide for the administration of any constitutional provisions or laws heretofore or hereafter enacted concerning the administration of relief.... The Legislature, or the people by initiative, shall have power to amend, alter, or repeal any law relating to the relief of hardship and destitution, whether such hardship and destitution results from unemployment or from other causes, or to provide for the administration of the relief of hardship and destitution, whether resulting from unemployment or from other causes, either directly by the State or through the counties of the State . . . .

Cal. Const. art. XVI, 3.

(2) The Legislature shall have the power to grant aid to the institutions conducted for the support and maintenance of minor orphans....

(3) The Legislature shall have the power to grant aid to needy blind persons not inmates....

(4) The Legislature shall have power to grant aid to needy physically handicapped persons not inmates....

Cal. Const. art. XIII, 4(b) (property tax exemption for charitable organizations).

## **COLORADO**

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Colo. Const. art. VIII, 1.

Educational, reformatory and penal institutions, and those for the benefit of insane, blind, deaf and mute, and such other institutions as the public good may require, shall be established and supported by the state, in such manner as may be prescribed by law.

Colo. Const. art. XXIV, 4 (stating “state board of public welfare” to administer old age pension fund).

Colo. Const. art. X, 5 (property tax exemption for charitable organizations).

## **FLORIDA**

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Fla. Const. art. VII, 3(a) (property tax exemption for charitable organizations).

## **GEORGIA**

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Ga. Const. art. IX, 2, P VIII.

The General Assembly shall not authorize any county, municipality, or other political subdivision of this state, through taxation, contribution, or otherwise, to appropriate money for or to lend its credit to any person or to any nonpublic corporation or association except for purely charitable purposes.

Ga. Const. art. IX, 3, P 1(c).

Any county, municipality, or any combination thereof, may contract with any public agency, public corporation, or public authority for the care, maintenance, and hospitalization of its indigent sick....

## **HAWAII**

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Haw. Const. art. IX, 3.

The State shall have the power to provide financial assistance, medical assistance and social services for persons who are found to be in need of and are eligible for such assistance and services as provided by law.

## **IDAHO**

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Idaho Const. art. X, 1.

Educational, reformatory, and penal institutions, and those for the benefit of the insane, blind, deaf and dumb, and such other institutions as the public good may require, shall be established and supported by the state in such manner as may be prescribed by law.

## **ILLINOIS**

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Ill. Const. art. IX, 6 (property tax exemption for charitable organizations).

## **INDIANA**

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Ind. Const., art. IX, 1.

It shall be the duty of the General Assembly to provide, by law, for the support of institutions for the education of the deaf, the mute, and the blind; and, for the treatment of the insane.



Ind. Const. art. IX, 3.

The counties may provide farms, as an asylum for those persons who, by reasons of age, infirmity, or other misfortune, have claims upon the sympathies and aid of society.

Ind. Const. art. X, 1(a)(1) (property tax exemption for charitable organizations).

## **KANSAS**

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Kan. Const. art. VII, 4.

The respective counties of the state shall provide, as may be prescribed by law, for those inhabitants who, by reason of age, infirmity, or other misfortune, may have claims upon the aid of society. The state may participate financially in such aid and supervise and control the administration thereof.

Kan. Const. art. VII, 1.

Institutions for the benefit of mentally or physically incapacitated or handicapped persons, and such other benevolent institutions as the public good may require, shall be fostered and supported by the state, subject to such regulations as may be prescribed by law.

Kan. Const. art. XI, 1(b) (property tax exemption for charitable organizations).

## **KENTUCKY**

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Ky. Const. 170 (property tax exemption for charitable organizations).

Ky. Const. 244A.

The General Assembly shall prescribe such laws as may be necessary for the granting and paying of old persons an annuity or pension.

## **LOUISIANA**

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La. Const. art. XII, 8.

The legislature may establish a system of economic and social welfare, unemployment compensation, and public health.

La. Const. art. VII, 21(B)(1)(a) & (b) (property tax exemption for charitable organizations).

## **MASSACHUSETTS**

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Ma. Const. art. XVIII, 3.

Nothing herein contained shall be construed to prevent the commonwealth, or any political division thereof, from paying to privately controlled hospitals, infirmaries, or institutions for the deaf, dumb or blind not more than the ordinary and reasonable compensation for care or support actually rendered or furnished....

## **MICHIGAN**

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Mi. Const. art. IV, 51.

The public health and general welfare of the people of the state are hereby declared to be matters of primary concern. The legislature shall pass suitable laws for the protection and promotion of the public health.

## **MINNESOTA**

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Minn. Const. art. X, 1 (property tax exemption for charitable organizations).

Minn. Const. art. XIII, 8.

The state may pay an adjusted compensation to persons who served in the armed forces of the United States during the period of the Vietnam conflict or the Persian Gulf War . . . .

## **MISSISSIPPI**

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Miss. Const. art. XIV, 262.

The board of supervisors shall have power to provide homes or farms as asylums for those persons who, by reason of age, infirmity, or misfortune, may have claims upon the sympathy and aid of society; and the legislature shall enact suitable laws to prevent abuses by those having the care of such persons.

## **MISSOURI**

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Mo. Const. art. IV, 37.

The health and general welfare of the people are matters of primary public concern; and to secure them there shall be established a department of social services in charge of a director appointed by the governor . . . . charged with promoting improved health and other social services to the citizens of the state as provided by law . . . .

## **MONTANA**

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Mont. Const. art. XII, 3.

(1) The state shall establish and support institutions and facilities as the public good may require, including homes which may be necessary and desirable for the care of veterans.

(2) Persons committed to such institutions shall retain all rights except those necessarily suspended as a condition of commitment....

(3) The legislature may provide such economic assistance and social and rehabilitative services for those who, by reason of age, infirmities, or misfortune are determined by the legislature to be in need.

(4) The legislature may set eligibility criteria for programs and services, as well as for the duration and level of benefits and services.

Mont. Const. art. VIII, 5(b) (property tax exemption for charitable organizations).

## **NEBRASKA**

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Neb. Const. art. VIII, 2 (property tax exemption for charitable organizations).

## **NEVADA**

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Nev. Const. art. XIII, 1.

Institutions for the benefit of the Insane, Blind, Deaf and Dumb, and such other benevolent institutions as the public good may require, shall be fostered and supported by the state, subject to such regulations as may be prescribed by law.

Nev. Const. art. X, 1(8) (property tax exemption for charitable organizations).

## **NEW JERSEY**

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N.J. Const. art. VIII, 1, P 2 (property tax exemption for charitable organizations).

## **NEW MEXICO**

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N.M. Const. art. IX, 14.

Neither the state nor any county, school district or municipality, except as otherwise provided in this constitution, shall directly or indirectly lend or

pledge its credit or make any donation to or in aid of any person, association or public or private corporation or in aid of any private enterprise for the construction of any railroad; provided:

A. Nothing in this section shall be construed to prohibit the state or any county or municipality from making provision for the care and maintenance of sick and indigent persons.

N.M. Const. art. XIV, 1.

The penitentiary at Santa Fe, the miners hospital at Raton, the New Mexico state hospital at Las Vegas, the New Mexico boys school at Springer, the girls welfare home at Albuquerque, the Carrie Tingley crippled children's hospital at Truth or Consequences and the Los Lunas mental hospital at Los Lunas are hereby confirmed as state institutions.

N.M. Const. art. VIII, 3 (property tax exemption for charitable organizations).

## **NEW YORK**

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N.Y. Const. art. XVII, 1.

The aid, care and support of the needy are public concerns and shall be provided by the state and by such of its subdivisions, and in such manner and by such means, as the legislature may from time to time determine.

## **NORTH CAROLINA**

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N.C. Const. art. XI, 4.

Beneficent provision for the poor, the unfortunate, and the orphan is one of the first duties of a civilized and a Christian state. Therefore the General Assembly shall provide for and define the duties of a board of public welfare.

## **OHIO**

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Ohio Const. art. VII, 1.

Institutions for the benefit of the insane, blind, and deaf and dumb, shall always be fostered and supported by the state; and be subject to such regulations as may be prescribed by the general assembly.

Ohio Const. art. VIII, 16.

To enhance the availability of adequate housing in the state and to improve the economic and general well-being of the people of the state, it is deter-

mined to be in the public interest and a proper public purpose for the state... to provide... housing....

Ohio Const. art. XII, 2 (property tax exemption for charitable organizations).

## **OKLAHOMA**

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Okla. Const. art. XVII, 3.

The several counties of the State shall provide, as may be prescribed by law, for those inhabitants who, by reasons of age, infirmity, or misfortune, may have claims upon the sympathy and aid of the county.

Okla. Const. art. XXV, 1 (Relief and care of needy aged and disabled persons - Co-operation with Federal Plan).

Okla. Const. art. XXI, 1.

Educational, reformatory, and penal institutions and those for the benefit of the insane, blind, deaf, and mute, and such other institutions as the public good may require, shall be established and supported by the State in such manner as may be prescribed by law.

Okla. Const. art. X, 6 (property tax exemption for charitable organizations).

## **OREGON**

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Or. Const. art. XI-A (Farm and Home Loans to Veterans).

Or. Const. art. XI-F(2) (Veterans' Bonus).

Or. Const. art. XI-I(2) (Multifamily Housing for Elderly and Disabled).

## **PENNSYLVANIA**

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Pa. Const. art. III, 29.

No appropriations shall be made for charitable, educational or benevolent purposes to any person of community nor to any denominational and sectarian institution, corporation or association: Provided, That appropriations may be made for pensions or gratuities for military service and to blind persons twenty-one years of age and upwards and for assistance to mothers having dependent children and to aged persons without adequate means of support....

Pa. Const. art. VIII, 2 (property tax exemption for charitable organizations).

## **SOUTH CAROLINA**

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S.C. Const. art. XII, 1.

The health, welfare, and safety of the lives and property of the people of this State and the conservation of its natural resources are matters of public concern. The General Assembly shall provide appropriate agencies to function in these areas of public concern and determine the activities, powers, and duties of such agencies.

S.C. Const. art. X, 4 (property tax exemption for charitable organizations).

## **SOUTH DAKOTA**

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S.D. Const. art. XIV, 1.

The charitable and penal institutions of the state of South Dakota shall consist of a penitentiary, a hospital for the mentally ill, a school for the developmentally disabled, and a reform school for juveniles.

S.D. Const. art. XI, 6 (property tax exemption for charitable organizations).

## **TENNESSEE**

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Tenn. Const. art. II, 28 (property tax exemption for charitable organizations).

## **TEXAS**

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Tex. Const. art. III, 51-a.

The Legislature shall have the power, by General Laws, to provide, subject to limitations herein contained, and such other limitations, restrictions and regulations as may by the Legislature be deemed expedient, for assistance grants to needy dependent children and the caretakers of such children, needy persons who are totally and permanently disabled because of a mental or physical handicap, needy aged persons and needy blind persons.

The Legislature may provide by General Laws for medical care, rehabilitation and other similar services for needy persons. The Legislature may prescribe such other eligibility requirements for participation in these programs as it deems appropriate....

Tex. Const. art XI, 2.

The construction of jails, court-houses and bridges and the establishment of county poor houses and farms, and the laying out, construction, and repairing of county roads shall be provided for by general laws.

Tex. Const. art. XVI, 8.

Each county in the State may provide, in such manner as may be prescribed by law, a Manual Labor Poor House and Farm, for taking care of, managing, employing and supplying the wants of its indigent and poor inhabitants.

## **UTAH**

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Ut. Const. art. XIX, 2 (Repealed in 1988).

Reformatory and Penal Institutions, and those for the benefit of the Insane, Blind, Deaf and Dumb, and such other institutions as the public good may require, shall be established and supported by the State in such manner and under such boards of control as may be prescribed by law.

Ut. Const. art. XIII, 2(2)(e) (property tax exemption for charitable organizations).

## **VIRGINIA**

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Va. Const. art. X, 6 (property tax exemption for charitable organizations).

## **WASHINGTON**

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Wash. Const. art. XIII, 1.

Educational, reformatory, and penal institutions; those for the benefit of youth who are blind or deaf or otherwise disabled; for persons who are mentally ill or developmentally disabled; and such other institutions as the public good may require, shall be fostered and supported by the state, subject to such regulations as may be provided by law.

## **WEST VIRGINIA**

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W.V. Const. art. IX, 2.

Coroners, overseers of the poor and surveyors of roads, shall be appointed by the county court.

W.V. Const. art. X, 1 (property tax exemption for charitable organizations).

## **WISCONSIN**

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Wis. Const. art. IV, 24 (1) & (2) (permitting the charitable organizations to hold bingo games and raffles).

## **WYOMING**

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Wyo. Const. art VII, 18.

Such charitable, reformatory and penal institutions as the claims of humanity and the public good may require, shall be established and supported by the state in such manner as the legislature may prescribe. They shall be supervised as prescribed by law.

## **SELECTED STATE CONSTITUTIONAL CASES RELATING TO WELFARE**

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*Aliessa v. Novello*, 96 N.Y.2d 418 (2001) (striking down state law denying Medicaid benefits to legal aliens under Article XVII of New York State constitution)

*Atkins v. Curtis*, 66 So.2d 455 (Ala. 1953) (rejecting state constitutional challenge to state law requiring counties to determine whether responsible relatives could support assistance claimants)

*Bullock v. Whiteman*, 865 P.2d 1977 (Kan. 1993) (rejecting state constitutional challenge to restrictions on welfare benefits)

*Butte Community Union v. Lewis*, 745 P.2d 1128 (Mont. 1987) (holding that Montana violated state constitution's welfare clause by limiting availability of public assistance based on presence or nonpresence of dependent children)

*Butte Community Union v. Lewis*, 712 P.2d 1309 (Mont. 1986) (under state constitution, invalidating state law that eliminated public assistance benefits to persons under thirty-five and no minor dependent children)

*Moore v. Ganim*, 233 Conn. 557 (1995) (rejecting state constitutional challenge to durational limit on general assistance benefits)

*Tucker v. Toia*, 43 N.Y.2d 1 (1977) (under Article XVII of New York State constitution, striking down statute restricting home relief for residents under age twenty-one)



## APPENDIX II

# Participants

**REGINA AUSTIN** is the William A. Schnader Professor of Law at the University of Pennsylvania. She is the author of numerous articles and co-edited the book *Black Genius: African American Solutions to African American Problems* (Norton, 1999). Her current research focuses primarily on economic discrimination.

**THERESA M. BEINER** is a Professor of Law at the William H. Bowen School of Law, University of Arkansas at Little Rock. Her areas of expertise include employment discrimination law as well as civil procedure and federal jurisdiction. She has written extensively in the area of employment discrimination, with a focus on sexual harassment law.

**NANCY DUFF CAMPBELL** is a founder and co-president of the National Women's Law Center. A recognized expert on women's law and public policy issues, she has participated for over thirty years in the development and implementation of key legislative initiatives and litigation protecting women's rights, with a particular emphasis on issues affecting low-income women and their families.

**HILARY CHIZ** is a project specialist in the Defense and Information Department of the Paper, Allied-Industrial, Chemical and Energy Workers' International Union. She conducts corporate and contract campaigns against anti-union companies and works on women's and civil rights issues.

**DONNA COKER** is a Professor of Law at the University of Miami School of Law. Her numerous publications include "Transformative Justice: Anti-Subordination Processes In Cases of Domestic Violence," in *Restorative Justice & Family Violence: New Ideas and Learning from the Past* (Braithwaite & Strang, eds., forthcoming); "Crime Control and Feminist Law Reform in Domestic Violence Law: A Critical Review," 4 *Buffalo Criminal Law Review* (2001); and "Shifting Power for Battered Women: Law, Material Resources, and Poor Women of Color," 33 *U.C. Davis Law Review* 1009 (2000).

**RHONDA COPELON**, Professor of Law at City University of New York, was co-founder of CUNY's International Women's Human Rights Law Clinic. In addition to litigating civil and international human rights cases such as *Drew v. Andrews* and *Harris v. McRae*, she co-authored the second edition of a leading legal text, *Sex Discrimination and the Law: History, Practice and Theory* (Little, Brown, 1996), and has published influential articles in the field of reproductive and sexual rights and international women's human rights.

**ROCIO CORDOBA** is director of the ACLU Foundation of Southern California, where she handles complex civil rights and civil liberties litigation and advocacy in the areas of education, gender and racial equity, poverty and reproductive rights.

**MARTHA DAVIS**, former president and legal director of the NOW Legal Defense and Education Fund, teaches at the Northeastern University School of Law. She argued *Nguyen v. INS* before the Supreme Court and was a participant in the *U.S. v. Morrison* litigation. Her *Brutal Need: Lawyers and the Welfare Movement, 1960-1973* (Yale University Press, 1995) received the 2001 Reginald Heber Smith Award for distinguished scholarship on the subject of equal access to justice.

**MARISA J. DEMEO**, Regional Counsel in the Washington, D.C. Office of the Mexican American Legal Defense and Educational Fund (MALDEF), develops policy positions and performs legislative advocacy on the national level for Latino civil rights in the areas of immigration, education, political access, employment, and access to public funds.

**LIA EPPERSON**, Assistant Counsel at the NAACP Legal Defense and Educational Fund, Inc., works in the areas of affirmative action, education, and employment. She served as a law clerk to the Honorable Timothy K. Lewis of the United States Court of Appeals for the Third Circuit, and as Litigation Associate at Morrison & Foerster in Palo Alto, California, where she worked on commercial and civil rights litigation.

**MICHELLE FINE** is a Professor of Psychology at the Graduate Center of the City University of New York. Her recent publications include *Speedbumps: A Student Friendly Guide to Qualitative Research* (edited with Lois Weis), (Teachers College Press, 2000); and *Changing Minds: A Participatory Action Research Analysis of College in Prison* (City University of New York, 2001).

**RUTH BADER GINSBURG**, Associate Justice of the U. S. Supreme Court since August 1993, served on the bench of the U.S. Court of Appeals for

the District of Columbia Circuit from 1980 to 1993. From 1972 to 1980, she was a professor at the Columbia University School of Law, simultaneously directing the ACLU Women's Rights Project; from 1963 to 1972, she served on the law faculty of Rutgers University. Throughout the 1970s she litigated and wrote briefs in numerous gender discrimination cases. Most notably, she argued six gender discrimination cases before the U.S. Supreme Court and won five of them, thereby playing the leading role in the effort to eliminate legal protection for gender-based discrimination.

**SALLY F. GOLDFARB** is an Associate Professor at Rutgers Law School – Camden. A former staff attorney at the NOW Legal Defense and Education Fund, she founded and chaired its National Task Force on the Violence Against Women Act and was instrumental in the drafting and passage of the Violence Against Women Act of 1994. She is the author of several law review articles and book chapters on violence against women, family law, and other topics.

**J. CUNYON GORDON** has been a trial lawyer for 20 years, in government and a large law firm. She has also taught at several law schools, in areas including evidence and trial advocacy. Her work with the ABA Commission on Women in the Profession has focused on disparate opportunities for women of all colors in law schools.

**JUDITH GREENBERG** is a professor at the New England School of Law, with a specialty in the area of domestic violence. She is the co-author of *Frug's Women and the Law* (Foundation Press, 1998) and of numerous law review articles on women's issues. In addition, she is the director of the Domestic Violence Project at NESL's Center for Law and Social Responsibility and the faculty supervisor for the NESL domestic violence clinic.

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