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American Civil Liberties Union and Women's Rights, The Essays

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[T]he constitutional values of equality and liberty are fundamentally linked by the notion that equal access to certain institutions and services is a prime component of any meaningful liberty. This link is reflected in the language of egalitarian movements. The civil rights movement of the 1960s, for example, marched under the banner of "Freedom" even though its chief objective was equal access—to the vote, to education, to housing, even to lunch counters. "Liberation" is today a theme of more than rhetorical significance in egalitarian causes such as the women's movement.¹

INTRODUCTION

Since I became the first female president in the seventy-one-year-history of the American Civil Liberties Union (ACLU) in February 1991, I repeatedly have been asked to comment on the significance of that event, in terms of the ACLU's commitment to women's rights. My

* Some of the material contained in this Essay appeared in Gale & Strossen, The Real ACLU, 2 Yale J. L. & Feminism 161 (1989). Specific passages that are drawn substantially from that earlier work are noted below.

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As a former Clinical Professor and Supervising Attorney of the Civil Rights Clinic at New York University School of Law, Professor Strossen is particularly happy to participate in this issue celebrating the history of women at New York University School of Law.

Many other individuals who have played important roles in the ACLU's efforts to defend and expand women's rights also have connections to New York University. One prominent example is Norman Dorsen, the Stokes Professor of Law at New York University, who in his capacity as ACLU General Counsel was the first person to argue to the Supreme Court that state restrictions on abortion violated women's constitutional rights. See note 46 infra (describing United States v. Vuitch, 402 U.S. 62 (1971)). Another New York University Law School faculty member, Professor Sylvia Law, long has served on the Advisory Committee of the ACLU's Reproductive Freedom Project. The Associate Director of the ACLU's Women's Rights Project, Joan Bertin, graduated from New York University School of Law, as did the two senior staff attorneys at the Reproductive Freedom Project, Lynn Paltrow and Rachael Pine. Finally, numerous New York University law students have interned, as Hays Fellows and Root-Tilden scholars, at both Projects.

answer is that the ACLU's election of a woman leader is a fitting symbol for an organization which, from its beginning, has committed itself to advancing women's rights and opportunities. Unfortunately, though, the ACLU's extensive work for women's rights both within the organization and within the larger society is not as widely known as it should be.

For example, how many people realize that the ACLU has argued more women's rights cases before the Supreme Court than any other American organization? That the ACLU was the first national organization to call for the right of all women to terminate an unwanted pregnancy, and the first to argue for such a right in the Supreme Court? That, since the 1970s, the ACLU Reproductive Freedom Project has handled approximately eighty percent of all reproductive freedom litigation nationwide? That outside analysts repeatedly have hailed the ACLU Women's Rights Project as the most effective champion of women's rights before the Supreme Court?

The public at large, and even the ACLU membership, is most familiar with the ACLU's work in the areas of free speech and rights of the criminally accused—classic political and civil liberties. What is less well known is the ACLU's accomplishments in promoting equal rights for traditionally disempowered groups in our society, including racial and religious minorities, women, and lesbians and gay men—often referred to as civil rights.

The differential awareness of the ACLU's work on civil liberties and civil rights parallels the perceived division between these two sets of issues, which in turn may stem from the different role government plays with respect to each. Civil liberties involve limits on the government's power: they prohibit, for example, warrantless searches, limits on individual speech, and imprisonment without due process of law. In con-

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2 M. Berger, Litigation on Behalf of Women: A Review for the Ford Foundation 16 (1980) ("More than any other group, the Women's Rights Project of the ACLU . . . has participated in cases before the Supreme Court challenging sex-based discrimination on constitutional grounds.").

3 See text accompanying notes 42-46 infra.

4 See text accompanying note 109 infra.


6 U.S. Const. amend. IV.

7 U.S. Const. amend. I.
The protection of civil rights requires affirmative government action to ensure that all people are treated equally and to remedy the effects of past discrimination.

The perceived separation between civil liberties and civil rights also derives from certain political perceptions. Groups all along the political spectrum advocate limiting government power, because the dangers of governmental intrusion threaten everyone's civil liberties equally. In contrast, affirmative government action in the civil rights area aids only groups historically excluded from the benefits of American traditions. Only naturally, then, there is more consensus on classical civil liberties.

But in fact, to meaningfully secure freedom for all, a combination of limiting government in some areas and expanding it in others is necessary. As noted in the opening quotation from Kenneth Karst, civil liberties and civil rights—liberty and equality—are inextricably linked. By exploring the ACLU's contributions to the empowerment of women and by noting that these accomplishments are paralleled for other traditionally oppressed groups in our society, this Essay demonstrates the essential link between civil rights and civil liberties.

To accomplish this goal, the Essay first gazes inward and documents the relationship between the organization's internal and external commitments to women's rights. Readjusting its focus outward, it then surveys the women's rights work to which the ACLU has contributed over the past seventy-two years, providing a unique panorama of women's achievements in the legal arena during that same period.

I

WOMEN'S LEADERSHIP IN THE ACLU

Since its founding in January 1920, the ACLU saw women's rights as intertwined with a broader civil liberties agenda. Although women did not yet have a constitutionally guaranteed right to vote, from the

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8 U.S. Const. amends. V and XIV.
9 A description of the ACLU's efforts and successes in the entire civil rights arena is beyond the scope of this Essay. See generally, Strossen, Regulating Racist Speech on Campus: A Modest Proposal?, 1990 Duke L.J. 484, 551-53 (outlining ACLU's efforts to combat race discrimination).
10 Women's Rights Project, With Liberty and Justice For Women: The ACLU's Contributions to Ten Years of Struggle for Equal Rights 3 (1982) (in summarizing women's rights cases in which ACLU involved, one "inevitably also summarize[s] the development in the law of gender discrimination and reproductive freedom: the story of this development has in large part been written by ACLU cases").
very beginning the ACLU leadership included women as well as men. Indeed, the ratification of the nineteenth amendment in August 1920 may help explain the important role that suffragists played in founding the ACLU. Believing that the rest of the feminist agenda would flow naturally from the franchise, these women turned their energies to other aspects of the individual rights movement.\(^{13}\)

The ACLU's founding mothers included many prominent social reformers and political activists, such as Jane Addams (1869-1935)\(^{14}\) and Emily Greene Balch (1867-1961),\(^{15}\) who were both Nobel Laureates, as well as Sophonisba Breckenridge (1866-1948),\(^{16}\) Mary Ware Dennett (1872-1947),\(^{17}\) Crystal Eastman (1881-1928),\(^{18}\) Elizabeth Gurley Flynn (1890-1964),\(^{19}\) Mary Eliza McDowell (1854-1936),\(^{20}\) and Jeannette Rankin (1880-1973),\(^{21}\) the first woman elected to Congress (in 1916). These women played such an important role in the organization's inception that Roger Baldwin, considered the ACLU's principal organizer,\(^{22}\) said that the "ACLU was born out of the interest of women who were

\(^{13}\) Pinzler, Introduction, Women's Rights Project, With Liberty and Justice for Women: The ACLU's Contributions to Ten Years of Struggle for Equal Rights 1 (1982).

\(^{14}\) The founder of Hull House, an organization dedicated to providing social services to immigrants, Addams was an active suffragist prior to World War I, when she became a prominent pacifist. Vilified for her opposition to United States entry into the war, she helped to form the ACLU and served on its National Committee throughout the decade until failing health obliged her to limit her activities in 1931. She received the Nobel Prize for Peace in 1931. See XI Dictionary of American Biography 12 (H. Starr ed. 1944).

\(^{15}\) Balch was a prominent pacifist who cofounded the American Union Against Militarism in 1914, out of which the ACLU grew. She received the Nobel Peace Prize in 1946 for her work with the Women's International League for Peace and Freedom. M. Randall, Improper Bostonian: Emily Greene Balch 136, 406 (1964).

\(^{16}\) The first woman to pass the Kentucky bar exam, Breckenridge became Dean of the Chicago School of Civics and Philanthropy, which trained social workers. She was involved in suffragist and pacifist organizations and was a founding member of the ACLU. XI Dictionary of American Biography 4-5 (H. Starr ed. 1944).

\(^{17}\) Dennett was a suffragist and pioneer of the birth control movement. Id. at 6. See also S. Walker, supra note 11, at 84-86.


\(^{19}\) Flynn was a labor organizer and later Communist. 2 ACLU Women's Rights Report 5 (1980) [hereinafter Women's Rights Report].

\(^{20}\) McDowell campaigned for social reform, organized women workers, and served as Commissioner of the Department of Public Welfare of Chicago from 1923 to 1927. H. Wilson, Mary McDowell: Neighbor 187-209 (1928); Women's Rights Report, supra note 19, at 8.

\(^{21}\) Influenced by Jane Addams, Rankin obtained a degree in social work. She was an active suffragist and pacifist, and championed women's rights as a congresswoman. She joined the ACLU in 1920 and later became its vice-president. Women's Rights Report, supra note 19, at 9.

\(^{22}\) See S. Walker, supra note 11, at 30.
concerned with the problems of war and peace.”

He explained further: The earliest leaders in the movement were Miss Lillian Wald of Henry Street Settlement House and one of the most prominent social workers in the country, and Jane Addams, who was the leader of the Women’s International League for Peace and Freedom. They and other well-known women, mostly social workers, banded together to form the American Union Against Militarism (AUAM) when they saw that the U.S. was being drawn into World War I. This organization became very active and well-known throughout the country. By 1917, it was a strong organization headed by Miss Wald.

Crystal Eastman was one of the primary forces behind the AUAM, the ACLU’s predecessor, while Baldwin began to work with the AUAM only as a temporary replacement for Eastman when she became ill. Despite her illness, Eastman devoted much time to the fledgling civil liberties organization. Thus, “in the early months of the ACLU... women were the dominant influence because ACLU origins were in the determination of women to fight for peace. And peace and civil liberties went right along together.” Moreover, as the organization expanded, developing state-based affiliates around the country, women provided most of the organizational and financial resources. These financial contributions are evidence of a recognition on the part of women that women’s rights were a natural part of, and inexorably tied to, protecting civil liberties for all.

Although women had played important roles throughout the ACLU since its inception, fifty years later men continued to comprise an overwhelming majority of the organization’s leadership. In response to the revived women’s movement, the ACLU renewed its dedication to women’s rights by adopting an affirmative action policy “to increase significantly the representation of women on all policy-making bodies and committees of the organization” and “to open up to women all executive and policy-making staff positions.” In 1980, the ACLU established a goal of twenty percent racial or ethnic minorities and fifty percent women at every level of staff employment. Shortly thereafter, the same

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24 Id.
26 Brinson, supra note 23, at 2.
27 Id. (quoting Baldwin).
28 Baldwin, who was the organization’s Executive Director from 1920 until 1950, said, “It was for the most part the women who raised the money, organized the affiliates and staffed the committees. They did the day-to-day, nuts and bolts work to build the ACLU.” Id. at 11.
29 See S. Walker, supra note 11, at 306.
30 Id.
percentage goals were set for membership on the ACLU National Board. Notably, in its renewed recognition of the importance of women's rights, the ACLU implemented internal policies traditionally thought of as civil rights remedies, thus demonstrating its view that civil rights and civil liberties cannot be separated.

As a result of such policies, women and racial and ethnic minorities now act in leadership roles throughout the organization. Specifically, women occupy one-third of the positions on the National Board of Directors and one-half of the positions on the National Executive Committee. Two of the five top national ACLU staff members are women. Women direct seven of the ACLU's fourteen major national projects: those concerned with arts censorship, capital punishment, children's rights, national security litigation, privacy and technology, reproductive freedom, and women's rights. Women also have played increasingly prominent roles within the ACLU's state-based affiliates.

The organization's vigorous internal efforts to place women in leadership positions encouraged women to seek the highest position in the ACLU. Until 1991, neither of the organization's two top positions—national president and executive director—ever had been occupied by a woman. When Norman Dorsen announced that he would resign from the presidency, National Board members, who choose the president from their ranks, apparently decided that a fitting expression of the ACLU's continuing and increasing commitment to women's rights would be the election of a woman as president. Accordingly, all four candidates for the position were women.

Post-election reports stating that my gender was a positive factor in my election to the ACLU presidency triggered angry responses from some readers, who perceived the suggestion that women, although less qualified, were supported for the presidency only because of their gender. To be sure, there were male members of the National Board whose experience qualified them to serve as president and who might have been willing to serve in that role, but for their preference (or their perception of the Board's preference) to have a female leader. However, each of the four women who ran for the office had substantial experience with the ACLU in other leadership positions, and the Board previously had

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32 As of February 1992, 27 of the 81 ACLU National Board members—or 33%—were female. In contrast, when the ACLU first endorsed internal affirmative action in 1970, only five of its 66 National Board members—or 8%—were women. S. Walker, supra note 11, at 305.

demonstrated its confidence in our abilities by electing us to significant offices. All four of us had been elected to the Executive Committee, which conducts the ACLU's business between National Board meetings; I had served as National General Counsel; two of the other candidates had served as president of her affiliate; and the third had served as Chair of the ACLU’s Biennial Conference, a national convention that proposes organizational policy. Therefore, all of us were logical presidential candidates wholly apart from our gender.

That the ACLU’s election of a woman president needs to be defended shows how far women still have to go to achieve equal status. Vigorous affirmative strategy is necessary to counter the perception of unequal ability. If these means worked within the ACLU, to the point that a woman has been elected and accepted as its leader, the same means should work outside this organization in society at large. Thus, the internal formulation of policy can act as a model of strategy for pursuing similar goals externally.

II

THE ACLU’S LEADERSHIP IN WOMEN’S RIGHTS

Proud as I am of the ACLU’s ongoing commitment to supporting women’s rights within its own organizational ranks, I am even prouder of its longstanding efforts on behalf of women in society at large. Yet, perhaps because of the common perception that civil liberties are distinct from civil rights, the ACLU’s efforts on behalf of women’s rights often are overlooked.

The ACLU began to advocate women’s rights long before the 1960s revival of the women’s rights movement, at a time when there were few national proponents of such issues. More. Moreover, since the 1960s, the ACLU has redoubled its own undertakings in the area, so that it still does more work to promote women’s liberty and equality than many organizations devoted exclusively to these causes. Part II of this Essay describes the organization’s external commitment to women’s rights prior to the 1970s and then surveys the work of two special ACLU projects formed at that time to carry out this commitment—the Women’s Rights Project (WRP) and the Reproductive Freedom Project (RFP). Notably, because of the ACLU’s substantial involvement in women’s rights, this Part also provides a window into feminist legal developments throughout the twentieth century.

The ACLU took on feminist cases and causes as early as the 1920s. It defended the distribution of a sex education pamphlet authored by one

34 See text accompanying notes 36-40 infra.
35 See text accompanying note 66 infra.
of its founding mothers, Mary Ware Dennett, when in 1922 the Postal Service proscribed the pamphlet as "obscene." It also fought, in 1937, for the right of Connecticut schoolteachers on maternity leave to be reinstated in their jobs following the birth of their children.

In the 1940s, the ACLU underscored the importance of its women's rights work by establishing a Committee on Discrimination Against Women in Employment (1944), which soon was renamed the Committee on Women's Rights (1945) to reflect the breadth of its agenda. The Committee's priorities included not only support of legislation guaranteeing equal pay for equal work, but also opposition to state and federal laws prohibiting the use of contraceptives and the distribution of birth control information. During this decade, the ACLU challenged a Massachusetts law that prohibited married women from teaching in public schools.

As is apparent from this discussion, many of the ACLU's formative women's rights cases involved the unique position of women in our society—childbearers who traditionally held a second-class status in the family and the workplace. The ACLU recognized that full equality requires respect for women's moral autonomy and that moral autonomy entails the ability to control one's body and one's livelihood. Thus, it was a natural step to recognize that respecting women's moral autonomy mandated respecting women's right to choose to have an abortion. This important connection between women's empowerment and reproductive freedom is obscured by those who seek to characterize the debate over reproductive choice as one between "pro-life" and opposing factions. As Margaret Sanger, the early reproductive freedom crusader who founded Planned Parenthood, wrote:

No woman can call herself free who does not own and control her body. No woman can call herself free until she can choose consciously whether she will or will not be a mother. . . . She who earns her own living gains a sort of freedom that is not to be undervalued, but in quality and in quantity it is of little account beside the untrammeled choice of mating or not mating, of being a mother or not being a mother. . . . [T]he earning of her own living does not give her the development of her inner sex urge, far deeper and more powerful in its outworkings than any of these externals. In order to have that development, she must still meet and solve the problem of

36 The case, United States v. Dennett, 39 F.2d 564 (2d Cir. 1930), was brought in 1928 and won on appeal in 1930. See S. Walker, supra note 11, at 84-86.
37 See S. Walker, supra note 11, at 167.
38 Women's Rights Report, supra note 19, at 2.
39 Id.; S. Walker, supra note 11, at 98.
motherhood.  

In 1964, Harriet Pilpel put abortion on the ACLU's agenda by attacking on constitutional grounds laws criminalizing abortion.  

In 1965, the ACLU joined Planned Parenthood in the landmark case of Griswold v. Connecticut, which struck down a state prohibition against the prescription, sale, or use of contraceptives, even for married couples. In 1967, the ACLU Board broadly affirmed the right to abortion. In 1970, the ACLU was instrumental in persuading New York state to repeal all statutory restrictions on abortion, the first such action by a state legislature. The next year, the ACLU became the first organization to urge the Supreme Court to declare restrictions on abortion unconstitutional.  

In the 1950s, the ACLU's focus in the equality area shifted to race discrimination, but its new Equality Committee—formed through the merger of the Women's Rights and Race Relations Committees—continued to promote women's rights during an era when there seemed to be little popular support for this cause. In 1956, the ACLU Annual Report decried the "denial of opportunity to serve [on juries as] one of the last remaining specific inequalities of women before the law." During this decade, the ACLU also led the lobbying effort to secure tax deductions for child care, arguing that providing such deductions to married couples only if the husband was incapable of self-support constituted "a denial of civil liberties to women." Also, in a combined assault on sex and race discrimination, the ACLU successfully challenged a state law making it a crime for a white woman to bear a child conceived with a black man.  

In the 1950s, the Equal Rights Amendment (ERA) forced the ACLU to confront the issue of moral autonomy in another context—protective legislation. The ACLU, along with almost every major femi-  

41 M. Sanger, Woman and the New Race 94-95 (1920).  
42 See S. Walker, supra note 11, at 267-68.  
43 381 U.S. 479 (1965).  
44 See id. at 485-86.  
45 Women's Rights Report, supra note 19, at 4.  
46 United States v. Vuitch, 402 U.S. 62 (1971), challenged a law criminalizing a doctor's performance of an abortion unless it was necessary to preserve the pregnant woman's life or health. Id. at 67-68. The Court did not reach the issue of a woman's constitutional right to choose an abortion. Instead, relying on the due process guarantee, the Court found that the "health" exception encompassed both physical and mental health and thus required the prosecution to prove that the abortion was both physically and psychologically unnecessary. See id. at 72. The Court ruled that the statute, as construed, was not unconstitutionally vague.  
47 Women's Rights Report, supra note 19, at 2.  
49 Women's Rights Report, supra note 19, at 2.  
50 Id. at 3.  
51 This paragraph and the accompanying footnotes are drawn substantially from Gale & Strossen, supra note *, at 164 & nn.17-18.
nist organization.\textsuperscript{52} originally opposed the ERA on the ground that it would nullify protective labor legislation for women workers.\textsuperscript{53} But the rise of a new feminist consciousness in the 1960s transformed the ACLU's approach to women's issues. Women lawyers, scholars, and activists within\textsuperscript{54} and without the ACLU reassessed, among other things, the desirability of the protective legislation which the ERA would invalidate.

In 1970, the ACLU reversed its opposition to the ERA, explaining:

Since the 14th Amendment has been available to the Supreme Court for 102 years and still has not been applied against sex discrimination, the ACLU believes it is time to fashion a new method . . . designed specifically to end discrimination against women . . . . The Equal Rights Amendment is such a method.\textsuperscript{55}

Since 1970, the ACLU has opposed protective laws applicable only to women on the ground that they lead to

- the denial of desirable employment,
- the promotion of occupational segregation,
- the furtherance of women's economic dependence,
- and perpetuation of the notion that childbearing and childrearing are women's most important roles.\textsuperscript{56}

Thus, the organization recognized that opposing such legislation actually protects women's moral autonomy, which is essential to true equality.

In 1966, the ACLU won another important victory for women's rights, successfully challenging Alabama's exclusion of women from juries.\textsuperscript{57} In the early 1970s the ACLU National Board declared women's

\textsuperscript{52} The primary exception was Alice Paul's National Woman's Party, comprised mostly of professional and upper-middle-class women, which originally proposed the ERA. See J. Mansbridge, Why We Lost the ERA 8 (1986); S. Walker, supra note 11, at 166-67. However, beginning in the 1930s with the National Association of Women Lawyers and the National Federation of Business and Professional Women's Clubs, support for the ERA widened; by the 1950s, leaders of both major political parties supported the ERA. J. Mansbridge, supra, at 9.

\textsuperscript{53} By 1970, when the ACLU reversed its position on the ERA, union opposition to the ERA largely had been mooted by judicial invalidation of women-only protective labor laws under Title VII of the Civil Rights Act of 1964 (codified as amended at 42 U.S.C. §§ 2000e-1 to 2000e-17 (1988)); J. Mansbridge, supra note 52, at 10.

\textsuperscript{54} Ruth Bader Ginsburg—now Judge of the United States Court of Appeals for the District of Columbia Circuit—served as ACLU General Counsel on the landmark equal protection case of Reed v. Reed, 404 U.S. 71 (1971), and became the founding Director of the organization's Women's Rights Project. See S. Walker, supra note 11, at 304-05. Feminist lawyers and leaders Dorothy Kenyon, Pauli Murray, and Harriet Pilpel also pushed for advocacy of women's rights during this time. Kenyon was the first ACLU activist to support abortion rights. Id. at 167. Kenyon and Murray urged the ACLU to support the ERA. Id. at 304. Pilpel, General Counsel for both the ACLU and Planned Parenthood, prodded the ACLU into taking an early stand against laws criminalizing abortion and homosexual relationships. Id. at 301-02.

\textsuperscript{55} Women's Rights Report, supra note 19, at 4.

\textsuperscript{56} National ACLU Policy Guide, supra note 31, Policy No. 315.

\textsuperscript{57} See White v. Crook, 251 F. Supp. 401, 408-09 (M.D. Ala. 1966); see also S. Walker,
rights its top legal and legislative priority, creating the national Women’s Rights Project in 1971. The WRP had two priorities: to challenge specific gender-based discrimination under the law and to eliminate discrimination based on pregnancy. Soon thereafter, in 1974, the ACLU established the national Reproductive Freedom Project, whose goal was to enforce and expand the contraception and abortion rights that the ACLU had helped to secure through such major decisions as Griswold and Doe v. Bolton, the companion case to Roe v. Wade.

The creation of the Reproductive Freedom Project signaled the ACLU’s recognition that reproductive freedom issues were so important, and sufficiently distinct from women’s rights generally, that they warranted separate resources. Accordingly, the remainder of this Essay traces separately the developments and accomplishments of the two ACLU special projects concerning women’s rights.

A. The Women’s Rights Project

Under the leadership of Ruth Bader Ginsburg, then a professor at Columbia Law School, the ACLU Women’s Rights Project charted a litigation strategy for enshrining women’s equality as a matter of constitutional law, relying on the equal protection clause of the fourteenth amendment. An expert on women’s rights, Professor Ginsburg worked half-time in the ACLU’s national office to establish the WRP. She deliberately chose to work with the ACLU as the vehicle for her activism, rather than an organization that had a narrower women’s rights agenda, not only for the pragmatic reason that the ACLU’s nationwide affiliate structure would enable it to locate relevant cases from all over the country, but also for a principled reason: the integral interconnection between civil liberties and civil rights, including women’s rights. She explained:

I wanted to be a part of a general human rights agenda. Civil liberties are an essential part of the overall human rights concern—the equality of all people and the ability to be free.

supra note 11, at 269-70 (federal court held that women and blacks could not be excluded from jury in prosecution of alleged murderer of black civil rights activist).

58 S. Walker, supra note 11, at 304.
59 Women’s Rights Report, supra note 19, at 5.
60 Id. at 7.
61 381 U.S. 479 (1965).
62 410 U.S. 179, 201 (1973) (state requirement that abortions be performed only in hospitals with approval of hospital committee and two independent physicians held unconstitutional).
63 410 U.S. 113 (1973).
64 See text accompanying notes 151-152 infra.
65 Women’s Rights Report, supra note 19, at 5.
The WRP quickly dominated the field of women’s rights litigation, entering far more cases than any of the organizations that specialized in women’s rights. Between 1969 and 1980, the WRP participated in sixty-six percent of the gender discrimination cases decided by the Supreme Court. The first WRP case to reach the Supreme Court, Reed v. Reed, challenged a state statute’s automatic preference of men over women as administrators of decedents’ estates. In this 1971 landmark ruling, the Supreme Court held that the differential treatment of men and women, based solely on gender, violates the fourteenth amendment’s equal protection clause. Two years later, in Frontiero v. Richardson, the WRP persuaded four Justices to declare sex a suspect classification comparable to race, the closest the Court has come yet to acknowledging the true power and intransigence of gender-based discrimination in our society.

In response to a majority of the Justices’ refusal to declare sex a suspect classification, the WRP intensified its efforts on behalf of ERA ratification, assigning full-time staff to work in unratified states. In 1975, a Ford Foundation grant enabled the WRP to expand its staff, thus becoming the major women’s rights litigation unit in the country. Since then, the WRP has continued to win important litigation victories extending women’s rights. The Project has won Supreme Court decisions prohibiting the systematic exclusion of women from juries, equalizing social security benefits for women workers, rejecting sex-segregated higher education, protecting equal employment rights and

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66 S. Walker, supra note 11, at 305.
68 Id. at 73.
69 See id. at 77.
71 See id. at 682 (plurality opinion).
72 Gale & Strossen, supra note *, at 166.
73 Women’s Rights Report, supra note 19, at 7.
74 Id.
75 The following sentence and accompanying footnotes are drawn substantially from Gale & Strossen, supra note *, at 166.
76 See Duren v. Missouri, 439 U.S. 357, 367 (1979) (invalidating state law that provided automatic jury exemption for women who so requested, with no equivalent exemption for men); Taylor v. Louisiana, 419 U.S. 522, 537-38 (1975) (invalidating jury selection system that operated to exclude women).
77 See Califano v. Goldfarb, 430 U.S. 199, 216 (1977) (invalidating social security provision awarding automatic widow’s benefits but denying widower’s benefits unless male spouse received at least half his support from deceased wife); Weinberger v. Wiesenfeld, 420 U.S. 636, 651-53 (1975) (invalidating social security provision awarding benefits to widows but not widowers responsible for dependent children).
opportunities for women,\textsuperscript{79} and ensuring women’s equal access to business and professional organizations that traditionally were exclusively male.\textsuperscript{80} Recently, it played a key role in persuading the Supreme Court to invalidate a fetal protection policy that barred women of childbearing age from lucrative jobs that were potentially hazardous to the reproductive capacities of both men and women.\textsuperscript{81}

During the 1980s, the WRP pursued several priority issues in addition to those it had handled during its first decade: equal access and treatment of all women in traditionally male jobs, the military, workers’ insurance plans and other fringe benefits, education, and workplaces where hazardous materials are used.\textsuperscript{82}

Most recently, the WRP pursued strategies to challenge the following types of discrimination against women, many of which constitute continuous or recurrent problems that the ACLU long has struggled against: infringements on reproductive rights in the workplace;\textsuperscript{83} legal structures, such as the inadequate enforcement of fathers’ child support obligations,\textsuperscript{84} that contribute to “the feminization of poverty”; denial of pay equity in setting differential compensation for jobs that traditionally are occupied by men and women, respectively;\textsuperscript{85} educational discrimination against pregnant students;\textsuperscript{86} exclusion of women from clinical drug experimental programs;\textsuperscript{87} gender discrimination in the private insurance market;\textsuperscript{88} employment discrimination against pregnant women;\textsuperscript{89} bias

\textsuperscript{79} See Turner v. Dep’t of Employment Sec., 423 U.S. 44, 46 (1975) (invalidating denial of unemployment benefits to pregnant women).

\textsuperscript{80} See Board of Directors of Rotary Int’l v. Rotary Club, 481 U.S. 537, 549 (1987) (men’s business and professional club cannot assert first amendment right of association to avoid compliance with California statute barring discrimination against women).


\textsuperscript{82} See generally Women’s Rights Project, supra note 10 (describing ACLU’s role in pursuit of “equal justice for women”).

\textsuperscript{83} See Love v. Thomas, 838 F.2d 1059 (9th Cir. 1988) (challenging use of pesticide which causes birth defects); Christman v. American Cyanamid Corp., 578 F. Supp. 63 (N.D. W.Va. 1983) (challenging company policy allowing only women who had been sterilized to work in areas involving exposure to substances harmful to fetuses).

\textsuperscript{84} Women’s Rights Project, 1989 Annual Report 24 (lawsuit filed against Texas for inadequate enforcement).

\textsuperscript{85} See id. at 18-19 (discussing charges filed with Equal Employment Opportunity Commission challenging Idaho’s practice of inequity).

\textsuperscript{86} See Women’s Rights Project, 1990 Annual Report 22-23 (discussing efforts to educate public regarding this problem); Mann, Discrimination, Wash. Post, Apr. 25, 1984, at B1 (advising pregnant high school student dismissed from National Honor Society).

\textsuperscript{87} See Women’s Rights Project, 1990 Annual Report 32-33 (discussing ACLU action against exclusion of women from access to experimental drugs for AIDS).

against women in educational testing;\textsuperscript{90} discrimination against women in the criminal justice and domestic relations systems;\textsuperscript{91} housing discrimination against families with children;\textsuperscript{92} and discrimination against women in the provision of health care.\textsuperscript{93} Furthermore, along with the Reproductive Freedom Project, the WRP has made major efforts recently to combat an array of governmental measures to control and punish the behavior of pregnant women in a purported effort to protect "fetal rights," at the cost of a woman's health or welfare, or even of her life itself.\textsuperscript{94}

In addition to the WRP's litigation accomplishments before the Supreme Court, the WRP has made significant contributions to women's rights through successful lower court litigation, through Supreme Court cases that did not result in victories, and through the submission of \textit{amicus curiae} briefs in the Supreme Court. In one recent lower court success, a New York federal court ruled that the state's use of test scores as the sole basis for awarding scholarships to high school seniors discriminated against girls, who consistently scored lower on the tests than boys, but whose grades showed that they surpassed boys in overall academic achievement.\textsuperscript{95} The ruling marked the first successful legal challenge to the widely used and much criticized\textsuperscript{96} Scholastic Aptitude Test.

Further, some of the WRP's Supreme Court cases, although not resulting directly in victories, have helped to shape attitudes and practices in ways that ultimately redound to the promotion of women's rights. For example, in \textit{Rostker v. Goldberg},\textsuperscript{97} the WRP challenged the male-only draft, arguing that it violated the equal protection clause\textsuperscript{98} by re-

\textsuperscript{89} 1989 Women's Rights Project Reporter 9 (WRP advised woman terminated from job after second pregnancy disability leave).

\textsuperscript{90} See text accompanying note 95 infra.

\textsuperscript{91} See Women's Rights Project, 1990 Annual Report 28-29 (discussing litigation efforts and work on Congressional bill addressing violence against women).


\textsuperscript{94} See text accompanying notes 138-143 infra.


\textsuperscript{97} 453 U.S. 57 (1981).

\textsuperscript{98} U.S. const. amend. V.
flecting outmoded stereotypes about males and females. Although the
Supreme Court rejected that challenge in 1981,99 subsequent develop-
ments—including the prominent role of women in combat positions dur-
ing the Persian Gulf War100—demonstrate that public and official
attitudes toward women in the military have changed dramatically in the
recent past. No doubt the WRP's persistent focus on these issues,
through public education and lobbying, as well as litigation,101 has
helped to bring about this change.

Similarly, the WRP's frequent appearances before the Supreme
Court as amicus curiae also have been influential. For example, Ruth
Bader Ginsburg's amicus brief for the WRP in *Craig v. Boren*102
apparently was instrumental in assisting the Supreme Court to craft the
so-called "middle tier" or "heightened scrutiny" for gender-based
classifications.103

Complementing its groundbreaking litigation work, the WRP effec-
tively has advocated legislation promoting the equal treatment of women.
For example, in 1978, the WRP helped to persuade Congress to pass the
Pregnancy Discrimination Act, which provided that pregnancy-based
discrimination constitutes gender discrimination for purposes of Title
VII of the Civil Rights Act.104 In 1990 and 1991, the WRP led a coal-
tion of civil rights organizations pressing for passage of legislation to
overturn the Supreme Court's decisions that made proving employment
discrimination under Title VII much more difficult.105 Those efforts bore
fruit in the enactment of the Civil Rights Act of 1991.106

B. The Reproductive Freedom Project

The notable achievements of the Women's Rights Project have been
paralleled by those of the ACLU's second project designed to promote
women's freedom and equality, the Reproductive Freedom Project. Cre-
ated in 1974, the RFP early on mapped out a nationwide strategy to

99 See *Rostker*, 453 U.S. at 66-83.
Povich, Senate OKs Air Combat Role for Women Pilots, Chi. Trib., Aug. 1, 1991, at 1; ZONE
C; Houston, Senate Backs Opening All Fighting Units to Females On Trial Basis, L.A. Times,
at A1.
101 See *Rostker*, 453 U.S. at 57.
103 See Women's Rights Project, supra note 10, at 3.
105 See, e.g., Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 655 (1989); see Women's
Rights Project, 1989 Annual Report 2 (stressing ACLU's unique expertise in coalition as sole
organization that litigates in both gender and race discrimination areas).
enforce the reproductive rights guaranteed by *Roe v. Wade* and to fend off the multifarious state and local efforts to erode those rights. The RFP has participated in almost every major Supreme Court case concerning reproductive rights, providing direct representation or significant amicus support for women and abortion providers. In addition, the RFP handles about eighty percent of all reproductive rights cases nationwide. Currently, the RFP remains the only national litigation organization dedicated to preserving reproductive rights. It serves as the legal arm of a diverse group of communities: women's groups, the family planning and population community, public health and medical organizations,

108 See *Rust v. Sullivan*, 111 S. Ct. 1759, 1776 (1991) (holding that government may prohibit dissemination of information regarding abortion by employees of family planning clinics that receive federal funding); *Hodgson v. Minnesota*, 110 S. Ct. 2926, 2947 (1990) (striking down portion of state statute requiring minor seeking abortion to notify both biological parents, even if parents are absent, divorced, or never married, and upholding portion of statute with judicial bypass option to notification requirement); *Webster v. Reproductive Health Servs.*, 492 U.S. 490, 519-20 (1989) (upholding constitutionality of state ban on use of public employees, facilities, and resources to aid abortions, and requirement of medical tests of fetal viability); *Bowen v. Kendrick*, 487 U.S. 589, 617 (1988) (holding that act authorizing Department of Health and Human Services to award federal grants to religious organizations, to promote teenage chastity, did not facially violate establishment clause); *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 772 (1986) (striking down as unconstitutional state statute requiring doctor to use abortion technique that maximizes chance of fetal survival except where it poses significantly greater risk to pregnant woman's life or health); *Akron v. Akron Center for Reprod. Health*, 462 U.S. 416, 452 (1983) (barring state from requiring abortion providers to inform pregnant women of details of fetal development, risks of abortion, or available social services, and from imposing 24-hour waiting period after patient signs consent form; allowing mature minor or one who can show abortion is in her best interests opportunity to obtain abortion through judicial proceeding as well as through parental consent); *H.L. v. Matheson*, 450 U.S. 398, 413 (1981) (authorizing state to require doctor, if possible, to notify parents of immature minor seeking abortion who has made no showing that abortion or waiver of notice would serve her best interests); *Harris v. McRae*, 448 U.S. 297, 326 (1980) (allowing government to refuse to pay for indigent women's medically necessary abortions even though it pays for medical costs of childbirth); *Maher v. Roe*, 432 U.S. 464, 480 (1977) (same); *Bellotti v. Baird*, 443 U.S. 622, 649 (1979) (holding that state may protect immature minors by requiring some parental involvement in abortion decision); *Colautti v. Franklin*, 439 U.S. 379, 390 (1979) (barring state from requiring doctor to maximize chances of fetal survival at cost of greater risk to woman's life and health); *Planned Parenthood v. Danforth*, 428 U.S. 52, 67-83 (1976) (denying state power to ban medically safe abortion techniques, require burdensome or privacy-invasive recordkeeping on abortions, or give husband or parents absolute veto over abortion, but allowing state to require woman's written informed consent); *Bigelow v. Virginia*, 421 U.S. 809, 829 (1975) (state may not ban advertising by abortion clinics).

Before creating the RFP, the ACLU was involved in *Doe v. Bolton*, 410 U.S. 179, 194 (1973) (state may not require all abortions to be performed in hospitals) and *United States v. Vuitch*, 402 U.S. 62, 71 (1971) (law criminalizing doctor's performance of abortion requires prosecution to prove abortion not necessary for women's mental or physical health).

109 This figure is based on a nationwide study conducted by the Reproductive Freedom Project in 1989.
religious groups, and, increasingly, the disabled and terminally ill.\textsuperscript{110}

In 1977, the Supreme Court,\textsuperscript{111} Congress,\textsuperscript{112} and President Carter\textsuperscript{113} severely restricted federal funding of abortions for poor women.\textsuperscript{114} In response, the ACLU National Board declared that its top priority was to establish the right of all women to obtain abortions, and launched a national Campaign for Choice.\textsuperscript{115} Since then, the RFP has filed hundreds of lawsuits and has participated in numerous legislative efforts to effectuate this goal. For example, the RFP's most recent annual docket of cases, issued in May 1991, showed that it was handling 187 cases in forty-five states.\textsuperscript{116} The issues presented included free speech about abortion in the United States and abroad; pregnant women's rights, including the threat posed by "fetal rights" arguments; prisoners' rights; the right of access to public health care facilities; parental notification requirements and other limitations on minors' access to abortions; husband notification requirements and other limitations on adult women's access to abortions; and harassment of patients and staff at abortion clinics.\textsuperscript{117}

Since the Supreme Court's 1989 decision in \textit{Webster v. Reproductive Health Services},\textsuperscript{118} which sanctioned abortion restrictions that could challenge the vitality of \textit{Roe v. Wade},\textsuperscript{119} the Reproductive Freedom Project has been in the forefront of the resistance to such restrictions. As one of the few pro-choice organizations with an affiliate or chapter in every state, the RFP was able to provide accurate and up-to-date information about state-level assaults on reproductive freedom to policymakers, legislators, and the press. By providing legal analyses, legislative strategies, model language, public education materials, and grants to certain ACLU state affiliates, the RFP helped to defeat all but a handful of the bills restricting abortion.\textsuperscript{120} In those states that passed laws inconsis-

\textsuperscript{111} See Beal v. Doe, 432 U.S. 438, 447 (1977) (states are not required to spend federal funds on elective abortions).
\textsuperscript{113} See Foreman, President Defends Court's Action Curbing Federal Aid for Abortion, N.Y. Times, July 13, 1977, at A1, A10.
\textsuperscript{114} Women's Rights Report, supra note 19, at 8.
\textsuperscript{115} Id.
\textsuperscript{116} See Reproductive Freedom Project, Legal Docket (C. Levine & N. Davenport eds. 1991) [hereinafter Legal Docket].
\textsuperscript{117} See id.
\textsuperscript{118} 492 U.S. 490 (1989).
\textsuperscript{120} See Reproductive Freedom Project, 1990 Annual Report 26-27; Reproductive Freedom
tent with *Roe* and its progeny, ACLU lawyers promptly obtained court injunctions against their enforcement. These cases currently are wending their way toward the Supreme Court as potential vehicles for overturning or further limiting *Roe*.121

The Reproductive Freedom Project also has been in the vanguard of efforts to pass state and federal legislation protecting reproductive rights. The RFP has played a crucial role in securing the enactment of state legislation that codifies the rights set forth in *Roe v. Wade*,122 and it has worked closely with Congress on the proposed federal Freedom of Choice Act,123 which would have the same effect nationwide. Other congressional measures to which the Reproductive Freedom Project has contributed significantly during the past two years include: legislation to overturn the Supreme Court's "gag rule" decision in *Rust v. Sullivan*,124 which would require health care professionals at family planning clinics that receive federal funding to give information about abortions;125 an appropriations bill allowing the District of Columbia to use its local tax revenues to finance abortions for low-income women;126 a bill allowing military servicewomen and dependents stationed abroad to obtain abortions in overseas military health facilities;127 legislation to allow low-income rape and incest victims to obtain Medicaid-funded abortions;128 a bill to lift the global restrictions on speech and privacy imposed by the Administration's "Mexico City Policy," which forbids foreign family planning organizations that receive United States Agency for Interna-

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122 410 U.S. 113 (1973); see, e.g., Conn. Gen. Stat. § 19a-602 (1990) (protecting right of woman in consultation with physician to terminate pregnancy prior to viability).


124 111 S. Ct. 1759, 1776 (1991) (government may prohibit dissemination of information regarding abortion in federally funded family planning clinics).


126 Cf. H.R. 2707, 102d Cong., 1st Sess. (1991) (most recent version prohibited spending of federal funds on elective abortions except in cases of rape or incest).


tional Development funds from speaking nonpejoratively about abortion or providing counseling or referrals for abortion;\textsuperscript{129} legislation to defund the Adolescent Family Life Act, which the RFP is challenging in \textit{Kendrick v. Sullivan},\textsuperscript{130} as violating the establishment clause through its funding of religious organizations that disseminate religious theories about family planning;\textsuperscript{131} and the Reproductive Health Equity Act, which would remove all funding restrictions placed on abortion.\textsuperscript{132}

A major focus of the Reproductive Freedom Project—as well as of the Women's Rights Project—in recent years has been to counter a series of governmental efforts to control the lives and behavior of pregnant women,\textsuperscript{133} or to compel women's use of certain contraceptive devices. The common theme that runs through these diverse governmental efforts is a vision of women as potential mothers; women therefore must take government-mandated steps either to avert pregnancy altogether or to maximize the health of their fetuses, even at the cost of their own well-being. For example, the RFP is fighting official attempts to force women to use Norplant, a contraceptive that is implanted under the skin. The RFP is co-counsel in \textit{Johnson v. People},\textsuperscript{134} which is challenging a judge's order requiring a woman who had pled guilty to child abuse to use Norplant as a condition of probation. The RFP also helped to defeat proposed legislation in Kansas, which would have required women receiving public assistance to use Norplant.\textsuperscript{135}

One of the most dramatic RFP activities is combating government measures that force women to take steps that would maximize fetal health, even at the cost of the women's lives.\textsuperscript{136} Under our legal system, the state never may compel an individual to submit to life-threatening medical treatment for the benefit of another person—let alone for a fetus, which, the Supreme Court has ruled, is not a "person" for purposes of constitutional protections.\textsuperscript{137} Yet, courts have ordered pregnant women

\textsuperscript{133} See text accompanying notes 111-114.
\textsuperscript{136} See In re A.C., 573 A.2d 1235, 1253 (D.C. 1990) (vacating trial court's order which compelled a terminally ill woman to undergo a caesarean section).
to undergo caesarean sections for the alleged benefit of their fetuses. One such case, *In re A.C.*, 138 involved Angela Carder, a twenty-seven year-old woman who was twenty-six and one-half weeks pregnant and hospitalized with critical cancer and pneumonia. Despite her objections and those of her family and doctors, a judge ordered Carder to undergo a caesarean section at the hospital's behest. 139 Both Carder and the fetus died, and the caesarean section was listed on her death certificate as a contributing cause of death. 140 In a resounding victory for the RFP and for pregnant women's autonomy, in 1990, the District of Columbia Court of Appeals overturned the lower court's order for surgery and nullified it as a legal precedent. 141 The court explained that "a fetus cannot have rights . . . superior to those of a person who has already been born." 142 As the first and only high court opinion based on full briefing in a case of its kind, the decision sets a crucial nationwide precedent. The RFP also initiated a civil action against the hospital, on behalf of Angela Carder's parents, which resulted in a settlement that is expected to have significant precedential impact. Under the settlement, the hospital adopted a policy affirming pregnant patients' autonomy and their right to make treatment decisions on behalf of themselves and their fetuses. 143

Another type of case in which asserted interests in fetal health are elevated over maternal health and welfare involves the attempted penalization of pregnant women's prenatal behavior which allegedly undermines fetal health. The serious danger that these measures pose to women's reproductive freedom, as well as to women's freedom more generally, is indicated by the combined resistance efforts of both the Women's Rights Project and the Reproductive Freedom Project. In essence, these various measures reflect the same rationale for limiting women's autonomy that the Supreme Court found unpersuasive in *International Union v. Johnson Controls*: 144 women's ability to become pregnant and to maintain fetal health. For example, with the help of both public and private hospitals, prosecutors are using positive toxicologies of newborns to initiate investigations into a mother's fitness to parent. 145 In a number of states, the ACLU has defended the rights of pregnant women addicts who have been subjected to neglect proceedings or prose-

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139 Id. at 1239-41.
140 Id. at 1241.
141 Id.
142 Id. at 1253.
cuted for drug use during pregnancy and for the delivery of drugs to their fetuses.\footnote{146} Ostensibly in the interest of the fetus, some counties are treating women convicted of drug-related offenses differently from men solely because they are pregnant, jailing women or forcing them to undergo medical treatment for the duration of their pregnancies.\footnote{147}

Together with health professionals, staff members of the Women’s Rights and Reproductive Freedom Projects have demonstrated the counterproductive effects of scaring women away from prenatal care,\footnote{148} as well as the lack of adequate drug treatment programs for pregnant women.\footnote{149} Staff members also have demonstrated that eighty percent of the pregnant women who have been prosecuted for using illegal drugs are poor members of racial minorities, even though drug use during pregnancy is equally prevalent among white middle-class women.\footnote{150} Working with health care experts, children’s rights advocates, and state agencies, the ACLU Projects are developing legislative and legal strategies designed to protect women’s civil liberties while guaranteeing the availability of essential preventive services and drug treatment programs to mothers and their children.

Tracking a development that characterizes the ACLU’s recent work on all issues in recent years, the Reproductive Freedom Project increasingly has emphasized public education as a strategy for advancing civil liberties. For example, the RFP has published three booklets on parental involvement statutes. The evidence cited in these publications, culled from the Project’s years of representing minors, has been used by every medical and pro-choice organization fighting such statutes. The RFP also publishes a biweekly “Reproductive Rights Update,” detailing developments on all fronts around the country, which is broadly circulated to scholars and lawyers working on reproductive freedom issues, state and national level policy analysts, pro-choice organizations, local coalitions and activists, and members of the press who regularly cover these issues. Additionally, the RFP maintains and publishes a legal docket summarizing the issues involved in and the status of all reproductive


freedom cases currently in litigation around the country. Published every other year, the docket is the only national compendium of these cases and often is the only source of information about many of them.\textsuperscript{151} The latest edition contains summaries of more than 200 cases.\textsuperscript{152}

Although this Essay concentrates on the ACLU's work at the national level, these efforts constitute only a portion of the ACLU's work to defend and expand women's rights. Much additional work is done on a local level by the ACLU's numerous affiliates and chapters. For example, the ACLU's California affiliates have enjoined a series of state laws banning public funding for poor women's abortions, as violating the California constitution.\textsuperscript{153} Some state-based ACLU affiliates have their own special projects on women's rights and reproductive freedom. This nationwide network enables the ACLU to deliver the fruits of victory in one forum to women in communities all over the country.

CONCLUSION

As the ACLU's first female president, I am especially proud to head an organization which, since its beginning in 1920, consistently has championed women's liberty and equality both inside and outside its ranks. I firmly believe that civil liberties and civil rights—including women's rights—are mutually interdependent. The ACLU's longstanding leadership in the women's rights movement demonstrates its staunch advocacy not only of "liberté" and "égalité," but also of "sororité."

\textsuperscript{151} Reproductive Freedom Project, 1990 Annual Report 19.
\textsuperscript{152} See Legal Docket, supra note 116.
Crystal Eastman, NYU Law, class of 1907.