

EARLY WOMEN'S RIGHTS ADVENTURES WITH
PROFESSOR RUTH BADER GINSBURG AND OUR CLINICAL
TEACHING AT COLUMBIA LAW SCHOOL

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I was very lucky early in my career to meet and work with the remarkable woman I then knew as Professor Ruth Bader Ginsburg. We were both working on very early women's rights issues at the time. In my last year at NYU School of Law (1969–1970), I was a fellow in the Arthur Garfield Hays Civil Liberties Program. Professor Norman Dorsen, the program's head, assigned me to do some work with an ACLU staff lawyer, Eleanor Holmes Norton. She asked me to research and write a memo to persuade the ACLU to change its opposition to providing women with equal rights in the Constitution, through the Equal Rights Amendment (ERA). The leaders of the ACLU opposition feared that the ERA would get rid of state "protective" labor laws for women. The so-called protection banned women workers from higher-paying jobs, whether because they required work at night, heavy lifting, or long hours. The theory was that these women needed to be home with children at night or were too weak to do the work. Alarmed at this opposition to women's equal rights, the ACLU supporters of the ERA demanded reconsideration of the issue. They thought the laws were classic examples of discrimination against women and were searching for arguments to overcome the opposition.

As I researched the issue, I soon learned that blue-collar working women were winning lawsuits invalidating these laws under Title VII of the 1964 Civil Rights Act.¹ Title VII required employers not to discriminate against workers based on their sex (as well as race, color, national origin, or religion). The women complained that they were being discriminated against because of these sex-based restrictions and that employers were denying them the better-paying jobs they desired. I wrote a memo arguing that Title VII mooted the ACLU support for these laws because the federal courts were already striking them down under Title VII. I also argued that

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1. Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e to 2000e-17; see also, e.g., *Bowe v. Colgate-Palmolive Co.*, 416 F.2d 711, 715–18 & n.5 (7th Cir. 1969) (reversing a lower court Title VII ruling upholding an employer policy barring women from jobs requiring lifting more than thirty pounds, a company policy adopted after studying other states with such laws); *Weeks v. S. Bell Tel. & Tel. Co.*, 408 F.2d 228, 232–33, 235–36 (5th Cir. 1969) (finding no Title VII violation under a Georgia law prohibiting women from lifting more than thirty pounds but noting Georgia's repeal of the law rendered the issue moot, and reversing the District Court's holding that the ban on women working the position could be justified as a policy matter); *Rosenfeld v. S. Pac. Co.*, 293 F. Supp. 1219, 1224–26 (C.D. Cal. 1968) (invalidating California's labor laws and regulations limiting women's hours and restricting the weight they can lift), *aff'd*, 444 F.2d 1219 (9th Cir. 1971).

the position made no sense on policy grounds—some women prefer working at night or may not have children. Indeed, some men may prefer not to work at night and may have children. Some women are strong and some men are weak, so it makes more sense to hire by a person's strength than by their sex. The memo helped turn the ACLU around and they soon supported the ERA.

Another project involved a different sex discriminatory employer policy: an employer's refusal to hire the mothers of pre-school-aged children, while hiring fathers of pre-school-aged children. The U.S. Court of Appeals for the Fifth Circuit had upheld the policy, and Ms. Ida Phillips, the plaintiff, had appealed to the Supreme Court.² I wrote an ACLU amicus curiae brief arguing that the policy was indeed sex-based discrimination prohibited by Title VII. It was an important case because it was the Supreme Court's first decision about Title VII's sex discrimination provisions. The Court ruled in Ms. Phillips favor, in *Phillips v. Martin Marietta Corp.*,³ rejecting the Fifth Circuit's theory that Title VII only prohibited discrimination based "solely on sex," not on "sex combined with another factor" such as having pre-school-aged children.⁴ In rejecting the "sex plus" employer defense, it prevented employers from inventing new defenses based on treating sub-classes of women worse than the same subclass of men.

During my law school years, I also worked on other discrimination issues involving women students. Several of us formed a group to work on these issues and there were many of them. NYU School of Law had no women law professors, something we helped persuade the Law School to change. By my last year, the faculty finally did so, hiring its first woman law professor to start the next year.⁵ The Law School also provided an extremely valuable Root-Tilden Scholarship Program, open only to men, that paid both law school tuition and living expenses for all three years; two men in each U.S. federal court circuit received it each year. We launched a project to end that by circulating a petition for students to sign, researching the origins of the rule,⁶ and addressing the faculty to demand a change or we would sue. Again, we succeeded. We also had success on other fronts, such as opening the men-only steam room next to the dorm swimming pool.

We also started examining employment possibilities. We discovered that the U.S. Attorney for the Southern District of New York didn't hire

2. *Phillips v. Martin Marietta Corp.*, 411 F.2d 1, 3–4 (5th Cir. 1969), reh'g en banc denied, 416 F.2d 1257 (5th Cir. 1969), rev'd, 400 U.S. 542 (1971).

3. 400 U.S. 542 (1971) (per curiam).

4. *Id.* at 543.

5. I was a student representative on the relevant Committee. Inexplicably, NYU School of Law passed over the opportunity to hire Professor Ginsburg, so Columbia Law School had the good fortune to gain her instead.

6. With the help of Professor Dan Collins, we examined the original trust instrument that supposedly excluded women. In fact, it did not.

women lawyers because they would have to work with, *gasp*, “criminals.” Similarly, many law firms wouldn’t hire women or would hire them only for trusts and estates departments (so they could work with widows and children). A group of law students even started a lawsuit against some of these firms.

Finally, we asked the faculty to hire someone to teach a new course—the first in the nation—on Women and the Law. As one professor on the relevant committee said, “Well, you could create a course around ‘the bicycle and the law,’ so why not ‘women and the law.’” With that strong support, we started. In the fall 1969 semester, we launched the new course, and in the following spring 1970 semester, another student and I helped start a new student-taught course on the subject at Yale Law School by teaching a session about Title VII, the Equal Pay Act, and important court decisions prohibiting sex discrimination in employment and pay.⁷

Professor Dorsen was himself deeply involved in the ACLU’s work, knew of my work there, and also knew of my work on women’s rights issues within the Law School. Accordingly, when the ACLU decided to launch a series of books for lay people on “The Rights of X Group,” he asked me shortly after graduation to write the book on *The Rights of Women*. At the same time, he asked Ruth to edit my book. So that was our first connection, though I didn’t have the manuscript ready for her review until a couple of years later.

Meanwhile, after graduation, I started work in Washington, D.C., where I joined the General Counsel’s Office at the Equal Employment Opportunity Commission (EEOC). That enabled me to continue working on important sex discrimination (and race discrimination) cases. The lawyers there wrote EEOC amicus curiae briefs for the many cases coming up through the federal courts under Title VII. At the same time, I co-taught the first Women’s Rights Course at George Washington National Law Center with Gladys Kessler,⁸ using materials we assembled ourselves to teach the course. Ann Freedman,⁹ a student in the Yale group that had started its student-taught course, and I helped persuade Barbara Babcock¹⁰ to teach the course with Ann at Georgetown Law. We all also used the same set of assembled materials. Eventually, the three of us plus Eleanor Holmes

7. Jean Murphy was the other student, and she was also a Hays Civil Liberties Fellow. We subsequently co-authored a short article on the subject. Jean Murphy & Susan Deller Ross, *Liberating Women, Legally Speaking*, in *With Justice for Some: An Indictment of Law by Young Advocates* 104 (Bruce Wasserstein & Mark J. Green eds., 1970).

8. She was then a partner in a local law firm and subsequently became a judge, first on the D.C. Superior Court, and later on the U.S. District Court for the District of Columbia.

9. She co-taught the course with Barbara Babcock and became a law professor at Rutgers Law School, Camden, where she specializes in family law, domestic violence, sex discrimination, and is active with the Domestic Violence Clinic.

10. Barbara Babcock was the Public Defender in Washington, D.C., and went on to become a law professor at Stanford Law School.

Norton,¹¹ the ACLU attorney I had worked with, decided to write a law school casebook, *Sex Discrimination and the Law: Causes and Remedies*.¹²

At the same time, Ruth Ginsburg, Herma Hill Kay, and Ken Davidson were starting their work on the same project; *Sex-Based Discrimination: Text, Cases, and Materials*¹³ came out a year earlier than ours. During the intervening years, we attended various conferences and learned of each other's work. For example, Ruth and I were both present at the Association of American Law Schools Symposium on the Law School Curriculum and the Legal Rights of Women (1972), where I presented on the Labor Panel and Ruth also presented. There was another conference at Yale Law School, where we all talked about our books in progress.

In addition, I found time to complete the ACLU handbook, *The Rights of Women*,¹⁴ and Ruth found time to edit it. That's when I first learned how superb her editing was. I always understood exactly why she suggested changes and agreed with them. They made perfect legal sense and sharpened my writing.

While teaching full-time at Columbia Law School, Ruth was also one of the ACLU General Counsels and launched the ACLU Women's Rights Project. In short order, she wrote and filed an amicus curiae brief in the Supreme Court for *Reed v. Reed*.¹⁵ The Court decision represented a giant step forward, as it held that a sex discriminatory law violated the Constitution. It was the first time in the over one hundred years that the Fourteenth Amendment had existed that the Court chose equality over discrimination, despite many previous opportunities to do so.¹⁶ In

11. Eleanor Norton subsequently became the Chair of the EEOC, a law professor at Georgetown Law, and the D.C. Delegate to the House of Representatives.

12. Barbara A. Babcock, Ann E. Freedman, Eleanor H. Norton & Susan Deller Ross, *Sex Discrimination and the Law: Causes and Remedies* (1975).

13. Kenneth M. Davidson, Ruth Bader Ginsburg & Herma Hill Kay, *Sex-Based Distinctions: Text, Cases, and Materials* (1974).

14. Susan Deller Ross, *The Rights of Women* (1973).

15. 404 U.S. 71 (1971).

16. They had rejected that opportunity many times before. Shortly after the Fourteenth Amendment was adopted, the Court ruled in *Bradwell v. Illinois*, 83 U.S. 130 (1872), that the Illinois refusal to permit women to practice law did not violate the Fourteenth Amendment's privileges and immunities clause. In a concurring opinion joined by two others, Justice Bradley stated:

[T]he civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. The harmony, not to say identity, of interest and views which belong, or should belong, to the family institution is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband. So

particular, the Idaho law preferring men to women in administering estates violated the Fourteenth Amendment's Equal Protection Clause.¹⁷ Thus, Ms. Sally Reed won the right to administer the estate of her deceased teenage son, who had committed suicide while in his father's care.

In 1975, I learned that the ACLU was hiring a new attorney for the Women's Rights Project staff, and I swiftly applied. To my delight, I was hired and quickly began working on Project cases. When my son Michael was born in November 1975, Ruth and her ten-year-old son James came to visit us, bringing a book for Michael. I was so touched by her generosity and warmth.

We worked on several issues together and it was always very exciting. On December 7, 1976, the Supreme Court handed down its infamous decision in *General Electric Co. v. Gilbert*.¹⁸ The Court decided that Title VII's ban on sex discrimination did not protect pregnant women when their employer denied them the same paid sick leave for childbirth and recovery that other workers received when they were in the hospital for necessary care and for recuperation afterwards. The Court's theory: Because there are no pregnant men to compare pregnant women to, there could be no sex discrimination.¹⁹ The *New York Times* quickly asked Ruth to write an opinion article about the issue, and she asked me to co-author it with her. About a month later, the *Times* published our article, *Pregnancy and Discrimination*.²⁰ I also became Co-Chair of the Campaign to End Discrimination Against Pregnant Workers, and within two years of the Court's decision, Congress enacted the Pregnancy Discrimination Act of

firmly fixed was this sentiment in the founders of the common law that it became a maxim of that system of jurisprudence that a woman had no legal existence separate from her husband, who was regarded as her head and representative in the social state; and, notwithstanding some recent modifications of this civil status, many of the special rules of law flowing from and dependent upon this cardinal principle still exist in full force in most States. One of these is, that a married woman is incapable, without her husband's consent, of making contracts which shall be binding on her or him. This very incapacity was one circumstance which the Supreme Court of Illinois deemed important in rendering a married woman incompetent fully to perform the duties and trusts that belong to the office of an attorney and counsellor.

Id. at 141 (Bradley, J., concurring in the judgment). Women tried repeatedly to win equal rights before the Supreme Court, but it took ninety-nine years to overcome that start. *Reed*, 404 U.S. 71.

17. *Reed*, 404 U.S. at 76–77.

18. 429 U.S. 125 (1976).

19. The Court explained: "There is no risk from which men are protected and women are not. Likewise, there is no risk from which women are protected and men are not." Id. at 135 (quoting *Geduldig v. Aiello*, 417 U.S. 484, 496–97 (1974)).

20. Ruth Bader Ginsburg & Susan Deller Ross, *Pregnancy and Discrimination*, N.Y. Times (Jan. 25, 1977), <https://www.nytimes.com/1977/01/25/archives/pregnancy-and-discrimination.html> (on file with the *Columbia Law Review*).

1978.²¹ It declared that pregnancy discrimination was indeed sex discrimination, contrary to the Supreme Court's opinion.

I was also working with Ruth on other cases. One was a case against Wayne State University and TIAA-CREF, the pension plan system for university professors used by many universities throughout the country. The pension plan paid lower retirement benefits to women who had earned the same as men on the theory that "women lived longer than men." What this actually means is that more women than men live to older ages. But there are women and men who are dying at the same age for every age. Thus, the plan punished women by paying them less than men who earned the same and died the same year, because there were not the same number of men and women dying at each age.

I particularly remember her reaction when the case started. It was upside down, she declared. Apparently worried that women professors had filed a complaint with the EEOC challenging its sex-based pension-plan discrimination, Wayne State University initially filed a lawsuit against the EEOC, the collective bargaining units at Wayne State, and other officials, seeking a declaratory judgment and injunctive relief that the plan did not violate Title VII. Ruth's eyes lit up when she read the complaint that I brought to her in her office. This was a lovely civil procedure question, one of her areas of expertise, and she was delighted to declare it a non-starter. Title VII gave women the right to sue their employer; it did not give employers the right to sue to avoid relief. So, we shortly launched the plaintiffs' Title VII suit against both Wayne State University and TIAA-CREF and moved to dismiss the Wayne State University suit. The District Court dismissed Wayne State's suit within a year, noting that it could use its claims as defenses in the plaintiffs' right-side up lawsuit.²²

After I tried the case,²³ but before the District Court's decision, the Supreme Court took a case raising the same issue, but in the context of women having to contribute more to the plans than men did to receive equal payments at retirement.²⁴ Ruth was once again delighted to tackle this issue. At her suggestion, I wrote an *amici curiae* brief on behalf of the ACLU and the American Association of University Professors. She added a section and edited the brief and we proofread it late one rainy evening, while she urged me to read faster. I thought I was quite a strict and rapid proofreader, but of course, she was better. In any event, we thought our

21. Pregnancy Discrimination Act of 1978, Public Law 95-555, 92 Stat. 2076 (partially codified as new Section 701(k) of Title VII, 42 U.S.C. § 2000e(k) (2018)) (defining discrimination based on sex as including discrimination based on pregnancy, childbirth, and related medical conditions).

22. See *Peters v. Wayne State Univ.*, 476 F. Supp. 1343, 1345 & n.1 (E.D. Mich. 1979) (noting its dismissal of the Wayne State University suit in *Board of Governors of Wayne State University v. Perry*, No. 670039 (E.D. Mich. Dec. 14, 1976)).

23. Marjorie Smith, another Women's Rights Project attorney, co-chaired part of the trial.

24. *L.A., Dep't Water & Power v. Manhart*, 435 U.S. 702 (1977).

argument—that the plan wasn't fair to individual women who lived the same life span as individual men but had to pay in more than the men to get equal benefits—had an effect. The Supreme Court adopted that rationale in *City of Los Angeles, Department of Water & Power v. Manhart*, declaring that the plan violated Title VII.²⁵ It was unfair to individual women, the Court ruled.²⁶ It was not permissible to use sex-based averages that held for the group as a whole to hurt individual women who were identical in all respects to individual men.

That development led the District Court to conclude that Wayne State University and the TIAA-CREF plan it provided its professors also violated Title VII, in its decision two years later, citing *Manhart*.²⁷ Despite a checkered history caused by the Sixth Circuit's reversal, the Supreme Court ultimately agreed.²⁸

Hopefully, this history of our work gives the reader a sense of the issues of the times, and the kinds of cases the students worked on with the ACLU Women's Rights Project lawyers. It was the dawn of a new era, the second wave of feminism, and the students were very excited to be working on cutting-edge issues. The issues were stark: Employers openly defended giving women workers fewer rights than men. State legislatures and Congress were still writing statutes that favored men over women. And Professor Ginsburg was a rising star, having won the first sex discrimination case under the Equal Protection Clause in the more than one hundred years since it was enacted. She would go on to win many more such cases.

The seminar students seemed to enjoy having her as a teacher and worked very hard. I was struck by how thoroughly she prepared for every class. I had early discovered how organized she was when I went to her office one day and she mentioned a Supreme Court case I should read. She then went to her file drawers and pulled out a neatly typed card with the correct legal citation to the case. The drawer was filled with these cards, one for each Supreme Court decision, all alphabetically organized. In class, she displayed the same attention to detail. If a class reading had a legal error, she would start class by correcting it. Although I knew Title VII very well, she would catch errors I hadn't noticed.

At the end of the semester, she again showed her generosity by sponsoring a party for the students. As was typical, though, her beloved

25. *Id.*

26. *Id.* at 709–10 & n.19, 716 & n.30.

27. *Peters*, 476 F. Supp. at 1347–51. The U.S. Court of Appeals subsequently reversed the decision, 691 F.2d 235 (6th Cir. 1982), but the Supreme Court in turn vacated the Sixth Circuit's opinion and remanded, 463 U.S. 1223 (1983), noting the Supreme Court's more recent opinion striking down as a Title VII violation a pension plan that had unequal payouts for men and women, with men receiving more than women, just like those used by TIAA-CREF. That case was *Arizona Governing Committee for Tax Deferred Annuity Plans & Deferred Compensation v. Norris*, 463 U.S. 1073 (1983).

28. See *supra* note 27.

husband, Marty Ginsburg, showed up with food and drink and was the life of the party. The students had a grand time and so did I. Since I moved to Washington, D.C., later that year, we stopped teaching together. But we continued to see each other in Washington once she moved there to become a Judge on the U.S. Court of Appeals for the D.C. Circuit and then moved on to the Supreme Court. Marty Ginsburg followed her, he quipped, because his wife got a very good job. He became a Professor of Tax at Georgetown Law and I joined the faculty too in 1983. A few years later, our offices were next to each other.

She was a wonderful woman and an inspiration to young lawyers. She accomplished so much. Her litigation victories before the Supreme Court helped turn the Court 180 degrees around, from always upholding sex discriminatory statutes to almost always overturning them. When she wrote the Court's decision in *United States v. Virginia*, she completed that transformation.²⁹ The Court ruled that the Equal Protection Clause required Virginia Military Institute to end its sex-based policy of excluding all women and that the remedy for the exclusion was to admit qualified women.³⁰ The opinion established a very strict standard for reviewing sex-based laws.³¹ It was so strict that Justice Scalia, in his dissent, wrote:

[T]he rationale of today's decision is sweeping: for sex-based classifications, a redefinition of intermediate scrutiny that makes it indistinguishable from strict scrutiny. Indeed, the Court indicates that if any program restricted to one sex is "uniqu[e]," it must be opened to members of the opposite sex "who have the will and capacity" to participate in it. I suggest that the single-sex program that will not be capable of being characterized as "unique" is not only unique but nonexistent.³²

29. 518 U.S. 515 (1996).

30. *Id.* at 556–58.

31. *Id.* at 532–33. She wrote:

To summarize the Court's current directions for cases of official classification based on gender: Focusing on the differential treatment for denial of opportunity for which relief is sought, the reviewing court must determine whether the proffered justification is "exceedingly persuasive." The burden of justification is demanding and it rests entirely on the State. The State must show "at least that the [challenged] classification serves 'important governmental objectives and that the discriminatory means employed' are 'substantially related to the achievement of those objectives.'" The justification must be genuine, not hypothesized or invented *post hoc* in response to litigation. And it must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females.

Id. (alteration in original) (citations omitted) (quoting *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982)).

32. *Id.* at 596 (Scalia, J., dissenting) (citations omitted). He was objecting in particular to the idea that if *any individual woman was qualified*, she deserved consideration, despite the fact that many other women were not. As Justice Ginsburg wrote in the part he objected so strongly to: "State actors controlling gates to opportunity, we have instructed, may not exclude *qualified individuals* based on 'fixed notions concerning the roles and abilities of

Tellingly, Justice Ginsburg did not contradict him. Knowing how careful she was with language, this was no accident.

Besides being a giant on the Supreme Court, she was also a warm and giving person. Over the years, she continued her generosity with young people. Every year, she met with young women lawyers who participated in the Women's Law and Public Policy Fellowship Program, a program I led from 1983–1998 at Georgetown. Under subsequent directors, she continued to do so until the end of her career, with her last such session in June 2019. She also attended many Georgetown Law school programs, participating each year in a program for first-year students. They loved the opportunity to hear from her.

When Marty died, she said, "I was lucky to have him as long as I did." We can say that about her as well: "We were lucky to have her as long as we did." Those Columbia Law School students so many years ago were very lucky to have the opportunity to work with her, as was I. And I like to think I am carrying on her work on a broader scale. Today, my teaching in the International Women's Human Rights Clinic at Georgetown Law is focused on countries where the law still explicitly discriminates against women in many ways.³³ Just as the students in the Columbia Law School Clinic on Gender and the Law worked on cases challenging sex discrimination in the United States, my students work on the same kinds of cases with women's human rights lawyers in other countries. Helping women win equal rights today is just as compelling as it was to Justice Ginsburg from the beginning of her career. Her vision and example continue to inspire and her legend lives on.

males and females." Id. at 541 (majority opinion) (emphasis added) (citing *Miss. Univ. for Women*, 458 U.S. at 725).

33. For examples of the Clinic's work, see Press and Publications, Geo. L., <https://www.law.georgetown.edu/experiential-learning/clinics/international-womens-human-rights-clinic/press-and-publications> [<https://perma.cc/Z8ZK-A7XL>] (last visited Mar. 12, 2021).

