

## INTRODUCTORY REMARKS

### ARIELA MIGDAL\*

Thank you, Katherine Franke, for your kind introduction and to the Columbia Law School Center for Gender and Sexuality Law for hosting this event. I am privileged to moderate this conversation among distinguished scholars and activists, each of whom will offer a unique perspective on the women's rights litigation of the 1970s. Justice Ginsburg spearheaded this litigation campaign, in collaboration with a number of our panelists. And I am tremendously honored to be part of this event celebrating Justice Ginsburg. As attorneys at the ACLU's Women's Rights Project, my colleagues and I, under the leadership of our director Lenora Lapidus, try to carry forward the work of these litigators and scholars.

I'm grateful for this opportunity to reflect on all that women's rights litigators achieved during that era, and to think about how we can most effectively build on those accomplishments to advance the cause of gender equality. When I reflect on the groundbreaking litigation that our panelists undertook in the 1970s, I confront a paradox. On one hand, I am acutely aware of their revolutionary accomplishments in exposing and ultimately overturning a web of laws and practices that limited women's equality. Yet, as a litigator and advocate, I spend most of my energy focusing on the remaining, entrenched *inequality* and devising ways to combat it. When I come to work in the morning, I focus on the part of the glass that is half empty.

When you spend your time examining how much more remains to be done, the stubborn persistence of gender inequality in many facets of life and society can seem overwhelming:

- Despite all the gains, women still make up less than a quarter of Congress and of state legislators.<sup>1</sup> Only twelve Fortune 500 companies are run by women,

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1 National Foundation for Women Legislators, *Facts About Women Legislators* (2011 statistics), <http://www.womenlegislators.org/women-legislator-facts.php>. Following the 2012 elections, this statistic remains true, although women gained. National Foundation for Women Legislators, *Facts About Women Legislators*, <http://www.womenlegislators.org/women-legislator-facts.php> (last visited Nov. 13, 2012) (giving statistics for 112th Congress); Jake Miller, *Women, Latinos: Record Numbers in Congress*, CBS News (Nov. 8, 2012), [http://www.cbsnews.com/8301-250\\_162-57547051/women-latinos-record-numbers-in-congress/](http://www.cbsnews.com/8301-250_162-57547051/women-latinos-record-numbers-in-congress/) (giving statistics for 113th Congress); Press Release, CAWP Election Watch, *Record Number of Women*

down from last year.<sup>2</sup> And while women make up about half the workforce, they make up the majority (fifty-nine percent) of the low-wage workforce, and they are clustered in lower-paying positions.<sup>3</sup>

- Women are still a tiny minority of those employed in good-paying blue collar jobs like construction.<sup>4</sup> While it is wonderful to hear that women make up about half the class at Columbia Law School, the same is not true in the world of unionized and other higher-paying blue collar jobs. Women also are a small percentage of those who are promoted in those jobs, and there are good reasons for this. My clients have explained to me that many of the training and certifications programs in those careers require nighttime and after-hours work and study, investments that are difficult for many working mothers to make.
- Mothers have it particularly bad—while wages of childless men and women are roughly equal depending on which measurement you look at, mothers' wages are only sixty percent of fathers'. While fathers benefit from a wage advantage, mothers face a Motherhood Penalty (with low-wage mothers affected the most) and a Maternal Wall in Advancement, although fathers who play a caregiving role are also penalized.<sup>5</sup>
- As Justice Ginsburg pointed out in her recent opinion concurring in part and dissenting in part in *Wal-Mart Stores, Inc. v. Dukes*, workers at one of

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*Will Serve in Congress* (updated Nov. 13, 2012), [http://www.cawp.rutgers.edu/press\\_room/news/documents/PressRelease\\_11-07-12.pdf](http://www.cawp.rutgers.edu/press_room/news/documents/PressRelease_11-07-12.pdf); National Conference of State Legislatures, *Women in State Legislatures: 2013 Legislative Session*, <http://www.ncsl.org/legislatures-elections/wln/women-in-state-legislatures-for-2013.aspx> (last visited Nov. 9, 2012).

2 *Women CEOs*, CNNMONEY (May 23, 2011), available at <http://money.cnn.com/magazines/fortune/fortune500/2011/womenceos/>. In the year following these remarks, the number of Fortune 500 companies run by women increased to 20. Sara Frier & Carol Hymowitz, *Mayer Becomes Highest-Profile Pregnant Woman Hired as CEO*, Bloomberg News (July 18, 2012), <http://www.bloomberg.com/news/2012-07-17/mayer-becomes-highest-profile-pregnant-woman-hired-as-ceo.html>.

3 U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-12-10, REPORT TO CONGRESSIONAL REQUESTERS, GENDER PAY DIFFERENCES: PROGRESS MADE, BUT WOMEN REMAIN OVERREPRESENTED AMONG LOW-WAGE WORKERS (2011), available at <http://www.gao.gov/assets/590/585721.pdf>.

4 LEGAL MOMENTUM, FEDERAL POLICIES ADOPTED MORE THAN THIRTY YEARS AGO HAVE FAILED TO REDUCE SIGNIFICANTLY WOMEN'S EXCLUSION FROM THE CONSTRUCTION TRADES (2009), available at <http://www.legalmomentum.org/our-work/women-at-work/resources-and-publications/2009-report-failed-federal.pdf>.

5 JOAN WILLIAMS, STEPHEN BENARD & IN PAIK, UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT 2, 69-70 (2001); Shelley J. Correll, et al., *Getting a Job: Is There a Motherhood Penalty?*, 112 AM. J. SOC. 1297, 1300 (2007).

the nation's largest employers alleged that women made up seventy percent of hourly workers, but only a third of managers, and that the higher up the corporate ladder, the fewer women held leadership positions.<sup>6</sup> In her opinion dissenting in *Ledbetter v. Goodyear Tire & Rubber Co.*, a Title VII case from a few years ago, after which Congress had the last word, Justice Ginsburg noted that gender-based pay disparities that start out small can grow stark over time.<sup>7</sup> While women have entered the workforce in droves, they too often land in lower-paid sectors.

Fortunately, the litigators of the 1970s laid much of the groundwork for uprooting the discrimination and biases that underlie these troubling remaining imbalances. Embedded within their victories are the insights and resources upon which we can draw to combat those inequalities.

Crucially, the activist litigators of the 1970s named and cast the bright light of judicial and social scrutiny on the normative biases that endorsed a male breadwinner and a female homemaker who performed primarily unpaid and underpaid caregiving work and who was unsuited for public life.<sup>8</sup> They did the same for generalizations and assumptions about men's and women's actual roles and capacities.<sup>9</sup> They called these prescriptive biases and descriptive assumptions sex-based stereotypes, asserting and constitutionalizing the view that these stereotypes did not justify the wholesale exclusion of people from jobs, rights, or civic obligations based solely on sex.<sup>10</sup>

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6 131 S.Ct. 2541, 2563 (2011) (Ginsburg, J., concurring in part and dissenting in part).

7 550 U.S. 618, 643-45 (2007) (Ginsburg, J., dissenting) *superseded by statute*, Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-12, 123 Stat. 5 (2009).

8 See, e.g., *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975) (concerning the right of a male primary caretaker to collect full social security benefits following the death of his wife, who had been the family's primary breadwinner). Ruth Bader Ginsburg argued on Wiesenfeld's behalf before the Supreme Court, making the case that differential treatment of men and women caretakers represented a "gross, stereotypic view of the economic and parental roles of men and women." Brief for Appellee, *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975) (No. 73-1892), 1974 WL 186057 at \* 16. The Supreme Court agreed.

9 See, e.g., *Cleveland Board of Education v. La Fleur* 414 U.S. 632 (1974) (responding to arguments made by Ginsburg and others by striking down a policy requiring pregnant teachers to go on mandatory leave midway through their pregnancies). The Court decided that school boards may not assume that all pregnant women were incapable of working late in their pregnancies.

10 See Brief for Appellant, *Reed v. Reed*, 404 U.S. 71 (1971) (No. 70-4), 1971 WL 133596 at \*17 (attacking "legislative judgments . . . based on inaccurate stereotypes of the capacities and sensibilities of women).

These litigators eradicated, directly and indirectly, thousands of facially discriminatory laws, policies, employer rules, municipal ordinances, and the like, leaving us with a country in which very few jobs and public roles remain formally closed to women. But they also worked to enact the laws we rely on today, including Title IX<sup>11</sup> and the Pregnancy Discrimination Act.<sup>12</sup> And they addressed gender bias in every facet of life—access to credit, education, sports, employment, unemployment insurance, family law, benefits, the court system and juries, and many more.

I sometimes say, half-jokingly, that the members of the ACLU Women's Rights Project of the 1970s, and their peers, struck down thousands of discriminatory laws and left the hard work for the rest of us. But they also left us the tools to accomplish the task at hand. In their achievements, we find the paradigms and normative vision of equality and freedom from stereotyping that hold the key to achieving that equality—formal and actual. I look forward to hearing more about these paradigms and vision from our panelists this afternoon.

If, during the panel discussion, you look out and notice that some of us—women's rights activists or scholars or students born in the 1970s or later—are looking down while you're speaking, please rest assured—it is not because we don't recognize all that you accomplished. It's because we're taking careful notes.

Now I will introduce our panelists. Kathleen Peratis was director of the ACLU Women's Rights Project from 1974 to 1978 under the supervision of Ruth Bader Ginsburg. She is a partner at Outten & Golden LLP, practicing employment law. She is co-chair of the firm's Sexual Harassment and Public Interest practice groups. She has represented plaintiffs in constitutional and employment cases in federal and state courts across the country. She is the author of *Woman and the Law* (with Eve Cary), and other articles and chapters on employment and women's rights.

Harriet S. Rabb is the Vice President and General Counsel at The Rockefeller University. She became the first woman dean in the history of Columbia Law School when she was named assistant dean for urban affairs in 1972. She oversaw the School's clinical legal education program for the next two decades. During the 1970s, both she and Justice (then Professor) Ginsburg were teaching at Columbia Law School and relying on law students as the engines of litigation. Through her work with the Employment Rights Project, a clinical program at Columbia, she handled a series of cases, which, in the words of one client, made a lot of the initial law in the sex discrimination area. She

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11 Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681(a) (2000).

12 Pregnancy Discrimination Act of 1978, 42 U.S.C. § 2000e(k).

followed that work by founding or co-founding other clinics at Columbia, among them an Immigration Law Clinic and a Fair Housing Clinic. In 1993, Ms. Rabb left the Law School and served for eight years as general counsel for the United States Department of Health and Human Services under Secretary Donna Shalala.

Wendy Williams is best known for her work in the area of gender and law, especially concerning issues of work and family, and is the co-author of a 1996 casebook on gender and law. She helped draft and testified before congressional committees on the Pregnancy Discrimination Act of 1978 and the Family and Medical Leave Act of 1993. Before joining the Georgetown Law faculty in 1976, she was a founder of Equal Rights Advocates, a public interest law firm in San Francisco. Professor Williams served on the National Research Council Panel on Employer Policies and Working Families and the Blue Ribbon Advisory Committee to the Yale Bush Center Project on Infant Care Leaves. She served as Associate Dean of the Law Center from 1989–93. Emerita since 2009, Professor Williams is co-authoring, with Mary E. Harnett, a biography of Justice Ruth Bader Ginsburg.

Herma Hill Kay is Barbara Nachtrieb Armstrong Professor of Law at the School of Law (Boalt Hall), University of California, Berkeley. In 1992, she received the Margaret Brent Award given by the ABA Commission on Women in the Profession. She joined the Boalt Hall faculty in 1960 where she earned teaching awards and served as Dean of Boalt Hall from 1992 to 2000. She teaches and publishes in the fields of Family Law, California Marital Property, Sex-Based Discrimination, and the Conflict of Laws. She is currently working on a history of women law professors in the United States between 1900–2000. She co-authored a casebook, published in 1974, on sex discrimination with Justice Ginsburg.

Reva Siegel is the Nicholas deB. Katzenbach Professor of Law at Yale University. Professor Siegel's writing draws on legal history to explore questions of law and inequality, and to analyze how courts interact with representative government and popular movements in interpreting the Constitution. She is currently writing on the role of social movement conflict in guiding constitutional change, addressing this question in recent articles on the enforcement of *Brown*, originalism and the Second Amendment, the "de facto ERA," and reproductive rights. She has written on the abortion debate, the constitution, sexual harassment, pregnancy discrimination, and other topics. She began teaching at the University of California at Berkeley in 1988.