



1997

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Recommended Citation

Strossen, Nadine (1997) "Women's Rights under Siege," *North Dakota Law Review*. Vol. 73 : No. 2 , Article 1.

Available at: <https://commons.und.edu/ndlr/vol73/iss2/1>

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WOMEN'S RIGHTS UNDER SIEGE^{*}

NADINE STROSSEN^{**}

I. INTRODUCTION

I am honored to address you, to help you celebrate Women's History Month. Some of my most vivid memories from my own student days involve hearing talks by women who were actively engaged in the women's rights movement. They made a powerful impact on me, and definitely played a role in my decision to become an advocate of human rights, including women's rights. I hope I can inspire some audience members in the next generation to carry on the unfinished work of securing full rights for all women, and eliminating any gender-based discrimination against women or men.

As that last statement indicates, some of the gender-based stereotypes and discrimination that are still all too present in our society adversely affect men. Men have been discriminated against in the family sphere—for example, in custody battles where women are presumed to be more fit parents.¹ On the other hand, in the public sphere, the prime victims of gender-based stereotypes have been women.

While my remarks will focus on women's rights, as befits this occasion, I did want to put those remarks in a broader context and to note that I see women's rights as part of a larger human rights agenda. Likewise, the battle to free women from gender-based stereotypes is part of the larger war against all group-based stereotypes, biases, and prejudices. Ruth Bader Ginsburg put this well many years ago. During the early 1970s, she was the founding director of the ACLU Women's Rights Project. When introduced as such to a male reporter, he said, using a then-popular term, "Oh, you work for women's liberation." She shot back, "It is not women's liberation; it is women's *and men's* liberation."²

^{*} This piece is an edited transcript of the keynote address that Professor Strossen delivered at the University of North Dakota on April 20, 1996. Therefore, there may be deviations from traditional law review format. The piece reflects developments subsequent to the lecture, most importantly, the Supreme Court's decision in *United States v. Virginia*, 116 S. Ct. 2264 (1996).

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1. See, e.g., *Court Ruling in Custody Relocation Cases*, L.A. TIMES, Apr. 24, 1996, at B4 (noting women still get physical custody of children most of the time).

2. David Margolick, *Trial by Adversity Shapes Jurist's Outlook*, N.Y. TIMES, June 25, 1993, at A1.

II. AN OVERVIEW OF THE ACLU'S WOMEN'S RIGHTS WORK

As the first female President of the ACLU, I am always particularly happy to talk about women's rights. I am proud that the ACLU has been in the forefront of the women's rights struggle since our founding in 1920.³ In the spirit of Women's History Month, let me give you just a thumbnail sketch of the ACLU's historic contributions to the women's rights cause.

We had founding mothers, as well as founding fathers, including some of the leading social reformers of their day: for example, Jane Addams, the first American woman to win the Nobel Peace Prize; and Jeannette Rankin, the first woman member of Congress.⁴ Also, some of the ACLU's earliest cases involved women's rights. For example, during our very first decade, we defended birth control and sex education advocates Margaret Sanger and Mary Ware Dennett, who was another ACLU founding mother. They were prosecuted under the 1873 Comstock Act,⁵ the first federal anti-obscenity act, which deemed information and expression about contraception and abortion to be criminal obscenity.⁶

These cases illustrate the indivisibility of rights, which I noted previously; they involved not only women's rights, but also rights of free speech and reproductive autonomy. Today, seven decades later, the ACLU is waging the very same battle, in defense of these very same interlocked rights, in our fight against the Communications Decency Act (CDA), which President Clinton signed on February 8, 1996.⁷ It transposes the repressive, Victorian-era Comstock Act to our newest, most promising communications medium, by making it a serious federal crime to communicate information about abortion on-line in cyberspace. The ACLU immediately brought a constitutional challenge to the Communications Decency Act, and one of our clients in that landmark

3. See Nadine Strossen, *The American Civil Liberties Union and Women's Rights*, 66 N.Y.U. L. REV. 1940, 1940-41 (1991) (discussing the ACLU's historical commitment to women's rights).

4. 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 obligated 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). 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. 2 ACLU WOMEN'S RIGHTS REPORT 9 (1980).

5. 18 U.S.C. §§ 1461 to 1465 (1994) (corresponding to the 1873 Comstock Act, ch. 258, § 2, 17 Stat. 599).

6. See *United States v. One Book, Entitled 'Contraceptions,'* 51 F.2d 525, 526 (S.D.N.Y. 1931); *United States v. One Obscene Book Entitled 'Married Love,'* 48 F.2d 821, 822 (S.D.N.Y. 1931).

7. 47 U.S.C. § 230 (1994).

case is Planned Parenthood Federation of America.⁸ How ironic that, three-quarters of a century after we defended Margaret Sanger against criminal charges under the original Comstock Act, we are now defending the organization she founded against the newest extension of that censorious law. This development proves the wisdom of two statements that have become ACLU mottoes. In the words of our principal founder, Roger Baldwin: "No fight for civil liberties ever stays won"; and in the words of Thomas Jefferson: "Eternal vigilance is the price of liberty."⁹

Continuing its defense of women's reproductive rights that the ACLU launched in its earliest years in defending Sanger and others, in the 1960s the ACLU became the first national organization to advocate a woman's constitutional right to choose to terminate a pregnancy, and the first to argue that position in the Supreme Court.¹⁰ Our women's rights work took on new momentum in the early 1970s when we founded two special projects, the Women's Rights Project and the Reproductive Freedom Project. As I already noted, the founding director of the Women's Rights Project was Ruth Bader Ginsburg. Thanks to her pioneering leadership, that Project won more victories for women's rights in the Supreme Court than any other organization.¹¹

III. A BACKWARD GLANCE TO MEASURE PAST PROGRESS AND SPUR FUTURE PROGRESS ON THREE FRONTS IN THE ONGOING BATTLE FOR WOMEN'S RIGHTS

The women's rights movement has made impressive gains in the last quarter century since I was a student, but we still have a long way to go before women are truly full and equal citizens under our Constitution and in our society. During Women's History Month, I think it is especially important to have this dual perspective: both looking backward, to see how far we have come; and looking forward, to see how far we still have to go. The backward perspective, thus, is not at all so that we can rest on our laurels, proud of our achievements to date. Rather, it is for the opposite purpose. By showing us how much progress it is possible to make through organizing and advocacy, this backward glance will encourage us to carry on those efforts energetically and optimistically.

8. *ACLU v. Reno*, 929 F. Supp. 824, 827 n.2 (E.D. Pa. 1996), *prob. juris. noted*, 117 S. Ct. 554 (1996), *aff'd* No. 96-511, 1997 WL 348012 (June 26, 1997).

9. Wendell Phillips, Address Before the Massachusetts Antislavery Society (Jan. 28, 1852). Many sources attribute this quotation to Thomas Jefferson.

10. *United States v. Vuitch*, 402 U.S. 62 (1971).

11. MARGARET A. BERGER, LITIGATION ON BEHALF OF WOMEN: A REVIEW FOR THE FORD FOUNDATION 16 (1980) ("[M]ore 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"); Karen O'Connor & Lee Epstein, *Beyond Legislative Lobbying; Women's Rights Groups and the Supreme Court*, 67 JUDICATURE 134, 142 (1983) (crediting the ACLU's efforts as the "major reason for th[e] high success rate" of women's rights claims before the Supreme Court).

Therefore, I would like to start by summarizing three major current battlefronts in our ongoing struggle for women's rights and autonomy. Then, to put them in perspective, I will tell you where we were on each of those fronts when I was a student a generation ago.

First, the United States Supreme Court has never yet held that the Constitution's equality guarantee applies fully to women or to gender-based discrimination. Rather, it applies a watered-down version of that constitutional guarantee, which is why until the summer of 1996, we still had two public educational institutions in the United States that completely excluded women: the Virginia Military Institute (or VMI) and the Citadel. The ACLU had always viewed such gender discrimination to be inconsistent with the plain meaning and purpose of the Constitution's Equal Protection Clause. Therefore, we represented Shannon Faulkner in her challenge to the Citadel's exclusionary policy,¹² and we worked with the Justice Department in its challenge to VMI's male-only policy.¹³

Thanks to the landmark Supreme Court decision in the VMI case in June 1996, the death knell has been sounded for at least these two exclusively male academies. It was poetic justice that Ruth Bader Ginsburg, who had so long championed gender equality from the other side of the Supreme Court bench, authored this historic decision that has brought us closer than any other to full constitutional protection against gender discrimination. Still, it is important to note that, consistent with past Supreme Court precedents, Justice Ginsburg's opinion does not treat gender-based classifications as violating the Constitution to the same extent that race-based classifications do. While racial classifications are subject to the strictest form of judicial review, and have to overcome the greatest presumption of unconstitutionality to survive that review,¹⁴ gender classifications are subject to a somewhat less strict form of judicial review, and receive a somewhat lessened presumption of unconstitutionality.¹⁵

I would now like to put this current state of women's constitutional equality rights in perspective through a backward glimpse. When I was a college student, the Supreme Court had *never* held that the Constitution's equality guarantee applied to women or to gender-based discrimination at all. Not until 1971 did the Court give us even a watered-down

12. The Fourth Circuit Court of Appeals ordered Faulkner's admission. *Faulkner v. Jones*, 51 F.3d 440 (4th Cir. 1995), *cert. dismissed*, 116 S. Ct. 331 (1995), and *cert. denied*, 116 S. Ct. 352 (1995).

13. *United States v. Virginia*, 116 S. Ct. 2264 (1996) [hereinafter *VMI*].

14. *Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097, 2113 (1995) (holding that strict scrutiny is the proper standard for analysis of all governmental, racial classifications).

15. *VMI*, 116 S. Ct. at 2274 (holding that "[p]arties who seek to defend gender-based government action must demonstrate an 'exceedingly persuasive justification' for that action") (citations omitted).

level of constitutional protection against gender discrimination.¹⁶ (It did so in an ACLU case argued by Ruth Bader Ginsburg.)

The second front in the ongoing struggle for women's rights is reproductive freedom. In 1992, in a case called *Planned Parenthood v. Casey*,¹⁷ in which the ACLU represented Planned Parenthood, we managed to persuade the Supreme Court not to completely overturn *Roe v. Wade*,¹⁸ its landmark reproductive freedom decision.¹⁹ However, the Court so severely cut back on *Roe* that, for all practical purposes, abortion is now harder to obtain for many women than it has been at any time in the last two decades.²⁰ And many members of Congress and state legislatures are trying to make abortion even more difficult to obtain, especially for poor women and young women.²¹

Accordingly, a major ACLU priority is to protect actual access to abortion for all women. One recent dramatic example is our lawsuit against the city officials in Blair, Nebraska, who kidnapped a 15-year-old girl and essentially imprisoned her in a foster home to force her to carry her pregnancy to term.²² This case is a mirror image of the much-maligned Chinese policy of government-compelled abortions.²³ How shocking that, on the verge of the twenty-first century, in the heartland of America, we could have government-compelled pregnancy and childbirth.

Again, though, let's consider this current state of women's reproductive freedom from a historical perspective. When I was a college student, abortion was still illegal throughout the United States, and the

16. *Reed v. Reed*, 404 U.S. 71, 76-77 (1971).

17. 505 U.S. 833 (1992).

18. 410 U.S. 113 (1973).

19. *Planned Parenthood v. Casey*, 505 U.S. 833, 846 (1992).

20. *States' Wrong on Abortion*, N.Y. TIMES, Sept. 3, 1996, at A14 (stating that in state legislatures, abortion opponents around the country are limiting mostly young, poor, rural, or small town women's right to choose).

21. Jeff Brand, *Restoring Roe vs. Wade*, RECORD (Bergen County), Jan. 22, 1993, at C7 (stating that the "Hyde Amendment, sustained by the Supreme Court, blocked poor women's access to abortion by halting federal Medicaid funding and by permitting states to do the same"); Adam Nagourney, *Clinton Seeks to Free Funds for Abortions*, USA TODAY, Mar. 30, 1993, at 1A (noting that there have been federal restrictions on the use of Medicaid money for poor women who get abortions).

22. Tamar Lewin, *Lawsuit Says Compulsion Prevented Girl's Abortion*, N.Y. TIMES, Sept. 25, 1995, at A8 (noting how a 15-year-old girl was taken away by law enforcement officers determined to stop her from having an abortion; she was put into foster care, and finally, was ordered by a judge not to abort the pregnancy); Robynn Tysver, *Police Accused of Raiding Girl's Home to Stop Abortion*, L.A. TIMES, Nov. 12, 1995, at A39 (stating how an unwed 15-year-old was taken away by uniformed officers to a police station, then to a foster home where a day later she was released after her parents agreed in court that an abortion was no longer an option because their daughter was further along in her pregnancy than they had thought).

23. Jenni Meili Lau, *U.S. Attack on Forced Abortion: Envoy to U.N. Jabs China Policy*, S.F. CHRON., Sept. 7, 1995, at A1 (noting that "China came under fire [when] Ambassador to the United Nations Madeleine Albright told a women's conference that no woman anywhere should be forced to abort her child").

Supreme Court had not yet recognized that women had any constitutional rights at all concerning abortion or pregnancy.²⁴ Therefore, had our Nebraska case occurred back then, the lawbreaker would have been the young woman who sought the abortion, not those who sought to stop her.

Let's turn finally to the third major front in the ongoing battle for women's rights: the legislative arena. Here we are seeing a broad scale attack on all legislation that has been passed at the behest of the modern feminist movement. This point was recently made by Janet Gallagher, the present Director of the ACLU Women's Rights and Reproductive Freedom Projects. Janet has been a women's rights activist for the past quarter century, and she is not prone to hyperbole. Therefore, I was particularly struck by the following statement she made during a 1995 speech: "This has been the most misogynistic legislative session, at both the federal and state levels, that I have ever seen. We are facing a rash of bills designed to roll back gains not only made during the last Congress, but also during the last twenty years."²⁵

Again, though, let's put these current legislative cutbacks on programs benefiting women in perspective. As Janet Gallagher's statement itself indicates, the embattled government programs were adopted in the last two decades. When I was a student, they could not have been dismantled, because they did not even exist.

IV. REPORT FROM THREE MAJOR BATTLEFRONTS IN THE ONGOING STRUGGLE FOR WOMEN'S RIGHTS

I would now like to elaborate on each of the three fronts I have outlined in our ongoing struggle for women's rights: the legislative assault, including the cutback on government programs that help women realize actual equality of opportunity in education and employment; the undermining of women's reproductive freedom; and the continuing denial of women's constitutional equality.

Before doing so, however, I would like to add one further introductory observation to put these current assaults on women's rights in a broader context. These attacks that we are currently witnessing are part of a larger campaign to cut back on human rights. The present political and social climate is extraordinarily hostile to civil liberties across the board, and in particular the civil liberties of groups that are relatively

24. See *Roe v. Wade*, 410 U.S. 113, 176 (1973) (noting that 21 states had abortion laws at the time) (Rehnquist, J., dissenting).

25. Janet Gallagher, Address at the ACLU National Briefing in Washington, D.C. (Sept. 21, 1996).

powerless in the political system. Unfortunately, women constitute one of those groups.

A major underpinning of the current anti-liberties environment is the insecurity and anxiety people feel about the economy, their own economic well-being, and that of their children. As we are undergoing the transition from an industrial society to an information society, many individuals are being displaced, downsized, and marginalized, just as many individuals fell economic victims to the similarly dislocating Industrial Revolution in the eighteenth and nineteenth centuries.²⁶ Accordingly, Labor Secretary Robert Reich has referred to what we used to call the "middle class" as the "anxious class."²⁷

As always, whenever we are in a historic period of societal turmoil and ensuing anxiety, people desperately crave a solution for their insecurity, and politicians are eager to offer them a "quick fix." As always, the cheapest "quick fix" available is the scapegoating of civil liberties, particularly those of individuals and groups who lack the political power to fight back.²⁸ Accordingly, we are now seeing an ugly scapegoating of the rights of society's least powerful and most unpopular groups, including not only women, but also poor people (especially poor women and their children),²⁹ immigrants,³⁰ people accused of crimes, and people convicted of crimes.³¹

26. Cf. David J. Lynch, *Rich Poor World: Widening Income Gap Divides America, Dying Dreams, Deadend Streets*, USA TODAY, Sept. 20, 1996, at 1B (noting that "[i]f the economy is experiencing a transformation akin to the industrial revolution of a century ago . . . it may be two or three decades before these changes play themselves out"); Vivien Raynor, *Tracking Milestones of the Iron Horse*, N.Y. TIMES, Apr. 7, 1996, at 13WC (suggesting that "the old days were probably not as good as they seem, but they provided jobs that even a downsized bank executive might envy"); Stratford Sherman, *A Brave New Darwinian Workplace*, FORTUNE, Jan. 25, 1990, at 50, 51 (stating that with structural changes in organizations and industries, Ameritech has eliminated 2,000 jobs since 1984 and is cutting 2,500 more).

27. *Anxiety Takes A Labor Day Holiday*, CHI. TRIB., Sept. 2, 1996, at 18 (noting that "the middle class is being transformed into an 'anxious' class, fearful of disappearing jobs and fading opportunities").

28. As the late Justice Thurgood Marshall observed: "[W]hen we allow fundamental freedoms to be sacrificed in the name of real or perceived exigency, we invariably come to regret it." *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 635 (1989) (Marshall, J., dissenting). More recently, Justice Sandra Day O'Connor put it this way: "It cannot be too often stated that the greatest threats to our constitutional freedoms come in times of crisis." *Vernonia Sch. Dist. 47J v. Acton*, 115 S. Ct. 2386, 2407 (1995) (O'Connor, J., dissenting).

29. *See It's Time to Benefit the Kids*, CHI. TRIB., Sept. 21, 1996, at 22 (stating that "the mothers affected by changes in the welfare law are . . . poor, single, often young and frequently uneducated"); Graeme Zielinski, *Adoption Group's Stakes Soar: Church Effort Ready To Fill Welfare Gap*, CHI. TRIB., Sept. 19, 1996, at 3 (noting the welfare legislation will end many benefits for the poor, and "[m]ore kids are going to be on the street").

30. *See Melita Marie Garza & Teresa Puente, Latino Delegates Feel Stuck Between Rock, Hard Place*, L.A. DAILY NEWS, Aug. 28, 1996, at N13 (noting how a California delegate to the Democratic National Convention was "irate over President Clinton's support of welfare legislation that [would] cut off benefits to many legal immigrants").

31. *See Scott Higham, Condemned Killers Get More Time; Judge Says State Has Not Complied With New Federal Law*, BALTIMORE SUN, Oct. 4, 1996, at 1B (noting that the Anti-Terrorism and Effective Death Penalty Act of 1996 is "aimed at speeding the trip from the courtroom to the death

These attacks are doubly flawed, because—in addition to eroding fundamental rights in a way that will ultimately endanger all freedoms for everyone—they also do not provide any meaningful, constructive solutions to the very real economic and other problems that do beset our nation. To the contrary, as many experts have observed, some of these measures may well exacerbate the very problems they are claimed to redress.³²

The foregoing pattern is well illustrated by the current rampant assaults on affirmative action programs, which counter ongoing discrimination against women and members of racial minorities, thereby promoting true equality of opportunity in employment and education.³³ These attacks are a prime example of the scapegoating of women's rights fueled by economic insecurity. As many people, including white men, are having a harder time finding and keeping jobs that pay for an adequate standard of living,³⁴ many seek to blame affirmative action programs, and the women and members of racial minorities who are their most immediate and obvious beneficiaries, for these difficulties.³⁵ In fact, there is much evidence that affirmative action programs indirectly benefit white males and their families, and that eliminating these programs would not advance the financial well-being of white males, but might well have the opposite effect. This is because the primary beneficiaries of affirmative action in employment have been white women.³⁶

chamber by cutting the number of appeals"); Hal Spencer, *Proposal to Send More Kids to Grownup Courts, Jails Likely Dead*, ASSOCIATED PRESS POL. SERV., Mar. 4, 1996, available in 1996 WL 5370727 (stating the measure for harsher treatment of juvenile offenders "would have 15-, 16-, and 17-year-olds automatically tried and punished in the adult system for serious offenses ranging from robbery to assault").

32. See Tom Daschle, "Dear Colleague" Letter to Bob Dole Re: *Gallegly Amendment*, GOV'T PRESS RELEASES, June 29, 1996, available in 1996 WL 8788378 (noting "that putting high school-age kids [the children of illegal immigrants] on the streets could . . . endanger public safety [and add to] the risks of increased crime and delinquency"); Donna St. George, *Groups Fight for Education for the Undocumented*, ORANGE COUNTY REG., June 9, 1996, at A16 (noting that "[a] coalition of police, teacher and immigrant groups has come together, saying the measure would punish innocents, lead to a surge in juvenile crime and do little to curb illegal immigration"); Marc Lacey, *Bill's Support Marked by Contradiction*, L.A. TIMES, July 6, 1996, at A4 (noting that "[t]he Fraternal Order of Police, the biggest police group with 278,000 members, has said the Gallegly provision in the House immigration bill would 'turn innocent kids with boundless potential into wards of the street'").

33. Emily Bazar, *SMUD Opposes Prop. 209 Board Says No To Curb On Affirmative Action*, SACRAMENTO BEE, Sept. 20, 1996, at B1 (stating the Sacramento Municipal Utility District Board "oppose[s] the initiative—which would eliminate affirmative action programs in public contracting, employment and education throughout the state" because it poses a threat to its employees).

34. Cf. Carol Tavris, *Goodbye, Ozzie and Harriet*, N.Y. TIMES, Sept. 26, 1996, § 7 at 1 (Book Review) (stating that families of "one bread winning husband and a wife who stay[s] home minding babies" only account for three percent of all U.S. families).

35. Mike Causey, *Those Telltale Signs*, WASH. POST, Sept. 2, 1996, at B2 (stating that the hiring and promotion gains for women and minorities raise the issue of reverse discrimination against white males); Letter from Joan Lawyer, to Editor, *Los Angeles Daily News*, reprinted in L.A. DAILY NEWS, Sept. 12, 1996, at N24 (noting how "white males are now crying that 'less qualified' minorities are getting jobs that are 'rightfully' theirs").

36. See Richard G. Carter, *White Women Owe Huge, Unacknowledged Debt To Blacks*, CAPITAL TIMES (Madison), Aug. 15, 1996, at 13A (stating that "white women—who pushed their status as a

Coupled with the fact that in most families, the wife's income is now a necessary supplement to the husband's for supporting the family,³⁷ this means that affirmative action has helped to raise the income, and hence the standard of living, not only for white women, but also for their husbands and children. Without affirmative action, women will increasingly be relegated to lower paying occupations and positions, which will adversely affect their whole families.³⁸

A. THE CUTBACK ON WOMEN'S RIGHTS IN THE LEGISLATIVE ARENA

A bill now pending in Congress would completely dismantle federal affirmative action. That legislation is generally known as the Dole-Canady bill;³⁹ as the name indicates, its chief proponent was then-Majority Leader Bob Dole, once an enthusiastic supporter of affirmative action, who recently became its ardent foe.⁴⁰ Similar measures are pending in many states, including the badly misnamed California Civil Rights Initiative, which would not only terminate all affirmative action programs statewide, but would also reduce the protection against gender discrimination under California law.⁴¹

To a large extent, attacks on affirmative action reflect the ongoing racial stereotyping and injustice that continue to plague this country. But they also reflect gender stereotyping and injustice, given that white women have been the major beneficiaries of affirmative action in employment and education. Women now fill "nearly three out of ten . . . lower and middle managerial positions in private industry . . . almost triple the percentage in 1966," before the first affirmative action policies were enacted.⁴² Even with affirmative action, there is still rampant gender discrimination at work, so I shudder to think how much worse it

minority to hitch a ride . . . with the black civil rights movement—are doing great guns with America the employer . . . and [white women] have reaped far more gains than black people in the forefront").

37. Ellen Debenport, *Women: We Carry the Economic Lead*, ST. PETERSBURG TIMES, Sept. 25, 1996, at 1A (noting that 64% of women earn half or more of the family income).

38. See *Affirmative Action: Hearings Before the Subcomm. on the Constitution, Federalism and Property Rights of the Senate Comm. on the Judiciary*, 104th Cong. (1995) (testimony of Marcia D. Greenberger, Co-President, National Women's Law Center) (stating that without affirmative action, a woman who became the Transportation Agency of Santa Clara County's first woman road dispatcher would have been passed over for the position by the men who interviewed her).

39. H.R. 2128, 104th Cong. (1995); S. 1085, 104th Cong. (1995).

40. Michael A. Fletcher, *Losing Its Preference: Affirmative Action Fades as Issue*, WASH. POST, Sept. 18, 1996, at A12 (noting that Dole, during an August appearance, stated "I supported race-based preferences in the past. But over time I've realized that preferences created with [the] best of intentions were dividing Americans instead of bringing us together").

41. See John Balzar, *Backing Measure Puts Businesses in Tough Spot*, L.A. TIMES, Sept. 16, 1996, at 2 (noting Proposition 209 is a "ballot initiative to outlaw preferential programs based on race and gender in government employment, contracting, and education") (emphasis added); Dave Leshner & Bettina Boxall, *Proposition 209: Hot-Button Issue Fails to Attract Big Money on Either Side*, L.A. TIMES, Sept. 19, 1996, at A3 (stating that "the hottest political debate in California is whether the government should end its affirmative action programs").

42. Gary Belsky & Susan Berger, *Women Could be Big Losers if Affirmative Action Falls*, MONEY, Aug. 1, 1995, at 20.

would get without affirmative action. In 1994, women filed almost 40,000 sex discrimination claims against their employers, the highest number ever in one year.⁴³ Of course, not every claim is meritorious. But, despite all the talk we hear of rampant "reverse discrimination" against white men, they filed far fewer complaints—according to a recent Labor Department report, only 2.5% of all complaints since 1990.⁴⁴ Moreover, only a tiny handful of these were found to be meritorious.⁴⁵ In light of numerous studies showing that our judicial system is biased against women and members of racial minorities,⁴⁶ we can hardly write off the small number of successful discrimination claims by white men as the result of a judicial system that is hostile to them. Quite the contrary.

Opponents of affirmative action frequently claim that it is no longer justified since, they say, there is no longer any discrimination against women or members of racial minorities. In fact, they often go further and claim that white men are the primary victims of discrimination, maligning affirmative action as "reverse discrimination."⁴⁷ When I recently debated William F. Buckley, he drew thunderous applause for asserting that the only victims of discrimination now are white men.⁴⁸

These claims could not be further from the truth. Many recent studies document the ongoing discrimination against women and members of racial minorities throughout the workforce.⁴⁹ One such study is

43. James E. Causey, *Discrimination Issue Wears Changing Face Managers and Workers Must Recognize Ground Rules*, MILWAUKEE J. & SENTINEL, Jan. 15, 1996, at 18 (stating that "[n]ationally, sex discrimination cases filed soared from 18,469 in 1987 to 26,181 in 1995, a 42% increase").

44. *Reverse Discrimination Complaints Rare, Labor Study Reports*, N.Y. TIMES, Mar. 31, 1995, at A23. A recent report by Rutgers Law Professor Alfred Blumrosen (prepared for the Office of Federal Contract Compliance Program) found fewer than 100 reverse-discrimination cases among more than 3,000 discrimination opinions by Federal district and appeals courts. *Id.* "Reverse discrimination was established in six cases." *Id.*

45. See *Abolishing Government Race or Gender Preferences: Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 104th Cong. (1995) [hereinafter *Hearing*] (testimony of William T. Coleman, Jr., Chairman, NAACP Legal and Education Defense Fund) (stating reverse discrimination in cases filed or cases before government agencies is exceedingly rare and the Labor Department said it constituted only three percent of more than 3000 reported federal cases between 1990 and 1994).

46. Cassia C. Spohn, *Courts, Sentences, and Prisons*, DAEDALUS, Winter 1995, at 119 (noting that studies show racial inequalities in all aspects of the adjudication process: appointment of counsel, bail, court processing, and sentencing).

47. Chris Vaughn & Gracie Bonds Staples, *The Dream Unfulfilled, Race Relations in Tarrant County*, FORT WORTH STAR-TELEGRAM, May 5, 1996, at 1 (noting "[t]he 3-decade-old federal affirmative action program, designed to remedy past discrimination against minorities and women, is now seen as reverse discrimination by many whites"); Khristyn Yuck, *Affirmative Action's Time has Passed*, PLAIN DEALER (Cleveland), July 15, 1996, at 3E (arguing that affirmative action is, in effect, a form of reverse discrimination because it gives preferential treatment to groups on basis of their race and sex).

48. Nadine Strossen participated in a debate against William F. Buckley called "Rights, Privileges, and Responsibilities," which was sponsored by Phi Theta Kappa and took place at their Annual Convention in Chicago, Illinois on April 8, 1995.

49. URBAN INSTITUTE REPORT 90-4, *EMPLOYER HIRING PRACTICES: DIFFERENTIAL TREATMENT OF HISPANICS AND ANGLO JOB SEEKERS* 42 (1990) (noting Anglo applicants sent out by investigators received

the "Glass Ceiling Commission Report," which was issued in 1995.⁵⁰ This report was prepared by a strictly bipartisan commission, half of whose members were Republican appointees, and the other half Democratic appointees. The commission was created pursuant to legislation that was sponsored by then-Majority Leader Bob Dole, who was at the time a strong supporter of affirmative action. The legislation was signed by President George Bush.⁵¹ Therefore, one could hardly dismiss the commission or its report as representing some liberal fringe. That report showed that, while white males constitute only 47.5% of the workforce, they hold 96% of all senior management positions, at the level of vice president or above.⁵² And according to the white male senior managers themselves, many of whom were interviewed for the study, the reason for this disparity has nothing to do with any disproportionate lack of qualifications on the part of women and members of racial minorities. Rather, the senior managers explained, the disparity reflects the persistence of bias, negative stereotypes, and prejudice concerning women and racial minorities. Additionally, the report concluded, these groups lack equivalent access to the mentoring relationships that allow white men to succeed disproportionately to their desserts.⁵³

Even when individual women do surmount the hurdles erected by persistent bias, they still earn only seventy-two cents for each dollar earned by men in comparable positions.⁵⁴ Concerning the persistent "gender gap" in wages, the *Radcliffe Quarterly* (my college alumni magazine) recently published an eye-opening issue on "Working Women in the '90s," with the apt subtitle, "Dramatic Leaps and Boundaries." I would like to share with you one key passage from the introductory article in that special issue:

In 1978, women working full-time earned 61 cents for every dollar earned by a man, while in 1993, women earned 71 cents for every male-earned dollar. However, these gains are concen-

52% more job offers than equally matched Hispanics); see also AYRES, FAIR DRIVING: GENDER AND RACE DISCRIMINATION IN RETAIL CAR NEGOTIATIONS (1991) (stating blacks and women simply cannot buy the same car for the same price as can white men using identical bargaining strategies); M. TURNER ET AL., U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, HOUSING DISCRIMINATION STUDY; SYNTHESIS i-vii (1991) (noting that in a 1989 audit study of housing searches in 25 metropolitan areas, over half of African-American and Hispanic testers seeking to rent or buy experienced some form of unfavorable treatment compared to paired white testers).

50. FEDERAL GLASS CEILING COMM'N, U.S. DEP'T OF LABOR, GOOD FOR BUSINESS: MAKING FULL USE OF THE NATION'S HUMAN CAPITAL (1995).

51. See *Hearing*, *supra* note 45 (noting the Glass Ceiling Commission was appointed by President Bush and it was President Bush who signed the Civil Rights Act of 1991).

52. *Id.* (citing the Glass Ceiling Commission Report, which found that males hold 96% of all senior management positions).

53. *Id.*

54. *Transcript of President Clinton's Remarks on Affirmative Action*, U.S. NEWSWIRE, July 19, 1995, available in 1995 WL 6618847 (noting "[w]omen have narrowed the earning gap, but still make only 72 percent as much as men do for [working] comparable jobs").

trated in executive positions and . . . are partly attributable to a decline in compensation for men who work in a nonsupervisory capacity. For most women in the workforce, whether they are blue-collar workers, attorneys, or computer systems analysts, pay inequity is still a fact of life.⁵⁵

This ongoing wage inequity hurts not only women ourselves, but also our husbands, children, and families, because they are increasingly dependent on women as breadwinners. A 1995 poll showed that 73% of women work to support their families or themselves, dramatically up from just five years earlier, when that number was only 55%.⁵⁶ In 1995, only 23% of the women surveyed said they worked to bring in extra money.⁵⁷ In short, women work because they have to.

In addition to making up almost 50% of the workforce,⁵⁸ women still bear the brunt of work in their own homes, shouldering 70% of household duties.⁵⁹ Studies show that even in couples where the woman works outside the home and the man is unemployed, men do only 36% of the housework.⁶⁰ In 1995, *Newsweek* had a cover story on exhaustion which featured a cover photograph of Harvard President Neil Rudenstine, who had recently collapsed from exhaustion, forcing him to take a leave of absence.⁶¹ But, guess which occupation the experts agreed was the most exhausting of all? Not that of university president, but rather, that of working mom.⁶² As *Newsweek* quipped, "Many women who are bringing home the bacon are still expected to fix and serve it, too."⁶³

It is going to be impossible for women to compete equally in the job market and in political life so long as they continue to bear most of the responsibility for housework and childcare. In contrast with virtually all other industrialized nations, the U.S. government refuses to fund comprehensive family leave and childcare programs.⁶⁴ Moreover, child-

55. *Working Women in the '90's: Dramatic Leaps and Boundaries*, RADCLIFFE Q. (Spring 1995).

56. See generally Sue Shellenbarger, *Workplace: Women Indicate Satisfaction With Role of Big Breadwinner*, WALL ST. J., May 11, 1995, at B1 (noting "that 55% of employed women bring in half or more of their household income").

57. Dennis Kelly & Karen Peterson, *Rising Student Debt Cause for Alarm, Report Says*, USA TODAY, Sept. 9, 1995, at 4D.

58. Pam Black, *Buoying Women Investors*, BUS. WK., Feb. 27, 1995, at 126 (stating that women comprise almost 50% of the workforce).

59. LynNell Hancock et al., *Breaking Point*, NEWSWEEK, Mar. 6, 1995, at 56, 60 (noting working women still take more responsibility for life at home and most women "who are bringing home the bacon are still expected to fry and serve it, too").

60. *Id.*

61. *Id.* at 56.

62. *Id.* at 60.

63. *Id.*

64. The passing of the Family and Medical Leave Act, 29 U.S.C. §§ 2601 to 2654 (1994), shows nationwide concern for the problem, but it still leaves much to be desired. Before its passage "[s]eventy-five [other] countries, including all of the other advanced industrialized societies, ha[d] statutory provisions guaranteeing women the right to leave work for a specified period, protecting

care is offered by only one percent of private employers in this country.⁶⁵ All of us—men, women, and children alike—are adversely affected by this situation. But women bear the worst of it, since our society still treats women as having the primary responsibility to raise the next generation.

Unfortunately, there are so many current challenges to women's rights in the legislative arena that I could keep you here all day and still only scratch the surface. They occur at every level and branch of government, from local school boards to the U.S. Congress.

Many of these threats to women's rights—as well as to other civil liberties—result from pressure by the well-organized radical right, groups such as the Christian Coalition. I deliberately eschew the label that is commonly applied to these groups, “the religious right,” since that implies that somehow it is the religious nature of their beliefs that is objectionable, or antithetical to civil liberties. That is completely incorrect. First, individuals have fundamental freedoms to hold and assert religious beliefs, and to seek to influence the government to enact policies that are consistent with those beliefs; whenever those rights are threatened, the ACLU stands up for them.⁶⁶ Moreover, many religious people, including many Christians, have supported women's rights and other human rights specifically because such rights are consistent with their religious beliefs. For example, two organizations that actively support women's reproductive freedom are the Religious Coalition for Reproductive Choice and Catholics for a Free Choice (CFFC).⁶⁷ Therefore, it is the anti-civil-liberties agenda of the Christian Coalition and other extreme right groups to which I object, not any religious beliefs that may undergird that agenda.⁶⁸

While the Christian Coalition may not represent the majority of Christians, it has disproportionately great political strength, which it has

their jobs while they are on leave and providing cash benefits equal to all or a significant portion of their wages while they are absent due to pregnancy and childbirth.” Scott A. Caplan-Cotenoff, *Parental Leave: The Need for a National Policy to Foster Sexual Equality*, 13 AM. J. L. & MED. 71, 93 (1987).

65. In 1993, seven percent of all private sector employees received employer assistance for child care. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, BULLETIN 2456, EMPLOYEE BENEFITS IN MEDIUM AND LARGE PRIVATE ESTABLISHMENTS, at 10 (1993).

66. To cite one recent example, the ACLU recently opposed a lobbying “reform” bill, sponsored by Senator Paul Wellstone (D-MN), which would have curtailed the First Amendment rights of (among others) the Christian Coalition, by requiring it to turn its membership lists over to the government. Michael Ross, *Senate GOP Filibuster All But Kills Lobby Reform Bill*, L.A. TIMES, Oct. 7, 1996, at A1.

67. Founded in 1973, Catholics for a Free Choice (CFFC) is an educational organization that supports the right to legal reproductive health care, especially family planning and abortion. CFFC also works to reduce the incidence of abortion and to increase women's choices in childbearing and child rearing through the advocacy of social and economic programs for women, families, and children. CFFC is headed by Frances Kissling.

68. See generally DAVID CANTOR, *THE RELIGIOUS RIGHT: THE ASSAULT ON TOLERANCE & PLURALISM IN AMERICA* (1994).

wielded to the detriment of women's rights and other human rights.⁶⁹ The Coalition's anti-liberties clout was highlighted by the 1996 Republican Convention. The Coalition's Executive Director, Ralph Reed, boasted that sixty percent of the Convention's delegates were supporters of his organization.⁷⁰ One striking example concerns women's rights of reproductive autonomy. The Republican Platform calls for the outlawing of all abortions, even those that are necessary to save a woman's life, and even in situations of rape or incest.⁷¹

The Christian Coalition and other radical right organizations have systematically attacked judicial decisions and government programs that advance women's rights. Coupled with the attacks on affirmative action that I have already described, this agenda would force women to conform to the "conventional morality" of "the traditional American family."⁷² The ACLU's Janet Gallagher described this as a "very systematic and self-conscious effort to recapture Murphy Brown . . . a very self-conscious desire on the part of the Christian Coalition to bring us back to the era of shot-gun weddings and underground abortions."⁷³

Christian Coalition Executive Director Ralph Reed recently argued that the Legal Services Corporation should be abolished because it is undermining traditional American values by representing poor people in domestic disputes and therefore is subsidizing divorce and illegitimacy.⁷⁴ Is it in fact a traditional American value to force people to enter or remain in marriages against their will? This sounds no more palatable than forcing that young Nebraska woman I described earlier to have a baby against her will. But the Christian Coalition would apparently force

69. Christian conservatives dominated the Republican party's 1996 convention in San Diego by electing hundreds of delegates to the convention and embracing extremist positions against women's right to choose, public education, and basic civil rights for millions of Americans. See Michael Hudson, *A Tale of Two Conventions*, U.S. NEWSWIRE, Aug. 15, 1996, available in 1996 WL 5623350 (discussing the religious right's participation at Republican National Convention).

70. Ralph Reed boasted that nearly 60% of the Republican convention delegates were religious conservatives. Alan Elsner, *Evangelicals Assert Control of Republican Party*, REUTERS, Aug. 7, 1996.

71. See Gloria Berger, et al., *Off to the Races*, U.S. NEWS & WORLD REP., Aug. 26, 1996, at 20, 25-26 (noting that the GOP platform calls for a constitutional amendment banning abortion); Alan Elsner, *Evangelicals Assert Control of the Republican Party*, REUTERS, Aug. 7, 1996 (noting that just one week prior to the Republican convention in San Diego, Bob Dole was forced into an embarrassing retreat over his stance on abortion by Christian conservatives and other abortion foes); Hudson, *supra* note 69 (explaining that the Christian Coalition was able to beat an extremist anti-abortion plank into the Republican party's platform over moderates' objections).

72. Steve Gushee, *TV Series Chronicles Rise of Religious Right*, PALM BEACH POST, Sept. 27, 1996, at 1F (explaining how the religious right does not seek any compromise on its "pro-family" agenda, which includes tough stances against abortion, single families, gay households, child care and women's rights).

73. Gallagher, *supra* note 25.

74. See Henry Weinstein, *Great Society's Legal Aid for the Poor Targeted by Budget Ax*, L.A. TIMES, Dec. 29, 1995, at A1 (noting that "Ralph Reed has accused the [Legal Services Corporation] of being anti-family because of its work in divorce cases").

poor women to remain entrapped in marriages, even when their husbands physically abuse them and their children.

Not only the cutback on Legal Services, but also many other recent legislative initiatives, would have this same effect of forcing women to stay in abusive relationships. Examples are the "welfare cap" provisions that deny funds for children for whom paternity has not been established, and for children born to single women, to women under eighteen, to women under eighteen and not living with their parents, and to women whose families are already receiving AFDC.⁷⁵ Another example is Congress's refusal to fund the portions of the Violence Against Women Act that called for battered women's shelters and other resources for domestic violence victims.⁷⁶

Nation magazine columnist Katha Pollitt recently wrote a column expressing some of the frustration I feel at the relative lack of public awareness or concern about these terrible congressional cutbacks on protections of women's rights and women's safety.⁷⁷ She made this observation by contrasting the large number who were deeply concerned about the particular woman who was victimized in the O.J. Simpson case, Nicole Brown Simpson, with the much smaller number who have shown any concern about the generic problem of domestic violence.⁷⁸ Katha wrote:

How many . . . who see [O.J. Simpson] as a vicious abuser have thought about the ways in which budget cuts, "welfare reform" and proposals to forbid legal-services lawyers from taking divorce cases will trap countless women in violent homes? . . . What if the millions appalled by Nicole's beaten face had joined last spring's march on Washington to oppose violence against women?⁷⁹

A recently organized group called the "Committee of One Hundred," which is composed of distinguished women from all walks of life with many ideological perspectives, has issued a statement that spotlights this aspect of the right-wing's current agenda. The Committee states that the right wing seeks to relegate women to traditional roles, subordinate to men not only at work and in the political sphere, but also at home.⁸⁰ Given the general lack of public awareness of how the cutbacks on

75. Suzanne Fields, *The Victorians and the New Safety Net*, WASH. TIMES, Mar. 30, 1995, at A25 (noting that a law in "New Jersey bars women in the Aid to Families with Dependent Children program from receiving extra cash benefits" upon the birth of an additional child).

76. Earl Pomeroy, Congressional Press Release, Oct. 31, 1995 (stating that the House approved \$50 million less than the Senate for funding provisions of the Violence Against Women Act).

77. Katha Pollitt, *Subject to Debate*, 261 NATION 457 (1995).

78. *Id.* at 457.

79. *Id.*

80. Committee of One Hundred, *A War Against Poor Women is a War Against All Women*, (Committee of One Hundred, Washington, D.C.) June 19, 1995.

welfare programs undermine women's rights, it is significant that the statement's headline reads, "A War Against Poor Women is a War Against All Women."⁸¹ Here is what the statement has to say about so-called "welfare reform," which many of us believe is more accurately labeled "welfare deform":

This agenda is billed as a campaign to decrease women's dependency on welfare, and to increase women's self-sufficiency. But by withdrawing federal assistance for women who find themselves without male support (and by simultaneously attacking affirmative action, Title IX [the federal law prohibiting gender-based discrimination in education], and college financing), by pauperizing these women . . . this agenda manifests its real intent: to pressure all women to depend economically on a man within a traditional marriage—whether or not she wants to, and whether or not the man is dependable.⁸²

The Congressional Caucus for Women's Issues, a group of female representatives in the U.S. Congress, recently issued a "report card on women's issues in the current Congress," which gave the Congress failing grades in several specific areas: choice; education; health; family; safety; and economic security.⁸³ Many of these indictments of Congress could be made about state legislatures all over the country as well.⁸⁴

For lack of time, I will just share with you some reasons for the failing Congressional grade in one of these specific areas. Since this lecture is taking place at an educational institution, I have chosen education. In that area, the report card reads as follows:

When the House cut student loans by \$10 billion, it made it harder for thousands of young women to get an education. But the House . . . added insult to injury when it cut funds for education programs specifically designed to make sure our daughters have the same educational opportunities that our sons have. From weakening enforcement of Title IX—the civil rights law guaranteeing equal opportunity in education, including access to school sports programs—to defunding the Women's Education Equity Act—a program established in 1974 to monitor sex discrimination in federally funded education

81. *Id.*

82. *Id.*

83. Congressional Caucus for Women's Issues, *A Report Card on Women's Issues in the 104th Congress: GOP Declares War on Women on the 75th Anniversary of Women's Vote* (on file with the author).

84. *Id.*

programs and provide for gender equity programs—the House has backed off from our country's educational commitment to half of our children.⁸⁵

B. THE UNDERMINING OF WOMEN'S REPRODUCTIVE FREEDOM

I would now like to turn to the second front in the ongoing battle for women's rights: abortion and other reproductive rights issues. As I already noted, in 1992 the ACLU won a Supreme Court case that reaffirmed what the Court called "the central holding" of *Roe v. Wade*: that women have some constitutional protection against governmental restrictions on abortion.⁸⁶ However, that ruling, in *Planned Parenthood v. Casey*, significantly decreased the scope of this constitutional protection and concomitantly increased the government's latitude to restrict abortions.⁸⁷ Therefore, both supporters and opponents of women's reproductive freedom have noted the substantial inroads that *Casey* made into this freedom. For example, even Chief Justice Rehnquist, who was disappointed that *Casey* did not literally and explicitly overrule *Roe*, noted that *Casey* did effectively and implicitly overrule *Roe*: "*Roe* continues to exist, but only in the way a storefront on a western movie set exists: a mere facade to give the illusion of reality."⁸⁸

Casey allows the government to impose any limitations and restrictions on abortion, even burdensome ones, so long as the Court does not deem them an "undue burden."⁸⁹ Exercising their newfound power to curb reproductive freedom, state and local governments have been imposing onerous restrictions that, for all practical purposes, make abortion unavailable to many women in our society, especially young women, poor women, and women who live far away from abortion services.⁹⁰

To cite a recent example, in August of 1996, the ACLU filed a lawsuit to bar Mississippi officials from enforcing a new statute and regulations that impose dozens of burdensome requirements on abortion providers that are unsupported by any legitimate medical or public health purpose and that depart from accepted medical standards in many ways.⁹¹ In addition, they ban any new "abortion facilities" within 1500

85. *Id.*

86. *Planned Parenthood v. Casey*, 505 U.S. 833, 845 (1992).

87. *See, e.g.*, Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. REV. 1185, 1199, 1208 (1992) (discussing the decision in *Casey*).

88. *Casey*, 505 U.S. at 954 (Rehnquist, C.J., dissenting).

89. *Id.* at 874.

90. Carole Paquette, *Planned Parenthood Pushes for Abortion Clinic in Smithtown*, N.Y. TIMES, Dec. 11, 1994, at L28 (noting that the New York City suburb of Suffolk County has no abortion facility for poor women who rely on Medicaid as their source of medical-service payment).

91. These measures subject physicians who perform abortions to regulations required of "mini-hospitals," but not physicians who perform other outpatient surgery. *See* MISS. CODE ANN. § 41-75-1

feet of a church, school, or kindergarten.⁹² According to ACLU Reproductive Freedom Project attorney Louise Melling, who is representing the plaintiffs in this challenge: "Imposing unnecessary abortion regulations is the latest tactic of anti-choice organizations and legislators. . . . Unable to outlaw abortion directly, they seek instead to make the procedure inaccessible by requiring providers to conform to irrational and prohibitively burdensome regulations."⁹³ Co-counsel Deborah Goldberg added, "In enacting these measures, the state legislature's only intent was to make Mississippi's handful of abortion providers close their doors permanently."⁹⁴

The increasing legal restrictions on abortion go hand-in-hand with increasing practical restrictions. One preeminent practical obstacle is the waning number of doctors and hospitals providing abortion services. Eighty-three percent of all counties in the United States have not a single abortion provider.⁹⁵ The growing numbers of hospital mergers between non-sectarian and religious hospitals are causing a diminution in all reproductive services, not only abortion. For example, these hospitals are refusing to treat rape victims with the "morning after pill," because they see it as an abortifacient.⁹⁶

(Supp. 1996) (discussing requirements for "ambulatory surgical facilities" and requiring abortions to be performed only at such facilities). The new laws, for example, impose requirements far more stringent than those imposed on birthing centers. See *id.* § 41-75-1(f-h) (listing the requirements of abortion facilities). This is so even though childbirth carries a maternal death rate ten times higher than abortion. Marilyn Goldstein, *How Pennysaver Had It Wrong*, NEWSDAY, July 31, 1992, at 8 (noting that Dr. David A. Grimes, professor of obstetrics and gynecology at U.S.C. and former head of the abortion surveillance unit of the Centers for Disease Control until it was closed under President Reagan, said "federal figures collected until the unit was closed show the maternal death rate from abortions dropped from 4 per 100,000 in 1972 to 0.5 per 100,000 in 1985 . . . women today are 25 times more likely to die of childbirth than abortion").

The Mississippi regulations require abortion facilities to comply with physical plant, equipment, personnel, and paperwork standards that bear no reasonable relation to the health or safety of women seeking abortions. See MISS. CODE ANN. §§ 41-41-33(1)(a)-(d), -41-35(1)-(4), -75-1(a)-(e) (1996 & Supp. 1996) (providing abortion regulations). These extensive, costly requirements are wholly unjustified, since the American College of Obstetricians and Gynecologists (ACOG) recognizes that first-trimester and early second-trimester abortions may be safely performed on an outpatient basis in a physician's office. See Sandra G. Boodman, *Should Non-Physicians Perform Abortions? Shortage of Trained Providers of the Procedure Leads to a Controversial Proposal*, WASH. POST, Feb. 15, 1994, at Z7 (arguing that the ACOG recognizes that such abortions are so safe to the mother that it now recommends using non-physicians to perform the abortions).

In another inexplicable departure from accepted medical standards, the regulations exclude two procedures for terminating a pregnancy, (1) medical abortion, and (2) dilation and evacuation, from the list of authorized abortion methods. The regulations also fail to protect patient confidentiality, instead allowing state inspectors access to all of a licensed facility's medical records at any time, and authorizing public disclosure of patient identities in licensing proceedings.

92. MISS. CODE ANN. § 41-75-1(h) (Supp. 1996).

93. *ACLU Seeks Injunction in Federal Court to Block Mississippi Abortion Statute and Regulations* (visited July 9, 1997) <<http://www.aclu.org/news/n081296 a.html>>.

94. *Id.*

95. Charles Leroux, *Facing Facts: Abortions Cross Racial, Economic, Religious Lines*, CHI. TRIB., July 5, 1992, at 1 (citing statistics on abortion facilities nationally, showing that "83% of U.S. counties, where 31% of the female population of child bearing age reside, have no abortion services").

96. Cf. Carl T. Rowan, *New Roadblock for Abortion*, CHICAGO SUN-TIMES, Sept. 27, 1992, at 46

The waning, aging group of doctors who do still perform abortions face harassment, death threats, bombings, arson, and even outright murder. In just two years, women's health centers have suffered over \$6 million in damage. Doctors' reports of harassment and terrorism number 200 a month. In just over one year, three doctors were brutally assaulted by gun-wielding fanatics. Two died. Also murdered were two young women who worked as clinic receptionists and a volunteer clinic escort.⁹⁷

How do so-called "pro-life" advocates respond to such violent, life-endangering acts, including outright murder? Rescue America called them "a legitimate use of force." Defensive Action labeled life-threatening attacks "justifiable assault," while Defenders of Defenders of Life called clinic murders "justifiable homicide." Advocates for Life Ministry actually praised one such violent attack as "a courageous act."⁹⁸ With such sentiments abroad, we can of course expect further violence and intimidation, and a continuing shrinkage in the actual availability of abortion.

In addition to these literal attacks, doctors who have performed abortions—in other words, doctors who have made it possible for women to exercise their constitutional rights—have also been attacked figuratively. Look what happened, for example, to Dr. Henry Foster, President Clinton's failed nominee for Surgeon General, whose nomination was eventually withdrawn due to controversy about the number of abortions he had performed during his career as an obstetrician-gynecologist.⁹⁹ Likewise, the doctor he was seeking to replace as Surgeon General, Dr. Joycelyn Elders, was also viciously attacked for her outspoken advocacy of the rights and welfare of women and children.¹⁰⁰ (There was a silver lining to the cloud of Dr. Elders' leaving government office, though, she was able to join the ACLU National Board of Directors!)

(noting that under a new federal "gag" rule, family planning clinics would be unable to discuss abortions or abortion services).

97. Adam Guasch-Melendez, *The Abortion Rights Activist: Victims of "Pro-Life" Violence*, (visited Oct. 2, 1996) <<http://www.cais.com/agm/main/index.htm>>.

98. *Pro-Life Activists: Violence Continues To Create Rifts*, ABORTION REPORT, Oct. 28, 1994, (National Briefing) (reporting that Advocates for Life Ministries (ALM) has recently published *A Time To Kill*, which asserts that "non-violence—along with contraception, opposition to capital punishment and the bestowing of 'victim status' on women who have chosen abortion—are 'false doctrines' and 'undermine' the pro-life movement;" and noting that ALM also advocates justifiable homicide in the case of abortion doctors).

99. Don Feder, *Foster Should be Issue for the GOP*, BOSTON HERALD, June 26, 1995, at 21 (noting that in 1978, Foster disclosed that he had performed nearly 700 amniocentesis and therapeutic abortions during his career).

100. Julie Cohen, *The Campaign that Helped Oust Elders; Christian Right May Target More Clintonites*, LEGAL TIMES, Dec. 19, 1994, at 1 (noting the anti-Elders campaign waged by the Christian Right included a petition drive, bumper stickers, and a massive assault on Christian radio and television outlets).

Significantly, reproductive freedom is not a partisan issue among the women in Congress. The last Congress marked an important milestone in the female members' bipartisan commitment to women's reproductive freedom: the Congressional Caucus for Women's Issues went on record as being pro-choice.¹⁰¹

During the much-ballyhooed "first 100 days" of the current Congress, Newt Gingrich had persuaded the extreme right to hold off on its social agenda, including the anti-abortion plank.¹⁰² But no sooner was that period over, than the Christian Coalition announced its "Contract With the American Family," including opposition to all abortions, and many Congressional leaders promptly endorsed it.¹⁰³ In 1995, Representatives Pat Schroeder and Nita Lowey issued a statement on this development. Noting that we now have "the most ardent pro-life Congress in modern memory," the statement concluded: "With the unveiling of the Christian Coalition's new 'Contract with the American Family,' . . . and the Republican leadership's swooning embrace of it, this new Congress will double its efforts to bring women's progress in exercising their reproductive freedom to a screeching halt."

Unfortunately, this dire prediction has already come to pass. Legislation has been introduced in Congress that would undermine every aspect of women's reproductive freedom, including proposed measures that would do the following:

—Reinstate the "gag rule," which prohibits federally funded family planning clinics from giving women information about abortion;¹⁰⁴

—Prohibit federal funding for medical research that uses fetal tissue, despite its promise for many important medical purposes, including treatment of breast cancer;¹⁰⁵

101. Congress' 24 women (10 Democrats and 14 Republicans) are generally liberal on social policy issues and are almost unanimously pro-choice on abortion. Richard S. Dunham, *Women are Winning Up On Capital Hill*, INDEPENDENT (London), Oct. 6, 1994, available in 1994 WL 10688835.

102. Kevin Merida, *Antiabortion Measures Debated; House Republicans Push for New Restrictions in Several Areas*, WASH. POST, June 14, 1995, at A4 (noting that during the first 100 days of the new Congress, GOP leaders in the House kept the abortion issue out of debate and focused instead on the economic issues contained in their "Contract With America").

103. Joyce Price, *Pro-Life Attack on Partial Birth Abortions Bears Fruit*, WASH. TIMES, June 4, 1995, at A4 (stating that in its "'Contract with the American Family,' the Christian Coalition urged Congress to 'enact restrictions on late-term abortions and end' partial-birth abortions").

104. See Kristine M. Holmgren, *Admire Suffragist's Model of Tenacity*, STAR TRIB. (Minneapolis-St. Paul), Dec. 31, 1995, at 21A; Pat Schroeder & Nita Lowey, "No Retrenchment" for Pro-Choice Side, ROLL CALL, May 22, 1995 (stating that some members of Congress have sought to counter such attempts to enact gag rules that would keep women from receiving information about their reproductive health choices from doctors).

105. See Holmgren, *supra* note 104, at 21A. But see Joyce Price, *Violence-sparked Tension won't Stop '95 March for Life*, WASH. TIMES, Jan. 22, 1995, at A3 (noting President Clinton's lifting of a "ban on federal funding on research using fetal tissue from induced abortions").

—Ban abortions in overseas military hospitals, thereby blocking access to abortion for U.S. women in the military, even when they pay for it themselves;¹⁰⁶

—Ban all federal funding for overseas family planning programs that provide abortion counseling or referrals, a measure that is known as “the international gag rule”;¹⁰⁷

—Ban the testing and marketing of the abortifacient RU-486;

—Eliminate Title X of the Public Health Service Act, the cornerstone of family planning programs, which provides basic reproductive health care to low income women and adolescents;¹⁰⁸

—Repeal FACE, The Freedom of Access to Clinic Entrances Act, which makes it a federal crime to use force or physical obstruction to interfere with reproductive health services;¹⁰⁹

—Force the Accreditation Council on Graduate Medical Education to repeal its requirement that obstetrics/gynecology programs provide training in abortion procedures—even though the Council exempts individuals and institutions with moral or religious objections to abortion;¹¹⁰

—Prohibit women in federal prisons from having abortions;¹¹¹

—Prohibit the District of Columbia from using locally-raised tax dollars to pay for abortions for low-income women;¹¹²

—Prohibit federal employees from choosing health benefit plans that cover abortions;¹¹³ and

—Withdraw Medicaid funding for abortions for low-income women in cases of rape, incest, or when the woman's life is endangered.

106. See Holmgren, *supra* note 104, at 21A.

107. See James V. Grimaldi, *Dornan Isn't Backing Off in His Clash vs. Gingrich*, ORANGE COUNTY REG., July 26, 1996, at A1 (noting that it was Republican Congressman Robert K. Dornan, “chairman of the military intelligence and personnel committees, [who] pushed through legislation to ban abortions at overseas military hospitals”).

108. See Holmgren, *supra* note 104, at 21A (discussing proposed repeal of Title X funding).

109. See Jerry Zremski, *'March for Life' Holds Higher Hopes; Activists feel New Congress will Listen, but Drastic Change is Unlikely*, BUFFALO NEWS, Jan. 22, 1995, at A3 (discussing proposed repeal of FACE).

110. George McKenna, *On Abortion: A Lincolnian Position*, ATLANTIC MONTHLY, Sept. 1995, at 51, 52 (discussing attempts to prohibit the Accreditation Council for Graduate Medical Education from requiring abortion training).

111. Letter from Maggie Wynne, Director, House Pro-Life Caucus, to Editor, *Washington Times*, reprinted in WASH. TIMES, Feb. 23, 1996, at A22 (discussing the law which prohibits the use of federal funds to pay for abortions for federal prisoners).

112. Edward Kennedy, Congressional Press Release, Feb. 27, 1996 (discussing opposition to a bill restricting the use of District of Columbia funds for abortion services).

113. See *Spotlight Story Federal Spending: House Votes to Retain Health Plan Ban*, AM. POL. NETWORK, July 18, 1996 (voting to retain ban).

To add insult to injury, the "Contract with the American Family," and many members of Congress who support it, put low-income women in a double-bind, as far as their reproductive freedom is concerned. As I have already explained, poor women are denied any funding for abortions, even if their pregnancies resulted from rape or incest, thus victimizing them a second time. Ironically, though, under the welfare "reform" proposals supported by some of the very same organizations and individuals, many poor women are denied any funding for the babies to whom they give birth. Under the "child exclusion" or "family cap" provisions included in the new federal law, as well as in many states, women are denied any welfare assistance for children born while their families are already receiving AFDC, children born to single mothers or mothers under eighteen years old, children whose mothers are under eighteen and not living with their parents, and children for whom paternity has not been established.¹¹⁴

These measures clearly seek to curtail childbearing by welfare recipients at the very same time that the cutbacks on abortion services seek to curtail their abortions. To further the irony, recall that many proponents of these measures also want to eliminate family planning services for poor women.¹¹⁵ Logically, the only remaining "choice" they would offer poor women is abstinence or celibacy.¹¹⁶ Indeed, that is the option expressly advocated by the radical right groups that are so influential with the current Congress.

C. THE CONTINUING DENIAL OF WOMEN'S CONSTITUTIONAL EQUALITY

As the abortion issue illustrates, a vast amount of ACLU resources—the time of our staff and volunteers—goes into helping real people to actually enjoy rights that are clearly theirs in principle. Combined with this "eternal vigilance"¹¹⁷ in enforcing accepted civil liberties, we also are constantly pushing forward the frontiers of the law. Our goal is to bring it closer to the ideal of liberty, equality, and justice for all, which was eloquently stated in the Declaration of Independence: "All men are created equal, and endowed by their creator with certain unalienable rights."

114. See Sylvia Moreno, *Lawmakers Tangle Over Welfare Caps; Plan Would End Benefits Boost for Births*, DALLAS MORNING NEWS, May 16, 1995, at 17A (discussing a Texas bill that would deny AFDC to some young mothers and cap benefits).

115. See, e.g., Rachel L. Jones, *Vote Threatens Family Planning Funds: Decision called "Pro-Life Victory,"* DENVER POST, July 21, 1995, at A2 (noting that the "federal program that provides family planning for poor women may soon be eliminated").

116. Cf. Kery Murakami, *Anti-Abortion GOP Legislators Face Dilemma Over Welfare Reform*, SEATTLE TIMES, Jan. 13, 1995, at A1 (noting argument by some that welfare cuts would actually encourage women to have abortions).

117. See *supra* text accompanying note 9 (stating full quote).

Since we in the ACLU believe that the word "men" in that famous passage should encompass both women and men, we have been working to secure full constitutional equality for women. Thanks to Justice Ginsburg's recent landmark decision in *United States v. Virginia (VMI)*, we have recently come very close to that goal, much closer than we were immediately before that ruling. In rejecting Virginia's proffered "separate but equal" school for women, the "Virginia Women's Institute for Leadership," as unconstitutional, the Court reversed the contrary ruling of the U.S. Court of Appeals for the Fourth Circuit.¹¹⁸ Moreover, in assessing the constitutionality of VMI's gender exclusionary admissions policy, the Supreme Court applied a more demanding level of constitutional scrutiny, one that is closer to the "strict scrutiny" it applies to any racial classifications.¹¹⁹

One could look at the *VMI* decision through a "glass-half-empty" or "glass-half-full" perspective. The more pessimistic view would stress that Justice Ginsburg remained faithful to the Court's past precedents by not subjecting gender-based classifications to the most exacting level of judicial scrutiny, to which it subjects racial classifications.¹²⁰ The more optimistic view would stress that, by repeatedly quoting the strongest language from the Court's previous decisions, Justice Ginsburg injected a renewed vigor into the Court's analysis of gender-based distinctions. Significantly, the lone dissenter, Justice Antonin Scalia (Justice Thomas did not participate in the decision), decried the Ginsburg opinion for, he said, in effect applying strict judicial scrutiny to gender classifications.¹²¹ If Justice Scalia is right, and if the Court continues to regard gender-based classifications with the same strong suspicion with which Justice Ginsburg regarded VMI's exclusionary policies, women's constitutional equality rights may indeed have the same secure status they would have received under the failed Equal Rights Amendment.¹²² While there is

118. *VMI*, 116 S. Ct. 2264, 2269 (1996); see also *United States v. Virginia*, 44 F.3d 1229 (4th Cir. 1995).

119. *VMI*, 116 S. Ct. at 2271 (holding, but without equating gender classifications with those based on race or national origin, that "the defender of the challenged action must show 'at least that the classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives'" (citations omitted)).

120. *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718 (1982); *Craig v. Boren*, 429 U.S. 190 (1976).

121. *VMI*, 116 S. Ct. at 2291 ("As to precedent: it drastically revises our established standards for reviewing sex-based classifications") (Scalia, J., dissenting).

122. The central language of the amendment states: "Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex."

In 1916 Alice Paul, a leader in the suffragist movement, founded the National Woman's Party (NWP), a political party dedicated to establishing equal rights for women. Paul viewed equality under the law as the essential foundation for full equality for women. Along with her colleagues, Paul began to work on constitutional amendments recognizing equal rights for women at both state and federal levels. See generally INEZ HAYNES IRWIN, *THE STORY OF ALICE PAUL AND THE NATIONAL WOMEN'S PARTY* (1977). Despite strong opposition by some women and men, the NWP introduced an Equal

much reason for optimism on this score, it still remains to be seen what the long-range implications of the *VMI* analysis will be in other contexts.

V. CONCLUSION

I would like to end with a quote from Ruth Bader Ginsburg, who is one of my heroines, and one of the many impressive women who I first heard speak when I was a student.

When President Clinton introduced Ruth Bader Ginsburg to the American people as his first Supreme Court nominee, her remarks concluded with a moving tribute to her mother, Celia Amster Bader. Justice Ginsburg has often said that she is haunted by memories of her late mother, whose intellectual gifts were not allowed to flourish in a male-dominated society.¹²³ How many of our mothers and grandmothers had dreams and talents they could not pursue? How many of their resulting frustrations have fueled our own aspirations? Thus, I would like to dedicate Ruth Bader Ginsburg's moving words about her own mothers to all our mothers, and to our foremothers in the women's rights movement; and also to all our daughters, and to our successors in the women's rights cause. She said:

My last thank-you . . . is to my mother, the bravest and strongest person I have known, who was taken from me much too soon. I pray that I may be all that she would have been had she lived in an age when women could aspire and achieve and daughters are cherished as much as sons.¹²⁴

Rights Amendment to the U.S. Constitution in 1923. It failed to get through the amendment process.

Opposition to the ERA in the 1970s was similar in some ways to opposition in the 1920s. Conservative politicians and organizations voiced strong opposition to the amendment. Phyllis Schlafly, one of the amendment's most vocal opponents, founded Stop ERA, a group that worked to defeat the amendment. Schlafly alleged that the ERA would force women to take on roles normally reserved for men and that equal rights meant women would give up the "privileges" of womanhood. She and others also appealed to opponents of abortion, arguing that the ERA would bar any restrictions on abortion. Despite this opposition, by August 1974 the amendment had been ratified by 33 of the required 38 states. A congressional mandate had set March 1979 as the deadline for ratification; by June 1978, only three additional states had approved the ERA. Ceding to popular sentiment, Congress granted a three-year, two-month extension for approval, yet not one additional state ratified the measure in that time. Ten years and two months after its first passage by Congress, the ERA failed to become part of the Constitution. Since its defeat, the ERA has been reintroduced in each opening session of Congress, and 16 states now guarantee equality of the sexes in their state constitutions.

123. Margolick, *supra* note 2, at A1.

124. *Transcript of President's Announcement and Judge Ginsburg's Remarks*, N.Y. TIMES, June 15, 1993, at A24.