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# People's Electric: Engaged Legal Education at Rutgers-Newark Law School in the 1960s and 1970s

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## PEOPLE’S ELECTRIC: ENGAGED LEGAL EDUCATION AT RUTGERS-NEWARK LAW SCHOOL IN THE 1960S AND 1970S

*George W. Conk\**

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### WHY NEWARK?

The Ames Moot Court Room at Harvard Law School was packed on a Friday night in September 1969. An overflow crowd rallied for the Chicago Eight. Professor Arthur Kinoy, defendant John Froines, and Tom Hayden’s defense attorney Leonard Weinglass reported on the courtroom confrontation that was front-page news every day. T-

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\* George W. Conk is an Adjunct Professor of Law and Senior Fellow of the Stein Center for Law & Ethics at Fordham Law School. He entered Rutgers Law School in 1970 and graduated in January 1974, having taken leave the fall of 1972 to volunteer in the Indochina Peace Campaign and the McGovern campaign. This Essay is dedicated to the professors of Rutgers Newark School of Law who trained me, the lawyers of the New Jersey Office of the Public Defender whose inspired, dogged work brought the repeal of the death penalty—the greatest accomplishment of our generation of New Jersey lawyers, and to my dear, late friend Louise A. Halper, ’73, who guided me in my quest to become a law teacher.

shirts and buttons saying “Join The Conspiracy” sold quickly. A motley crew of anti-war movement and “Black Power” leaders were charged with conspiracy to cross state lines to incite a riot at the 1968 Chicago Democratic Convention. ““ Kinoy’s stem-winder roused the young crowd—and me, fresh from two years in the Peace Corps in India and a graduate student of radical historian Howard Zinn. Like many other young activists—male and female—I changed course and applied to Rutgers-Newark, somewhere across the Rubicon in New Jersey. Kinoy had promised nights in the library until midnight, fighting to protect the “most fundamental principles, now under attack.” We weren’t disappointed.<sup>1</sup>

Three great shifts were underway, and Newark’s legal community and Rutgers Law School were at the heart of it all. African Americans’ demands for an end to poverty and discrimination, the anti-war movement, and the women’s liberation movement converged. Civil rights and liberties were the long-standing focus of three leading civil rights movement lawyers—Professor Arthur Kinoy, William Kunstler, and Morton Stavis. They were experienced and successful advocates who frequently and sometimes with spectacular success had represented civil rights workers in the south and before the U.S. Supreme Court.<sup>2</sup> They founded the Law Center for Constitutional Rights (CCR), which had its first office on Branford Place, across the street from Hobbie’s deli, a pastrami palace that fed much of Newark’s bar.<sup>3</sup>

In the middle and late 1960s, disappointment with the slow pace of change—particularly economic change—led African Americans to join a series of civil disturbances—urban riots—mostly in major cities. Prompted in part by Urban Renewal projects (often criticized as

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1. For a contemporary account by a New York Times journalist who covered the conspiracy trial, see J. ANTHONY LUKAS, *THE BARNYARD EPITHET AND OTHER OBSCENITIES: NOTES ON THE CHICAGO CONSPIRACY TRIAL* (1970); see also JOHN SCHULTZ, *THE CHICAGO CONSPIRACY TRIAL* (1972); Douglas Linder, *The Chicago Conspiracy Trial* (2007) (unpublished manuscript), available at <http://ssrn.com/abstract=1029397>.

2. In *Hamer v. Campbell*, Stavis successfully represented civil rights movement legend Fannie Lou Hamer in an attack on the Mississippi poll tax and the four-month registration requirement. See 358 F.2d 215 (5th Cir. 1966). Kinoy and Kunstler represented civil rights worker James Dombrowski in a landmark case enjoining the bad faith prosecution of the activist by Louisiana under its Subversive Activities and Communist Control Law. See *Dombrowski v. Pfister*, 380 U.S. 479 (1965).

3. The Law Center, relocated in 1971 to New York and renamed the Center for Constitutional Rights, remains an important progressive public interest law firm. See CENTER FOR CONST. RIGHTS, <http://ccrjustice.org> (last visited Mar. 12, 2013).

“Negro removal” projects) that cleared large residential areas, the disturbances in Newark were particularly severe. The state National Guard patrolled the streets, and there were deaths and widespread property damage.<sup>4</sup> Rutgers Law School’s new building had itself sparked controversy in and out of the school as protesters demanded jobs for African American and Latino construction workers.<sup>5</sup>

African American law students—who had been recruited—staged a dramatic protest that led to the establishment of a committee with the extravagant name “The Tripartite Commission.” There, faculty members, African American students, and others met to discuss the law school’s role in the current crisis. The results would shape Rutgers Law School: a Minority Student Program was created.<sup>6</sup>

“Poverty law,” civil rights and liberties, women’s rights, employment discrimination, and public education were the foci of legal education at Rutgers-Newark. In the late 1960s and 1970s, Rutgers-Newark—which we affectionately called People’s Electric—presented a model of engaged legal education that was and is unique. To my knowledge, no other law school has been so thoroughly characterized by a broad progressive social agenda.

Rutgers-Newark changed the profile of who became lawyers: the school was far ahead of the curve in admitting women. In 1971 the entering class was 40% women, the second largest percentage in the country.<sup>7</sup> The influx of women was part of an epochal nationwide transition that saw women go from 11% of entering law students in 1969 to nearly 37% in 1975.<sup>8</sup> Begun in 1968, its affirmative action program brought many minority students to the school. The Minority Student Program provided mentoring, internship and other guidance to minority students and later expanded these services to non-minorities from poor families).

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4. NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS (THE KERNER REPORT) chs. 1–2 (1967), *available at* <http://www.blackpast.org/?q=primary/national-advisory-commission-civil-disorders-kerter-report-1967> [hereinafter THE KERNER REPORT].

5. Alfred W. Blumrosen, *Forty Five Years Near Broad Street: A Memoir of Rutgers Law School*, 51 RUTGERS L. REV. 777, 804–14 (1999).

6. PAUL TRACTENBERG, A CENTENNIAL HISTORY OF RUTGERS LAW SCHOOL IN NEWARK: OPENING A THOUSAND DOORS 51–60 (2010).

7. Diane Crothers, *The Origins of the Women’s Rights Law Reporter in the Civil Rights and Women’s Liberation Movements*, 31 WOMEN’S RTS. L. REP. 190, 196 (2010).

8. See FRED STREBEIGH, EQUAL: WOMEN RESHAPE AMERICAN LAW 17 (2009).

As chronicled by some of its key professors, the history of Rutgers-Newark is one of which the law school is proud.<sup>9</sup>

### IMPACT LITIGATION

There were opportunities in Newark for all who were caught up in the excitement of the times—the civil rights movement, the War on Poverty, the rise of “women’s liberation,” and, of course, opposition to the war in Vietnam. In the mid-1960s, a faculty assembled at Rutgers-Newark that would make great innovations in legal education—clinical education by professors who conceived of and built the school as a law-reform institution.<sup>10</sup>

Frank Askin

Alfred Blumrosen

Ruth Bader Ginsburg

Willard Heckel

Arthur Kinoy

John M. Payne

Annamay Sheppard

Alfred Slocum

Nadine Taub

Paul Tractenberg<sup>11</sup>

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9. See, e.g., Frank Askin, *The Origins of the People’s Electric Law School*, RUTGERS SCH. L. NEWARK, <http://www.law.newark.rutgers.edu/public-service/people-s-electric-law-school> (last visited Mar. 12, 2013); see generally TRACTENBERG, *supra* note 6 (chronicling the first one hundred years of Rutgers School of Law at Newark, including the history of the Minority Student Program). Rutgers reports that to date, 2,500 students have graduated from the program. *Minority Student Program*, RUTGERS SCH. L. NEWARK, <http://law.newark.rutgers.edu/admissions-financial-aid/minority-student-program> (last visited Mar. 12, 2013).

10. Frank Askin, *A Law School Where Students Don’t Just Learn the Law; They Help Make the Law*, 51 RUTGERS L. REV. 855, 857 (1999); see also *History*, RUTGERS SCH. L. NEWARK, <http://law.newark.rutgers.edu/clinics/history> (last visited Mar. 12, 2013) (describing the clinical program and its history).

11. The group was composed of seven Jews, an African American, and a gay white man whose sexual orientation was an open secret. In my years there, those facts never occurred to me—save that Slocum was obviously a black man. (“Black,” rather than Negro or African-American, was the dominant parlance of the day in which “Black Power” was a popular slogan. Thus, the Left’s alternative to the traditionally Black National Bar Association was the National Conference of Black Lawyers—led for many years by Lennox Hinds, ’72, and Victor Goode, ’73.)

The names of these key faculty—not to slight others—comprise an honor roll of progressive lawyers. Their achievements are carved in the law books, not the law reviews. Business did not interest them. They were career teachers and litigators. Slocum, for example, was an architect of the Minority Student program and a public servant as New Jersey's Public Advocate.<sup>12</sup> They founded or led clinics, which were the driving force of the People's Electric. Their creed was not to observe neutrally, but rather to make a difference—for legal, social, and economic equality of all and particularly for African Americans and Latinos; to advance the rights of women; and to expand and protect the fundamental rights of speech, privacy, and due process of law. They scrupulously held to certain basic precepts: a belief in the integrity of the judiciary, confidence that reason could reach every judge, and that the basic principles of our legal system were adequate to the tasks before us.

The result was that Newark—not Berkeley, Cambridge, New Haven, or Washington, D.C.—was the most exciting place to be a law student or law professor in the mid-1960s to late 1970s. The Law Center for Constitutional Rights began there. Rutgers-Newark Law School was the most innovative, exciting, and effective American law school in the 1960s and 1970s. The tension between the role of lawyers as public persons—officers of the court and the standard bearers of the rule of law—and lawyers as the facilitators of commerce that has troubled the profession had little resonance at Rutgers Law School. Education there was virtually free when I enrolled. Law students were not troubled by the prospect of burdensome debt.<sup>13</sup> Although it had once been a huge proprietary law school (2,335 students in the 1920s), it became part of the University of Newark and in 1946 was absorbed into Rutgers University. As employees of the State University of New Jersey, the professors at Rutgers-Newark were salaried and assured of a pension

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12. See *Faculty Profile: Alfred Slocum*, RUTGERS SCH. L. NEWARK, <http://law.newark.rutgers.edu/our-faculty/faculty-profiles/alfred-slocum> (last visited Mar. 12, 2013).

13. In my second year, I applied for and got a full scholarship. In my third year, tuition doubled to \$1,000. I kept the \$500 scholarship. There was also a \$60 student activity fee. The total cost was \$1,180 for three years. For a point of reference, in 1970, the tuition at Boston College Law School was \$2,100 and Boston University was \$2,500. When I got my first job in 1976 as a lawyer and business representative for Actors Equity Association, I made \$13,500—six times one year's tuition at B.C.

by their eligibility for the public employees retirement system, and so they had both security and academic freedom.<sup>14</sup>

### IN TUNE WITH THE TIMES

Rutgers Law School reflected and joined the progressive movements of the 1960s and 1970s. Primary among the driving forces were the civil rights movement and the effort to overcome the damage done by centuries of slavery and a century of the American apartheid system called Jim Crow.<sup>15</sup> The mass movement of African Americans in the South attracted the support and devotion of millions. The landmarks were the Civil Rights Act of 1964,<sup>16</sup> the Voting Rights Act of 1965,<sup>17</sup> the Fair Housing Acts of 1968,<sup>18</sup> and the Economic Opportunity Act of 1964.<sup>19</sup> The last of these was the enabling legislation for what Lyndon Johnson declared would be a War on Poverty.<sup>20</sup>

In 1977 the great New Jersey judge and Supreme Court Justice William J. Brennan, frustrated by the Supreme Court's pulling back from the expansionary mode of the Warren Court, lectured at Harvard Law School:

[S]tate courts cannot rest when they have afforded their citizens the full protections of the federal Constitution. State constitutions, too, are a font of individual liberties, their protections often extending beyond those required by the Supreme Court's interpretation of federal law. The legal revolution which has brought federal law to the fore must not be allowed to inhibit the independent protective force of state law—for without it, the full realization of our liberties cannot be guaranteed.<sup>21</sup>

Rutgers Law professors had already recognized the need and opportunity to utilize state constitutions.

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14. TRACTENBERG, *supra* note 6, at 21–52.

15. *See generally* C. VANN WOODWARD, *THE STRANGE CAREER OF JIM CROW* (1955) (offering an in-depth analysis of the origins and effects of the Jim Crow laws in the South).

16. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. §§ 1981–2000h-6).

17. 42 U.S.C. §§ 1973–1973aa-6 (1965).

18. 42 U.S.C. §§ 3601–3619 (1968).

19. Pub. L. No. 88-452, 78 Stat. 508 (1964).

20. ROBERT A. CARO, *THE YEARS OF LYNDON JOHNSON: THE PASSAGE OF POWER* 538–45 (2012).

21. William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977).

Two of the lasting programs of that era were Community Legal Services for the poor and the Headstart preschool programs (part of the Community Action Programs). Educational equality and legal protections for the poor were People's Electric's signature issues. Annamay Sheppard, a left-leaning local lawyer and 1958 graduate was one of the first to respond to the civil legal services programs<sup>22</sup> that the Economic Opportunity Act of 1964 enabled.<sup>23</sup> Contrary to those who would use the contemptuous Tory phrase "nanny state" to dismiss these programs, the statute and the Office of Economic Opportunity (OEO) headed by Sargent Shriver emphasized self-help and economic development.<sup>24</sup>

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22. Annamay T. Sheppard, *Bricks, Mortar, Heart*, 51 RUTGERS L. REV. 971, 974 (1999).

23. For a synopsis of the program's origins, see *History: The Founding of the LSC*, LEGAL SERVS. CORP., <http://www.lsc.gov/about/what-is-lsc/history> (last visited Mar. 12, 2013). See also Economic Opportunity Act, *supra* note 19.

24. Programs developed because of the statute and the OEO to help achieve self-help and development include:

VOLUNTEERS IN SERVICE TO AMERICA (VISTA), which recruited, selected, trained, and referred volunteers to state or local agencies or private nonprofit organizations to perform duties in combating poverty;

THE JOB CORPS, which provided work, basic education, and training in separate residential centers for young men and young women, ages sixteen to twenty-one;

NEIGHBORHOOD YOUTH CORPS, which provides work and training for young men and women, ages sixteen to twenty-one, from impoverished families and neighborhoods;

WORK STUDY, which provides grants to colleges and universities for part-time employment of students from low-income families who need to earn money to pursue their education;

URBAN AND RURAL COMMUNITY ACTION, which provided financial and technical assistance to public and private nonprofit agencies for community action programs developed with "maximum feasible participation" of the poor and giving "promise of progress toward elimination of poverty";

ADULT BASIC EDUCATION, which provides grants to state educational agencies for programs of instruction for persons eighteen years and older whose inability to read and write English is an impediment to employment;

VOLUNTARY ASSISTANCE FOR NEEDY CHILDREN, which establishes an information and coordination center to encourage voluntary assistance for deserving and needy children;

LOANS TO RURAL FAMILIES, which provides loans not exceeding \$2,500 that will assist low-income rural families in permanently increasing their income;

ASSISTANCE FOR MIGRANT AGRICULTURAL EMPLOYEES, which provides assistance to state and local governments, public and private nonprofit agencies or individuals in operating programs to assist migratory workers and their families with housing, sanitation, education, and day care of children;

EMPLOYMENT AND INVESTMENT INCENTIVES, which provided loans and guarantees, not in excess of \$25,000 to a single borrower, for the benefit of very small businesses;



It is worth remembering, too, that President Lyndon B. Johnson once said:

For so long as man has lived on this earth poverty has been his curse. On every continent in every age men have sought escape from poverty's oppression. Today for the first time in all history of the human race, a great nation is able to make and is willing to make a commitment to eradicate poverty among its people.<sup>25</sup>

The Legal Services programs for the poor were part of the OEO-funded Rural and Urban Community Action Programs. One early program was the Newark Legal Services Project, which was based in the Law School. After serving as Deputy Director, Annamay Sheppard joined the faculty as its third female member, along with Ruth Bader Ginsburg and Eva Hanks.<sup>26</sup> With Prof. Richard Chused, she soon became the co-director of the Urban Legal Clinic.<sup>27</sup>

#### AFFIRMATIVE ACTION

Ending school segregation in the south required more than just wiping the Jim Crow laws from the books; it required affirmative action.<sup>28</sup> The Civil Rights Act of 1964 conditioned federal aid to local schools in dismantling the dual school systems and bolstered the courts that had been stymied by a decade of white southern defiance

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WORK EXPERIENCE, which provided payments for experimental, pilot, and demonstration projects to expand opportunities for work experience and needed training of persons who are unable to support or care for themselves or their families, including persons receiving public assistance.

See The 1964 Economic Opportunity Act, *supra* note 19.

25. Audiotape: Discussion Between President Johnson and Representative Phil Landrum Pertaining to the Economic Opportunity Act (May 14, 1964), *available at* <http://whitehousetapes.net/clip/lyndon-johnson-phil-landrum-economic-opportunity-act>.

26. See STREBEIGH, *supra* note 8, at 13–14.

27. Sheppard, *supra* note 22, at 975. I earned 12 academic credits as a clinical student in 1972. I tried and lost my first case—a retaliatory eviction defense of a tenant leader. I did not understand that the bubble of the presumption of retaliatory intent burst once rebuttal testimony had offered a non-discriminatory motive. Absent evidence of hostile intent, my client's claim failed. Richard Chused, a professor at New York Law School, spent thirty-five years at Georgetown where he explored the property law implications of decisions like *Javins v. First National Realty Corp.* See *Faculty Profile: Richard Chused*, N.Y. L. SCH., [http://www.nyls.edu/faculty/faculty\\_profiles/richard\\_chused/](http://www.nyls.edu/faculty/faculty_profiles/richard_chused/) (last visited Mar. 12, 2013).

28. See *Green v. Cnty. Sch. Bd. of New Kent*, 391 U.S. 430, 437–38 (1968) (holding that vestiges of school segregation must be eliminated “root and branch”).

of the mandates of *Brown v. Board of Education*.<sup>29</sup> Despite the transition to formal equality, the situation of black people in the north was troubled by the fact that centuries of discrimination left millions of black people poor, ill-educated, and unprepared for the new “cybernetic” economy, the shape of which could only be glimpsed at the time. Rising expectations confronted legal, political, and economic walls. Beginning with the Watts neighborhood in Los Angeles, an era of urban disorders emerged. Cities burned and the police and state national guard responded to suppress the bitter, spontaneous uprisings.<sup>30</sup> The phenomenon known as “white flight” accelerated the city-suburb lines as a racial divide.<sup>31</sup> The process had long been underway. The iconic suburban developer William Levitt followed an openly segregationist policy in his FHA-assisted tract house developments.<sup>32</sup>

The National Advisory Commission on Civil Disorders was formed shortly after the 1967 Newark riot, and its report on the causes of civil disorders became known by the name of its chairman, former Illinois Governor Otto Kerner.<sup>33</sup> The Kerner Report stated its conclusions plainly. The Commissioners placed the blame squarely on racism, warning, “Our Nation Is Moving Toward Two Societies, One Black, One White—Separate and Unequal.”<sup>34</sup>

The 1967 riots gave enormous impetus to the changes at Rutgers Law School, which was located in downtown Newark, as it is now.

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29. *United States v. Jefferson Cnty.*, 380 F.2d 385, 389 (5th Cir. 1967) (en banc) (“[B]oards and officials administering public schools in this circuit have the affirmative duty under the Fourteenth Amendment to bring about an integrated, unitary school system in which there are no Negro schools and no white schools—just schools. Expressions in our earlier opinions distinguishing between integration and desegregation must yield to this affirmative duty we now recognize.”). Circuit Judge John Minor Wisdom’s opinion relied on DHEW guidelines to impose rigid desegregation requirements in schools in the deep south states of the old Fifth Circuit. *See Jefferson Cnty.*, 372 F.2d at 836.

30. *See* THE KERNER REPORT, *supra* note 4.

31. *See, e.g., White Flight and Urban Riots*, TEMPLE UNIV. & N. PHILA., <http://www.urbanosis.org/temple/?q=whiteflight> (last visited Mar. 15, 2013).

32. *See Levitt & Sons, Inc. v. Div. Against Discrimination in the State Dept. of Educ.*, 158 A.2d 177, 179 (N.J. 1960).

33. *See* THE KERNER REPORT, *supra* note 4.

34. *Id.* Its conclusion that racism was the main problem, fifteen years later, yielded in the Reagan period to the conservative view that liberals’ support of uplift and support programs had excused or enabled bad, self destructive behavior which perpetuated poverty and independence. *See, e.g.,* Stephan Thernstrom, *The Kerner Commission Report Lacks Credibility*, Address Before the Heritage Foundation (Mar. 13, 1998), available at <http://www.heritage.org/research/lecture/the-kerner-commission-report>.

The development of the new law school building, Ackerson Hall, also sparked protests demanding that black workers be hired to work on the project. Led by Professor Alfred Blumrosen, the University was persuaded to side with the picketers and file a complaint with the state Education Department's Division on Civil Rights against the contractors and trade unions asserting discrimination against African American and Latino construction workers. The building was erected and Rutgers' commitment to affirmative action advanced.<sup>35</sup>

#### CLINICAL EDUCATION AND AFFIRMATIVE ACTION

Rutgers-Newark's emphasis on clinical education and affirmative action began early. The postwar development toward greater academic strength of "university law schools" disparaged the programs that trained so many in the postwar years as mere trade schools. Ending the night-school part-time program was a key objective of Dean Lehan Tunks, who sought a "great full-time university law school" after his 1953 appointment.<sup>36</sup> In 1955, Tunks, Associate Dean Willard Heckel, and Assistant Dean Malcolm Talbott recruited two Michigan grads, Alfred Blumrosen and Clyde Ferguson. Blumrosen had spent a couple of years in small firm practice in Ann Arbor and regretted the lack of practical training at Michigan Law School. Ferguson—recruited at the same AALS "meat market" as was Blumrosen—had been an Assistant U.S. Attorney. He would become the school's first Black faculty member. The faculty was "looking for professors to introduce what we now call 'clinical' educational experiences" recalls Blumrosen.<sup>37</sup> It would be more than a decade before the stars aligned to bring into being the practical training and commitment to educating minority lawyers that made Rutgers Newark the premier training ground of those who sought to use the law as an "instrument of social change," a phrase that often came from our lips. The civil rights movement had shown that it was possible and we sought to defend those gains, and advocates of women's liberation sought and expected similar broad gains.

Dean Willard Heckel,<sup>38</sup> an early supporter of civil rights for minorities and women, his longtime partner, law professor and later

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35. See Blumrosen, *supra* note 5, at 804–14.

36. TRACTENBERG, *supra* note 6, at 39–42.

37. Blumrosen, *supra* note 5, at 779.

38. Heckel, a leading figure in the Presbyterian Church, is remembered in Alfred W. Blumrosen, *Willard Heckel and the Spirit of Rutgers Law School*, 41 RUTGERS L. REV. 48 (1989). See also C. Willard Heckel, 74, *Ex-Law Dean, Dies*, N.Y. TIMES,

Rutgers-Newark Provost Malcolm Talbott, and other faculty of the law school had made conscious efforts to “selectively” recruit black students in the 1960s.<sup>39</sup> Some of them went on to great prominence. Through this approach, which was administered by Malcolm Talbott, the school enrolled perhaps a dozen minority students between 1960 and 1968. Among them were two future Public Advocates,<sup>40</sup> Alfred A. Slocum, who also became the school’s third black law professor in 1970, and Stanley Van Ness.<sup>41</sup> Important as those recruits were, the faculty was not content to stop there; they also created a committee, headed by Professor Frank Askin, whose objective was to develop a “critical mass” of minority students. The decision was to expand the student body to add twenty minority students the first year and forty by the second year. Thus, the Rutgers Minority Student Program was born, which would graduate almost 3,000 lawyers in the next thirty-one years.<sup>42</sup>

The faculty and the students responded, forming an extravagantly named Tripartite Commission of three Black students, three SBA

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Apr. 7 1988, <http://www.nytimes.com/1988/04/07/nyregion/c-willard-heckel-74-ex-law-dean-dies.html>.

39. See Bernard K. Freamon, *The Origins of the Anti-Segregation Clause in the New Jersey Constitution*, 35 RUTGERS L.J. 1267 (2004) (discussing Heckel’s role in drafting of the New Jersey Constitution of 1947—a document which included strong civil rights provisions and other progressive provisions). On Heckel’s support for progressive positions, see TRACTENBERG, *supra* note 6, at 52; Elizabeth Langer, *Seizing the Moments: The Beginnings of the Women’s Rights Law Reporter and a Personal Journey*, 30 WOMEN’S RTS. L. REP. 592 (2009).

40. The Department of the Public Advocate was created in 1974 in the administration of Democrat Brendan T. Byrne. Frederick D. Murphy, *Government Under Glass*, BLACK ENTERPRISE (July 1977), at 45, 45. Stanley Van Ness was the first Public Advocate. *Id.* Republican Governor Christine Todd Whitman abolished the Department in 1994. See N.J. STAT. ANN. §§ 52:27E-1–52:27E-15 (West 1994) (repealed 1994). The Department was restored in 2005 by Democratic Governor Richard Codey, and abolished again by Republican Governor Chris Christie. See N.J. STAT. ANN. § 52:27EE-5 (West 2005) (repealed 2010). The Public Advocate department included the Public Defender which was not abolished, nor was the Division of Rate Counsel. See *Learn About the Division*, DIVISION RATE COUNSEL, <http://www.state.nj.us/rpa/about/> (last visited Mar. 15, 2013); *OPD Structure*, OFF. PUB. DEFENDER, [http://www.state.nj.us/defender/his\\_stru.shtml](http://www.state.nj.us/defender/his_stru.shtml) (last visited Mar. 15, 2013). Functions repealed include: Divisions of Advocacy for the Developmentally Disabled, Mental Health Advocacy, Elder Advocacy, Child Advocate, and Public Interest Advocacy.

41. See Blumrosen, *supra* note 5, at 814. The first black law professor at Rutgers was Clyde Ferguson. See *id.* at 780.

42. Blumrosen, *supra* note 5, at 814–15. For a history of the Minority Student Program, see *Minority Student Program*, RUTGERS SCH. L. NEWARK, <http://law.newark.rutgers.edu/admissions-financial-aid/minority-student-program> (last visited Mar. 21, 2013).

representatives, and three faculty members. Their May 1970 report, “Strategy for Change,” would transform the school. They demanded clinical education to train a “new breed of lawyers with deep roots in the honored past of our profession who [we] would characterize as people’s lawyers.”<sup>43</sup> Dramatic changes in the law school’s curriculum followed. A new required first year course was added called Legal Representation of the Poor, which was the brainchild of Professor Eli Jarmel. The course expressed the spirit of the times. Professor Paul Tractenberg recalls that when he polled his Corporations class, most responded that they only wanted to learn corporate law to learn how to undermine capitalism.<sup>44</sup>

But most dramatic was the creation of the clinics. The faculty promptly established the Constitutional Litigation Clinic, the Urban Legal Clinic (where students represented the poor in civil matters), and the Administrative Process Project, which assisted the New Jersey Division on Civil Rights in its work, from drafting regulations to opening the skilled trade union apprenticeship programs to minority workers.<sup>45</sup> Students at People’s Electric now had the opportunity to engage deeply in the legal struggles of the day. And the atmosphere was electric indeed when the first class entered a school transformed by the faculty’s embrace of the Tripartite Commission report.

The 1970-1971 school year saw several key shifts in the composition of Rutgers-Newark’s student body. Committed to doubling the number of African American lawyers in the state within five years, Rutgers began the year with forty new black students,<sup>46</sup> doubtless more than any “white” law school had ever seen. It also saw a substantial increase in female students and a strong group of anti-war movement activists who came to Newark for the opportunity

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43. Arthur Kinoy popularized the phrase. *See* ARTHUR KINOY, *RIGHTS ON TRIAL: THE ODYSSEY OF A PEOPLE’S LAWYER* (1983).

44. TRACTENBERG, *supra* note 6, at 53–66 (chronicling the story of the Tripartite Commission and the curricular changes it spurred); *see also* Blumrosen, *supra* note 5, at 814–15.

45. *See* Askin, *supra* note 9, at 855; Blumrosen, *supra* note 5, at 810–14. From 1971–72 I was a student in the APP, assigned to the New Jersey Division of Law’s Deputy for Civil Rights, David Ben-Asher.

46. TRACTENBERG, *supra* note 6, at 55–56. By 1971 Black students were 20% of the student body.

to work with Arthur Kinoy on the appeal of the Chicago Seven convictions.<sup>47</sup>

The Chicago Seven appeal demanded much of these students. Dozens of students worked reviewing and summarizing trial transcripts, researching, and even drafting a few of the points in the massive brief. A few blocks away, Morton Stavis was working on the appeal of the contempt convictions of the trial lawyers in the Chicago case—Leonard Weinglass, whose office was across the street from Ackerson Hall, and William Kunstler, co-founder with Kinoy and Stavis of the Law Center for Constitutional Rights.<sup>48</sup>

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47. The trial record can be found at *Famous American Trials: "The Chicago Seven" Trial 1969-1970*, FAMOUS TRIALS, <http://law2.umkc.edu/faculty/projects/ftrials/Chicago7/chicago7.html> (last visited Mar. 16, 2013). A TV review twenty years later that captures much of the feel of the times can be found at *Chicago Tonight: The Chicago Conspiracy Trial* (WTTW television broadcast Feb. 21, 2005), available at [http://www.richsamuels.com/nbcmm/chicago\\_conspiracy\\_trial/index.html](http://www.richsamuels.com/nbcmm/chicago_conspiracy_trial/index.html).

The report of Daniel Walker to the National Commission on the Causes and Prevention of Violence concluded:

Police violence was a fact of convention week. Were the policemen who committed it a minority? It appears certain that they were—but one which has imposed some of the consequences of its actions on the majority, and certainly on their commanders. There has been no public condemnation of these violators of sound police procedures and common decency by either their commanding officers or city officials. Nor (at the time this report is being completed—almost three months after the convention) has any disciplinary action been taken against most of them. That some policemen lost control of themselves under exceedingly provocative circumstances can be understood; but not condoned. If no action is taken against them, the effect can only be to discourage the majority of policemen who acted responsibly, and further weaken the bond between police and community.

Although the crowds were finally dispelled on the nights of violence in Chicago, the problems they represent have not been. Surely this is not the last time that a violent dissenting group will clash head-on with those whose duty it is to enforce the law. And the next time the whole world will still be watching.

Daniel Walker, *An Excerpt from Rights in Conflict*, CHICAGO '68, <http://chicago68.com/ricsumm.html> (reproducing the preface to the report) (last visited Mar. 12, 2013).

48. That fall, the Center for Constitutional Rights (renamed to omit the word Law at the insistence of the local New Jersey ethics committee) relocated above a paint store on Ninth Avenue in New York. Counsel on appeal were mainly from the Center. Kinoy was the principal drafter of the merits brief, and Stavis the contempt brief. All the convictions were reversed. *In re Dellinger*, 461 F.2d 389 (7th Cir. 1972). At a second trial, District Judge Edward T. Gignoux found David Dellinger, Abbott Hoffman, Jerry Rubin and William Kunstler guilty of various contempts but did not impose any sanctions. *In re Dellinger*, 370 F. Supp. 1304 (N.D. Ill. 1973). The sentences were upheld on appeal. *In re Dellinger*, 502 F.2d 813 (7th Cir. 1974).

At the same time, Ruth Bader Ginsburg was teaching an innovative seminar course on women and the law; the readings began with Simone de Beauvoir's *The Second Sex*.<sup>49</sup> The Women's Rights Litigation Clinic soon followed, which brought litigator Nadine Taub to the school. Students soon founded the *Women's Rights Law Reporter*, which was the first specialty law student journal devoted to the subject.<sup>50</sup>

Professor Paul Tractenberg joined the faculty in 1970. He soon began an Education Law seminar and went on to found and lead the Education Law Center. That Newark-based public interest law firm has led the forty-year struggle in litigation and legislation to make the promise of equal education a reality for students in poor districts.<sup>51</sup>

Dozens of People's Electric Law School (PELS) students began a decade of assisting in litigation efforts that transformed American law, imbuing the students not simply with the skills that their teachers honed but also with the confidence to believe that they could have an impact on the law. One can best capture the depth of that confidence by surveying the litigation accomplishments of that extraordinary group of law professors.<sup>52</sup>

#### URBAN LEGAL CLINIC

The Urban Legal Clinic was formed first. The clinic grew out of OEO-funded legal services projects that would transform the constitutional landscape with victories like *Goldberg v. Kelly*, in which New York's MFY Legal Services expanded the concept of due process to establish the right to notice and a fair hearing before government welfare benefits were terminated.<sup>53</sup>

The Urban Legal Clinic's focus was on economic rights. It was basically a branch neighborhood Legal Services office, and many

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Stavis, Kunstler, and Doris Peterson of the CCR represented the contemnors. *Id.* at 814.

49. SIMONE DE BEAUVOIR, *THE SECOND SEX* (H.M. Parshley ed. & trans., Bantam Books 1961) (1949).

50. Strebeigh, *supra* note 8, at 19; TRACTENBERG, *supra* note 6, at 60–61; *see also* Nadine Taub, *The Rutgers-Newark Women's Rights Litigation Clinic: An Old and a New Story?* 51 RUTGERS L. REV. 1023 (1999).

51. *See* TRACTENBERG, *supra* note 6, at 82–84. For the history of the Education Law Center, which Tractenberg founded, *see Mission and History*, EDUC. L. CENTER, <http://www.edlawcenter.org/about/mission-history.html> (last visited Mar. 12, 2013).

52. *See generally* Askin, *supra* note 9.

53. 397 U.S. 254, 261 (1970). Mobilization for Youth (MFY) was an OEO Community Action Program in Manhattan.

students worked as interns in the summer at the neighborhood legal offices of the suburban and Newark project offices. There, they contended with the problems of the urban poor—particularly the struggles to avoid eviction and to receive the repairs that the landmark case *Marini v. Ireland* mandated.<sup>54</sup> In a victory for Camden Regional Legal Services and the New Jersey State Office of Legal Services, the New Jersey Supreme Court had extended its concept of “implied warranty of habitability” to every residential leasehold and introduced us to the equitable distinction between money due and money owed.<sup>55</sup> The New Jersey opinion was published eleven days after the more widely recognized landmark decision by Circuit Judge J. Skelly Wright in *Javins v. First National Realty Corp* came down.<sup>56</sup> The two decisions exemplified the rapid development of a new consumer-protective common law—a trend that could be traced to the New Jersey Supreme Court’s *Henningsen v. Bloomfield Motors* decision, which introduced to product liability law the concept of implied warranty of fitness for use.<sup>57</sup>

We students represented tenants in rent strikes and eviction proceedings, arguing for rent reductions for broken toilets and fallen plaster ceilings, cracked windows, cold radiators, and broken locks on apartment building doors. Others worked on child support cases, often for men against whom the County Welfare Board pressed efforts to recoup welfare funds. Consumer protection was a major focus, as legal services lawyers handled consumer bankruptcy cases before pressure from creditors and some sectors of the bar led Congress to sharply limit the ability of Legal Services attorneys to handle fee-generating cases.<sup>58</sup> Other students worked at the “Essex-Newark Joint Law Reform Project.” Such projects made Legal Services the target of elected officials who resented the reform efforts

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54. 265 A.2d 526, 534–35 (N.J. 1970).

55. *Id.*

56. 428 F.2d 1071 (D.C. Cir. 1970); *see also* Richard Chused, Saunders (*a.k.a.* Javins) v. First National Realty Corporation, 11 GEO. J. ON POVERTY L. & POL’Y 191 (2004); Javins *Project: Court Papers and Pictures*, GEORGETOWN L. LIBR., <http://www.law.georgetown.edu/library/collections/javins/index.cfm> (last visited Mar. 12, 2013). The Chused paper appears in abridged form in PROPERTY STORIES (LAW STORIES) (Gerald Korngold & Andrew Morriss eds., 2d ed. 2009).

57. 161 A.2d 69 (N.J. 1960).

58. 45 C.F.R. §§ 1609.1–1609.6 (2012).



and the federal mandate of “maximum feasible participation of the poor.”<sup>59</sup>

The attorneys at the Newark Law Reform project ran afoul of Superior Court judge (and future state Attorney General) Irwin Kimmelman, who had ordered the leaders of a rent strike in a public housing project to turn over to the court the rent funds their members had withheld. The defiant tenant leaders instead returned the money orders they had collected to the tenants. The tenants’ young Legal Services lawyers were held in contempt for failure to report the defiance as soon as they learned of it. The lawyers were represented by Sheppard and Dickinson Debevoise (now a Senior U.S. District Judge). The New Jersey Supreme Court finally vacated the contempts in 1975.<sup>60</sup>

Sheppard scored a notable victory in *Oxford Consumer Discount v. Stefanelli*.<sup>61</sup> In that case, the New Jersey Supreme Court affirmed a judgment exonerating homeowners from an obligation to a Pennsylvania Secondary mortgage lender who had not complied with New Jersey law.<sup>62</sup> Something of the spirit of the times may be gleaned from the dissent of Chief Justice Joseph Weintraub, which began:

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59. *History of Civil Legal Aid*, NAT’L LEGAL AID & DEFENDER ASS’N, [http://www.nlada.org/About/About\\_HistoryCivil](http://www.nlada.org/About/About_HistoryCivil) (last visited Mar. 15, 2013). On Maximum feasible participation, see, e.g., *War on Poverty*, SARGENT SHRIVER.ORG, <http://www.sargentshriver.org/articles/war-on-poverty> (last visited Mar. 15, 2013).

The OEO principle of empowerment—we strove for maximum feasible participation of the poor—outraged America’s mayors and created enormous political headaches for Sarge every day. The concept was simple: poor people had a right to one-third of the seats on every local poverty program board. The mayors went crazy. I was once asked by a mayor who had closed five neighborhood centers: ‘Why should I open five organizations to campaign against me.’ Sarge never buckled. He hated welfare and believed in community action. Even when Johnson effectively pulled the plug on the War on Poverty to fund the war in Vietnam, Sarge fought on and won. We didn’t always get our paychecks on time because Congress delayed our funding—that’s why I got an American Express Card in 1967—but in the end Sarge won the battle and the anti-poverty program went on. It’s not always appreciated today, but during the Shriver years more Americans got out of poverty than during any similar time in our history.

*Id.*; see also Lillian B. Rubin, *Maximum Feasible Participation: The Origins, Implications, and Present Status*, 389 ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE 14 (1969).

60. See *In re Callan*, 331 A.2d 612 (N.J. 1975).

61. 262 A.2d 874 (N.J. 1970).

62. *Id.*

This case has an emotional overlay for it involves the distasteful business of lending money at predatory rates to people who are poor or soon will be. I would add, irrelevantly to be sure, a regret that government does not provide loans at tolerable interest charges for those of our citizens who need them most. Instead, the impecunious are made a separate class, alone required to underwrite the high credit risk attributed to some of their number.<sup>63</sup>

Another aspect of the spirit of the times—and the resistance met by those who asserted the rights of the poor—is seen in the clinic's victory in *Smith v. Walker*, a proceeding for child support under New Jersey's Bastardy Act for "support of an illegitimate child."<sup>64</sup> The County Court judge reversed the Municipal Court and ordered that an indigent putative father was entitled to have an HLA blood-grouping test paid for by the County.<sup>65</sup> But the court felt constrained to observe that:

In the briefs filed in this matter and in the opinion of the municipal court, much attention was paid to the fact of defendant's alleged indigency, but this properly ought not to be an issue before the court. The Supreme Court caused to be published on August 3, 1970, in the New Jersey Law Journal (93 N.J.L.J. 577), the following directive: "The attention of the Supreme Court has been called to the fact that in some instances judges have been questioning Legal Services attorneys as to their right to represent clients before the court. The Supreme Court is of the view that it is not the responsibility of the judge and should not be his concern whether a person represented by a Legal Service Project attorney is in fact eligible for such representation. The question of eligibility for representation by the Legal Services attorney is a matter for determination by those responsible for the operation of the Legal Services Offices and not the court."<sup>66</sup>

The Urban Legal Clinic remains a part of Rutgers Law School.<sup>67</sup> Although the bulk of its work consists of individual case representation, its faculty has also identified important law reform issues. The clinic now boasts of a string of landmark victories reaching to the Circuit and Supreme Courts of the United States. The clinic often collaborated with the Constitutional Litigation Clinic

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63. *Id.* at 877–78 (Weintraub, C.J., dissenting).

64. 350 A.2d 319 (N.J. Essex County Ct. 1975).

65. *Id.*

66. *Id.* at 322.

67. See *Urban Law Clinic*, RUTGERS SCH. L. NEWARK, <http://law.newark.rutgers.edu/clinics/urban-legal-clinic> (last visited Mar. 15, 2013).

in such matters, providing students with the opportunity to participate in high-level appellate litigation under experienced faculty leadership.<sup>68</sup>

### ADMINISTRATIVE PROCESS PROJECT

Professor Alfred Blumrosen came to Rutgers in 1955. Labor and employment law was his principal personal, professional, and scholarly interest. With his wife and frequent collaborator Ruth, he was a participant in key civil rights victories in New Jersey courts<sup>69</sup> and was an architect of the strengthening of the New Jersey Division on Civil Rights and the Federal Equal Employment Opportunity Commission. Blumrosen had personal experience with affirmative action before the term was even coined.<sup>70</sup>

Blumrosen, then an assistant professor at Michigan, was interviewed at AALS by Willard Heckel, then Associate Dean, Malcolm Talbott, then assistant dean, and Professor Tom Cowan. Blumrosen was already an advocate for clinical education, which had fallen into disfavor as law schools tried to be more selective and academic.<sup>71</sup> Dean Tunks hired both Blumrosen and Clyde Ferguson, the only Jewish and African American professors at the school, respectively. Ferguson went on to become General Counsel of the U.S. Civil Rights Commission and the second African American professor at Harvard.<sup>72</sup> Blumrosen has spent the rest of his outstanding career at Rutgers where he is now Professor Emeritus.

The fifties were not the sixties. The student body's average age then, reports Blumrosen, was about thirty and it was difficult for the then twenty-six year old novice teacher to "get a class to engage in discussion that touched on political values."<sup>73</sup> Blumrosen's principal

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68. See, e.g., *Delaware v. Prouse*, 440 U.S. 648 (1979) (establishing that random highway police stops of motorists for license and registration checks are unconstitutional); *Docket Highlights*, RUTGERS SCH. L. NEWARK, <http://law.newark.rutgers.edu/clinics/docket-highlights> (last visited Mar. 15, 2013).

69. Ruth Blumrosen was on the team that won *Levitt & Sons, Inc. v. Div. Against Discrimination*, 158 A.2d 177 (N.J. 1960), against the builder of the iconic and all-white south Jersey suburb Levittown (now known as Willingboro) and *David v. Vesta Co.*, 212 A.2d 345 (N.J. 1965), which upheld the state laws prohibiting racial discrimination in housing.

70. See Blumrosen, *supra* note 5, *passim*.

71. See TRACTENBERG, *supra* note 6, at 58–66.

72. See Alfred W. Blumrosen, *Clarence Clyde Ferguson and Individual Rights*, 27 HOWARD L.J. 1093 (1984).

73. See Blumrosen, *supra* note 5, at 782.

interest was in labor law, particularly in individual worker rights. In the 1960s, that interest led to work in Trenton beefing up the State Division on Civil Rights. After Congress passed Title VII of the Civil Rights Act of 1964,<sup>74</sup> Blumrosen went to Washington to work for the newly founded Equal Employment Opportunity Commission—a toothless but symbolically important expression of the new national commitment to end racial discrimination. Blumrosen served as Director of Federal State Relations and later as Chief of Conciliations.<sup>75</sup>

When construction of a new law school building began in 1963, the Congress of Racial Equality (CORE) picketed, demanding that half the construction workers be black to mirror the population of the city.<sup>76</sup> The school was part of a new campus being built by the state university. An early exemplar of the activist spirit, Blumrosen, with then-Dean Willard Heckel's blessing, prevailed upon Rutgers president Mason Gross to file a complaint on the University's behalf supporting the picketers' demands before the state's Division on Civil Rights.<sup>77</sup>

Though himself a prolific writer and contributor to law reviews,<sup>78</sup> Blumrosen skeptically remarked that law professors “tend to wait until case law has developed” before assessing a statute.<sup>79</sup> In contrast, he took the activist view. As he explains, “I was in a position to both study and help implement parts of Title VII.”<sup>80</sup> Blumrosen was, therefore, a key supporter of the Tripartite Commission's demand for relevant and practical clinical education. With Professors Frank Askin and Richard Chused, the Administrative Process Project was founded.<sup>81</sup> The Project developed two books on civil rights practice<sup>82</sup> and drafted new procedures at the Division on Civil Rights, including a landlord reporting rule that the New Jersey Supreme Court upheld

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74. Title VII of the Civil Rights Act of 1964 is codified at 42 U.S.C. 2000e.

75. See generally Blumrosen, *supra* note 72.

76. *Id.* at 805. CORE is the acronym of the Congress of Racial Equality, a civil rights group. *Congress of Racial Equality (CORE)*, MARTIN LUTHER KING, JR. RES. & EDUC. INST., [http://mlk-kpp01.stanford.edu/index.php/encyclopedia/encyclopedia/enc\\_congress\\_of\\_racial\\_equality\\_core/](http://mlk-kpp01.stanford.edu/index.php/encyclopedia/encyclopedia/enc_congress_of_racial_equality_core/).

77. Blumrosen, *supra* note 5, at 806.

78. See Blumrosen's faculty profile. *Alfred W. Blumrosen*, RUTGERS SCH. L. NEWARK, <http://law.newark.rutgers.edu/faculty/faculty-profiles/alfred-w-blumrosen> (last visited Mar. 15, 2013).

79. Blumrosen, *supra* note 5, at 809.

80. *Id.*

81. See *id.* at 811–12; see also Askin, *supra* note 8.

82. See Blumrosen, *supra* note 5, at 812.

in *New Jersey Builders v. Blair*.<sup>83</sup> Students in the ten-credit, two-semester clinic interned at the Division on Civil Rights, participating in intake interviews, assisting in the drafting of probable cause findings, and drafting proposed regulations designed to integrate the construction trade unions.<sup>84</sup>

### WOMEN'S RIGHTS LITIGATION CLINIC

When Willard Heckel hired Ruth Bader Ginsburg in 1963, Ginsburg was one of the first twenty women to teach at an American law school. At Rutgers, she was one of two female faculty members (something NYU lacked). The first was Eva Hanks, now professor emeritus at Cardozo Law School. Ginsburg's field was civil procedure, particularly comparative civil procedure. But when the phrase "women's liberation" joined the argot of the day in 1969, women beseeched her to teach a course on women and the law.<sup>85</sup>

In the spring of 1970, Ginsburg taught the second course on women and the law in the country.<sup>86</sup> The seminar had no textbook, because no such textbook existed. My former law partner Eileen Tulipan recalls that they began by reading Simone de Beauvoir's 1949 classic *The Second Sex*, a foundational feminist text.<sup>87</sup> Ruth (as everyone called her) led her students on a survey of statutes and pending cases on women's rights around the country.<sup>88</sup> She drew on the first serious book—Leo Kanowitz's *Women and the Law: The Unfinished*

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83. 288 A.2d 855 (N.J. 1972).

84. I was a participant in the project under the supervision of instructor James Cooper and Deputy A.G. Ben-Asher.

85. See STREBEIGH, *supra* note 8, at 13–20.

86. STREBEIGH, *supra* note 8, at 19–20.

87. The book was not universally greeted. The Vatican placed it on the Index of Forbidden Books. Albert Camus complained that Beauvoir made Frenchmen look ridiculous. See Francine DuPlessix Gray, *Dispatches from the Other*, N.Y. TIMES, May 27, 2010, <http://www.nytimes.com/2010/05/30/books/review/Gray-t.html>.

88. STREBEIGH, *supra* note 8, at 20. Ginsburg discussed the courses in 1970 in remarks at the annual meeting of the Association of American Law Schools (AALS). See Ruth Bader Ginsburg, *Treatment of Women by the Law: Awakening Consciousness in the Law Schools*, 5 VAL. U. L. REV. 480 (1971). She said of hers and other developing law school offerings: "These courses develop two themes: the part law has played in assisting society to 'protect' women (and keep them in their place) and the stimulus law might provide in the evolution of society toward equality and independence for the still submissive sex." *Id.* at 480. The AALS remarks are reprinted in Ruth Bader Ginsburg, *The Progression of Women in the Law*, 28 VAL. U. L. REV. 1161 (1994).

*Revolution*.<sup>89</sup> Women's rights had begun to emerge after the passage of the Civil Rights Act of 1964, which incorporated the rights of women to equal treatment.

One case that caught Ginsburg's eye was that of Sally Reed. Reed had been barred from administering the estate of her son who died intestate because an Idaho law directed that when two persons of an equal degree of consanguinity sought to be administrator, the right went to the male.<sup>90</sup> Another important case for Ginsburg was that of Nora Simon, a nurse. Stephen Nagler, the director of the New Jersey ACLU, called Ruth to speak to her about Simon, who had written to Nagler. Simon and her husband were soldiers. Simon was discharged when she discovered that she was pregnant. Simon and her husband gave the infant up for adoption and the couple divorced. Simon's husband re-enlisted, but Nora Simon was ineligible for re-enlistment. Ginsburg, who had never argued in a court before, agreed to take on Simon's case, but she didn't have to meet that challenge just yet. Writing on her Rutgers stationery, she explained to the Secretary of the Army that, having given up her child for adoption, Simon was "in all respects . . . a single woman without issue," and denial of her re-enlistment was inconsistent with the federal policy expressed in Title VII the Civil Rights Act of 1964. The Secretary folded, and Simon was allowed to return to duty. One woman, one case, no precedent. The search for cases continued.<sup>91</sup>

Ginsburg's husband, Martin, a Manhattan tax lawyer, identified a new issue to pursue: the IRS denied Charles Moritz a \$600 tax deduction for household help for his eighty-nine year old invalid mother. Only women were entitled to such a deduction. Melvin Wulf of the ACLU agreed to fund Ginsburg's challenge. Soon, the U.S. Supreme Court accepted Reed's petition for certiorari, which Wulf had drafted. Ginsburg sent her *Moritz* brief to Wulf and NYU law professor Norman Dorsen, General Counsel of the ACLU. Dorsen was impressed. He and Wulf brought Ginsburg aboard.<sup>92</sup>

In the spring of 1971, Wulf and Ginsburg drafted the brief, aided by four women: Diana Rigelman of Rutgers, Ann Friedman of Yale, Mary Kelly, and Janice Goodman of NYU. The objective was to

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89. See Bob Egelko, *Leo Kanowitz, Early Proponent of Women's Rights, Dies at 81*, SFGATE, Aug. 24, 2007, <http://www.sfgate.com/bayarea/article/Leo-Kanowitz-early-proponent-of-women-s-rights-2508390.php>.

90. STREIBEIGH, *supra* note 8, at 31–32.

91. *Id.* at 20–23.

92. *Id.* at 23–27.

persuade the Supreme Court that the proper degree of review was strict scrutiny—the same skeptical stance the Court had developed to knock down Jim Crow racial classifications.<sup>93</sup>

Ginsburg asked to argue the case, but Sally Reed's Idaho lawyer, though grateful for the ACLU's help, was not about to yield the chair for his opportunity of a lifetime. The case was argued in October 1971. In her civil procedure class—in which I was a student—Ginsburg laid out her strategy: it was to track the path, the step by step process that the NAACP Legal Defense and Education Fund took in its path to the landmark *Brown v. Board of Education*.<sup>94</sup> Strict scrutiny should apply to gender classifications. She attended and helped prepare the oral argument that semester and did not believe the Court would take that step as its first.<sup>95</sup>

Indeed, in November—only four weeks after oral argument and before the semester ended—the Court ruled. The Court neither embraced nor discussed strict scrutiny, but it did hold that “regardless of their sex, persons within any one of the enumerated classes of that section are similarly situated with respect to that objective. By providing dissimilar treatment for men and women who are thus similarly situated [in relation to the deceased], the challenged section [of the Idaho statute] violates the Equal Protection Clause.”<sup>96</sup>

The first blow had been struck. The Court slowly would begin to examine the use of gender classifications. When she reached the Supreme Court, Ginsburg, writing for the majority in *United States v. Virginia*, struck the state military college's male-only policy that denied women the benefits of Virginia Military Institute's “adversative” educational methods. Regardless, the majority still had not embraced strict scrutiny as the appropriate standard.<sup>97</sup>

Ginsburg departed from Rutgers for Columbia in 1972,<sup>98</sup> but the spirit lived on and her commitments were institutionalized. Women were entering law school in large numbers, imbued with the

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93. *Id.* at 34–35

94. 347 U.S. 483 (1954)

95. *Id.* at 37–41, 43–44.

96. *Reed v. Reed*, 404 U.S. 71, 77 (1971); see STREBEIGH, *supra* note 8, at 44–45.

97. *United States v. Virginia*, 518 U.S. 515 (1996). Justice Antonin Scalia, a graduate of an all-male military academy, unleashed a bitter dissent. See *id.* at 566 (Scalia, J., dissenting); Michael Frost, *Justice Scalia's Rhetoric of Dissent: A Greco-Roman Analysis of Scalia's Advocacy in the VMI Case*, 91 KY. L.J. 167, 171, 180–81 (2002).

98. STREBEIGH, *supra* note 8, at 46–47.

enthusiasm of the “women’s movement.”<sup>99</sup> Elizabeth Langer, a 2L, took the initiative and the first student-edited journal of women’s rights was born: *The Women’s Rights Law Reporter*.<sup>100</sup>

The Women’s Rights Litigation Clinic began on an experimental basis in the fall of 1972 under the direction of the recent NYU graduate Janice Goodman. In 1973, the clinic became permanent. Rutgers hired Nadine Taub, who directed a local ACLU law reform unit, the Community Legal Action Workshop (CLAW). For three decades under Taub’s leadership, the Women’s Rights Clinic played a dramatic role in the development of the law in New Jersey.<sup>101</sup> I was not Taub’s clinic student, but nearly fifteen years ago I experienced her exacting standards when I partnered with her on a Brandeis brief for the New Jersey chapter of the National Organization for Women (NOW) to show that the psychological impact of rape was usually its gravest consequence.<sup>102</sup> In *Collins v. Union County Jail*, the New Jersey Supreme Court set aside case law that had long barred recovery for sexual assault without physical harm or manifestation.<sup>103</sup> But that is getting ahead of the story.

The clinic pursued a broad agenda. Reproductive rights, of course, played a large role. One of its first efforts in advocating for reproductive freedom was a pre-*Roe v. Wade* challenge to a New Jersey statute criminalizing abortion in *Young Women’s Christian Association v. Kugler*.<sup>104</sup> In an action by doctors and women, the court found the statute unconstitutionally vague but dismissed the women’s claims on federal standing grounds.<sup>105</sup> In *Doe v. Bridgeton Hospital*, a private hospital was required to let willing doctors perform abortions at the hospital.<sup>106</sup> The most dramatic win was

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99. STREBEIGH, *supra* note 8, at 15–20. There was a good deal of culture shock as women entered the law school in large numbers. In the spring of 1970 a group of Rutgers Law women imposed an embargo on the distribution of the yearbook called the Legacy. Incensed by the page headlined “Women of Rutgers” depicting a “go go dancer” at a tavern across the street, women took a “guerilla action”. In a leaflet signed by the “Leg Out of Legacy Conspiracy” the women analyzed the cause: the editors had a “mens rea, not a woman’s consciousness.”

100. Langer, *supra* note 39, at 599–601 (2009).

101. See Nadine Taub, *The Rutgers-Newark Women’s Rights Litigation Clinic: An Old and A New Story?*, 51 RUTGERS. L. REV. 1023, 1023–24 (1999).

102. On file with author.

103. 696 A.2d 625, 632 (N.J. 1997).

104. 342 F. Supp. 1048 (D.N.J. 1972), *aff’d*, 475 F.2d 1398 (3d Cir. 1972)

105. *Id.* at 1052.

106. 366 A.2d 641, 647 (N.J. 1976).



*Right to Choose v. Byrne*.<sup>107</sup> The New Jersey Supreme Court required the state Medicaid program to pay for elective abortions.<sup>108</sup> That principle was defeated by the Hyde Amendment, which seems to have become a permanent part of our law, having been incorporated into the Affordable Care Act.<sup>109</sup>

Public accommodations for women were a key element of civil rights litigation from the beginning. In *National Organization of Women v. Little League Baseball, Inc.*, the clinic helped open up sports for young girls.<sup>110</sup> Perhaps the clinic's most widely publicized win was in 1990 in *Frank v. Ivy Club* where the New Jersey Supreme Court ended discrimination by some Princeton University eating clubs, relying on the New Jersey Law Against Discrimination.<sup>111</sup>

Taub and the clinic students prevailed in the early sexual harassment case of *Tomkins v. Public Service Electric & Gas Co.*<sup>112</sup> However, the Second Circuit dismissed a class action in *Alexander v. Yale University*.<sup>113</sup> But the case established that a private right of action could properly be recognized under Title IX of the 1964 Civil Rights Act, which barred gender discrimination by recipients of federal education aid.<sup>114</sup> The clinic initiated the challenge to a gender-based Social Security Act provision regarding widows and widowers benefits in *Califano v. Goldfarb*.<sup>115</sup> With Taub and ACLU attorney Melvin Wulf on the brief, Ruth Ginsburg argued the case before the high court and established the intermediate level of scrutiny with respect to gender distinctions in the law.<sup>116</sup>

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107. 450 A.2d 925 (N.J. 1982).

108. *Id.*

109. 42 U.S.C. § 18001; *id.* § 18023 (containing the special rules regarding abortion coverage).

110. 318 A.2d 33 (N.J. Super. Ct. App. Div. 1974), *aff'd*, 338 A.2d 198 (N.J. 1974); *see* Taub, *supra* note 101, at 1029.

111. 576 A.2d 241 (N.J. 1990); *see* Taub, *supra* note 101, at 1028.

112. 568 F.2d 1044, 1048–49 (3d Cir. 1977) (“Title VII is violated when a supervisor . . . makes sexual advances or demands toward a subordinate employee and conditions that employee’s job status . . . on a favorable response to those advances or demands, and the employer does not take prompt and appropriate remedial action after acquiring such knowledge.”); *see* Taub, *supra* note 101, at 1025.

113. 631 F.2d 178 (2d Cir. 1980).

114. 20 U.S.C. § 1681 (2006) (“No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . .”).

115. 430 U.S. 199 (1977).

116. *Id.*

Goldfarb challenged a Social Security Act provision that survivors' benefits based on the earnings of a deceased husband covered by the Act were payable to his widow. Such benefits on the basis of the earnings of a deceased wife covered by the Act were payable to the widower, however, only if he "was receiving at least one-half of his support" from his deceased wife.<sup>117</sup> In an opinion by Justice Brennan, the majority held that the gender-based distinction violates the Due Process Clause of the Fifth Amendment.<sup>118</sup> Justice Stevens, concurring, concluded that the relevant discrimination "is against surviving male spouses, rather than against deceased female wage earners," and that such discrimination "is merely the accidental byproduct of a traditional way of thinking about females," and that "something more than accident is necessary to justify [under the Fifth Amendment] the disparate treatment of persons who have as strong a claim to equal treatment as do similarly situated surviving spouses."<sup>119</sup>

The clinic did not neglect family law issues. In 1975 it established that a woman has a right to change her name after divorce.<sup>120</sup> In *Milner v. Milner*, the clinic helped expand the right of a woman to permanent alimony when, despite rehabilitative alimony, she was unable to find work.<sup>121</sup> When the AIDS epidemic struck, the clinic developed educational materials so that women could obtain Supplemental Security Income benefits. That work ultimately led to the establishment of the separate Women and AIDS Clinic in 1998.<sup>122</sup>

### EDUCATION LAW

The highest-impact litigation that originated at Rutgers regarded education law. Professor Paul Tractenberg joined the faculty in 1970.<sup>123</sup> After Peace Corps service and several years at big New York firms, he opted for "more psychic income," as he put it.<sup>124</sup> Dean Heckel promised that at least half his work would be in public interest law. Thus began a career in which the Newark native transformed

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117. *Id.* at 201 (citing 42 U.S.C. §§ 401–31 (1970 & Supp. V)).

118. *Id.* at 206–07.

119. *Id.* at 218, 223 (Stevens, J., concurring).

120. *Egner v. Egner*, 337 A.2d 46 (N.J. Super. Ct. App. Div. 1975).

121. *Milner v. Milner*, 672 A.2d 206 (N.J. Super. Ct. App. Div. 1996).

122. Taub, *supra* note 101, at 1028–29; *see, e.g.* Douglas Frank, *Helping Women with AIDS*, RUTGERS FOCUS, Dec. 4, 1998, <http://urwebsrv.rutgers.edu/focus/article/School%20of%20Law--Newark/516/>.

123. Paul L. Tractenberg, *Using Law to Advance the Public Interest: Rutgers Law School and Me*, 51 RUTGERS L. REV. 1001, 1003 (1999).

124. *Id.*

the New Jersey legal and educational landscape. So huge was the impact of his bold litigation strategies that it was too large for a law school clinic. Committed to remedying the consequences of racial discrimination and urban poverty, Tractenberg founded and became the first director of the Education Law Center. It has carried on forty years of struggle to put meat on the bones of New Jersey's Constitution of 1947 that mandated a system of "thorough and efficient system of free public schools."<sup>125</sup>

As Professor Tractenberg observed in his 1998 review of the effort:

It is almost impossible to pick up a daily newspaper in New Jersey without seeing prominent coverage of public education issues. Often, the coverage relates to constitutional litigation in progress or threatened, and usually the basis of that litigation is a provision of New Jersey's Constitution of 1947. The most dramatic example is the effort begun in 1970, and still proceeding, to use the constitution's Education Clause to reform the way in which the state funds and provides public education to students in its poor urban districts.<sup>126</sup>

In the United States, education has always been a primarily local matter, though federal intervention became a much larger force with the Civil Rights Act of 1964, a principal force in implementing the *Brown v. Board of Education* promise to end the South's dual school systems.<sup>127</sup> The United States Supreme Court in *San Antonio Independent School District v. Rodriguez* made it clear that the Court would not use the Fourteenth Amendment to address the problem of unequal provision of school resources by the states.<sup>128</sup> In its conservative jurisprudence, the Court saw in the Fourteenth Amendment only limits on state action, not a charter for federal action to accomplish the post-Civil War Amendment's goals of eliminating the legacy of slavery and racial discrimination. That principle has led now to the appalling rejection by the United States Supreme Court of voluntary racial integration. In *Parents Involved in Community Schools v. Seattle School District No. 1*, Chief Justice Roberts rejected the fundamental premise of *Brown*—that segregation stigmatizes—and that of *Bakke*—that diversity is a high

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125. *Id.* at 1001–02, 1012–14; Paul L. Tractenberg, *The Evolution and Implementation of Educational Rights Under the New Jersey Constitution of 1947*, 29 RUTGERS L.J. 827, 833 (1998).

126. Tractenberg, *supra* note 125, at 828–29.

127. *See, e.g.*, *United States v. Jefferson County*, 380 F.2d 385 (5th Cir. 1967)

128. 411 U.S. 1 (1973).

educational value—and declared flatly that “the way to stop discriminating by race is to stop discriminating by race.”<sup>129</sup>

Tractenberg looked to the state constitution to both implement old law and to make new law. He engaged in two principal efforts: first, to create new law to equalize public school funding, and second, to implement old law to achieve racial balance in the *Englewood Cliffs v. City of Englewood* dispute.<sup>130</sup> There, the small, wealthy borough of Englewood Cliffs, which had no high school, sought to withdraw from its link to largely black Englewood and affiliate instead with the affluent, white district of Tenafly.<sup>131</sup> Challenged by the NAACP, the Englewood Cliffs battle was a protracted one. But it did not succeed in the ultimate goal of integration by the creation of a regional school district in the county.<sup>132</sup>

Tractenberg's educational reform effort had begun with a challenge by Jersey City students and parents to the state's public school funding system.<sup>133</sup> Its equal protection focus was typical of a wave of litigation that sought to expand the parameters of the Fourteenth Amendment, which had long been constrained by narrow textual constructions, beginning with the notorious Civil Rights Cases.<sup>134</sup> Spurred by success in the 1971 Supreme Court of California case *Serrano v. Priest*,<sup>135</sup> Tractenberg (with the help of the Constitutional Litigation Clinic) joined in *Robinson v. Cahill*,<sup>136</sup> the

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129. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007)

130. Tractenberg, *supra* note 123, at 1005–06.

131. *Id.* at 1014.

132. *Bd. of Educ. of Englewood Cliffs v. Bd. of Educ. of Borough of Tenafly*, 788 A.2d 729, 731 (N.J. 2002) (“The State Board [of Education] concluded that neither regionalization nor agency adjudication could resolve the segregation problem at Dwight Morrow. Although acknowledging that the protracted litigation involving the three districts had ‘not ameliorated the racial isolation of the students attending Englewood’s public schools,’ the State Board expressed its intention to pursue a voluntary solution that focused on the development at Dwight Morrow of a magnet school, affiliated with a university, that was designed to attract students from neighboring districts in order to achieve enhanced racial diversification of Dwight Morrow.”).

133. TRACTENBERG, *supra* note 6, at 82–84.

134. *See* 109 U.S. 3, 20 (1883) (finding that the Thirteenth and Fourteenth Amendments are “self-executing without any ancillary legislation,” and that sections I and II of the Civil Rights Act of 1876 were therefore unconstitutional).

135. 487 P.2d 1241 (1971).

136. Constitutional Litigation Clinic Professors Askin, Bender (through 1975), and Sheppard participated on six of the occasions on which the New Jersey Supreme Court considered *Robinson v. Cahill*, 358 A.2d 457 (N.J. 1976), *amended by* 360 A.2d 400 (N.J. 1976); 355 A.2d 129 (N.J. 1976); 351 A.2d 713 (N.J. 1975); 339 A.2d 193

Jersey City action, as counsel for extremely active *amici*—the Newark NAACP chapter and the ACLU. In 1972, the trial judge Theodore Botter struck the state statute, largely on federal and state equal protection grounds. He declared, “[L]ocal control is illusory. It is control for the wealthy, not for the poor.”<sup>137</sup>

But in its landmark decision, the Supreme Court of New Jersey took a sharply different approach. Spurning the state and federal equal protection clauses, the court grounded its affirmance on the state constitution’s “thorough and efficient clause,” which provides that “The Legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in this State between the ages of five and eighteen years.”<sup>138</sup>

As Professor Tractenberg views it, the New Jersey Supreme Court essentially recognized it as a “specialized equal protection clause.” Relying on a constitutional affirmative obligation of state government the ‘narrow’ ruling enabled the court to embark on what has proven to be a multi-decade effort—without the additional burden of a unique expansive understanding of the equal protection principle.<sup>139</sup> The legislature responded with the Public School Education Act of 1975, which the court found facially constitutional while warning that it might fail to meet state constitutional standards “as applied”:

We should and do proceed upon the assumption that complete funding will be forthcoming to furnish the necessary means to put the statute into full operation. The determination we reach—that the statute is facially constitutional—rests upon this assumption. Put more plainly, the 1975 Act, absent funding, could never be considered a constitutional compliance with the 1875 amendment to the New Jersey Constitution—adjuring the legislative establishment of a system of thorough and efficient education.<sup>140</sup>

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(N.J. 1975); 306 A.2d 65 (N.J. 1973); 303 A.2d 273 (N.J. 1973); and in trial court at 287 A.2d 187 (N.J. Super. Ct. Law Div. 1972).

137. *Robinson v. Cahill*, 287 A.2d 187, 212 (N.J. Super. Ct. Law Div. 1972).

138. N.J. CONST. art. VIII, § 4, para. 1 (1947); *Robinson*, 287 A.2d at 209.

139. Tractenberg, *supra* note 101, at 1011.

140. *Robinson v. Cahill*, 355 A.2d 129, 132 n.2 (N.J. 1976); *see also* *Robinson v. Cahill*, 358 A.2d 457 (N.J. 1976) (issuing an order enjoining every public officer from expending any funds for the support of any free public school unless timely legislative action was taken providing for the funding of the Public School Education Act of 1975 for the 1976-77 school year); 360 A.2d 400 (N.J. 1976) (dissolving the 1976 order due to passage legislation permitting full funding of the Public School Education Act of 1975).

Thus began stage II, which continues to this day: the battle over funding. The State ran afoul of the court in *Abbott v. Burke* in 1984. Argued by 1973 Rutgers graduate Marilyn J. Morheuser,<sup>141</sup> with Professor Tractenberg on the briefs, the boldness of the New Jersey Supreme Court's declaration astonishes even today:

We find that under the present system the evidence compels but one conclusion: the poorer the district and the greater its need, the less the money available, and the worse the education. That system is neither thorough nor efficient. We hold the Act unconstitutional as applied to poorer urban school districts. Education has failed there, for both the students and the State. We hold that the Act must be amended to assure funding of education in poorer urban districts at the level of property-rich districts; that such funding cannot be allowed to depend on the ability of local school districts to tax; that such funding must be guaranteed and mandated by the State; and that the level of funding must also be adequate to provide for the special educational needs of these poorer urban districts in order to redress their extreme disadvantages.<sup>142</sup>

As Professor Tractenberg has explained, the court demanded "spending parity" between poor urban districts and the average of what the state's wealthiest districts spend on "regular education" (i.e. the core curriculum), plus additional resources to meet urban students' special needs. Further, state government was required to take responsibility for bringing to an acceptable level the physical plant and facilities of poor district schools. Finally, state oversight was required to ensure educational effectiveness.<sup>143</sup>

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141. The case was not entrusted to a young phenom. Morheuser was a former Catholic nun, experienced educator and seasoned community activist who came to Newark for law school.

142. *Abbott v. Burke*, 575 A.2d 359, 363 (N.J. 1990).

143. Tractenberg, *supra* note 123, at 1012-13. The court has established for New Jersey urban students the most comprehensive set of constitutional rights of any state. They include:

- Parity of regular education funding;
- Whole school reform;
- Full-day kindergarten;
- At least half-day preschool for three-and four-year old;
- School-based coordination and referral of students to off-site health and social services, and, if necessary, school-based services;
- Enhanced security;
- Enhanced technology;
- Alternative schools;
- School-to-work and college-transition programs; and
- Safe, sanitary, and sufficient facilities.

An epic battle ensued. The mandate and its asserted failure was at the center of political contest in New Jersey. In the aftermath of the 2008 financial crisis and the election of a blunt anti-tax governor, the court in *Abbott XXI* declared in a 2011 opinion by Associate Justice and Rutgers law graduate Jaynee Lavecchia: “It is now undisputed that the State has failed to fully fund SFRA in Fiscal Year (FY) 2011. The record in this matter shows generally that the cuts to school aid funding, in districts of various needs, have been instructionally consequential and significant.” The state was again ordered to correct these deficiencies.<sup>144</sup>

There may be no greater lasting legacy of the People’s Electric Law school than the Homeric efforts of Professor Tractenberg and the New Jersey Supreme Court to address inadequate public education—one of the central causes and consequences of urban poverty and our nation’s heritage of racial discrimination.

#### MT. LAUREL—OPEN HOUSING

If *Robinson v. Cahill* has a rival it is *Southern Burlington County NAACP v. Township of Mount Laurel*,<sup>145</sup> a decision cited 1,369 times to date.<sup>146</sup> Plaintiffs attacked the system of land use regulation by defendant Township of Mount Laurel on the ground that the system unlawfully excluded low- and moderate-income families from the municipality. The trial court declared the Township’s zoning ordinance totally invalid.<sup>147</sup> Represented by Camden Regional Legal Services, the plaintiffs sought relief as representatives of a class of poor black and Latino persons in need of access to affordable housing. But the Supreme Court initiated a revolution in New Jersey land use planning by broadening the protected class, declaring:

It is plain beyond dispute that proper provision for adequate housing of all categories of people is certainly an absolute essential in promotion of the general welfare required in all local land use regulation. Further the universal and constant need for such housing is so important and of such broad public interest that the general welfare which developing municipalities like Mount Laurel

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*Id.* at 1013.

144. *Abbott v. Burke*, 206 N.J. 332, 341 (2011).

145. 336 A.2d 713 (N.J. 1975).

146. Citing References, WESTLAW, <http://www.westlaw.com> (find citation “336 A.2d 713”; then follow “Citing References” hyperlink) (last visited Mar. 15, 2013).

147. *S. Burlington Cnty. NAACP v. Twp. of Mt. Laurel*, 290 A.2d 465, 473 (N.J. Super. Ct. Law Div. 1972).

must consider extends beyond their boundaries and cannot be parochially confined to the claimed good of the particular municipality. It has to follow that, broadly speaking, the presumptive obligation arises for each such municipality affirmatively to plan and provide, by its land use regulations, the reasonable opportunity for an appropriate variety and choice of housing, including, of course, low and moderate cost housing, to meet the needs, desires and resources of all categories of people who may desire to live within its boundaries. Negatively, it may not adopt regulations or policies which thwart or preclude that opportunity.<sup>148</sup>

Thus began a struggle that continues to this day. In March 2012, the Appellate Division reviewed an Executive Order of Governor Chris Christie, who sought to abolish the legislatively created remedial Council on Affordable Housing (COAH). The New Jersey high court explained that COAH was “the entity charged with implementing and administering the legislative mandates of the [Fair Housing Act].”<sup>149</sup> At issue on appeal was whether a governor, pursuant to the Executive Reorganization Act of 1969, could “abolish an independent agency created by the Legislature that is ‘in but not of’ a department of the Executive Branch.”<sup>150</sup> As applied to the case, the narrower issue was whether Governor Christie could abolish COAH and transfer its duties, responsibilities, and obligations to the sole authority of an Executive Branch department.<sup>151</sup> The court rejected the Governor’s Executive Order as exceeding his power.<sup>152</sup>

From 1976 to his untimely death in 2009, Professor John Payne was a key intellectual force as well as one of the leading lawyers in the *Mt. Laurel* cases. He appeared on behalf of housing advocates as a volunteer attorney for public interest groups and as a faculty member on behalf of the Constitutional Litigation Clinic and the

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148. *Mt. Laurel*, 336 A.2d at 727–28.

149. *In re* Plan for Abolition of Council on Affordable Hous. & Providing for the Transfer of the Functions, Powers, & Duties of the Council on Affordable Hous. To the Dep’t of Cmty. Affairs, Reorganization Plan 1-2011, 38 A.3d 620, 621 (N.J. Super. Ct. App. Div. 2012); see N.J. STAT. ANN. §§ 52:27D-301–52:27D-329 (West 2013).

150. *In re* Plan for Abolition of Council on Affordable Hous. & Providing for the Transfer of the Functions, Powers, & Duties of the Council on Affordable Hous. To the Dep’t of Cmty. Affairs, Reorganization Plan 1-2011, 38 A.3d 620, 621 (N.J. Super. Ct. App. Div. 2012).

151. *Id.*

152. *Id.*



Environmental Law Clinic.<sup>153</sup> His nationally recognized *Mt. Laurel* work led to a re-conceptualization of the housing law field and a shift in thinking from a world in which there was no right to housing opportunity to one in which decent shelter is considered a fundamental right. He also authored a leading casebook on land use.<sup>154</sup>

### CONSPIRACY ON TRIAL—THE CHICAGO EIGHT

The cadre that embraced the slogan “People’s Electric” was further electrified by the federal Anti-Riot Act<sup>155</sup> prosecution of leaders and celebrities of anti-war and counter-culture known as the trial of the Chicago Eight. The group became the Chicago Seven after Black Panther Party leader Bobby Seale was bound and gagged in the court room for two days, then severed as the remaining defendants continued in the frequently raucous trial that ended in the convictions of five<sup>156</sup> and contempt convictions for the defendants and their lawyers, William Kunstler and Leonard Weinglass. The conspiracy and the contempt convictions were overturned by the Seventh Circuit Court of Appeals, which found, “It is not a simple matter to evaluate this trial, nor to assign responsibility for its deficiencies. It lasted almost five months, and the transcript exceeds 22,000 pages. Trial decorum often fell victim to dramatic and emotionally inflammatory episodes.”<sup>157</sup>

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153. See John Payne, *Noted Affordable Housing and Land Use Scholar and Beloved Teacher at Rutgers Law School-Newark, Dies*, RUTGERS MEDIA RELATIONS (June 16, 2009), <http://news.rutgers.edu/medrel/news-releases/2009/06/john-payne-noted-aff-20090616/>.

154. PLANNING AND CONTROL OF LAND DEVELOPMENT (John M. Payne et Al. eds., 7th ed. 2008).

155. 18 U.S.C. § 2101 (2006); see *Nat’l Mobilization Comm. v. Foran*, 411 F.2d 934, 939 (7th Cir. 1969) (upholding 18 U.S.C. § 2101 as constitutional). In the Chicago Seven appeal, Judge Pell dissented in part, saying he found the act overbroad and facially unconstitutional in violation of the First Amendment right to freedom of speech. See *United States v. Dellinger*, 472 F.2d 340, 409–16 (7th Cir. 1972) (Pell, C.J., dissenting in part and concurring in part).

156. David Dellinger, Rennie Davis, Tom Hayden, Abbie Hoffman, and Jerry Rubin were convicted. John Froines and Lee Weiner were acquitted. Seale was never re-tried. See *Dellinger*, 472 F.2d at 340.

157. *Dellinger*, 472 F.2d at 385 (majority opinion) (reversing all convictions and remanding for new trial “if the government elects so to proceed”); see also *In re Dellinger*, 461 F.2d 389, 395 (7th Cir. 1972) (setting aside summary contempt convictions because “[i]n this situation, the possible prejudice to the accused as well as the diminution of the quality of justice in the public eye overrides any economy of effort that would be achieved by summary procedure”).

As Judge Pell echoed in his partial dissent, the record on appeal included “22,000 numbered transcript pages and some 2485 pages of parties’ briefs, using that term in no descriptive sense.”<sup>158</sup> Those transcript volumes—long before PCs and PDFs, when even flat glass platen photocopiers were unknown—were fodder for an army of law students. We summarized transcripts and prepared memoranda supporting dozens of trial objections made in the raucous proceedings before the overwhelmed trial judge, whose incompetence provided much fuel for the antics of the Yippie leaders Abbie Hoffman and Jerry Rubin.

At the heart of the passion was the fact that the charge—conspiracy to incite a riot—was aimed at leaders of a broad coalition of opponents of the war in Vietnam who had found themselves the victims of what an official commission of inquiry termed a “police riot” during the Democratic presidential nominating convention of August 1968.<sup>159</sup> It is important to remember that Robert F. Kennedy had been murdered only a few weeks before the convention at a moment when he had attained commanding momentum in his Presidential campaign, in which he pledged to end the war in Vietnam that his brother had started.<sup>160</sup> Two days before he was murdered, Kennedy had attended mass at the Cristo Rey chapel in Oxnard, California, praying with Cesar Chavez,<sup>161</sup> the charismatic leader of the United Farm Workers Union whose pacifism and struggles on behalf of migrant workers made him a Gandhian figure for American liberals. It is a testament to his work that President Obama has now declared Chavez’s home to be a national monument.<sup>162</sup> The anti-war activists who gathered in Chicago were appalled that the Democratic Party was about to nominate Hubert H. Humphrey, the Vice President who could not bring himself to break with President

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158. *Dellinger*, 472 F.2d at 409 (Pell, C.J., dissenting in part and concurring in part).

159. See JEROME H. SKOLNICK, *THE POLITICS OF PROTEST* (1969) (report to the National Commission on the Causes and Prevention of Violence).

160. See *Robert F. Kennedy*, ROBERT F. KENNEDY CENTER FOR JUST. & HUM. RTS., <http://rfkcenter.org/robert-f-kennedy> (last visited Mar. 16, 2013).

161. Shane Cohn, *In Memory of Cesar Chavez*, VC REPORTER (Mar. 29, 2012), [http://www.vcreporter.com/cms/story/detail/in\\_memory\\_of\\_cesar\\_chavez/9680/](http://www.vcreporter.com/cms/story/detail/in_memory_of_cesar_chavez/9680/).

162. Barack Obama, *Presidential Proclamation—Establishment of the Cesar E. Chavez National Monument*, WHITE HOUSE PRESIDENT BARACK OBAMA (Oct. 8, 2012), <http://www.whitehouse.gov/the-press-office/2012/10/08/presidential-proclamation-establishment-cesar-e-chavez-national-monument>.

Johnson, who had committed 500,000 soldiers to a war which we plainly seemed to be losing and were conducting in a shameful way.

Newark was the post-trial ground zero for the work on appeal. Professor Arthur Kinoy was the principal drafter of the brief on appeal, and he had thousands of pages of transcripts that needed to be summarized for a statement of facts. Dozens of law students answered the call. A few of us were assigned to draft some of the points on appeal. A couple of blocks away at 744 Broad Street, Morton Stavis, co-founder of the CCR and Kinoy's frequent collaborator, continued to labor on the appeal of the contempt citations. Across the street from the law school was the Bleeker Street office of Leonard Weinglass, who had just formed a firm with four young lawyers. The firm was named in egalitarian and alphabetical fashion: Ball, Broege, Elberg, Fogel & Weinglass. The "band of brothers and sisters" élan of that effort was an important part of the school's spirit.

Thus, many students began their careers under the direct mentorship of one of the great lawyers of the civil rights and anti-war movement, Arthur Kinoy. Others had opportunities to work with William Kunstler and Leonard Weinglass. A few (I was one of the lucky) also got to see the work of Morton Stavis, who was the finest legal craftsman of the three founders of the CCR.<sup>163</sup> We began our law school careers engaged in one of the great legal battles of the time, directly under the leadership of lawyers of the first class. Many of us went on to the leadership of the National Lawyers Guild, American Civil Liberties Union, the Center for Constitutional Rights, and the New Jersey Office of the Public Defender.

#### CONSTITUTIONAL LITIGATION CLINIC

Kinoy, Sheppard, and Askin formed the Constitutional Litigation Clinic. Askin was its director, and he still is.<sup>164</sup> He brought on two outstanding lawyers to assist—William J. Bender, and his wife Rita Schwerner, the widow of the murdered civil rights worker Michael

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163. A Lexis search shows that Morton Stavis was counsel in 161 cases with published opinions, many of them in the United States Supreme Court. When, many years later, I was involved in *Daubert v. Merrell Dow Pharmaceuticals*, I was proud to have Morton Stavis move my admission to the bar of the high court.

164. See Askin, *supra* note 9.

Schwerner.<sup>165</sup> Askin was an activist of the ACLU whose New Jersey office was a couple of blocks away. The clinic's agenda was bold.

Askin filed a class action against Arthur Sills, the Attorney General of New Jersey, and a raft of local police departments for their 'red squad' surveillance of anti-war activists. The claim was that an overbroad surveillance initiative would have a "chilling effect" on exercise of free speech. Some examples of such speech include: civil disturbance, riot, rally, protest, demonstration, march, and confrontation. The Attorney General had asked all 567 New Jersey municipal police departments to complete Security Incident Reports which called for "the names of the organizations or groups involved in the 'incident.'"

The Attorney General's instructions singled out "Examples of types: Left wing, Right wing, Civil Rights, Militant, Nationalistic, Pacifist, Religious, Black Power, Ku Klux Klan, Extremist, etc." and as "Examples of How Involved: Sponsor, co-sponsor, supporter, assembled group, etc." Individuals were also to be the subjects of reports. The "Narrative" portion of the form read: "citizenship/naturalization data—parental background/occupation—armed forces service/draft status—membership, affiliation and/or status with organizations or groups—education background—habits or traits—places frequented—parole/probation data—data on immediate family—financial/credit status—include other record of past activities, findings and/or observations."<sup>166</sup>

The state Supreme Court in *Anderson v. Sills* brushed off the named plaintiffs' fears as "hypothetical," reversed the summary judgment grant in favor of plaintiffs, and remanded but did not dismiss the clinic's case.<sup>167</sup> The clinic's students were involved in every phase of the case. I drafted questions for and attended my first deposition—that of an Assistant Attorney General who had helped to implement the surveillance scheme.

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165. The murder of Mississippi Summer Project volunteers Michael Schwerner, Andrew Goodman, and James Chaney was a galvanizing event. The murders were the subject of the movie *Mississippi Burning*. The frustrating efforts to obtain justice for the slain workers is chronicled by Douglas Linder in his Famous Trials series. Douglas O. Linder, *The Mississippi Burning Trial* (U.S. v. Price et al.), FAMOUS TRIALS, <http://law2.umkc.edu/faculty/projects/ftrials/price&bowers/Account.html> (last updated Aug. 2009).

166. *Anderson v. Sills*, 265 A.2d 678, 683 (N.J. 1970).

167. *Id.*; see also *Anderson v. Sills*, 363 A.2d 381, 384 (N.J. Super. Ct. Ch. Div. 1976) (dismissed as moot because defendants had removed the offensive forms and guidelines and were, therefore, no longer ripe for adjudication).

*Anderson v. Sills* inspired a much broader effort by Askin. It had been revealed that the Department of Defense had been conducting surveillance of civilian anti-war activity. The Clinic filed suit against Melvin Laird, the Secretary of Defense. Virtually every anti-war, civil rights, and civil liberties group in the country joined *Tatum v. Laird* as plaintiffs. Arlo Tatum was the leader of the Quaker unit Central Committee for Conscientious Objectors. We did legal research and helped organize a group of social scientists whose opinions were offered to prove a fact—that such garrison state tactics of surveillance by the military would have a “chilling effect” on free speech.

The United States Supreme Court granted certiorari to review the decision of the Court of Appeals for the D.C. Circuit that plaintiffs had stated a claim on which relief could be granted.<sup>168</sup> The ACLU supported the clinic’s appeal with the great Melvin L. Wulf on the brief. As a student, I helped organize the sessions that yielded a “Brandeis brief” appendix to plaintiffs’ brief—a statement by social scientists regarding the “chilling effect” on free speech created by the existence of wide military surveillance of civilian activity. Extraordinary amici joined: Senator Sam J. Ervin, Jr. of South Carolina argued the cause for the Unitarian Universalist Association et al. as *amici curiae* urging affirmance.<sup>169</sup> Former Assistant Attorney General for Civil Rights Burke Marshall and Harvard Professor Arthur R. Miller filed a brief for a “Group of Former Army Intelligence Agents” as *amici curiae* urging affirmance.<sup>170</sup> But in *Laird v. Tatum*, the Supreme Court, in an opinion by Chief Justice Warren Burger, held that plaintiffs, whose own speech had not been chilled, had not suffered an injury that satisfied the case and controversy requirement of Article III.<sup>171</sup> I will just say that it struck us as ironic that daring to challenge the military disqualified one from challenging the military.

Other clinic cases of the period included William Bender’s successful challenge to the constitutionality of 40 U.S.C. § 193(g), the statute upon which the Chief of the Capitol Police relied to bar a group of women—the Jeannette Rankin Brigade—who sought to

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168. *Tatum v. Laird*, 444 F.2d 947 (D.C. Cir. 1971).

169. Brief of Unitarian Universalist Ass’n Council for Christian Social Action et al. as *Amici Curiae* Supporting Respondents, *Laird v. Tatum*, 408 U.S. 1 (1972) (No. 71-288), 1972 WL 135681.

170. Brief of a Group of Former Army Intelligence Agents as *Amici Curiae*, *Laird v. Tatum*, 408 U.S. 1 (1972) (No. 71-288), 1972 WL 135683.

171. 408 U.S. 1 (1972).

parade in front of the United States Capitol and then enter to entreat members of Congress to bring an end to the war in Vietnam. Their challenge was joined by notable intervenors—Members of Congress, New York's Bella Abzug and Berkeley's Ronald Dellums, one of the founders of the Congressional Black Caucus.<sup>172</sup> The case was decided by three District Court judges empanelled under the now-repealed 28 U.S.C. § 2282,<sup>173</sup> who found that the Capitol Grounds statute's limitations on demonstrations was unconstitutional.<sup>174</sup>

As observed, Rutgers was deeply involved with the responses to the urban crisis and the civil disorders—the riots—of the 1960s. One of the most disturbing manifestations of that period was the killing by a mob of an on-duty policeman, John V. Gleason, who had confronted and shot a young man in Plainfield, New Jersey. Eleven people were tried and two convicted in a trial in which the police had little evidence to identify the perpetrators. The public controversy was bitter. Many rallied to support the police, while a citizens' group rallied to the side of the defendants who, they believed, had been picked out practically at random. One of the two convicted,<sup>175</sup> George Merritt, was almost undoubtedly innocent. A civilian employee at the Army Nike Missile Base in Monmouth County, Merritt was tried and convicted three times before being released in 1980 on a habeas corpus petition granted by federal judge Curtis Meanor. Represented then by Morton Stavis, the court found Merritt had suffered grave

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172. Founded in 1971, its original members were Representatives Shirley Chisholm, William L. Clay, George W. Collins, John Conyers, Ronald Dellums, Charles Diggs, Augustus F. Hawkins, Ralph Metcalfe, Parren Mitchell, Robert Nix, Charles B. Rangel, Louis Stokes, and Washington, D.C. delegate Walter Fauntroy. See *Our History*, AM.'S CONG. BLACK CAUCUS, <http://thecongressionalblackcaucus.com/about/our-history/> (last visited Mar. 16, 2013).

173. Section 2282 provided for a three judge District Court when a statute's constitutionality was challenged. One of the three was to be a Circuit Judge. Appeal was directly to the Supreme Court of the United States. See 28 U.S.C. § 2282 (repealed 1976).

174. *Jeannette Rankin Brigade v. Chief of Capitol Police*, 342 F. Supp. 575 (D.D.C. 1972).

175. The conviction of co-defendant Gail Madden, like Merritt's was reversed on the ground that the aiding and abetting instruction was prejudicial. Like Merritt she was convicted in a second trial. But Merritt's verdict was reversed, setting the stage for a third trial – which also resulted in conviction. This history is recited in *United States ex rel. Merritt v. Hicks*, 492 F. Supp. 99 (D.N.J. 1980) (with Rutgers grad Neil Mullin assisting on the briefs).

violations of the *Brady v. Maryland*<sup>176</sup> requirement that a prosecutor must disclose exculpatory evidence.<sup>177</sup> Merritt was not tried again.

In June 1971, the Appellate Division reversed Merritt's conviction for the first degree murder of police officer Gleason. Before the second trial began, the United States Supreme Court in June 1972 in *Furman v. Georgia* effectively voided every capital statute in the country.<sup>178</sup> The New Jersey Supreme Court, in *State v. Funicello*, had five months earlier declared the state's capital murder statute unconstitutional because a provision that one could escape a death sentence by waiving trial by jury improperly burdened the exercise of that right.<sup>179</sup> Merritt was no longer charged with a capital crime, we argued, and was therefore entitled to bail. Bender assigned me to draft a motion and memorandum for release on bail under the New Jersey Constitution, which provides: "No person shall, after acquittal, be tried for the same offense. All persons shall, before conviction, be bailable by sufficient sureties, except for capital offenses when the proof is evident or presumption great."<sup>180</sup> I was shocked when the trial court, Appellate Division, and state Supreme Court refused to set bail for Merritt. The clinic filed a habeas corpus petition for bail, which was granted, with the bulk of the briefing done very ably by a People's Electric Law School student from the class of 1973 (and later clinic staff attorney) Larry Gross.<sup>181</sup>

That same year, Arthur Kinoy won one of his greatest victories, *United States v. United States District Court for the Eastern District of Michigan*.<sup>182</sup> There had been others. Chief among them were *Powell v. McCormack*, in which the United States Supreme court spurned the defense of non-justiciability and ordered John McCormack, the Speaker of the House, to reinstate Harlem Congressman Adam Clayton Powell.<sup>183</sup> Another was *Dombrowski v. Pfister*.<sup>184</sup> James Dombrowski was a leader of a leftist civil rights group, the Southern Conference Educational Fund, which was closely

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176. 373 U.S. 83 (1963).

177. *United States ex rel. Merritt v. Hicks*, 492 F. Supp. 99 (D.N.J. 1980).

178. 408 U.S. 238 (1972).

179. 286 A.2d 55 (N.J. 1972).

180. N.J. CONST. art. I, para. 11.

181. *United States ex rel. Merritt v. Vukceovich*, 339 F. Supp. 779, 781 (D.N.J. 1972).

182. 407 U.S. 297 (1972) (sustaining the warrant requirement in domestic surveillance cases).

183. 395 U.S. 486 (1969).

184. 380 U.S. 479 (1965).

linked to Martin Luther King's Southern Christian Leadership Conference.<sup>185</sup> He was threatened with indictment for violation of the blatantly unconstitutional Louisiana Subversive Activities and Communist Control Law<sup>186</sup> and the Communist Propaganda Control Law.<sup>187</sup> Persuaded by Kinoy that the statute was unconstitutionally overbroad the United States Supreme Court authorized District Courts to enjoin bad faith prosecutions of civil rights workers, which could have a "chilling effect" on free speech.<sup>188</sup>

In *United States v. District Court for the Eastern District of Michigan*, Lawrence Robert 'Pun' Plamondon, a member of a fringe leftist group, was charged with the dynamite bombing of a CIA office in Ann Arbor, Michigan. Kinoy, joined on the brief by Bender and Kunstler, argued successfully that the United States' electronic surveillance of defendant's conversations without prior judicial approval was unlawful. As his work was in progress, Kinoy explained his strategy to us in his popular Civil Rights and Civil Liberties course. And a group of students from the Constitutional Litigation clinic assisted in the legal research upon which Kinoy and the others drew in their successful mandamus action to compel the United States to disclose the fruit of its electronic surveillance in order to examine it in a "taint" hearing. The opinion in *United States v. United States District Court for the Eastern District of Michigan*, written by Justice Lewis Powell, is a landmark of Fourth Amendment law.<sup>189</sup> Among the many lessons for students was that a conservative corporate lawyer like Lewis Powell could be persuaded by carefully developed and well-supported argument.

Justice Powell figured prominently in another issue important to Rutgers—the defense of its Minority Student Program. The Constitutional Litigation clinic represented Rutgers—the State University of New Jersey—in an amicus brief defending the principle of affirmative action in one of the first "reverse discrimination" cases. Marco DeFunis, Jr., a Caucasian man, asserted he had been wrongly denied law school admission on account of his race. The University of Washington School of Law set aside minority applicants and

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185. See Irwin Klibaner, *The Travail of Southern Radicals: The Southern Conference Educational Fund, 1946–1976*, 49 J. S. HIST. 179, 180 (1983).

186. LA. REV. STAT. ANN. §§ 14:358–14:374 (1962).

187. LA. REV. STAT. ANN. §§ 14:390–14:390.8 (1962).

188. *Pfister*, 380 U.S. at 490.

189. 407 U.S. 297 (1972) (sustaining the warrant requirement in domestic surveillance cases).



reviewed them to identify those most likely to succeed in law school. The school explained: “[w]e gave no preference to, but did not discriminate against, either Washington residents or women in making our determinations. An applicant’s racial or ethnic background was considered as one factor in our general attempt to convert formal credentials into realistic predictions.”<sup>190</sup> The Supreme Court dismissed *DeFunis v. Odegaard* as moot because DeFunis had been admitted by court order—his score on the school’s weighted criteria was higher than some minority candidates. Justice Douglas disagreed on mootness; he felt the issue should be dealt with sooner, rather than later.<sup>191</sup>

The chance came again in a few years, and Lewis Powell played a prominent role. The case was that of Allen Bakke against the Regents of the University of California—another “reverse discrimination” case. The plaintiff alleged that as a medical school applicant he had been turned down, while African American students with what Bakke asserted to be lesser credentials had been accepted. Askin and Ruth Ginsburg joined the ACLU amicus brief,<sup>192</sup> while Annamay Sheppard and Jonathan Hyman, the co-director of the Constitutional Litigation clinic, represented Rutgers University as friend of the court.<sup>193</sup> Lewis Powell’s concurring opinion on a divided court rejected racial “preferences” but its focus on “diversity” as an educational value has framed the constitutional debate and has saved affirmative action in higher education, where it clings precariously to the precipice.<sup>194</sup>

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190. *DeFunis v. Odegaard*, 416 U.S. 312, 324 n.5 (1974) (Douglas, J., dissenting) (citing *DeFunis v. Odegaard*, 507 P.2d 1169, 1174 (Wash. 1973) (en banc)).

191. *Id.* at 324.

192. Brief of the American Civil Liberties Union, the ACLU of Northern California, the ACLU of Southern California, Amici Curiae, Regents of the Univ. of Cali. v. Bakke, 438 U.S. 265 (1977) (No. 76-711), 1977 WL 187972.

193. Brief of the Board of Governors of Rutgers, the State University of New Jersey, the Rutgers Law School Alumni Association and the Student Bar Association of the Rutgers School of Law-Newark Amici Curiae, Regents of the Univ. of Cali. v. Bakke, 438 U.S. 265 (1977) (No. 76-711), 1977 WL 189514.

194. *Regents of the Univ. of Cali. v. Bakke*, 438 U.S. 265, 313–14 (1978). Announcing the opinion of the Court Powell wrote “even at the graduate level, our tradition and experience lend support to the view that the contribution of diversity is substantial.” *Id.* at 313. In *Sweatt v. Painter*, the Court made a similar point with specific reference to legal education:

The law school, the proving ground for legal learning and practice, cannot be effective in isolation from the individuals and institutions with which the law interacts. Few students, and no one who has practiced law would

### PELS GRADS IN THE OFFICE OF THE PUBLIC DEFENDER

But what did they do after graduation? The largest cadre of PELS graduates entered the statewide Office of the Public Defender (PD), which handles the defense of the overwhelming majority of indictable offenses in New Jersey.<sup>195</sup> As the largest “law firm” in New Jersey, PD absorbed, I am sure, more PELS graduates than any other employer. There they continued the civil rights work that had been begun at the clinics—fighting in the courts every day for fair trials. Taking advantage of the PD’s statewide organization, they continued the fight begun at the Constitutional Litigation Clinic against the notoriously arbitrary vehicle search practices of the State Police.<sup>196</sup> The PD’s systematic gathering of information led to federal intervention and eventually transformed the notorious racial profiling highway patrol practices, leading to a ten-year consent decree monitoring the state police.<sup>197</sup>

But the PD’s most important and successful effort was against the death penalty, which during the PELS glory years was not part of New Jersey law. That changed with its restoration in 1982. For the next twenty-five years until its 2007 legislative repeal,<sup>198</sup> the PD was involved in or conducted solely the defense of every death penalty

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choose to study in an academic vacuum, removed from the interplay of ideas and the exchange of views with which the law is concerned. 339 U.S. 629, 634 (1950).

195. I take particular pride in my classmates of '73 who joined the PD. Matthew Catania, Lois DeJulio, Patricia Del Bueno, David Evans, David Hamilton, Dale Jones, Paul Klein, James Louis, Cynthia Matheke, Marilyn Morheuser, Harold “Bud” Mynett, Marianne Nelson, Howard Sims, Thomas Smith, Jerry Soffer, and Phyllis Warren. Six of these attorneys remain on staff with the PD as of this writing. I had the privilege of working as a “pool attorney” for the PD from 1979–83.

196. *Lewis v. Hyland*, 554 F.2d 93, 94–95 (3d Cir. 1977) (“When this case initially was before us, we determined that the complaint set forth facts which, if proved, would justify a federal equitable remedy. Plaintiffs have now substantiated (and, indeed, augmented) their initial allegations. The district court’s extensive findings of fact reveal what can only be described as callous indifference by the New Jersey State Police for the rights of citizens using New Jersey roads. Were it not for the Supreme Court’s opinion in *Rizzo v. Goode*, which was announced after the district court proceedings had been concluded, our original mandate in this case, would have required that we reverse the district court’s denial of injunctive relief in light of plaintiffs’ demonstration of numerous violations of their constitutional rights.” (citations omitted)).

197. *State Police Consent Decree Information*, STATE N.J. DEP’T LAW & PUB. SAFETY, <http://www.nj.gov/oag/decreehome.htm> (last visited Mar. 16, 2013).

198. Capital Punishment Act, ch. 111, 1982 N.J. Laws 555, amended by Act of Dec. 17, 2007, ch. 204, sec. 1, 2007 N.J. Laws 1427 (codified as amended at N.J. STAT. ANN. § 2C:11-3 (West 2012)).

case in New Jersey. Their astounding record is as follows: of 228 death penalty trials, 60 were sentenced to death, and 57 death sentences were reversed on appeal.<sup>199</sup> Eight condemned men remained on death row when the Legislature's Study commission recommended repeal in 2007.<sup>200</sup> No one was executed from reinstatement to the day the Legislature repealed capital punishment in December 2007, replacing execution with life imprisonment without parole.<sup>201</sup>

Four members of the first PELS class of 1973 played critical roles in the PD's litigation response. Thomas Smith, as the First Assistant Public Defender (and, from time to time, the Acting Public Defender) ensured that the PD had the appropriate amount of resources from the legislature to do the job, apportioned them correctly and allocated staff to provide proper representation. Dale Jones, who tried New Jersey's first capital case, wore many hats during that time, including trial work, training, supervising and, ultimately, serving as the PD's Director of Capital Litigation from 1984 to 2002. Lois DeJulio worked on the first capital case both on trial and appeal and several thereafter and was regarded by many as the "brains" of the operation. Paul Klein, who also handled capital appeals, supervised and trained other attorneys who handled capital appeals as well. Particularly worthy of mention is Leigh Bienen a 1974 graduate. She was the lead author of the landmark report for the PD which led to the Supreme Court's mandate of "proportionality review."<sup>202</sup>

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199. See George W. Conk, *Herald of Change: New Jersey's Repeal of the Death Penalty*, 33 SETON HALL LEGIS. J. 21, 24 (2008); James R. Zazzali, *The Dynamic Interaction Between Courts, Legislature, and Public Opinion*, 33 SETON HALL LEGIS. J. 55, 58 (2008).

The heroic roles of the Office of the Public Defender and the heroic New Jersey Supreme Court in its relentlessly conscientious review of every capital case can be gleaned from the papers and proceedings of the Symposium, *Legislation, Litigation, Reflection & Repeal: The Legislative Abolition of the Death Penalty in New Jersey*, 33 SETON HALL LEGIS. J. 1 (2008).

For New Jersey death penalty repeal resources, see *Resources*, SETON HALL L., [http://law.shu.edu/About/News\\_Events/deathpenalty/Resources.cfm](http://law.shu.edu/About/News_Events/deathpenalty/Resources.cfm) (last visited Oct. 10, 2012).

200. See NEW JERSEY DEATH PENALTY STUDY COMMISSION REPORT (2007), available at [http://www.njleg.state.nj.us/committees/dpsc\\_final.pdf](http://www.njleg.state.nj.us/committees/dpsc_final.pdf).

201. See Zazzali, *supra* note 200, at 57.

202. See *State v. Koedatich*, 548 A.2d 939 (N.J. 1988) (directing Attorney General's office to develop statewide capital case selection guidelines); DAVID C. BALDUS, DEATH PENALTY PROPORTIONALITY REVIEW PROJECT: FINAL REPORT TO THE NEW JERSEY SUPREME COURT 22-24 (1991).

The New Jersey courts took their mandate to avoid arbitrariness with utmost earnestness and approached their task with scientific rigor. In its mission to “save lives,” the Office of the Public Defender commissioned a rigorous study to examine death penalty outcomes across a spectrum of circumstances.<sup>203</sup> The New Jersey Supreme Court appointed Special Masters to determine if racial or other impermissible disparities tainted the death sentences.<sup>204</sup> The New Jersey Supreme Court itself used what Justice Alan Handler (a death penalty opponent) called “super due process”<sup>205</sup> and Justice John Wallace’s idea of exacting review—the idea that “when life hangs in the balance error has no place.”<sup>206</sup> This was a fusion of the lessons of the Fifth, Sixth, Eighth, and Fourteenth Amendments. It was this process, not obstruction, as some detractors would argue, that led to the lack of executions.

### LOOKING BACK

The unique activism of Rutgers-Newark—a small state university law school in an afflicted city—had a huge impact in the development of the law. The activist faculty and the clinics engaged law students deeply in innovative and intense litigation regarding the most important and controversial issues of the day. Students at People’s Electric learned the law-making function of the courts firsthand. They often helped make that law. No other law school in the country can begin to match its record in the 1970s. This was accomplished without endowment, without a base of high ranking or wealthy alumni, and without a tradition of such activism at the school. It was merely a public law school whose tuition was nominal. Students learned from the extraordinarily talented lawyers whom they assisted. Their successes showed students how to succeed by really trying. We

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203. See Leigh Bienen and Deborah Denno, *The Reimposition of Capital Punishment in New Jersey: The Role of Prosecutorial Discretion*, 41 RUTGERS L. REV. 27 (1988).

204. See *supra* note 202; see also *In re* Proportionality Review Project (II), 757 A.2d 168 (N.J. 2000).

205. See, e.g., EVAN J. MANDERY, CAPITAL PUNISHMENT: A BALANCED EXAMINATION 101, 104, 561, 570 (2005); ELIHU ROSENBLATT, CRIMINAL INJUSTICE 199, 200 (1996). Super due process refers to the additional rights afforded to defendants in a capital case, beyond those afforded to defendants in a non-capital proceeding, such as the possession of more appeal rights and the right to present unlimited mitigating evidence.

206. *State v. Wakefield*, 190 N.J. 397, 570 (2007) (Wallace, J., dissenting).

left Rutgers confident that we knew how to, and could, change the law, confident that we could make a difference.

Why Newark? First, the sixties and seventies were the high water mark of public higher education. The two law schools of Rutgers—Rutgers-Newark and Rutgers-Camden—were practically free, like other leading public university systems such as those of New York, California, and Michigan. We entered law school with no dread of acquiring debt that would constrain our career choices. Confident in American prosperity, our concerns as students were for meaningful careers, not debt service. Struggling financially after graduation was not a prospect we contemplated.

Second, the quiet leadership of Dean Willard Heckel brought extraordinary talent to the law school and accommodated the activism of the clinical professors highlighted in this essay. Of course, there were professors who disapproved and who wished that the school would become the small, elite academic model they remembered as the Yale Law School from whence they came.<sup>207</sup> Yet those professors—Alex Brooks, David Haber, and Julius Cohen—provided another side to the student experience—the scholarly exactitude of the academic lawyer. Nothing about Rutgers made it a bar-exam prep school of the sort that some today urge as a solution to the high costs of “academic” law schools.<sup>208</sup> In fact, I do not remember anyone worrying about the bar exam. Although we could take one-third of our credits in clinics, the first year core curriculum was conventional, and so were the other offerings. So, the young activists who disdained capitalism nonetheless learned Business Associations, Evidence, Civil Procedure, and Remedies in lecture classes where they read the same Langdellian casebooks as students at the Ivy League schools did.

Third, the spirit of the times gave great confidence to reformist litigators. Kinoy, Kunstler, and Stavis had experienced much success in their work in the civil rights movement. They believed they could reach and persuade the members of the United States Supreme Court. When the Court began to retrench with the appointment of the “Minnesota Twins”—Warren Burger and Harry Blackmun—the activists doubled down.<sup>209</sup> And time proved that they could. Stevens

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207. See Blumrosen, *supra* note 5, at 781.

208. See BRIAN Z. TAMANAHA, *FAILING LAW SCHOOLS* (2012) for a survey of the current crisis in legal education caused by its high cost.

209. See LINDA GREENHOUSE, *BECOMING JUSTICE BLACKMUN: HARRY BLACKMUN'S SUPREME COURT JOURNEY* (2006)

and Blackmun eventually wore the mantle of the civil rights movement heroes—Earl Warren and Louisiana’s “Mr. Republican” John Minor Wisdom.<sup>210</sup> Even Lewis Powell played a progressive role at times, as in his concurring opinion in *Bakke*, which recognized diversity as a key educational value. After his 1987 retirement, he told law students that the only votes he regretted were upholding the Georgia criminal sodomy statute in *Bowers v. Hardwick*<sup>211</sup> and *McClesky v. Kemp*,<sup>212</sup> in which the Supreme Court upheld Georgia’s death sentencing process as constitutional, despite overwhelming evidence that killers with white victims were far more likely than killers of black victims to be sentenced to death.<sup>213</sup>

Looking back at the many reported and landmark decisions in which Rutgers professors and students participated, the alliance between the ACLU and the Women’s Rights and Constitutional Litigation Clinics stands out. In those days—before the invention of the PC multiplied briefs like the axe of the sorcerer’s apprentice multiplied brooms—key cases saw only a smattering of amicus briefs. Often, the ACLU and the Clinics were the only non-parties who participated. That pattern began to change in the late 1970s when conservative public interest law firms began to emerge.<sup>214</sup> Dramatic change occurred in the Reagan era as the conservative movement began to drive out the “RINOs”—Republican in Name Only—and developed an ideological perspective on the law that was both more conservative and more rigorous than the genteel conservatism of a Lewis Powell.<sup>215</sup> Later litigators faced fierce, intellectually powerful conservatives like Antonin Scalia, who renounced the Warren Court. The next generation of litigators faced in William Rehnquist, a Chief

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210. See JOEL FRIEDMAN, *CHAMPION OF CIVIL RIGHTS: JUDGE JOHN MINOR WISDOM* (2009).

211. 478 U.S. 186 (1986).

212. 481 U.S. 279 (1987).

213. See Joan Biskupic & Fred Barbash, *Retired Justice Lewis Powell Dies at 90*, WASH. POST, Aug. 26, 1998, <http://www.washingtonpost.com/wp-srv/national/longterm/supcourt/stories/powell082698.htm>; Ruth Marcus, *Powell Regrets Backing Sodomy Law*, WASH. POST, Oct. 26, 1990, available at <http://www.glapn.org/sodomylaws/bowers/bonews05.htm>.

214. See, e.g., *United Steelworkers of Am. v. Weber*, 443 U.S. 193 (1979) (upholding voluntary private affirmative action plan over dissents by Burger and Rehnquist). Among the twenty-seven amicus curiae briefs were submissions opposing affirmative action filed by Pacific Legal Foundation, Washington Legal Foundation, Great Plains Legal Foundation and others who decried as impermissible quotas of the voluntary plan to recruit black steelworkers.

215. See generally MICHAEL AVERY & DANIELLE MCLAUGHLIN, *THE FEDERALIST SOCIETY: HOW CONSERVATIVES TOOK THE LAW BACK FROM LIBERALS* (2013).

Justice more consistently conservative and more competent than Warren Burger, who was only able to slow, and not reverse, the progressive jurisprudence of the Warren Court.

Finally, credit must be given to the New Jersey Supreme Court. New Jersey's progressive jurisprudence began with the landmark products liability case *Henningsen v. Bloomfield Motors*, which introduced implied warranty of fitness for use to liability in tort for defective products.<sup>216</sup> In the 1970s, the New Jersey high court embraced the call by its former member, Justice William Brennan, to use state constitutionalism as an alternative to the foot-dragging of the Burger Court.<sup>217</sup> Brennan knew the potential in New Jersey because he had served as a member of the judiciary committee of the 1947 New Jersey Constitutional Convention.<sup>218</sup> This path's effectiveness was seen most dramatically in the education law cases of *Robinson v. Cahill* and its progeny *Abbott v. Burke*. Like the landmark zoning/open housing case *Southern Burlington County NAACP v. Township of Mount Laurel*,<sup>219</sup> the educational law cases continue to roil New Jersey politics, often along partisan lines.

Some have asked if there are any lessons for today's law schools and law students, who labor under the burden of the massive shift—due to anti-tax sentiment—of the costs of higher education from the public to the backs of students via the federal student loan system. Can the circumstances that gave rise to Rutgers great successes be replicated? No. But the principle of the public interest, that “we take care of our own,” as Bruce Springsteen sings,<sup>220</sup> can again, with enough energy, will, wisdom, and good fortune rise to the forefront of our thinking as a nation.

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216. 161 A.2d 69 (N.J. 1960).

217. William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977).

218. See Frank Askin, *Justice William J. Brennan, Jr. (1906–1997) The Jurisprudence of Remedies*, 49 RUTGERS L. REV. 1277, 1280 (1997).

219. 336 A.2d 713 (N.J. 1975).

220. BRUCE SPRINGSTEEN, *We Take Care of Our Own, on WRECKING BALL* (Columbia 2012).