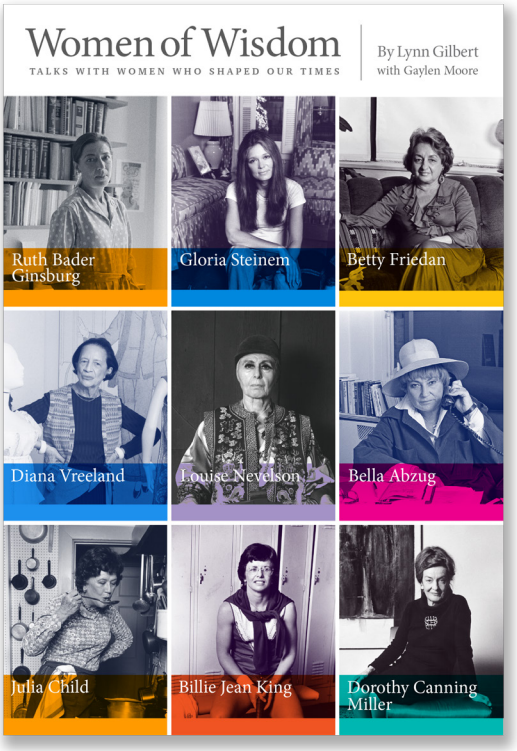
WOMEN OF WISDOM

TALKS WITH WOMEN WHO SHAPED OUR TIMES

Ruth Bader Ginsburg

By Lynn Gilbert

with Gaylen Moore



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Dedication

To the women of the past, who made a difference,
the women of today who keep the goal of equality aloft,
and the women of tomorrow in whom we entrust our future.

— Lynn Gilbert

Ruth Bader Ginsburg in her apartment, photograph by Lynn Gilbert ©1978, New York City.

Ruth Bader Ginsburg

(born 1933, Brooklyn, New York) is a judge who, during her career as a lawyer, briefed and argued several precedent-setting cases before the Supreme Court on sex-based discrimination. These cases have done for women's rights what the historic NAACP Legal Defense Fund legal strategy did for civil rights in the 1950s. A former professor at Columbia University Law School and founding director of the American Civil Liberties Union's Women's Rights Project, she is now a Supreme Court Justice.

I WAS TEACHING LAW at Rutgers University in the late sixties when sex discrimination complaints began trickling into the New Jersey affiliate of the American Civil Liberties Union. Those complaints were referred to me because, well, sex discrimination was regarded as a woman's job. At the same time my students wanted to put on a Law Day program about sex discrimination and the law, a subject I had not studied in a disciplined way at the time (1968-69). I repaired to the library and spent the better part of a month reading every article written and every published federal case in the area since the nation's start. That was not an awesome task by any means. There was so little, it was amazing how little. In all that time there wasn't as much as is produced in one year nowadays.

In the process, my own consciousness was awakened. I began to wonder, How have people been putting up with such arbitrary distinctions? How have I been putting up with them? I can't claim I suddenly saw a bright light one morning. It was a gradual process. Both the ACLU and my students prodded me to take an active part in the effort to eliminate senseless gender lines in the law. Once I became involved, I found the legal work fascinating and had high hopes for significant change in the next decade.

The turning-point Supreme Court decision came in November 1971 in Reed v. Reed. I was a principal author of the brief, but did not argue the case. Reed was a unanimous decision overturning a law that preferred men over women for appointments as administrators of decedents' estates. It was the first time the Supreme Court ever overturned a law in response to a woman's complaint of unfair sex-based discrimination. The ACLU was heartened and, to build on the Reed victory, its board voted to establish a Women's Rights Project.

The project's goal was to get decision-makers to understand what sex stereotyping is and how the notion that men are this way (frogs, snails, puppy dogs' tails) and women are that way (sugar, spice, everything nice) ends up hurting both sexes. Our idea was to try to find the right cases, bring them before the most sympathetic tribunals, and help develop constitutional law in the gender classification area step by step. It didn't work out exactly as planned, but on the whole I think it worked out well.

A major problem was the impossibility of organizing a step-by-step litigation campaign immune from disturbance by others bringing up weak cases in the wrong order and at the wrong time. The ACLU doesn't control the civil rights litigation world, or even a small part of it. In the old days, when school desegregation law was in its infancy, Thurgood Marshall, then chief lawyer for the NAACP Legal Defense Fund, was able to manage the development of the litigation, building block by building block. The NAACP was then the only show in town. If you wanted representation in a school segregation case, you went to them. That's no longer true of black civil rights cases, and it has never been true for women's rights cases. Since the women's rights litigation started, there were always lawyers somewhere who would take sex discrimination cases without thinking how they fit into a larger pattern. The courts needed to be educated. That requires patience; it may mean holding back a case until the way has been paved for it.

A good example of this education process is Duren v. Missouri, a case the Supreme Court decided in 1979. Duren involved automatic exemption of every woman from jury service. The court held the exemption unconstitutional. If Duren had been brought to the Supreme Court in 1972, the year after Reed v. Reed, it would have been a loser. Steps had to be taken in between.

One of these in-between steps was Weinberger v. Wiesenfeld, a case decided by the Supreme Court in 1975. The case involved a woman, Paula Wiesenfeld, who happened to be the principal wage earner in her family. She died in childbirth. Her husband, Stephen, wanted to take care of the baby and not work full-time until his son reached school age. If Stephen had been a widowed mother, then unquestionably he would have gotten Social Security benefits. Because he was a widowed father, the law provided no benefits for him. Yet Paula had paid the same Social Security tax as a man pays. The justices were able to see clearly in that case what sex stereotyping is.

Wiesenfeld set the stage for harder cases. One such case was Califano v. Goldfarb, decided by the Supreme Court in 1977. The issue was survivor's benefits for

an elderly gentleman whose wage-earning wife had died. Mr. Goldfarb wanted to collect Social Security benefits under his wife's account because he was not independently covered by Social Security. His case was less sympathetic than Stephen Wiesenfeld's, because there was no child in the picture. But once you explained that the woman worker should get the same protection for her family as the male worker gets for his family, the courts could see the point. The Wiesenfeld and Goldfarb cases were brought by widowers, but the discrimination started with the women workers. In effect, Paula Wiesenfeld and Hannah Goldfarb were not getting paid what a man would be paid. They were not getting the same fringe benefits for their families. The Social Security Act, as passed in the 1930s, ranked women as dependents. The law protected a woman as an appendage of a man but did not give her a full count when she was self-standing. If she was working, she was treated as a pin-money earner, not as a real breadwinner.

The very same preconception is reflected in the notion that women do not have to pay alimony. If the Supreme Court had gotten the alimony case Orr v. Orr in the early 1970s, the justices never would have understood it. By 1979 they did.

There are still some loose ends, confusion, and untidiness in sex discrimination law. The Equal Rights Amendment would help get us past the confusion, but the amendment is encountering a hard time. One reason is a lack of understanding, all the scare stories about what the ERA would do.

Any human rights guarantee that is phrased in grand, general terms is vulnerable to a scare campaign. That is what's happening to the Equal Rights Amendment. The Equal Rights Amendment is not comparable to the amendment that says eighteen-year-olds can vote. That amendment plainly means eighteen and not seventeen. Because the ERA reads, Equality under the law shall not be denied or abridged by the United States or by any state on account of sex, people can distort its meaning. They can say, well, the ERA means you can't have single-sex bathrooms, they can say all manner of similarly outlandish things. In its generality, the ERA resembles the Bill of Rights guarantees of freedom of speech and religion. Think of the fear tactics that could be employed if the freedom of speech and religion provisions were before the public today. As to free speech,

well, what about crying Fire in a crowded theater when there is no flame? Freedom of religion? Does that mean we have to allow far-out sects to handle poisonous snakes at religious ceremonies, endangering children as well as adults in attendance?

Without the ERA, the controversy will drag on as case by case is reviewed, ideally by legislators, but if they default, then by judges. It will take a long time, but I am confident the equality advocates will emerge as the winners.

We believe in racial equality, we believe in free speech. We have recorded those beliefs in the Constitution, our fundamental instrument of government. We are advancing toward the belief that men and women should be seen as equal before the law. We should record that basic principle in the Constitution. We should do that in preference to reading the principle into Constitutional provisions drafted in the eighteenth and nineteenth centuries.

We know the founding fathers in the eighteenth century did not think men and women were or should be equal before the law. During the nineteenth century, after the Civil War, there were still tremendous differences in the law's treatment of men and women. It was accepted that men should vote and women shouldn't vote. It's hard to read into provisions written over a century ago our modern concept that men and women should have equal opportunities, so far as government action is concerned. Yet the Supreme Court Justices have been doing just that. They have done so because our Constitution is meant to survive through the ages; there must be some adaptation to changing times and conditions.

But it would be so much cleaner if the Constitution were amended to state the sex equality principle expressly. A case by case approach could achieve the same end, but not as solidly or securely. The same issue would have to be fought out again and again and again, in the several states and up court ladders. It is a tedious, wearying process. I would much prefer that the society register its commitment to the equality of men and women before the law up front, that we say where every nation can see it, right in our Constitution, Government shall not deny people

equal rights on account of their sex.

When I graduated from law school in 1959, it was not possible to move legislators or judges toward recognition of a sex-equality principle. The idea was unfamiliar and therefore unacceptable. I did not go into law with the purpose of becoming an advocate of equal rights.

I became a lawyer for personal, selfish reasons. I thought I could do a lawyer's job better than any other. I have no talent in the arts but I do write fairly well and analyze problems clearly. At Cornell, where I was an undergraduate, I was influenced particularly by a government professor, Professor Robert Cushman. I studied with him and worked as his research assistant. That was in the mid-1950s, an interesting time, the heyday of McCarthyism. Cushman was a defender of our deep-seated national values—freedom of thought, speech, and press. He wasn't outspoken about it. He was a very gentle man. His own credentials were impeccable. But he could not tolerate threats to our American way, whether they came from the left or from the right. The McCarthy era was a time when courageous lawyers were using their legal training in support of the right to think and speak freely. That a lawyer could do something that was personally satisfying and at the same time work to preserve the values that have made this country great was an exciting prospect for me.

I didn't have difficulty being accepted at Harvard Law School, nor was I treated as a person of lesser worth, but my experience in law school may have been deceptive in that it didn't prepare me for the job market as it then was.

I started law school in 1956, one of nine women in an entering class of over five hundred. We wondered why there were only nine, and asked a faculty member—he was a good friend, his wife was a lawyer. "Is it discrimination?" we inquired. "Certainly not," he said. "From the large gray middle of the applicant pile we try to take people who have something unusual, something different about them. If you are a bull fiddle player, for example, you would get a plus, and if you're a

woman you would get a plus." If that suggested there was no discrimination in admission, it also suggested that women in the law were strange, unusual.

The small number of women in law school in the 1950s was largely a result of self-selection—women knew that opportunities to make a living as lawyers were limited for them. So many places were closed to women in those days. The most prestigious clerkships with judges were not open to women. Some of our most distinguished jurists simply refused to interview a female. No U.S. attorney's office would hire a woman as a prosecutor. U.S. attorneys were beginning to hire women for civil litigation, but not for criminal cases. That seemed to me ironic. The excuse was women are too soft, they can't handle hardened criminal types. If you looked at the other side of the street to see who was defending indigent defendants, it was Legal Aid. Legal Aid was full of women. The relationship between the defendant and the defense lawyer is much closer than that between the prosecutor and the accused. So it wasn't women's inability to deal with hardened criminals. Women did just that in Legal Aid, where lawyers tend to be paid less than they are in other legal jobs.

Why were there so few women in law school a generation ago? It was the sense that, well, I can go through three years of law school, and then what? Who will hire me and how will I support myself?

I was aware of the limited opportunities to some extent when I entered law school. I was already married and had a child and the response of my own family at the time was, Now she can do whatever she wants because she's got her man so she will never starve. It was the tail end of the Korean War and my husband went into the service after his first year of law school. I was with him in the military for two years. Our daughter was born during that time.

It wasn't as hard to go to law school, being married and with a child, as people think. I thought it would be an overwhelming burden and when I became pregnant I began to think I would never earn a law degree. Early on, my father-in-law said to me that if I decided not to go to law school because of this baby, that would be

fine. No one would think the less of me for making that decision. But if I really wanted to be a lawyer, having a baby wouldn't stand in my way. I realized he was absolutely right and I think he gave me sound advice for most things in life. If you want to do something badly enough you find a way, somehow you manage.

In Cambridge, we found a New England grandmother type to be a baby-sitter for my daughter. She came in the morning when I left for class and stayed till four p.m. My husband and I have always shared the household chores, and he has always outrun me in the kitchen. He's a super chef and I'm, at best, a low pass as a cook.

My husband is my biggest supporter. That was certainly true my first year in law school. Like all first-year law students, I had concerns about how I was doing in relation to all those brilliant people. My husband told his classmates and mine, "My wife is going to be on the Law Review." Colleagues told me later they thought he lacked judgment, saying such a thing about a woman who didn't look particularly impressive. But that's the way he was, in law school and in most stages of our life after that.

The women in law school were more conspicuous than the men. If you were a male law student you could blend into the crowd, and if you weren't so well prepared you could hide from the professor's view on a back bench. But if you were one of two women in a section, you felt (and this was not paranoia) that you were in plain view, not only in the eye of the instructor but also in full vision of your classmates. You were on your guard in a way that women law students today are not when there are over a hundred in each class. It wasn't harassment as much as it was fun and games: Let's call on the woman for comic relief. Most of the professors didn't do that, but some of them did, and they did it pointedly.

There were other petty annoyances. At that time Harvard kept one room in the Lamont Library closed to women. It was symbolic of the old days, but it happened to be the old periodical room and I had to check a reference in an old periodical for the Law Review. I went over there rather late at night. The man at the door barred my way. I said, "Well, I'll stand at the door and you bring me the magazine

and I'll check the reference." He wouldn't do it. I had to call back to the Law Review and say, "You have to send a man for this job." It was a trivial thing, as were other encounters of a similar kind at law school. There was no outrageous discrimination but an accumulation of small instances.

I transferred to Columbia Law School at the end of my second year. I graduated in 1959, tied for first in my class. I signed up for all the law firm interviews I could get, but no one offered me a job. I think a combination of factors contributed to this. In the fifties, the traditional law firms were just beginning to turn around on hiring Jews. In the forties it was very difficult for a Jew to be hired in one of the well-established law firms. They had just gotten over that form of discrimination. But to be a woman, a Jew, and a mother to boot, that combination was a bit much. Probably motherhood was the major impediment. The fear was I would not be able to devote my full mind and time to a law job.

I ended up clerking for a distinguished federal district court judge, a man I deeply admire, whose friendship I cherish to this day. Another very dear friend, then a teacher of mine, told me years later that he had spent quite some time persuading the judge to hire me, assuring him that I wouldn't be calling or running home constantly to attend to my then four-year-old child. At the time my reaction was to prove that motherhood posed no problem at all. I worked probably harder than any other law clerk in the building, stayed late whenever it was necessary, sometimes when it wasn't necessary, came in Saturdays, and brought work home.

After the clerkship, and based on a high recommendation from the judge, I got a number of law firm invitations.

But instead I came to Columbia and worked on the International Procedure Project for the next two years. I did that for a few reasons, some clear to me then, others probably locked in my subconscious. One reason was the opportunity to write a book. The idea that I would have something of my own between hard covers was tremendously appealing. Another attractive feature was going off to a foreign land I knew nothing about and being wholly on my own. The book was about the Swedish judicial system. I was tutored in Swedish for several months, then

went abroad for two separate stays, the first, four months, and the second, two months. For the first stay, I departed alone. My daughter, who was turning seven, joined me a few weeks later at the close of first grade and my husband joined us for his vacation. The next year I waited until my child finished the school year and we traveled to Sweden together. The University of Lund, where I did much of my work, had a fine day-care center for children of students and faculty, just an excellent place. That kind of all-day center was just about unknown in the United States then.

After the Columbia project, I started teaching at Rutgers. A teacher of procedure at Rutgers was leaving to become dean of the Howard Law School. He was a black man. Not only did Rutgers have a black man on the faculty, it also had a woman, and she had smoothed the path for me by the excellence of her performance. That was in 1963. It was extraordinary for a law school then to have even one woman as a full-time teacher.

Women did not begin to appear in law school in numbers until the late 1960s. The law schools were concerned that with the heightened Vietnam War draft calls, a considerable number of men might not show up. They began to accept more women and to make it known that women were genuinely welcome at law school. The big change came in 1970 when enrollment by women took off. Across the country, women are now over one fourth of all law students, and the percentage is higher at some schools. Cardozo Law School in New York, which is part of Yeshiva University, has close to 50 percent women; NYU, close to 40 percent; Columbia, about a third.

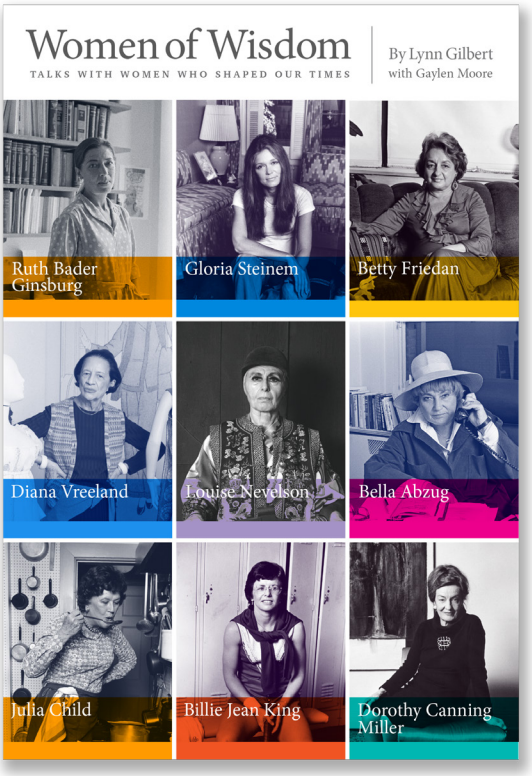
I found I liked teaching. I liked the sense of being my own boss. I had the good fortune not only to teach one of the subjects I wanted to teach but also to write about what interested me. That was different from a law firm where the notion of the hired gun is true to this extent: You have a client, he or she has a problem, and you work on that problem. There's a tremendous luxury in being a law teacher in that you can spend most of your time doing whatever interests you.

In teaching it's very hard to be a devil's advocate. Sometimes, if I think that the

students will have a knee-jerk reaction one way I will deliberately present the other side as strongly as I can, without saying where I stand personally, then have the students defend their views.

But I don't pretend to be neutral on issues when I am not. I like the students to understand that most of us have a perspective, most thinking people do, but that it's important to disclose one's biases. I'm not trying to brainwash people, but I'm not going to present myself as neutral. I don't think my students have any doubt where I stand on the Bill of Rights.

I'm still involved in the ACLU's Women's Rights Project, now as a kind of grandmother. We have filed a friend-of-the-court brief with the Supreme Court for a case that's going to be decided this term. This case involves a workers' compensation law that provides benefits to a spouse when a man dies on the job, but not when a woman suffers a fatal industrial accident. The same principle is at stake as the one involved in 1973, 1974, 1975,nd 1977 cases. It's exciting to be able to use your professional tools to advance a cause you believe in.



PARTICULAR PASSIONS

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