

Justice Ruth Bader Ginsburg
Distinguished Lecture on
Women and the Law
New York City Bar
February 8, 2016

I am so honored to be here tonight to give the 2016 Ruth Bader Ginsburg Distinguished Lecture on Women and the Law. Ruth has been a hero of mine ever since the early 1970s when I first became aware of the ground-breaking work she was doing for the Women's Rights Project of the ACLU. She was a pioneer in fashioning and implementing a strategy to persuade the Supreme Court to apply the Equal Protection Clause to prohibit gender discrimination, thus laying the basis for the revolution in the rights of women that has taken place in the ensuing forty years. For her accomplishments in that regard, she has quite rightly been referred to as the Thurgood Marshall of the women's movement.

In fact, Ruth is such a monumental figure in women's rights that I find it rather intimidating to speak on women and the law in a lecture series in her name. Indeed, doing so is almost as scary as publicly disagreeing with Alan Greenspan, Bob Rubin and Larry Summers about the need for over-the-counter derivatives regulation in the late 1990s. Time magazine may have called them the Committee to Save the World, but we all know that Ruth is the Notorious RBG. She was instrumental in changing the world for women and girls in the United States. Ruth

is a leader, mentor and inspiration for all of us who have strived to increase opportunities for women.

We have seen enormous gains in opportunities for women in the fifty years since I began to practice law. I would like to talk tonight about the important role that lawyers have played in accomplishing those gains and the urgent need for continued efforts in order to make gender equality a reality.

In 1961, when I started law school, there were relatively few women working outside the home, and jobs tended to be segregated by gender. Only three percent of the legal profession was female, and that percentage had not changed for over 50 years. Virtually all law schools had quotas on the number of women students they would admit. My law school, Stanford, had no women faculty members, and my graduating class included seven women out of about 135 graduates. That was the largest number of female graduates Stanford Law School had ever had.

Even women lawyers had a hard time finding a job in those days. When Justice Sandra Day O'Connor graduated from Stanford Law School in the 1950s, the only law firm job she was offered in California was as a legal secretary.

A decade later I was more fortunate. After graduation, I clerked for Judge Henry W. Edgerton on the U.S. Court of Appeals for the D.C. Circuit. To the best

of my knowledge, he was the only judge on that court who had ever had a woman law clerk up until that time. Of course, no judges on that court were women.

When I was looking for my first law firm job in 1964 and 1965, many firms in New York and Washington, DC had no women lawyers. The Equal Pay Act of 1963 had been passed and was supposed to guarantee equal pay for equal work without regard to gender. However, it was narrow in scope, had not been meaningfully implemented at that point and has never been a very useful tool in reducing wage disparities between the sexes, which are still significant. Women working full time, year round still earn seventy-nine cents for every dollar earned by men.

Fortunately, a more promising statute, Title VII of the Civil Rights Act of 1964, had been adopted in the summer after I graduated from law school and more broadly forbid employment discrimination on gender grounds. With its enactment, law firms began to think twice about refusing to interview or hire women lawyers. Up until then, newspapers around the country had want-ads that were divided between “Help Wanted - Men” and “Help Wanted - Women.” Needless to say, the “Help Wanted - Women” ads did not offer jobs as lawyers or in most other professions.

After my clerkship I decided to accept an offer from Arnold & Porter in Washington, DC in large part because Carolyn Agger was a senior partner in the

firm and the head of its tax department. I was not aware of any other major firm in the District of Columbia with a woman partner.

What was the state of the law on women's rights when I began to practice law? Abortion was a crime in many states until the Supreme Court decided *Roe v. Wade*, 410 U.S. 113 (1973), in 1973. The only Constitutional equality of women recognized by the Supreme Court was the right to vote. The 19th Amendment to the Constitution granting women the right to vote had been adopted in 1920, fifty years after African-American men had been granted the right to vote by the 15th Amendment. There had been no use of the Equal Protection Clause to strike down laws discriminating against women until the 1971 Supreme Court case of *Reed v. Reed*, 404 U.S. 71 (1971). *Reed* was the seminal case from which Ruth Bader Ginsburg developed Supreme Court case law on gender bias during the 1970s.

State and federal law was replete with such discriminatory provisions. Vestiges of the incapacity of married women at common law still pervaded the law of most states. Married women were treated by the common law as similar to infants or persons with incapacitating mental disabilities. Upon marriage a woman lost legal rights to hold or manage property, enter into contracts and otherwise handle her own affairs. According to Blackstone, "By marriage, the husband and wife are one person in law" And as U.S. Supreme Court Justice Hugo Black

commented in 1966 in his dissent in *United States v. Yazell*, 382 U.S. 341, 361 (1966), “though the husband and wife are one, the one is the husband.” In the mid-19th Century a number of states adopted married women’s property acts which granted married women some of the powers lost upon marriage under the common law. These statutes varied from state to state, and many did not comprehensively restore all powers, leaving a patchwork of disabilities.

Moreover, paternalistic and stereotypic views of women, whether single or married, tainted our laws. For example, employment laws in many states limited the hours a woman could work, the amount of weight she could be asked to lift or the jobs for which she could be hired. Although these laws were purportedly designed to protect and benefit women, their effect was to exclude women from many employment opportunities. For several years after the adoption of Title VII of the 1964 Civil Rights Act, some employers continued to argue that such state laws justified discrimination against women.

Even government benefits laws were riddled with gender discrimination based on stereotypic notions of the proper roles of each gender. For example, the Social Security law presumed that a man’s spouse was his dependent, entitled to benefits on his death, while a woman’s spouse was not. Many state and federal laws on taxes, disability benefits, child support, retirement benefits, worker’s

compensation and benefits for members of the military treated men and women differently based on such stereotypes.

Thanks to the efforts of Ruth Bader Ginsburg and other women's rights advocates, a line of cases presented these and other issues to the Supreme Court, challenging gender discrimination under the Equal Protection Clause or Title VII. A number of these cases were successful, beginning to erode the bias embedded in our laws.

The failure of the states to ratify the Equal Rights Amendment in the late 1970s and early 1980s was a great disappointment to those of us active in the women's movement. It would have been the most effective and efficient way to eliminate the many discriminatory provisions in federal and state law.

Nonetheless, litigation striking down such provisions under the Equal Protection Clause, and ensuing efforts to amend existing legislation and to frame new legislation to avoid gender discrimination, have significantly diminished the problem of de jure discrimination.

In addition, new federal statutes were adopted that prohibited certain types of pervasive sex discrimination in the private sector. For example, the Fair Housing Act of 1968 prohibited discrimination on the basis of sex and other characteristics in the sale and rental of housing, and the Equal Credit Opportunity Act of 1974 required the extension of credit without regard to gender. Seven years

earlier I had been told by the largest bank in Washington that my income as an associate at Arnold & Porter would not be considered in its determination of how large a mortgage my husband and I could obtain. After all, the bankers said, I would soon become pregnant and resign.

It was not until the adoption of Title IX of the Education Amendments Act of 1972 that the legal profession began to open up to women in a meaningful way. That statute forbids discrimination on the basis of sex by education programs or activities receiving federal financial assistance. Law schools and other professional schools had to abandon their quotas on admissions, and women began to enter the profession in significant numbers.

The opening of opportunities for women during the last 50 years has amounted to a social revolution. In the legal profession alone, almost half the law school graduates are women, about 45 percent of law firm associates are women, and 20 percent of law firm partners are women. About a quarter of the judges on the federal courts are female, and we now have three women justices on the U.S. Supreme Court. About 20 percent of law school deans and 21 percent of the general counsel at Fortune 500 companies are women.

Although a great deal more needs to be done to achieve full equality, we should celebrate the fact that women and girls in the U.S. may now aspire to participate in virtually all human endeavors and that their contributions and labor

are now recognized and valued. Thanks to these changes, women have a chance to work in their chosen fields and to help support themselves and their families. Moreover, our society today can call on twice the number of people for their talents, creativity, and efforts in solving our problems and improving our lives. These changes have truly benefited us all.

How did these changes in the profession and in our society occur? Women lawyers across the country, along with many of their male colleagues, played an important part in accomplishing this revolution. Ruth Bader Ginsburg was a leader in the effort, but many others were working toward the same goals as well. These women had witnessed the changes in our society wrought by the civil rights movement, the peace movement and the war on poverty and realized how much could be accomplished through coming together in pursuit of a common cause. And they used their skills as lawyers to further that cause. They brought the lawsuits against sex discrimination, they drafted the legislation forbidding it, they appeared before the Equal Employment Opportunity Commission and other agencies seeking equal treatment and increased economic opportunities for women, and they used their advocacy skills to gain allies and persuade policy makers.

Many of the women instrumental in the effort were trailblazers in the legal profession, but they were not satisfied with being the first woman lawyer in a law

firm or the first woman judge on a court or the first woman member of a law school faculty. The important thing to them was to make sure they were not the only women, to make sure that opportunities opened up for the women coming after them.

During the past ten years I have been working on an oral history project for the American Bar Association that is seeking to capture and preserve the contributions of a number of these women. The Women Trailblazers in the Law Project has been taking the oral histories of senior women attorneys throughout the country who are leading private practitioners, judges, government lawyers, in-house corporate counsel, public interest lawyers and legal academicians. We now have over one hundred completed oral histories that tell the important story of these women's struggles to succeed in a male-dominated profession and their significant contributions to women's rights. A number of distinguished New Yorkers have provided oral histories, such stars of the Bar as Sheila Birnbaum, Barbara Black, Betty Ellerin, Maryann Saccomondo Freedman, Roberta Karmel, Judith Kaye, Bettina Plevan, Barbara Paul Robinson, Lynn Hecht Schafran, Shirley Siegel and Judith Vladeck. Many of the oral histories are on the ABA website, and I urge you to view them. They are truly inspirational and memorialize an important part of our history that is in danger of being forgotten.

In the early 1970s, as Ruth Bader Ginsburg was working through the ACLU's Women's Rights Project here in New York to expand gender equality under the Equal Protection Clause, other women lawyers were establishing other groups to further women's interests. NARAL was created to advocate for reproductive rights in 1969, four years before *Roe v. Wade* was decided. The NOW Legal Defense and Education Fund -- now called Legal Momentum -- was established here in New York in 1970. A group of women lawyers in Washington, DC started the Women's Legal Defense Fund in 1971 to champion women's interests; it is now called the National Partnership for Women and Families. Equal Rights Advocates was started as a public interest law firm in San Francisco in 1974.

All these organizations have played a major role in opening opportunities for women. But I would like to take a few minutes to describe in more detail another group very close to my heart. At the same time that Ruth was beginning her work at the ACLU Women's Rights Project in New York, the Center for Law and Social Policy, a public interest law firm in Washington DC, started its own Women's Rights Project. In 1972, the Center hired a young lawyer, Marcia Greenberger, and her first assignment was to research whether there really was enough work on women's issues to keep a lawyer busy full-time. Because the Center had an all-

male board of trustees at that time, it created a female advisory board to oversee the Women's Rights Project on which I and other women lawyers served.

From its inception, the Women's Rights Project thrived and grew, accomplishing critically important successes furthering women's interests. Its early victories in reproductive rights included stopping the coercive use of an experimental contraceptive on low-income and institutionalized women and securing new regulations protecting low-income women from involuntary sterilization. With respect to educational opportunities, the Project successfully required the federal government to begin to enforce Title IX and persuaded the President to issue an executive order prohibiting sex discrimination in schools nationwide. It also brought a major Title IX case challenging an intercollegiate athletic program and obtained a court-ordered settlement expanding women's sports.

With respect to employment, early efforts by the Project resulted in an order requiring government-enforced, nationwide goals for hiring women in federally funded construction. The Project played a leadership role in passing the Pregnancy Discrimination Act of 1978, establishing that Title VII prohibits employment discrimination based on pregnancy.

The Project also filed a persuasive amicus brief in a Supreme Court case holding that federal Aid to Families with Dependent Children should be available

to two-parent families with unemployed mothers as well as those with unemployed fathers. In that amicus brief the Project was proud to act as co-counsel with Ruth Bader Ginsburg and the ACLU's Women's Rights Project.

The Women's Rights Project grew rapidly and in 1981 was spun off from the Center on Law and Social Policy to become an independent organization, the National Women's Law Center, on whose board I have served since its inception. Marcia Greenberger and Nancy Duff Campbell have ably led the Center as its co-Presidents since its creation. I would like to take a moment to recognize Marcia Greenberger, who is here tonight along with some Center board members, staff and volunteers. Marcia, thank you and the Center for all you have done for women and girls for over forty years.

Marcia, Duffy Campbell and the Center's outstanding staff, now approaching seventy, have operated as a top-notch law firm, using all the lawyerly skills to open new possibilities for women and eliminate barriers based on gender. The Center has encouraged the adoption and enforcement of new statutes, litigated ground-breaking cases all the way to the Supreme Court, conducted sophisticated advocacy campaigns, and educated the public about ways to make the law and public policies work for women and their families. Building on its early work, the Center continues to take on the issues essential to women's lives in employment, education, family economic security and health and reproductive rights.

For example, the Center has continued its pioneering work implementing and expanding Title IX's guarantee of equal educational opportunity. It has been a leader in extending school athletics programs to girls and women, ensuring protection from retaliation by schools against those who complain about gender discrimination, and combating sexual harassment and sexual assault in the school house and on the college campus.

A recent major success of the Center in the employment area was the Defense Department's decision to open all positions in the military to qualified women -- the culmination of years of work by the Center and its allies that had the effect of opening hundreds of thousands of jobs to women for the first time. The Center has also worked for several years on passage and full implementation of the Affordable Care Act, which prohibits a number of health insurance practices that discriminate against women and includes contraception and yearly well-woman visits without deductibles or co-payments. Other important on-going projects include furthering pay equity, eliminating discrimination based on pregnancy, raising the minimum wage, adopting paid family and medical leave, promoting improvements in child care quality and availability, increasing access to abortion services, and expanding child care tax credits and child support.

I am so proud to have been associated with the Center and its great accomplishments in furthering the interests of women and girls for more than forty

years. It has been the most rewarding work of my career. That work has been possible only because Arnold & Porter has been so devoted to public service. The firm's policy of encouraging its lawyers to engage in pro bono activities allowed me the freedom to pursue my interests in women's rights.

In an effort to help further the goals of the Center, I and some other like-minded women lawyers joined the American Bar Association in the early 1970s to enlist its support for the Equal Rights Amendment, for implementation of Title IX, and for effective legislation forbidding sex discrimination in areas like credit and housing. We worked through the ABA's Individual Rights Section during the 1970s and 1980s to have the ABA adopt positions on those issues and others such as abortion services, access to contraception, pregnancy discrimination, domestic violence, and increasing the numbers of women in the legal profession and the judiciary. Once the ABA adopted such positions, its lobbyists in Washington joined with women's groups to support them, and the ABA's reputation as a large conservative professional organization lent considerable weight to the positions being advocated.

It was during my service on the Individual Rights Section's Council that I first had an opportunity of working closely with Ruth Bader Ginsburg. She joined the Council in the mid-1970s, and we served together for several years. She brought brilliant analysis, precision and intellectual fire power to the effort to

persuade the ABA to oppose gender discrimination in all its forms and proved to be a wonderful ally, colleague and friend.

As a result of my ABA activities, in 1977 I was appointed as the first woman member of the ABA Standing Committee on Federal Judiciary, which evaluates the professional qualifications of potential federal judicial nominees and reports to the President and the Senate. It was a wonderful time to serve on that Committee. Jimmy Carter was President and wanted to nominate significant numbers of women lawyers and lawyers of color to the federal bench for the first time in history. The ABA Federal Judiciary Committee's standards for nominees had essentially been designed on the assumption that the typical qualified nominee was an older white male litigator at an establishment law firm. They required among other things fifteen years of trial experience, a requirement that very few women lawyers or lawyers of color could meet in 1977. So there was a danger that the Committee would find some of President Carter's proposed nominees not qualified.

After meetings with Attorney General Griffin Bell and President Carter, the Committee was persuaded that its criteria needed to be revised. The Committee redrafted its standards to eliminate the fifteen-year requirement and to provide that, in assessing a candidate's professional competence, the Committee would recognize that women lawyers and lawyers of color had entered the profession in

significant numbers only recently and therefore might not have had the same extent and diversity of experience that the Committee had historically expected judicial candidates to have. These new standards eliminated a significant impediment to President Carter's nominees, and he proceeded to diversify the federal bench in a meaningful way for the first time in history.

As the District of Columbia member of the Committee between 1977 and 1980, I had the great pleasure of investigating Patricia Wald and Ruth Bader Ginsburg to be the first female judges on the D.C. Circuit. They clearly met the qualifications for that court under any criteria. It was particularly sweet to have the Committee find Ruth exceptionally well qualified, its highest designation, in light of her outstanding career as a Supreme Court advocate. Subsequently, while I served as chair of the Committee in the early 1980s, I had the wonderful thrill of participating in its evaluation of Sandra Day O'Connor as fully qualified to be the first woman justice on the Supreme Court.

Although a lot has been accomplished in furthering women's interests in the last 50 years, there is a lot more to be done. The revolution certainly is not over, and women's equality is not yet a reality. Most people in poverty in this country are women and their children. As I mentioned earlier, women's earnings are still substantially less than those of men with comparable education and qualifications, and the workplace still does not adequately accommodate the demands of

childbearing and childrearing. Lack of mentoring, sexual harassment, and stereotypic notions still hinder women's career advancement, and the lack of paid family and medical leave and high-quality, affordable childcare are nationwide problems. Women are the victims of domestic violence and sexual assault, and our society is still working to devise effective ways to protect them. Title IX's promise of educational opportunity has not yet been fully realized for all women and girls, and women's health issues have not received the research and attention they deserve. Women's access to abortion services and even to contraception and other reproductive health care are under siege. And of course, women in poverty, women of color, LGBTQ women, women with disabilities, and elderly women face additional challenges and burdens. The wonderful gains women have achieved in the last fifty years continue to be fragile and require constant vigilance to preserve them.

Even within the legal profession, much more needs to be done. Women still are not adequately represented in the partnership ranks in firms, in general counsel positions at corporations, on the faculties of our law schools or as judges on our courts. Indeed, women are generally underrepresented in the most important decision-making positions in the profession. It is up to all of us to continue the effort to shatter the glass ceiling that still exists in the profession and in society at large. Positions of power from President of the United States to the chairs of law

firms still tend to be held by men, and the men in power still tend to choose other men in their own mold as their successors.

Fifty years ago, I hoped that the entry of women into the profession would lead to changes in the workplace that would adequately accommodate family responsibilities. While we have made significant progress, there is still a lot to do in this regard as well. Two-career families are significantly challenged by the high level of billable hours and the single-minded devotion to work that many law firms expect. Few firms provide on-site high quality daycare. All too often family-leave and part-time policies are underutilized, and many of those who do use them are unfairly penalized in their career development.

So much more work is needed, and I invite all of you to work to address the problems that women continue to face in our society and in the legal profession. Working together, we can achieve true equality and economic opportunity for women. Lawyers can and should make a difference.

Thank you.