

BOOK EXCERPT: NOTORIOUS RBG: THE LIFE AND TIMES OF RUTH BADER GINSBURG

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This is an excerpt from the new book by Irin Carmon and Shana Knizhnik, “Notorious RBG: The Life and Times of Ruth Bader Ginsburg.” In this excerpt, the authors begin their account with Struck, a case that challenged the then-existing U.S. military policy of forcing pregnant female service members to make the following choice: either have an abortion or quit your job. This case was granted cert, but was dismissed as moot in 1972 when the military voluntarily changed its policy in response to litigation. As Carmon and Knizhnik explain, after Struck, Ruth Bader Ginsburg (“RBG”) continued to push for equal treatment regardless of a person’s sex or pregnancy.

DO THE DEED, PAY THE PRICE

Six weeks after the *Struck* case¹ hit a wall, the Supreme Court handed down its twin decisions in *Roe*² and *Doe*.³ Seven justices declared that the constitutional right to privacy “is broad enough to encompass a woman’s decision whether or not to terminate her pregnancy,”⁴ and struck down all fifty states’ abortion laws. In the years that followed, RBG made no bones about her dislike of Justice Harry Blackmun’s opinion in the case. “It’s not about the woman alone,” she remarked disdainfully.⁵ “It’s the woman in consultation with her doctor. So the view you get is the tall doctor and the little woman who needs him.”⁶ Worse, the very sweep of the opinion violated RBG’s go-slow policy, which she believed was the only way to change minds.

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1. *Struck v. Sec’y of Def.*, 460 F.2d 1372 (9th Cir. 1971) (challenging the then-existing U.S. military policy of forcing female service members to choose between having an abortion and keeping their jobs, on behalf of Susan Struck, an Air Force nurse seeking to keep her position while carrying her pregnancy to term), *vacated as moot*, 409 U.S. 1071 (1972).

2. *Roe v. Wade*, 410 U.S. 113 (1973).

3. *Doe v. Bolton*, 410 U.S. 179 (1973).

4. *Roe*, 410 U.S. at 153.

5. Emily Bazelon, *The Place of Women on the Court*, N.Y. TIMES, July 7, 2009, <http://www.nytimes.com/2009/07/12/magazine/12ginsburg-t.html?pagewanted=all>.

6. *Id.*

The Supreme Court had chosen a path that led it away from where RBG had been hoping to coax the justices, and there seemed to be no turning back. If abortion was a private choice, would public insurance have to pay for it like any other medical procedure? No, said the Supreme Court seven years after *Roe*, when it upheld a ban on federal funding for abortion.⁷ The burden of “privacy” fell on poor women’s shoulders. What if a woman wanted to stay pregnant, like Struck? Was her right to continue working free from discrimination protected by the right to privacy? That answer came even sooner.

Employers had long refused to hire or promote women because they might get pregnant, forced them to take unpaid leave if they did get pregnant, and then refused to give women their jobs back when they were ready to return to work. Such treatment, RBG argued, made assumptions about women’s God-given roles just like the laws struck down in *Reed* and *Frontiero* did. They were “grounded on stereotypes concerning women’s physical limitations and ‘proper place’ in society,”⁸ RBG wrote in an amicus brief in one of a string of pregnancy-related cases before the Supreme Court in the seventies. “These employer policies,” RBG wrote, had nothing to do with “the ‘nature’ of women or the realities of pregnancy.”⁹

That many of these women *needed* to work when pregnant and parenting didn’t seem to register. “The notion is that when the woman gets pregnant, she’s going to stay home and take care of her baby, everything’s wonderful, and she’s going to have a husband to support her,”¹⁰ RBG said in 1977. “Well, the kinds of plaintiffs that came up in these cases were women who had no husbands. They were the sole support of themselves and the child to come.”¹¹ No matter their income, pregnant women were assumed to have taken themselves out of public life.

RBG also understood that how pregnant women were treated had to do with sex. Only a woman’s body showed proof of having sex, and only women were punished for having it. She wrote to advise the lawyer of a pregnant servicewoman who had gotten a general discharge instead of an honorable one. “Surely the less than honorable aspect is not ‘getting pregnant’ but the conduct,”¹² RBG wrote. “As for that, it takes two, and no man (or no woman, probably) is discharged for having sexual relations.”¹³

7. *Harris v. McRae*, 448 U.S. 297 (1980).

8. Brief for the American Civil Liberties Union and Equal Rights Advocates, Inc. as Amicus Curiae, *General Electric Co. v. Gilbert*, 519 F.2d 661 (4th Cir. 1975) (No. 74-1557) (on file with the Library of Congress Manuscript Division).

9. *Id.*

10. Mitchel Ostrer, *Columbia’s Gem of the Motion: A Profile of Ruth Bader Ginsburg*, JURIS DOCTOR, Oct. 1977, at 35.

11. *Id.*

12. Letter from Ruth Bader Ginsburg to Mary Just Skinner, Re: *Crawford v. Cushman* (Feb. 13, 1973) (on file with the Library of Congress Manuscript Division).

13. *Id.*

The Supreme Court stubbornly refused to listen to any of this. Excluding pregnancy from a disability plan wasn't necessarily discriminating against women, the justices claimed in 1974 with *Geduldig v. Aiello*,¹⁴ because not all women are pregnant, even though all pregnant people are women. In another case, female employees sued General Electric,¹⁵ a company that had once made all women quit upon marrying, for excluding pregnancy coverage on its employee plan. GE's lawyer told the Supreme Court with a straight face that, after all, women didn't have to be pregnant. If they wanted to work, GE's attorney suggested, women now had legal access to what he called "an in-and-out noon-hour treatment."¹⁶ He meant abortion.

Astonishingly, on December 7, 1976, a majority of the Supreme Court agreed. Rehnquist wrote for the majority that pregnancy was special, because unlike race or gender itself, it was often "voluntarily undertaken and desired."¹⁷ The message was clear: Once you did the deed, you had to pay the price—that is, if you were a woman. Justices William Brennan and Thurgood Marshall protested in their dissent that GE hadn't left out any "so-called 'voluntary' disabilities including sport injuries, attempted suicides, venereal disease, disabilities incurred in the commission of a crime or during a fight, and elective cosmetic surgery."¹⁸

Within a day of the General Electric decision, RBG called a meeting to map out a Plan B to protect pregnant workers from discrimination. "She was very much a leader of the coalition,"¹⁹ says fellow feminist lawyer Judith Lichtman. "It only took two years to overturn a really stinky—can I say 'shitty'?—decision,"²⁰ she added. In October 1978, Congress passed the Pregnancy Discrimination Act,²¹ which made clear that employers would be discriminating against women if they didn't treat pregnant workers like other temporarily disabled workers.

Some feminists wanted pregnancy to be recognized as essentially different from "sports injuries" or "elective cosmetic surgery." But RBG was adamant that treating pregnancy as special would backfire. She hoped gender-neutral policies would make it harder for employers to single women out for discrimination. Her experience and clients had convinced her that anything that looked like a favor to women would be used against them.

14. 417 U.S. 484 (1974).

15. *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125 (1976).

16. FRED STREBEIGH, *EQUAL: WOMEN RESHAPE AMERICAN LAW* 121 (2009).

17. *Gilbert*, 429 U.S. at 136.

18. *Id.* at 151 (Brennan, J., dissenting).

19. Interview by Shana Knizhnik with Judith Lichtman.

20. *Id.*

21. 42 U.S.C. § 2000(e) et seq.