Nancy Gertner

September 5, 2012; September 6, 2012; September 7, 2012

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ORAL HISTORY

of

NANCY GERTNER

Interviewer: Pamela Berman

Dates of Interviews:

September 5, 2012
September 6, 2012
September 7, 2012
Ms. Berman: We are at Harvard Law School in Cambridge, Massachusetts. The interviewee's name is The Hon. Nancy Gertner, a retired judge of the United States District Court for the District of Massachusetts and a professor of practice at Harvard Law School. The interviewer is Pamela Berman. Judge Gertner, tell me about your background, your family.

Judge Gertner: First, I feel like saying I was the formerly Honorable but I shouldn't say that. I was born on the lower east side of Manhattan. My parents were people of modest means, Morris and Sadie, and they were born in this country but to all intents and purposes, my father was like an immigrant. He couldn't speak English until the second grade. He spoke Yiddish. Both of them were raised in very insular Jewish families, poor insular Jewish families. Neither of them went to college. My sister and I were the first in our generation to go to college and my mother, I don't believe ever finished high school. I was one of two children. And I said we lived in a tenement on the lower east side. It is ironic now that my son who goes to NYU, went to NYU was of course living in a $3000 a month apartment close to where I was born. We had really very little money and I slept in a crib until I was 8 because we all slept in one room. They couldn't afford and didn't have the space for another bed.
When I was eight, we moved to what they thought was moving up in the world which was Flushing, Queens which was a small community in the flight path of LaGuardia airport — in a two bedroom, one bath apartment. And as I said, they were very conservative. They didn't fit the profile of the Jewish parents who were very interested in pushing their children, you know ambitious for their children. They wanted us to be educated in ways they had not been. Both of them were very well-read but the pressure was mainly to get married and have kids. The pressure which I resisted for as long as I could. The story is, they applauded our achievements and I'd like to describe that there's always a situation where there's a text and a subtext. Where the text was you should get married and have children but the subtext was, boy you're really interesting. Let's have a debate about, as we used to call it Red China's admission to the UN. So it was a very conservative family. My father didn't want to pay for college. My older sister persuaded him to pay for college. So when I came along as a younger sister, I could insist on it and wanted to go “out of town.” And that was out of the question, so I went to Barnard. I could keep going but I'll wait for your question.

Ms. Berman: That's okay. When you went to school as a child, did you go to a public school.

Judge Gertner: Yes. That was the only alternative. I went to public school in Manhattan, no I guess I first went to public school in Queens, College Point and then Flushing and then I went to Flushing High School. My parents, it was interesting, there are these wonderful exam schools in
New York like Hunter College and Bronx High School Science and my parents didn’t even envision that as an option for us. Didn’t push us to do it and wanted us to be in the neighborhood, the neighborhood schools essentially. So that wasn’t even something we went for.

Ms. Berman: And what kinds of activities did you participate in high school?

Judge Gertner: I think it’s fair to say I did everything. You know I was always someone who couldn’t quite figure out where I wanted to land. I’d like to describe us all as being a part of a transitional generation. So I have to confess I was a cheerleader, yes I was a cheerleader. And I was a musical comedy star. I sang in various productions in Flushing High School. And I was president of the student body in Barnard and vice president, Flushing High School, on the one hand. And then on the other hand, you know I was valedictorian. I know other women like this. It’s almost as if you were you weren’t exactly sure where the zeitgeist was going. So you were gonna cover all bases. Homecoming queen, runner-up actually. And valedictorian. I just was active all the time. There were no sports if you recall at this time. So cheerleading to some degree was the closest I could get to being the football player that my father really wanted. If there were other alternatives, perhaps I would have done them.

Ms. Berman: And did you experience any sexual discrimination or sexual disparate treatment during high school that you realized at the time?

Judge Gertner: That’s actually an interesting question. I don’t think I was aware of the extent to which high school and my family was channeling me into one
direction. On the one hand it was very, very strong channeling. I wasn’t fighting it in the way I fought it later on, but I’m not sure how much I was aware of it, but it was clear that I was, but my rebellion was to do well in school. My rebellion was to talk about wanting to be a senator and President of the United States. My rebellion was to envision a different life than my mother’s life. But it wasn’t overt at the time and there certainly was no movement that I was aware of in Flushing High School at the time.

Ms. Berman: And when you said it came time for college you decided to go out of town, out of Flushing.

Judge Gertner: Out of New York, out of New York City. I wanted to go to Radcliffe. My father wouldn’t let me do that. My father is a very important force in my life just as a parenthetical. He wouldn’t let my mother drive, he wouldn’t let my mother work after they were married. So on the one hand he could not be more traditional as a man, but he was complicated vis a vis his daughters. It was almost as if the message was I love your mother very, very much but it’s okay you’re not like her. And my father and I would have extended debates into the night about politics. And the fact that he was there and talking to me and engaging with me was the message, conveyed the message “I think your ideas are important.” But he would literally say to me, “I’m not going to let you go out of town to school, the only time a woman should leave home is if she’s married.” So I was getting this, and beginning to be more explicit in my reaction to it. So I went to Barnard which was a wonderful school.
And how did you choose Barnard?

My sister had gone there. My sister had gone there; it was the best school as far as I was concerned in New York. And my sister had already paved the way so there was no fight about it.

Barnard was all women

Yes.

And what kinds of activities did you participate when you were at Barnard?

Well Barnard was complicated. I was at Barnard from 1963 to 1967. And that’s really when the movement began to crystallize. So we had a hygiene class at Barnard College. And we all had to take posture pictures to make sure that we were standing up straight. And the hygiene class would teach you such important things as how to get in and out of a cab without having someone look at your skirt. And the hygiene professor would say quaint things like the best form of birth control is an aspirin between your knees. But then they gave us the *Feminine Mystique* to read. And it was a game-changer for me. And for all of us. It was suddenly giving voice to what had only been sort of a kind of a malaise that we were feeling. When you asked me -- did I feel discriminated against in high school -- the fact of the matter is that the *Feminine Mystique* gave voice to what I had been feeling in high school about the identity I was being channeled towards. I don’t recall being active in women’s rights activities at Barnard, but I certainly identified
at that point very strongly. Then the school began to change as well. Barnard began over time to develop a much more feminist identity. I think if asked, I would have defined myself as a feminist. But there were also competing political things going on at Barnard and all across the country, namely the anti-war and civil rights activities. So I was defining myself in terms of all of that. I lived at home during the first two years at Barnard and commuted an hour and a half in both directions which limits your outside activities dramatically. Then I moved to Barnard, moved to the area around Columbia. Ran for office, became the undergraduate president and began to get active in the anti-war movement. I was one of the hundred student body presidents who signed a letter to President Johnson opposing the war and began to march. In fact I remember the first march down Fifth Avenue and how euphoric we felt to sort of one, put your money where your mouth was, and two, confront your government which is an interesting and moving moment when one does that, when one stands up and runs the risks that we thought we were running. This is 1966 - 67.

Ms. Berman: Were you arrested during the march?

Judge Gertner: No. But I’ve written about this, but I came back from marching to our Queens apartment one weekend, told my father, you must have heard this story. Told my father, I just marched against the war, wanted to let him know because there may be a possibility that the cameras panning the marchers he would have seen me. Of course, that was extremely unlikely but he got furious. And said to me, “Nance, it’s one
thing to believe in something, it's quite another thing to do something about it.” The words just rang in my ear. But it was another issue of the difference between our generations. That was not a political issue. His reaction was not a political response. His generation is a post-Holocaust generation. And the sense you got was that Jews should keep their heads down. If I did anything that attracted attention to me, I would be vulnerable. It wasn’t necessarily a woman issue. It wasn’t even a political issue. It was very much of a sense of keeping your head down even in America. I had nothing of those kind of feelings. And this is something I’ve come to realize later on and it’s not something he was explicit about but I’m convinced that really was what going on.

Ms. Berman: Now through the experiences at Barnard, did you, how did you decide to go to law school?

Judge Gertner: I think I always wanted to be a lawyer. Before I got to Barnard, I think it was either musical comedy or law. I was ambitious. Somehow I managed to envision a world other than the one my parents were presenting and I remember when I was in public school that I wanted to be President of the United States which was interesting. As I say, there was nothing in my family that would have pushed us in that direction. You didn’t even imagine that for a woman at the time, but I wanted to be President of the United States; Abraham Lincoln was my model. There were no women models. This is obvious. And so I was going to run for Congress first as he did and the prerequisite for that was becoming a lawyer. Over time the Presidency and running for Congress
began to dissolve and being a lawyer was more of what I wanted to do and then that matched the time. You know lawyers were very much heroes in the Civil Rights Movement. They then evolved to become heroes of the Women Rights Movement. It was a safe way to channel my progressive tendencies. To be a lawyer and implement progressive agenda, women rights issues, or civil rights issues is a safer way of being an activist than being an activist on the street, simply being an organizer. And so I think that partly I was moving in that direction anyhow from these ambitions and in addition, it matched my lower middle-class background in a way. My parents would love that I was a lawyer, even with their ambivalence about my not being married. And this was a way to channel my political feelings. So that’s how, I think it was actually very early on because father and I would debate until all hours of the night. And remember at two or three in the morning finally when everyone else was asleep and he was bleary-eyed, he would say to me, go to bed, go be a lawyer. So I think everyone understood that’s that where I was going.

Ms. Berman: And going back to what you said about your father giving you advice after that march down Fifth Avenue, do you think any of his advice about not doing, not actually going out and marching, do you think any of that maybe filtered through and maybe steered you a little more toward being a lawyer or do you think you were headed in that direction before that advice anyway.

Judge Gertner: Oh I was headed in that direction before that advice. I loved public
speaking, I loved acting, I was always very comfortable in front of an audience and you know I remember reading about Clarence Darrow. It's very interesting because we talk about having women role models. And I didn't have any. But I was, maybe it was the times. I was prepared to make Clarence Darrow, Clarette Darrow. I was prepared to translate all of this and however limited my parents' ambitions were for themselves, it was ultimately okay with them when I was doing all this. Just as a footnote, when my father died, by the side of his bed we found clippings from every time I had ever been mentioned in the press. So this notion that he was always operating on two levels, on the one hand what he thought he was supposed to say, and on the other hand, the message I was actually getting.

Ms. Berman: So you're at Barnard and you are pursuing, you're an activist, how did you decide where you would go to law school?

Judge Gertner: I was an activist on the one hand, but I also loved school, and Yale Law School was a place where you could combine social action and thought. And I think that was part of it. I didn't apply to any other law school. I love to tell the story, I actually did not get in when I first applied. I didn't get in. I actually applied to Harvard; I was on the waiting list at Harvard, I didn't get into Yale. And I went to graduate school at Yale instead. I went to graduate school in political science. In fact I remember an associate dean at Yale Law School who interviewed me and who suggested that based on my record, he didn't think I would make it as a lawyer. That was interesting. And so I went to graduate
school in political science at Yale and then took courses at the law school which I aced. And the law professor with whom I took most of courses, an international law professor, wrote a letter of support when I applied telling Yale I was his best student since Supreme Court Justice Byron White. And then that letter is very charming. That letter has that sentence, and then the next sentence is that I was really attractive. These are very old-fashioned, wonderful comments. So that's how I got into Yale. But Yale was also known for its social activism and it was a comfortable place to be. I still was on the cusp of wanting to be an activist. So I was actually on my way to get a PhD in political science and a law degree. That was my initial goal. You didn't ask the question of discrimination at Barnard. Was that a question you meant to ask?

Ms. Berman: Did you experience any discrimination at Barnard?

Judge Gertner: Sexual harassment I experienced.

Ms. Berman: Really?

Judge Gertner: There was a sociology professor who took research assistants. And I applied to be his research assistant knowing very little about him. The first summer I was there, he was supposed to give testimony before the Congress and I was going to write the testimony. And then one time when we were going over the testimony, he said to me, where are you going to tell your parents that you're going to stay since you can't tell them that you'll stay with me. This of course was the first time I knew what he was planning. What was stunning about that comment was that
it was not a question. It was like "droit de seigneur" in a medieval castle. He assumed that I was going to be sleeping with him and assumed that there would be one hotel room. And I was totally flustered and I said to him, I'm not telling them anything. I'm not going, we're not going to do this and the relationship deteriorated. Later on, I found that he had a well-known reputation for hitting on young women students. And again it was an open secret. I worked for him the following summer, but because I had a boyfriend we had a much more correct relationship. Having a boyfriend was a different issue than just being totally vulnerable. This was stunning exactly because of how matter-of-fact he was. And he didn’t think he had to ask. It was sort of part of the job.

Ms. Berman: Amazing. Now when you went to apply at Yale Law School, how many women were in the class?

Judge Gertner: The year I would have gone had I gotten in, there were only eight women out of 160. The year I went, after graduate school, there were 20. And people talk about critical mass. What’s a critical mass of people. We’re not a majority obviously, we were not close to a majority. But all of a sudden Yale had to admit more women because of the Vietnam War. They couldn’t fill all their slots with men, so they had to begin to admit women who had no relationship to the men in the class. And so those are the terms on which I was admitted. And that was a moment of explicit feminist consciousness. In 1968 when I started at Yale, we had women consciousness-raising group, by the third
year, we had a women in the law course. We were challenging professors for their language, for the hypotheticals they were using. A hypothetical would be -- two members of the weaker sex buy a television -- that was really the eye-opening moment. *Women v. Connecticut* was started about this time, which is one of the first abortion cases in the country. As far as I was concerned there was the explosion of political activity. Both the Civil Rights Movement to a lesser degree by 1968 the anti-war movement and without a doubt the women's movement. We felt ourselves a discrete and insular minority as a footnote in *Carolene Products* says, but yes, that was a very special time. Hillary was in the class after me. We were very different. She was a very, very close friend. But whereas I was happy to go to consciousness-raising meetings and march, she was more happy to work behind the scenes. There was a certain caution about her which I didn't have.

Ms. Berman: That's Hillary Rodham Clinton.

Judge Gertner: That's right. And Bill Clinton the year after her. But as I said it was a very exciting time to be in school. The consciousness-raising group would meet once a week and we were determined not to make it just women law students, but the wives of the male law students. We were prepared to deal with all boundaries, with all the premises about women. And there were some raucous sessions because of that. Everything was up for examination which was just incredibly interesting. There were still interesting divisions. I recall that the women who were married and
at home if they weren’t working or if they had children would come to the conscious-raising sessions dressed up. This would be their “going out” for the day. We, the women law students, were determined to look grubbier than anyone in the world and we succeeded rather mightily in that regard. So you could look around the room and see the differences between where we were in our lives. That didn’t really matter. Some of my closest friends came out of both sides of that divide. And the story was that the Dean of the Yale Law School, Abe Goldstein, believed that he was most afraid of the women in the class because we were more strident than any other group at this point. And we were strident. No question about it.

Ms. Berman: Did you make demands on the law school?

Judge Gertner: Oh yeah. I didn’t know how to speak without making demands. I demanded everything. There was an issue of language, there was an issue of a professor who would call on only women on certain days. There were, as I said, the sexist hypotheticals. Everything was in terms Simone de Beauvoir would describe, everything was in terms of man. They were the standard by which everything was measured. So we challenged the “reasonable” man standard. We challenged the premises of contract law that seemed to be suggesting immutable divisions between men and women. We challenged the different treatment of women and men on juries. Ruth Bader Ginsberg was beginning to do the litigation for which she became famous. And we did create a “Women in the Law” course so that we could take every course at the
law school and look at its implications for women and develop
essentially an alternative curriculum. We insisted, we demanded, we
just demanded. We demanded that Yale find a professor for us. Had to
be a woman. There was only one woman on the faculty. So we selected
Barbara Babcock who was then a public defender in DC, now a Stanford
Law professor. And she was the professor. And also from the women
in the law course evolved the Women in the Law Conference. We,
along with, I think they were NYU students began to put together a
conference on women in the law. Again the purpose was to look at the
legal system and whether it either explicitly or implicitly discriminated
against women. The Women in the Law Conference, I think I didn't go
to the first one, I went to virtually everyone thereafter for the next 20
years. The first one was to involve women law students and lawyers.
And we only knew one woman lawyer. So, I'm told, the women met
with Nancy Stearns in the first conference. And thereafter, wherever we
were in the country, we all met once a year, invited Ruth Bader
Ginsberg to speak, Barbara Jordan, anyone we wanted to hear. So
essentially the consciousness that I felt at Yale persisted even when I
was clerking and even when I went into practice through this group
which I'm still in touch with.

Ms. Berman:

Let that be the question which is somewhat obvious in some of the
things you said, in addition to the language and many of the things you
mentioned, did you have specific examples of personal discrimination
you experienced while you were at Yale.
Judge Gertner: I’m sure that there were, although those memories have been supplanted by the discrimination I encountered when I left Yale. In Yale, there was at least a dialogue. Someone would say something which would be an over-generalization about women, a professor or a student. You would confront them. There would be a discussion about it. In law school students, professors, were at least conscious enough to believe that it was an issue that ought to be addressed. To some degree, that ill-prepared me for the world. Because when I left law school and clerked and practiced, when you brought something to someone’s attention, something someone said, some over-generalization, some biased comment, I would get a very different reaction -- “get off your high-horse. Don’t be such an angry feminist.” It’s a very different world. So I don’t actually remember anything explicit in law school except that we were talking about it all the time. Clerking was a different matter.

Ms. Berman: How did you decide to go from law school to clerking as opposed to going into practice.

Judge Gertner: I don’t remember thinking clearly about clerking or whether I wanted to clerk. And it’s interesting I don’t remember. I have lots of papers from these days and I have actually found in the papers of a professor of mine who died, memos from the faculty about clerking for the Supreme Court. The professors would come together and recommended clerks for the Supreme Court. And I found the list from the year before mine and it was all men. So I don’t actually remember. I just don’t remember any discussion about clerking. I don’t think it was as
common an option as it is today. I wound up clerking for reasons that embarrass me. I wound up clerking because the man I was dating at the time was in Chicago and I wasn’t sure where that was going but clerking was a good one-year commitment to that area. So I wound up clerking for the Chief Judge of the Seventh Circuit and we went to Chicago for a year. As I said, I don’t remember thinking seriously about that decision or where I was going. I did want to go into academics and so clerking was the next stop. I don’t remember any discussion about applying to the Supreme Court and certainly wasn’t pushed in that direction. But my comment about the difference between the world and Yale was made dramatic when I interviewed for my judge. This is a story I’ve told before. Judge Swygert’s a wonderful, wonderful human being, old-line New Deal democrat. Gut sense of justice, warm as can be. I apply in 1971 for a Clerkship and he interviews me and I think, the first question asked was if I planned to marry and have kids. I was stunned by the question. Because as I said at Yale, we were challenging everything, I was just stunned by the question. So I didn’t know what to do exactly. It was the first moment when you say, do you tell him that’s an inappropriate question and thereby end the interview. Do you get angry, what do you do? It was all of those kinds of things, and so finally I said to him, Judge Swygert, I never plan to marry and have kids. Even though I was dating this man in Chicago, it was both an overstatement and something about which I was ambivalent at the very least. I began to clerk for him the following year, but the relationship with my then
boyfriend dissolves immediately as soon as I arrive in Chicago. And
Judge Swygert and I got along famously but there were still moments of
his old-fashioned attitudes. So there was a retirement party for a retiring
probation officer in the one of the clubs, I think it was the Union League
Club, I'm not sure of the name of it. Women had to come in the side
entrance. And that's where the official court party was to celebrate the
retirement of this person. Again I was of the generation by this point
that believed that if, the old saw, if you're not part of the solution,
you're part of the problem. And that you simply couldn't take these
kinds of indignities. You had to stand up for everything. Otherwise you
were implicitly legitimizing them. So again, I didn't know what to do.
But I organized all the law clerks, male and female, to go in the side
entrance. Judge Swygert was furious and I thought I would be fired
which is unheard of during a clerkship. And I don't know what he was
going to do except that when he talked to others about it, it turns out that
the women-in-the-side entrance policy had ended the week before this
party. And so he was enforcing a policy that they no longer enforced
and so he backed off. We became very, very close friends. And then
some, almost a decade later, when he was retiring from the bench, he
had a birthday party, and we had remained in touch and he had been
enormously supportive of my career. So I was asked to give a speech to
the assembled group of law clerks and friends and luminaries in
Chicago. And the man I was living with then came with me. So I gave
a speech in front of everyone. I got on my knees and faced the group,
and said Judge Swygert, faced him, and said: Judge Swygert, 20 years ago, I promised you that I would never marry and have children. I'm 39, barren, release me from the pledge! And he was laughing and by that point of course, he had had a good many women law clerks including one that was nursing in the law library; he had set aside space for her. So, I think when I look back on this, I had a number of relationships with my father replicated in all of these relationships. Where they were resistant to women's issues, I would struggle with them. And the struggle reflected both their resistance on the one hand but ultimately their fascination with where women were moving. And he was an example, my father was an example. The judges that I appeared before when I was a young lawyer reflected the same pattern: “Who the hell is she, and what is she doing, and why doesn’t she stop talking on the one hand, but boy isn’t this interesting. And maybe I’d like to see my daughters do that.” But as I said, clerking was an extraordinary year.

Ms. Berman: How did you learn either then or perhaps before then to use humor as part of you weapon to get people to see women’s issues in a different light and move forward?

Judge Gertner: It was a defensive mechanism. After clerking, I decided to go directly into practice; I didn’t want to do academics. I wanted to be in the world. Massachusetts, as I suspect every state at the time, could not have been more hostile to women. I was in a small firm that no one ever heard of. A civil rights firm. I was doing criminal defense and civil rights work.
I was representing people that everybody hated. And in addition I was a young woman looking younger than my years, and felt like an alien. So when you go into court and a judge makes a crack or the prosecutor or the lawyer on the other side, you could get angry and walk right into the humorless feminist routine. It was clear to me that when one did that, they would all bond and you'd be mocked. You could ignore it which wasn't in my DNA at the time. Ignoring these things was being complicit. Humor was a way of leveling the playing field. I began to realize that when you make fun of the other side, or made a joke, it was equalizing. When he laughed, he was legitimizing you in a way that your indignation wouldn't do. I also noticed other things. I began to look at sort of inter-personal dynamics. The other thing was that men touch you. A man would talk to you and put his hand on your shoulder so I would begin to put my hand on his shoulder. It was narrowing the social distance. And I was doing all this explicitly. In addition, I have to admit, my father was quite a cutup. Being sarcastic and dealing with these issues with sarcasm and humor was part of what he used to do. So this was an easy technique for me. When I was dealing with a prosecutor and I said let's talk about the plea and the prosecutor would say, "I would much rather chase you around the desk," my response -- sarcastic -- was "I was thinking the same thing." At that point melted, the guy was mortified. The judge who asked me, "how you do you want to be described, Miss, Mrs., or Ms.," and I would say, as we all learned to say, "you can just call me counselor." That was being funny at his
expense. Being indignant just wasn’t going to cut it. I was also learning how to be a jury trial lawyer. And it was the same issue before a jury. You had to figure out how to humanize yourself. You had to make sure that they were not going to caricature you as one of “those” women. And while it was easy for me to use my humor even in that situation, you had to do it with some delicacy. But it was leveling.

Ms. Berman: We stopped when we were talking about your clerkship and so how did you decide where you would go at the end of your clerkship?

Judge Gertner: I still was inclining to an academic career which is interesting because I always had this side. But I decided that I wanted to take two years or three years dabbling in practice before I went back to academia. I did not want to return to New York, New York City. Whereas New York is a cosmopolitan wonderful city to everybody else, for me it was where the expectations of my family would come crashing down on me. And I really wanted to, I needed to be in a new place to create a new person. I didn’t think it was going to be easy to carve out that person in New York City. New York City was also a different city than it is now. There was much more crime; people were fleeing the city; this was the late sixties, early seventies, when there was sort of urban decay across the country. I wanted either San Francisco or Boston. My sister was in Boston. They were just beautiful cities and I thought I would try in either direction. I happened to have more contacts in Boston. And it was easier to look for a job because she was here. I sent out my resume to lists of people in both places, and got nowhere except with a small
civil rights firm that I had never heard of, named Zalkind and Silverglate. (By the way, when I became a judge I still had lists of all the people who turned me down. I throw out nothing.) I certainly felt like an odd duck, an outsider, when I was pounding the pavement, looking for a job. I don’t remember anyone saying anything particularly sexist to me at the time but it was clear; you knew when you walked into a firm that you were different from everybody else in it. So things didn’t necessarily have to be said. Norman Zalkind and Harvey Silverglate interviewed me. It was the fall, about Thanksgiving, when I was still clerking they made me a commitment to hire me the following September. It was actually an interesting moment for me because when you went to Yale graduate school and Yale Law School and somebody asks you what you were doing, and you said, Yale, there didn’t have to be another sentence. Now when people ask me “what are you doing after clerkship,” and I said, “Zalkind and Silverglate,” suddenly I had to explain what I was doing. As I said, I don’t know exactly what I was thinking but I wanted to be in a firm where I knew I could control the cases that I took. I wasn’t a standard criminal defense lawyer, I’m not even sure I was clear about criminal defense. I was determined not to do rape cases. And I didn’t want to do cases, even on the civil side that I found objectionable. I was very much the purist. I didn’t want to have to represent people that some partner wanted me to represent with which I disagreed. So a small firm was more about the control over your practice than really anything else. I joined the firm immediately after
my clerkship ended. It was as painful a first year of practice as one has ever had. These were the days when there were no trial practice courses, and I was the only woman in the courtroom. It was different for a woman to start as public defenders where even if there were no women in the courtroom, you at least had people behind you. Even in those days, I'm not sure there were many. I didn't know of any women public defenders either. For a big firm, you come into court with the legitimacy of the firm behind you. Coming into court as a young woman with a high-pitched voice representing people that nobody liked, from Zalkind and Silverglate, did not necessarily mean that you'd be welcomed anywhere. By that time, they had a practice of civil rights work and drug cases. Marijuana was a middle-class drug. They also did some anti-war counseling, representing anti-war activists. So when you walk into court as the only woman, young, from this firm, representing who I was representing, it was already going to be an uphill battle. But I was stunned at how explicit the comments that people made to me were. I knew the world had not dramatically changed, but at least at Yale, these were mainly inadvertent comments, immediately-apologized for comments. The culture post-Yale was so overtly sexist, I was astonished and hurt. Since there were no trial practice courses when I went to law school, when I walked into court for the first time, I literally had no idea where to stand. I didn't know anything. And I remember, when a judge made a comment or a prosecutor made a comment, or the other opposing counsel made a comment that suggested you have no
business being a lawyer, the first reaction is “Of course they’re right.” You are not so sure you had any business being a lawyer. The most difficult problem was to keep my insecurity from matching their lack of confidence. And I would just talk to myself at home about what I was feeling -- I lived alone. “Don’t let this get you down.” I would say to myself. It was made worse by the fact I was really in the belly of the beast, the lowest courts in the state. So Somerville District Court. You’re representing someone who was just arrested overnight. You’re trying very hard to show your legitimacy to the man you are representing who already is not so sure that he wants “Gertner” rather than “Harvey” or “Norman.” He didn’t really hear of you anywhere and so you’re dealing with that illegitimacy, the unspoken “who the hell are you?” And I remember arguing for bail, I don’t remember the nature of the argument but, every time I spoke the Judge would go the edge of the bench away from me, summon the police officer, whisper and laugh. I would say something and he would mock it. All of this was taking place in front of your client, “how do you being to deal with that?” I remember once in the Boston Municipal Court going before a judge and having a fabulous Fourth Amendment argument and saying Judge, the Fourth Amendment requires that you suppress this evidence. And he leaned over again looking at the other court officer and laughed. He said, “Ms. Gertner,” “Constitution, shmonstitution,” “not in my court.” So the tools that I had from Yale which are my intellect and my education and my preparation weren’t going to work. I would be
mocked at the district court level which was virtually lawless. (It is not a court of record.) Worcester was one of the worst places. I remember going into court with a young woman who was working with me, and I said to the judge, as you’re supposed to, “would you let Miss Smith sit with me at counsel table, Your Honor.” And he said to me, “oh geez, I thought one woman in a courtroom was bad enough.” The explicitness of the ceremonies for me were ceremonies of degradation. I initially didn’t know how to deal with that. So apropos of your earlier question, I came to expect them. I came to figure out lines that would respond to them. Humor, mocking a little bit, sarcasm as a way of responding to them. Figuring out that if I surfaced what was going on in some way, it would actually help me on appeal. I could use their perception of my illegitimacy to get them to make mistakes and actually affect my case so long as my client was not leaving me because he didn’t understand what was going on. It became one tool in your toolkit. It didn’t work the first year; I lost every time I went into court. I lost continuances, I lost everything and I lost with a judge who said, in this mocking way “no honey, no continuance.” Or comments like that. So I lost every one. I had a jury trial my first year. A young Black woman whom the police said failed to stop when he signaled her. He was White she was Black. I had measurements of the road, and car speed. I prepared like a crazy person. This was in Lowell. And you understand the judges in these days were not just sexist, but also racist and tyrants. The judge gave an instruction: “Black people have rights in the United States but no more
rights than anyone else. In order to find this woman not guilty of failing to stop for a police officer, you have to label an officer of the Commonwealth a miserable liar.” I objected. After closing argument, I went to the ladies room thinking that I had a few moments of dignity in the ladies’ room. Almost immediately the court officer was banging on the door -- literally as I closed the stall door -- and said, “there was a verdict.” It’s the fastest verdict in the world. And of course, the woman was convicted. I called Norman Zalkind that afternoon and said she was convicted. His answer was, “some people have it and some people don’t.” So the illegitimacy that I felt personally at doing this and the lingering question how dare you, a woman, risk a client’s liberty for your politics?” matched what I was hearing in court. I could have left and put myself on the academic market then, but candidly I had never failed before. And I couldn’t leave the practice until I had knew I had succeeded. So I just kept on going. After the first year of practice, Zalkind and Silverglate broke up and Harvey Silverglate offered me a partnership, a meteoric rise to success. And thereafter, he supported me in extraordinary ways. I am often asked about women mentors, and there were some women whom I identified with, but Harvey eased my way and encouraged me, in a way that I don’t believe any other male lawyer could have done. So by the second year, I had a little bit more stature. Not very much. My capital contribution to Silverglate Shapiro & Gertner, as the firm was called, was a $600 check that bounced. But I began to win. And one of the things about winning is that you delude
yourself into believing that, of course, you've finally gotten it. But the delusion helps because it enables your self confidence, and then the winning continues. Again I was learning how to be sarcastic. Sarcastic isn't the right word. I had a case, a labor case against a hospital, a Catholic hospital. There was a union election and as soon as the union won, the Catholic hospital announced that it was going to shut down. It was a hospital that was going to be taken over by another hospital. It was a hospital that housed nursing home patients, very elderly sick people, chronically ill. The name of the hospital was “St. John of God.” A classmate of mine from law school had called me and now that I was a partner in my own firm, I could take whatever I wanted. So I agreed to take on this case. There was no theory that anyone could think of that would keep the hospital from closing down. I came up with one -- you could seek an injunction to prevent a tort, here the tort of malpractice. It was malpractice if the hospital closed precipitously. It was clear that a certain number of those patients would die because of the dislocation. So I went into court for a preliminary injunction, confronted a judge with the usual sense of being an alien. And the opening question of the judge reflected his perspective. He said, “Ms. Gertner, how does it feel suing ‘St. John of God?’ ” And I said, without missing a beat, “Judge I take a certain amount of solace from the fact that this is St. John of God Inc.!” And the case settled. I always felt that there was some religious discrimination in Boston at the time as well, Boston being a very, very Catholic city, and to some degree that colloquy reflected a not so subtle
inquiry -- "Do you know who you are suing?" But I began to win. I began to keep track of the people who were saying sexist things to me in my file called "sexist tidbits." I remember there was a weekly lawyers magazine, a lawyers weekly. And there was a column that was a column that was written by a woman who was a legal secretary. And the column was incredibly sexist. In other words, she was sort of mocking what bosses would do and it was clear that the bosses were male and that she was female. There would be lines like -- "sometimes a deadline takes precedence over the girdle sale at Burdines's." These were sexist jokes whose premise was always male boss, female secretary. So I wrote a letter to the editor which I still have somewhere in which I said that is not an assumption any longer. You can't make that assumption. Now again, I was beginning to feel that I could raise these issues in a way these issues in a way that I hadn't felt from the beginning. I get the rejoinder on this occasion, "a humorless feminist" but by that point I didn't particularly care. I began to go on television a lot involving my cases. And to some degree my newness in the legal profession was beginning to match the newness of women in journalism. So I had great relationships with the young journalists around me. So I began to feel that I was getting control of getting some, control isn't the right word, but beginning to offset the discrimination by succeeding. And more than that, I was handling just an enormous amount of clients. And then in 1975, came the call from Susan Saxe which changed the following 20 years of my practice.
Ms. Berman: Let’s talk about the Susan Saxe case which is incredibly interesting.
Tell us how it began and then talk about the entire, the case itself.
Because it’s a fascinating case.

Judge Gertner: So in 1975 Susan Saxe was apprehended in Philadelphia. I got a call from a woman I had represented who had married one of the codefendants of the Saxe case. The Saxe case was about five people who had decided that the way to deal with the stalling of the anti-war movement was to, this is 1970, rob banks, to get money to fund more anti-war activities. By the early 70s, the anti-war movement had begun to get more violent. There was a group that continued to march, that was the part I was in, and then there were certain people who were doing more violent things as the war continued. The Weather Underground was one, which was related to the townhouse that blew up in Greenwich Village. This group of five -- three men, two women were robbing banks up and down the Eastern Seaboard. The men were ex-cons who were part of a re-entry program at Brandeis University. The women were Brandeis students. One was Susan Saxe and one was Kathy Power. Susan had been an anti-war activist, indeed I believe, we were on the New Haven Green at the same time, I as a legal observer -- I was in law school at the time -- she was an activist. 1970 was a turning point in the anti-war movement as well. It was the time of Kent State, the time of Ohio State. There was very much a sense that we were on the borders of anarchy, a feeling perhaps overblown in our youthful enthusiasm. Students had been shot on those two occasions; it felt very
much like it was a turning point. Susan Saxe is five years younger than I am. The change in the movement caught her when she was graduating college, a delicate movement for all of us. “What am I going to do with my life?” Susan winds up aligned with these four other people, another woman at Brandeis and these three men. The idea was that one woman would be guarding the getaway car with a “switch car.” One of the men would be in front of the bank guarding the bank, watching out if the police arrived. There would be three inside the bank, two men and Susan. The robbery took place. They left the State Street Bank and Trust Company, and got into the switch car, the car that Kathy Power was driving. And on the way back to their apartment, they heard over the radio that a police officer was shot. What apparently happened was that the man who was guarding the bank in the front saw a police officer enter, go up the sidewalk to the bank. He did not realize that the robbery was over, the other four en route home. (One story was that his view was blocked by a truck.) He shot the police officer in the back. What had been a serious crime now turned into a capital offense, under the felony murder rule; if you participate in the felony, you are responsible for foreseeable consequences which included this murder.

The five of them went underground, split up. The men are caught almost immediately. Between 1970 and 1973 there was a series of trials in which two lost. One of the men was not tried; he wound up dying in prison on another charge. But the man who had actually done the shooting got the death penalty which was ultimately set aside in
Massachusetts. He subsequently was sentenced to life imprisonment.

The third man wound up cooperating against everybody. He did a certain amount of time. The women disappeared completely and it’s one of the ironies that part of the reason they were so successful in disappearing was that the FBI did not know how to deal with women criminals anymore than women anything. So they were literally looking for these women in Las Vegas and strip joints and gambling places. They did not understand that they only had to look at day care centers and natural food stores and they would have understood better where they were. Kathy Power went underground for 20 years. Susan Saxe was apprehended in 1975, five years later. So in 1975 I had been a lawyer for three years, not counting clerking. Saxe was apprehended in Philadelphia. There had been a Philadelphia bank robbery too, which is where the prosecution would begin. I was asked to help with Boston issues because one day there would be a rendition to Boston. Susan’s lawyer was a woman named Katie Rohrbach who in fact was a mentor of mine. She was a criminal defense lawyer in New Haven whom I knew in law school. While I can’t say it was clear that I wanted to be her, she certainly was the only model I had. I, of course, said yes, when Katie asked me to help. I didn’t know anything about Massachusetts criminal defense law. I’d been a lawyer for three years; “what did I know?” But I figured, I’d learn. I flew to Philadelphia. I pretended to know what I’m talking about. Susan pled guilty in Philadelphia, 10 years, to be imposed after the Boston case. Katie decided she didn’t
want to try the Boston case. She was a New Haven lawyer and did not want an out-of-town case. She suggested to Susan that she hire me. In 1975, I was a lawyer, as I said for three years. As I say in my book, she asked me how many jury trials I had, “I rounded off 3 to the nearest 10.” She asked me how many felony charges I had done. I rounded up 4, perhaps to 10. I had really limited experience. But she wanted a woman to represent her. And the irony here was that after I had spent those years fighting because I was the only woman, now suddenly it was a strength. Margaret Bunnham, who was a public defender a few years older than I, was the only other female defender I knew. I went to my partners, Tom Shapiro, and Harvey Silverglate and told them I wanted to take the case. I didn’t know how it would be paid for. Susan was essentially cut off by her parents, who were astonished that their middle-class honor student could be in this situation. Harvey and Tom were troubled that this would be a case that would take down the firm. I don’t know of any other male partners who would have invested in what was essentially my first high-profile, my first murder case period. I don’t know of anyone else who would have had both the confidence to say, “you can do it” as they said to me. And more, they said “we will keep the firm afloat.” It was astonishing. Really, really astonishing. If there’s a side footnote here it’s the importance of people supporting us all. Harvey and Tom are at the top of the list. Harvey was going to work on keeping the firm afloat. Tom was going to advise me on the Saxe case. Susan was determined to have a woman lawyer, a woman
staff. While men could participate, women were calling the shots. In a sense, I had to rise to the challenge. So we put together an all woman jury selection team. Indeed, the case actually gave status to women in a number of different areas. We created an investigative team called Nancy Drew Associates, also two gay women. The newspapers had the case covered by young women reporters many of whom are still around today and remember this. The Herald and the Globe, whatever the newspapers were called then, assigned their younger reporters, because the feeling was that this was a case involving the next generation. They believed that generation ought to be involved. So in some sense, I was part of a wave that brought in lots of women (less so people of color). I said yes to taking the case because I couldn't imagine saying no. It was part if the ethos of members of my generation. We constantly believed that if you fell apart in court, if you turned something down (a challenge that a man would accept), you were undermining the movement. Each of us saw ourselves on the frontlines of the movement -- whether we actually were or not. So I said yes, because no wasn't a possibility. Even though I didn't know what I was doing. The case took two years to try. I remember it was if it were yesterday. I'd run into men on the street and I asked what should I do about this or that and the answer over and over again was “get out of the case.” “You’re in over your head.” The prosecutor made cracks that prosecutors had been making before not just anti-women but anti-gay (Susan was gay.) Once I wore a flouncy dress that was sort of a shapeless dress and the prosecutor, Jack
Gaffney, said to me, “you’ve no business looking pregnant when you’re representing that lesbian.” There were anti-gay remarks, anti-women remarks. The newspapers didn’t know how to cover the case. I was constantly banging heads with the judge. The judge was an old-fashioned “no nonsense” judge and whenever you tried an interesting argument, a Constitutional challenge to the felony murder rule, interesting jury selection, he would listen -- to his credit -- but he would for the most part deny everything in a very flippant way. The newspapers would cover those encounters by describing that I was being “chided” by the judge. The verbs were the verbs of dressing down a child. The Patty Hearst case was going on in California at the same time with F. Lee Bailey. Every time F. Lee Bailey had an encounter with a judge, it was essentially described in male adjectives: “‘Objection,’ Bailey boomed.” I was a child being dressed down. The day before the trial began the *Globe* headline was “Saxe Trial To Begin Tomorrow, Prosecutor Able, Tough.” I literally was not mentioned in the article. From the prosecutor to the judge to the elevator operator, the comments continued -- anti-woman, anti-gay. We were, after all, representing someone accused of shooting a well-respected police officer. We were on the wrong side. From the clerk, to the elevator operator, to the prosecutor, to the judge, there would be “what the hell are you doing, we all know she’s guilty” kind of comments. I don’t know where, I can’t say I know where my strength came from except some of it came from Susan. She figured, as I said, that this was her last moment on the stage,
she’d go away for the rest of life, and she wanted the ceremony of the trial to reflect her values. She was telling me that the ceremony had to be appropriate and reflect her values. I unfortunately wanted to win. For me it wasn’t an expressive issue or a symbolic issue. I wanted to win. Although she was only five years younger than I was, and although I had taken a different path I understood how she had gotten to where she had gotten. I had been at meetings in the seventies when we’d say let’s have a demonstration in front of the courthouse and somebody in the room would say “let’s burn it down.” And there would be silence. No one had the argument to answer that. It was a particularly chaotic moment. I would walk out of those meetings, but I understood how she had made the decisions she did. And I adored her. I wanted to save her life. So I set aside just about everything, boyfriend, friends, fun, everything. And I dug into the case over two years. Luckily, the timing of the trial enabled me to learn better how to be a lawyer by the time the trial arrived. We challenged everything. Suppression motions, dismissal motions, everything. Because I didn’t know what I was doing, I also took advice from unusual places. I began to take advice from social psychologists, from consultants in different fields, which many now do today, but I did then because I had no experience to fall back on. We had jury consultants dealing with the selection of the jury. We ended up selecting the jury that was the youngest jury ever selected. We had information about jurors that nobody else had. We had done investigations; we knew who was gay,
who was a Republican or Democrat, the kind of company they worked for, etc. We hadn’t interviewed the prospective jurors. You can’t do that. We had volunteers who found out whatever information they could lawfully find. And one man on the jury, I remember, in particular, I was assured he was likely gay because of where he was living. The judge gave us a jury selection procedure that no one in Massachusetts had ever gotten, no doubt on the assumption that we were going to lose anyway. So we had individual juror *voir dire*. And in the case of one woman, individual lawyer *voir dire*. This is a case that is actually written up in the *Muu-min* decision of the Supreme Court with a Thurgood Marshall dissent about jury selection. The day before the Saxe case began, there was a terrible article in the *Globe*. Jury selection was set to begin on Monday. The first or second potential juror got on the stand and said in response to the Judge’s question about whether she had read, seen, or heard about the case and she said, “There was a lovely article in the Boston *Globe*. “ And the judge said “I find this juror to be ‘indifferent.’ ” I went up to the judge as I did with virtually every juror and showed him the article she was talking about. I’ve been advised by my social psychology consultants that I would do a better job questioning her than the Judge because she was more likely to tell the truth to me than to a judge in robes. The likely response to a judge in robes would be whatever you want her to say. It would be a civics lesson. So I went up to her and wearing a mini-skirt, I believe, my hair down my back, my voice was very, very high, I said to her, “Miss
Smith" -- whatever her name was -- “you said there was a ‘lovely article’ in the Boston *Globe*, is that correct?” To which she responded, “We all know she’s guilty.” It was one question and that was the answer. So she was struck. We had gotten individual *voir dire* and additional peremptory challenges because we had done a survey of Boston residents. I was going to do everything. I made perhaps a $1.50 hour on the case, but I was going to do everything. Doing everything by the way also became a sort of a signature for me because that was armor. That was the way in which I could make up for my lack of experience. One way to do everything that we did here, was a survey which suggested, I believe, that 75 percent of Boston recognized Susan’s name. No 90 percent recognized her, of the 90 percent, 75 percent would answer the question that they could be fair and impartial jurors -- “Yes.” And some substantial number of that group also believed she was guilty. So it was clear that the usual question, “can you be a fair and impartial juror,” was never going to get an accurate answer. The survey suggested that. So from that, the judge would enable us to have additional peremptory challenges, to make up for the skewing of the pool by the press and this additional jury questioning. So the jury that resulted was an amazing jury. Most were in their early 20s. And that was not manipulation in a way because they were also the people who had not heard about the crime. They were a demographic that one could believe didn’t know about the crime. The case proceeded. I know everything. I have memorized the transcripts of the
other trials. Every time the judge said something off-script I could wag my finger at him. The case proceeded. My parents are in the courtroom. My father, true to form -- when the press came up to him and asked him if he’s Nancy Gertner’s father, he said “no comment.” Denying paternity. That was his humor. And before I get into the trial, there’s a funny story I tell about my father when I called him up and said “Dad, I’m going to do this very high-profile anti-war case. I want to let you know about it so that you and Mom won’t be embarrassed.” He had a poker game and Mom a mahjong game. I didn’t want him to be embarrassed with their friends. And my father’s comment was -- “I want you to take the case, I want you to do your very best. I want Susan to be acquitted and then I want her to leave the courtroom, walk across the street and be hit by a car.” So the prosecutor, the judge, my father, Susan’s mother were calling me every night asking me why Susan couldn’t look like a lady. I was getting pressure from all quarters. In any event the trial began, and the press was covering it not knowing, not having any understanding that we were making some headway. The coverage was terrible. There’s the evidence, the physical evidence, the cooperator will testify that Susan was in the bank. There were bank pictures which in fact were very fuzzy. Nobody in the bank could identify the woman. In one sense you get a sense of the discrimination of the time. She was a non-entity. They could recognize the men, but not the woman, not her. So the physical evidence and even the cooperator did not present a very strong case against Susan, certainly not
as strong as it had been against men. But the prosecutor had two pieces
of paper which were devastating. One piece of paper was a letter
written by Susan to her rabbi and one to her father after the robbery.
And they each began "by the time you get this letter, you’ll know what
your little girl has been up to." They were essentially confessions.
When the trial began, we really had no defense. There were defenses
that Susan wouldn’t let me do. There was the “men made me do it.” I
was not permitted to do it, although I’m sure that the jury would have
been sympathetic given the times. I was not even allowed to underscore
the fact that she had not been the shooter. She figured it was hopeless,
so the content of the trial, what we said and how we said it was part of
what was important to her. But again I wanted to win. So at the time
the trial began, we literally had no defense. We had to give the
government a list of witnesses before the trial began. And just in case,
although extremely unlikely, we gave them a list of witnesses as if we
were going to try the Vietnam War. There had been numbers of anti-
war related criminal prosecutions, none as serious as this, such as
throwing blood on draft files where the defense had essentially had been
we’re doing this to protest the Vietnam War and we’re asking the jury to
nullify. That’s what these witnesses suggested. Howard Zinn, the
Berrigan brothers, all across the country people were flying in to court
and the press was covering that. The press was reporting this as if
Gertner, the lunatic is going to try the Vietnam War. The prosecutor
believed the press. So the case proceeded and the physical evidence
came in which was really equivocal. It’s the day before Yom Kippur and we have Yom Kippur off. The government announces who their last witness is going to be and it’s clear that they are about to end their case without the two confessional letters. At that point Harvey and Tom and I all knew. I don’t know whose idea it was but it was decided that if the government rested without those letters, we would rest. Resting without putting a case is the most difficult decision for me. But it was clear that nothing in our defense was going to match those letters. So the next day we went into court and the prosecutor puts on the witness and at 11:00 he turns to the judge and says, “the prosecution rests.” I don’t remember the details; this is really a blur. I’m told that I got up and in a voice that sounded like Minnie Mouse, and I said, “in that case we rest as well.” The courtroom emptied with the press calling their home offices. Again the sense of “what the hell is she doing?” was apparent. And I have to admit I was thinking it too. I had practiced the closing argument. I had no idea how effective I was as a trial lawyer at that point. That afternoon I give the closing argument; the prosecutor gave the same argument that he had given in the two other cases which I could mock in my closing. I had read about how you immunize the jury to the other to the other side’s argument. So I did a closing. At one point I walked over to Susan and I got a piece of paper from her and read her words. I was chided in the course of the closing many times by the judge for talking about the anti-war effort. And then I describe what their closing was going to be and that was what their closing was. Over
the next week, I couldn’t do anything else. I’d go to the jail at the basement of the Suffolk County Courthouse to stay with Susan along with a wonderful woman U.S. marshal who was guarding her because charges were still pending. The woman marshal was Darlene Therrien. And Susan, Darlene and I watched Bonanza reruns on television in her cell waiting for the jury to come back. I only had that first jury trial where the jury was back in a minute and half when I was in the bathroom. I think there were one or two others, I don’t remember. Everybody assumed we were going to lose thunderously. The first day reporters get the news that the jury is split 9 to 3 for acquittal. I was astonished. By the second day it was 10 to 2 for acquittal and the third day it was 11 to 1. The feeling of being on the cusp of an acquittal was like nothing I had ever felt before. The jury hung at 11 to 1. It was seen as a victory. Everyone understood how close we had come to acquittal. She subsequently plead guilty to manslaughter and got eight years which was less than she was going to get in Philadelphia. All of a sudden I had a career and a reputation, no doubt ill-deserved after one case, but it was as if the illegitimacy that I had encountered by this point for years, was erased with a ridiculous sense of my powers. On the wall behind you was a picture of the Boston Magazine. It was the New England supplement to the Boston Globe. The caption is, “Criminal Law Superstars” and it’s me with five older men. I am the one with the long hair. Only the year before I wasn’t mentioned in the Globe and suddenly I was criminal law superstar. It enabled me to craft a career
out of whatever I wanted to do. I can’t say whatever I wanted to do because in fact there were still cases that I didn’t get part of because of the old boys’ white collar network. Still I could pick wonderful, civil, criminal cases — whatever I wanted to do for the most part. It was an unusual beginning and it certainly delayed my academic career substantially.

Ms. Berman: As a result of that did you, you broke tremendous barriers with that case for women, women generally, and women in criminal law specifically. How did you, what did you decide to do after that case? What was your next . . .?

Judge Gertner: I wanted to do everything. Just as I had in Flushing High School, I wanted to do everything. What did “everything” mean? It meant employment discrimination cases. Let me back up, to some degree, work was the armor that I used to deal with the discrimination. A man would come into the field with the assumption that he could be a lawyer; I had to prove it. And I had to prove it over and over again. There were no women on television, there were no women lawyers in the courtroom — so I had to prove it. In addition I learned that doing everything works. So I would take a case and I would envision everything one would do in the case if one had an unlimited amount of time and then cut back from there. I also had the allure of saving someone’s life and the freedom of not working for money. Better yet, the power that comes from not working for money. So I would take an employment discrimination case that had an interesting issue that I knew I could do and hope there
would be money but that wasn't essential. I was single, I had a very modest house and a car that barely worked. So I would take employment discrimination cases, sex harassment cases, race and gender. The very year after Saxe, I took a case representing a woman who had been denied tenure at Tufts in the Art History department of all things. And the chair of the department was known to ban women from wearing pants to his classroom. Or he would describe the art of the time as “see the woman cowering in the corner, see the man striding out.” Barbara White, the woman I represented, was a Renoir scholar and the committee which the chair controlled denied her tenure, a decision notoriously difficult to challenge. In 1977, I won a preliminary injunction in the case and after a bitter contest, the case settled. In employment discrimination, no one was an expert. We were all inventing it. People started calling me on criminal cases; they had never called before. And I would get calls from men in prison on rape cases and I turned them down. I changed that practice in one case, many years later. But at this point I turned them down because it was clear that they didn’t want my skills which were still relatively modest. They wanted my legitimacy. And that I didn’t want to give them. I would take all sorts of any other kind of criminal cases. I would take malpractice cases. In my book I talk about a woman whose shrink had sex with her. And in each of these cases, I had to think outside the box as they say because I didn’t know what the box looked like. I only had the vaguest sense of the box. So I could take cases that I cared about and it was a
remarkable practice. I could represent people that I wanted to represent and issues that I cared about. And that's what I did for the next almost twenty-four years. At some point, I began to pay a little more attention to money but at the beginning, it was just that. There was a group of us doing the same thing. The Women in the Law Conferences enabled women to gather whether working for public defender, or working in a public interest firm or in private practice. We could come and talk about the issues that were coming down the pike. So if someone called about a battered woman syndrome case, I already had the context from the conferences I had attended. In other words I was a private practitioner with a law reform bent. I could look at a case and say this raises an issue that we just talked about two months ago and I think this is a good case to raise it in. And I did, I began to work with the ACLU on every abortion case in Massachusetts. To me, this was the signature issue of our generation because it was the issue that enabled me and other women to choose all the roles that men were playing. And in my twenties, that meant dating, having relationships with men, being a lawyer and postponing child bearing, which men could do. So I was going to represent anyone, anywhere in Massachusetts where the cases came to deal with abortion rights issues. And I met my husband in connection with these cases, which is a whole other thing.
Ms. Berman: We’re in Cambridge, Massachusetts at Harvard Law School. The interviewee is Judge Nancy Gertner. The interviewer is Pamela Berman. And we were discussing Judge Gertner’s career as an advocate before she went on the bench and we were talking about her experience working on cases with the ACLU.

Judge Gertner: When I was in law school I think I mentioned that Women v. Connecticut was going on which was one of the early challenges to the criminalization of abortion. I wasn’t active in that but it was clearly an issue that we cared deeply about; this was our issue. This was what would enable us to take on all the roles of men. And I always saw it as a discrimination issue, not as a privacy issue. In other words, we wanted to date and have relationships with men. But we also wanted to be workers and teachers and students and not necessarily be mothers or determine when to be a mother, when to welcome a child. So this is an issue that was very dear to my heart because at that point, I was not even close to my having children. I was in the Star Market I believe on Memorial Drive in Cambridge the day that Roe v. Wade came down. And I was in the checkout line and there was a newspaper there that announced that the decision had just come down. And I literally started to cry. It, I just started to cry. For me, it was a defining issue. And at that point, I don’t know whether I decided to do this
beforehand, but I began to volunteer for the ACLU, volunteering for the ACLU in particular for the post *Roe v. Wade* challenges that were just about to happen. So the first challenge was in 1974 or late 1973, when Dave Mazzone who subsequently became judge decided to represent a group of hospitals, one hospital in particular, Hale Hospital in Haverhill, Massachusetts that did not want to do abortions. They argued that they had a right to create a neighborhood option. This argument resonated with the school desegregation cases; because there were some people who wanted to create neighborhood schools; neighborhood public hospitals would reflect the politics of the neighborhood.

The ACLU of Massachusetts got a call from a doctor at Hale Hospital who wanted to do abortions, who had been doing abortions and because of the hospital’s new policies, he would no longer be able to use hospital facilities for abortions. And I don’t know how I heard about it but I volunteered to work on it. You understand at this point I was making next to no money so volunteering was a broad concept. I seemed to be volunteering in everything. I had met the legal director of the ACLU before that at parties, or at receptions, I believe. We really had never spoken. So we arranged for me to pick him up on a street corner opposite the Boston City Hall and then we’d drive together to the Hale Hospital to interview this doctor. I had a car befitting the money I had. It was nicknamed the “Iffy” because it was never clear when it would start. And periodically the blinker would beep for no apparent reason. So I drive up to pick up John Reinstein in this car and he is drop dead adorable. While I was determined never to get married or have children, the story he tells is that as soon as he got in the car, I asked him if he was married. Which of course is not
true. As soon as he got in the car I asked him if he was Jewish. As we later talked about it, it is the same question. He was both married and not Jewish. We were friends for many, many years. We were married when he uncoupled many years later. So we wound up, actually it's an interesting story, representing these doctors who wanted to do abortions. We went into court for a preliminary injunction. A preliminary injunction was relatively easy to get in those days because the irreparable harm was conceded by most courts. The minute the abortion limitations came into effect, there would be some constituency of women who would not be able to have abortions. And in those days, there were stories of self-induced and botched abortions and fatalities. The critical question was the likelihood of success on the merits. And that was a question going directly to the scope of Roe v. Wade. We filed a motion for preliminary injunction. The judge was Judge Andrew Caffrey who was not a particularly well-liked judge at the time and was a Republican, very conservative, and an irascible human being. He had a conference in his lobby. We all trundled into the lobby. He went through the complaint and the affidavits and he said, “Let me see, one broad comes from New Hampshire and one broad comes from Massachusetts.” It was another moment where you had to figure out how to be true to yourself, how to have legitimacy, and how to address these issues. I was not about to take him on, although it was clear that those remarks were intended for me. It was clear he was baiting me and I wasn’t going to take the bait. We went into court and argued the case. John Reinstein who was the legal director of the ACLU encouraged me to argue. He had perhaps three more years experience on me, but he insisted I should argue. This is a woman’s issue,
there should be a woman’s voice in the courtroom, he said. So I did. When the judge took it under advisement, we went outside of the courtroom. There were cameras all over the place. John said to me, you should speak. It’s a woman’s issue, there should be a woman’s voice. I like to tell him now, that was the last time he was ever able to get in a word edgewise, either in court or in front of the cameras. But in any event, this very conservative judge nonetheless issued a preliminary injunction. It was a very different time. We essentially became the go-to people for every abortion case in Massachusetts and it’s really was where my heart was. And I would go to Women in the Law conferences and collect cases from around the country, have a sense of what cases were coming up. Although ours was not a public interest law firm we essentially functioned like one. So when Governor Dukakis lost his second term and Governor King, a Republican, was elected, suddenly there was a raft of abortion litigation or efforts to restrict abortions. We were really ready. One day we got a call from a prisoner, a woman prisoner who came into prison pregnant and wanted an abortion. She needed it right away. Every minute meant a more advanced pregnancy. We were before Judge David Nelson who was wonderful judge, but clearly didn’t want to make a decision. My argument went like this. The government took the position that this woman could get an abortion on her own. They would give her a furlough—there were still furloughs in those days. And I literally got up and said let me see if I’ve got this right. There she is walking through the streets of the Boston Common in shackles going “Abortion! Can anybody give me an abortion?” It was a ridiculous argument. Her healthcare was completely dependent upon the Department of Corrections. Whatever rights
she had on the outside, they had to provide inside the walls. Ultimately the case was settled; she was able to get an abortion without a decision. Then came the most dangerous attacks on abortion which were the attacks on their funding. Not criminalization, but access. This was the support super structure of government funding that made the choice of abortion a meaningful one. And that really was the beginning of the end. That’s too strong; we are not at the end but this surely was the beginning of an effort to make abortion so restrictive, that it is essentially a right like none other, a perfunctory right. Congress passed a law, restricting Medicaid funding of abortion; there was litigation around the country. We cooperated with the litigation going on in other states. The major case came out of New York; so we coordinated our challenges with the New York case. They had a religious challenge to the law that would restrict Medicaid funding of abortions. They actually wanted to try to prove that the law was a product of the mobilization of religious forces, notably the Catholic Church. That was not going to succeed. It was an equal protection challenge which resulted in a very bad decision, *Harris v. McCrae*. The Supreme Court held that even if there is differential treatment between abortion and other male-specific conditions, that differential treatment was justified by the state’s interest in potential life. The decision essentially stripped away what we had won in the public hospital case. Public hospitals didn’t have to provide abortions; the government didn’t have to pay for abortions except under very unique, very specific circumstances. We had brought a similar case here, I believe in our case it was called *Pre-Term v. Dukakis* and we had gotten preliminary injunctions while there was a national injunction. Now the national injunction was over.
John and I, and I’m not sure how we did this, for the next two years, the law was never implemented in Massachusetts. For two years we kept on moving for reconsideration and applying for *certiorari*. These procedural devices kept the Medicaid law from being implemented. While this was going on, we were fashioning a state constitutional challenge to the law. The Massachusetts Declaration of Rights had just begun to be interpreted differently from the U.S. Constitution—death penalty, pregnancy discrimination, the exclusionary rule. And so we crafted a lawsuit that would be an equal protection lawsuit, now presuming a different standard in Massachusetts and the Massachusetts Equal Rights Amendment. Massachusetts had a state equal rights amendment though the national one had not yet succeeded and was not doing well. We were visited, John and I, by Ellie Smeal, head of NOW and Ellen Zucker with her. Ellen was very active in NOW. (She subsequently became my law clerk when I became a judge.) Ellie Smeal tried to persuade us not to raise the Equal Rights Amendment claim. They argued that if we raised the Equal Rights Amendment claim, their efforts to try to get Equal Rights Amendment passed across the country would fail. They were trying to put together a coalition of Republican women who were anti-choice and Democratic women supporting the Equal Rights Amendment. I had clients to represent; I would not listen. Even more significant, I didn’t agree with her strategy. If the Equal Rights Amendment didn’t cover abortion, it wasn’t worth the paper that it was written on as far as I was concerned. So we were very pleasant but we told her that we were going to go ahead with the case. Let me describe to you who our clients were and why this case was so important. A woman who had chemotherapy who could not
possibly carry a child to term both because she was getting radiation and because
of her anxiety over both. A woman with a heart condition: if she carried a baby
to term she would endanger her heart. These were not just women who wanted
to use abortion for birth control. These were women with serious medical
conditions. So we proceeded with the case, went before Judge Ben Kaplan who
was on the Supreme Judicial Court of Massachusetts. He was the emergency
judge; we indeed timed the case for when he was the emergency judge. And he
was superb. He gave us the injunction which was now I think the only
injunction in the country based on the state law. The case went to the full bench
and I remember it was just before I was about to go on a western trip with
whomever I was dating at the time. (This is before I was married.) We heard
that it was a 6-to-1 decision, in favor of the plaintiffs, situating the right to
choose in the Massachusetts Constitution. And based on an argument that was
not highlighted, not an equal protection argument, not based on the Equal Rights
Amendment grounds, but rather, on a substantive due process grounds. It was
essentially the decision you would have wanted from the United States Supreme
Court but didn't get. There were no trimesters in this decision. It was simply
the right to choose, the right to choose and have Medicaid support it. It was as
broad a decision, as close to unanimous decision, and it was an extraordinary
victory. Every time I wanted to change professions, or change jobs, there would
be something like this that would happen that would make me feel so right about
what I was doing. And this really was. This is one of the sweetest ones. When
I applied for a judgeship many years later, there was a page that I was supposed
to list the things that I was most proud of. Of course this decision was right up
there. That essentially ended abortion litigation in Massachusetts because it stopped any of the limitations. We didn’t have to do anything then. The situation is changing now. John and I made a good team. We worked on cases together. We were very different workers. I could stay up all night; he had no such stamina. So I would stay up all night doing the brief, he would fall asleep on the couch. In the morning I’d be asleep, he’d take what I wrote and edit it. “Edit” doesn’t describe it. Slash and burn it. I’d wake up and I would restore things. Again I did what I wanted to do. I don’t know how to describe it. I didn’t make much money but I just did whatever was interesting and I loved. And so one day in the middle of the week, we get a call from a friend of ours who has been detained in New Hampshire as part of the Seabrook Nuclear Power Plant demonstrations. Again, this is relatively early on in my career, it’s in the midst of the abortion litigation, just after Saxe. And John and I come running up to New Hampshire, sort of drafting papers along the way. What had happened was there were 1400 demonstrators demonstrating around Seabrook Nuclear Power Plant. In the past, the authorities had just released all of the detainees on personal recognizance and then not press charges. If they pressed charges it would be pay the fine by mail. This time the authorities wanted to teach these kids a lesson. So they required bail. Some of the kids didn’t have a dime on them. Some people just didn’t want to cooperate as a matter of principle. So 1400 people including our friend were detained. We went up there and I was more of a criminal lawyer than John so I fashioned a theory that this was the punitive use of bail, not for the purposes for which bail was initially intended. We filed a law suit in federal court with a request for a preliminary
injunction and with affidavits from anyone we could find. The judge in New Hampshire was Judge Hush Bownes who was, I came to know later one, a wonderful, warm caring human being. And the first weekend after we filed the case we were determined to look at the conditions of the confinement. New Hampshire didn't have enough cells for 1400 people. So they took over the National Guard armories throughout the state. They didn't have a way of feeding 1400 people. So they went to McDonald's and got Egg McMuffins and hamburgers. They thought these kids would be very happy. On Saturday we visited all of the armories with the Judge, to see the conditions of confinement; we prepared a questionnaire for them to reflect what their terrible conditions were. Well the questionnaires which Judge Bownes read, were nothing sort of hysterical: "Insufficient deep well water." "No gluten flower in the bread." In short, the demonstrators were countercultural kids for whom McDonald's was poison, and the prison conditions of confinement that John and I had been used to challenging—lights on all day, cold temperatures, disease—that wasn't what was going on. Judge Bownes had a wonderful sense of humor and recognized that even though this was not the gulag, it was nevertheless a troubling situation and he said "We'll hold hearings beginning on Monday until we finish." What the hearing served to do was to put enormous pressure on the state because of the amount of money they were spending. And again I was a relatively new lawyer, only a year or two after Saxe, I knew I could count on my instincts which young lawyers needed to learn so I candidly ripped people apart on cross-examination. I wasn't sure where the case was going but there were times during the course of the trial that Judge Bownes would lean over and say, "other than
showing your proficiency, what’s the point of this examination?” And of course the point was to dramatize the issue. We had a colorable claim but the point in fact was to dramatize the issue. By Friday, the state decided to let everybody out. The case continued as a damages lawsuit and in fact required the deposition of the then-Attorney General of New Hampshire which was David Souter. I don’t remember what ultimately happened but its purpose was to get these kids out of jail and that was accomplished. My practice could not have been more diverse. It was really just what I wanted to do. I would get a phone call, I would read the newspaper and literally, volunteer. One morning I read in the newspaper that a young woman had just been sentenced by a judge for rape. She was gay. She’d been part of a melee. But when he sentenced her and another woman who was also gay, he said, “I don’t believe you deserve to be in the animal kingdom.” And so I went to visit her the next day. And I volunteered to represent her. And I said, whatever she had done, it was clear she was not getting a fair hearing. That was really all I was concerned about. I went into court the next day and I told the judge that I was going to enter an appearance. And he said, “no you’re not.” I said Judge, “I’m not asking for an appointment.” He said, “I’m not going to let you enter an appearance.” “Judge, let me see if I got this right, I’m not asking for the state to pay, I’m simply volunteering.” He said, “I deny it.” So I sued him. I sued him, went to the SJC and of course, the SJC Clerk called him up and said you’re being an idiot, let her enter an appearance. This was one of many times that I sued judges complained about them. When I didn’t get on the murder list for appointments in Suffolk County, I complained. I never got a case. I was the only woman on the list and I never
got a case. So I wrote a letter to all the judges of the Superior Court which was the organizing entity for the murder list. And I said, “Dear Judges, I’ve been on the murder list for whatever it was and I’ve never gotten a case. I’m trying to understand what the rationale of selection could be. It can’t be alphabetical, my last name begins with G; I’m in the middle of the alphabet. It can’t be geographical, other people from Cambridge where I was then living had gotten on the list, and I went through all of the alternative theories that it might be. And then in the final paragraph, I said I certainly don’t want to believe that it is gender. I would appreciate a meeting as soon as possible.” That letter led me to get immediately numbers of appointments and they were particularly disgusting appointments. It was clear that someone was having a lot of fun. It would be the body is in Norfolk, the head is in Suffolk, etc. Great jurisdictional issue; send it to Gertner. But I understood and I did the cases. Sometime in the mid-eighties, there was a woman in the federal court, a clerk, who was a docket clerk. She claimed that she was being passed over to be courtroom deputy. (The docket clerk sits in the clerk’s office; the courtroom deputy sat with higher pay and higher status in front of a judge.) The courtroom deputies were all male. I looked at the numbers and I looked at her background. The employing entity was the judges of the United States District Court. So we sued the judges of the United States District Court and we had to name each of them separately. And they had to be each separately served. This was many years before I became a judge of that very court. Ultimately the case settled but I don’t recall how. It was not just that I did what I wanted, I did what I thought was interesting and I also had the sense of where I could make a contribution. If I could make a
contribution with a phone call or an appearance or a demand letter, I couldn’t resist doing it. I’m having some of the same troubles now actually. I just did what I wanted. I did federal, state, civil, criminal, appeals, trials. And the only other case I would want to highlight for this time in my career was the malpractice case. What did you ask me? I could keep on going!

Ms. Berman: No go ahead, let’s talk about the malpractice case.

Judge Gertner: After the Saxe case, I get a call from shrinks about a patient of theirs. The patient claimed that her psychiatrist had had sex with her. It was an extraordinary call because it was her word against the psychiatrist; it was extraordinary that her current psychiatrists believed her. It was also extraordinary that they called me. I’d never done a malpractice case. Then again, I hadn’t done a murder case. As far as I was concerned everything was open. And they called me because I had a reputation by then of being a fighter and they thought I would believe her. And of course I did. And I did because every woman I knew including myself had had the experience of a trusted professional doing something he shouldn’t have done. In my case it was a dentist who put me under laughing gas and as I was coming to his hands were on my breast. Everyone I knew had some story like that. So when this woman told me her story about her psychiatrist, I could well believe it. There was some evidence of the truth of her charges, something more than her statement. The cost of the sessions declined at the time the sex began. They were later in the afternoon after the secretary had left. There were prescriptions for Flagul when she developed a vaginal infection. These were things that were certainly inconsistent with an ordinary psychiatrist-patient relationship. But one of the
things about being a powerless new lawyer was that I never liked the odds. If
the judge had a discretionary decision to make, I was likely to lose in those days.
And if a jury were required, I didn’t know what a jury would do in this situation.
So one day I asked my client what the doctor’s genitals looked like. And to my
astonishment she described them. And indeed to my further astonishment, she
drew them. She drew his penis and she drew his buttocks. And he had a mark
on both. The question is what do you do with this information. My office found
the situation to be hysterical, what to do? A motion to take a view? We drafted
a motion for physical examination; I went to court with an affidavit saying he
has these marks in these various places and she couldn’t have known them
unless she had had sex with him. Can we have a physical examination of this
very well-respected doctor? I went to the motions session of Suffolk Superior
Court. I’m still the only woman in the courtroom. I go up to the judge and I
make the argument and as soon as I say “penis,” he gets up and runs off the
bench. The judge was mortified that I was saying what I was saying. Hours
later he gave us the motion for a physical examination but it was clear that he
was embarrassed. Well then what do we do? So we hired a plastic surgeon.
Where did these strategies come from? It’s as if my being a woman informed
my lawyering in that I had to work harder than anyone else. But also I had to
come up with things that no one had ever thought of before. It was the only way
to arm myself. So the doctor went to the plastic surgeon at Mass. General
Hospital. Our plastic surgeon told me in advance that one mark could be
removed without a scar and the other could not. After the examination he came
down the stairs, saying “there’s good news and there’s bad news.” I said,
“what’s the bad news?” The mark that could be removed was removed. There was no scar. And the mark that could not be removed without a scar has a scar.

A month or so later, the Friday before the Monday trial is to begin, I am served with a number of documents, medical records, that were generated in an emergency room in Maine. Apparently the doctor now claimed he had fallen on a bottle and had to go to the emergency room and have his buttocks stitched up, conveniently where the mark my client described had been. The trial was to begin on Monday. I could have done what many lawyers would have done which is to tell the judge on Monday that these records should not be admitted because they were served late. But again I did not trust any discretionary decisions. The judge at that point could choose to let them come in or not. But I didn’t trust any discretionary decisions. I didn’t assume that I’d get the benefit of any ruling like that. So I sent my investigator to Maine on Saturday. Just as a footnote my investigator was Susan Saxe’s lover. A very formidable woman who basically could find out anything at any time. And I told her I didn’t know what I was looking for, but I wanted to find out who the emergency room doctor was, whether he knew the defendant, whether they were school chums, where the accident took place, what the conditions were, what the weather conditions were. About two in the morning, she calls me; she’s investigated everything. Yes, the emergency doctor was a school chum. But on the day in question there was a freak snowstorm in Maine. There were twenty-four inches of snow on the ground where he said he had fallen on a bottle. And unless he had dug out that spot, stripped and sat on the bottle this accident didn’t happen as he said. I conveyed that information on Monday and the case settled. I was actually
troubled that it settled. I was in this for law reform, not necessarily for private gain. But that’s what the woman wanted and so we did. A condition of the settlement was that she withdraw the complaint before the Board of Registration Medicine and that its terms remain confidential. She was prepared to accept that. I was troubled but I had to accept it. Then my hairdresser, a couple of years later, tells me he was in a case involving a doctor, a psychiatrist, who had slept with his patient. He was on the jury and he had voted for the doctor. I’m just making conversation; I ask “why did you vote for the doctor?” Because no one else had come forward he said. I asked him the name of the doctor, and of course it was the doctor I had sued. But the story doesn’t end there. Many years later than that, the Boston Globe had a spotlight team coverage of sex abuse in the Catholic church. And one article touted Cardinal Laws’ efforts to root out child sex abuse by sending errant priests to counseling. Who was the counselor? The very doctor that I had sued. So I called my client and I said to her, you could jeopardize your settlement if you were to come forward now, but it’s up to you. She actually called the Globe and they subsequently wrote an article. They protected her identity, but it was clear who it had to be. Her settlement was not jeopardized but at least some good was done. So I did murder, I did employment discrimination I did malpractice cases. I did lawsuits on behalf of women who were raped, civil lawsuits, not criminal cases, premises liability cases. And then academic discrimination cases. Tenure cases. I think the principle of selection was: Was it an interesting and important case? Could I make a difference? And that was _____________.

Ms. Berman: You talked about taking tenure cases. You took a tenure case for Clare Dalton.
Tell us about that.

Judge Gertner: I had been teaching at Harvard in eighty-five. I’d taken a year off to teach at Harvard and have a baby. Telling it a year off and teaching here is really a contradiction in terms. Anyhow, I got to know Clare Dalton while I was here and then when I went back to practice. The year I went back to practice Clare was denied tenure under circumstances that in my judgment strongly suggested sex discrimination. Of course it was a combination of gender and political discrimination but certainly gender discrimination. I believe that five men made tenure that year and when you compare her record to theirs, she was equal if not far better. (With my teaching here now, in 2012, I have a hard time saying “far better” since some of these people are now my colleagues.) Academic discrimination cases were perhaps the most difficult of all discrimination cases because rather than having these sort of errant foreman on the line who doesn’t say the right things or dresses down a woman or an African-American, these are cases that have a veneer of legitimacy. There’s a record; there’s a pile of academic writings; there is a committee so it’s not just one person. So even if one was biased, how could a committee be similarly affected? They all can’t be biased. There is a rationale for the woman’s rejection which is typically written down, often elaborate. These are the most difficult cases. They are also the most expensive discrimination cases. And you don’t have a national constituency for them. Liberal judges will feel that we shouldn’t be messing around with academic freedom and conservative judges may not be so thrilled about the discrimination laws to begin with. So I had actually taken of numbers of academic cases notably right after the Saxe cases. The first was against Tufts
case, a woman who was denied tenure in the art history department. There were
numbers of academic cases after Tufts. Clare’s case, of course, was particularly
challenging. At the time, no one had ever sued a law school and certainly no
one had ever won. The case was brought initially in the late eighties. We filed a
complaint with the Mass Commission Against Discrimination but it was clear
that Clare didn’t want to press it at that time. We did what we could to preserve
her rights but no further. I went on with the rest of my practice and then
astonishingly many, many years later in 1992 I believe, or 1993, we suddenly
get a report from the Cambridge Commission on Human Rights. The Mass
Commission Against Discrimination had sent the case to the Cambridge
Commission on Human Rights who had investigated the case to see if there was
probable cause to proceed. Clare moved on to teach at Northeastern Law
School. But suddenly there was this extraordinary decision in her favor finding
probable cause to believe that she was discriminated against. Really without my
participation, I hadn’t done anything. They just did this on their own. So I got
in touch with Clare and I said, what do you want to do now? We could have a
hearing before the Mass Commission Against Discrimination; we could take the
case and move into court. 1992 was a sort of momentous year. Bill Clinton had
just been elected with whom I had gone to law school. Clare’s then-husband,
Bob Reich had been appointed to be the head of the Department of Labor. Clare
and he were moving to Washington to participate in the Clinton Administration.
And my name was up for a judgeship. So, but you know my feeling was, I
didn’t think I had much of a chance of a judgeship, I certainly wasn’t going to
change my stripes for that. So I was fine about going forward and she agreed.
We began; we took depositions and we interviewed people. And then we decided to try to mediate. The mediation was extraordinary. The Charles Hotel, Cambridge, Massachusetts, was the site. The General Counsel of Harvard was Margie Marshall soon to be the Chief Justice of the Supreme Judicial Court, and author of the landmark gay marriage decision. Joan Lukey was representing Harvard, one of the top trial lawyers in the city. I was representing Clare and the mediator I believe was a woman, now a judge, from California, Margaret Morrow. So after laboring in the vineyards and being the only woman in a courtroom twenty years before, suddenly in the case, everyone was a woman. And we were mediating the case until 5:00 p.m. That was all the time we were going to spend because Clare was on her way to Washington. Although we got along very well, there were some interesting moments in the litigation. Right after Clare had been denied tenure, I had interviewed members of the Harvard Faculty who participated in the tenure decision. These were my friends. Clare hadn’t interviewed them, Clare had called a meeting at her house and all the faculty members who had supported her came. And I was there. It was at a time when the status of faculty members as employers was not clear. In other words, whether the faculty comprised employers represented by Harvard’s counsel or whether they comprised workers essentially not represented by Harvard’s counsel. If they were part of the employer group, then I had no right to interview them without Harvard counsel present. As I said, it was a profoundly ambiguous situation. These were my friends. It wasn’t clear I was going to be representing her. Likewise, it wasn’t clear what their status was. The bottom line is that I had gotten information about the process that nobody had ever had.
When I raised that, with Margie and Joan, they threatened me. They said that they had been considering filing disciplinary charges against me for those interviews but that they decided against it because my name was up for a judgeship. I was about as offended as one could be. And I said then, as I did through the whole nomination process, I’m going to do what I think is right and you throw your best shot. So if this had gone into litigation, it would have been a rather interesting litigation. It would have been divisive litigation. But getting back to the mediation, they certainly knew that I had information that no plaintiff’s lawyer would typically have; I knew what had gone on inside the walls of the tenure proceeding. Harvard was taking the position that they did not want to give a penny to Clare directly. But by the end of the day there was a very unique and interesting settlement which I like to think was a product of having all women in the room. The settlement was a quarter of a million dollars which doesn’t sound like a money today but was then, that Harvard would give to the Northeastern Law School Domestic Violence Program which was what Clare had founded and was directing. Since she was drawing her salary from that entity, indirectly Harvard was paying her. At five o’clock we were finished; we wrote down the terms and there was no mention of confidentiality. On the way back from the session, in the car, Clare drafted a press release. And the press release essentially said Harvard lost and she won, that she felt vindicated, etc. Then get a call from Ms. Lukey telling me that she thought we had a gentlemen’s agreement not to go to the press and I said, “we’re not gentlemen; we had no agreement.” But Clare was happy, continued in that position at Northeastern Law School, and ultimately I left to become a judge. But Harvard
was not the only institution I had sued for gender discrimination. I had sued the University of New Hampshire, Dartmouth, Westfield State College. Someone said the best way to introduce me was not in terms of the degrees I had but the colleges I sued. To some degree I was representing myself in these cases because I was always flirting with an academic career. So that the Clare Dalton case.

Ms. Berman: Earlier on yesterday in your interview, you said that in the beginning you did not want to represent someone who had been accused of rape particularly when they thought you were using you for their own legitimacy but later on you did represent some defendants, or at least one defendant who had been accused of rape. Tell us how you came to do that.

Judge Gertner: Reluctantly. I had two small children, it was in the early nineties and I had two small boys, as well as my stepdaughter. And the son of a friend of a friend came to see me, telling me about this case. The defendant was eighteen or nineteen, nineteen-years-old. He was in local college and he was 4’ 11’, very slight. He was a freshman. This was his first sexual experience. And about ten months after this sexual experience with this woman, she accused him of rape. The case was as thin as one can imagine. It was chilling. Chilling because the accusation came many months later and in addition about a month after she alleged rape, she invited him to her parents' house for the weekend. So there was behavior that was not just inconsistent with having been raped, but directly contradictory. And the whole story just didn’t make any sense. What moved me was not just that this a friend of a friend, but that I could see how any man might be vulnerable. And that was frightening. And in a funny way of the early nineties,
rape had turned around. In other words, whereas when I started practicing
prosecutors would never bring so-called date rape cases. Women still had to
immediately complain of having been raped or else the case would not be
brought, the concept known as “fresh complaint.” The rape had to be violent.
There was no concept of lack of consent without more. He had to use force and
she had to resist with all her might. It was really a crime that had been defined
two hundred years before and had really not changed to reflect women’s
autonomy. By the early nineties, things had begun to shift in the other direction.
Now there were multiple docudramas on television about date rape.
Jurisdictions were appropriately changing the law to reflect the view that rape
was a crime against a woman’s autonomy and not necessarily just a violent
crime. And in this young man’s case, the prosecutor felt he had no choice but to
bring charges because of the woman’s movement. A movement I had been part
of, that I loved dearly had achieved such political pressure that the prosecutor
didn’t want to be the one to say that this case was insubstantial. I still didn’t
want to take the case but I arranged for my partner to do it. I didn’t want take
the case for my usual reasons, one reason was not only the legitimacy point but I
had gotten to be a very proficient cross-examiner and I really did not want to use
my skills against a woman. It was just awkward and uncomfortable and I just
didn’t want to do it. My partner tried the case. He went jury waived because the
weekend before there had been a documentary about date rape. I find out later
on that not only had the prosecutor felt pressured to bring the charges, but also
the grand jury indicted even though there were statements by the grand jurors
that suggested it was not a strong case. Indeed, one grand juror had heard that I
was representing him as was later related to be, and, assumed he would be well
taken care of. And it was at every point along with the way when there ought to
have been a screen, the screen had holes in it. So he was indicted, and there was
a trial before a judge. The testimony could not be thinner, the judge asking
pointed questions which strongly suggests that he's going to acquit. But then he
comes out on the bench and he says, I have “no choice” but to convict. If the
defendant had gone before a jury, this case would look fresh and new and they
might well have acquitted, he stated. But when you see as many cases as I have, I
feel like I have no choice. What he was essentially saying was, this is justice on
the assembly line. He was tired, didn’t want to stick his neck out. It was clear
that if he had acquitted, there would be an article next morning that some
feminist would be saying this is what has always happened; women are being
victimized and the courts don’t care. If the defendant had been convicted, there
would not be a word. I was appalled. I was in the middle of a sex
discrimination case, I couldn’t have tried the matter anyhow. The defendant was
sentenced to time to be served over the summer. The judge wanted to keep him
in college. It was a ridiculous position because at that point, he had been
suspended. The parents of the defendant went around town looking for someone
else to do the appeal which I thought was perfectly fair. They went to Tom
Dwyer who was a lawyer in town, who had been a prosecutor, very different
background from my own. (He actually had been a prosecutor in the office
when I tried Susan Saxe.) And when they went to him and mentioned my name,
he said, you have the best, you don’t want to go anywhere else, go back. Two
things happened as a result. One is that I then represented this young man on
appeal which I’ll talk about in a minute, and two I wound up being a partner of Tom Dwyer and leaving Harvey Silverglate. But the appeal: I wrote a feminist brief. In other words, I did the opposite of what I had wanted to do all along which was I used all of my legitimacy. I wrote a feminist brief which literally began—we should not exchange a regime in which we are only concerned about false accusations of rape to a regime in which we are never concerned about false accusations of rape. And it was really putting my feminism on the line.

We needed to get bail pending appeal so that the defendant was not going to be jailed. We wound up going before Judge Edith Fine of the Massachusetts Appeals Court. There was a hearing in her lobby with me, Judge Fine and a young Assistant District Attorney named Wendy Murphy. The issues on appeal were substantial but not overwhelming. There was surely a sufficiency of the evidence issue but it was a judge trial. Such arguments are very difficult to make. There were some limitations on cross examination which could have merit, and then a sleeping evidentiary issue ten months after the crime, the alleged crime, when the woman claimed rape, she did so to a psychiatrist. And because of the doctor-patient privilege, we did not know the circumstances of the first time she said “rape.” Given a ten-month delay, and the invitation to the defendant to visit to her parents’ house was a substantial issue. We wanted to get access to her psychiatric records. Back to the hearing in the lobby of Judge Fine: Judge Fine is not sympathetic. We don’t know what’s going to happen. About two or three weeks later, to our surprise, she grants bail. And I hear through the grapevine the people who knew her, what had happened—which I think is really just right as the legal issues could go either way—she was going
to err on the side of releasing him because this case had the aroma of innocence. She didn’t believe he did it. It was very hard for anyone to look at the facts and believe that he did. So the case goes up on appeal. I argue it, and Wendy Murphy argues it on the other side. The Massachusetts Supreme Judicial Court issues a decision which reverses his conviction; but I’m described in the *Globe* as the only lawyer in history who criticizes the SJC for the scope of its decision. Every reason why I didn’t want to take rape cases prior to that case was reflected in that decision. It was broader than it needed to be to accomplish the result in this case. They essentially carved out a rule that said henceforth, defense lawyers can get the psychiatric records of rape victims. This was not remotely what I asked for, not remotely what I thought was right and it was a throwback to the time when rape victims were seen as crazy. I volunteered to anybody to work to try to narrow that decision. The defendant was released. They never prosecuted him and he went on about his life and we are still in touch. I started to be picketed because of this case. All the years before, the twenty some odd years before, the abortion decisions, the discrimination and sex harassment decisions, paled before the rancor that accompanied this decision. Literally, I would be on a panel and someone would get up the in the back and say how could you have a woman who represented a rapist on the panel. It was as I describe in my book as the fascism of the woman’s movement. I was appalled at what I was seeing. Someone once asked me a question during one of those panels, “Why did I represent him?” I said that one reason was because I thought he was innocent. And her response was “that’s irrelevant.” But I later heard that this also could have derailed my nomination for judgeship. People were being
asked about my role in this case. It’s extraordinary that it could have had any role. Before this case, I did civil actions for rape which didn’t raise any of those issues. Civil actions were between private parties. The young woman who goes on a business trip for her boss and is raped in a hotel room. Or the woman who is working late and goes to get her car and is raped in a badly-lit parking lot. Or the woman who is living on her own in an apartment building and the landlord doesn’t fit the locks as he should. Those cases involved institutional responsibility for assuring a woman’s safety. So I had no trouble with that. But I never did another rape case again.

Ms. Berman: So at some point you become interested in being a judge. How did that interest arise?

Judge Gertner: Very accidentally in a way. So it’s 1992 and I was in the midst of a very high profile case which I represented the brother of Charles Stewart. Charles Stewart was the man who claimed that he and his wife were assaulted by an African-American in their car coming from a birthing class. The wife and the fetus are killed. He’s shot and he blames it on a black man. The city is ripped apart. Ultimately Charles Stewart’s brother, Matthew, comes forward with information suggesting that Charles did it and Charles commits suicide. I represented Matthew which was a very difficult case given the anger at the family. But the day that Matthew pled guilty was the day that Bill Clinton won the election. Everyone I knew was seeking a job in the administration. I had never been a public defender; I had never been a U.S. Attorney, I never had a government job. I had essentially my version of a public interest firm, but I began to think that if there ever were a moment to do something different, this would be it. I’d known
Bill and Hillary; Hillary had been one of my closest friends in law school and thereafter for a number of years. So this was the moment. I talked to people about what I should go for. Judgeship was not immediately on the list for me. I thought about working in the Attorney General’s office or even trying to become Attorney General. Everything was open; friends recommended I should apply for a judgeship. I thought I had no chance, not because I wasn’t qualified. There was not anything that I had not done as a lawyer. Civil, criminal, trials, appeals, federal cases, I had taught at Harvard and other law schools. In terms of qualification and competence, there’s no way I could be denied a judgeship. It was only politics. And at that point, I was working with Tom Dwyer who is a genius at mobilizing people. I applied. My application disclosed everything that anyone could ever conceivably imagine about me. What’s the case you’re most proud about the nominating papers suggested. The abortion case I replied. Is there anything else you want to tell us that is not covered by any of these questions. Well, every year if I get cash from a client, I pay taxes on the cash, and I file a currency form that the government requires, but I will not tell the source of the cash, where that source is a client. And I wrote a brief about why that was so. I just volunteered that. If I was going to lose the nomination, I was going to lose not because of non-disclosure. Tom mobilized everyone who ever opposed me to write a letter on my behalf. It was really quite impressive. Bill Weld was the ex-governor of Massachusetts; every prosecutor in every jurisdiction that had ever opposed me and they were wonderful letters. They said words to the effect—I may not agree with her, but I trust her implicitly. Kennedy had a merit-selection committee which was really impressive. There
were four vacancies on the district court bench in Massachusetts. This part of the story, I'm telling through indirect sources. I'm not sure about all of it. But there were four vacancies at the time; he had the four highly qualified people for those. One was Patti Saris who had worked with him and he knew well. One was Reg Lindsey who was an African-American, a fabulous lawyer. Rick Stearns was a very close friend of Bill Clinton, closer than I was at the point and Michael Ponsor, a superb judge was going to be in Springfield. Four vacancies and four likely people. I had heard from a number of sources that Kennedy went to Judge David Mazzone, the irony being Dave Mazzone was the lawyer who opposed in the first abortion case against Hale Hospital—that Kennedy persuaded Mazzone to take senior status which opened a fifth vacancy and Kennedy would work to get Mazzone on the Sentencing Commission. I did not know Ted Kennedy, I had not been active in any campaign. I had been political but not with a capital P, with a small p. I had a wonderful interview with Kennedy. The kind of interview you have when you don't think you have a prayer of getting the position—funny and loose and at the end of the interview I sort of chided him, telling him that at some time he should reward a civil rights career with a judgeship. If he cares about people making the kinds of choices that I made, he should reward such a career with a judgeship. It doesn't have to be me, I insisted, but there has to be someone for whom that happens. And I was told that's what did it for him and that pushed him to talk to Judge Mazzone. Even though I was close to Bill and Hillary, my nomination and confirmation was a product of Ted Kennedy. So I applied and I laid out everything I had ever done. A week before the confirmation hearing, there's an article in the Herald.
I can’t believe I’m blanking on his name. An article in the Herald by a columnist. The article compared me to Lorena Bobbitt. “Judge Gertner will do to justice with her gavel what Lorena did to her husband with a kitchen knife.” Kennedy puts our hearings on between the NAFTA vote and the Thanksgiving recess. At the hearing, I’m first which I thought was terrible but it was told that as soon as the bell ran for the NAFTA vote, and the Committee Chair said “thank you,” me, my husband, my six year old, my eight year old, my eighty-five year mother-in-law were to run down the hall out of there. I got through the committee and the day after the committee vote, I was called by someone from the US Attorney’s Office Tax Division. They wanted to bring an enforcement action against me to disclose the name of the client who had given me cash. It was to be U.S. v. Gertner, a civil enforcement action. I did not tell them that I was up for a judgeship, but I explained to them, that the law was against them in Massachusetts and I just left it at that. Then we hear that Senator Jesse Helms put a hold on my nomination. The other four get through, but there’s a hold on mine. Over the next ten months, the Republicans had mobilized against Court of Appeals appointees but had not touched the District Court. By the seventh or eighth month, I was beginning to be mentioned with the other court of appeals nominees as people who they would oppose. Then, one day, my husband and I were reading the paper and the Globe said Kennedy voted for Helms School Pray Amendment. So the Senator called and I said to him, “Senator, I don’t think I’m worth this.” He says, “don’t worry, we’ll take care of it in committee.” A few hours after that he called back and he was virtually incomprehensible. He tried to imitate Jesse Helms’ southern accent. So Ted
Kennedy with his New England accent imitating Jesse Helms’ southern accent quotes Helms, “Senator, you got your judge.” And I was confirmed. I had been prepared for three, four days before my hearing, by the way. There were three binders: One, of the cases that I had worked on, the cases that we’ve talked about. One were articles that I had written, scholarly articles. And the third category was speeches I had given on Boston Common. That was a problem. I had threaten to burn my Bar card once over a Supreme Court decision. I had some fairly incendiary speeches. But nonetheless I was confirmed. I’m not yet sworn in. I put off my swearing in for about two months because I have to wind down my practice. The day after I was formally confirmed, I was finally served with a summons in *U.S. v. Gertner*. Lloyd Cutler, the President’s General Counsel, starts calling me to ask me to put off my swearing in until *U.S. v. Gertner* was over. I told him, “No.” Then he called me back and said the President wants you to announce if this case *U.S. v. Gertner* gets publicized, that you’ll recuse yourself in any case involving the government. I consulted with Judge Joseph Tauro whose then the Chief Judge of the District. And what he told me is unprintable and unstateable. He said, hell no essentially, don’t recuse yourself from anything, At most, offer to recuse yourself on a case involving the IRS, but that’s it. I transmit that to Lloyd Cutler. He calls me back the next week. He’s absolutely furious. Absolutely furious. The President is very angry he says. If there is any publicity attached to this, we want to let you know that we’re going to examine your application and if you have left anything out that should be in there, in effect there will be an impeachment proceeding. I had the prospect of being the first judge, as I like to described it, who would be
impeached before I was "peached." And I hung up the phone and I fell apart. I was dealing on a national political level, a level of vituperative national politics; a murder jury was easier than this. I went back over everything that I had submitted. The application to Kennedy was the same application that had gone to the Senate committee. The Senate committee application, however, did not have reference to this issue of not disclosing the client's name when given cash. Of course, it wasn't clear that I ever had to disclose this matter in my application when I applied there was no "case." But I knew I had disclosed it. What had happened was that although I had disclosed it in the first application to the Senator, the Department of Justice had edited it out as irrelevant when they presented the application to the Senate. So one part of the Department of Justice thought this was no big deal, and the other part was suing me for it. By the time we were able to show that I had disclosed everything, I was finally sworn in. We had heard after the fact that the deal that was struck by Web Hubble who was then the President's Chief of Staff, was that they didn't want to take my nomination off the floor because they knew it would kill it. So the plan was when I was confirmed by the Senate, Clinton would not sign the papers, an interesting Marbury v. Madison. Putting that aside, Clinton either didn't get the message or forgot. He signed the papers immediately. So I had the leverage to tell Lloyd Cutler, I'm going to be sworn in, and there was nothing he could do about it. The confirmation process had been a horrible experience. And at many points over those ten months, I would have withdrawn my application were it not for Senator Kenney and the work he was putting in, a lifetime's worth of work was being caricatured. And ultimately my name was more important to
me than the position.

Ms. Berman:  Whatever happened to *U.S. v. Gertner*?

Judge Gertner:  I won. The case was reassigned to a District Court Judge out of the District Court of Massachusetts, Mort Brody in Maine. He ruled in my favor and the First Circuit affirmed. Years later Judge Brody came up to me at a judicial conference to tell me how courageous he thought I had been to hold out on this but it wasn’t an issue for me. It just wasn’t an issue for me. People had advised me to disclose the client’s name on my application. The client was in jail, and I started to do that, I made a reservation to go visit him and explain it to him but I cancelled the reservation because I couldn’t figure out how I could possibly explain to him that my ambition mattered more than his life. If I were disclose that he was the source of the funds, it would be used as evidence against him. So I refused to disclose. My nomination is an amazing story now. It couldn’t possibly happen today without Senator Kennedy. It just wouldn’t be possible. Because you have to be willing to stand up for someone; you have to be willing to say—this is just the person we should get through, and stand by it.

Ms. Berman:  What about your swearing in?

Judge Gertner:  My father had died three days before President Clinton called to nominate me. My mother had died nineteen years before. My father had read the letters of recommendation on my judgeship. And very touchingly talked about how proud he was of me. And I told him I would tell a story at my swearing in that I’ve become famous for in Boston and that many have heard 9000 times. But I would tell the story because it sort of reflected the distance that I have travelled.
So the story went like this. After I’m sworn in with Senator Kennedy and Judge Breyer on the stage, I am asked to speak. The audience was not only filled with luminaries in the Boston community, but many of my clients. It was a very unusual audience—babies crying, some people in leather. So I told this story:

In 1971 I graduated Yale Law School with honors, on my way to clerk for a Court of Appeals judge. My mother and I have a huge fight in our kitchen. And as I describe it, it’s the kind of fight that only mothers and daughters can have. You say things to one another that you never would say to anybody else. What was the fight about? My mother wanted me to take the Tri-Borough Bridge Toll Takers Test, just in case. You never know. At that point, the audience crack up and when the laughter dies down, I said, “Excuse me. I have to say something to my mother long ago deceased.” I say, “Ma, at last, a government job!” So that was the story I’d become famous for. But it was true. It was completely true.

Ms. Berman: When you became a District Court judge, what was your first impression about the job. You’d never been a District Court judge before, you clerked for the Circuit. What was the most surprising thing about the job?

Judge Gertner: Well, it’s interesting, I’m trying to sort that out now. Whatever one says about liberals on the bench or conservatives on the bench, the office hits you between your eyes. In other words, I remember one of the first motions to suppress evidence. I had seen police officers whom I believed were lying throughout my career. And I remember listening to this officer testifying, and at the conclusion of his testimony, I realized believed him, no matter what had gone on in my cases, I simply believed him. And it was sort of a moment of recognizing that this role was different from the roles that I had played before. And that I could
do it. I struggled for seventeen years with my principles. In other words, I didn’t go on the bench, as Justice Thomas would say, with amnesia about my life or claim that I had never taken a position about issues. I had taken positions. I knew exactly what I believed in. But everyone has to move to neutral. And everyone should struggle because none of us are born judges. Being neutral is an alien position for anyone engaged in the world. So in one sense, the struggle that I was feeling was easier for me I think than other judges because it was completely open. I absolutely knew when I sentenced someone to a term that I thought was outrageous but could think of absolutely no lawful way to impose a lower sentence. I knew that and I wasn’t going to pretend what I was doing was just. It made for some very uncomfortable times. When you are a young activist and you are screaming and yelling on New Haven Green, you know that when you become a professional, a lawyer, you have to mold your perspectives into the language of the profession. And there are arguments that you have to throw out because they’re not even remotely in the range of arguments that the court would accept. When you become a judge, that range is narrower. You know that there are certain positions that simply have no place in this role but there is a range; the Constitution or the law often doesn’t define what to do. There’s usually a range, a more narrow range than you’ve had as an advocate, but there is a range. And I didn’t think there was anything wrong with my saying that if there were two results in a case and one in my view demonstrably unjust and I could go either way, why not choose the just result. And I had a sense of what the just result was. Let me give you a dopey example, actually one is a serious and one is a dopey example. There was enormous pressure to move the cases,
huge pressure to move the cases. Not inappropriate unless you're sacrificing other issues for it. So there was a man who had gotten his hand cut off by a saw, and he'd gone to trial, not before me but before another judge. He gets a rather good jury verdict and the saw manufacturer appeals. Again, I'm not involved at all. The case is reversed and reassigned to me. The man has died in the interim and the lawyer has to substitute the Estate for him. The lawyer messes up; he doesn't file the substitution within the allotted time. It's the end of March and my clerk comes to me. We're going through the cases that could be dismissed so that my numbers—the number of pending cases—won't look bad. For the most part, I didn't care about the numbers but I would do some cleanup to see if there were cases that languished and shouldn't be on the list. And my clerk comes to be with this case and he says, "Judge, the lawyer messed up; he didn't file the substitution of the estate; you have discretion to dismiss the case." And this sweet young man looks up at me and says, "but justice in the world suggests you don't." And that really to me was a metaphor. It's very rare when you consider a case and there is a single undeniable option, Option A. Usually it's A B C, a range of interpretations. So if I had discretion to give this man, his family, another shot at a verdict, why not? As far as I was concerned that was an access to justice issue. So I, by the time I left the bench, I didn't think there was anything wrong with having a sense of what I thought the just result was. I would examine the papers, examine the issues, and it was clear that the just result couldn't be achieved I would know it. One of the reasons I wrote so many decisions is that if I couldn't justify something on the page, I couldn't do it. There certainly were times that I would feel like I wanted to say "denied" or
“allowed” and nothing more. But if I went back to the chambers and tried to justify what I was doing and realized there was no justification, I couldn’t do it. So I melded my feelings as to what I thought was right on the one hand, with the job. Sometimes I’d write decisions indicating that I believed I had no choice and I thought it’s wrong, but I know where the law went. There is one case which I will write about, which was the one of the most difficult cases that I had to deal with. It was an abortion case. The fact that I had feelings about abortion is not a basis for recusing at all. When we pick judges in our late forties and early fifties, they are likely to have positions on major issues. You can’t be a human being and not. So this was a case of a young woman soldier who was married, in the army, got pregnant, wanted the pregnancy and her doctor tells her early on in the pregnancy that the baby is anencephalic; it means it has no brain. Her priest tells her that she should have an abortion. She has an abortion and bills the army for the cost of the surgery, which was $5,000. The army refuses and she brings a suit. The principal argument against paying was the law prohibiting paying for abortion deriving from those old Medicaid cases that I had litigated in the eighties. The army took the position that they don’t have to pay for abortion unless the mother’s life and health is at stake and there was really no life or health issue here. It was simply—this was a hopeless pregnancy. There was no brain transplant or other medical intervention. This was a totally hopeless pregnancy. My first law clerk was a woman who came to me and said you have to dismiss the case. And I said, “That outcome really makes no sense. Anencephaly is an abnormal condition. It sometimes lead to ten months pregnancy, and in those cases, had to be terminated by abortion. In other words,
the baby is so abnormal that it doesn’t even release the hormones that enable it to be born. Sometimes it is spontaneously aborted, sometimes not. Moreover, there’s no chance of potential life. Everyone admitted as much. So I hold onto the case without decision because I don’t know what to do. I absolutely don’t know what to do. I’m not going to write a decision that is not sustainable. But I also wasn’t going to give up so soon because it was a palpably absurd result. My next law clerk also researches the case and agrees, and says, there’s not much you can do. But she digs. She finds that the “Right to Life” movement had come up with regulations for what a doctor should do when a baby is born. What are the conditions that necessitate extraordinary measures? And there is a long list of them. It was a controversial list that had been implemented during the Reagan Administration. It called for extraordinary life-saving measures, interventions, when a baby is born with any of these conditions. The only exception was anencephaly. So the regulations post-birth recognize that there was nothing one could ever do about anencephaly. And so I re-examined the decisions that I had drafted. And I concluded that the language could not have been meant to cover this kind of situation. There was no slippery slope. Everyone recognized that this was a unique condition. I issued and published a decision that granted her relief. The government appeals. While the appeal is pending another judge across the country has a woman who could not afford an abortion, very similar circumstances; she used my decision to get a preliminary injunction in that case. The government appeals; $5,000 is what we’re talking about. It appeals to the First Circuit which is the wrong court. This is a claim against the United States; it was supposed to go from me to the Court of Claims
in Washington. The government has missed all the deadlines. The First Circuit allows the government to refile the appeal in the right court, excusing the deadlines in a decision that says in effect, Judge Gertner’s decision wreaks havoc on a major government program. My decision, $5,000, anencephaly wreaked havoc? The plaintiff goes to the Court of Claims and loses. That was an example of what I don’t apologize for that at all. I understood what the law was, but I would critically evaluate it. I knew there had been many times over the seventeen years when I could not do what I thought was right. I knew that if I hit a wall and there was no intellectually supportable decision I would say that. But I certainly was going to look at what seemed to be a preposterous result for anybody. So at first it was not easy, I didn’t know how to be me on the job. And I was struck with the differences between advocacy and judging. But by the end I figured out how to do it, all the while to some degrees be true to the job. I would work harder than anyone in the room. I would write what I thought was right precisely so it would be examined in review. And writing was a constraint on me. When I couldn’t do what I felt was right I would say that. So but it’s hard.

Ms. Berman: What would you say were your most interesting cases as a judge in addition to the one that you just described.

Judge Gertner: I am a lawyer’s lawyer in the sense that I love complexity. I love any kind of complexity. It’s like a puzzle to me. Clearly for the high-profile cases, actually there are three volumes that my law clerks put together called “Intergalactic Decisions.” Each clerk over seventeen years offered what they felt were the most important decisions they had worked on and they could only use two. One
was the Lynn desegregation case, which I decided before the Supreme Court seemed to demean affirmative action in public schools. Lynn had a voluntary program preserving neighborhood schools but if you wanted to go to one of the magnet schools which were integrated, there was certain standards including an analysis of the racial makeup of the school you were coming from and the school to which you are going. It was a desegregation plan that had been in place for thirty years. It was voluntary. If you wanted a neighborhood school and if you wanted your kids to walk to school, fine. But it was a way of encouraging people to go to go to more diverse schools. And it had been enormously successful. It had been successful both as an integrative tool but it had also been successful in the terms of the quality of the school. What happened is that the effort to deal with integration in a way that wouldn’t offend the legal standards, also required officials to pay attention to these schools. So the test scores had gone up and it was really a model program. It wasn’t just mixing. There would be programs about racism. There would be an effort to make sure there wouldn’t be cafeterias that were just divided by race. The people who ran for office wouldn’t been running on a racial slate. The program was challenged by a foundation that was challenging race-based remedies all across Massachusetts. The lawsuit was brought by a white mother and her child. I knew that the law was changing. I told the parties that every issue that had been accepted over the previous thirty years had to be litigated. In other words, I needed testimony on what comprised a compelling same interest. I needed to hear witnesses on whether this was the least drastic means of accomplishing these goals. It was a factual question. We had a month’s worth of hearings.
The plaintiff presented one witness. The defendants presented perhaps ten about how the program worked, what the reasons were, the kind of adjustments they made, how they titrated it so that it would be flexible, not one size fits all. And they did a wonderful job. I issued a decision that supported the program. The First Circuit affirmed, cert. was denied, but a number of years later in several Supreme Court cases, the premises of this decision were undercut. The FBI case was another. I had a case brought by four men who were imprisoned on the strength of the testimony of an FBI informant. And when the relationship between the FBI and these informants, including Whitey Bulger surfaced, these individuals, and many individuals across Boston sued the FBI. This case was about false imprisonment and other claims. The other cases involved the FBI’s complicity in murders. Four men were suing for having been imprisoned for almost twenty years on the strength of the testimony which they claimed the FBI knew to be false. That was a judge trial. And it was essentially the history of Boston and to some degree, a history I knew about. It was exactly enormously helpful that I had been a criminal trial lawyer and I knew the context, I knew the setting, I knew the relationships. I issued a decision against the FBI and in favor of these men for $107 million. It was a very difficult, very difficult to make those kind of findings against the FBI. It’s very difficult to believe that kind of lawlessness could have gone on. It was the product of an attitude—“anything to get the mob.” The FBI took down the Italian mob but they also took down four people who were innocent of the charges. There were gender discrimination cases, one notable one against the Brigham and Women’s Hospital. But I wrote about everything; I wrote about reinsurance. I had five or six major decisions on
reinsurance. It's just interesting to me. And then when I first got on the bench I started to write sentencing opinions. The guidelines were mandatory but deeply flawed. And I was determined not to only apply the guidelines but where appropriate, to interpret them. And in many instances they were ambiguous but we judges were not acknowledging the ambiguities. Again, it was a situation where you know the guidelines might say family circumstances are not “ordinarily relevant.” That should have admitted to a wide-ranging debate about what that meant, what “ordinarily relevant” meant. How did it fit into the purposes of sentencing? I engaged in that debate. And other judges, and some other judges around the country did as well. The First Circuit candidly for the most part did not. By 2005 the guidelines became advisory and many, really if not all, of the decisions I had written for the previous ten years became law. So that was interesting because again I did not want to rely on my instincts when it comes to sentencing. I needed to spell out what I was doing to assure myself and the public that this could be justified. And as I said if I couldn't put it on the page, I couldn't do it. There were certain times that I wanted to say “two years” and leave the bench. But by the time I went back to my lobby to write a decision, it may have been totally different because I realized my initial instincts couldn't be justified under the law. So my way of taming my advocacy in a way was to write!
It's September 7, 2012. The interviewee is Judge Nancy Gertner and the interviewer is Pamela Berman. We are in Boston, Massachusetts and this is tape 3. We left off with questions about your career in judging. And we were just talking off the tape about when you felt compelled to rule one way but your philosophy may have guided you in a different direction and how that, how you resolved that issue.

That was really the central adjustment of judging. It wasn't knowing the law because I knew the law. It wasn't knowing about to conduct trials or case management because I knew all of that from having been a lawyer but the central issue was that I couldn't deny, I couldn't ignore who I had been. I knew what I believed in. I knew the way I thought things should come out in many cases, not in all. But at the same time, I loved the law, its principles, its rules. I didn't want to be false to my positions, on the one hand, or to the law, on the other. So that set up a conflict that was going to go on for the next 17 years. And it was a conflict between my clear sense of what was fair on the one hand and my sense of what the law required. At the beginning, it seemed
dishonest to acknowledge what I was feeling. It seemed as if the way to become a judge was to sort of put a mask over yourself and say I am now a new person. No longer hang out with lawyers who had known you and just become a new person. Over time, first of all, that was extraordinarily uncomfortable for me because I am so completely engaged in this legal community. I wasn’t a corporate lawyer. I was active in bar associations and community organizations. I’ve been in every prison in the state. I had appeared in virtually every court across the state. And I’m married to a lawyer. So the notion of becoming someone else, was very, very difficult. One of the reasons I wrote my memoir because I felt homogeneous in the robes. And I felt like I wanted to at least have a record of once having been a different person. Over time, it began to be clear to me that I could trust both sides of my personality. In other words, I would acknowledge what my feelings were and know about them and have them right in front of me and be able to address them. And there was nothing inappropriate about that so long as I acknowledged my conflicts, the forces that pulled me in different directions. Let me give you an example. I was assigned to a federal death penalty case. It was an unimaginable thing for someone like me to get a death penalty case. It had been the question that had been the most difficult for me to prepare for when I was asked what I thought about the death penalty in the preparation session prior to my Senate confirmation hearing. I had been opposed to the death penalty
from the beginning of my practice. I had actively opposed it. I was clear that the answer which was true was that the Supreme Court had upheld the death penalty and I would enforce it if I had to. That was clear. You can't take the job unless you can make that statement and make it in good faith. So I am assigned to a particularly difficult death penalty case. Four members of a Black gang shooting at another gang. And two of the members were accused of killing a member of the other gang. The case began with an unfairness that was palpable to me that I couldn't shake. Not just the unfairness of the death penalty. It was that one side of the battle was being charged for murder in aid of racketeering in the federal court with a death penalty and the other side, the other gang, which had not been as successful as killing people, was in state court with a different penalty structure and decision-maker. The men who were in federal court were going to go before an all White jury because the federal pool is eastern Massachusetts is overwhelmingly White. The suburban population dilutes Boston’s minority population. That had actually been my experience in a previous 10 years I was on the bench. In addition they were facing the death penalty. It was the most troubling decision-maker and the most troubling penalty, death. The people on the other side, the other gang, were going to be in Suffolk Superior Court in Boston, likely 40 percent minority. A case with the death penalty hanging in the balance, together with the circumstances of the jury, made the case seem palpably unfair. At this point in my career
as a judge, I had no problem saying to myself that the outcome will be whatever the outcome will be but I was going to make sure this was a fairest case I knew how to try. And that meant, this actually resonates with the \textit{Saxe} case. That meant looking at every stage of the proceeding and asking if this is the fairest way we can do it. For years on the federal court, ten years or so that I’d been on the bench at that point, I wondered about the representativeness of our juries. Some of it could be explained by demographics but I gave the parties funds to examine the circumstances of jury selection in federal court Massachusetts. Everyone in the courthouse reflected discomfort at what we saw but everyone always passed it off to the demographics. As I had done the \textit{Saxe} case, I wouldn’t take this on face value. Let’s find out. And sure, enough the demographics in eastern Massachusetts, 7 percent minority, explained part of the pattern but our numbers were one or two percent. And part of the reason for the disjunction is that we chose jurors from resident lists, not voting lists. Resident lists were better in some respects. The numbers for minority participation in voting were not great. With resident lists you can literally get some accounting of where someone lives in every block. The problem was that in the poor parts of Boston the resident lists were not accurate. There were no resources to keep them up. And in fact anecdotally my staff would look at the lists in Boston, the jury lists and wonder why there wasn’t representation of people from metropolitan Boston. The poorer White areas of Boston, as
my courtroom deputy would say, were likewise underrepresented. We did not see many from south Boston or Dorchester or Mattapan, surely not as many as the representation from the suburbs. The poor neighborhoods simply could not afford to keep these lists up. And the poorer neighborhoods were also the neighborhoods with the most transient population. So the combination of the two meant that while we had lists that looked fabulous, they were not accurate. People would get summonses and the summons would be returned “undeliverable.” So I held hearings on this. What I wanted to do, what I thought the law should say would be that this was a Sixth Amendment violation. These practices had the net effect of discriminating against minorities. But the Sixth Amendment law was not very good. And as I said I was intellectually honest enough to know that. The law had moved in a direction that I thought was wrong. There was an equal protection analysis, but it required proof of intentional discrimination. No one was intending to discriminate, in this case. There was a statute governing jury selection that said, do your best to make juries diverse. But even that avenue had been narrowed so that the only actionable case was a situation in which somebody was putting their thumb on the scale. It seemed like there was no place to go. I wasn’t going write a decision that said the jury process was unconstitutional although I thought it ought to be. But I thought that I had supervisory authority as a judge. And I came up with really a minor tweaking of the selection process
which I thought that everyone would agree with because no one would want the prospect of a White jury passing a death sentence on these Black men. It seemed to me to be obvious. We weren’t talking about whether you were for or against the death penalty. Under my supervisory authority under the jury selection statute, I ordered that for every summons that came back “undeliverable” in these underrepresented areas, you had to send another summons. That was it. Not that you had to have someone from those areas; I knew that wasn’t appropriate. But you had to try again with these areas. My remedy was not going to accomplish a 7 percent minority jury. It was going to tinker at the edges. But it seemed to me that if there were something that could be done even if it was minor, it should be done. The government appealed, to my amazement. I was driving from my son’s college in Bennington; my husband called me up and said that the decision has been reversed. I literally pulled over on the side of the road. I was apoplectic. What I did in that situation was what I believed was fair, reconciling the advocate and the judge. I examined the situation with care and reflection. The examination reflected my passions and my principles but the outcome reflected my intellect, what I thought was an intellectually honest position. I should say as a footnote that the author of the opinion reversing the decision, an appellate court judge, called me up several weeks later to go out to lunch and I said, you know, I know I’m not supposed to say this but I’m going to need a year or so to get
over this one. It wasn't that it was personal; it was just that it was wrong. The Appeals' Court rationale was Gertner can't do something in this case that is more fair than other judges do. Of course, if they had affirmed what I did, others would have followed. And indeed about three years later this became a policy of the District of Massachusetts; we all adopted it. It was troubling that a solution that contributed to a fairer trial could be dismissed so cavalierly especially in a death penalty case -- all White jury and black defendants. It is something I am trying to write about. If the law could have gone in either direction -- and it surely could have gone in either direction -- what I did was not barred, why not chose the more fair alternative. I had written books on jury selection. I held elaborate hearings. I knew that death qualification required that you ask a juror not are you for or against the death penalty but would your feelings about the death penalty preclude you from ordering death. That's a very troubling question to begin with but it also was a question that further reduced the minority population. If the venire were at one or two percent minority, that question was going to wipe out all minority representation. If you questioned the jury in the first instance for the liability jury, the guilt or innocence jury, the person you selected would also be on the death penalty jury. And that's why you had to ask the question at the beginning of the process. But it was also a question that would not only reduce the minority population but it was demonstrated that would make that jury more conviction-prone. So
I said, I'm prepared to choose two juries, not death qualify the liability jury, keep them "pure" to make the liability decision, but have a second jury. Again, in a multiple defendant case it meant having multiple cases trying one person two times; it was tremendously complicated. But it seemed to be a complexity that was worth it. If it would make the process more fair, and I was prepared to put in the work, why not? The government took me up again on interlocutory appeal. I'm reversed again. At this point, I'm really troubled. And so then there's a third pre-trial issue, a ballistics issue. The question was whether a shell casing found near a crime scene was linked to a gun associated with the defendant. Again because of my intellectual interests I knew all about ballistics and forensic evidence. I held a hearing; the testimony was, in a word, preposterous. When the bullet comes out of the gun, there are all sorts of marks. There are accidental marks which we can't identify with anything. They just happen. Then there are marks that are unique to that gun. And then there are marks that are unique to the manufacturer. And this witness said, "I can distinguish which is which." When asked if he kept a database of the manufacturer marks so you at least know that it's not characteristic of all such guns, he answered - I don't have a database. How do you know? Do you keep records. No I don't keep records. How do you know? I just know, he said. I just know. I've been doing this for such a long time, I just know. How do you know that the bullet you're looking at now is the one you looked at
ten years ago when this was investigated. You had no photographs. The testimony was plainly problematic. It could be true but certainly not the way he did it. I wrote a decision which I’m not proud of. I wrote a decision in which I criticized this expert’s testimony, described why I thought it was flawed. But I wouldn’t exclude it. And I was clearly not excluding it because I was sure that if I excluded it, the government would take the case up to the First Circuit, and there would be a risk I would be removed from the case. There would be no basis to remove me from the case. These rulings were all entirely appropriate and were the kind of scrutiny one should use in a death penalty case. So I described the flaws of the testimony and precluded the witness from saying this bullet comes from this gun, which was a conclusion that he absolutely could not arrive at. But he could tell the jury these marks look like these marks. In other words, the best he could do is observation, not scientific conclusion because he had no basis for a scientific conclusion. I wrote a decision critiquing him and me as well. I was not happy with that outcome but I felt compelled, not by the law but the institutional pressures, a risk that if reversed again I would be taken off the trial. The case went to trial; and the issue is whether the gang was a racketeering enterprise. This totally disorganized gang was being described as a racketeering enterprise. The premise of the government’s case was flawed. These were kids who happened to be born on the same block. And when the government’s principal witness
was asked the question, “tell me what groups do you belong to,” he said, “you mean school groups?” “What groups do you belong to?” “Do you mean sports groups?” It took four questions to get to the “gang.” No hierarchy, no initiation, no cohesiveness. At the close of the government’s case, there’s a motion for a directed verdict. Again, I thought the case was weak but if a judge directs a verdict at the conclusion of the government’s case, there is no appeal. And I had done that only twice in seventeen years because I thought it was unfair to the government. I felt it was right that there should be a verdict as a matter of law, but it was unfair to do it at that time given the fact that the government didn’t have to have an appeal. The sense of sort of the institutional honesty suggested that one doesn’t do it. The first question was whether this was a racketeering enterprise. The jury hung on the question. At that point, I’m asked to direct a verdict of acquittal. And I directed the verdict of acquittal, describing what the rationale was. The rest of the story doesn’t have anything to do with my judging particularly because ultimately what happened was what should have happened. These men were then tried in Suffolk Superior Court where they were acquitted. It’s a shocking story. So by this point, my personal feelings, my sense of what’s fair, my sense of what I thought the law ought to be, was certainly going to propel me to work very, very hard. And to look at everything, to look underneath every rock to see if the fair result could be achieved. But I knew when I could not achieve
the fair result. As I have said, there was one part of me that loved the law and I loved the institution. That was one part of me. I knew if I wrote “A” on a page, but the law was clearly going a different direction, “not A.” I couldn’t do that. So what I did in the death penalty case was to acknowledge my personal feelings, mediated by the institution and by the law; I don’t think there’s anything wrong with that. And ultimately, I might add, I found out that the government, the local US Attorney had actually objected to making this a death penalty case. This was the time of the Ashcroft Department of Justice and this prosecution had been foisted on the local people by the Department of Justice. The community was furious as well. I think that someone who pretends to have no feelings and to approach the law as if it is a computer is doing violence to our traditions. Holmes rightly said the life of the law is not logic but experience. A judge who approaches the role as if he or she is a computer that will give you an answer, rather than a set of interpretations, is wrong. Sentencing was an area where I regularly did what I didn’t agree with. I would hold sentencing hearings that were more elaborate than anyone else’s. Criminal law had become a plea culture with 97 percent pleas; the procedural protections that we care about were irrelevant. In my courtroom, it was not going to be a perfunctory stage. And I would take as much time as I thought I needed to make a decision. But the bottom line is that I because of mandatory minimums, mandatory guidelines, I regularly had to do what I didn’t
believe in. And that was very troubling. I would surely criticize the obligatory sentences, whenever I could. We have created a prison system that everyone should be ashamed of. Our incarceration rate is the highest in the world; the next in line are China and Rwanda. This is a product in part of not looking at context and the implications of what we are doing, but pretending that the law itself is a computer and all you have to do is look at the rule on the page. This is not true. Never has been true.

Ms. Berman: One of the things that you mentioned in that answer was how you after particularly after the first years as a judge continued to work with your relationships outside of the judicial community and you did. You were very active with the Bar and thanks goodness, and with Women’s Bar and how did you do that. You are unique among the judges in maintaining those relationships. How did you decide.

Judge Gertner: Of course I’m married to a lawyer. You had to sort of stay involved. But also I wouldn’t know as much if I failed to keep up these relationships. I’d participate in panels across the country on various issues, like panels on forensic issues and I’d learn more by participating. These were panels with other judges but also with scholars and practitioners. And it’s not easy to remain engaged in the community. You do wind up with the guy who sat next to you at dinner arguing a case in front of you. But again you learn to separate the judge from the person all the time. Although it’s difficult, you can do it. My
commitment to women's issues was something different. I got nauseous at being trotted out as a woman judge, "look at our success." It was as if all I have to say is "Gertner, judge," point to all the women judges and announce we won. I had been a women's rights activist before I became a judge. I knew this announcement to be poppycock. I love to speak. I always had to be careful when I spoke because I would sit down and wonder if I said something wrong. The speech I gave to the Women's Bar Association was 10 years ago now. It was a watershed for me too in a way because I really wanted to say something. I really did not want to get up there and be a cheerleader for a movement which I fundamentally believed had stalled. And so I said that. In one sense it's not something illegitimate for a judge to do it all. I could talk about issues in the profession and they were troubling. The movement had stalled and I thought I could lend my voice to naming that. So I was active on issues like that, I was active on issues having to do with sentencing, as a critic of the Sentencing Commission. I could be active in issues having to do with the administration of justice. And I took that very seriously. But it's hard; there's no question that if you finish your work at 5:00 and you go home and stay in your house and do not engage with the Bar or your neighbor who's a lawyer or only going to Bar Association activities and don't do anything else, it is much easier for you to steer clear of personal entanglements. There's no question about it. You also don't understand the pressures of law practice, 24/7, the implication of
technology. You don’t understand what’s going on in front of you. And I wanted to understand what was going on in front of me. The women’s issues were a classic example. When a woman said to me I want to go home so I can be at the soccer game, I understood how profoundly hypocritical we would be if we said, no you can’t and pretend to equality. Either you said yes to that and make work schedules flexible. Or you were a hypocrite. It made it harder. There’s no question about it. It made it much more complex. I would find myself at social events and you know you just had to learn how to split yourself which I did. And it was always in fact a risk that the person in front of you is a friend, and you had to take pains to keep from bending backwards in the other direction. It was a tension. But it was a creative tension. It was a good tension, rather than pretending to be an ostrich which is what others did. I’ll give you a silly example of that. This was not so much being engaged in outside activities but how experience makes a difference, real experience, real world experience as opposed to abstract experience. Federal sentences were out of control in part because they were built on state convictions. So if someone had a state conviction for possession with intent to sell drugs, that would count towards their conviction on the federal side, that would raise their criminal records score. The Federal Sentencing Guidelines had become so mechanistic, that if the score went up, your sentence went up commensurate with it. Lawyers, good lawyers would go up to the state courts and try to set
aside those convictions and were often quite successful. One of the judges in my court got tremendously indignant that we were undermining the legitimacy of the state institutions, giving the lawyers time to set aside convictions, by encouraging lawyers to go back into state court and set aside convictions. That judge had never been in any of those courts. Those courts are community courts. Sentencing takes place in a minute and a half. The person will plead to whatever time served required. No thought went into the felony conviction for possession with intent to sell rather than a misdemeanor. It was the pressures of a busy urban docket. So if the lawyer could go back and examine the record -- was the defendant given the appropriate procedural protections that attach to that plea -- it was entirely fair. And every state court judge recognized what they were doing was quick, urban, community justice. So his indignation made no sense to me and I was able to say that. But it was the experience that I brought to bear on this. So that's not exactly an answer to your community question.

Ms. Berman: But interesting from your vantage point of having in both state and federal court. One of the things I don't think we've touched on is your family and how you balance or didn't balance or coped with having a family while you were a judge. Talk a little bit about your family and who they are and how you put it all together.

Judge Gertner: Well combining family with judging was not hard at all. It was the practice that was the issue. I didn't have children until I was 39. My
first was at 39, my second was at 41, and then we had John’s daughter from his first marriage who was 8 when got together and 12 when we married. I got married in 1985 and at that point, I wasn’t a judge, I was a practicing lawyer. The advantage of getting married late in life, later in life, is that I had stature by this point. I could call someone up and say Stephen is sick. I had a name so I had the flexibility that people talk about and I had my own firm. You still felt a tug but I remember after Stephen was born -- he’s my oldest, Peter is the youngest, Sarah is my step-daughter. After Stephen was born, when I met someone on the street and they asked, are you going back to work, the question was inconceivable to me. First, work was my identity. Work was my love. I loved this child, but work also my passion. Second, my husband was an ACLU lawyer. I had to work. Frankly he does God’s work and God really doesn’t pay very well. But I loved the work. And it’s always a dirty little secret of young mothers that you actually look forward to getting dressed up and going to your office, where there’s no baby vomit on the desk. So that wasn’t an issue and I could do it. John was a trial lawyer as well and we would alternate family responsibilities. I had a murder case in Springfield with a battered woman syndrome defense right after Peter was born. And I stayed out in Springfield which is about 2 hours outside of Boston. Every other night, I stayed in Springfield and John would take care of the kids. I had enough money to be able to hire a nanny, it made all the difference in the world. And
so, in terms of stature and resources, I could deal with it, then the only issue is your heart. And you know I loved the work so much, I could deal with the heart part. In one sense, judging was even easier because I could completely control my own schedule. So if I got a call from the school that Peter was sick, or Stephen was sick, or Sarah was melting down, I could cancel my afternoon. I was the one in charge of that. So it was much easier to combine the two. It was not easier in terms of the money. By the time I went on the bench, we could no longer afford a nanny and the money was terrible. To be sure, at these times of economic exigency, it's always hard to complain about judicial salaries. But that was really the hard part, my kids were six and eight when I went on the bench. We began to use college students who would live with us to help out. They were in school; it wasn’t so bad combined with the flexibility that one needed that came from my judicial schedule. And then when they went to college, we were annihilated. A combination of the cost of college and the 2008 financial crisis wiped us out. Just wiped us out. And that’s another whole other troubling discussion; if we don’t do something about judicial salaries, the bench will be occupied by people who earned a lot of money in their career, went on the bench later in life when they were not supporting children. As a result, you won’t have the experience which you should have of people with young children on the bench, people with different backgrounds. And right now if you look at my bench, the one that I left,
they may be wonderful people, but you’re not going to have the kind of
diversity of perspective that comes from enabling everybody to be able
to get on the bench, inherited wealth, spouses who are wealthy, lucrative
legal career. We’ve had this discussion before. It shouldn’t be whether
I can combine children and a career, a family and a career depends on
who you happen to marry. The choices that you make, when I decided
to have children. But in truth with no other institutional support, it does.
So I married a man I worked with and who loved my working and
valued what I did. So that made all the difference in the world. I
married when I was older, so I had resources and stature and I could
control my time. We lived in a community in which all the women
work. So the school, rather than as Ann Marie Slaughter describes it,
rather than the school day reflecting farm hours, the hours typical to
farmhands which is you start early and you end early, this was a school
that had an extended daycare program, until 6:00 pm. The school’s
meetings would be called at 7 in the morning, not in the middle of the
day which had happened when I had Peter briefly in a private school.
They called a meeting at 11:00 in the morning. The assumption was that
women don’t work outside the home. And then none of my sons’ or my
step-daughter’s friends had stay-at-home parents. So you didn’t have
the kind of pressure when your child comes home and says, “Sally’s
mother baked cookies and drove us to the soccer game.” Everyone was
dealing with the same challenges and supported one another. So I had
institutional supports of a sort that women in the suburbs don’t necessarily have at a time when I needed it. So again it was a world that I created. It shouldn’t be that way. We need to do more to support women institutionally. “Not to go back to work.” I didn’t even understand the question because that was where my identity was. This mother stuff was wonderful but I loved the work. I’m actually a grandmother now and I have some of the same issues. I love my two grandchildren; they are fabulous. But I’m no more willing to be their nanny and take care of them full time than I was with my own children. I work. I still work. I will be there for them a lot. But giving up the work I love? That’s unimaginable to me.

Ms. Berman:

One of the questions I had for your and we’ve talked about it throughout so I don’t want to minimize what you’ve said throughout, but if you had advice to give to young women in the profession in addition to what you’ve said throughout the interview, what advice would you give to young women in the profession.

Judge Gertner:

Well there’s the individual advice and then the collective advice. The collective advice is that you have to be fighting for more than we’re fighting for. It’s not an individual problem. It’s a societal problem. It’s no longer an option for women to work; women must work. So the government should be supporting day care centers; law firms should change their policies to make them more flexible. The model of the worker can’t be the male model. It can’t be the male model in law
firms. It can't be the male model in academic settings. The model has to be a person with children, or a person with family responsibility. And all the policies of the government and of work have to have to be implemented with that model in mind. So that's the institution side. Even though that's not happening anytime soon, we have to recognize that that's the goal. For individual women I tell the women that I teach now: To some degree you have to arm yourself in the way I did, which is, I armed myself with every credential I could muster. When I went to Yale, I was a social activist but I was on LAW REVIEW. I was going to be representing people who are active against the war, but I clerked for a judge. I did that not with any intentional arming of myself; my choices were more traditional because we were the transitional generation. I wasn’t quite sure who I was. So I was going to do everything. Valedictorian, cheerleader. But it turned out to be a good thing because I entered into the market with a certain amount of credibility. The other thing was that I tell young women that are going to the big firms that the best way to be able to have leverage when you have children is to show them how good you are. I have adopted what Cheryl Sandburg of Facebook describes as leaning in and leaning out. I don’t regard that as a commentary on women being at fault in any way. But I see it is a commentary on women predicting that they are going to have trouble when they're a partner or about to-be partner having a family and partnership and opting for career path to avoid that problem rather than
doing what they want to do, enjoying the profession, taking what
engages them, and working as hard as they humanly can and then
banging up against the glass ceiling when they hit it and screaming. So
what happens is that if you lean out early, there won’t be enough women
for the partnership track. So I tell them that’s what, you know, you
show yourself to be fabulous and indispensable. You show what you
competence is. I don’t deny that that may be hard in a firm. I know that
competence is sometimes gender-determined. A man can be seen as
competent when a woman isn’t. I became indispensible as a lawyer
long before I was going to have children. I had a brand, I had a crazy
career, but I had a brand. So I think that you have to arm yourself. You
do have to if you choose to marry, you do have to find someone who for
whom this understands is part of you. With all of that, the family, the
division of labor and the family in many families, in mine as well, as not
completely changed. My husband loves to cook. But I was the one who
remembered dental appointments. If he would cook, he would help
clean, he would shop for food, we would split the laundry, but I
organized the house. And that division of labor still maintains
elsewhere. So it means if you have a murder trial, you were organizing
the house, your to-do list might include the criminal record of X for the
motions but make sure the laundry is done. Now Oliver Wendell
Holmes did not have to do that. Clarence Darrow didn’t have to do that.
And then when I became a judge and was making the same kind of list, I
would think, Oliver Wendell Holmes didn’t have to do this. So the division of labor in the family has to change as well. And work has to change. Joan Williams at Hastings Law School describes the paradigmatic American work and particularly the paradigmatic American family continues to be the man with the woman at home, taking care of the kids and doing the organizing. Or the single man or single woman. We have to broaden the definition of the person we expect to have as a worker and support them. And it has implications with a 24/7 clock. Now that I’m retired and all of a sudden I’m consulting on some litigation, I am stunned by emails you get on Saturday where someone will say, gee, what do you think about this argument? And I want to say, I think it’s Saturday. We don’t have to have this discussion now. What are you talking about? But there’s a constant stream which on the one hand enables women to be home and work, on the other hand enables everyone to be driven crazy.

Ms. Berman: Well I want to thank you -- you are done.

Judge Gertner: Are we done? Oh good.

Ms. Berman: Thank you for doing this.

Judge Gertner: Oh this is great fun.