

IN MEMORIAM

In Memoriam for Justice Ruth Bader Ginsburg

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Since Justice Ruth Bader Ginsburg's passing in 2020, I have held dear the memory of my year as her law clerk and the everyday moments of mentorship that she generously shared. Three memories in particular stand out as exemplars of her remarkable wisdom on the values of perspective, precision, and patience in both life and the law.

The first: one day, Justice Ginsburg was talking to me in her chambers about a speech she was about to give. She commented that, of the nineteenth-century pioneers for women's suffrage, she particularly admired Elizabeth Cady Stanton because she was a "whole person." By this, Justice Ginsburg meant that not only was Stanton a brilliant and path-marking leader who paved the way for women's suffrage eighteen years after her death, but she also sustained meaningful relationships in her life, supported other causes, and raised seven children.

This passing comment made an indelible mark on me. The challenges of balancing career, friendships, marriage, parenting, and personal pursuits are all too familiar, especially during a global pandemic. Justice Ginsburg herself embodied the quality she most admired in Stanton: a brilliant career as an advocate for women's rights, a scholar, and a jurist; a devoted marriage of fifty-six years and a deep commitment to her children and grandchildren; close personal relationships, including her fabled friendship with Justice Antonin Scalia; and an abiding love for her personal passions, opera perhaps chief among them. When things get hard, I call on Justice Ginsburg's strength and clear-headed wisdom, earned through a lifetime of both enormous challenges and incredible opportunities, to guide my way.¹

But Justice Ginsburg's comment reflects more than her personal ethos; it embodies the foundations of her commitment to equality before the law for all. In her career with the American Civil Liberties Union advocating for equal citizenship stature for women, Ruth Bader Ginsburg pursued a vision of the

* Senior Fellow, Institute for Constitutional Advocacy and Protection, Georgetown University Law Center. © 2022, Amy Marshak. Many thanks to Mary Hartnett, whose work with Justice Ginsburg has illuminated my thinking about the Justice, and to Shelby Calambokidis and the staff of *The Georgetown Law Journal* for their thoughtful comments and suggestions. This piece is dedicated to the memory of Justice Ginsburg and her dear friend, Judge Robert A. Katzmann, who, like Justice Ginsburg, was a devoted mentor and brilliant jurist.

1. It should be noted, however, that Justice Ginsburg would be the first to point out that her ability to "have it all" appears more clearly in hindsight than in any given moment. As she once said, "you can't have it all, all at once," even if, over the course of her life, she did just that. *Ruth Bader Ginsburg, in Art and Words*, WASH. POST (Sept. 19, 2020), <https://www.washingtonpost.com/graphics/nation/2020/09/19/ruth-bader-ginsburg-art-words/>.

Constitution that rejected arbitrary distinctions that prevented people from living as their whole selves. This was visible in her work as an advocate. In the amicus brief she filed in *Frontiero v. Richardson*, one of the foundational sex discrimination cases she argued at the Supreme Court, Ginsburg contended that “equality of rights under the law for all persons, male or female, is so basic to democracy and its commitment to the ultimate value of the individual that it must be reflected in the fundamental law of the land.”² And it was visible in her work as a Justice, when in *United States v. Virginia* she explained in her opinion for the Court that “generalizations about ‘the way women are,’ estimates of what is appropriate for *most women*, no longer justify denying opportunity to women whose talent and capacity place them outside the average description.”³

Justice Ginsburg was known for her strategic genius in bringing cases on behalf of men who were denied “privileges” reserved under the law to women, perhaps most famously in *Moritz v. Commissioner*⁴ and *Weinberger v. Wiesenfeld*.⁵ But this was more than an astute legal strategy. The ability of men to participate in family life was critical to Justice Ginsburg’s vision of equality—one that recognized that “generalizations about the way women and men are may have unhappy consequences” for all involved.⁶ She understood that the opportunity to care for loved ones could be as important to men’s ability to be their full selves as women’s freedom to pursue equal education and employment opportunities is. In other words, as she is remembered to have said, she pursued not just “women’s liberation” but “women’s and men’s liberation.”⁷ And in laying this legal foundation, Justice Ginsburg paved the way for all persons, including nonbinary individuals, to assert their right to live as their own whole selves outside of stereotyped assumptions about the way people should be.

This same commitment to the whole person could be seen in Justice Ginsburg’s relentless focus on the lived experience of the people involved in the cases before her. Despite the abstractions of the legal questions addressed from the Supreme Court’s lofty perch, Justice Ginsburg never lost sight of the fact that real people’s lives were at issue. For example, in her dissent in *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania* (one of her last opinions), Justice Ginsburg focused with laser clarity on the serious consequences for the tens of thousands of women who would lose contraceptive coverage based on the federal government’s decision to provide employers’ religious and moral

2. Brief of American Civil Liberties Union as *Amicus Curiae* at 19–20, *Frontiero v. Richardson*, 411 U.S. 677 (1973) (No. 71-1694) (quoting President’s Commission on the Status of Women, *American Women* 44–45 (1963)), reprinted in RUTH BADER GINSBURG, MARY HARTNETT & WENDY W. WILLIAMS, *MY OWN WORDS* 133, 133 (2016) [hereinafter *MY OWN WORDS*].

3. 518 U.S. 515, 550 (1996).

4. 469 F.2d 466 (10th Cir. 1972).

5. 420 U.S. 636 (1975).

6. Justice Ruth Bader Ginsburg, *Advocating the Elimination of Gender-Based Discrimination: The 1970s New Look at the Equality Principle*, Remarks at Wake Forest Law School (July 2008), reprinted in *MY OWN WORDS*, *supra* note 2, at 154, 162.

7. *Ruth Bader Ginsburg*, in *Art and Words*, *supra* note 1.

exemptions from the Affordable Care Act's contraceptive-coverage mandate.⁸ Her ability to tackle both abstract legal principles and the practical implications of the Court's decisions strengthened her majority opinions and imbued her dissenting opinions with a moral force that resonates in our ongoing legal and policy debates. It may not be surprising that a woman whose own life defied many of the rules of her day would maintain abiding compassion for those who want to be treated fairly; that she should be so impactful in remaking the world into a fairer place for all made her truly extraordinary.

The second memory that stands out is Justice Ginsburg's approach to opinion writing. Upon being assigned an opinion, Justice Ginsburg would ask a law clerk to draft the opinion based on her instructions. After reviewing the draft, Justice Ginsburg would call the clerk into her office where they would sit together at a table and carefully review each edit she made—always in perfect penmanship and always in pencil—and the reasons for each word she inserted and phrase she changed. These conversations were immersive lessons in painstaking precision of language that I continue to treasure. Every word was carefully chosen and every sentence thoughtfully placed to convey the specific meaning she sought to achieve. (I still use “qualifies as,” rather than “constitutes,” if the thing listed does not make up the whole of the category described—a common Justice Ginsburg correction.) Of particular note, Justice Ginsburg's unique sentence structures drew as much from creative writing as from traditional legal writing. For example, she would begin sentences with a gerund and a subordinate clause in what read to me like setting the scene for the reader, and she often would set off “the Court held” and similar phrases, almost like dialogue in a novel. Through the opinion-writing process, Justice Ginsburg taught me that the language of the law could be both persuasive and evocative, and that the audience for her opinions was not merely judges and lawyers but the American people, who should be able to understand what the institutions of their government are doing.

I admire Justice Ginsburg's precise prose and attention to detail as much as her intuitive sense for the big-picture values and legal principles at stake in each case. But even more than that, I learned so much from how she understood the connections between the small and the large. Accuracy in language meant less room for misunderstandings to develop in the law. Her opinions never inaccurately characterized the Court's precedent or a disagreeing Justice's position to make her own argument easier, allowing the strength of her arguments to carry the weight instead. She understood that fairness and accuracy in these details ultimately added to the persuasive force of her writing. And, in doing so, she sought to lay the building blocks for the incremental development of the law.

The final moment happened when Justice Ginsburg proved unsuccessful in convincing her colleagues of something in one of the cases before the Court. Rather than raging in anger or frustration (as I very much wanted to do), Justice Ginsburg calmly said, “Well, this is one for the file.” In this, she expressed what

8. 140 S. Ct. 2367, 2408–09 (2020) (Ginsburg, J., dissenting).

she has elsewhere called “the dissenter’s hope: that they are writing not for today but for tomorrow.”⁹ Or, as Justice Ginsburg has quoted Chief Justice Charles Evans Hughes as saying, a dissent is an “appeal . . . to the intelligence of a future day, when a later decision may possibly correct the error into which the dissenting judge believes the court to have been betrayed.”¹⁰

This view speaks of Justice Ginsburg’s fundamental faith in the future and the power of our institutions. Justice Ginsburg spent much of her twenty-seven-year tenure on the Supreme Court in dissent on many issues she cared about. Yet she continued to believe in our constitutional system and the ability of the courts, Congress, and the American people to reflect, grow, and change. That her faith extended to memoranda and drafts in her files that might not see the light of day for decades shows the prophetic reach of her vision for a better future.

Justice Ginsburg believed that “enduring change[] happens one step at a time,”¹¹ even if that change is slow in coming. And she believed firmly in achieving change through our democratic systems—whether that meant penning a dissent that persuades future justices or convincing Congress to amend a statute when she believed the Court got something wrong. She succeeded in this latter effort with her dissent in *Ledbetter v. Goodyear Tire & Rubber Co.*, a 2007 opinion in which she called on Congress to amend the statute of limitations for Title VII of the Civil Rights Act of 1964,¹² which Congress ultimately did with the passage of the Lilly Ledbetter Fair Pay Act of 2009.¹³ As entertained as she was by her “Notorious RBG” moniker (elements of which adorned her clerks’ offices in chambers), I think she most enjoyed that her late-in-life celebrity engaged more people, and especially young people, in the work of the Supreme Court and in our democracy more broadly.

These memories make up my image of what made Justice Ginsburg a remarkable historical figure and role model; she combined a vision of American society that makes room for each individual person to live a whole life with a willingness to work through the details and a belief in incremental progress in which, in the long run, we as a nation will create lasting change that lifts us all up. Justice Ginsburg made enormous progress toward that goal, and she has passed the baton to the next generation of lawyers and activists who strive for a more just society for all. I am forever grateful for the opportunity to learn from a visionary like Justice Ginsburg, and we are richer as a nation for her service.

9. *Ruth Bader Ginsburg, in Art and Words, supra* note 1.

10. Justice Ruth Bader Ginsburg, *The Role of Dissenting Opinions*, Remarks at Tulane University Law School (July 2013), *reprinted in MY OWN WORDS, supra* note 2, at 278, 282–83.

11. *Ruth Bader Ginsburg, in Art and Words, supra* note 1.

12. 550 U.S. 618, 661 (2007) (Ginsburg, J., dissenting).

13. Pub. L. No. 111-2, 123 Stat. 5.