

## A TITAN AMONG US—ON DISSENTS, WAYMAKING, AND STRONG COFFEE

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September 23, 2020. Top step, second column from the left. I remember exactly where I stood when the hearse carrying Justice Ruth Bader Ginsburg’s body arrived at the Supreme Court. I was flanked by over one hundred of the Justice’s other law clerks, who had come from around the nation to the capital to cherish and celebrate the Justice’s memory. The pallbearers slowly marched the coffin up the steps, faces obscured by masks as the pandemic was in full-swing. Dead silence, despite thousands assembled on the Court grounds. A devastating moment.

The clerks had assembled at the courthouse to serve as the Justice’s honor guard, and for most of us, it was the first time we had left our neighborhoods since the COVID-19 pandemic had begun. This journey was the last thing any of us expected. For the next two days, the Justice’s clerks took turns standing watch over the Justice as she laid in repose on the steps of the courthouse. On my shift, at dusk the next day, I thought about the mentor I had lost. Justice Ginsburg was a Titan. During her forty years of public service, and really her entire legal career, she lived by Deuteronomy’s teaching—“Justice, Justice thou shalt pursue.” She was an icon, a genius, a hero, a shining example of how to overcome incredible challenges while staying true to one’s self. She fought for the rights of the downtrodden, the marginalized, the voiceless. Slight in physical stature, even-tempered, and a quiet, measured voice among those much louder and showier, the Justice nevertheless was a giant. Her words and presence had a gravitational pull, or in her own words, “staying power.” During the year I clerked for Justice Ginsburg, October Term 2006, the Justice had more losses than wins. But even in defeat, her words carried unmistakable force.

It was May 29, 2007, the tail end of my time in Chambers, and I was wedged into the clerks’ row of seats for a dissenting opinion that the Justice was set to announce from the bench, something the Justices rarely do. It’s a practice reserved for special cases. And for the Justice, this was one of them, even though it might not have seemed so on the surface. The case was *Ledbetter v. Goodyear Tire & Rubber Co.*<sup>1</sup> In *Ledbetter*, the Supreme Court dismissed pay discrimination claims filed by Lilly Ledbetter against

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1. *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007).

her former employer Goodyear.<sup>2</sup> Ledbetter was a supervisor in Goodyear's Gadsden, Alabama, tire plant from 1979 to 1998.<sup>3</sup> Shortly before her retirement, upon learning that she had for years been systematically paid less than her male counterparts, she filed a charge with the Equal Employment Opportunity Commission (EEOC) and later filed a suit against Goodyear.<sup>4</sup> At trial, a jury awarded her back pay and damages.<sup>5</sup> But on appeal, the Eleventh Circuit wiped the jury verdict away,<sup>6</sup> and a 5-4 majority of the Supreme Court affirmed.<sup>7</sup> The reason? Ledbetter had filed her claims too late.<sup>8</sup>

In the view of a majority of the Supreme Court, the clock to file a charge with the EEOC complaining about pay discrimination started to run when the unequal pay began, so in Ledbetter's case, years and years earlier.<sup>9</sup> The Court shut down claims that were based, as in Lilly Ledbetter's case, on the cumulative effect of discrimination over the years.<sup>10</sup> That's so even though Ledbetter had no idea she was facing pay discrimination until shortly before she filed her charge.<sup>11</sup> On the bench, Justice Alito gave a matter-of-fact distillation of the majority's opinion: "Our cases make it clear that an EEOC charge must be filed within 180 days of the unlawful employment decision itself even if its effects are not felt until later."<sup>12</sup>

Justice Ginsburg laid into the majority's rationale: "The Court does not comprehend or is indifferent to the insidious way in which women can be victims of pay discrimination."<sup>13</sup> She noted that the majority counseled women to "sue early on . . . when it is uncertain whether discrimination accounts for the pay disparity you are beginning to experience," and when "you may not know that men are receiving more for substantially similar work."<sup>14</sup> The Justice observed that "[o]f course, you are likely to lose a less-than-fully baked case."<sup>15</sup> On the other hand, "[i]f you sue only when the

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2. *Id.* at 621.

3. *Id.*

4. *Id.* at 621–22.

5. *Id.* at 622.

6. *Id.*

7. *Id.* at 620–21.

8. *Id.* at 621.

9. *Id.* at 628–29.

10. *Id.* at 638–40.

11. *Id.* at 649–51 (Ginsburg, J., dissenting).

12. Opinion Announcement of Justice Alito at 2:30, *Ledbetter*, 550 U.S. 618 (No. 05-1074), [https://apps.oyez.org/player/#/roberts2/opinion\\_announcement\\_audio/22216](https://apps.oyez.org/player/#/roberts2/opinion_announcement_audio/22216) (transcript on file with the *Columbia Law Review*).

13. Oral Dissent of Justice Ginsburg at 4:00, *Ledbetter*, 550 U.S. 618 (No. 05-1074), [https://apps.oyez.org/player/#/roberts2/opinion\\_announcement\\_audio/22216](https://apps.oyez.org/player/#/roberts2/opinion_announcement_audio/22216) (transcript on file with the *Columbia Law Review*).

14. *Id.* at 4:13.

15. *Id.* at 4:32.

pay disparity becomes steady and large enough to enable you to mount a winnable case, you will be cut off at the court's threshold for suing too late."<sup>16</sup> Justice Ginsburg lamented that the Court's decision "cannot be what Congress intended when in Title VII it outlawed discrimination on the basis of race, color, religion, sex or national origin in our nation's workplaces."<sup>17</sup> And she invited Congress to step in and fix things: "Today, the ball . . . lies in Congress' court."<sup>18</sup> The Justice's words were powerful and moving. I remember just how quiet it was when the Justice announced her dissent, her words taking the oxygen out of the room.

And her forceful, commonsense response to the majority was exactly what was needed. We were all listening. Not only in the courtroom or in the legal academy, but in the halls of Congress. Less than two years later, the same month President Obama was inaugurated as the 44th President of the United States, the first bill he signed into law was the Lilly Ledbetter Fair Pay Act,<sup>19</sup> which reversed the Court's decision in *Ledbetter* and made clear that the clock on equal pay claims like Ledbetter's is restarted with every check, regardless of when the discrimination began.

The Justice's dissent in *Ledbetter* was one of many that she became famous for around this time. Not just famous in a law review, SCOTUSblog nerd kind of way. But really famous. Famous enough to be likened to a genre-defining rap artist like the Notorious B.I.G.,<sup>20</sup> and famous enough to be known the world over, even to those who otherwise would have no clue who sits on the Supreme Court. In the years since, documentaries and movies have been made, books have been written, and in *Deadpool 2*, the Justice even applied to join the superhero team X-Force.<sup>21</sup>

Shortly after I finished my clerkship, I received a mysterious, unmarked package in the mail. No return address. Inside was a baseball t-shirt with a crude rendering of the Justice and "DISSENT" written in massive letters below it. Also below the Justice's face were two enormous hands, flipping the bird (presumably at "the Establishment"). To this day I have no idea who sent me this shirt. The Justice of course would have *hated* it. But the fact that it had been mass-produced (along with RBG bobbleheads, commemorative jabots, custom jewelry, and even "Roastin' RBG" hot sauce) is a testament to how deep in the nation's consciousness Justice Ginsburg's dissents struck. Just as she had done for decades before she was appointed to the federal bench in 1980, she gave voice to the voiceless, she spoke up for women and outsiders who had no one else to

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16. *Id.* at 4:38.

17. *Id.* at 4:52.

18. *Id.* at 10:44.

19. Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5.

20. See Melena Ryzik, *Ninja Supreme Court Justice: Ruth Bader Ginsburg Has Fun with Fame*, N.Y. Times (May 9, 2018), <https://www.nytimes.com/2018/05/09/movies/ruth-bader-ginsburg-rbg-documentary.html> (on file with the *Columbia Law Review*).

21. See *id.*

speak on their behalf. She stood up for them even in defeat, when a particular case was lost, because she was fighting for equality and change on a grander scale. That's the Justice I remember.

Those efforts to give voice to the voiceless extended far beyond the hot-button issues she was most recognized for.<sup>22</sup> Justice Ginsburg was a maven on procedure, and she even famously penned a leading treatise on Swedish civil procedure.<sup>23</sup> She understood that the mechanisms of discrimination are often buried in seemingly vanilla procedural rules and other insidious roadblocks to access. And she was determined to expose and change them.

Here's an example from before the Justice became a Justice. On November 1, 1978, then-advocate Ruth Bader Ginsburg, a leading lawyer at the American Civil Liberties Union (where she co-founded the Women's Rights Project) and Professor of Law at Columbia Law School (the first woman who served as a tenured professor there),<sup>24</sup> was arguing the cause of Billy Duren in the Supreme Court.<sup>25</sup> Duren had been convicted of first-degree murder and first-degree robbery in Jackson County, Missouri.<sup>26</sup> At the time, Jackson County offered women an automatic exemption from jury service if they wanted it, the so-called "woman's privilege."<sup>27</sup> Billy Duren was convicted by an all-male jury, with a venire that included forty-eight men and just five women.<sup>28</sup> He challenged the constitutionality of his conviction on Sixth and Fourteenth Amendment grounds, arguing that he had been denied his right to a jury representing a fair cross-section of his community.<sup>29</sup> Justice Ginsburg wasn't a criminal lawyer, but this case was about more than just criminal law.

At oral argument, the Justice—whom her co-counsel referred to as "Professor Ginsburg" but whom the Justices referred to as "Mrs. Ginsburg"<sup>30</sup>—cut the legs out from the State's proffered justifications for the exemption. The State rationalized the automatic exemption as actually favoring and helping women.<sup>31</sup> Foreshadowing dissents in cases like *Ledbetter*, where she underscored the often "insidious ways" in which

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

23. Ruth Bader Ginsburg & Anders Bruzelius, *Civil Procedure in Sweden* (1965).

24. See Aryeh Neier, *How Ruth Bader Ginsburg Got Her Start at the ACLU*, ACLU (Sept. 25, 2020), <https://www.aclu.org/news/civil-liberties/how-ruth-bader-ginsburg-got-her-start-at-the-aclu> [<https://perma.cc/87DP-KP9Q>].

25. *Duren v. Missouri*, 439 U.S. 357 (1979).

26. *Id.* at 360.

27. *Id.* at 361.

28. *Id.* at 363.

29. *Id.* at 360.

30. Transcript of Oral Argument at 4, 17, *Duren*, 439 U.S. 357 (No. 77-6067).

31. *Id.* at 28.

women endure discrimination,<sup>32</sup> Justice Ginsburg laid these justifications to rest. During her argument, she observed that the “woman’s privilege” to be excused from jury service, when “viewed against history’s backdrop, simply reflects and perpetuates a certain way of thinking about women. Women traditionally were deemed lesser citizens.”<sup>33</sup> This was “hardly a privilege” and “hardly a favor to the supposedly favored class”; rather, it reflected the notion that “women are not really needed, not really wanted for participation in the democratic processes of Government.”<sup>34</sup> Justice Ginsburg understood that even a voluntary privilege can be disabling, that it can cause harmful stereotypes to fester. Dispelling those stereotypes was a common thread in the cases she litigated during this period. As she later recounted: “The object was to get at a stereotype that held women back from doing whatever their talent would allow them to do . . . . The notion was that there were separate spheres for the sexes. Men were the doers in the world and women were the stay-at-home types.”<sup>35</sup>

In *Duren*, the Court sided with Justice Ginsburg, reversing her client’s conviction 8-1, and holding that the State had no valid justification for the exclusion of women from jury service, with a lone dissent from then-Justice Rehnquist.<sup>36</sup> The argument in *Duren* is notable for another reason. At the end of Justice Ginsburg’s incisive and careful argument—where she concluded by noting that based on the record and the Court’s precedents, “the unconstitutionality of Missouri’s excuse for any woman as it operates to distort Jackson County jury panels is plainly established”—Justice Rehnquist had this to say: “You won’t settle for putting Susan B. Anthony on the new dollar, right?”<sup>37</sup> Laughter followed.<sup>38</sup> We couldn’t imagine a sitting Justice making a comment like that today, especially to a seasoned Supreme Court advocate like Justice Ginsburg, who was arguing her *sixth* case before the Court, and was a tenured professor at Columbia Law School and general counsel of the ACLU.<sup>39</sup>

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32. See, e.g., Oral Dissent of Justice Ginsburg, *supra* note 13, at 4:00.

33. Transcript of Oral Argument, *supra* note 30, at 12.

34. *Id.* at 13.

35. Alanna Vagianos, Ruth Bader Ginsburg Tells Young Women: ‘Fight for the Things You Care About’, Harv. Radcliffe Inst. (June 2, 2015), <https://www.radcliffe.harvard.edu/news-and-ideas/ruth-bader-ginsburg-tells-young-women-fight-for-the-things-you-care-about> [<https://perma.cc/QGD8-KQWN>] (quoting Ruth Bader Ginsburg).

36. See *Duren v. Missouri*, 439 U.S. 357, 369–78 (1979).

37. Transcript of Oral Argument, *supra* note 30, at 19.

38. *Id.*

39. When I heard this is in the recording of the oral argument, I could relate. It’s not news that women and minority lawyers have the experience of fielding comments from those in seats of power calling attention to their race, status, or gender, even if meant in good humor or as a compliment. One recent experience: A chief executive of our adversary in a civil lawsuit jokingly asked my law firm partner whether I would be deposing him. Why? Because he was “concerned” that he might not understand me “over my Indian accent.” I

Justice Ginsburg wouldn't settle, and less than two years after the argument in *Duren*, she was appointed by President Jimmy Carter to the Court of Appeals for the D.C. Circuit.<sup>40</sup> And thirteen years later she was nominated and confirmed to a seat on the Supreme Court, sworn in by none other than now-Chief Justice Rehnquist himself.<sup>41</sup> Here's the smiling Justice, accompanied by her amazing husband Marty, and the Chief Justice, at her swearing in:



August 10, 1993 (Associated Press).

And just three years later, on June 26, 1996, Chief Justice Rehnquist voted *with* Justice Ginsburg in *United States v. Virginia*, in which the Supreme Court struck down the male-only admission policy of the Virginia Military Institute (VMI).<sup>42</sup> In announcing the decision for the majority in this landmark case, Justice Ginsburg, this time in victory, noted, “[S]tate actors may not close entrance gates based on fixed notions concerning the roles and abilities of males and females. . . . To afford genuinely equal protection, women seeking and fit for a VMI quality education cannot be offered anything less.”<sup>43</sup>

As always, Justice Ginsburg won over her critics through hard work and perseverance, exactly the values that she taught all of her clerks. She understood, and instilled in each of us, that the power to persuade others was borne of dedication, research, late nights, and, of course, strong coffee. And persuasion was what Justice Ginsburg was aiming for. The Justice once noted: “Fight for the things that you care about, but do it in

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had met this seasoned corporate executive on several occasions. And while I might be accused of occasionally sporting a Southern accent, a vestige of my upbringing in Texas, I don't believe that I have somehow synthesized an “Indian accent.”

40. See Robert Barnes & Michael A. Fletcher, Ruth Bader Ginsburg, Supreme Court Justice and Legal Pioneer for Gender Equality, Dies at 87, *Wash. Post* (Sept. 18, 2020), [https://www.washingtonpost.com/local/obituaries/ruth-bader-ginsburg-dies/2020/09/18/3cedc314-fa08-11ea-a275-1a2c2d36e1f1\\_story.html](https://www.washingtonpost.com/local/obituaries/ruth-bader-ginsburg-dies/2020/09/18/3cedc314-fa08-11ea-a275-1a2c2d36e1f1_story.html) (on file with the *Columbia Law Review*).

41. See *id.*

42. 518 U.S. 515, 519 (1996).

43. Opinion Announcement of Justice Ginsburg at 6:11, *United States v. Virginia*, 518 U.S. 618 (No. 94-1941), <https://www.oyez.org/cases/1995/94-1941> (transcript on file with the *Columbia Law Review*).

a way that will lead others to join you.”<sup>44</sup> The Justice tried to get there through a relentless, tireless work ethic.

Well into her 80s, the Justice worked around the clock on her craft. Anyone who has worked for the Justice has the memory of getting a marked-up draft with a running pencil line down the side, evidence of where the Justice may have nodded off for a moment at 3:00 AM while editing.<sup>45</sup> She worked deep into the night scrutinizing briefs, analyzing cases, and writing, rewriting, and re-rewriting opinions. Not just on the high profile constitutional cases that most people read about in the paper, but even arcane disputes about the minutiae of everyday law that make up most of the Supreme Court’s docket. One late night in Chambers, the Justice was poring over briefs for an upcoming sitting. She asked me to make her a cup of coffee, and I—not realizing that her secretaries had for years been diluting the Justice’s brew because she stayed up too late—made it full strength. “This is *great* coffee,” the Justice noted over her intercom. Even though she was at the absolute pinnacle of the legal establishment, she still wanted extra fuel to review the briefs in, as I remember, a scintillating case about the standard for obviousness challenges under Section 103 of the Patent Act.<sup>46</sup> I am constantly reminded through her example that it’s impossible to be relentless and obsessive about justice and equality without being relentless and obsessive about the work that it takes to get there.

That’s how the Justice got to where she was. What might be most astounding about the Justice’s career are the challenges she overcame to achieve what she did. The beginnings of Justice Ginsburg’s career are the stuff of lore. Her mother died while she was in high school; during law school, the Justice divided her time between her studies, caring for her baby daughter, Jane, and at the same time shepherding her husband Marty through his battle with cancer.<sup>47</sup> At Harvard, she was subjected to the same episodes of discrimination she would fight to eliminate for others.<sup>48</sup> At a dinner with the other eight women in her law school class, the dean asked the Justice to justify taking a place in the class that otherwise would have gone to a man.<sup>49</sup> Her opportunities were limited despite graduating first in her class at Columbia, as she found herself unable to land a job at any New York firm and passed over for a clerkship with Justice Felix

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44. See Vagianos, *supra* note 35 (quoting Ruth Bader Ginsburg).

45. While writing this, I was reminded by one of my co-clerks of a mug we gave the Justice that year, which read: “I’m not tired, you’re just boring.”

46. See *KSR Int’l Co. v. Teleflex Inc.*, 550 U.S. 398 (2007).

47. See Linda Greenhouse, Ruth Bader Ginsburg, Supreme Court’s Feminist Icon, Is Dead at 87, *N.Y. Times* (Sept. 18, 2020), <https://www.nytimes.com/2020/09/18/us/ruth-bader-ginsburg-dead.html> (on file with the *Columbia Law Review*) (last updated Sept. 24, 2020).

48. See *id.*

49. *Id.*

Frankfurter.<sup>50</sup> That's just the tip of the iceberg that the Justice had to navigate around.

I've never had to face anything even close to these kinds of challenges. In many ways, the Justice reminds me instead of my parents, and maybe the parents of all first-generation Americans. My parents came to America from India in the early 1970s. My father hailed from a village town outside of Chennai. Like many immigrants, my parents came to America with little money in their pockets, few friends, and no connections. They worked day and night and overcame tremendous discrimination and adversity, taking it in stride to open up doors of opportunity not for themselves, but for their children and future generations. My father worked his way through several companies as a control systems engineer. My mother took on odd jobs, went to school in what little spare time she had, and like Justice Ginsburg's mother, worked as a bookkeeper. They faced daily challenges that most people in my generation can only fathom.

It's easy to forget about these generational shifts, but Justice Ginsburg reminded us about them through her own example. In her memoir, *My Own Words*, she asks, "What is the difference between a New York City garment district bookkeeper and a Supreme Court Justice?" Her answer: "One generation, my life bears witness, the difference between opportunities open to my mother, a bookkeeper and those open to me."<sup>51</sup> Two years ago, my parents finally met the Justice, a dream of theirs since I had clerked. The Justice and my parents talked about the Justice's recent documentary on CNN and her upcoming films. They talked about grandchildren while my two toddlers roamed around Chambers, crying and screaming, wondering why we were in this strange building talking to this strange woman named "Ruth." My wife and I cringed, but the Justice was unfazed. It struck me how easily my parents got along with the Justice, despite being from totally different universes. But the truth is that they weren't. They were from the same generation of pioneers, and they had spent their lives paving the way for others and future generations. "Waymaking" or "pathmarking" as the Justice might put it.

I have the slip opinion from *Ledbetter* hanging on the wall in my office. It is a reminder to me of the things the Justice taught all of her clerks. Persistence, persuasion, and the pursuit of justice, even in defeat. It's easy to relish and celebrate the wins, but often the light of justice burns brightest in darkness. The Justice's lessons have never been more important to us than right now. The COVID-19 pandemic is testing all of the institutions that as Americans we previously took for granted, and our collective resolve on matters of justice, freedom, equality, and fidelity to the Constitution. The Justice taught all of us that it is precisely in these

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50. See *id.*

51. Ruth Bader Ginsburg, with Mary Hartnett & Wendy W. Williams, *My Own Words* 73 (2016).

moments that we must stay true to who we are, fight for what we believe in (win, lose, or draw), and never forget the value of hard work. The Justice taught us that if we stay true to these values and stick together, we can make it through intact.

I will miss the Justice immeasurably. I had the privilege of spending a short time with her in her Chambers. Like many others, I'll always regret the call I didn't make, the trip to Chambers I was too busy for, the letter I could have, but didn't, write. Like the hundreds of thousands of Americans and millions worldwide who have perished over the last year, she was gone too soon. All we can do is try to carry the torch that the Justice had borne for decades and put into practice the values that the Justice tried to instill in all of us. To make sure that her legacy, like her dissents, has "staying power." *Yehi zichra baruch*. May her memory be a blessing.

