

JUSTICE GINSBURG'S QUIET EXAMPLE

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I clerked for Justice Ginsburg before she was notorious. During October Term 2004, she was still the second-most junior Justice, and the dissenting opinions that she would write as the leader of the Court's liberal wing—the ones that spawned memes like “*You can't handle the Ruth*”—were years in the future. But though she was not yet the popular icon she would become, there were plenty of reasons to feel awed in her presence. My co-clerks and I were all well aware of the Justice's achievements as an advocate fighting for women's rights. We knew that Justice Ginsburg had to break down barriers in her own career in order to become the first director of the ACLU Women's Rights Project.¹ And we knew that at a time when women were a rarity at the Supreme Court's podium, Justice Ginsburg stood there six times, achieving historic victories that altered the law's treatment of sex discrimination.² We had read the resulting decisions in our casebooks, thirty years later. And those of us who were women knew that a Supreme Court clerkship was a possibility only because of the efforts of Justice Ginsburg and others to open the legal profession to women. Justice Ginsburg herself, after all, had been turned down for a clerkship because she was a woman.³ So my co-clerks and I were grateful to have the opportunity to learn from someone who was not only a Supreme Court Justice, but also a celebrated advocate for civil rights.

To our surprise, though, Justice Ginsburg rarely spoke about her historic victories with her clerks. She didn't tell war stories (though we would have been an eager audience!), and she didn't hand out advice based on her years as an advocate. Instead, she taught by example: She showed up every day and focused on the work at hand. So the first thing that we learned was that for her, achieving the pinnacle of the legal profession after an illustrious career as an advocate didn't mean resting on her laurels. Instead, it meant striving every day to live up to the immense responsibilities of a Supreme Court Justice. The most important work, she

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1. See Anthony D. Romano, In Memory of Justice Ruth Bader Ginsburg (1933–2020), ACLU (Sept. 19, 2020), <https://www.aclu.org/news/civil-liberties/in-memory-of-justice-ruth-bader-ginsburg-1933-2020> [<https://perma.cc/X9CW-2U9N>] (noting that Justice Ginsburg joined the ACLU as the founding director of its Women's Rights Project in 1972).

2. *Id.*

3. See Neil A. Lewis, The Supreme Court: Woman in the News; Rejected as a Clerk, Chosen as a Justice: Ruth Joan Bader Ginsburg, N.Y. Times (June 15, 1993), <https://www.nytimes.com/1993/06/15/us/supreme-court-woman-rejected-clerk-chosen-justice-ruth-joan-bader-ginsburg.html> (on file with the *Columbia Law Review*) (recounting how Justice Frankfurter declined to hire Justice Ginsburg in 1960).

taught us, is the work on your desk, and you should do it to the very best of your ability. Focus on that, and the rest will follow.

I.

For Justice Ginsburg, doing the work on her desk meant pursuing clarity and concision in all things—the questions that she would ask at argument, the memos that she would circulate to the other Justices, and of course her opinions. She would refine every opinion over and over, until each unnecessary word had been excised and every nuance perfected. She felt that wordiness was the enemy of precision. Perhaps unsurprisingly, she disliked showiness for its own sake. Although she could effectively employ a memorable phrase—her line from *Shelby County v. Holder* about “throwing away your umbrella in a rainstorm because you are not getting wet”⁴ comes to mind—she would do so only if it would advance the substantive argument. She was a ruthless editor, not only of our work, but also her own. The process of revising a draft opinion was one of culling, of asking whether each phrase was doing necessary work in the argument. And Justice Ginsburg’s rigorousness never flagged; she was equally exacting with the first draft and the tenth, in the first days of writing a draft and in the middle of the night when the opinion was to be released the next morning.

Justice Ginsburg’s exacting standards made the process of helping her draft opinions a demanding one. But the drafting process also represented our primary opportunity for substantive interaction with her, so we waited with anticipation after each sitting to learn which of us would have writing assignments that month. When Justice Ginsburg was assigned a majority opinion, she would expect an initial draft within ten days. We would turn in the draft in fourteen-point font, triple spaced, to give her enough room to mark it up. Within a day or two, the Justice would call us into her office to discuss the draft. Once summoned, we would find her sitting with a copy of our draft, extensively marked up in her precise, penciled-in cursive. She would explain why she made each change—changes that would range from replacing an entire argument with her own, to minute alterations in syntax and word choice. And sometimes she would quiz us: “Why would you use passive voice here?” “Why begin the factual background this way?”

At the time, those meetings were intimidating! But looking back, I am amazed and grateful that Justice Ginsburg took the time and trouble to critique our drafts in detail, to explain why she changed our writing in the way she did. The lessons that Justice Ginsburg taught in those meetings have stayed with me, and they guide my writing today. And that is true of so many of us: This fall, comparing notes with other clerks at the Justice’s memorial and reading the many tributes from former clerks, I was struck by how many people mentioned her influence on their writing. Among her many other legacies, Justice Ginsburg taught scores of young lawyers

4. 570 U.S. 529, 590 (2013) (Ginsburg, J., dissenting).

to hold their writing to the rigorous standards by which she judged her own.

The precision that Justice Ginsburg insisted on in her work was not an end in itself. It was a means to advance Justice Ginsburg's humane vision of the law. Over the course of my clerkship, that vision became clear, particularly in the Justice's separate opinions. In 2004, Justice Ginsburg's relatively junior position on the Court made her unlikely to be assigned the lead dissents in the most high-profile cases. But the occasions on which she felt moved to write separately revealed a pattern. They were cases in which she thought that the majority ignored the way in which the Court's ruling would interact with the lived reality of the people who would be affected by it.

By highlighting those realities in separate opinions, Justice Ginsburg insisted that the Court should apply the law in a manner that would alleviate hardship, rather than ignoring or exacerbating it. In *Illinois v. Caballes*, for instance, Justice Ginsburg insisted that in evaluating the reasonableness of using a drug-sniffing dog during a routine traffic stop, the Court should take into account the "embarrassment and intimidation" a motorist would feel upon being investigated by a large, "intimidating animal . . . , on a public thoroughfare, for drugs."⁵ Similarly, in *Kowalski v. Tesmer*, Justice Ginsburg argued that the majority's third-party standing analysis ignored the fact that indigent criminal defendants would face significant practical obstacles to navigating Michigan's complex appellate system in order to bring their own pro se challenges to Michigan's refusal to supply appellate counsel.⁶ Those relatively obscure dissents reflected the same pragmatic humanity that Justice Ginsburg later brought to the dissents that made her famous in popular culture—those in which she argued that the law should take into account the practical difficulty of discovering that one is a victim of pay discrimination,⁷ or that the location of a polling place can suppress the vote just as surely as less subtle methods.⁸

Although Justice Ginsburg never told us any stories about her celebrated advocacy for women's rights, a year spent working for her was enough to figure out how she must have done it: Insist that the law should be humane, that it should recognize the lived reality of all people. In furtherance of that effort, harness a deep devotion to the craft of advocacy and to building rigorous doctrinal arguments, piece by piece, until even the skeptical come around to the just result. That is what Justice Ginsburg taught us, by example rather than instruction. It is hard to imagine a better blueprint for a meaningful legal career.

5. 543 U.S. 405, 421 (2005) (Ginsburg, J., dissenting).

6. 543 U.S. 125, 140–42 (2004) (Ginsburg, J., dissenting).

7. See *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 643–45 (2007) (Ginsburg, J., dissenting).

8. See *Shelby County*, 570 U.S. at 573–76.

II.

A few years after my clerkship ended, I had the privilege of getting to know Justice Ginsburg from a different vantage point: the podium. In 2009, I joined the Office of the Solicitor General, the division within the DOJ that represents the United States in front of the Supreme Court. Over the next eight years, I argued before the Court several times a year. Justice Ginsburg, of course, was on the bench for all of those arguments.

To argue before the Supreme Court as a woman is to owe a debt to Justice Ginsburg. That's true in the obvious sense—by winning the cases she did, she helped open all professions, including the legal profession, to women. But it's true in a less obvious sense as well. No doubt one reason that women, historically, appeared before the Supreme Court only rarely was that women were thought ill-suited to verbally sparring with the all-male Court. But Justice Ginsburg, over the course of her six arguments, proved that a woman could win the big cases—and that she could do so by being herself as an advocate. To listen to recordings of Justice Ginsburg's arguments now is to marvel at just how much she sounds like *herself*, decades later—she rarely deviated from the measured speaking pace for which she later became known, and she never showed exasperation, even in arguments in which she weathered sustained skepticism from the bench. By being herself, Justice Ginsburg showed future generations of women lawyers what was possible—that we too could stand up before the Supreme Court, that we could find our own ways of being persuasive and successful advocates. Justice Ginsburg once said of Belva Lockwood, the first woman to argue before the Supreme Court, that “we should appreciate the women on whose shoulders we stand.”⁹ That captures how I felt about Justice Ginsburg whenever I stood at the podium.

Justice Ginsburg loved to see her clerks argue before the Court. Each time I argued, she would catch my eye as she filed in with the other Justices to take the bench. She would raise an eyebrow and smile, almost imperceptibly. It was such a small thing, but it always put me more at ease, giving me the sense that she was pulling for me. That was especially helpful before my first argument—and during that argument, Justice Ginsburg kindly asked me the first several questions, which helped (somewhat) with the intimidation of the moment.

Justice Ginsburg was always an exacting and persistent questioner. Her questions reflected her basic approach to the law: faithful to doctrine, but concerned with how that doctrine would actually affect people's lives. For instance, in a case in which I argued for the government that the Court should permit a defendant's silence in response to noncustodial questioning to be used against him at trial, Justice Ginsburg closely questioned me on

9. In *Re Lady Lawyers: The Rise of Women Attorneys and the Supreme Court*, Sup. Ct. of the U.S., <https://www.supremecourt.gov/visiting/exhibitions/LadyLawyers/Section4.aspx> [<https://perma.cc/PAJ9-HQKU>] (last visited Feb. 12, 2021) (internal quotation marks omitted) (quoting Justice Ginsburg).

whether that silence could reflect anything other than the defendant's unsophisticated attempt to invoke the Fifth Amendment. As she explained, a defendant's Fifth Amendment protection should not turn on whether he happened to be "savvy" enough to cite the Fifth Amendment rather than simply remaining silent. That principle ultimately served as the basis for the dissenting opinion she joined.¹⁰ And in a case involving the application of an international child abduction treaty, Justice Ginsburg raised concerns that our position would force mothers to litigate child custody in foreign forums that could be less respectful of women's rights. She was ultimately convinced that the treaty should be enforced in that case, and she joined the majority to do so¹¹—but not before highlighting concerns about its practical impact. By asking questions like these, Justice Ginsburg made sure that government advocates always thought about how the government's positions would affect real people.

At the same time, even in cases in which I knew she would be vehemently opposed to the government's position, I never dreaded her questions. She was unfailingly courteous. And her questioning style could be a boon to an advocate. Arguing before a Court with so many active questioners can sometimes feel like a struggle to get out more than a few words at a time. Justice Ginsburg's unhurried manner would slow the argument down, and she framed her questions so as to create space for the advocate to answer—no matter how skeptical she was of the advocate's position. She would, for instance, invite the advocate to give all the reasons that the Justice might be wrong about a proposition, or to switch over to arguing a point that might have a better chance of persuading the Court. In her questions as in her opinion writing, then, she wasn't looking to score points. And—perhaps because she remembered what it was like to argue before the Court for the first time—she treated all advocates with the same respect and consideration, whether they were well known Supreme Court specialists or lawyers presenting their first (and perhaps only) Supreme Court argument. For her humane presence on the bench, she will be deeply missed by the Supreme Court bar.

III.

When Justice Ginsburg passed away, over 120 of her law clerks traveled from all parts of the country to attend her memorial at the Supreme Court. The gathering of clerks itself was a vivid illustration of the Justice's legacy. Spanning Justice Ginsburg's forty years on the bench, there were judges, professors, current and former government attorneys, private attorneys, and public defenders. Over the next few days, clerks gathered

10. See *Salinas v. Texas*, 570 U.S. 178, 201–02 (2013) (Breyer, J., dissenting) (“Salinas, not being represented by counsel, would not likely have used the precise words ‘Fifth Amendment’ to invoke his rights because he would not likely have been aware of technical legal requirements, such as a need to identify the Fifth Amendment by name.”).

11. See *Abbott v. Abbott*, 560 U.S. 1, 4 (2010).

in small groups around the Court to exchange reminiscences about the Justice. The clerk community is one that Justice Ginsburg painstakingly created, year by year, choosing a few people at a time who wanted to learn from her. Our coming together all at once—all of us bound by a shared connection to the Justice—felt like her last, great, gift to us.

When a Justice passes away, they lie in state as the public comes to pay its respects and the clerks take turns standing vigil over the casket. Usually the lying-in-state takes place inside, in the Great Hall of the Supreme Court. But because of the pandemic, Justice Ginsburg's casket was placed outside on the Portico, at the top of the steps leading to the Court's front entrance. Members of the public could file by on the Court's plaza, looking up the steps at the casket. At some point that week, my co-clerks and I went through the public line. The Justice's casket was framed by the columns that point upward to the motto on the Court's pediment: "Equal justice under law." How appropriate, I thought, that Justice Ginsburg would lie in state beneath the promise that she worked so hard to make a reality. She devoted her career and her many gifts to using the law to expand opportunities for all people. And she did that work with the highest possible standards, without tiring, without flagging in the face of opposition and, eventually, illness.

Looking up at the Court's façade, I thought about how the Justice never regaled us with tales of her civil rights victories. That must have been because it wasn't yet time. She of all people would have thought that there should be no laurels before the work is done, the end accomplished. Though she had achieved so much, she always understood that there is more to be done. "Equal justice under law" is still an aspiration. Striving every day to achieve it is, I think, the best way to honor Justice Ginsburg's memory.