

IN MEMORIAM JUSTICE RUTH BADER GINSBURG: JUSTICE, JUSTICE THOU SHALT PURSUE

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From her early days making her way through the male-dominated halls of Harvard Law School to her rise to reach a coveted place as the 107th Justice on the US Supreme Court, Ruth Bader Ginsburg's tireless fight for equality in the broadest sense of the word captured the hearts and minds of millions. With a plethora of biographical and autobiographical materials accessible to those who yearn for deeper engagement with the formidable 'tigress on civil procedure',¹ this article seeks to share insights into lesser-known qualities that were wrapped in a tiny package with a huge message.²

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At first glance, it might seem passé to offer readers a eulogy dedicated to the late US Supreme Court (SCOTUS) Justice Ruth Bader Ginsburg (RBG) seven months after her death. Yet, as the indefatigable champion of rights unequivocally emphasized, there is no statute of limitations for recapitulation and remembrance of valor in the fight for equal rights. Here in the Netherlands, a major political party's flirtation with antisemitism and, in the US, a

President's frantic attempts to overturn democratic election processes underscore the importance of vigilance in the name of justice.

The passing of the diminutive judiciary giant appointed by Bill Clinton in 1998 left its mark far beyond the hallowed halls of the US high court.³ A champion for civil liberties, she was the second woman appointed to serve on the bench. Her 27 years of courageous decision-making and, crucially, her powerful dissent earned her iconic status. In recent years, the humble, often self-effacing SCOTUS Justice metamorphosed into the 'people's Justice', the Notorious R.B.G., with a tip of the 'cap' to the late rap star, The Notorious B.I.G.

Unlike many high courts in continental Europe, in which judges function as *la bouche de la loi* handing down decisions in concurrence without public expressions of dissent, SCOTUS Justices do not hide behind an *esprit de corps* of judicial concord. Headlines such as 'Ginsburg, Sotomayor Issue Scathing Dissent of SCOTUS Travel Ban Decision',⁴ accompanied by the subhead 'The justices argue Trump's order was "motivated by anti-Muslim animus"', exemplify the court-related prose that enlivens US public debate. Although 'the court's main trust is to repair fractures in federal law',⁵ legal scholars and court watchers share the view that SCOTUS dissent is a marker for future developments in the law,⁶ as the *Ledbetter* case showcases.⁷

Dissent aside, RBG was vocal on the subject of lifelong learning, especially from those whose viewpoints differ from one's own. The late Justice Antonin Scalia, the flamboyant voice of conservative ideals, the ur-champion of black letter Constitutional interpretation, was one of RBG's closest personal friends. Beyond their shared love of opera and travel adventure, RBG credits her mighty court opponent for sharing a life lesson: 'attack ideas, not people'.⁸ Their mutual legacy was to agree to disagree in the name of a higher goal.

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- Justice Antonin Scalia's quote given in a *Reuters* interview, available at: www.reuters.com/article/usa-court-ginsburg-obituary-idUSKBN26A04Y.
- Ruth Bader Ginsburg, with Mary Hartnett and Wendy W. Williams, *My Own Words*; Jeffrey Rosen, *Conversations with RBG: Ruth Bader Ginsburg on Life, Love, Liberty*



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and Law; Jane Sherron De Hart, *Ruth Bader Ginsburg: A Life* and Debbie Levy's best-selling children's book, *I Dissent* are a few titles of note to enrich the reader's immersion into the life and times of RBG.

- 3 Statement made by Justice Antonin Scalia.
- 4 E. Foley & W. Frej, 'Ginsburg, Sotomayor Issue Scathing Dissent of SCOTUS Travel Ban Decision', *The Huffington Post* June 26, 2018.
- 5 Ruth Bader Ginsburg, 'Ruth Bader Ginsburg's Advice for Living' (Sunday Review), *The New York Times* October 1, 2016.
- 6 An excellent point of departure can be found in the following title: M.I. Urofsky, *Dissent and the Supreme Court: its role in the Court's history and the nation's constitutional dialogue*, New York: Pantheon 2015.
- 7 *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 127 S. Ct. (2007) hereinafter, *Ledbetter*, discussed in the paragraphs to follow.
- 8 With the notable addition, 'Some very good people have some very bad ideas.' Quote

The 'mensch' factor

If there was one word to characterize the RBG judicial force-of-nature, the word 'mensch' – a person of great character, integrity and honor – comes to mind.⁹ Her Jewish immigrant parents instilled in her the strong values of life-long learning and compassion for others above personal gain.¹⁰ A top graduate of James Madison High School, the public institution that counts US Senators Bernie Sanders and Charles Schumer amongst its graduates, she was proud of her immigrant roots and the borough called home. 'I am, as you know from my responses to your questionnaire, a Brooklynite – born and bred.'¹¹ The extraordinary trajectory of RBG's commitment to equality began long before her nomination to SCOTUS – by the time of her appointment in 1998, her legal triumphs netted the revocation of over 200 discriminatory decisions. To many in her inner circle, this commitment to equality developed from her earliest experiences in a stereotypical melting pot community: Brooklyn, New York. As the popular saying goes, 'you can take a girl out of Brooklyn, but you can't take Brooklyn out of the girl!'

One of nine women selected for entrance to Harvard Law School, she attended that venerable institution with her husband, Marty Ginsburg. When cancer prevented him from attending classes, RBG took notes for two and supported the family that had grown to include a baby daughter. Adding insult to injury, Harvard's Law School Dean commented on the lamentable fact that RBG had taken up a place that could have been given to a male student. RBG's

remarks given at the 40th anniversary of female graduates at Harvard Law School in 1993 indicate her cognizance of ongoing discrimination: 'I struck out on three grounds: I was Jewish, a woman and a mother'.¹²

RBG substituted the term 'gender' for 'sex' in her pleadings, reasoning that the mere mention of sex could sidetrack male judges. Her tactic worked: RBG won five of the six gender discrimination cases that reached SCOTUS

Following her husband to New York, RBG finished law school at Columbia and became the first student ever to have served on two prestigious Ivy League law reviews. Yet, academic success did not lead to a top clerkship, the coveted and expected career path of her male counterparts at the apex of academic achievement. Women, even those with extraordinary legal minds, were more likely to be relegated to the backbench. RBG joined the Columbia Project on Civil Procedure, where she moved to Sweden to participate in a research project on gender discrimination. Back in the USA, she joined the law faculty at Rutgers where she soon discovered that she earned significantly less than her male counterparts,

a fact she chose to withhold from her husband. In the early 1970s, RBG became an active member of the ACLU's¹³ Women's Right Project. While feminism's leading light referred to sex discrimination as 'the problem that has no name',¹⁴ RBG substituted the term 'gender' for 'sex' in her pleadings, reasoning that the mere mention of sex could sidetrack male judges. Her tactic worked: RBG won five of the six gender discrimination cases that reached SCOTUS.

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Old Time Religion

Of the masses of kudos that filled national and international media following RBG's passing, one in particular raised eyebrows. After listing her copious accomplishments in the fight for equality, an obituary published by *The Guardian* avowed that RBG had rejected the old-time religion of her forefathers during her teenage years.¹⁵ As she was known to impart, 'we beg to differ'. The consistency in RBG's justice narrative is underlined in the old Testament admonition 'you shall not judge unfairly',¹⁶ encompassing the belief that every person should endeavor to fight against inequality. Indeed, to right wrongs runs like a river through RBG's opinions. The Torah passage *justice, justice, shall you pursue* occupied a prominent place on her SCOTUS office wall and was always close to heart, sewn into the lace of her signature jabot. Talmudic scholars through the ages opened the floodgates to centuries of discussion concerning the meaning of the repetition of the word justice.¹⁷ A 12th-century scholar pronounced that duplication emphasizes the importance to seek justice in every manner possible, twice over if necessary.¹⁸ In nineteenth-century Poland, home to RBG's maternal ancestors, Reb Yaakov Yitchak expounded: 'the pursuit of justice must also be undertaken justly, unblemished by invalid means, with lies and surreptitiousness as some permit themselves under the flag of a worthy cause'.¹⁹

Tikkun olam, an integral component of Jewish thought, dictates the importance to engage and to encourage others to engage in acts of kindness in order to perfect or 'repair' the world.²⁰ A purpose-driven life that embraces the *tikkun* ideal was also RBG's ultimate antidote to despair. Her modus operandi included strength of character, a sense of mission, a penchant for work-related immersion and the commitment to move forward with dignity. Cases in point: RBG marched across the high school stage to receive her diploma one day after her mother succumbed to cancer and reported to work the day after her life partner of 56 years was felled by that dread disease. She remained tight-lipped concerning her five bouts of cancer preferring to proclaim the virtues of exercise. Practicing what she preached, RBG was wont to launch into rounds of pushups and plank

exercises on her office floor. Never minimizing other forms of strength, the importance of commonly held values, RBG declared: 'it has to be the people who want the change, and without them no change will be lasting'.²¹

Waging judicial war on discrimination: several seminal RBG contributions

The man as a breadwinner and the woman as a homemaker model is built into the fabric of many societies, surprisingly central within the so-called progressive Dutch culture. Liesbeth Staats' recent tripartite documentary series ('Waarom werken vrouwen niet?')²² focused on the phenomenon related to women who opt for full-time employment far less than their male counterparts. RBG fought to protect choice and equality at every level, to her even the choice to stay at home, if well-informed, should be protected. Beyond specific protections enshrined in legislation, RBG's legacy embraces the widest interpretation of freedom of choice unencumbered by gender bias. Applauded as a quintessential women's liberation frontliner, RBG ingeniously took on a man's right to equal protection under the Fourteenth Amendment. RBG set her sights on a case in which a man was denied family support benefits following the death of his wife, an Air Force employee. The distinction between a widow's allowance and a widower's lack thereof rested on, to quote RBG, an 'archaic and overbroad generalization' that presupposes that a man's earnings are a necessity for family support while a woman's earnings are ancillary. Decades later, RBG intimated that *Weinberger v. Wiesenfeld*²³ was her favorite. The 'story within the story' lay emphasis on her ability to translate empathy into action. The small woman with a big heart showed her gumption in court while saving the softer side for a man in need. Quoting from an interview with the defendant Stephen Charles Wiesenfeld:

'We met after I had written a letter to the editor of my local newspaper in New Jersey in December 1972. Paula had died about six months earlier as she gave birth to our son, Jason, but in those days, the Social Security survivor's benefit was only handed out to widows. She called a short time later, and by February 1973, she had filed a case in federal court in Trenton on my behalf. She told me whoever lost would likely appeal the decision to the Supreme Court. The three-judge panel ruled in my favor, and the federal government appealed.'

We were set to go in front of the Supreme Court in January 1975. The night before, Ruth explained her legal strategy. She was making the case from three points of view: my wife's, my son's and mine. She made it clear to the court it was unfair I was denied the benefit so I could raise Jason, as Paula would have if I had been the one who died. She wanted me there because she wanted the eight male justices – Justice William O. Douglas was ill – to see me, so they could identify with who was bringing this case.

Watching her in court, I could see she was very confident. Our unanimous victory was one of the amazing things about her, and what she was able to do – this was the Warren Burger court, a very conservative court. It was the only case in which Justice Rehnquist voted in her favor. It was years before I found out I was the only client she ever took to sit before the Supreme Court as she argued a case.²⁴

taken from 'Justice Ruth Bader Ginsburg Eulogy at Justice Scalia Memorial Service (C-SPAN); C-SPAN, *Youtube* March 1, 2016. Available at: www.youtube.com/watch?v=jb_2GgE564A.

- 9 According to the Merriam-Webster dictionary, *mensch* derives from the Yiddish *mensch*: human being www.merriam-webster.com/dictionary/mensch.
- 10 RBG's father was born in the Pale of Russian Settlement in Odessa and her mother came from Cracow, then part of the Hapsburg Empire.
- 11 A link to RBG's opening address in the 1993 Senate confirmation hearings, available at: www.loc.gov/item/2019630722/.
- 12 Rajath Shourie reporting in *The Harvard Crimson*, October 4, 1993.
- 13 American Civil Liberties Union (ACLU).
- 14 Reference to Betty Friedman's description of the isolated housewives, see her seminal work, *The Feminine Mystique*, New York: W. W. Norton & Company 1963.
- 15 *The Guardian's* RBG obituary is available at: www.theguardian.com/us-news/2020/sep/19/ruth-bader-ginsburg-obituary.
- 16 Deuteronomy 16:18.
- 17 In the original Hebrew, *tzedeq, tzedeq tirdof / תְּדַבֵּר תְּדַבֵּר*.
- 18 Bakhya ben Asher, Spain, 12th century.
- 19 See, interpretive roots available at: www.reconstructingjudaism.org/dvar-torah/justice-justice.
- 20 Found in the Mishnah, a collection of classical rabbinical teachings.
- 21 Available on videolink, Colleen Walsh, *Harvard Law Today*, February 7, 2013. <https://today.law.harvard.edu/ginsburg-holds-court-at-his-video/>.
- 22 The series was aired on NPO3 in November-December 2020.
- 23 *Weinberger v. Wiesenfeld* 420 U.S. 636 (1975).
- 24 E. Connelly, 'Man at center of famed Ginsburg SCOTUS victory recalls his lifelong friend', *New York Post* September 19, 2020. Available at: <https://nypost.com/2020/09/19/man-at-center-of-famed-scotus-victory-recalls-ruth-bader-ginsburg/>.

Another groundbreaking discrimination case, *United States v. Virginia*,²⁵ examined the admission procedures at the Virginia Military Institute (VMI), a public education establishment that admitted young men but reserved its historic right to bar women from admission. Writing for the majority, RBG relied on succinct prose to draw attention to the fact that VMI's admissions policy violated the Fourteenth Amendment: 'Virginia serves the state's sons, it makes no provision whatever for her daughters. That is not equal protection.'²⁶ This landmark decision granted gender equality a central and important place within the safety net of protected constitutional rights.

Turning her prodigious pen to the rights of the mentally disabled, RBG wrote for the majority in *Olmstead v. L.C.*,²⁷ a case in which two women admitted to the psychiatric ward of a state hospital were held in involuntary isolation. To strike down the injustice perpetrated by the systemic misclassification of the mentally disabled, it was paramount to link the right of participation in public life to the protective mantle of Title II of the American with Disabilities Act (ADA).²⁸ RBG persuasively argued that to sequester patients without their consent 'perpetuates assumptions that persons so isolated are incapable or unworthy of participating in community life'.²⁹

**Justice, justice, repeated twice,
loud and clear is needed,
now more than ever**

Dissent as a potent weapon: *Ledbetter v. Goodyear Tire & Rubber Co.*

In *Ledbetter*,³⁰ a female supervisor who worked for over two decades at the Goodyear Tire and Rubber Corporation, filed suit for equal pay after conversations with colleagues led to the discovery that she had earned significantly less than two male colleagues. After opting for early retirement, Ledbetter filed a charge at the U.S. Equal Employment Opportunity Commission (EEOC), bringing several discrimination claims under Title VII to her defense.

On appeal, Goodyear argued that Ledbetter's case was time-barred regarding all claims that had taken place more than 180 days prior to her EEOC filing. The Eleventh Circuit reversed the trial court's decision, holding that the two pay decisions taken within the 180-day time span were insufficient to prove Goodyear's discriminatory intent. Ledbetter petitioned SCOTUS with the question:

'Whether and under what circumstances a plaintiff may bring an action under Title VII of the Civil Rights Act of 1964 alleging illegal pay discrimination when the disparate pay is

received during the statutory limitations period but is the result of intentionally discriminatory pay decisions that occurred outside the limitations period.'³¹

In a 5-4 decision, SCOTUS affirmed the Eleventh Circuit's holding unwilling to grant deference to the argument that the time bar contributed to a discriminatory practice. In the words of the majority, reconsideration would 'jettison the defining element of the legal claim on which her Title VII recovery was based'.³² Furthermore, to quote Justice Samuel Alito reading for the majority, 'current effects alone cannot breathe life into prior, uncharged discrimination'.³³

Chastising the majority for its 'cramped' interpretation of Title VII, the dissent was scathing, labeling the majority's ruling out of tune with the realities of wage discrimination and accusing the majority of 'a cramped interpretation of Title VII, incompatible with the statute's broad remedial purpose'.³⁴ Opting to read her dissent out loud, RBG took on the voice of the people to encourage Congress to move forward when SCOTUS refused to budge:

'In our view, the Court does not comprehend, or is indifferent to, the insidious way in which women can be victims of pay discrimination [...] Today's decision counsels: Sue early on, when it is uncertain whether discrimination accounts for the pay disparity you are beginning to experience. Indeed, initially you may not know that men are receiving more for substantially similar work. Of course, you are likely to lose such a less-than-fully-baked case. If you sue only when the 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".'³⁵

Heated debate in congressional halls ensued. In 2008, President Obama signed the Lilly Ledbetter Fair Pay Act into law proclaiming: 'there are no second-class citizens in our workplaces [...] it is bad for business, to pay someone less because of their gender, age, race, ethnicity, religion, or disability'.³⁶

In Jewish lore, a soul that passes on the Jewish New Year (Rosh Hashana) represents a righteous person, a *tzaddik*. The news of RBG's death on that holy day set off week-long vigils, inspired larger-than-life murals and spontaneous outpourings of commemorative grief worldwide. The first woman in US history to lie in state at the US Capitol was not permitted to rest in peace. Despite RBG's final wishes to the contrary,³⁷ President Trump succeeded in filling her SCOTUS vacancy in record speed, muscling in Amy Coney Barrett, a pro-life conservative, whose political stance and professed beliefs stand in sharp contrast to the woman of valor she replaced. Justice, justice, repeated twice, loud and clear is needed, now more than ever.

25 *United States v. Virginia* 518 U.S. 515 (1996).

26 *United States v. Virginia* 518 U.S. 515 (1996).

27 *Olmstead v. L.C.* 527 U.S. 58 (1999).

28 'A primary goal of the ADA is the equal participation and integration of people with disabilities in the mainstream of American life. A person with a disability must be integrated to the maximum extent appropriate for that person. The goal is to encourage interaction among all user and participants.' Available at the ADA website: www.adaactionguide.org/ada-title-ii-requirements.

29 See, *Olmstead v. L.C.* 527 U.S. 58 (1999).

30 See, *Ledbetter*.

31 Lilly Ledbetter's Petition for Certiorari, see, *Ledbetter*. Available at: www.oyez.org/cases/2006/05-1074.

32 See, *Ledbetter*.

33 See, *Ledbetter*.

34 See, *Ledbetter*.

35 Justice Ginsburg's dissent. She was joined by Justice Stevens, Justice Souter, and Justice Breyer, text available at: <https://supreme.justia.com/cases/federal/us/550/618/-tab-opinion-1962369>.

36 Lilly Ledbetter Fair Pay Act of 2009, 123 Stat 5 (West 2009).

37 RBG's granddaughter, Harvard law student Clara Spero, dutifully noted her grandmother's last wish: 'My most fervent wish is that I will not be replaced until a new president is installed.' See, www.npr.org/sections/death-of-ruth-bader-ginsburg/2020/09/18/914643289.