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LEARNING TO LISTEN TO RUTH BADER GINSBURG

*Linda Greenhouse**

Because this special Symposium issue of the New York City Law Review is filled with articles analyzing Justice Ginsburg's life and work, I decided that this introduction could most usefully take a somewhat different approach to the subject. My focus is not what Ruth Bader Ginsburg has told the Supreme Court over the years, both as advocate and Justice, but rather the impact that her words and ideas had on her audience.

I want to focus on one particular member of that audience, Justice Harry A. Blackmun. He was her Supreme Court colleague for only one year, October Term 1993, but for twenty-two years before that, ever since Professor Ruth Bader Ginsburg submitted her brief on the merits for the appellant in *Reed v. Reed*,¹ he had been one of her most important listeners. This focus will add some value to the perspectives presented in this Symposium issue, I think, because quite often, Justice Blackmun was a skeptical listener. We know this not only from his votes in such cases as *Frontiero v. Richardson*,² in which he rejected Professor Ginsburg's call to subject sex discrimination to strict scrutiny, but from the notes and memos contained in the voluminous collection of his papers,³ opened to the public by the Library of Congress a week before Justice Ginsburg's visit to the law school. By the end of his career, Justice Blackmun was such an icon of feminism that I was quite taken aback to see that when it came to women's issues, especially but not only early in his career, he could best be characterized as a grumpy old man. Whatever Ruth Ginsburg was selling, Harry Blackmun was not buying.

That fact, as well as the fact that he eventually did work his way around to her point of view, is a reminder both of the context in

* B.A., Radcliffe College, 1968; M.S.L., Yale Law School, 1978. Since 1978, the author has been Supreme Court Correspondent for The New York Times. She won a Pulitzer Prize in journalism in 1998 for her coverage of the Court. Her biography of Justice Blackmun, based on his papers at the Library of Congress, will be published in May 2005 by Times Books/Henry Holt.

¹ 404 U.S. 71 (1971).

² 411 U.S. 677 (1973).

³ See Linda Greenhouse, *Documents Reveal the Evolution of a Justice*, N.Y. TIMES, Mar. 4, 2004, at A1 for an analysis of Justice Blackmun's papers.

which Ruth Ginsburg began her Supreme Court advocacy and of the impact she had. The arguments she made struck many of the middle-aged men who heard them as counter-intuitive. What could possibly be wrong with laws aimed at protecting women from harm, sheltering them from the consequences of their limited earning capacity, taking into account the biological and cultural imperatives of motherhood? The fact that she often brought these questions to the Court in cases with male plaintiffs was all the more unsettling. Under her rigorous analysis and presentation, tectonic plates began to shift, as this Symposium issue documents, but Harry Blackmun's journey reminds us that there was nothing inevitable about where they would come to rest.

That he was not the first in line to enlist in Ruth Bader Ginsburg's crusade is hardly surprising for a man born in 1908, who graduated from Harvard Law School a full generation before that august institution deemed women worthy of attending (and it was only last year that Harvard Law School got a female dean).⁴ At the time Ruth Ginsburg started bringing cases to the court in her capacity as director of the ACLU Women's Rights Project, official discrimination on account of sex was simply not considered a constitutional harm – no more so than discrimination on account of eye color or height would have been. Her challenge was to deconstruct the layers of paternalism and stereotyped assumptions through which women, even when receiving especially beneficial treatment, were disabled from participating as full citizens in the civic affairs of the country.

She accomplished this case by case, through a careful litigation strategy in which the challengers to the status quo were just as likely to be men as women. Some of her most significant victories came on behalf of male petitioners who were disadvantaged by assumptions built into various social service laws about women being in special need of the state's solicitude. The first case she brought to the court was *Reed v. Reed*,⁵ argued in October of 1971, the start of Harry Blackmun's second term. This was not one of her six Supreme Court arguments, but she was counsel of record for the ACLU. The case challenged an Idaho probate law under which a man received an automatic preference over a similarly situated woman for court appointment to administer an estate. Ruth Gins-

⁴ Sam Dillon, *First Woman Is Appointed as Dean of Harvard Law*, N.Y. TIMES, Apr. 4, 2003, at A18 (reporting appointment of Elena Kagan and noting that the school did not admit women until 1953).

⁵ 404 U.S. 71 (1971).

burg's client was Sally Reed, the mother of a young man who committed suicide, dying intestate. She and her husband were separated. Each applied to be named administrator of their son's very small estate. Under the preference provision of the Idaho probate law, in which "males must be preferred to females" if both were "equally entitled," the father, Cecil Reed, received the appointment.⁶ Sally Reed challenged this outcome, but the law was upheld in the Idaho Supreme Court, basically on the ground of administrative convenience. The statutory preference for men "is neither an illogical nor arbitrary method devised by the legislature to resolve an issue that would otherwise require a hearing as to the relative merits" of competing claims, the state court said.⁷

Ruth Ginsburg's challenge to the statute, and to that opinion, proved to be a hole-in-one. The court overturned both, unanimously, in a seven-page opinion by Chief Justice Burger. Clearly the statute did serve an objective, the court said, one that was not completely illegitimate. But it was simply not a weighty enough objective to overcome the constitutional command of equal protection. The automatic preference was "the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause," the court said.⁸ By providing dissimilar treatment for similarly situated men and women, "the challenged section violates the Equal Protection Clause."⁹ In other words, convenience was not enough. Although by its terms, the opinion applied nothing more rigorous than rational basis review, this was rational basis with teeth: discrimination on account of sex violated the Constitution.

Harry Blackmun went along, but he was not particularly happy. "The ACLU, on behalf of the appellant mother here, has filed a very lengthy brief filled with emotion and historical context about the inferior status of women,"¹⁰ he wrote in his notes to himself while preparing for the argument. His note after argument, when the handwriting was on the wall for reversal, said: "Avoid an emotional opinion about women's rights. Write it narrowly."¹¹

When I read these notes, I wondered what could have been in Ruth Ginsburg's brief that struck Justice Blackmun as so over the top. So I went up to the Supreme Court library and called for the

⁶ *Id.* at 73.

⁷ *Id.* at 76.

⁸ *Id.*

⁹ *Id.* at 77.

¹⁰ Harry A. Blackmun Collection ("H.A.B. Collection"), Library of Congress Manuscript Division, Container 135, folder 10.

¹¹ *Id.*

brief. While at sixty-eight pages it was not drastically longer than the fifty pages permitted by the Court's current rules,¹² this was the mother of all sex discrimination briefs, clearly aimed at educating the court on a scale that went considerably beyond the challenge to an Idaho probate law.

Citing Gunnar Myrdal and other social commentators and critics, the brief sought to get into the Supreme Court record, and the justices' collective consciousness, the disadvantaged status of women in society—"pervasive social, cultural, and legal roots of sex-based discrimination," as the brief put it.¹³ "American women have been stigmatized historically as an inferior class and are today subject to pervasive discrimination . . . A person born female continues to be branded inferior for this congenital and unalterable condition of birth."¹⁴

These were hardly radical observations, even in 1971. Whether they were too emotional I will leave for others to decide. As a legal matter, the brief asked for official discrimination on account of sex to be accorded strict judicial scrutiny. That did not happen, not then, not two years later when the strict scrutiny argument got only four votes in *Frontiero*¹⁵—and, I should point out, not yet.

But Ruth Ginsburg kept coming back, making her arguments. Her actual argument, as opposed to the briefing, seems to have been crucial in persuading Justice Blackmun to see things her way in a 1975 case, *Weinberger v. Wiesenfeld*,¹⁶ a challenge to a federal social security provision that granted survivors' benefits to the widow as well as to the children of a deceased male wage-earner, based on his earnings, but withheld similar benefits from a widower. Justice Blackmun's clerk, Richard Blumenthal, now the attorney general of Connecticut, urged him to vote to uphold the statute against the charge of unconstitutional sex discrimination brought by Ruth Ginsburg's male client. "No doubt, the statute's provision rests on a stereotype—a stereotype that has greatly diminished validity,"¹⁷ the law clerk wrote. But he said it did still have some validity, based on the income disparities between the typical man and the typical woman. "The objective is to alleviate need. Women are more likely to be needy, even in this increasingly liber-

¹² SUP. CT. R. 33.

¹³ Brief for Appellant at 10, *Reed v. Reed*, 404 U.S. 71 (1971) (No. 70-4).

¹⁴ *Id.* at 25.

¹⁵ *Frontiero v. Richardson*, 411 U.S. 677 (1973).

¹⁶ 420 U.S. 636 (1975).

¹⁷ H.A.B. Collection, Container 203, folder 6.

ated age. The statute would seem to be constitutional.”¹⁸

Justice Blackmun’s notes indicate that he was inclined to agree. In his pre-argument memo to himself, he wrote: “Widows with children are more likely to need social security benefits than widowers with children. This is due to the fact that the widower usually is working and enjoys a higher income than his female counterpart.”¹⁹ If this premise was outmoded, he said, the argument should be made to Congress and not to the court. “So long as the objective of the differential is to alleviate need, I suspect that we shall have to hold that the differential is not unconstitutional. For the moment, therefore, I shall vote to reverse.”²⁰

But Justice Blackmun’s mind changed as he listened to Ruth Ginsburg’s argument. “It is a good clean case, factually,”²¹ he noted to himself while on the bench. “The differential does seem rather useless.”²² He ended up joining Justice Brennan’s opinion to hold the provision unconstitutional.

By the end of his career, he was fully on board. He had come to see *Roe v. Wade*²³ as a decision not just about doctors and their patients, but also about women’s place in society. One of his very last opinions came in *J.E.B. v. Alabama*,²⁴ in April 1994, holding that gender is an impermissible basis for the exercise of peremptory challenges in jury selection. The Supreme Court case grew out of a paternity and child support action in Alabama state court, in which the state, representing the interests of the mother, used nine of ten peremptories to remove male jurors, creating an all-female jury. “When state actors exercise peremptory challenges in reliance on gender stereotypes, they ratify and reinforce prejudicial views of the relative abilities of men and women,”²⁵ Justice Blackmun wrote. “It denigrates the dignity of the excluded juror and, for a woman, reinvokes a history of exclusion from political participation.”²⁶ Justice Ginsburg silently joined this majority opinion. She had done her work. There was nothing she needed to add.

When Justice Ginsburg was nominated to the Supreme Court,

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ 410 U.S. 113 (1973).

²⁴ 511 U.S. 127 (1994).

²⁵ *Id.* at 140.

²⁶ *Id.* at 142.

I called her a “judicial-restraint liberal.”²⁷ By that, I meant that she has a liberal vision of a muscular and broadly inclusive Constitution coupled with a pragmatist’s sense that the most efficacious way of achieving the Constitution’s highest potential as an engine of social progress is not necessarily through the exercise of judicial supremacy. During her visit to CUNY Law School, she made clear that the protection of civil liberties is not a job for judges alone—in fact, that judges alone cannot do the job.

In the question-and-answer session following her formal remarks, the Justice was asked to list “the most important legal issues that you believe the United States Supreme Court faces today.”²⁸ Here is her reply:

I would like to amend the question slightly to say: “what are the most important issues that the people of the United States are facing today?” Every day the question of the balance between liberty and security is before us. I have said on that subject that people, the people of the United States, take great pride in our heritage; that we love liberty and cherish freedom; and that we have not been given to security concerns to the extent some other countries have. Will we be able to preserve that spirit given the current challenges? If the people don’t care about preserving their liberty and are overwhelmed by security concerns, there is no court that can change that sad development. But I am confident that it won’t happen in the United States, because the people do care. The courts, you know, are reactive institutions. We don’t create the controversies that come to us, we respond to the problems that are emerging in the society the courts exists to serve. The Supreme Court will respond to these challenges, but there must be people out there to bring them and support them.²⁹

That stance as a “judicial-restraint liberal” has enabled her to speak to both sides of the court and to win not only the affection, but the respect of her colleagues. Who would have believed that Chief Justice Rehnquist would join her in invalidating the Virginia Military Institute’s all-male admissions policy,³⁰ or that last term, in upholding the Family and Medical Leave Act against an Eleventh Amendment attack, he would write an opinion that sounded as if he was channeling for her—talking about the burden placed on

²⁷ Linda Greenhouse, *The Supreme Court: A Sense of Judicial Limits*, N.Y. TIMES, July 22, 1994, at A1.

²⁸ Justice Ruth Bader Ginsburg, Remarks at the City University of New York School of Law (Mar. 11, 2004), 7 N.Y. CITY L. REV. 221, 232 (2004).

²⁹ *Id.*

³⁰ *United States v. Virginia*, 518 U.S. 515 (1996).

women by the stereotyped assumption that if an emergency arises at home, they are the ones who will leave the office to deal with it.³¹

Harry Blackmun was not an easy sell, but that made his eventual conversion all the sweeter. To show you just how tough a job it was, let me quote from a memo I found in his file from November, 1980, thirteen years before Justice Ginsburg would join the court. It had just occurred to the Justices that they would have a female colleague someday, probably someday soon (and they were right—it happened six months later). What to do about the traditional appellation, “Mr. Justice”? The proposal was made to eliminate the “Mr.”

Justice Blackmun objected. “It seems to me that of late we tend to panic and to get terribly excited about some rather inconsequential things,” he said in a letter to Chief Justice Burger that he circulated to all his colleagues.³² “I regard this as one of them We seem to be eliminating, step by step, all aspects of diverse-ness, and we give impetus to the trend toward a colorless society.” He concluded: “As Hugo Black once despairingly said (and how well I remember), ‘All these changes around here!’”³³

There have indeed been changes around here.

³¹ *Nevada Dep’t. of Human Res. v. Hibbs*, 538 U.S. 721 (2003).

³² H.A.B. Collection, Container 1548, folder 4.

³³ *Id.*