

INTRODUCTION

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In 2017, when my beloved colleague at the University of California, Berkeley School of Law, Herma Hill Kay, passed away, another colleague and her spouse helped endow a lecture series in Herma's memory.¹ There was one very obvious choice to deliver the inaugural lecture—Herma's longtime close friend and co-author of the very first legal casebook on gender-based discrimination, Justice Ruth Bader Ginsburg. To our collective great delight, Justice Ginsburg accepted the invitation to deliver the first annual Herma Hill Kay Memorial Lecture in October 2019. As the Justice and I planned her visit, we decided she would begin with remarks about her decades-long friendship with Herma, and then we would sit down for a conversation about how the Justice has pursued gender equality through her life and work.

This book stems from Justice Ginsburg's time in Berkeley that fall. Following her visit, she and I decided to assemble a collection of materials that tracked our conversation about her life and work in order to give readers a glimpse into how as a lawyer and federal judge she has worked tirelessly for gender equality and, more generally, achievement of our Constitution's most fundamental aspiration—to build “a more perfect Union.”

When Joan Ruth Bader was born on March 15, 1933, the law viewed women very differently than it does today. A little over two decades before her birth, the very Court on which she would one day sit issued an opinion in *Muller v. Oregon* positing that even if a woman “stood, so far as statutes are concerned, upon an absolutely equal plane with [a man], it would still be true that she is so constituted that she will rest upon and look to him for protection.”² This was the same Court that late in the nineteenth century upheld a state’s refusal to license a married woman to practice law, with one justice going so far in that case to assert that “[t]he natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life.”³ Through the 1960s, in fact, the Supreme Court upheld legislation drawing distinctions between men and women, declining to disturb, among other things, a law that prohibited women from bartending unless they did so under the auspices of a husband or father,⁴ and also laws that excluded women from local jury pools.⁵ Speaking to the latter issue, the Court’s 1961 decision in *Hoyt v. Florida* observed:

Despite the enlightened emancipation of women from the restrictions and protections of bygone years, and their entry into many parts of community life formerly considered to be reserved to men, woman is still regarded as the center of home and family life. We cannot say that it is constitutionally impermissible for a State, acting in pursuit of the general welfare, to conclude that a woman should be relieved from the civil duty of jury service unless she herself determines that such service is consistent with her own special responsibilities.⁶

Against this backdrop, perhaps it is unsurprising that a young Justice Ginsburg did not even contemplate a career in the law. As she told me in our conversation, “I didn’t think about the legal profession for me because women were not there.” But, as she and I also discussed, law became her chosen path based on her experience in college during the McCarthy era watching lawyers stand up for the First Amendment rights of Americans to “think, speak, and write as we believe and not as a big brother government tells us is the right way to think, speak, and write.” Another pull in her gravitation toward the law came when she chose as her partner in life

Martin D. Ginsburg, “Marty,” who would be her beloved spouse for fifty-six years. As she described in our conversation, after they met at Cornell, the two decided they would enter the same profession. After a process of elimination, law won out and both eventually enrolled at Harvard Law School, Marty one year ahead of the Justice.⁷

Justice Ginsburg was one of only nine women in her Harvard Law School class of over 500 students. She was also a mother at the time, with a fourteen-month-old daughter at home.⁸ As she described this period of her life in our conversation, motherhood gave her life “balance,” ensuring that she would not be completely consumed by her law studies. As we also discussed in our conversation, there were also trying months when Marty was diagnosed with cancer in the winter of his third year and it was not at all clear he would survive. He did, and as the Justice told me, this—and her own more recent courageous battles with cancer—taught her that “if you have survived cancer, you have a zest for life that you didn’t have before, you count each day as a blessing.”

After taking her final year of studies at Columbia Law School and graduating tied for first in her class, she found job offers hard to come by. She was, after all, Jewish, a woman, and a mother. With the powerful backing of a favorite professor, Justice Ginsburg started her legal career in a clerkship with District Judge Edmund L. Palmieri of the Southern District of New York, after which she gained academic appointments. She joined the Rutgers Law School faculty in 1963, the nineteenth woman law professor appointed to an accredited law school in the United States.⁹ But, as she and I discussed in our conversation, even though her appointment occurred the year the Equal Pay Act became law, she was still paid less than her male colleagues. As her law school dean told her at the time, Rutgers could pay her less than her male counterparts because she had “a husband with a well paid job.” It was during her time at Rutgers that Justice Ginsburg’s path intersected with Herma Hill Kay’s and in 1974 the two, together with Kenneth Davidson, published the pathbreaking *Cases and Materials on Sex-Based Discrimination*, the very first casebook on the subject.¹⁰

Meanwhile, Justice Ginsburg had already begun a litigation career that would lead in time to comparison of her work for gender equality to the work Justice Thurgood Marshall had undertaken to dismantle segregation.

One by one, Justice Ginsburg toppled the stereotypes and assumptions that had provided the foundation for cases like *Muller v. Oregon* and *Hoyt v. Florida*. It began, as those who have seen the 2018 movie *On the Basis of Sex* know, with a case she jointly litigated with Marty, *Moritz v. Commissioner of Internal Revenue*.¹¹ As she and I discussed in our conversation, their effort began when Marty, a tax lawyer, handed his wife some pages from a Tax Court advance sheet after seeing a report of Mr. Moritz's case. In short order, they prevailed on behalf of Mr. Moritz, a never married man, who had been disallowed a caregiver tax deduction his female equivalent would have been allowed. In time, as Justice Ginsburg noted in our conversation, *Moritz* offered her a roadmap for the series of cases she litigated in its wake as Director of the American Civil Liberties Union's Women's Rights Project, and later, as one of the ACLU's four General Counsels. Throughout the 1970s, she briefed ten Supreme Court cases on behalf of parties challenging gender discrimination, presented oral argument in six of those, and prevailed in seven (with one becoming moot before the Court decided it).¹² Justice Ginsburg also filed friend of the Court, or *amicus curiae*, briefs in at least a dozen more cases.

In one of those cases, the first she argued before the Supreme Court, *Frontiero v. Richardson*, Justice Ginsburg explained in her brief to the Court: "Historically, women have been treated as subordinate and inferior to men. Although some progress toward erasing sex discrimination has been made, the distance to equal opportunity for women in the United States remains considerable."¹³

To close that distance, Justice Ginsburg successfully challenged in litigation before the Supreme Court and lower courts, among others: a statutory scheme that preferred men to women as estate administrators,¹⁴ the automatic discharge of pregnant Air Force officers,¹⁵ federal statutes granting disparate benefits to male and female members of the military,¹⁶ the automatic exemption of women from jury pools (effectively winning the overruling of *Hoyt v. Florida*),¹⁷ the denial of equal social security benefits to men and women caregivers,¹⁸ the denial of unemployment benefits to pregnant women,¹⁹ the denial of equal social security benefits to male surviving spouses,²⁰ and the limitation of assignments available to women in the Navy.²¹ Mindful that her work was the continuation of efforts by many who had come before her, Justice Ginsburg included the

names of Dorothy Kenyon and Pauli Murray on the first brief she filed in the Supreme Court, for the appellant in *Reed v. Reed*.

In 1980, President Jimmy Carter nominated and the Senate confirmed Justice Ginsburg to serve as a judge on the United States Court of Appeals for the District of Columbia Circuit. Then, in 1993, President Bill Clinton nominated her to serve as an Associate Justice of the Supreme Court. In the hearings before the Senate Judiciary Committee leading up to her confirmation, the Justice gave opening testimony in which she introduced her family and then offered this self-description:

I am . . . a Brooklynite, born and bred—a first-generation American on my father’s side, barely second-generation on my mother’s. Neither of my parents had the means to attend college, but both taught me to love learning, to care about people, and to work hard for whatever I wanted or believed in. Their parents had the foresight to leave the old country, when Jewish ancestry and faith meant exposure to pogroms and denigration of one’s human worth. What has become of me could happen only in America. Like so many others, I owe so much to the entry this nation afforded to people yearning to breathe free.²²

Justice Ginsburg next credited Marty for supporting her choice to become a lawyer “unreservedly” and for believing “when we met, and . . . today, that a woman’s work, whether at home or on the job, is as important as a man’s.” Among many others she also thanked for the opportunity before her, she credited “the determined efforts of men and women who kept dreams of equal citizenship alive in days when few would listen,” specifically mentioning Susan B. Anthony, Elizabeth Cady Stanton, and Harriet Tubman.

Finally, in her statement, Justice Ginsburg discussed the role of the judge and more generally what it means to serve as a guardian of our Constitution. “[T]he Justices,” she said, “do not guard constitutional rights alone. Courts share that profound responsibility with Congress, the president, the states, and the people.” She continued: “Constant realization of a more perfect Union, the Constitution’s aspiration, requires the widest, broadest, deepest participation on matters of government and government policy.” As we will see throughout the pages of this book, striving for this aspiration—the “more perfect Union”—has always been at the heart of Justice Ginsburg’s life’s work. As she testified at her confirmation hearings,