

Judicial Profile

PHIL SCHATZ

Hon. Ruth Bader Ginsburg Associate Justice, Supreme Court of the United States

On Nov. 16, 2009, the Foundation of the Federal Bar Association made Justice Ruth Bader Ginsburg an Honorary Life Fellow in a well-attended ceremony in the West Conference Room of the United States Supreme Court Building. After making brief remarks, Justice Ginsburg surprised the assembled lawyers by opening the floor for questions. Following an embarrassed pause—it is a rare talent to render a room of lawyers speechless—Justice Ginsburg fielded a wide variety of questions with the same candor and humor that made her what President Clinton has called “the Thurgood Marshall of the women’s rights movement.”



In connection with the ceremony, Justice Ginsburg consented to being profiled for *The Federal Lawyer*. She asked that the profile focus on the struggle for equal citizenship stature for men and women. Because of her heavy work schedule, she also asked that the profile be drawn from publicly available writings and interviews as well as Fred Strebeigh’s highly recommended book, *Equal: Women Reshape American Law*, published last year by W. W. Norton & Company.

An Only Child of Immigrants

Joan Ruth Bader, nicknamed “Kiki,”¹ was born on March 15, 1933, and grew up in the working-class immigrant community of Flatbush, Brooklyn, a polyglot mixture of Italian, Irish, Jewish, and Polish families. Her father, Nathan, emigrated from Russia when he was 13 years old. He was a gentle and reserved man with a sly sense of humor, who developed a modest business manufacturing low-priced furs. Her mother, Celia, was born in the United States but conceived in Poland. She was a fierce intellect and prolific reader, who graduated from high school at the age of 15. She gave up her own dreams of college to help finance her brother’s education at Cornell, and then she became a full-time wife and mother.

Touched by Tragedy

The death of Justice Ginsburg’s older sister, Marilyn, from meningitis left Justice Ginsburg an only child at the age of two. She says that her father would have spoiled her rotten had it not been for her mother, who

instilled both a love of reading and a drive to do the best she could with whatever talents God gave her. Celia made sure Justice Ginsburg did her homework and practiced her piano and regularly took her to a public library branch located over a Chinese restaurant, creating a permanent association between reading and the smell of Chinese food.

Celia was diagnosed with cervical cancer the year Justice Ginsburg entered James Madison High School. As was common in those days, the diagnosis was kept secret outside the family. Increasingly bedridden and in pain, Celia continued to encourage her daughter’s reading and studies. Justice Ginsburg sometimes did her homework at her mother’s bedside. Celia died the day before Justice Ginsburg’s graduation from high school at the top of her class.

Justice Ginsburg survived these trying times by focusing on her studies. “I knew that she wanted me to study hard and get good grades and succeed in life so that’s what I did.”² She calls her mother the bravest, strongest,³ and “perhaps the most intelligent person I ever knew.”⁴ She also credits her mother with two main life lessons: to be independent and to be “a lady” (that is, courteous in all situations). Later, when she was a lawyer arguing before the Supreme Court, Justice Ginsburg wore her mother’s jewelry for inspiration. “I think of her often when I am in challenging situations.”⁵

Falling in Love at Cornell

Armed with New York state and Cornell Scholarships,

Justice Ginsburg entered Cornell in 1950. She graduated Phi Beta Kappa in 1954, with honors in government.

At Cornell, she re-affirmed her love for good prose, studying European literature with the novelist Vladimir Nabokov. His insistence on “the right words in the right word order” greatly influenced Justice Ginsburg’s own writing. “He changed the way I read and the way I write,” she says.⁶ “To this day, I can hear some of the things that he said.”⁷

She also fell in love with Martin Ginsburg, a mischievous kindred spirit who was one year ahead of her at Cornell, who now says that he spent most of his time playing on the Cornell golf team. “He was the first boy I ever met who cared that I had a brain,” recalls Justice Ginsburg, and “we decided that whatever we would do, we would both do it.”⁸ They decided to become lawyers.

Uncle Sam interrupted the newlyweds’ plan to attend Harvard University Law School together, activating Martin, who had just finished his first year, and posting him to Fort Sill in Oklahoma. Justice Ginsburg gave up her admission to the school to stay with her husband. A year later, she gave birth to their daughter, Jane Carol, who is now the Morton L. Janklow Professor of Literary and Artistic Property Law at Columbia University Law School. The Ginsburgs’ son, James, today the chief executive officer of Chicago’s classical record company Cedille Records, was born 10 years later. In 1956, after two years in the Army, Martin returned to Harvard, and Justice Ginsburg joined him as an entering first-year law student.

Law school was essentially a men’s club in 1956. Justice Ginsburg’s class of 500 held only nine women. Women were objects of curiosity, if not condescension, frequently assumed to be trolling for lawyer-husbands. The pressure on the few women to prove their entitlement to attend law school was intense. “You felt that every eye was on you,” Justice Ginsburg recalls. “Every time you answered a question, you felt you were answering for your entire sex.”⁹ During her very first day of classes, Justice Ginsburg was awed by the response to a question volunteered by journalist Anthony Lewis, then taking law classes as part of a university fellowship. She said to herself, “He is going to be my model. I am going to speak in class as often as he does.”¹⁰

Cancer Strikes Again

Cancer again disrupted Justice Ginsburg’s studies. Martin was diagnosed with advanced testicular cancer, then considered a death sentence. Twin surgeries and massive radiation left him effectively incapacitated for an entire term. He was awake only a few hours a day. Justice Ginsburg shouldered his studies on top of her own, in addition to meeting the demands of caring for their baby. “That’s when I learned to work all night,” she wryly remembers.¹¹ Despite this triple workload, Justice Ginsburg kept up with her work as a member of the *Harvard Law Review*. Miraculously, Martin recovered fully from his cancer. The couple learned from this experience that

“nothing could happen that we couldn’t cope with.”¹²

No Law Firm Would Take Her

In 1958, Martin graduated and took a job as a tax attorney in New York City. (He is now one of the premier tax experts in the entire country.) Rather than be separated from her husband, Justice Ginsburg transferred to Columbia Law School, where she again made *Law Review*.

Although she graduated at the top of her class in 1959, no law firm would hire her. “The traditional law firms were just beginning to turn around on hiring Jews,” she remembers. “But to be a woman, a Jew, and a mother to boot—that combination was a bit too much.”¹³ Indeed, she was able to get only a judicial clerkship (with Hon. Edmund L. Palmieri of the Southern District of New York) through the back channel cajoling of her mentor and friend, constitutional law scholar Gerald Gunther. After her clerkship, Justice Ginsburg studied Swedish law as part of her work at the Columbia Law School Project on International Civil Procedure, and she co-authored a book on Swedish civil procedure for which she subsequently received an honorary doctorate from the University of Lund in 1969. In 1963, she became an assistant professor at the Rutgers School of Law in Newark, teaching civil procedure and conflicts of laws.

The Turning Point—*Reed v. Reed*

From 1868 to 1971, the 14th Amendment was not understood to guarantee equal rights and opportunities for women. During this period, the U.S. Supreme Court “never saw a gender classification it didn’t like.”¹⁴ In 1970, a group of women law students asked then-Professor Ginsburg to teach a course on women and the law. She read everything available, which, she says, “proved not to be a burdensome venture.” Her teaching put her in the vanguard of the emerging women’s rights movement, and she worked closely with a network of professors, practitioners, and idealistic young women law students seeking to change the law.

In 1971, Professor Ginsburg uncharacteristically asserted herself, volunteering to act as co-counsel in briefing for the Supreme Court case *Reed v. Reed*. *Reed* presented an equal protection challenge to an Idaho law stating that, in choosing among persons equally entitled to administer a decedent’s estate, men must be preferred over women. Justice Ginsburg’s brief (following Justice Brandeis, among her “favorite lawyers of all time”) is stocked with extralegal quotes and citations (including Swedish economist and Nobel laureate Gunnar Myrdal, French writer Simone de Beauvoir, Norwegian playwright Henrik Ibsen, and French political thinker Alexis de Tocqueville). Her brief was central in convincing the Burger Court that equal protection demands that laws concerning gender “must rest upon some ground of difference having a fair and substantial relation to the legislation, so that all persons similarly circumstanced shall be treated

alike.”¹⁵ *Reed* was the first Supreme Court decision to invalidate a law as discriminatory on the basis of sex.

The ACLU Women’s Rights Project

In 1972, Justice Ginsburg was named director of the just formed Women’s Rights Project (WRP) of the American Civil Liberties Union. The mission statement of the WRP was “to advance, simultaneously, public understanding, legislative change, and change in judicial doctrine.”¹⁶ The selection of legislative targets was aided substantially, if inadvertently, by Solicitor General Erwin Griswold’s 1973 appendix to a petition for certiorari cataloging federal statutes that differentiated on the basis of sex. The selection of judicial targets was less precise—cases arose from multiple sources across the country—but Justice Ginsburg’s preference was to pick cases that would challenge the common belief among male judges that sex-based laws operated benignly in women’s favor. Such judges thought, “Who wants to serve on juries? Women don’t have to serve on juries. Who wants to work in a bar? We’re going to save women from that.”¹⁷

To change the law, Professor Ginsburg sought to change these judges’ perceptions, selecting cases with strong facts and sympathetic plaintiffs, male and female, to demonstrate “that arbitrary differentials based on sex hurt *everybody*—men, women, and children. And that was the strategy, to build case by case.”¹⁸

During her tenure on the WRP from 1972 to her elevation to the bench in 1980, Professor Ginsburg helped author 34 briefs and personally argued six cases before the Supreme Court, including the following:

- *Frontiero v. Richardson*, 411 U.S. 677 (1973), which held constitutionally infirm federal statutes granting male service members housing and medical benefits for their spouses but denying those benefits to females unless they could show that their husbands were dependent on them for financial support;
- *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975), a case dear to Justice Ginsburg’s heart, which held that widowers as well as widows are entitled to Social Security benefits when a wage earner dies leaving a minor child in need of care;
- *Craig v. Boren*, 429 U.S. 190 (1976), the first articulation of “heightened scrutiny” for gender discrimination, overturning an Oklahoma statute that permitted young women, but not men, to buy 3.2 percent beer when they turned age 18;
- *Califano v. Goldfarb*, 430 U.S. 199 (1977), invalidating “archaic and overbroad” gender-based assumptions in the payment of Social Security benefits; and
- *Duren v. Missouri*, 439 U.S. 357 (1979), invalidating a Missouri statute exempting women from jury duty, effectively overturning *Hoyt v. Florida*, 368 U.S. 57 (1961).

As evidence of the compassion and interest in others that underlies Justice Ginsburg’s somewhat re-

served exterior, she developed personal relationships with many of the people she represented that continued long after her elevation to the Supreme Court.

Appointed to the Court of Appeals

In 1980, President Jimmy Carter named Professor Ginsburg to the U.S. Court of Appeals for the District of Columbia Circuit. (In the words of her husband’s impish biography on the Fried Frank law firm’s Web site, where he is of-counsel, she “was a lawyer before she found better work.”) Only one Republican on the Senate Judiciary Committee, Sen. Strom Thurmond of South Carolina, voted against her nomination. This time it was Martin’s turn to move to accommodate his spouse, giving up his tenured professorship at Columbia Law School and lucrative private practice at a leading New York City firm to join his wife in Washington, D.C. “I have been supportive of my wife since the beginning of time, and she has been supportive of me,” he says. “It’s not sacrifice; it’s family.”¹⁹

Taking a Seat on the High Court

In 1993, when Justice Byron White retired, President Clinton nominated Ruth Bader Ginsburg to become the second woman on the Supreme Court, joining Sandra Day O’Connor. In her confirmation hearings, she answered questions frankly and fully but refused to predict how she would rule on hypothetical Supreme Court cases. She said, “Were I to rehearse here what I would say and how I would reason on such questions, I would act injudiciously.”²⁰ But she did explain her approach to judging:

My approach, I believe, is neither “liberal” nor “conservative.” Rather, it is rooted in the place of the judiciary [...] in our democratic society. The Constitution’s preamble speaks first of We, the People, and then of their elected representatives. The Judiciary is third in line, and it is placed apart from the political fray so that its members can judge fairly, impartially, in accordance with the law and without fear about the animosity of any pressure group.²¹

The Senate confirmed her nomination by a vote of 96-3. Serving on the Supreme Court, she said, “is the highest honor, the most awesome trust, that can be placed in a judge.”²²

The addition of a second woman to the Court not only led to equal access to public restroom facilities (unbelievably, the Supreme Court’s public bathrooms, at that time, were open for men but not for women before 9 a.m.) but also incrementally expanded the Court’s outlook. “A system of justice is richer for diversity of background and experience,”²³ says Justice Ginsburg.

The Culmination of Change

As a member of the Court, Justice Ginsburg had the honor of writing the 7-1 majority opinion in *United*

States v. Virginia, 518 U.S. 515 (1996), which opened the state-sponsored Virginia Military Institute (VMI) to women and effectively concluded the equal protection revolution begun by *Reed*. Justice Ginsburg regards the VMI case “as the culmination of the 1970’s endeavor to open doors so that women could aspire and achieve without artificial constraints.”²⁴ Her opinion held that gender-based distinctions are subject to “heightened scrutiny” requiring an “exceedingly persuasive justification” to survive an equal protection challenge, the functional equivalent of strict scrutiny. The VMI case “was not really about women,” Justice Ginsburg has explained. “Instead, VMI was about a State that invested heavily in a college designed to produce business and civic leaders, that for generations succeeded admirably in the endeavor, and that strictly limited this unparalleled opportunity to men.”²⁵

The sole dissenter on the VMI case was Justice Scalia, who is Justice Ginsburg’s closest colleague on the Court. “No matter how overworked and tired I feel, he can always say things that make me laugh.”²⁶ Their friendship persists even as their ideologies may clash. “I love him. But sometimes I’d like to strangle him.”²⁷

Moving Forward

During her tenure on the Court, the ideological balance has shifted rightward. Justice Ginsburg takes a philosophical view of the shift. “You know that these important issues are not going to go away. They are going to come back again and again. There’ll be another time, another day.”²⁸ One change that she still hopes for is an express recognition in the Constitution (like Justice Hugo Black, she carries a copy of the Constitution with her at all times) of gender equality. Ours is the “oldest written constitution still in force in the world,” and it “contains no express provision regarding discrimination on the basis of gender.”²⁹

A more pressing problem concerns Justice Ginsburg’s recent surgery for pancreatic cancer, one of the deadliest cancers known. The cancer was caught early, and her chances for recovery are hopeful. Justice Ginsburg is fundamentally an optimist and says that “you never know in life whether something is going to work out to your advantage even if it seems to be a terrible impediment.”³⁰ Like her inability to find work at a New York law firm, so devastating at the time, which turned out to be a blessing in disguise. “So many times, what seemed to be ill fortune turned out to be, instead, a stroke of luck.”³¹ As one of her heroes, Abigail Adams, said, “It is not in the still calm of life, or the repose of a pacific station, that great characters are formed. The habits of a vigorous mind are formed in contending with difficulties.”³² **TFL**

Phil Schatz is a partner at Wrobel & Schatz LLP in New York City, a commercial litigation boutique, and the vice president of the Federal Bar Association’s Southern District of New York Chapter.

Endnotes

¹⁴“Kiki” has a short first “i” and is pronounced “kicky.”

²Ruth Bader Ginsburg, interview by Brian Lamb, C-SPAN, June 1, 2009, (hereafter cited as Lamb Interview), available at supremecourt.c-span.org/assets/pdf/RBGinsburg.pdf (accessed March 11, 2010).

³Danielle Burton, *10 Things You Didn’t Know About Ruth Bader Ginsburg*, US NEWS & WORLD REPORT (Oct. 1, 2007) (hereafter cited as *10 Things*), available at www.usnews.com/articles/news/national/2007/10/01/10-things-you-didnt-know-about-ruth-bader-ginsburg.html (accessed March 11, 2010).

⁴Lamb Interview, *supra*, note 2.

⁵Ruth Bader Ginsburg, *Advocating the Elimination of Gender-Based Discrimination: The 1970s New Look at Equality Principle*, presentation at Loyola (Chicago) Law School Summer Program in Rome (July 2009) (hereafter cited as Loyola Remarks).

⁶Debra Bruno, *Justice Ginsburg Remembers Her First Steps in the Law*, LEGAL TIMES, (Nov. 13, 2007) (hereafter cited as Bruno Interview), available at www.law.com/jsp/article.jsp?id=1194861838591 (accessed March 11, 2010).

⁷Ruth Bader Ginsburg, interview by Bryan Garner, *Law Prose*, 2006–2007 (hereafter cited as Garner Interview), available at [www.lawprose.org/interviews/supremecourt.php?vid=ginsburg_part_1&vidtitle=Associate Justice Ruth Bader Ginsburg Part 1 and Part 2](http://www.lawprose.org/interviews/supremecourt.php?vid=ginsburg_part_1&vidtitle=Associate%20Justice%20Ruth%20Bader%20Ginsburg%20Part%201%20and%20Part%202) (accessed March 11, 2010).

⁸Ruth Bader Ginsburg, interview by Larry Josephson, *Only in America: 350 Years of the American Jewish Experience* (Sept. 2, 2004) (hereafter cited as Josephson Interview), available at www.onlyinamerica.info/ginsburg.shtml (accessed March 11, 2010).

⁹Emily Bazelon, *The Place of Women on the Court*, NEW YORK TIMES (July 7, 2009), available at www.nytimes.com/2009/07/12/magazine/12ginsburg-t.html (accessed March 11, 2010).

¹⁰Bruno Interview, *supra*, note 6.

¹¹Bruno Interview, *supra* note 6.

¹²Bruno Interview, *supra* note 6.

¹³*10 Things*, *supra*, note 3.

¹⁴Elaine McArdle, “I remain optimistic about the potential of the United States,’ Ginsburg tells Gender and the Law Conference,” *Harvard Law School Web site*, March 24, 2009, available at www.law.harvard.edu/news/spotlight/civil-rights/ginsburg-.html (accessed March 10, 2010)

¹⁵*Reed v. Reed*, 404 U.S. 71, 76 (1971) (quoting *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920)).

¹⁶Ruth Bader Ginsburg, *Remarks for the Celebration of 75 Years of Women’s Enrollment at Columbia Law School*, 102 COLUM. L. REV. 1441, 1441 (2002) (hereafter cited as *Remarks for Celebration*).

¹⁷Ruth Bader Ginsburg, interview by Nina Totenberg, *NOW with Bill Moyers*, PBS (May 3, 2002), available at www.pbs.org/now/transcript/transcript116.full.html (accessed March 11, 2010).

¹⁸Ruth Bader Ginsburg, interview by Sandy Ogil-

vy, National Archive of Clinical Legal Education, Columbus School of Law (Aug. 17, 2007), available at lib.law.cua.edu/nacle/Transcripts/Ginsburg.pdf (accessed March 11, 2010).

¹⁹Stephen Labaton, *The Man Behind the High Court Nominee*, N.Y. TIMES (June 17, 1993), available at www.nytimes.com/1993/06/17/us/the-man-behind-the-high-court-nominee.html?pagewanted=1 (accessed March 11, 2010).

²⁰Ruth Bader Ginsburg, excerpts from “Nomination of Ruth Bader Ginsburg, to be Associate Justice of the Supreme Court of the United States,” Hearings Before the Committee on the Judiciary, U.S. Senate, 103rd Congress, at 53–56 (1994), available at www.uscourts.gov/outreach/topics/sctwo.html (accessed March 11, 2010).

²¹*Id.*

²²Malvina Halberstam, *Ruth Bader Ginsburg: The First Jewish Woman on the United States Supreme Court*, 19 CARDOZO L. REV. 1441, 1453 (1998), quoting *The Supreme Court: Transcript of President’s Announcement and Judge Ginsburg’s Remarks*, N.Y. TIMES, June 15, 1993, at A1.

²³Ruth Bader Ginsburg, “The Supreme Court: A Place for Women,” Wilson Lecture delivered at Wellesley College (Nov. 13, 1998), available at www.wellesley.edu/PublicAffairs/Releases/1998/111098.html (accessed March 11, 2010).

²⁴Loyola Remarks, *supra*, note 5.

²⁵Loyola Remarks, *supra*, note 5.

²⁶Joan Biskupic, *Ginsburg, Scalia Strike a Balance*, USA TODAY (Dec. 25, 2007), available at www.usatoday.com/news/washington/2007-12-25-ginsburg-scalia_N.htm (accessed March 11, 2010).

²⁷Joan Biskupic, *Justice Scalia, Revealed*, WOWOWOW: THE WOMEN ON THE WEB (Nov. 24, 2009), available at www.wowowow.com/politics/justice-scalia-revealed-409449 (accessed March 11, 2010).

²⁸*A Conversation with Justice Ruth Bader Ginsburg*, 56 REC. ASS’N B. CITY N.Y. 1, 19 (2001).

²⁹Loyola Remarks, *supra*, note 5.

³⁰Bruno Interview, *supra*, note 6.

³¹Ruth Bader Ginsburg, Interview for *Questions Presented, Ruth Bader Ginsburg ’59*, available at www.law.columbia.edu/magazine/153269/ruth-bader-ginsburg-59 (accessed March 11, 2010).

³²*Remarks for Celebration, supra*, note 16.