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PART I
SHAPING A LEGACY

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Notes on a Life

Nina Totenberg

Early in the fall of 1971, I was pretty new to the Supreme Court beat, and I came upon a brief that I simply could not understand. The brief argued that the Fourteenth Amendment guarantee of equal protection of the law applied not just to racial minorities, but also to women.¹ “How can that be?” I wondered, since the Fourteenth Amendment was enacted after the Civil War specifically to protect African Americans.

I flipped to the front of the brief and saw it had been written by one Ruth Bader Ginsburg, a Rutgers Law School professor. So, I called her. The short answer to my question was that the Fourteenth Amendment says no “person” shall be denied the equal protection of the law;² and women, after all, are people.

But I got a lot more than that. She spent an hour filling me in, teaching me, and answering my undoubtedly very stupid questions. I emerged from a tiny phone booth in the Supreme Court press room like a goose primed to have her liver removed for foie gras. We soon became phone friends.

I *met* RBG, as she is known inside the Court, at some rather boring legal conference in New York. It was so boring, in fact, that we undertook a different task – shopping.

I have a vivid memory of our cab ride in New York that day. Ginsburg had applied for a federal district-court judgeship, and the New York senators’ screening committee had interviewed her, telling her she was not qualified because she had not handled any major securities litigation. I remember Ginsburg, flinty-eyed, muttering, “And I wonder how many gender-discrimination cases they have handled.”

It was classic RBG – tough and to the point, with a touch of gallows humor.

The other authors in this book will tell you much about Ruth Bader Ginsburg’s career, background, legal journey, and jurisprudence. I want to hit just a few highlights, and add a few stories you won’t hear elsewhere.

Ruth Bader Ginsburg is the leading liberal voice of dissent on the modern Supreme Court. But she arguably made her most profound mark on the law before becoming a judge, as a pioneer for women's rights. Put simply, she changed the way the world is for American women.

For more than a decade, until her first judicial appointment in 1980, she led the fight in the courts for gender equality. When she began her legal crusade, women were treated, by law, differently from men. Thousands of state and federal laws restricted what women could do, barring them from jobs, and even from jury service. By the time she donned judicial robes, however, Ruth Ginsburg had worked a revolution.

For those readers not familiar with the Ginsburg bio, let me reprise it quickly. She has lived a life that is both blessed and benighted. Born and raised in Brooklyn, Ruth Joan Bader lived a comfortable, though hardly plush, life as the daughter of a not very successful furrier-turned-haberdasher. She went to public schools and excelled as a student – and a baton twirler and a majorette. (She still keeps a baton in her chambers still and will, on occasion, twirl it for a visitor.)

By all accounts, her mother was the driving force in her life, and when Ruth was thirteen, her mother fell ill with cancer. Mrs. Bader remained sick, often bedridden, until her death the day before her daughter's graduation as valedictorian from high school. At Cornell, Ruth Bader, then seventeen, met Martin (a.k.a. Marty) Ginsburg, the well-off, happy-go-lucky son of a corporate executive. She often said that he was the only person she dated who was interested in her brain. Cornell, in those days, was something of a party school. The future justice did a fair amount of studying in the bathroom back then to avoid being seen as a grunt. She again finished first in her class.

Ruth and Marty were married at his parents' home. His mother would become like a second mother to her daughter-in-law, and on the wedding day, the senior Mrs. Ginsburg offered some advice on the secret of a happy marriage: "It is simply that every now and then it helps to be a little deaf." The advice was so good, recalls RBG, that she followed it "not just in dealing with my dearly beloved spouse but with my colleagues at the Court."

By 1958 the young Ginsburgs were at Harvard Law School, juggling schedules and their three-year-old daughter Jane.

We all think of Justice Ginsburg as the tiny, elegant octogenarian she is today. But back then she was "exotically and ravishingly beautiful," in the words of one of her male classmates. So much so that when school opened, and a professor, in one of those giant classrooms, first called on "Mrs. Ginsburg," there was an audible and collective "groan" of male disappointment in the room.

Then terror struck. Marty Ginsburg was diagnosed with testicular cancer. It had spread to four lymph nodes, and doctors told the couple that his chances of survival were almost nil. The Ginsburgs decided to try everything, including two draconian operations and daily radiation therapy. As Marty later put it, “that left Ruth with a three-year-old child, a sick husband, and *Law Review*,” all of which she did with aplomb, as well as collecting notes from Marty’s classes (he was a year ahead of her) and typing his papers. The happy ending of this story is that Marty Ginsburg survived, graduated with honors, and went to New York to join a big law firm.

The couple, however, was not sure yet that he would live for long, so wife and daughter moved with Marty, with Ruth doing her last year of law school at Columbia, where she again graduated at the top of her class. Harvard refused to give her a degree, and when it sought to amend that many years later, Ginsburg said no.

It is hard today to imagine the kind of discrimination Ginsburg endured because of her sex. How, despite her top place at Columbia, she could not find a job with a law firm. How she was recommended for a Supreme Court clerkship, but Justice Felix Frankfurter wouldn’t even interview her. How she wore loose clothes to hide her pregnancy while teaching at Rutgers for fear she would not get tenure if they knew she was pregnant, and how she was the first woman to teach at Harvard Law School but was not offered a permanent position.

Ginsburg views those experiences with some grace, observing that if she had been able to follow a more traditional career path, she might not have had the headline-grabbing career she ended up with.

She tells some pretty funny stories about her life as a young lawyer. She finally got a clerkship with Judge Edmund L. Palmieri, having been turned down by, among others, Judge Learned Hand, who told a mutual friend he couldn’t hire a woman because he couldn’t swear in front of her. As it turned out though, Ginsburg’s boss, Judge Palmieri, would often give Hand a ride home from work, and Hand would sit in the front seat singing sea shanties and swearing up a storm. Ginsburg, sitting in the backseat, was transfixed. She finally asked why, if Hand said “whatever came into his head” in the car, he had refused to consider her as a law clerk on grounds that he wouldn’t feel free to speak without censoring himself? Replied Hand: “Young lady, I am not *looking* at you.”

Bucking her up on the sidelines during all such madness was Ginsburg’s husband Marty. The Ginsburg marriage was one of those marvels of life, a fifty-six-year marathon of love and support.

Before law school Marty was drafted, and they spent two years at Fort Sill, Oklahoma, a diversion that he would later say proved a stroke of good fortune.

“We had nearly two whole years far from school, far from career pressure, and far from relatives, to learn about each other and begin to build a life,” he later said.

Among the things he learned was that “Ruth was a fairly terrible cook, and for lack of interest, unlikely to improve.” So Marty, “out of self preservation” learned to cook. He took the Escoffier cookbook the couple had received as a wedding present and started at the beginning, working all the way through it.

Marty Ginsburg, in addition to becoming a famous tax lawyer, became a famous chef. The couple’s children, at an early age, banished their mother from the kitchen.

James, their second, was an unexpected surprise ten years after Jane was born, since Marty had been told his radiation treatments had likely made him sterile.

Ruth and Marty Ginsburg complemented each other in ways too numerous to list. She was shy, introverted, and soft-spoken. He was witty and outgoing. Typical was his puckish description of why, after becoming a law professor, he moved teaching posts, from Columbia Law School to Georgetown Law School. His wife, he deadpanned, had gotten “a good job” in Washington.

Marty Ginsburg was always promoting his wife. Clinton administration officials said it was his relentless and artful behind-the-scenes lobbying that brought RBG’s name into the mix of potential Supreme Court nominees in 1993.

At the end of his life, facing a losing battle with cancer, Marty wrote to his wife that he had “admired and loved” her almost from the moment they met. Turning introspective about his own life, he told a friend, “I think the most important thing I’ve done is to enable Ruth to do what she has done.”

The day after Marty died, an ashen-faced Justice Ginsburg announced her opinion for the Court in one of the Term’s major cases. She was on the bench, she told colleagues, “because Marty would have wanted it this way.”

The Ginsburgs were partners not just in marriage but also in law. Fittingly, it was a tax case that Marty came across that led his wife into the area of law for which she became so famous.

The case involved a traveling salesman in Oklahoma named Charles Moritz who had claimed a dependent-care deduction on his taxes for money spent to take care of his eighty-nine-year-old mother while he was on the road. The IRS had disallowed the deduction, noting that Congress had allowed it only for women and divorced or widowed men. Charles Moritz was single and had never been married, so the IRS said he was ineligible. Moritz represented himself in the tax court, arguing that if he were a dutiful daughter instead of a dutiful son, he would be allowed the deduction.

The tax court concluded that the Internal Revenue Code was immune from constitutional challenge – a proposition that Marty Ginsburg, tax lawyer extraordinaire, found “preposterous.”

Walking into his wife’s workroom at home, he dropped the decision on to her desk, suggesting that she might find it “interesting.” Soon she emerged with three words: “Let’s take it.” Marty called Moritz, and the couple began working on the brief, he from the tax perspective, she from the constitutional-law perspective.

According to Marty Ginsburg, for his wife, this was “the mother brief.” She had to sit down and think through the issues and the remedy. The solution was to ask the court not to invalidate the statute but to apply it equally to both sexes. The Ginsburgs won in the lower court, and the government appealed to the Supreme Court. In its petition for certiorari, the government said that the lower court’s decision cast a cloud of unconstitutionality over literally hundreds of federal statutes. And to prove its point, the government appended to its brief a list of these hundreds of statutes.³ The government had no idea it was handing Ginsburg a road map, for these were the very laws that she would target to litigate and challenge over the next decade.

By the 1970s, now a professor at Columbia, Ginsburg had founded a special project on women’s rights at the American Civil Liberties Union (ACLU) and was leading the battle in the courts against sex discrimination.

Her battle plan was characteristically cautious, precise, and single-mindedly aimed at one goal – winning. Knowing that she had to persuade male, establishment-oriented judges, she often picked male plaintiffs, and she particularly liked Social-Security cases because they illustrated how discrimination against women can harm men too. For example, in 1975, she persuaded a unanimous Supreme Court to strike down a law that denied survivors benefits to widowers but allowed them for widows.⁴

As an advocate in court, Ginsburg was a diminutive, even-toned powerhouse. She was organized, thoroughly prepared, and as one observer put it, “tough as nails.” After one argument at the Supreme Court, a colleague asked her why she had twice avoided answering a question put to her by Justice John Paul Stevens. “Because,” she replied coolly, “if I had answered him, my answer might have lost Justice [Lewis] Powell’s vote, and if I didn’t answer Stevens, I was going to get his vote anyway.”

By the end of the 1970s, Ginsburg had argued six cases in the Supreme Court, won five, and written briefs in dozens of other cases. She revolutionized the law.

In her own life, too, Ginsburg was fearless about pressing the cause for women. When she was teaching at Rutgers, she pointed out to the dean that

the women faculty members were not paid as well as the men. The dean demurred, noting that her husband, after all, “had a good job.” So Ginsburg joined a class-action suit against Rutgers, resulting in enormous salary increases in settlement of the suit. A couple of years later, while on the Columbia law faculty, she gave the Columbia administration fits too. When school officials decided to save money by sending layoff notices to twenty-five maids but not a single janitor, Professor Ginsburg entered the fray. As a result, no maids were laid off.

And if those weren’t enough, she joined a class action against the university over disparate pensions for female and male faculty.

Over the years there have been many occasions in which Ginsburg, through actions, not words, has stood up for something she felt strongly about. Most recently, after the Supreme Court ruled in two gay marriage cases, she became the first sitting Supreme Court justice to preside at a same-sex marriage ceremony.

When Justice Antonin Scalia calls her “fearless,” he means not just intellectually fearless, but physically as well. Scalia vividly remembers being with Ginsburg at one of those flossy summer teaching gigs justices get invited to. This one was on the French Riviera. “And she went parasailing!” he recalls in amazement. “This little, skinny thing. You’d think she’d never come down. She was sailing off a motor boat . . . way up in the sky. My God, I would never do that.”⁵

Being a judge was always Ginsburg’s objective, as far back as when I first knew her when she was in her thirties, but getting there took a while. In 1980 she was appointed to the Court of Appeals for the District of Columbia, where she served with distinction for more than a dozen years. And then, in 1993, there was a Supreme Court vacancy.

In the beginning of President Bill Clinton’s search for a nominee, she was not at the top of his list. Mario Cuomo, George Mitchell, and Stephen Breyer (later to get the nod) were all ahead of her initially. But one of the things that people greatly underrate about Ginsburg is her ability to perform. She may be quiet, shy, even hard to talk to, but put her on a stage, and this woman knows how to deliver. That’s what she did in her interview with Clinton, and his aides said he quite simply was “smitten.”

Ginsburg has another trait that few appreciate. She knows how to handle the press, even use it when she wants to. In her two bouts with cancer, she knew that hiding her condition or treatment would only provoke speculation, so she was relatively forthcoming (for a Supreme Court justice) in releasing information.

Conversely, in the summer of 2013, after she turned eighty, she knew speculation would soon accelerate over her possible retirement. So, she embarked

on a not-so-quiet campaign to head off such speculation by granting a bunch of interviews. Time after time, she responded that she had no intention of retiring, unless and until her health prevented her from doing the job. Yes, she admitted, there were some things she had given up – water skiing, for example – but not her court work.

Indeed, if anything, Ginsburg seems to have found a voice stronger than ever. It is the voice of dissent.

She has acknowledged that she regrets going along with the 2009 decision that upheld the Voting Rights Act but sowed the seeds for overturning it.⁶ And when the Court four years later did in fact overturn the key section of the law requiring preclearance for certain states, her dissent was full throated.

“The sad irony of today’s decision lies in its utter failure to grasp why the [Voting Rights Act] has proven effective.... Throwing out preclearance when it has worked and is continuing to work to stop discriminatory changes [in voting procedures] is like throwing away your umbrella in a rainstorm because you are not getting wet.”⁷

“Some of my favorite opinions are dissenting opinions,” she once told me. “I will not live to see what becomes of them, but I remain hopeful.”

In one case she did live to see her dissent become the law of the land. In the 2007 case of *Ledbetter v. Goodyear Tire & Rubber Co.*,⁸ the Court, by a 5-to-4 vote, gutted a major provision of the civil rights law barring employment discrimination. Ginsburg’s dissent blasting the majority essentially called on Congress to overrule the decision. Presidential candidate Barack Obama campaigned on the promise to do just that, and when he was elected, with large democratic majorities in both houses, the Lilly Ledbetter Fair Pay Act was the first statute enacted by the new Congress and signed by the new president.⁹ Ginsburg has a framed copy of the act in her chambers.

Ginsburg is not without victories. At least one had to be seen to be fully appreciated. The case involved the strip-search of a teenage girl named Savana Redding after a classmate told the school vice principal that Redding was carrying unauthorized prescription-strength ibuprofen. Redding’s mother sued the school district for violating Savana’s right to be free from unreasonable searches. School officials found no drugs on the girl.

The Court’s conservatives seemed to think there was no big deal to this. And fellow Clinton appointee, Stephen Breyer, opined, “I’m trying to work out why this is a major thing to, say, strip down to your underclothes, which children do when they change for gym.... How bad is this?”¹⁰

Every woman in the press section could hardly believe her ears, remembering what it is like to be a pubescent and shy teenage girl, with a developing body.

As for Ginsburg, she looked like she might explode. She interrupted, her voice dripping with exasperation, to note that Redding had been forced to “shake (her) bra out, shake, (and stretch) the top of her underpants” and, even after school officials found nothing, they made Redding sit outside the vice principal’s office for two hours, putting her in a “humiliating position.”¹¹ Ginsburg’s fury seemed to turn the tide, and when the decision came out, the Court held, 8 to 1, that the search violated the Fourth Amendment.¹²

Ginsburg’s most notable majority opinion came just three years after her appointment to the Supreme Court: her 7-to-1 opinion declaring that the Virginia Military Institute (VMI) could no longer remain an all-male institution.¹³ True, said Ginsburg, most women, indeed most men, would not want to meet the rigorous demands of VMI, but the state, she said, could not exclude women who could pass muster.

“[The state] may not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females,” she wrote. “[G]eneralizations about ‘the way women are,’ estimates of what is appropriate for *most women*, no longer justify denying opportunity to women whose talent and capacity place them outside the average description.”¹⁴

Let me say here that in all the years I have known Ginsburg, I have failed to pry out of her any exclusive information, with one exception. I learned from her quite recently that Justice Sandra Day O’Connor was originally assigned the VMI opinion, but she declined, telling the senior assigning justice, John Paul Stevens, that the opinion, by right, should go to Ginsburg.

Ginsburg was forever grateful to O’Connor, loved serving with her, viewed her as a kind of sister “in law,” and was amused by the high-powered lawyers who confused the two women justices – despite the fact that the two have never looked anything like each other.

People often find it odd that she also loves the company of Justice Antonin Scalia, despite their more than frequent disagreements and sometimes vituperous footnote battles. But Ginsburg served with Scalia on the D.C. appeals court, and she loves that he makes her laugh. They share a love of opera, and they often have spent New Year’s Eve together.

Ginsburg has been a generous friend to me, especially when my late husband was terribly ill for nearly five years. She often would scoop me up and take me somewhere with her to get rid of my blues. But she and I know the boundaries.

On one occasion in 2010, I really felt obligated to push them. I was interviewing Ginsburg at the 92nd St. Y in New York on stage. It was just days after President Obama had excoriated the conservative Court majority for its campaign-finance decision, *Citizens United v. FEC*.¹⁵ Justice Samuel Alito, sitting