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RUTH BADER GINSBURG WITH LINDA GREENHOUSE

A Conversation with Justice Ginsburg

This transcript is adapted from the inaugural Gruber Distinguished Lecture in Women's Rights, hosted by the Yale Law School. The Lecture took the form of a dialogue between Justice Ginsburg and Linda Greenhouse at Yale University's Battell Chapel on October 19, 2012.

LINDA GREENHOUSE: It's a great pleasure and treat to be here in this inspiring setting with my inspiring conversation partner. We have the next hour to engage in a wide-ranging conversation that will play off some of the themes of the wonderful panel discussion and some other topics as well. I want to start with a case that Judith Resnik finished with in her panel presentation[1]: the *M.L.B.* case.[2] Justice Ginsburg's majority opinion for the Court held that this individual had a constitutional right to receive a trial transcript that she could not afford and that it should be paid for by the state, so that she could take an appeal from a decision that had stripped her of her parental rights. And the reason I want to start with that case is that it wasn't about women's rights per se. It exemplified what I think is sometimes lost a little bit in the description of Justice Ginsburg as the founder of constitutional women's rights. What her jurisprudence stands for is equality writ large—as large and as capacious as possible. So, in this case, which I'll ask her to describe, it's not a matter of checking a box of equality, a box of liberty, or a box of due process, but really looking at the Constitution as a whole—the doctrine was not particularly friendly to the holding of this case—and extracting meaning from it in the deepest possible way. *M.L.B.* is one of your favorite cases, as I've heard you say before. So, if you could, talk a little bit about the challenge of reaching the holding that you found in that case.

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1. Judith Resnik, *Equality's Frontiers: Courts Opening and Closing*, 122 YALE L.J. ONLINE 243 (2013), http://yalelawjournal.org/2013/02/19/resnik.html.

2. M.L.B. v. S.L.J., 519 U.S. 102 (1996).

JUSTICE RUTH BADER GINSBURG: *M.L.B.*, as Linda said, involved a woman who had been stripped of her parental rights. In order to appeal that decision, she had to have a transcript. The law as it then existed was that, if you had a criminal case and were too poor to purchase a transcript, even if it was a petty offense, you were entitled to a transcript at state expense. But there was a sharp line between criminal cases and civil cases. In civil cases, you had to fend for yourself or receive the aid of a charitable organization, a legal-aid society, for example. The state provided no money for the transcript. So the challenge was to get the Court to make a small breach in the line between "yes" in criminal cases and "no" in civil cases—a small breach, but one that had growth potential. The opinion employs an amalgam of due process and equal protection, comparing first what was at stake for M.L.B., loss of her parental rights, and what was at stake for a petty offender who did not even face jail time. The right at stake—to be a parent—was essential to M.L.B. The opinion emphasizes what retaining parental status meant to M.L.B. and how artificial the distinction between civil and criminal cases was in this context. Another example of the civil/criminal case divide: Currently, in immigration cases where the government is seeking to deport or remove someone from the United States, the proceeding is labeled civil. But for the individual who is feeling the weight of the state's power, being cast out of the country is no less devastating than conviction of a petty offense.

GREENHOUSE: So, in *M.L.B.*, first you have to find what's at stake—to persuade your colleagues that something was at stake, even though it was labeled "civil."

GINSBURG: Yes. It was a small beginning. M.L.B. had the good fortune to be represented by counsel. A lawyer had volunteered to represent her. But she lacked the money to buy a transcript, and she could not appeal without it.

GREENHOUSE: Of course, she didn't persuade everybody in that case.

GINSBURG: I think it was six to three.

GREENHOUSE: Six to three. And there was a very vigorous dissenting opinion, which asked, "Where does this right come from? Where does this substantive due process right come from?"

GINSBURG: We had the infusion of equal protection—anyone of means would, of course, have the right to appeal. M.L.B. lacked that right because she was too poor to pay for a transcript.

GREENHOUSE: She had a nominal right to appeal, but not functional access to court. So, at the bottom line, what that opinion gave this individual was access to court to vindicate whatever right she would have had.

GINSBURG: The *M.L.B.* opinion explained that the state recognized the importance of the right at stake, because, to deny M.L.B. parental status, the state had to prove she was an unfit parent by clear and convincing evidence—not just a preponderance of the evidence, the ordinary standard in civil cases. The proof standard wasn't beyond a reasonable doubt, but it was higher than the ordinary standard. We used the elevated clear-and-convincing-proof standard to show that M.L.B.'s case was no ordinary civil matter. And we made the opinion comprehensible by drawing on the comparison between a petty offender and a woman about to lose her parental rights.

GREENHOUSE: I want to emphasize something that Robert Post said in his introduction and that Kenji Yoshino alluded to in his panel presentation,[3] which is the central radicalism of your project. You were able to think outside the boxes that were part of the law that you learned at Harvard Law School and that you imbibed from the society of the 1950s and 1960s. We were having dinner last night in the company of Judge Guido Calabresi, and he told an interesting story. He said that, at the time of his confirmation hearing to be a judge on the Second Circuit, one of the senators said to him, "Have you ever belonged to a discriminatory organization or taken part in a discriminatory institution?" And Judge Calabresi said, "Well, yes." The senator looked shocked and asked him for an explanation, and Judge Calabresi said, "Well, I went to Hopkins Grammar School, and that was all boys. And I went to Yale College, and that was all men. And I had a Rhodes Scholarship, and that was not open to women. So I basically grew up in a discriminatory world." And the senator said, "No, no, that's not what I meant." But you grew up in that world. I grew up in that world.

GINSBURG: Linda, I would like to come to the defense of Harvard Law School Dean Erwin Griswold. It's true that, when women numbered under

3. Kenji Yoshino, *Sex Equality's Inner Frontier: The Case of Same-Sex Marriage*, 122 YALE L.J. ONLINE 275 (2013), http://yalelawjournal.org/2013/02/19/yoshino.html.

twenty at Harvard Law School, Dean Griswold hosted a dinner at his home for the women in the first-year class. Each of us had a distinguished professor as an escort. Mine was Herbert Wechsler. It was intimidating. Professor Wechsler looked to me more like God than any man I had seen. But, as the Dean said, there were still "doubting Thomases" on the Harvard faculty, people who questioned the wisdom of admitting women. I came there in 1956. The Law School began admitting women in 1950. The Dean asked us this question: "Why are you at the Law School occupying a seat that could be held by a man?" He didn't mean to wound or embarrass the women. He hoped the question would arm him with stories from the women themselves about how they would use their law degrees. Dean Griswold was hardly known for his sense of humor. And he was one of the prime supporters of the admission of women to the Harvard Law School. In fact, he figured out how much it was going to cost. They would have to install a women's bathroom, and he had budgeted exactly what the renovation would cost.

GREENHOUSE: You commented earlier—and I've heard you say this before—that you were lucky to be coming of age and working in the 1970s, because the culture was changing, the time and place were changing and were in motion. So, whereas the great, liberal, progressive Warren Court had not recognized a claim to women's equality as having anything to do with the Constitution, the Court you spoke to was, to some degree, ready to hear you.

When we think about cultural shifts, I want to ask you to reflect on a case you mentioned in your response at the panel,[4] the *Struck* case.[5] That was the case of the Air Force woman in 1970 who, when she became pregnant, was told by the military, "Go to the military hospital and have an abortion, or we're going to throw you out of the military." Can you imagine before *Roe v. Wade*,[6] in 1970, your government telling you to have an abortion? Fast-forward to everything we've been living with today in reproductive rights. I'd like to hear more about the *Struck* case, but also about the relationship between law and culture, between making law and living in the culture.

GINSBURG: I was tempted to open the brief for Captain Susan Struck by saying her problem in Vietnam was that she picked the wrong form of recreation. Had she been an alcoholic or a drug addict and reported herself, she

4. Ian Shapiro, *Still Speaking in a Judicial Voice: Ruth Bader Ginsburg Two Decades Later*, 122 YALE L.J. ONLINE 257, 263-65 (2013), http://yalelawjournal.org/2013/02/19/shapiro.html.

5. Struck v. Sec'y of Def., 409 U.S. 1071 (1972), *vacating* 460 F.2d 1372 (9th Cir. 1971).

6. 410 U.S. 113 (1973).

would have been put into a rehabilitation program, and she likely would have remained there for many weeks more than the period surrounding childbirth, for which Captain Struck was seeking leave. It was, I thought, the perfect first reproductive-choice case to come before the Court. The government was telling Captain Struck, "You cannot exercise your choice for childbirth unless you give up your chosen career." She had the choice of leaving the service or having an abortion, available to her on the military base pre-*Roe v. Wade*. She became pregnant in 1970, if I recall correctly. Susan Struck's position was, "It's my decision to make. The government cannot dictate my choice. It cannot force me to give up my career if I make the choice for childbirth." The Court had agreed to hear her case. She had lost in the district court and lost again, two to one, in the Ninth Circuit. But her diligent lawyers got her discharge stayed each month. She remained in the military striving to continue in service rather than being cast out.

After the Court agreed to hear her case, just as our brief was filed, the then-Solicitor General, my dean at the Harvard Law School, filed a suggestion of mootness. He had convened the military brass and counseled: waive Captain Struck's discharge, and then change the regulation that makes pregnancy an automatic ground for discharge. Captain Struck was allowed to stay in service. Our Solicitor General, Dean Griswold, urged that the case had become moot because Captain Struck had gained all the relief she was seeking. When I received the Solicitor General's motion to remand for a determination of mootness, I called Captain Struck and asked, "Is there anything you're missing so we can claim the case is not moot?" "Well," she first said, "I've gotten all my pay and allowances." Then she thought further. "My dream," she said, "is to become a pilot. But the Air Force does not give flight training to women." We laughed, because we knew, in 1972, that her dream was indeed impossible. Society hadn't changed so much that we could mount a winnable case about the exclusion of women from flight training. Susan Struck's case was dismissed as moot, and, instead of her case, *Roe v. Wade* became the lead reproductive-choice case.

GREENHOUSE: Your clients were never abstractions to you, obviously. You involved yourself in their lives. You involved yourself with their children. And you were able in your litigation strategy to tell their stories in a compelling way.

GINSBURG: None of the cases I litigated were test cases in the sense that plaintiffs were sought out by an advocacy organization. Consider Sally Reed,[7] whose son died tragically: it was a suicide. Sally and her husband were divorced. When the boy was young—as lawyers say, "of tender years"—Sally had custody. When the boy reached his teens, the father applied for custody because, he argued, now the boy must be prepared to live in a man's world. The court gave the father custody rights. Sally was unhappy about that. And when the boy committed suicide, she applied to be appointed administrator of his estate. Her husband applied some days later. The probate judge in Boise, Idaho, explained that the probate code was dispositive. It read: "As between persons equally entitled to administer a decedent's estate, males must be preferred to females." Sally Reed, on her own dime, engaged a Boise lawyer. With his aid, she took her case through three levels of the Idaho courts. The remarkable and heartening thing is: Sally Reed was an everyday woman who thought she had suffered an injustice and believed that the system of justice in the United States was capable of righting that wrong. The plaintiffs I represented were extraordinary people in the sense that they had faith in our system of justice and had the bravery to test that faith. But they were also everyday people like Sally Reed, who made her living by taking care of elderly or disabled persons in her home.

Weinberger v. Wiesenfeld[8] is another case in point. The plaintiff, Stephen Wiesenfeld, was a man whose wife had died in childbirth. He wanted to attend to his newborn son personally. He could manage that by earning up to the Social Security limit and getting Social Security benefits to carry him through. But those benefits were available only to a widow, not a widower.

Frontiero[9] may be the case featured in law school casebooks more than any other. Sharron Frontiero was an Air Force officer; the young man she married was a college student. She wanted to get the housing allowance available to married male officers, and she also wanted her spouse to have access to the medical and dental facilities on post. Again, those facilities were available only to the spouses of male servicemembers. Why? Because the man was considered the breadwinner, the supporter of the family. The woman, if she earned anything, was considered to be earning income just for herself. As pin-money earner, she didn't need family benefits or a housing allowance. Sharron Frontiero brought her case to the Southern Poverty Law Center office—again,

7. *See* Reed v. Reed, 404 U.S. 71 (1971).

8. 420 U.S. 636 (1975).

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

she was an everyday person who believed we have a system of justice capable of righting what she regarded as a denial of her equal citizenship stature.

GREENHOUSE: Do you think people still believe that today?

GINSBURG: I hope so. I hope so. Lilly Ledbetter perhaps fits the bill.[10]

GREENHOUSE: Back to the *Reed* case for a minute. The brief that you filed with the Court for the ACLU for Sally Reed—this is very famous, and it is in some of the casebooks—is known alternatively as the "grandmother brief," or the foundational brief of the sex-discrimination argument. And you instruct the Court about the nature of sex discrimination, about the historic role of women, about the current role of women. You make big claims. You ask for big relief. It's a fascinating document. I've assigned it to students. And I thought of it when I went back in preparing for this and read your testimony in your Senate confirmation hearing in 1993, when you invoked a stance of incrementalism as a judge. You quoted Justice Cardozo as saying, "Justice is not to be taken by storm. She is to be wooed by slow advances."[11] So I'd just like to put Ruth Ginsburg the advocate and Ruth Ginsburg the judge side by side and talk about that trajectory, because I think it's pretty interesting.

GINSBURG: The major problem that gender-equality advocates faced in the 1970s was the perception that laws differentiating between men and women did so for a benign purpose, to protect the woman. The audience I was addressing was a virtually all-male federal bench. Members of that audience thought of themselves as good fathers, good husbands. They knew that race discrimination was a bad thing. But the idea of gender discrimination was something new to them. They thought the law operated benignly in women's favor, for example, by exempting them from jury service or barring them from working at night, as bartenders, or in hazardous occupations. Restrictions we now see as discriminatory, keeping women in a confined space, were regarded as designed to protect and care for the weaker sex. So, we had to be clear in showing, concretely, how these classifications harm everyone: men, women, and children.

One other observation: *Reed* was decided in 1971. If you read the brief, you will notice references to two decisions of the West German Constitutional

10. *See infra* text accompanying note 32.

11. BENJAMIN N. CARDOZO, THE GROWTH OF THE LAW 133 (1924).

Court.[12] There's much discussion today about the utility of references to foreign law. One of the West German cases cited in the *Reed* brief involved a provision in the German Civil Code that instructed, if the parents disagree about the education of a child, the father decides. The West German Constitutional Court held that instruction unconstitutional under the equality norm contained in their post-World War II constitution. The other case involved a certain kind of estate in land that had to be inherited whole. That is, there would be one inheritor—if there were twelve children, the whole estate went to the eldest male. It didn't matter whether the eldest male had three sisters who were older. That, too, was declared to be in violation of the equality norm of the West German Constitution.

Now, I never expected the Supreme Court to cite the decisions of the West German Constitutional Court. But it seemed to me that, if I could show them that another constitutional court had seen the light—our Court was looked to as a leader in advancing liberty and equality—they might ponder how far behind the West German Constitutional Court the U.S. Supreme Court could be. The comparative side-glances may have had a psychological impact on the Justices.

GREENHOUSE: Do you think it did? They don't cite it, right? But subliminally you think that it did shake them awake a little bit.

GINSBURG: Yes. And, of course, they were aware of the sea change in what women were doing. I should say that the only chance the Warren Court had to rule on the constitutionality of gender-based classifications—and it was a good one—arose in 1961, in Gwendolyn Hoyt's case.[13] Gwendolyn Hoyt was what we would today call a battered woman. She had an abusive, philandering husband. One day he had so humiliated her—the scene resembled the tragic circumstances described by Melville in *Billy Budd*,[14] when seaman Billy is unjustly accused by officer John Claggart. Billy stammers, unable to form words. He strikes Claggart, and the blow results in Claggart's death. Well, Gwendolyn Hoyt spied her son's baseball bat in the corner of the room. She grabbed it and, with all her might, brought it down on her husband's head. He fell. End of the humiliation. End of the husband. Beginning of the murder prosecution. Gwendolyn Hoyt's notion was that, if women served on her jury, they might better understand her state of mind. They might not acquit her, but

12. Brief for Appellant at 55, *Reed*, 404 U.S. 71 (No. 70-4).

13. Hoyt v. Florida, 368 U.S. 57 (1961), *overruled by* Taylor v. Louisiana, 419 U.S. 522 (1975).

14. HERMAN MELVILLE, BILLY BUDD, SAILOR (1924).

they might convict her of the lesser charge of manslaughter, rather than murder. Florida law at the time didn't put women on the jury rolls. But if a woman wanted to serve, she could go to the clerk's office and sign up. Think how many men would sign up if they weren't obliged to serve! Hoyt was convicted of murder by an all-male jury. The Supreme Court held that the exclusion of women was constitutional, because women were "the center of home and family life," so they shouldn't be burdened with jury duty.[15] Gwendolyn Hoyt, as you can imagine, didn't understand that rationale.

During the 1970s, the Supreme Court decided two cases involving the exclusion or exemption of women from service or juries, one from Louisiana[16] and the other from Missouri.[17] By then, the Court understood that, if you don't require women to serve on juries just as you require men to serve, you are treating women as expendable, not really needed by our system of justice. But if a woman is a full citizen, she has obligations as well as rights. The law that said women are automatically exempt from jury duty diminished women's stature as citizens. That was the message the Warren Court did not comprehend. Society in 1961 hadn't moved far enough for the Court to appreciate that it was no favor to a woman to treat her as a child, a citizen who doesn't have civic obligations. So that was the *Hoyt* case in 1961. A huge societal change occurred in the span of a decade. And that change, propelled by a revived feminist movement, prepared the Court to say, unanimously in 1971, that a law preferring males to females as estate administrators could not survive review for constitutionality.[18]

GREENHOUSE: Of course, the Burger Court was unable to extend the jury cases to the military. And when the challenge came to the all-male draft, similar arguments were made.[19]

GINSBURG: The all-male-draft case arrived at the Court too soon. They were not ready for it.

GREENHOUSE: The military is different.

15. *Hoyt*, 368 U.S. at 62.
16. *Taylor*, 419 U.S. 522.
17. Duren v. Missouri, 439 U.S. 357 (1979).
18. Reed v. Reed, 404 U.S. 71 (1971).
19. Rostker v. Goldberg, 453 U.S. 57 (1981).

GINSBURG: Yes, but not untouchable, as Sharron Frontiero's case showed.

GREENHOUSE: We've talked about your role as an advocate, but not as much your role as a judge. And the quotation of Justice Cardozo, I think, is worth unpacking a bit—in terms of what a judge's stance should be toward the shifting culture or the big arguments that come before the Court. How do you do that in your current role? Of course, you've been a judge for a very long time. You were a judge for about thirteen years before you went on the Court nearly twenty years ago. That's a chunk of time. But what is the right stance for a judge?

GINSBURG: You have in mind an appellate judge sitting on a collegial court. The real power holders in the system are the trial judges in this sense. They are in sole command of the courtroom. With a firm final judgment rule, a litigant ordinarily can't get to the court of appeals until the end of the trial-court road. A typical appellate panel is composed of three judges. At least one other mind has to agree with you for your position to prevail. At the Supreme Court, the magic number is five. None of us operating in that setting can hope to prevail if we act like a king or a queen. If you write for the Court, you must accommodate the views of others. And that means there is a strong tug toward the middle and away from extremes at either end. Sometimes a law professor asks me, "Why did you include footnote four in your opinion?" Should I reveal in response, "Well, Justice so-and-so said he would sign on to the opinion if I added it"?

GREENHOUSE: So how could Stephen Breyer and Elena Kagan sign John Roberts's opinion on the Medicaid extension?[20]

GINSBURG: That mystery may someday be explained, but not here, and not by me.

GREENHOUSE: I want to get back to a case that Reva Siegel talked about in her presentation,[21] the *Coleman* case.[22] That was a case under the Family and

20. Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012).

21. Reva B. Siegel, *Equality's Frontiers: How Congress's Section 5 Power Can Secure Transformative Equality (as Justice Ginsburg Illustrates in* Coleman*)*, 122 YALE L.J. ONLINE 267 (2013), http://yalelawjournal.org/2013/02/19/siegel.html.

22. Coleman v. Court of Appeals, 132 S. Ct. 1327 (2012).

Medical Leave Act that would have seemed on the surface to be governed by the decision that Chief Justice Rehnquist wrote in 2003. In *Hibbs*,[23] another Family and Medical Leave Act case, he said that the states were not immune from suit under the family-care provision of the Family and Medical Leave Act. And Chief Justice Rehnquist wrote—to the shock of many people who read it, including myself—that the purpose of that section of the law was to break down the stereotype that caring for family members was women's work, and so it was an anti-sex-discrimination enactment by Congress. What you explain in your dissent in the *Coleman* case, which comes up under the self-care provision, is that this was one statute. The self-care provision arose from the same impulse, except that it came out of a context in which there was a big debate in the feminist community over how to treat pregnancy and maternity leave. And the fear was that, if maternity leave was carved out as a special benefit for women, women would be less desirable in the workplace. So it was a concerted decision to make the self-care leave universal instead of special for women. You lay that all out, and in a totally persuasive way, but the Anthony Kennedy majority doesn't even acknowledge the historical evidence that you presented in that dissent. And I just found that astonishing. So how could that be? They could disagree with you. They could draw a different conclusion from it. But the two sides—the majority and your four-member dissent—seem to be speaking from different planets.

GINSBURG: Perhaps I can explain the division. The Family and Medical Leave Act gives leave to take care of a sick child, a sick spouse, a sick parent, and yourself, when you're sick. The majority said, in effect: "We understand that taking care of children or elderly parents has been regarded as women's work. Congress wrote the law so that people will see that taking care of a child, spouse, or parent is an obligation you have as an adult human. But sick leave is just for yourself. There's no gender aspect to it." The self-care leave, as you identify, Linda, responded to this question: should the law provide for a pregnancy leave? After all, pregnancy is a condition that only women experience, so women need sick leave around the time of childbirth, weeks they are unable to work. The decision was made to generalize the need to care for oneself. If there were a special pregnancy leave, and other people who have temporarily disabling conditions get no leave, not only is there a risk that employers won't want to hire women, but there may be resentment among coworkers. Someone has a heart attack and doesn't get any leave, but the woman absent from work because of childbirth does. So the notion was,

23. Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721 (2003).

instead of having a special pregnancy leave, require leave for anyone temporarily unable to work. That would place the woman taking pregnancy leave not in isolation, but as part of the larger group of people who must take time out to care for themselves. That was the scheme Congress adopted, one quite plainly designed to ward off the adverse impacts of pregnancy leave. Yes, the majority chose to ignore the history that accounts for the self-care provision.

GREENHOUSE: But opinions were circulating, and in conference you must have discussed it. How could they not even acknowledge the history?

GINSBURG: Well, you read the opinions! Could it be willful blindness? A lack of interest in responding to a dissent once one has five on board? Some Justices engage with dissents more than others. In fact, as I said at the end of the announcement of the dissent I read from the bench in *Coleman*, the majority's opinion was confined in this sense. The only issue before us was whether state governments had to pay damages for violating the self-care provision—that is, whether Congress had abrogated the states' immunity otherwise shielded by the Eleventh Amendment. The majority didn't say that the law, apart from damages, was inapplicable to the states. The private sector remains bound by the Family and Medical Leave Act in its entirety. I tried to attribute the outcome to the large attachment of some of my colleagues to the Eleventh Amendment and the state sovereign immunity they see as shielded by that Amendment. But if you had in the front of your mind women engaged in paid labor, and you were designing a sensible leave policy, would you ever decree, "You can take leave to care for your husband, your child, your parent, but not yourself"? It doesn't make any sense.

GREENHOUSE: I've always been struck by your obvious affection for, as you call him, "my old Chief," Chief Justice Rehnquist. And obviously you didn't see lots of things the same way, but you nurtured him and brought him along, for instance, in the Virginia Military Institute case.[24] He didn't sign your opinion, but he joined your judgment. And he wrote *Hibbs*, the foundational Family and Medical Leave Act case. How do you think he would have voted in *Coleman*?

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

GINSBURG: I can't be sure, but I think he would have been with the four in dissent. In light of *Hibbs*, he should have made a fifth vote in Coleman's favor.

GREENHOUSE: He would have given you a majority?

GINSBURG: Chances are, yes. If you read the *Hibbs* opinion—when I brought it home to my husband, Marty said, "Ruth, did you ghostwrite it?"—it's remarkable. This was a man I could count on to dissent in the cases I litigated in the 1970s, all save one[25]—and he had come all that distance. As I said in the prior session,[26] I think his granddaughters had a lot to do with his education. The old Chief was a caring presence in the life of those girls, especially after his daughter became divorced. He spent quality time with his granddaughters, and they loved him dearly. I think they unconsciously opened his eyes. It is a relationship to which I adverted as a litigator. I would try to get men on the bench to think not so much about what good husbands and fathers they were, but about how they wanted the world to be for their daughters and granddaughters.

GREENHOUSE: That's right. He has a daughter who's a lawyer. Lewis Powell had daughters.

GINSBURG: Right.

GREENHOUSE: Lewis Powell, one of the strongest supporters of Harry Blackmun in *Roe v. Wade*.

GINSBURG: There's something else I would like to say about my old Chief. Many people thought he was standoffish, Nordic cool. The year 1999 was tough for me. I had colorectal cancer. After surgery, there were months of chemotherapy and weeks of daily radiation. I left the conference early one day for my chemotherapy session. The first scheduled procedure that day was an implant through which infusions would be run so my arms wouldn't continue to be a mess of black and blue marks from injected needles. The old Chief told me that morning, "Of all the procedures Nan"—his deceased wife—"endured, the implant was the least distressing, quite painless." When I started radiation,

25. *Weinberger v. Wiesenfeld*, 420 U.S. 636, 655 (1975) (Rehnquist, J., concurring in the result).

26. Cary Franklin, *Justice Ginsburg's Advocacy and the Future of Equal Protection*, 122 YALE L.J. ONLINE 227, 233-34 (2013), http://yalelawjournal.org/2013/02/19/franklin.html.

he volunteered, "Ruth, I'm going to keep your assignment light this sitting." My response: "Oh, Chief, not now. I'll need a break in the final two weeks. The first weeks I should be okay." "Well then," he said, "what opinion would you like to write?" Never before had he offered me a choice. (And never since.) This is just one example of how the Court resembles a family when personal challenges arrive. All of my colleagues rallied around me to get me through that year. The best advice I got was from Justice O'Connor, who had taken her seat on the bench at an oral argument just nine days after her breast cancer surgery. "Ruth," she counseled, "you're going to get reams of mail from well-wishers. Don't even try to respond. Just concentrate on the Court's work." And she added, "Schedule chemotherapy for Fridays. Use the weekend to get over it, and be back in Court on Monday."

GREENHOUSE: Well, of course, many Justices have had health problems, but it has always struck me that in both Justice O'Connor's case and your case, you told the public what was happening. And the guys never do. I mean, look at the old Chief. The last year of his life was a very sad year. And nobody knew what was happening with him. That must have been a very tough year inside the Court, that 2004 Term, because of his illness.

GINSBURG: It was. But he was convinced he had at least another year to live.

GREENHOUSE: Speaking of his giving you your choice of opinion, of course, now, often when the Court is divided, you are the senior Associate Justice in dissent, so you have the ability under the Court's rules to assign a dissenting opinion, and I guess sometimes you can be the senior Associate Justice in the majority, too.

GINSBURG: I've never assigned a majority opinion. Dissents, yes. You know, we are prime dons and prima donnas in a way. There we are, just nine of us, on a high bench. I try to meet with my colleagues so that we can agree on the content of a dissent. In *Bush v. Gore*,[27] we thrust on the public four separate dissents, because there was no time to come together. So the first effort is to ensure that all of us can subscribe to the same approach.

GREENHOUSE: For the biggest impact?

27. 531 U.S. 98 (2000).

GINSBURG: Yes.

GREENHOUSE: The biggest public understanding?

GINSBURG: Yes. And next, in assigning dissents, one aims for a fair distribution so one person doesn't get a disproportionate share of the headline cases, and another, the lion's share of the less-noticed cases. Last year, my first year as lead assigner of dissents, I wrote more dissents than I assigned to my colleagues. But not as many as Justice Stevens did when he was the senior assigner of dissents.

GREENHOUSE: So is that satisfying, that kind of ability to shape the voice—when you look at the dissenting opinion as the voice aimed at the future, even though it didn't prevail in the present?

GINSBURG: Discussions among dissenters in cases of major importance can sometimes resemble a conversation among academic colleagues.

GREENHOUSE: What's the unfinished business of equality in your view? Is there substantial work yet to be done?

GINSBURG: Very few overt gender lines remain. In the immigration area, the *Miller* case[28] and the *Nguyen* case[29] preserve a distinction I regard as misguided. It is still the law that a child whose parents are unmarried automatically acquires the citizenship of the mother, not the father. Immigration is about the only domain in which overt lines persist.

One challenge is countering unconscious bias. That issue cropped up in the *Wal-Mart* case.[30] The European Court of Justice has dealt sensibly with this issue.[31] A province in Germany adopted this policy for public employment: if the field is one that has been dominated by men, and the choice is between two applicants more or less equally qualified, prefer the woman. The Court held the preference compatible with the equality principle emanating from the Rome Treaty. The decision suggests that choice of the woman may be less a

28. Miller v. Albright, 523 U.S. 420 (1998).

29. Nguyen v. INS, 533 U.S. 53 (2001).

30. Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541 (2011).

31. Case C-450/93, Kalanke v. Freie Hansestadt Bremen, 1996 E.C.R. 1-03051.

preference, more a means to overcome unconscious bias that decisionmakers harbor. For example, suppose an administrator is deciding on the candidate who will fill a single vacancy. The administrator interviews a candidate who looks like him. He tends to trust such a person. A candidate of a different race, a different national origin or sex, is unfamiliar. She does not attract the same instinctive trust.

Perhaps the largest challenge is to make it possible for people to thrive in both a work life and a family life. There's very little a court can do to solve that problem. Legislation like the Family and Medical Leave Act can advance chances for people to have a satisfying work life and, at the same time, a fulfilling family life.

GREENHOUSE: So is the Court's project basically finished, or at least the progressive Court project, and is it now over to the legislature? Or is there a sense of a partnership, a judicial-legislative partnership, that's got to continue?

GINSBURG: Well, as I said, the overt lines are almost gone. At the start of the 1970s, the law books, state and federal, were riddled with gender-based classifications. There is still important Title VII litigation, for example, discrimination against women in fields once closed to them. The *Ledbetter* case[32] is a good example. Lilly Ledbetter worked as an area manager in a Goodyear tire plant, once a job reserved for men. The Court ruled for Goodyear, five to four, and against Lilly Ledbetter, but the upshot was curative legislation: the Lilly Ledbetter Fair Pay Act. Lilly Ledbetter's case illustrates what I mean when I say that the Court is sometimes engaged in a dialogue with the legislature. Congress wrote Title VII. The Court, in my judgment, misinterpreted it. The ball goes back to Congress's court to consider curative legislation.

GREENHOUSE: Looking back at your confirmation hearing, you said the following: "In my lifetime I expect to see three, four, perhaps even more women on the high-court bench, women not shaped from the same mold, but of different complexions"—not all the same. And twenty years later, that prediction has come true. Did you think it would happen within your service on the Court? I want to talk a little bit about the difference that it has made in terms of life on the Court or the life of the law.

32. Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618 (2007), *superseded by statute*, Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (codified as amended in scattered sections of 29 U.S.C. and 42 U.S.C.).

GINSBURG: Our neighbor to the north, Canada, has a woman as Supreme Court Chief Justice, and three other Justices are women—four out of the nine. People ask me about the U.S. Supreme Court, "When will there be enough?" My reply: "When there are nine!" Some are startled by that answer. I remind them that, from the beginning until 1981, the Supreme Court's bench had been composed of nine men. Linda, you've been in the Court since we've had three women—doesn't it make a real difference? I am seated toward the middle; Elena Kagan's on my left, Sonia Sotomayor, on my right. Advocates call us by our own names. In each of the twelve years I sat with Justice O'Connor, invariably, one lawyer or another would call me Justice O'Connor. It had happened before, when I was a new judge on the D.C. Circuit. Pat Wald preceded me by several months. Lawyers knew there was a woman judge on the Circuit bench. Her name was Judge Wald. So I anticipated what would happen from 1993 until 2005. The National Association of Women Judges was prepared, too. In the fall of 1993, they held a reception at the Court for Sandra and for me, and presented us with T-shirts. Justice O'Connor's reads, "I'm Sandra, Not Ruth." Mine: "I'm Ruth, Not Sandra." No one has called me "Justice Kagan" or called Justice Kagan "Justice Sotomayor." And if you visit the Court, you will see that my newest colleagues are lively participants in oral argument. They are not shrinking violets. Some may suspect a contest between Justices Scalia and Sotomayor over who will ask the most questions. So the three of us look like we belong there as Justices—we are not one-at-a-time curiosities.

GREENHOUSE: In fact, I think from an audience point of view, you stop thinking about it because it just is normal.

Just to conclude: you love your job, don't you?

GINSBURG: Yes. It's the best and the hardest job I've ever had.

GREENHOUSE: And I say that because not everybody loves the job. I think your former colleague, David Souter, was not the happiest camper.

GINSBURG: Well, he didn't like the company-town atmosphere in Washington, D.C. But when I could get him to attend a social function with me, he was the best company. He's a prolific reader and a great storyteller. It was said of Justice Cardozo that he wrote his opinions with his very blood. I think the same is true of Justice Souter.

GREENHOUSE: And Harry Blackmun, I think, struggled every day with how to get up in the morning and go off to court. But I think, from the minute you got there, despite all the frustrations, and despite the fact that you've never had a chance to assign a majority opinion, that it's something that you love doing.

GINSBURG: For seventeen years I was a law teacher. Appellate judging is more like law teaching than any other two ways of working at the law. You are constantly endeavoring to persuade, to explain your position, and to convince others to join you. I am sometimes asked: "Don't you miss advocacy?" When the Court is divided, my role resembles an advocate's. To be effective at conference, there's a great premium on preparation. If you are not prepared to speak your mind at the conference, you may not have a second chance. I don't mean to convey that the conference vote always sticks. Sometimes the debate continues. I recall a dissent assigned to me by a senior colleague. The conference vote was seven to two. In the fullness of time, the decision came out six to three, and my dissenting opinion, originally for two, became the opinion of the Court. That doesn't happen often. It's rare. But hope springs eternal, and "it ain't over 'til it's over." The vote at conference isn't fixed in stone. Every year, a Justice or two will announce one case less than the others. These clues never escaped you, Linda. You would notice that in first-sitting cases one of the Justices didn't write any Court opinion, and in the fourth sitting another Justice published no opinion speaking for the Court. No one picked up shifts like that last Term, although they occurred.

GREENHOUSE: You mean the case last Term that was dismissed at the very end of the Term that Clarence Thomas was supposed to write?[33]

GINSBURG: I won't comment on that. But you kept track of each sitting, noticing who wrote opinions from each sitting, who ended up with no unanimous or majority opinion, who wrote more than his fair share of Court opinions. Then you told the public what you thought had happened.

GREENHOUSE: It was fun. We have to stop, but I thank you very much for being here.

33. First Am. Fin. Corp. v. Edwards, 132 S. Ct. 2536 (2012) (per curiam) (dismissing the writ of certiorari as improvidently granted). For further discussion of the case, see Pamela S. Karlan, *The Supreme Court, 2011 Term—Foreword: Democracy and Disdain*, 126 HARV. L. REV. 1, 57-63 (2012).

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