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Memoriam: Justice Ruth Bader Ginsberg

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*Margo Schlanger**

It's simultaneously hard and easy for me to write an appreciation like this one for Justice Ginsburg, because my admiration for her and my debt to her are so deep. Little in my life would have been the same if I had not been her law clerk from 1993 to 1995, during her first two years on the Supreme Court. She helped me get my first job as a civil rights lawyer and was instrumental in my meeting my now-husband. She was the smartest lawyer I ever worked for or with, and the most profound thinker about equality and the law. She and her husband, Marty, modeled a marriage of personal and professional equals deeply important to my husband and me. I was very, very lucky to know her.

I thought about telling some cute stories. But instead, let me share some lessons I began to learn from RBG:

- Always (really, *always*) do your best work. Work very hard, on worthwhile things; don't waste time on projects that don't matter.
- Write with care, and without unnecessary words. (This is hard. I often write too long.)
- Find and cherish a life partner who loves partnership.
- Build a professional life consonant with a family life.
- Celebrate, don't deprecate, differences between men and women.
- Celebrate, don't deprecate, the huge differences *among* women and men.
- Counter your opponents' best arguments, not easier ones.
- Pursue a nonprofessional passion.

Among the virtues of the Notorious RBG phenomenon — the books, the movies, maybe even the merch — is amplification of many of those lessons.

These life lessons are important, but I think RBG's jurisprudential lessons are even more so. Justice Ginsburg was obviously a terrifically successful advocate, bringing gender equality into the Equal Protection Clause framework; she deepened that framework as a Justice. Yet it is undeniable that her strongest jurisprudential commitments remain unimplemented.

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In 1978, not long before she became a judge, then-Professor Ginsburg offered the hope that “the Court may take abortion, pregnancy, out-of-wedlock birth, and explicit gender-based differentials out of the separate cubbyholes in which they now rest, acknowledge the practical interrelationships, and treat these matters as part and parcel of a single, large, sex equality issue.”⁷⁶ This never happened. But she has left us many signs pointing the way.

Consider a not-very-celebrated case, *Coleman v. Maryland Court of Appeals*.⁷⁷ In 1993, Congress enacted the Family and Medical Leave Act⁷⁸ (FMLA), entitling eligible employees to take up to twelve weeks of unpaid leave per year.⁷⁹ The FMLA covered leave to tend to a newborn or newly adopted child; to care for a spouse, son or daughter, or parent with a serious health condition; and for the employee’s own serious health condition.⁸⁰ In 2012, the Supreme Court held that this last type of leave — for “self care” — could not be enforced by state employees.⁸¹ The Court ruled that Congress’s attempt to exercise Fourteenth Amendment authority to abrogate state sovereign immunity failed, because the self-care mandate was insufficiently connected to a Fourteenth Amendment discrimination problem.⁸²

Justice Ginsburg’s dissent is not terribly famous, but it should be. The self-care provision, she explained, was aimed directly at sex discrimination — the denial of medically necessary pregnancy and labor-recovery leave.⁸³ But to single out pregnancy’s medical complications for solicitous treatment would harm women’s employment; employers would be more reluctant to hire women who might get pregnant, in anticipation of their augmented leave rights.⁸⁴ Universal self-care leave was Congress’s solution.⁸⁵ The dissent (joined by Justices Breyer, Sotomayor, and Kagan) was a tour de force, a fluent and comprehensive summary of the centrality of pregnancy to women’s inequality in the workplace, encapsulating the sophisticated dialogue between feminists of various stripes seeking to foster equality. It set out a profoundly more humane constitutional vision than the Court’s, marking a path, so far not taken, by which both the Court and Congress could evaluate threats to equality realistically and holistically.

⁷⁶ Ruth Bader Ginsburg, *Sex Equality and the Constitution*, 52 TUL. L. REV. 451, 462 (1978).

⁷⁷ 566 U.S. 30 (2012).

⁷⁸ 29 U.S.C. §§ 2601–2654.

⁷⁹ *Id.* § 2612(a)(1).

⁸⁰ *Id.*

⁸¹ *Coleman*, 566 U.S. at 33 (plurality opinion).

⁸² *Id.* at 36–37.

⁸³ *Id.* at 50–51 (Ginsburg, J., dissenting).

⁸⁴ *See id.*

⁸⁵ *See id.*

In other dissents, RBG similarly lighted so-far-not-taken paths to racial equality. Over and over again, she emphasized the continuing presence and effects of long-entrenched race discrimination, and insisted that official efforts to lift that oppressive weight off of Black people's necks should be encouraged and ratified, not subjected to skeptical fly-specking by an unsympathetic Court.⁸⁶

It took decades for Justice Holmes's "great dissenter" opinions to enter into law.⁸⁷ I am hopeful, if not precisely optimistic, that Justice Ginsburg's dissents will follow a similar (but shorter) life cycle. For her many fans — including me — she is the best model we could have of perseverance for justice.

