

**THE ROBERT L. LEVINE
DISTINGUISHED LECTURE**

**A CONVERSATION
WITH JUSTICE RUTH BADER GINSBURG
AND PROFESSOR AARON SAIGER***

DEAN MATTHEW DILLER: Ladies and gentlemen, my name is Matthew Diller. I have the honor and privilege of being the Dean of Fordham University School of Law. I sense the anticipation in this room is palpable. We are all incredibly excited to be here, and I want to welcome you to tonight's Robert L. Levine Distinguished Lecture.

Robert L. Levine, as your notes describe in more detail, was a member of the Fordham Law School great Class of 1926 and practiced law for sixty-two years.

Before we begin the program, I would like to just say a few words of thanks and acknowledgement.

We are grateful to the Levine family, who join us here this evening, for making this lecture possible. Because of their generosity, Fordham Law has been able to host many distinguished guests for this series, including Justice Sandra Day O'Connor, the late great Judge Judith Kaye, Judge Robert Katzmann, Judge Raymond Lohier, and of course our illustrious guest tonight, Ruth Bader Ginsburg.

I would like to thank our President of Fordham University, Father Joseph McShane, and our Provost, Dr. Stephen Freedman, who join us here this evening. I would also like to acknowledge my colleague, Dean Emerita Nina Appel of Loyola University Chicago, who has made a special trip here this evening to be with her good friend Justice Ginsburg.

I would like to thank the *Fordham Law Review* for organizing this event and, in particular, the *Review* editor Alexa West and members of her family, Joyce West and Jerome Leitner, who are friends of Justice Ginsburg.

I want to thank our great Professor Aaron Saiger, who is moderating tonight's discussion. Professor Saiger served as a clerk to Justice Ginsburg during the 2001–2002 Term and came to Fordham Law the following year. He is among the country's most original and sophisticated scholars in the field of education law.

* This conversation was held on September 20, 2016, at Fordham University School of Law. The transcript has been lightly edited.

And of course, we are very fortunate to have Justice Ginsburg with us here this evening. She needs no introduction, so I will keep my remarks very brief. Born in Brooklyn and educated in New York City public schools, she became the second woman to sit on our country's highest court. Justice Ginsburg is a jurist wholly committed to fairness, equality, and the Constitution's promise of liberty for all. Her opinions are characterized by equal measures of precision and passion. She is a lawyer's lawyer.

Decades before her nomination to the Supreme Court in 1993 by President Bill Clinton, Justice Ginsburg, while at the ACLU, argued before the Court in six of the most significant gender discrimination cases in the country's history, winning five of them. In fact, she has been called the Court's most accomplished litigator.

This evening, she will impart some of the wisdom that she has gained through the course of her career and through her twenty years on the bench on the Supreme Court with us. It's very special to have you with us here, Justice Ginsburg.

Justice, I thank you for coming to our school this evening, and I note that we are the only law school that you can visit during an intermission at the Metropolitan Opera. [Laughter] And I invite you to drop by and visit with us any time between acts, or any other time for that matter.

Without further ado, Professor Saiger.

PROFESSOR AARON SAIGER: It's a signal honor for Fordham Law School and a personal honor for me and a pleasure to have Justice Ginsburg here tonight. We want to thank you for coming.

I think I will not reiterate all of the thanks Dean Diller has offered, except to say that we are very grateful to the Levine family and deeply indebted to the students of the *Law Review* who have made tonight happen.

The format of the evening is as follows: I will ask questions and the Justice will answer them. That's the plan. [Laughter]

JUSTICE RUTH BADER GINSBURG: It's a reversal of my usual role. [Laughter]

PROFESSOR SAIGER: She very graciously agreed that she need not see her questions in advance, and I took her up on that offer. So you should know what she faces.

I do intend to scrupulously obey what is known as "the Ginsburg rule," which is that one does not ask the Justice about cases that are before or may come before the Supreme Court. If I fail, I will surely be corrected.

I have asked everyone in the room, pretty much, to suggest questions, if they have any, to me. And rather than call on members of the audience, I have taken all of those questions, and I plan to ask many of them tonight.

Also, my daughters Hannah and Yael are here. Each of them, when they were in the seventh grade, had an audience with the Justice—their seventh grade class did—and I have stolen some questions from the seventh graders that I want to ask the Justice. And I have one or two of my own. So that is the plan for the conversation.

I do want to begin on a sad note, because it has only been a short time since we lost Justice Scalia. You had an important relationship with him. I wonder if you would begin by saying something about him.

JUSTICE GINSBURG: Justice Scalia was my best buddy on the Court. People are surprised about our friendship, but we had a number of things in common. One, our love of music, and particularly opera. Another, we really cared about family.

Justice Scalia could make even the most sober judge smile. He was a wonderful storyteller, a man who loved life.

How has the Court changed? The best way I can express it is to say that the Court is a paler place without our lively Justice Scalia.

I am looking forward this summer to the second production of the comic opera *Scalia/Ginsburg*. It will be performed in August in Cooperstown, New York, at the Glimmerglass Festival. Let me give you just a taste of the opera. [Laughter]

Scalia/Ginsburg was written by Derrick Wang, a young man studying law when the idea came to him. He had a music degree from Harvard and a master's in music from Yale. In the music business, he believed, it might help to know a bit about the law. So he enrolled in his local law school, the University of Maryland School of Law. In his constitutional law class, he read some dueling opinions—Scalia for the Court, Ginsburg in dissent; Ginsburg for the Court, Scalia in dissent—and decided that our disagreements could make an amusing opera.

Scalia has the opening aria. It's a rage aria—very Handelian in style. It goes like this: “The Justices are blind! How can they possibly spout this? The Constitution says absolutely nothing about this!”

I answer: “You are searching in vain for bright-line solutions to problems that have no easy answers. But the beautiful thing about our Constitution is that, like our society, it can evolve.”

Early on, Justice Scalia is locked up in a dark room. He is being punished for excessive dissenting. [Laughter] I enter the scene through a glass ceiling [Laughter] to help him through the trials he must pass in order to gain release from the dark room.

Close to the end of the opera, we sing a duet: “We are different. We are one.” Different in our approach to interpreting legal texts, but one in our fondness for each other, in our reverence for the Constitution, and for the institution we serve.

If any of you happen to be in the vicinity of Cooperstown next August 13, you can see *Scalia/Ginsburg*.

PROFESSOR SAIGER: I feel like I'd also like to ask you about your relationship with the late Chief Justice Rehnquist, who is the other Justice who has died while sitting, I think, since you have been on the bench. That was also an important relationship, and I would be curious what you had to say about him.

JUSTICE GINSBURG: Yes. When I was a new member of the Court, I wondered about how I would relate to the Chief. He did vote for my client

once in the cases I argued before the Court in the 1970s. It was one of my favorite cases.

The Chief was an unusual man. As one lives, one can learn. Chief Justice Rehnquist, in dissent after dissent, had criticized the famous *Miranda* rule about the warnings the police must give someone arrested. But, when he was confronted with the question of overruling *Miranda*, he said, “No, the *Miranda* warnings had become part of the nation’s culture.”¹ So he wrote the opinion that saved *Miranda*.

He also upheld the Family and Medical Leave Act in a fine opinion.² When I brought the Chief’s opinion home to Marty, he read it and said, “Did you write this?” [Laughter] So Rehnquist, who was notorious for ruling that “discrimination on the basis of pregnancy is not discrimination on the basis of sex”³—that was in the 1970s—became the man who wrote the decision upholding the Family and Medical Leave Act.

PROFESSOR SAIGER: Now you are sitting on a Supreme Court of eight. There has been a lot of interest in what an even number and a higher probability of 4–4 divisions of opinion does to the work of the Court. We are curious how you and your colleagues are managing this new situation.

JUSTICE GINSBURG: I think everyone would agree that for a collegial body, eight is not a good number. You need an odd number. And all of us hope that by the end of the current Term we will have a full house again.

When the Court divides evenly, the decision below is automatically affirmed. We don’t write any opinion. The affirmance has no precedential value.

Last Term, only four cases could not be decided, so they came down as 4–4 splits.⁴ The issues that could not be resolved will come back to the Court another day. The Court, I should underscore, does not sit to right wrong judgments. If we attempted that, we would be hearing hundreds of cases. Instead, we see our mission as endeavoring to keep the law of the United States more or less uniform, so when other courts disagree about what the federal law is, whether a statute or a constitutional provision, when others disagree, that’s when we step in. So the issues in the four cases that yielded a 4–4 division no doubt will come back to us.

I think it speaks well for the Court that we are unanimous—at least on the bottom-line judgment—in about 40 percent of the cases. We divided 4–3 or 5–3, I think, in only 20–25 percent of the cases.⁵

1. See *Dickerson v. United States*, 530 U.S. 428, 443 (2000) (“*Miranda* has become embedded in routine police practice to the point where the warnings have become part of our national culture.”).

2. See *Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721 (2003).

3. See *Geduldig v. Aiello*, 417 U.S. 484 (1974).

4. See *United States v. Texas*, 136 S. Ct. 2271 (2016); *Dollar Gen. Store v. Band of Choctaw Indians*, 136 S. Ct. 2159 (2016); *Friedrichs v. Cal. Teachers Ass’n*, 136 S. Ct. 1083 (2016); *Hawkins v. Cmty. Bank of Raymore*, 136 S. Ct. 1072 (2016).

5. In October Term 2015, judgments were unanimous in 38 of 80 cases decided on the merits (47.5 percent); the Court divided 4–3 or 5–3 in only 10 of the 80 merits cases (12.5 percent). SCOTUSBLOG, STAT PACK FOR OCTOBER TERM 2015, at 5 (2016),

PROFESSOR SAIGER: You have said in public many times that the ideal number of women for the Supreme Court of the United States is nine. [Laughter]

JUSTICE GINSBURG: Of course. Why not? Nine men was a satisfactory number until 1981.

PROFESSOR SAIGER: So now we are at a moment where the ratio of women to men on the Court is the highest it has been in the history of the nation, and I wonder if you wanted to comment on that.

JUSTICE GINSBURG: We are three now, one-third of the Court. We are not doing as well as Canada, our neighbor to the north. They have nine members; four are women, including the chief justice.

But the change in the federal judiciary as a whole has been enormous since the 1970s. People sometimes ask, “Did you always want to be a judge or Supreme Court Justice?” I smile. Nina Appel, my Columbia Law School classmate, who is with us today, will remember how it was when we graduated from law school. There was no antidiscrimination law. Employers were upfront about not wanting a lady lawyer in their firm.

There was little change until Jimmy Carter became President. He looked around at the federal judiciary and he said, “They all look like me, but that’s not how the great United States looks.” He was determined to appoint members of minority groups and women in numbers, not as one-at-a-time curiosities. And even though he had only four years in office and no Supreme Court vacancy to fill, he changed the complexion of the federal judiciary. He appointed over twenty-five women to district courts, eleven to courts of appeals—I was one of the lucky eleven—and no President ever went back to the way it long was.

President Reagan didn’t want to be outdone. He was determined to appoint the first woman to the Supreme Court. To that end, he made a nationwide search and came up with a superb choice, Justice Sandra Day O’Connor.

When we sat together at oral argument—Aaron, I’m sure you witnessed this more than once—I would ask a question and the response would be, “Justice O’Connor . . .” She would sometimes say, “I’m Justice O’Connor; she’s Justice Ginsburg.” [Laughter] With one glaring exception, it doesn’t happen nowadays. At least no one calls me Justice Sotomayor or Justice Kagan. [Laughter]

Because I have been there for such a long time, twenty-three years, I sit close to the middle, with Justice Sotomayor on one end and Justice Kagan on the other, so we appear all over the bench. And my newest colleagues are not shrinking violets. They are very active in questioning counsel. There was a rivalry between Justice Scalia and Justice Sotomayor over who could ask the most questions at oral argument.

PROFESSOR SAIGER: I have to confess that when you told me it would surely happen that you would be called Justice O’Connor, I found it

hard to believe, until I did see it happen, I believe, three times in the year that I was there.

There was a moment of backsliding, though, right? After Justice O'Connor's retirement, you were the lone woman on the Court for some time. Were you worried at that point that it was possible to go back, or did you feel confident that it was just temporary?

JUSTICE GINSBURG: I felt lonely. I thought the perception was altogether wrong. Schoolchildren stream in and out of the Court, watching for ten minutes, and they saw eight men, rather well-fed, and then there was this little woman. [Laughter] The picture was not right.

PROFESSOR SAIGER: Okay, I do have one of the questions from the seventh grade that I was so interested in when it was asked of you that I want to ask again, which is: "Is it frustrating when you can't change your colleagues' minds and you know that you're right?" [Laughter]

JUSTICE GINSBURG: It is challenging.

If it's a question of statutory interpretation, there is another audience. In the *Lilly Ledbetter* case, where I thought the Court had misinterpreted Title VII, the tagline of the opinion was, "The ball is now in Congress's court to correct the error into which my colleagues have fallen."⁶

I was in dissent in the *Ledbetter* case, but I prevailed ultimately because Congress, in very short order, with large majorities on both sides of the aisle, passed the Lilly Ledbetter Fair Pay Act. It was the first piece of legislation President Obama signed when he took office.

Now, if it's a constitutional decision, you don't have another forum. You can hope that someday the Court will see the error of its decision and overrule it.

Throughout the history of United States, there have been Justices who thought the Court's decision was wrong and said so. Think of the most dreadful decision the Court ever wrote, the *Dred Scott* case.⁷ The Court said no person brought from Africa to the United States in chains, and no descendant of such a person, shall ever be a U.S. citizen. There were two dissenters in that case. Justice Curtis's was particularly memorable.

Or think of the "separate but equal" doctrine advanced in the so-called *Civil Rights Cases*⁸ and *Plessy v. Ferguson*.⁹ The first Justice Harlan dissented.

Think of the free speech cases around the time of World War I, when two Justices joined in reminding us that we had a First Amendment that gave us the right to think, speak, and write as we believe and not as "big brother government" tells us we should believe. Those two Justices were Oliver Wendell Holmes and Louis D. Brandeis. All of their dissents are today the

6. See *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 661 (2007) (Ginsburg, J., dissenting).

7. See *Dred Scott v. Sandford*, 60 U.S. 393 (1856).

8. 109 U.S. 3 (1883).

9. 163 U.S. 537 (1896).

law of the land. So a dissenter is looking for a cure by Congress or looking forward to a future Court that will overrule the wrong decision.

PROFESSOR SAIGER: Do your colleagues ever change your mind?

JUSTICE GINSBURG: Do my colleagues ever change my mind? The answer is of course yes, but it's rare. [Laughter]

Usually, by the time we sit for oral argument, we have read what other good judges thought about the issue, the trial court and the court of appeals. We then read prior decisions in point. We will read all the briefs filed by counsel and some of the briefs filed by friends of the Court in headline cases. After all that reading, the Justices come on the bench leaning one way or the other.

Sometimes, there might be a procedural hindrance that you overlooked and one of your colleagues spotted.

My favorite story about changing other people's minds is a dissent I wrote for Justice Stevens and myself, just the two of us. In the fullness of time, the decision came out 6–3. The two had become six.

Now, I will admit I haven't had a repeat of that experience, but hope springs eternal. When I write a dissent, I'm always hoping one or two of my colleagues will switch sides.

Aaron, you have observed many oral arguments, and you know that sometimes we are trying to influence each other. We may ask a question, not so much to elicit an answer from counsel as to stimulate our colleagues' thinking.

PROFESSOR SAIGER: I have been given two questions by the students about what it's like to be Justice Ruth Bader Ginsburg, so I want to ask those questions early in the evening to make sure I don't lose them.

Number one: Do you have a smartphone? And if you do, do you use it for anything besides making phone calls? And if you don't, do you want one?

JUSTICE GINSBURG: The answer is yes. I had, in fact, two until the Court's automation staff took the BlackBerry away, telling me, "Nobody uses that anymore." [Laughter]

What do I use my iPhone for? Not for selfies. [Laughter] I use it to read my emails. The best thing for me, you can get any number of sounds from an iPad or an iPhone. I had a noise machine that I took with me whenever I traveled. One day during a recent stay in Switzerland, the noise machine died. The police officer who was with me said, "Not a problem." She showed me how I could get on my iPad whatever sounds I wanted. So my iPad is now my sound machine. That is the principal function.

PROFESSOR SAIGER: Here is the second one of this category: In the past few years, you have achieved what can only be described as a certain notoriety in the popular culture. One of our students wants to know: "Do you enjoy that, do you cultivate it, or is it a burden of the office?"

JUSTICE GINSBURG: "The Notorious RBG." "Notorious RBG" was started by a second-year student at NYU School of Law. She started it the

year the Court decided the *Shelby County* case that held a key part of the Voting Rights Act of 1965 unconstitutional.¹⁰

This student thought it was a wrong decision, and she was angry. Then she remembered that I had once given a talk in which I said, “Anger is a useless emotion. It wastes time. It doesn’t advance your cause.” So she decided she would do something positive. She started the Tumblr with my dissenting opinion in the *Shelby County* case, and then it just took off from there into the wild blue yonder.

The name “Notorious RBG” was inspired by the rapper “Notorious BIG.” The two of us had one important thing in common: we were both born and bred in Brooklyn, New York.

It is amazing that, though I am eighty-three, everyone wants to take a picture with me. [Laughter]

PROFESSOR SAIGER: I do now want to ask you about something that Dean Diller mentioned, which is, of course, that one of your signal causes has been the equality of men and women under the law. I think fewer of my students than I would like know about the course of litigation in which you engaged before the Supreme Court before you became a judge. I was hoping that you would be willing to say something about the environment that women in this country confronted as you began that course of litigation and perhaps also something about one or two of what you have called “the turning point cases.”

JUSTICE GINSBURG: What was the legal atmosphere until the decade of the 1970s? The federal statute books, the U.S. Code, and state laws were riddled with gender-based distinctions, most of them based on the idea that there are separate spheres for men and women. Man’s sphere is winning bread for the family—he represented the family outside the home—and the woman’s sphere was the household and raising children. Any number of laws were based on that view, that separate-spheres view.

The job of ridding the statute books of those distinctions was carried out in the 1970s. The last decision, and one of the most important, was either in 1981 or 1982. The case is captioned *Kirchberg v. Feenstra*.¹¹ It was a challenge to Louisiana’s then Head and Master rule.

In common law states, as well as in civil law (community-property) states in the United States, there was the same description of a marriage: that is, husband and wife are one under the common law, but the husband is the one. He was the head of the household. He could decide where they would live and how they would live. She was obliged to follow.

In the community-property states, the theory was that each owned half of the gains that came in during the marriage, except he was the head and master.

The case came from Louisiana. A woman there had a ne’er-do-well husband who ran off with whatever the family had, leaving the woman with only one asset: her home. And then the tax collector came along and said,

10. *See Shelby County v. Holder*, 133 S. Ct. 2612 (2013).

11. 450 U.S. 455 (1981).

“Your husband owed these taxes, and we’re going to take your home in payment of his debt.”

Well, all of that ended in the 1970s. Why the 1970s? It wouldn’t have happened in the 1960s. People say, “In the 1960s there was the liberal Warren Court, and in the 1970s the conservative Burger Court.” As far as gender-discrimination cases are concerned, that’s not so.

In 1961, during the heyday of the “liberal Warren Court,” the Court heard the case of a woman who, today, we would call a battered woman. Her husband was a philanderer. He was abusive. One day he had humiliated her to the breaking point. She spied her young son’s baseball bat in the corner of the room, took it, and with all her might hit him over the head. He fell against the stone floor. End of the argument, beginning of the murder prosecution.

In those days, Florida didn’t put women on juries. Gwendolyn Hoyt, the defendant in the murder prosecution—her notion was: “If there were women on the jury, they might not acquit me, but perhaps they would convict me of the lesser crime of manslaughter and not murder.” She was convicted of murder by an all-male jury.

When the case was decided by the Supreme Court, the Court said, in effect: “We don’t understand Gwendolyn Hoyt’s complaint. Why, women have the best of all possible worlds. We don’t call them for jury duty, true; but if they want to serve, they can come to the court clerk’s office and sign up.” So, the Florida system of putting only men on the jury rolls was upheld.¹²

In the 1970s, among other cases, the Court swiftly ended the all-male jury. A sea change in the way people were living became apparent in the preceding decade, the 1960s.

I can explain it in terms of my own life. I have two children, one born in 1955. When she started school, I was one of the few working moms. My son was born ten years later, in 1965, and by then a two-earner family was not at all unusual.

Women were living longer, and most of their adult years were spent in households without childcare responsibilities. Inflation contributed too, because it gave parents an incentive for having a two-earner family. The way people ordered their lives had changed.

Then the law began to catch up with that change. None of the cases that I argued before the Supreme Court were test cases in the sense that we went out looking for plaintiffs.

The turning-point case, *Reed v. Reed*,¹³ is illustrative. The plaintiff was Sally Reed, a woman from Boise, Idaho, who had a young son. She and her husband separated and ultimately divorced. She was given custody of the boy when he was “of tender years,” which is the legal expression. When the boy reached his teens, the father sought custody, arguing that “now the boy needs to be prepared for a man’s world, so I should be the custodian.”

12. See *Hoyt v. Florida*, 368 U.S. 57 (1961).

13. 404 U.S. 71 (1971).

Sally Reed, the mother, thought that was not a good idea and, sadly, she turned out to be right. The boy's father was given custody. In his father's home, the boy became sorely depressed. One day, he took out one of his father's many guns and committed suicide.

Sally wanted to be appointed administrator of her son's estate, not for any economic gain—there was very little there—but for sentimental reasons. So she applied to be appointed administrator. Her ex-husband applied some weeks later. The probate court judge told Sally Reed: "The law gives me no choice." The law of the State of Idaho provides that "as between persons equally entitled to administer a decedent's estate, males must be preferred to females." Just that simple.

Sally Reed was an everyday woman. She made her living by taking care of elderly or disabled people in her home. She thought an injustice had been done to her and, on her own dime, she took her case through three levels of courts in the State of Idaho. When she lost in the Idaho Supreme Court, my colleagues at the ACLU read the report in *Law Week* and decided Sally Reed's appeal would be the turning-point case.

The next plaintiff, Sharron Frontiero, was a lieutenant in the Air Force. When she married—she married a man who was then a college student—she got no housing allowance. Had she been a male officer, she would have received a housing allowance. And her husband could not use the medical and dental facilities on the Air Force base. She thought she had a great equal pay case, but the Equal Pay Act in those days did not apply to government employment. So she comprehended, "I've been denied the equal protection of the laws." That was Sharron Frontiero.

Another case, probably my favorite, was brought by Stephen Wiesenfeld, a man whose wife had been the dominant breadwinner in the family. She was a high school teacher. She had a healthy pregnancy and continued teaching into the ninth month. Immediately after the birth, the doctor informed Stephen Wiesenfeld, "You have a healthy baby boy, but your wife died of an embolism."

Stephen vowed that he would not work full time until his child was in school a full day, and he calculated that between the Social Security benefits for child care and his part-time earnings, he could support his son himself. So he went to the Social Security office to seek child care benefits and was told, "We're sorry. These are mothers' benefits. They are not available to fathers."

Stephen Wiesenfeld wrote a letter to the editor of his local newspaper in Edison, New Jersey. It conveyed, "I have been hearing so much about women's lib. This is my story." And the tag line was, "Does Gloria Steinem know about that?"

Well, it happened I was teaching at Rutgers at the time. A woman on the Spanish faculty lived in Edison, read the letter to the editor, and called me. She said, "This isn't right, is it?" And I said, "Suggest that Mr. Wiesenfeld call the New Jersey affiliate of the ACLU."

His case illustrated how gender lines in the law could hurt everyone. There was a unanimous judgment for Stephen Wiesenfeld, but the Court divided three ways on the reason.¹⁴

The majority said, “Of course the discrimination is against the woman as wage earner. She pays the same Social Security taxes as a man, but her tax payments don’t get for her family the same benefits.”

A couple thought it was discrimination against the man as a parent, because Stephen Wiesenfeld would have no choice; he could not be the personal caretaker of his child.

One, who later became my Chief—he was then Justice Rehnquist—said, “This is totally arbitrary from the point of view of the baby. Why should the baby have the opportunity for the personal care of a sole surviving parent if that parent is female but not if the parent is male?”

These people—Sally Reed, Sharron Frontiero, and Stephen Wiesenfeld—they were not members of a cause-oriented group. They were, as I said, everyday people who thought they had experienced an injustice and believed that the legal system could right the wrong they had experienced.

It speaks very well, I think, for the system that people would take their case to court, eventually even the Supreme Court.

PROFESSOR SAIGER: Can I ask you about one more plaintiff, because I think she might be of particular interest to this audience. That is Susan Struck, who was a believing Catholic, which figures into her story a little bit.

JUSTICE GINSBURG: Yes. Captain Struck was in the Air Force serving in Vietnam. She was a highly skilled nurse. She became pregnant. This was about 1970.

Her base commander said, “Captain Struck, you have a choice. You can have an abortion.” This is three years before *Roe v. Wade*.¹⁵ Military bases were then offering abortions to service members and dependents of service members.

Susan Struck said, “I cannot have an abortion. I’m Roman Catholic. But I will use only my accumulated leave time for the birth and I’ve made arrangements for the child to be adopted at birth.”

The commanding officer responded, “Well, if that’s your choice, you’re out because pregnancy is a nonwaivable moral and administrative cause for discharge.”

Susan was sent back to the West Coast, where she had excellent representation. Lawyers in the State of Washington affiliate of the ACLU got her discharge stayed pending the final judgment in her case. She lost in the trial court. In the court of appeals, the court divided 2–1.¹⁶ There was a strong dissent.

Captain Struck petitioned for review and the Supreme Court took her case.

14. *See* *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975).

15. 410 U.S. 113 (1973).

16. *See* *Struck v. Sec’y of Def.*, 460 F.2d 1372 (1971).

A distinguished gentleman was the Solicitor General at the time. In fact, he had been the dean of the first law school I attended, Dean Griswold. He saw tremendous loss potential in Susan's case. So he convened the Air Force brass and said, "This regulation that pregnancy is a moral and administrative cause for discharge, you should not retain that regulation. I propose that you immediately waive Captain Struck's discharge and change the rule prospectively so that women who are pregnant and become mothers can remain in service if that is their choice."

Susan's discharge was waived. The Government's next move, as some of the law students here might have anticipated, is that the Solicitor General moved to have the case dismissed as moot because Captain Struck got what she wanted; she remained in service.

I called her and said—this conversation took place in 1972—"Susan, is there anything you're missing so we can say the case is still alive?" She replied, "I'm not out any pay or allowances." Then she paused and said, "There is one thing. All my life I've dreamed of being a pilot, but the Air Force doesn't give flight training to women." Both of us laughed, because we knew it was too soon. In 1972 it was too soon to challenge that barrier.

Think of it today. Today it would be unthinkable to say that women, just because they are women, are ineligible for flight training. So much has changed for the better.

PROFESSOR SAIGER: Is this undertaking finished? How good a job at this moment do the laws of the United States do in ensuring that there is no discrimination as among men and women?

JUSTICE GINSBURG: Almost all the explicit distinctions are gone. There are a couple left in the immigration area, but for the most part, explicit gender-based lines have vanished from state and federal legislation.

A large problem remains. It has been called unconscious discrimination, or unconscious bias.

An example is the symphony orchestra. When I was growing up, I never saw a woman in a symphony orchestra. Critics, including a well-known critic for the *New York Times*, swore that they could tell the difference between a woman playing the piano and a man, or the violin. Someone said, "Well, let's put a blindfold on him and see how good he is at identifying auditioners as male or female." Put to the test, he was all mixed up.

Then someone came up with a brilliant idea: "Let's drop a curtain so the people who are conducting the audition will not see the person who is auditioning." Literally overnight, women began to get positions in symphony orchestras in numbers.

When I told this story at a music festival some time ago, a young violinist in the room spoke up to inform me, "You left out one thing."

"What did I leave out?"

She said, "We auditioned shoeless so they wouldn't hear a woman's heels coming on stage."

Wouldn't it be wonderful if we could drop a curtain in every field of endeavor? But, sadly, we cannot.

A case brought in the 1970s is a good example of this unconscious bias. It was a Title VII suit brought against AT&T for passing over women for promotion to middle-management jobs. The women did well enough on all the criteria up to the last one, a "total person test."

What was the total person test? There was an interviewer, and the candidate had a conversation with the interviewer. Women dropped out disproportionately at that stage. Why? When the interviewer faced someone who looked like himself, there was a comfort level, he felt at ease. But if he faced someone of a different race or a woman, he was uncertain, didn't feel at ease, and so didn't think that person would be someone who could work well in a management job. It wasn't deliberate discrimination, it was unconscious bias.

As more and more women are out there doing things, there will be less and less of that. Justice O'Connor once said, "The first thing women should do is get out there, do the job, make a good show. As more women are out there doing things, there will be more women with the courage to try, and we will all be better off for it."

The other problem is what is known as work-life balance. Some of the women law clerks at the Court tell me they have never encountered gender-based discrimination. I smile and think, "Wait until baby comes."

But that is changing too. I mentioned the Family and Medical Leave Act. This law does not require a leave for mothers only. This leave is for all employees, male or female, who take care of a sick child, a sick parent, a sick spouse. It's gender neutral.

Law firms slowly are beginning to understand that they can have a flexible work schedule for a lawyer without adverse consequences for the firm. Nowadays a lawyer has the entire law library at her fingertips.

Those two are the major problems that professional women now encounter.

In my own life, I was tremendously fortunate to have a husband who wanted to share in raising our children. It also helped that he was a great chef. [Laughter]

PROFESSOR SAIGER: I would like to follow up on this from two directions. One is to ask you this question again, but in a different version. This version of the question comes from my colleague, Professor Catherine Powell, so I will read it to you as she suggested it to me: "What is your view of gender as a category of constitutional analysis now that women are rising to power as heads of state and now that transgender rights challenge the boundary between men and women?"

JUSTICE GINSBURG: Do I think now when women are, for example, the Chancellor of Germany, perhaps President of the United States, we will live in a perfect world? No. As I have indicated, we have come a long way, but there are still hurdles.

You asked when will there be enough women on the Court. When there are nine, of course. We now have twenty women in the Senate, up from my first year on the Court when there were only six. The direction is right, but there is a way to go.

Transgender rights are a new area. People didn't even talk about it before. And you know, Aaron, we have already had one emergency application this Term concerning high school restroom access.

It was a student typed male at birth who identified as female and wanted to use the girls' restroom. She was told by the school authorities that she couldn't. That case may very well be heard on the merits this Term.

By the way, the same-sex marriage issue could not have arisen without the precedent set in the Louisiana case I mentioned earlier, *Kirchberg v. Feenstra*.¹⁷ While marriage was a relationship between a dominant male and a subordinate female, what same-sex couple would want to gain access to that kind of union? Marriage had to become a partnership between equals before it was even thinkable to have same-sex unions.

PROFESSOR SAIGER: I also want to ask you about those law clerks. To speak personally for one second, one of the ways in which you were an important inspiration to me in my own life was in providing a model for how to construct a marriage or partnership of equals, especially one where both partners had serious professional commitments and aspirations, and wanted to parent their children and wanted, for example, to live in the same place.

I know that you moved geographically several times for Professor Ginsburg's career, and he moved for yours—geography being a topic that comes up often when I talk to my students about this. So, beyond luck, can you give, especially the younger people in the room starting out, some advice about what they should do to construct partnerships like that as they go forward?

JUSTICE GINSBURG: I would recommend that you choose a spouse who thinks your work is as important as his. In a marriage, it's a balance. Sometimes one defers to the other.

There was an article some time ago in the *Atlantic*—I think it is now a book—by Anne-Marie Slaughter, *Why Women Still Can't Have It All*. I haven't met anyone, male or female, who has had it all, all the time. I have had it all in my long life, but not all at one time. When Marty was climbing up the ladder at Weil Gotshal, I took the major responsibility for the children and the home.

When I got my first good job in Washington, D.C., appointment to the U.S. Court of Appeals for the D.C. Circuit, people asked me, "Isn't it hard for you commuting from New York to D.C.?"

I replied, "What makes you think I'm commuting?"

Marty, who by then was teaching at Columbia Law School, transferred to Georgetown. He was enthusiastic about what I was doing in the 1970s, and

17. 450 U.S. 455 (1981).

took on more and more of the home responsibilities, although I must credit my daughter for getting her mother out of the kitchen.

We had an arrangement. My husband, who was a super chef, cooked for company and on weekends. I was never allowed to cook for company. [Laughter] And daughter Jane, around her junior year in high school, noticed an enormous difference between daddy's cooking and mommy's. She decided mommy should be phased out of the kitchen altogether [Laughter] and daddy should become, not just the weekend and company cook, but the everyday cook. For me, it was like Tom Sawyer and the fence.

In a partnership where you love and respect each other, that is what you do, one defers to the other at different times.

To give you a sense of why I am exhilarated by the changes occurring in my lifetime—we moved to Washington, D.C., in 1980 when I commenced service on the U.S. Court of Appeals for the D.C. Circuit. We are at a party, and someone introduces me as “Circuit Judge Ginsburg.” More often than not, the hand went out to Marty [Laughter] with an expression like, “Oh, Judge Ginsburg, I've heard so much about you.” Marty would smile and reply, “She's Judge Ginsburg.” That doesn't happen now. [Laughter]

PROFESSOR SAIGER: I want to close this section just by saying that several of our students asked more generally if you had any advice, particularly for women, entering the profession. And one student asked me to ask this question in a much more bold fashion, which I will do: “Do you have any advice for female law students combating misogyny in law school?”

JUSTICE GINSBURG: Don't react in anger. Don't say, “You sexist pig.” Take a deep breath and realize that you have an opportunity to educate someone. A sense of humor is helpful.

One example: I'm arguing a case in the early 1970s before a three-judge federal district court in New Jersey. It's a gender discrimination case. The judge commented, “Well, I understand everything is equal for women now, even in the military.”

My response was, “Your Honor, the Air Force doesn't give flight training to women.”

He answered, “Oh, my dear, don't tell me that. Women have been in the air forever. I know from experience with my own wife and daughter.”

So what do you do? You say, “Yes, Your Honor, and I know some men who don't have their feet planted firmly on the ground.” [Laughter]

So, a sense of humor helps, also the good advice that my mother-in-law gave me the day of my marriage: “In a happy marriage, it helps now and then to be a little deaf.” [Laughter] That means if an unkind or a thoughtless word is spoken, you tune out.

What I would say to all law students is, whatever your paying job is in life, do something outside yourself. If you simply do your lawyering job for pay, then you have a skill, yes, you are like a plumber. But if you are a true professional, then you will give back to your community, you will help

repair tears in that community, you will do something outside yourself. I have gotten more satisfaction doing things for which I was not paid than from the jobs for which I was compensated.

PROFESSOR SAIGER: I have a number of questions for you about various legal questions that the students, in particular, have raised. A surprising number wanted me to ask you about corruption in the United States: “Does the law handle political corruption well? And does the criminal-justice system handle it well?”

This set of questions, if it treads against the Ginsburg rule, I’m sure you will tell me.

JUSTICE GINSBURG: If you read the papers, as I do, do we have corruption in our system? Yes. Are we as bad as some other systems of government? No. It takes a will to root out corruption, but I don’t think I have any more expertise on that subject than the rest of you.

PROFESSOR SAIGER: This is another student: “Do we have a two-tier criminal-justice system in the United States, with one standard for the rich and powerful and another for those without advantage?”

JUSTICE GINSBURG: You mean that a rich person can afford the best lawyer money can buy? Access to justice, I think, is a serious problem. Again, some nations do better than we do; many are much worse.

I worry about some trends. For one thing, driving cases out of the courts into arbitration. If you have a cell phone, if you have a credit card, and you read the small print, you will find that if you have any complaint, you may not go to court—you must go to arbitration—and you can sue only for yourself, you can’t join together with others in class actions.

The decisions of the Supreme Court have so far upheld the right to contract, no matter how one-sided the bargaining power. I have dissented in all of those cases. I think making the courts accessible to all people is essential—what is law for? It exists—or should exist—to serve a society of people, all people, not just wealthy people.

Let me give you one example of what a caring person can do. So, if you care as lawyers—I know a lot of judges care. The chief judge of the Second Circuit, Robert Katzmann, saw a crying need for lawyers to represent people caught in the toils of immigration procedures; either they don’t have a lawyer at all or they have a lawyer who is taking advantage of them. Judge Katzmann worked hard for a number of years to build a project that affords representation to people in need.

PROFESSOR SAIGER: Can you comment on the way that your view of the death penalty has changed since you have been on the Court?

JUSTICE GINSBURG: I served on the court of appeals for thirteen years, there was no death penalty in the District of Columbia, so death cases were new to me. And, Aaron, as you know, the jurisprudence in that area is dense.

I asked my law clerks to prepare a memorandum for me, bringing me up to speed so I would know the relevant case law.

Then I had to make a decision: Would I follow the model set by Justices Brennan and Marshall? They regarded the death penalty, under any and all circumstances, to be unconstitutional? They dissented in every death case in which the penalty was upheld.

I decided not to do that because it would disable me from participating in shaping the law. So I accepted the decisions as they are and became a player in deciding the future direction.

The drop in implementing the death penalty across the United States has been precipitous. Last year across the country, there were only twenty-eight executions. A majority of states either have abolished the death penalty or have retained it on the books but have had no executions for years. The death penalty tends to be concentrated in six states, and not even the state as a whole, but particular counties within the state.

So I think it is becoming more and more apparent that what the Court thought it could accomplish—that is, ensuring a death penalty that is administered with an even hand—is not achievable.

PROFESSOR SAIGER: A more cheerful question from a student: “My civil procedure professor described you as a civil procedure maven. Your opinions demonstrate your mastery of this area of the law. What sparked your interest in civil procedure, and how would you describe the subject’s importance to attorneys early in their careers?”

JUSTICE GINSBURG: My love of procedure is attributable to Benjamin Kaplan. He was my civil procedure teacher. It was the first law class I ever attended. He was a man who used the Socratic method, but never to wound, always to stimulate.

And then, at age 29, I had what turned out to be an incredibly great opportunity. Together with a Swedish jurist, I coauthored a book, called *Civil Procedure in Sweden*. Not exactly a best seller. [Laughter] Columbia had established an international procedure project. The project included books on France and one on Italy. They didn’t do Germany because the *Harvard Law Review* had two excellent articles on the German system.

They decided to include Sweden. Why Sweden? Sweden has fewer people than the City of New York. The Swedes had revised their judicial code to incorporate what they conceived to be the best of the Anglo-American common law system. By 1962, the new system had been in force long enough to describe it.

I came to appreciate that we had common goals but different ways to accomplish them. Also, that a procedural system reflects the society it serves. I couldn’t say, “Oh, the Swedes do this and it’s so great, we can do the very same thing.” But we can learn from each other and adopt other ways but fitting them into our own system.

What the Swedes did, for example: there used to be no single trial episode in civil cases. A court might hear one witness one day and look at some documents another day. The Swedes decided that, like the Anglo-American system, they wanted one concentrated trial episode, and they wanted the lawyers to be permitted to examine the witnesses. In a typical

civil law system, the judge interrogates the witnesses and decides what evidence will be considered. Under the revised code, the lawyers initially question the witnesses.

But, if you observe a proceeding, you notice immediately how differently the systems operate. The witness stands at a podium facing the court, right in the middle. The lawyers are seated at tables to the side of the witness, and they ask questions from a seated position. The Swedes have also adhered to what is called the free evaluation of evidence. Anything relevant is admissible.

They also had an unusual lay judge system. The English jury and the Swedish lay judges started out the same way. They were more witnesses than they were triers. They were people from the vicinity who knew the lay of the land.

But it evolved in Sweden that these lay judges sit with the professional judge, seven to nine lay judges sit with the professional judge. No charge is given to the jury, because the lay judges deliberate with the professional judge. If there are nine lay members, it takes seven to outvote the professional judge.

Seeing a different way of trying to accomplish a fair, accessible system of justice made me more flexible in my own thinking. I would love to write all of the procedure decisions at the Supreme Court, but none of us are allowed to be specialists. Justice Breyer might like to write all the trade-regulation decisions; or Justice Kagan, the administrative-law opinions.

PROFESSOR SAIGER: Is there any other Justice itching to write the procedure decisions of the Supreme Court? [Laughter]

JUSTICE GINSBURG: Well, Justice Scalia liked procedure, but he and I had some strong disagreements about the proper resolution of certain issues. [Laughter]

PROFESSOR SAIGER: Would it be fair to say that this Swedish experience also influenced your view about the utility of comparative law for American judges?

JUSTICE GINSBURG: Yes, very much so. An example, in the turning-point gender-discrimination case I described to you, Sally Reed's case, before her case, there hadn't been, in the entire history of the United States, any gender line the Court didn't like, or at least didn't think was constitutional.

After World War II, West Germany established a constitutional court. Two decisions of that new court were featured in Sally Reed's brief. One resolved a challenge to a civil-code provision that directed, when the parents disagree about the education of the child, father decides. The West German Constitutional Court declared that provision incompatible with their constitution's equality norm.

The other case involved a form of primogeniture. They didn't want certain kinds of farms to be broken up into small parcels, so the law provided that there would be only one inheritor, and that one would be the eldest son. It didn't matter that the first male had older sisters. That too was declared unconstitutional.

I had both decisions translated, cited them to the Supreme Court, quoting excerpts from them in the *Reed* brief. I never expected the Court to refer to them, which it didn't. But I think they had at least a psychological effect. The message I sought to convey: If that is how the then-West German Constitutional Court ruled, how far behind can the U.S. Supreme Court be?

PROFESSOR SAIGER: I fear that our time is running short, so I think I have time maybe for two more questions for you.

"What is the most egregiously unfortunate decision of the Supreme Court in recent times?" There are some predictions coming out of the audience; I can hear them.

JUSTICE GINSBURG: One that would be on my list—I have said this more than once—is *Citizens United v. FEC*.¹⁸ The notion that the public gets all the election speech money can buy is not, I think, healthy for a democracy. Sensible limits on campaign contributions and spending, I think, will eventually be upheld. Sometimes it has to get worse before it gets better.

I also mentioned *Shelby County*, the decision invalidating a key part of the Voting Rights Act of 1965, another on my list of precedents not worthy of preservation.

PROFESSOR SAIGER: The last question I want to ask you comes from my colleague, Professor Abner Greene: "Is there any one of your own votes on the Supreme Court that you have come to regret, knowing what you know now?"

JUSTICE GINSBURG: I'll answer that by telling you of the good advice I received when I was appointed to the D.C. Circuit. The advice was given to me by Judge Edward Tamm. He said, "Ruth, you're going to work very hard to make your decisions right. But when it's over, when the opinion is released, don't look back; don't worry about what is done. Go on to the next opinion and give it your all."

Good advice for a judge, don't you agree? Waste no time worrying about things past; go on to what lies in front of you.

Wish I could say, because I don't want to sound boastful, that a wrong decision of mine springs immediately to mind. But I don't think back, and nothing leaps to my consciousness as an egregious mistake on my part.

PROFESSOR SAIGER: Me neither.

I want to apologize to the students to whose questions I did not get, but our time is up. So I want, on behalf of the whole audience, to thank you for your time and your attention.

JUSTICE GINSBURG: Thank you. Thank you.

DEAN DILLER: Justice Ginsburg, thank you so much for sharing your experiences and your wisdom and insights with us.

Aaron, thank you so much for really superb questions. I know it was a collective effort, but you really posed them so artfully. I thank you on behalf of all of us.

18. 558 U.S. 310 (2010).