RHETORIC OF JUSTICE RUTH BADER GINSBURG: BRIEF COMPARISON OF THE LANGUAGE OF THE ADVOCATE WITH THE LANGUAGE OF THE JUSTICE

KATHLEEN PERATIS*

I worked with and for Justice Ruth Bader Ginsburg in the 1970s at the ACLU. I have been in private practice since then, mostly practicing employment law.

As I was considering what to speak to you about today, I decided to look back at the briefs that Justice Ginsburg wrote in the 1970s. And as I read them, it occurred to me that there's a very interesting difference between the way she framed her arguments those thirty-five years ago, the language she used, the results she sought then as an advocate, and the way she does those things now as a judge.

I offer you two illustrations.

The first comparison I call "high dudgeon then and now."

Justice Ginsburg didn't display high dudgeon very often as an advocate but I found one excellent example, and I cherish it. It comes from her first Supreme Court brief, the one in *Reed v. Reed* in 1971.[1]

Reed v. Reed, was a challenge to an Idaho statute that preferred men to women as administrators of estates.[2] That seems simple and straightforward enough today, but 1971 was a different world. First, there was no Supreme Court precedent at all, or, rather, there was a lot of Supreme Court precedent, and all of it was bad. Justice Ginsburg's brief in *Reed* was the very last time she would ever have to brief a case in the United States Supreme Court without being able to cite a Supreme Court case that she herself had won.

Also significant is this—we were then right in the middle of the civil rights movement. *Brown v. Board of Education of Topeka* was in the recent past.[3] Maybe more important, Justice Ginsburg herself was practically a child—a mere thirty-eight years old. Despite her brilliance, she had not up until then gotten the jobs that were easily available to

* Kathleen Peratis is a partner at Outten & Golden LLP.

1 Brief for Appellant, Reed v. Reed, 404 U.S. 71 (1971) (No. 70-4), 1971 WL 133596.

2 Reed v. Reed, 404 U.S. 71 (1971).

3 Brown v. Bd. of Ed. of Topeka, 347 U.S. 483 (1954).

brilliant men, and even to men who were not so brilliant. And the Idaho statute she was challenging was particularly stupid.

Justice Ginsburg knew, and has said as much, that it was our job to avoid frightening and alienating old male judges and show them, instead, that the favors they thought they were doing for women were not favors at all, that the pedestal was actually a cage. Throughout her ten years of women's rights advocacy, she challenged gender lines by showing judges that the classification was the outmoded product of stereotypical thinking: men as breadwinners, women as dependents; men as active, women as passive.

But that gentle approach is not the only thing on display in the *Reed* brief. Perhaps it was her youthful exuberance, but in that brief, it would be hard to say that she was not downright confrontational. Here are a few quotes from that brief:

"Race and sex are comparable classes. Both have been defined by, and subordinated to, the same power group—white males."

"Both slaves and wives were once subject to the all-encompassing paternalistic power of the male head of house."

"Prior to the Civil War, the legal status of women in the United States was comparable to that of blacks under the slave codes, albeit the white woman ranked as 'chief slave of the harem.' "

She might have cited—but didn't—the infamous line of her colleague, Professor Curt Berger, who said in his property law textbook, "Land, like woman, is meant to be possessed."[4]

Justice Ginsburg concluded the *Reed* brief with the most audacious line of all. She asserted that designating sex as a suspect classification was *overdue*! Despite the fact that no one—not even she—had ever before actually asked the Court to do so.

As far as I know, Justice Ginsburg as advocate was never quite so confrontational in any later brief. But she certainly was as a judge. My favorite illustration is her dissenting opinion five years ago in *Ledbetter v. Goodyear Tire & Rubber Co.*[5]

Allow me to set this up.

---

4 CURTIS J. BERGER, LAND OWNERSHIP AND USE 139 (1968).

5 Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618 (2007).

When Lily Ledbetter was about to retire from nineteen years of employment from Goodyear, she learned that she had been denied raises in the past due to her sex and those denials rendered her current pay much lower than that of comparable males. The discrimination would follow her into retirement and until her dying day.

In a 5-4 decision, the Supreme Court blocked her Title VII claim, holding that it was time-barred because nothing illegal had happened within the 180 days before she filed her EEOC charge. Justice Ginsburg was infuriated by the injustice.

"The discrimination of which Ledbetter complained is not long past," Justice Ginsburg states in her dissenting opinion. "The Court's insistence on immediate contest overlooks common characteristics of pay discrimination. Every paycheck that perpetuates past discrimination is a new and actionable discriminatory act."[6]

But she did not simply dissent and leave it at that. In a breathtaking deployment of the tools in the toolbox of Supreme Court Justice, and with her high dudgeon on display, she let the Supreme Court know that they should not count on having the last word.

"This is not the first time the Court has ordered a cramped interpretation of Title VII, incompatible with the statute's remedial purpose," she said, citing a treatise describing how bad judicial opinions led to amendment of Title VII known as the Civil Rights Act of 1991.[7]

"Once again," she said, "the ball is in Congress' court. As in 1991, the Legislature may act to correct the Court's parsimonious reading of Title VII."

And you all know what happened: the Lily Ledbetter Fair Pay Act of 2009 happened, utterly undoing the parsimonious Supreme Court.[8]

It is called the Lily Ledbetter Fair Pay Act, but I have always thought of it as the Ruth Bader Ginsburg Fair Pay Act.

My second set of cases is my favorite. I call it sweet victory—better late than never.

---

6 *Id.* at 645.

7 *Id.* at 661 (Ginsburg, J., dissenting) (citing B. LINDEMANN & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 2 (3d ed. 1996) ("A spate of Court decisions in the late 1980s drew congressional fire and resulted in demands for legislative change[,]" culminating in the 1991 Civil Rights Act (footnote omitted)).

8 Lilly Ledbetter Fair Pay Act of 2009, Pub. L. 111-2, 123 Stat. 5 (2009).

Here I will compare her brief in *Vorchheimer v. School District of Philadelphia*[9] with her 1996 opinion for the majority of the Supreme Court in *United States v. Virginia* (*VMI*).[10] As Justice Ginsburg herself has said of the *VMI* decision, "It never took me so long to win a case as the *Vorchheimer* case."[11]

In all my days at the ACLU, I don't remember any case as fraught as the *Vorchheimer* case, mainly because the local lawyer who represented the plaintiff kept making mistakes that we just couldn't stop. Let me remind you that *Vorchheimer* was a challenge in 1976 to Central High School in Philadelphia, the city's top academic public high school, a boys'-only school from which girls were excluded. The trial court had held in favor of the plaintiff, Susan Vorchheimer, but the court of appeals had reversed.

As I reviewed Justice Ginsburg's Supreme Court brief in that case, I noticed things I had missed at the time, in particular, her brilliant choice of verbs. For example, she did not say, as I just did, that Central High excluded girls. What she said is that Central High was *reserved* for males and Girl's High was *confined* to females.[12] "Reserved" suggests status; "confined" implies deficit, even illness. That, of course, is exactly what she wanted to convey and by using the verbs she did, she didn't have to spell it out.

After submitting her brilliant brief, Justice Ginsburg did not participate further in the case. Long story. She was famously disappointed in the Reply Brief and in the Supreme Court argument by Vorchheimer's lawyer. If you read the Reply Brief, you will know why.[13] I won't say more than to point out that it relies heavily upon *Shelley v. Kraemer*,[14] a case she firmly discouraged us from citing on the ground that doing so was a sloppy shortcut.[15]

---

9 Brief for Petitioner, Vorchheimer v. Sch. Dist. of Philadelphia, 430 U.S. 703 (1977) (No. 76-37), *available at* 1976 WL 181263 (December 2, 1976).

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

11 Interview with Justice Ruth Bader Ginsburg, Assoc. Justice of the United States Supreme Court, confirmed in e-mail from Justice Ruth Bader Ginsburg, Assoc. Justice of the Supreme Court to author (Oct. 31, 2012) (on file with the author).

12 Brief for Petitioner, *supra* note 9, at 14; *id.* at 4.

13 Reply Brief for Petitioner, Vorchheimer v. Sch. Dist. of Philadelphia, 430 U.S. 703 (1977) (No. 76-37), *available at* 1977 WL 204768 (February 17, 1977).

14 Shelley v. Kraemer, 334 U.S. 1 (1948) (holding that courts may not enforce racially restrictive covenants on real estate).

15 *See* Interview with Justice Ginsburg (characterizing the performance as "rather poor"), *quoted in* PHILLIPPA STRUM, WOMEN IN THE BARRACKS: THE VMI CASE AND EQUAL RIGHTS 74-75 (2002).

The sad outcome of *Vorchheimer* was a 4-4 tie (Justice Rehnquist did not participate), which meant that the bad court of appeals decision is, in effect, affirmed but with no precedential value.

So why am I telling you about *Vorchheimer*?

Because in 1996, twenty years later, along came the *VMI* case, in which the United States government challenged the exclusion of women from the Virginia Military Institute. The most terrifying line to the lawyers for the Virginia Military Academy in the entire Supreme Court opinion must have been:

"Justice Ginsburg delivered the opinion of the Court."

VMI was a military academy in Virginia. As it was described in the opinion, it sounds god awful: barracks, constant surveillance, no privacy, constant drills, torment, punishment, and suffering. It was hard to understand why anyone would want to go there, male or female. But that, of course, was not the question before the Court. The question was—could the State of Virginia run this institution and refuse to consider any women, no matter how qualified? You know the answer to that question.

The victory was sweet at 7-1 including a concurrence by Justice Rehnquist. The sole dissent in *VMI* was Justice Scalia; Justice Thomas took no part.

There is much to love in the opinion. Here are two of the most lovable:

First, with the *VMI* decision, the fight over the standard of review was virtually over. As Justice Ginsburg herself declared: "A party seeking to uphold government action based on sex must establish an *exceedingly persuasive* justification for the classification." Few gender lines can survive this test. "The Commonwealth's justification," she said, for excluding all women from 'citizen-soldier' training for which some are qualified . . . cannot rank as 'exceedingly persuasive . . . .'"[16]

Second, the classical approach to evaluating an equal protection defense was smashed for good. No longer would any *post hoc* clever justification dreamed up by a clever lawyer be acceptable. Instead, from now on, "[t]he justification [of a gender line] must be genuine, not hypothesized or invented *post hoc* in response to litigation. And it must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females."[17]

16 United States v. Virginia, 518 U.S. at 545.

17 *Id.* at 533.

While Justice Ginsburg as judge has had many opportunities to quote her own cases in her Supreme Court opinions, her opinion in *VMI* allowed her to quote from and cite virtually all of them—even, graciously, her one loser, which shall remain nameless, at least by me.[18]

In 1971, Justice Ginsburg as advocate said that real equality was "overdue." As justice in the *VMI* case, she went a long way to making it the law of the land.

Justice Ginsburg herself has said of the *VMI* opinion: "I've never had an opinion come out exactly as I would have it if I were queen."[19]

Though perfect, the *VMI* opinion is not the last word. It is reported in *The New York Times* today[20] that the Pentagon is opening up more, but still not all, jobs to women, explaining that "infantrymen in the Army and Marine Corp are not ready to have women serve at their sides in combat and that the physical demands are too onerous," thus, in the words of the *VMI* opinion, excluding all women from jobs for which some are undoubtedly qualified.

So there is work left for us to do—and the incomparable Ruth Bader Ginsburg has given us all the tools we need to get on with it.

---

18 Kahn v. Shevin, 416 U.S. 351 (1974).

19 Mark Curriden, *Justice Ruth Bader Ginsburg*, SMU DEDMAN SCHOOL OF LAW 2011 ALUMNI MAGAZINE, 7 (2011).

20 Elisabeth Bumiller, *Pentagon Allows Women Closer to Combat, but Not Close Enough for Some*, N.Y. TIMES, Feb. 10, 2012, at A17.