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Inequality Frontiers

Melissa Murray
Berkeley Law

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MELISSA MURRAY

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This Essay was adapted from remarks delivered at Equality's Frontiers, *a panel discussion celebrating Justice Ginsburg's gender-equality jurisprudence and analyzing its relationship with new developments in the law of equality. The discussion preceded Justice Ginsburg's Gruber Distinguished Lecture in Women's Rights, held on October 19, 2012, at Yale University.*

Ruth Bader Ginsburg's work challenging sex-role stereotypes in cases such as *Struck v. Secretary of Defense*,[1] *Moritz v. Commissioner*,[2] *Weinberger v. Wiesenfeld*,[3] and *United States v. Virginia*[4] is well known. In these remarks, I want to offer a different gloss on Justice Ginsburg's legacy by focusing on a less well-known aspect of her advocacy—her work on an amicus brief filed in the Supreme Court in the 1977 death penalty case *Coker v. Georgia*.[5]

Although *Coker* features prominently in the Supreme Court's vexed jurisprudence on the death penalty, the issue presented to the Court—and the issue that Ginsburg addressed in the brief—was actually quite narrow: Was the death penalty a proportional punishment for the crime of raping an adult woman? Ginsburg argued that it was not. However, in so doing, she did not rely on the traditional Eighth Amendment arguments advanced in prior cases like *Furman v. Georgia*[6] and *Gregg v. Georgia*.[7] Instead, she located the death

1. 460 F.2d 1372 (9th Cir. 1971).
2. 469 F.2d 466 (10th Cir. 1972).
3. 420 U.S. 636 (1975).
4. 518 U.S. 515 (1996).
5. 433 U.S. 584 (1977).
6. 408 U.S. 238 (1972).
7. 428 U.S. 153 (1976).

penalty for rape in a larger history of gender subordination and gender-role stereotyping.

The *Coker* brief advised the court to reject the death penalty for rape as a vestige of an ancient, patriarchal system in which women were viewed both as the property of men and as entitled to what Ginsburg called men's "crippling 'chivalric protection.'"[8] The brief emphasized rape's origin as a property crime, a view advanced just a few years earlier by Susan Brownmiller in her groundbreaking book *Against Our Will*.[9] According to Ginsburg, understanding rape as a property crime made clear that the true victim was not the woman herself, but the man—her husband or father—whose property had been violated and defiled.

To underscore rape's provenance as a property crime, Ginsburg looked to the common law's treatment of rape. The brief noted that, at common law, a female victim could save her attacker from punishment by agreeing to marry him. Through marriage, the offender could provide recompense to the victim and her family for the property he had ruined. Put differently, he had stolen something: her virtue. Through marriage, he could pay restitution for what he had taken.

The marital-rape exemption also furnished a vivid illustration of rape's property underpinnings. In 1977, when the brief was filed, the marital-rape exemption existed in a number of U.S. jurisdictions. By its logic, rape within marriage was not considered rape at all, and it could not be prosecuted as rape. The theoretical foundations of the marital-rape exemption were well known. In *The History of the Pleas of the Crown*, Sir Matthew Hale asserted that "the husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given herself up in this kind unto her husband, which she cannot retract."[10] Although Hale's theory of implied consent provided that consent to marriage furnished consent to all of the duties of marriage, including sex, the *Coker* brief maintained that whatever the rationale, the marital-rape exemption ultimately reflected rape's property roots. A married woman could not be raped by her husband because she belonged to him, and he had every right to possess what he already owned.

8. Brief Amici Curiae for the ACLU et al. at 11, *Coker*, 433 U.S. 584 (No. 75-5444), 1976 WL 181482, at *11.

9. SUSAN BROWNMILLER, AGAINST OUR WILL: MEN, WOMEN AND RAPE (1975).

10. 2 SIR MATTHEW HALE, THE HISTORY OF THE PLEAS OF THE CROWN 629 (P.R. Glazebrook ed., Prof'l Books Ltd. 1987) (1736).

On this account, the imposition of the death penalty for the rape of an adult woman underscored that the crime was the ultimate violation of another man's most precious belonging—and thus rightly subject to the most extreme sanction. Relatedly, the imposition of the death penalty reflected a woman's need for male protection and made clear that men were entitled to use all of the resources at their disposal, including death, to provide that protection.

In this way, Ginsburg emphasized that rape laws were built on, and indeed operated under, a set of stereotypes that emphasized women's passivity and dependence on men. By itself, this gendered lens through which to view rape and the imposition of the death penalty for rape was an important contribution to both the capital punishment debate and the nascent effort to reform rape laws. But the *Coker* brief went further to join the critique of rape's gendered origins with a critique of the racialized operation of rape laws and the racialized imposition of the death penalty.

To do so, Ginsburg linked the notion of rape as a crime against a man's property to the high premium placed on white women's chastity and their social roles as wives and mothers. To make these connections clear, she referenced *Sims v. Balkolm*,[11] a 1964 Georgia Supreme Court decision upholding the death penalty for rape as necessary

> to guard and protect the mothers of mankind, the cornerstone of civilized society, and the zenith of God's creation, against a crime more horrible than death, which is the forcible sexual invasion of her body, the temple of her soul, thereby soiling for life her purity, the most precious attribute of all mankind.[12]

The *Sims* reference starkly illustrated that rape law did more than simply criminalize nonconsensual sex—it played a powerful role in cultivating particular racial and gender stereotypes. Rape law constructed white women as wives and mothers, whose legal and social identities were mediated through and protected by their husbands. Together, rape law and the death penalty operated to protect white women because they were their husbands' possessions and the vessels for bringing forth the next generation.

In addition to elaborating rape law's part in producing gendered roles and stereotypes, the *Sims* reference also gestured toward rape law's role in marking and policing sexual and racial boundaries. As Ginsburg noted in the brief, the prospect of black men transgressing these boundaries to gain sexual access to white women, whether through rape or consensual circumstances, was deeply

11. 136 S.E.2d 766 (Ga. 1964).

12. *Id.* at 769.

troubling to many throughout the South. It undermined an interest in protecting and preserving racial purity and, as Ginsburg went on to note, it was seen to threaten the status of white men by devaluing their property interest in white women.

For these reasons, society—and Southern society in particular—had multiple ways of maintaining these sexual and racial boundaries. Lynching—extralegal, private, vigilante justice—was one infamous vehicle for punishing black men who breached these sexual boundaries. The imposition of the death penalty for rape was another.

As the *Coker* brief recounted, in antebellum Georgia, the death penalty for rape was reserved for black men convicted of raping white women. Although Georgia adopted a race-neutral statute after slavery's abolition, under the new statute blacks were more likely to be sentenced to death for rape than whites, particularly when their victims were white. On this account, the imposition of the death penalty for the crime of rape not only helped entrench the understanding of women as men's property, but also specifically marked white women as the property of white men and marked African-American men as dangerous trespassers. Together, rape law and the death penalty fostered and perpetuated a rigid hierarchy of gender roles, while simultaneously maintaining a crippling racial hierarchy.

Ultimately, the *Coker* Court concluded that the death penalty was indeed a disproportionate penalty for the crime of raping an adult woman. However, in doing so, the Court declined to follow Ginsburg's reasoning. Instead, the Court followed the more orthodox doctrinal path forged in earlier death penalty cases. Nevertheless, shades of Ginsburg's arguments are evident in the *Coker* opinion. Although the Court did not mention the brief explicitly, it did note that rape is "highly reprehensible, both in a moral sense and in its almost total contempt for the personal integrity and autonomy of the female victim."[13] In so doing, the Court recast rape as a violation of women's sexual autonomy rather than a violation of men's property.

There has been very little discussion—scholarly or otherwise—of Ginsburg's work in *Coker v. Georgia*. This is not entirely surprising. When compared with the other cases with which Ginsburg has been associated—*Struck*, *Moritz*, *Wiesenfeld*, *Reed v. Reed*,[14] and *Frontiero v. Richardson*,[15] all cases that considered the gendered administration of public benefits—*Coker* seems like an anomaly. This is unfortunate because the *Coker* brief provides yet

13. 433 U.S. at 597.

14. 404 U.S. 71 (1971).

15. 411 U.S. 677 (1973).

another lens through which to consider Justice Ginsburg's unparalleled legacy as an advocate for sex equality. It provides a broader view of what Ginsburg understood to encompass equality's frontiers.

The *Coker* brief also serves as a rejoinder to those who have argued that, in focusing almost exclusively on gender, Ginsburg's advocacy work was inattentive to questions of race. The *Coker* brief confirms that this was not the case. Indeed, throughout the brief, Ginsburg goes to great lengths to explain the degree to which gender, race, and sexuality were inextricably intertwined in the operation of rape law. Thus, while race was not necessarily central in the cases that form the corpus of Ginsburg's legacy as an advocate, it is clear from the *Coker* brief that she understood all too well the way in which these twin forms of discrimination worked in tandem to produce inequality.

The *Coker* brief also suggests that the issue of gender discrimination and corollary issues of gender subordination and gender stereotyping, on which Justice Ginsburg focused her career, pervade *all* areas of the law, including criminal law. In arguing that the death penalty for rape was a vestige of a patriarchal system, the brief demonstrates how rape law, as much as public-benefits law, has contributed to the production and persistence of gendered stereotypes about women and men.

This point warrants elaboration. We often think of criminal law as being divorced from the legal regulation of the family and intimate life. But criminal law, no less than family law, has been integrally involved in marking, policing, and enforcing the normative parameters of intimate life. If marriage has historically defined and marked the boundaries of legitimate sex and intimacy, then criminal law has been marriage's muscle, reinforcing the boundaries of legitimate sex and intimacy by forcefully condemning and punishing *illegitimate* sex and intimacy.

The *Coker* brief underscores this cooperative, regulatory enterprise by documenting the way in which the criminal law of rape and the imposition of the death penalty for rape reified and entrenched stereotypes about legitimate sexuality and men's and women's roles both within the family and in society. And, perhaps most importantly, the *Coker* brief reveals how the production of race and gender stereotypes ultimately impedes equality, and indeed how such stereotypes expand the frontiers of *inequality*.

This too warrants further elaboration. Throughout the *Coker* brief, Ginsburg argued that unduly severe penalties for rape, like the death penalty, not only reflected persistent racial and gender stereotypes but also led to the underenforcement of rape laws and a dearth of rape convictions. Because the stakes were so high in rape cases, the evidentiary burdens were also high, making it difficult to mount successful prosecutions. Because the penalties were so harsh, jurors went to great lengths to avoid convicting defendants,

focusing instead on the complainant's conduct and actions at the time of the crime, or convicting the defendant for a lesser offense, even in the face of clear evidence of guilt. Rooted in racial and gender stereotypes, rape law operated to protect women. But, ironically, the severe penalties that these stereotypes prompted made it difficult for many rape victims to avail themselves of the law's protection and to obtain the justice they deserved.

With all of this in mind, the *Coker* brief is not at all an aberrant one-off. Indeed, it is entirely consistent with Justice Ginsburg's legacy of challenging gender stereotyping and revealing the ways in which stereotypes that are intended to protect and assist actually limit and impede men and women. On this account, her work in *Coker*—no less than her work in *Frontiero*, *Reed*, *Struck*, and *Moritz*—demonstrates that law can cultivate the conditions in which stereotypes flourish, and, in so doing, may limit the ways in which men and women live their lives. But, more hopefully, Justice Ginsburg's work in *Coker* also suggests that, although law may cultivate the conditions for inequality, it also furnishes the tools—and in Justice Ginsburg's case, the personnel—for identifying, dismantling, and remedying these inequalities.

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Justice Ginsburg offered the following response:

> Thank you so much. You have captured just what I tried to convey in the *Coker* brief. On the question of interrelationships, recall the very first Title VII gender discrimination case, *Phillips v. Martin Marietta Corp.*[16] Ida Phillips wanted to work for Martin Marietta, but she had a problem. The company did not employ mothers of preschool children. Ida Phillips argued that the policy was discriminatory, for there was no ban on hiring fathers of preschool children. Ida Phillips was a white woman, yet she was represented by lawyers from the NAACP-Inc. Fund. The Fund immediately recognized how important the decision—a right decision—would be for many women of color who needed to work but had preschool children. As discrimination laws developed, precedents involving race discrimination could be helpful in gender-discrimination cases, and the other way around as well.

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16. 400 U.S. 542 (1971).

Melissa Murray is a professor of law at the University of California, Berkeley. *She thanks her fellow panelists—Cary Franklin, Judith Resnik, Reva Siegel, Ian Shapiro, and Kenji Yoshino—and their interlocutor, Justice Ginsburg, for a lively exchange of ideas. She is grateful to Maria Garrett, Joshua Hill, Anne Joseph O'Connell, and Cameron Russell for helpful comments and conversations.*

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