The Marshall Project

# RBG's Mixed Record on Race and Criminal Justice

*Ruth Bader Ginsburg was a revered feminist icon. Her legacy on issues such as prisoners' rights, capital punishment, racial justice and tribal sovereignty has been less examined.*

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In the days since Supreme Court Justice Ruth Bader Ginsburg died at the age of 87, tributes have tended to focus on her work championing gender equity and reproductive rights. Her record on issues of criminal justice and race is less examined—and less consistent. The Marshall Project reached out to a range of court-watchers, scholars and prisoners' rights advocates to ask about Ginsburg's legacy in these areas.

Most criminal justice reform proponents we spoke to praised Ginsburg for her record, in which she was typically skeptical about the government wielding its power unfairly against defendants and prisoners. But there were times she sided with law enforcement and the Trump administration, and she was outspokenly pragmatic on her approach to the death penalty, frustrating its opponents. Here's a look at Ginsburg's record on policing, fair trials, sentencing, prison conditions, racial justice, Native rights and more.

**RBG on the rights of the incarcerated**

When it came to prison conditions and the rights of incarcerated people, Justice Ginsburg simply wasn't as visible. She wasn't the primary author on any of our blockbuster human-rights-in-prison cases.

When she did author a decision on these issues, it was generally when the court was unanimous or near unanimous. Meanwhile, in split decisions, she generally sided with the more liberal justices, but she was not the primary author. In other words, she just wasn't a leader in this particular area of jurisprudence—but that doesn't negate her tremendous influence in other areas of law.

*—Andrea Armstrong, law professor at Loyola University New Orleans*

On prisoners' rights, Justice Ginsburg was an inconstant ally. She authored Cutter v. Wilkinson, which enhanced protection for prisoners' religious rights. But she also wrote Porter v. Nussle, which erected new barriers for prisoners seeking to vindicate their rights in federal courts. She dissented in Beard v. Banks, when the court upheld 23-hour solitary confinement without newspapers, radio, television, or telephone calls. But she also joined the court's opinion in Overton v. Bazzetta, which upheld draconian visiting restrictions in Michigan prisons,

including a potential lifetime ban on visits for prisoners found guilty of substance-abuse violations.

The reality, of course, is that no Supreme Court justice in recent memory has been a consistent champion of the rights of incarcerated people. Justice Ginsburg recognized prisoners as rights-bearing individuals and was willing, more frequently than most of her colleagues, to uphold those rights against government challenges.

*—David Fathi, director of the American Civil Liberties Union National Prison Project*

Justice Ginsburg developed a deep interest in prison conditions and prisoner rights long before she was a justice. In the 1990s, her husband, Marty Ginsburg, told me (rolling his eyes a bit at forgone golf games) that before she was appointed to the Supreme Court, they frequently toured prisons when they were in Europe on vacation. Similarly, before she was on the Supreme Court, she ensured that each year's Court of Appeals law clerks visited a federal prison, so they understood the stakes of the criminal cases they helped her with.

*—Margo Schlanger, former law clerk for Ginsburg, University of Michigan law professor, and an expert on prisoners' rights litigation*

**RBG on solitary confinement**

I don't think that solitary confinement was really her issue. She did find it constitutionally problematic enough to vote that a certain amount of process needs to attend a decision to put people in solitary. She did sign onto a couple of statements or dissents by other justices where the issue of solitary was raised, saying, either, we need to review this because it's constitutionally problematic, or, this is a backdrop that makes the deprivation of another constitutional right all the more significant.

But in Davis v. Ayala, a 2015 case [that wasn't about solitary confinement but where the petitioner had been held in solitary for decades], Justice Kennedy writes separately to condemn the practice of solitary confinement and she doesn't join that concurrence. So this is not to say that I think she endorsed solitary confinement. But this is not one of the causes she was a real champion for.

*—Laura Rovner, professor of law and director of the civil rights clinic at the University of Denver College of Law*

**RBG on race and racial justice**

I have a mixed take: She was willing to, for example, credit a Black queer civil rights attorney on Reed v. Reed, which is the case where the court said that the equal protection clause in the 14th Amendment prohibits discrimination based on sex. She built her argument off of the scholarship of Pauli Murray, and I think that's something a lot of White people don't generally do, credit arguments to people of color. I think her understanding of racism as a problem in this country was sound, and I think that's clear from SHELBY COUNTY V. HOLDER[1]—but I think when it comes to more modern issues of racial justice including police brutality and Black Lives Matter, I think she failed in that regard. And I'm talking specifically about her comments about

Colin Kaepernick. I do credit her with pretty quickly saying she shouldn't have said that. But I would rather her have said nothing. And also I would have liked to see her back up Justice Sonia Sotomayor more when it came to her more scathing dissents on equal protection in cases like the DACA case.

Ginsburg wrote a biting dissent in a decision that counties with a legacy of discriminatory voting practices no longer had to get special permission to change their voting rules.

But the big case that sticks out is Utah v. Strieff, the 4th Amendment case where Ginsburg signed onto all the nuts and bolts but failed to sign on to the section of Sotomayor's dissent that's been called a BLACK LIVES MATTER MANIFESTO[2]. [Sotomayor] cited Michelle Alexander and Ta-Nehisi Coates, and I think bringing that level of Black scholarship to bear in a Supreme Court case, you don't see that very often. Signing on with that would have been in line with Ginsburg's legacy.

The only section of Sotomayor's dissent that Ginsburg didn't sign onto stated that the majority's decision "implies that you are not a citizen of a democracy but the subject of a carceral state, just waiting to be catalogued."

*—Imani Gandy, senior editor of law and policy at Rewire News*

**RBG on Indigenous rights**

Tribes have done really well in the last six or eight years, and Ginsburg voted with the majority. In 2016, she wrote the opinion in US v Bryant about the use of tribal court convictions to enhance federal sentences for domestic violence repeat offenders. It was very much a question of issues of gender and violence against women.

But before that she wrote several opinions that were really awful for tribal interests. She struck down a $600 million judgment that favored the Navajo Nation that was the result of overt obvious corruption in the Department of Interior. She wrote the opinion in CITY OF SHERRILL V. ONEIDA INDIAN NATION OF NEW YORK[3] that was incredibly dismissive of tribal prerogatives. Some of the language in that opinion is considered some of the more overtly racist language in its challenge and skepticism of tribal interests. She also wrote an opinion in the 90s—Strate v. A1 Contractors—that gets a lot of criticism for demeaning tribal interests in accidents that occur on the reservation that should be adjudicated in tribal court.

In 2005, Ginsburg wrote a decision that said land belonging to members of the Oneida Indian Nation was not technically part of their reservation, and thus not tax-exempt, because it had been sold in 1807 and then later reacquired.

Most of these are unanimous opinions, so it's not like she's the only one. I think she used incredibly broad language that she would later regret. She later tried to limit the scope of the Sherill opinion, but the damage was already done.

I think it's a function of the Supreme Court not having any real knowledge of Indian country and not having any pushback among the justices themselves. It's hard to say it's RBG's fault for screwing these other cases up. It is, but it's also the fact that the court, well into the 2010s, was

super skeptical of everything tribes were doing. Tribes won almost none of their cases during that time. And that's turned around since Justice Sotomayor has come on the court.

*—Matthew Fletcher, Foundation Professor of Law at Michigan State University College of Law, director of the Indigenous Law and Policy Center and member of the Grand Traverse Band of Ottawa and Chippewa Indians*

The civil rights framework that informed her gender discrimination work left little or no room for collective interests like tribal sovereignty. The testimony she gave at her confirmation hearing demonstrated a meager understanding of Native American history and present day circumstances, and very small acquaintance with federal Indian law.

Not surprisingly the decisions she wrote in the early part of her tenure demonstrated her lack of understanding and respect for tribal sovereignty. Scholars commented on this and their criticisms were pretty blistering. Maybe because she took those criticisms to heart, maybe because she had more experience, her later decisions reflected much greater appreciation for the value of tribal sovereignty and the realities of tribal governments and economies. I think it's worth noting that she joined the majority in her final Indian law case, MCGIRT V. OKLAHOMA[4], which was a very consequential affirmation of reservation existence and tribal sovereignty in Oklahoma.

This 2020 case found that much of eastern Oklahoma is Indian Country.

*—Carole Goldberg, distinguished research professor at UCLA Law*

**RBG on creating legislation**

Justice Ginsburg was protective of the rights of criminal suspects and defendants, and was very protective of trial rights. The one area where she was not protective of criminal suspects and defendants was the scope of federal power over criminal legislation. One of the significant cases here was Gonzales v. Raich—on the question of whether Congress had the authority to prohibit the consumption of marijuana that was produced and consumed within a single state. The argument was that it couldn't possibly be interstate commerce, and yet the Supreme Court ruled that it could be regulated under the Commerce Clause. That decision signaled that Congress could legislate basically anything it wanted. Justice John Paul Stevens wrote the majority opinion that Ginsburg joined in a 6-3 judgment.

The other notable case more recently is Gundy v. United States, regarding the "nondelegation doctrine," the basic rule that Congress has to legislate, it can't delegate its legislative power to another branch. This was about the sex offender registry, regarding offenders who had committed their offenses before the law passed and had to register. The law basically said it was up to the attorney general whether they had to register, and the problem was that that was basically delegating legislative authority to the attorney general on the scope of criminal liability. And she joined Justice Elena Kagan's majority opinion in a 5-3 decision.

So if you look at things on an individual rights basis, she was very protective of criminal suspects and defendants but less so when you look at things from a structural, separation-of-powers perspective.

*—Jay Schweikert, policy analyst with the Cato Institute's project on criminal justice*

**RBG on sentencing**

She wasn't as much a quote-unquote liberal on criminal justice issues but she did a lot of good things like on sentencing—with APPRENDI V. NEW JERSEY, BLAKELY V. WASHINGTON, AND UNITED STATES V. BOOKER[5]—getting us away from some of the worst aspects of sentencing from the 80s and 90s. Basically, those three Supreme Court cases determined that the Sixth Amendment right to trial prohibited a sentence beyond statutory maximums unless it was heard by a jury. She was a believer in letting the jury make the decision instead of giving it to a judge in a jury trial.

In these cases, decided in 2000, 2004, and 2005, respectively, the Court held that any fact a judge might use to make a sentence longer than a statute calls for must first be proved to a jury. In Booker, the court also made the federal sentencing guidelines—which gave judges strict rules about what sentences to hand down in what circumstances—advisory rather than mandatory.

And she was obviously a protector of the right to counsel. She was pro-defense on a number of different issues, but she was also faced with a majority that was much more conservative.

*—Mark Holden, Americans for Prosperity board member and former general counsel and senior vice president of Koch Industries*

Justice Ginsburg's most significant sentencing legacy emerged from her role in a series of cases concerning constitutionally required sentencing procedures (and here she often voted alongside Justice Antonin Scalia who was her close friend but also, in other areas of the law, her ideological opposite). She was the key swing vote in the landmark ruling in United States v. Booker: she was the sole justice who both supported finding the mandatory federal sentencing guidelines unconstitutional, but then allowed those guidelines to continue to operate as advice to federal judges at sentencing.

Over 1 million federal defendants have been sentenced since 2005 under the advisory federal sentencing guideline system that Justice Ginsburg is most responsible for giving us. And in 2007 she authored a critically important opinion in Kimbrough v. United States, which allowed a judge to be more merciful than the harsh federal sentencing guidelines for crack cocaine offenses. Many thousands of defendants continue to cite Kimbrough at sentencing every year as they urge judges to take full advantage of the sentencing discretion that Justice Ginsburg helped give them.

*—Douglas Berman, professor at The Ohio State University Moritz College of Law, founder of Sentencing Law and Policy*

**RBG on extreme sentences for youth**

The Supreme Court has ruled multiple times that youth accused of crimes should be treated differently than adults, because they are uniquely able to grow and change and deserve a second chance. We attribute these decisions most directly to retired Justice Anthony M. Kennedy. But Ginsburg was a pivotal voice in advancing the constitutional rights of children.

In the 2005 case Roper v. Simmons, for example, the court ruled that putting children to death is unconstitutional. In the oral argument, Ginsburg pointed out that teenagers can't vote, can't sit on juries, can't serve in the military and are typically wards of their parents. "Why should it be that someone is death-eligible under the age of 18 but not eligible to be an adult member of the community?" she asked. And in A 2012 CASE[6], she famously said of the idea of sending a child to prison for life without a chance at parole, "Essentially, you're making a 14-year-old a throwaway person."

In this case, Jackson v. Hobbs, and its companion case Miller v. Alabama, the court held that a juvenile should only be sentenced to life without parole in the rarest of circumstances, when the child is deemed beyond rehabilitation.

To date, more than 650 people originally sentenced as children to die behind bars have been released as a result of these decisions.

*—Heather Renwick, legal director, Campaign for the Fair Sentencing of Youth*

**RBG on the death penalty**

RBG's earliest engagement of the death penalty was as a litigator writing an amicus brief on behalf of the leading women's rights and civil rights groups. The case was Coker v. Georgia, and the question was whether the death penalty amounts to excessive punishment for rape when life is not taken. RBG detailed the way in which capital punishment for rape in the South was used almost exclusively to punish African-Americans convicted of raping White women. She drew a straight line connecting the death penalty for rape to regressive patriarchal views about women and racially discriminatory attitudes and practices. She argued that the belief that rape justifies capital punishment is rooted in a view of rape as a crime against the victim's father or husband, who were deemed to have a property interest in women's chastity.

RBG wrote that "chivalric" protection in this context had the effect of putting women "not on a pedestal, but in a cage." This brief was distinctive and enduring because it rejected a rigid dichotomy between sexism and racial discrimination; rather she saw them as reenforcing systemic problems that amplified each other in the death penalty context. As she wrote, "[T]he death penalty for rape is an outgrowth of both male patriarchal views of women no longer seriously maintained by society, and gross racial injustice created in part out of that patriarchal foundation."

*—Jordan Steiker and Carol Steiker, law professors and authors of "Courting Death: The Supreme Court and Capital Punishment"*

Justice Ginsburg was as anti-death as she could be without, I think, ever expressly saying that. She wrote the majority opinion in the Bobby Moore case, saying that whether or not someone is intellectually disabled had to be decided differently. I know of several cases where defendants' sentences have been commuted from death to life on the basis of that decision.

I was on the Texas Court of Criminal Appeals at the time, and for me personally it meant the world that she took the time to cite to me—to mention me by name—in her majority opinion, quoting my dissent. It's kind of like she was saying 'atta girl' to me for speaking out.

*—Elsa Alcala, former Texas Court of Criminal Appeals judge*

In Maples v. Thomas in 2012, Justice Ginsburg wrote that Maples had been abandoned by his lawyers, and therefore could fight his death sentence in federal court. She devoted part of her opinion to a discussion of the inadequacies of Alabama's system for providing lawyers for people facing the death penalty. She sent a message to states that failing to provide competent lawyers in capital cases runs the risk of the conviction and sentence being thrown out.

In 2015, she also joined Justice Stephen Breyer's dissent in Glossip v. Gross in which he suggested the court should consider whether the death penalty as currently carried out violates the Eighth Amendment ban on cruel and unusual punishment. It was seen as an encouraging indication that the steep decline in death sentences, and the obvious arbitrariness and lack of reliability in capital sentencing, would result in the court declaring it unconstitutional. Unfortunately, the change in the composition of the court has ended that possibility for now.

*—Stephen Bright, law professor and founder of the Southern Center for Human Rights*

In Buck v. Davis, I argued that Duane Buck's death sentence was unconstitutional because it was imposed after his own attorneys presented expert testimony that Mr. Buck was more likely to commit criminal acts of violence in the future because he is Black. Justice Ginsberg agreed and joined Chief Justice John Roberts and the majority of the court in reversing the lower court decisions denying relief to Mr. Buck. The alleged link between race and criminality at the heart of Mr. Buck's case echoed a false and racist trope which is deeply rooted in our country's history, and which animates much of the racial inequity and disproportionality that continue to characterize the administration of criminal justice.

*—Christina Swarns, executive director of the Innocence Project*

**RBG on defendants' rights**

Justice Ginsburg protected defendants' rights more often than not, and she evolved over time—particularly on issues like qualified immunity and prosecutorial misconduct that are salient right now. In Connick v. Thompson, Justice Thomas allowed New Orleans prosecutors to avoid liability for convicting an innocent man and made civil rights lawsuits infinitely harder in the process. Her dissent painstakingly catalogued the misconduct in the case, placed blame where it belonged—on the men at the top—and stood up for the constitutional right to a fair trial.

*—Somil Trivedi, ACLU Criminal Law Reform Project senior staff attorney*

Justice Ginsburg was a champion of protecting the rights of the individual against the tyranny of government overreach. This is best exemplified in Alabama v. Shelton in 2002, where Ginsburg addressed the issue of whether the Sixth Amendment right to an effective lawyer applies to certain misdemeanor cases, in which a jail term is suspended in lieu of probation.

In practice, poor defendants in misdemeanor courts often were denied lawyers and then asked to negotiate plea deals for probation directly with prosecutors. They usually agreed to rules that were difficult to meet, and then were jailed for violating them. In Shelton, the U.S. Supreme Court determined such practices to be unconstitutional because these defendants couldn't go back and challenge the government's original accusations against them. Ginsburg wrote the majority opinion.

Unfortunately, the unconstitutional practices highlighted in Shelton persist to this day for a variety of reasons. But here too, Ginsburg, points the way to how best to rectify these practices. Shelton suggests allowing defendants, without admitting guilt, to enter rehabilitation programs before facing prosecutors in court. If the defendant successfully completes the program the original charges are dismissed.

*—David Carroll, executive director of the Sixth Amendment Center*

**RBG on guns and the Second Amendment**

Justice Ginsburg joined the dissents in District of Columbia v. Heller and McDonald v. Chicago, two major cases which expanded an individual's right to keep and bear arms unconnected with militia service. She said publicly that the Second Amendment was outdated and had long since served its function, which was controlling state militias during the early years of the republic. She believed the Second Amendment had no relation to the issues of guns in modern society, issues like background checks or assault weapon bans.

Today, courts evaluating Second Amendment claims overwhelmingly consider the effectiveness of gun laws on public safety. But there is a rising number of judges and justices who think that gun laws should be evaluated by history and tradition. It's possible that a Justice Ginsburg replacement will tip the scales to this second group. The likely outcome, if the Supreme Court mandates a more strictly originalist approach, is that more gun control laws will be struck down.

*—Joseph Blocher, professor of constitutional law at the Duke School of Law*