

BARRIERS TO ENTRY AND JUSTICE GINSBURG'S CRIMINAL PROCEDURE JURISPRUDENCE

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INTRODUCTION

In her twenty plus years on the United States Supreme Court, Justice Ruth Bader Ginsburg has issued momentous decisions and significant dissents concerning constitutional guarantees of equality. She is best known for her leadership—as an advocate, scholar, judge, and justice—on issues of gender discrimination.¹ Although one might expect related commitments to civil liberties to shape cases concerning the criminal justice process, Justice Ginsburg's mark on constitutional criminal procedure appears comparatively faint. Her contributions have been subtle,² and her cautious opinions at first seem disconnected from the clear principles established in the discrimination cases.³

Yet when Justice Ginsburg's criminal procedure decisions are considered through the lens of her broader jurisprudence on equality, some common commitments emerge. The argument for “equal citizenship stature”⁴ relates to her efforts to remove the systematic barriers to entry that preclude access to the courts in criminal cases. Here too she seeks to protect the dignity of defendants facing official power. And through careful engagement with the facts of each case and a consistent focus on the prerequisites to fair adjudication, she has highlighted the due process obligations of prosecutors, demanded adequate representation of defendants, expanded the right to confront witnesses, and increased the jury's control over sentencing determinations.

This chapter reconsiders Justice Ginsburg's understated but important criminal procedure legacy. Notably, a comprehensive bibliography documenting her own prolific writings, together with the academic commentary and assorted tributes published through her first ten years on the Court, lists hundreds of publications, but not a single one concerning criminal procedure.⁵ Part I assesses the perception of Justice Ginsburg's muted voice in the field. It describes her role in protecting existing trial rights from encroachment and articulating new requirements of procedural equality, and also characterizes those cases as consonant with her incremental approach. Justice Ginsburg's contributions have received little attention in part because her disposition to caution often produces outcomes that appear to favor the government, at least in the short term. Her opinion for the Court in *Perry v. New Hampshire*,⁶ for example, surprised some observers by rejecting any special reliability screening for suggestive eyewitness identifications,⁷ and Part I concludes with a discussion of that case.

When Justice Ginsburg writes from an internal perspective on the courts, however, and shifts her focus from reliability to opportunity, the volume of her voice increases. Part II describes Justice Ginsburg's efforts to ensure meaningful access to the criminal courts. Her opinions appear most animated when they

concern an aspect of the criminal justice process that reinforces inequality. And that concern may have found its fullest expression in a civil case: *Connick v. Thompson*.⁸ In *Connick*, Justice Ginsburg issued a fierce dissent from the Court's decision to vacate a damages award in favor of a defendant who was wrongfully convicted after prosecutors suppressed exculpatory evidence.⁹

Part III connects Justice Ginsburg's advocacy for meaningful access to the criminal courts to her dedication to fair treatment in other realms. Intellectual history and personal experience complicate any justice's jurisprudence, and it can be difficult to trace beliefs in one area to decisions in another. Legacies are not always linear, but this chapter suggests that Justice Ginsburg's legacy is more integrated than previously thought. There is an unexplored connection between her perception of the role of the courts in remedying unfairness in the discrimination cases and in lowering barriers to entry in the criminal justice process.

I. INCREMENTAL PROTECTIONS AND RESTRAINED DECISIONS

Justice Ginsburg's criminal procedure jurisprudence appears mild because she has acted primarily to preserve existing liberties rather than to expand constitutional protections. By and large, she seems less active on behalf of criminal defendants than "one might expect from a Justice appointed by a Democratic president and hailing from the ACLU."¹⁰ This perception is in keeping with "progressive criticism of Justice Ginsburg as an excessively cautious jurist."¹¹ And some commentators report the defense bar's assessment that her "support of defense-oriented positions is somewhat lacking in intensity" and thus has not had a significant impact.¹² Though she has in fact voted more frequently to protect defendants than most of her colleagues on the Rehnquist and Roberts Courts, Justice Ginsburg's record does not appear to favor defendants as much as the decisions of progressive icons such as Justices Brennan and Marshall did.¹³

This is so in part because Justice Ginsburg's intellectual instincts on the Court, as with her earlier litigation strategies, have been incremental across substantive areas of the law. As an advocate, she challenged classifications based on gender discrimination one at a time rather than attempting to prevail on a new constitutional theory aimed at broad social change. Often celebrated for these measured steps in the direction of what were ultimately historic advances in gender equality, Justice Ginsburg has repeatedly cited slow but steady forward motion as her preferred speed on the bench as well.¹⁴ Indeed, she has self-identified as given to interstitial action, an approach that she believes "affords the most responsible room for creative, important judicial contributions."¹⁵ She favors narrow rules, adheres closely to established precedents, and generally avoids grand pronouncements.¹⁶ Her conception of the judicial role, as she stated in her confirmation hearings, is to "get it right and keep it tight."¹⁷ This layered, gradual,

common-law approach to social progress extends to abortion rights, and Justice Ginsburg has famously expressed concern that the landmark *Roe v. Wade*¹⁸ decision was an ill-timed sudden move that “ventured too far.”¹⁹

Pragmatism characterizes many of Justice Ginsburg's criminal procedure decisions as well. She has employed her incremental approach not only to slowly advance social change but also to defend the remnants of Warren Court precedents. The Warren Court extended the right to counsel to indigent defendants charged with felonies, required that suspects undergoing custodial interrogation be advised of their right to remain silent and consult an attorney, and applied the exclusionary rule to state-court suppression of evidence seized in violation of the Fourth Amendment.²⁰ Justice Ginsburg has served on the Court during an era of erosion in those and other criminal procedure rights. Although approximately half of her decisions could be categorized as favoring the government, she often carefully constructs a narrow majority ruling, drafts a concurrence that mitigates the impact of the decision, or dissents to lay down a marker against future encroachment.²¹ As Christopher Slobogin has observed, “rather than lambasting the majority for its blindness or illogic in broad and far-reaching language, [her] concurrences pay close attention to precedent and rely on precise ‘lawyerly’ analysis detailing how narrow the majority ruling is, or could be construed to be.”²²

In relation to other areas of the law, Justice Ginsburg has garnered few marquee opinion assignments concerning criminal procedure. Some of the majority opinions that she has authored fit within this narrow, cautious genre. One closely-followed decision, *Perry v. New Hampshire*,²³ concerned eyewitness identifications. Members of the defense community hoped the Court would address growing skepticism of eyewitness testimony, which is often persuasive evidence against criminal defendants, but flawed in terms of reliability. The Court, however, concluded that a fair opportunity for the defense to raise the soundness of an identification before a jury was sufficient to assure due process, even if the identification was made under suggestive circumstances.²⁴

The witness in the *Perry* case had called the police to report seeing an African American man allegedly breaking into cars in the parking lot of her apartment complex. When the police arrived and questioned the witness in her apartment, the witness pointed out her kitchen window at a suspect, Barion Perry, standing in the parking lot. A month later, however, the witness could not identify Perry in a photo array. And at the time of the initial identification, Perry was standing next to a police officer in the still-dark parking lot, and was the only African American person there. Perry was charged with theft by unauthorized taking and criminal mischief, and he moved to suppress the parking lot identification on the ground that admission of a suggestive one-person show-up would violate due process. The New Hampshire trial court denied the motion and

admitted the identification. Perry was convicted of theft and appealed through the state courts to the Supreme Court.

The Supreme Court affirmed. Due process concerns, it reasoned, arise only when law-enforcement officers introduce the suggestive element themselves, and the improper police conduct creates a "substantial likelihood of misidentification."²⁵ In reaching that decision, Justice Ginsburg frustrated some observers by disregarding the mounting social science evidence calling the reliability of eyewitness identifications into question.²⁶ She reasoned, however, that the Constitution protected the defendant not by excluding the evidence but by affording an opportunity to persuade the jury that it is not credible.

Perry exemplifies Justice Ginsburg's emphasis on in-court process over on-the-street policing. She generally views law enforcement from a practical perspective, and she has imposed few new constraints on investigative practices. Justice Sotomayor presents something of a contrast, with notable decisions advancing a more expansive and technologically savvy understanding of privacy under the Fourth Amendment,²⁷ objecting to the narrowing scope of Fifth Amendment *Miranda* protections in custodial interrogations,²⁸ and dissenting from the Court's due process analysis in *Perry* itself.²⁹

Justice Ginsburg's *Perry* opinion also reveals the way in which she privileges the context of the adversarial process over content-based exclusions. It is in keeping, for example, with her alliance with Justice Scalia to establish a reinvigorated Sixth Amendment right to confront witnesses, no longer tethered to the reliability of the hearsay statement a witness made.³⁰ "The potential unreliability of a type of evidence," she wrote in *Perry*, "does not alone render its introduction at the defendant's trial fundamentally unfair."³¹ Justice Ginsburg further deferred to state and lower federal courts on the question whether evidence is sufficiently reliable to be admitted.

Where Justice Ginsburg does act to strengthen protections against law enforcement intrusion, it is often because she perceives a need to discourage misconduct. In *Perry*, for example, she noted the limited deterrence value of a contrary ruling, concluding that it would be difficult to dissuade law enforcement from engineering identifications through a case where only external facts and circumstances gave rise to the suggestiveness.³² In other cases, however, she has resisted unfair manipulation of investigations, and objected to governmental end-runs around the rules.

For example, Justice Ginsburg has often advocated rules designed to prevent law enforcement from gaming encounters with suspects. As she acknowledged in *Perry*, police misconduct represents a systematic failure that raises a due process problem and may require an exclusionary remedy. In a recent Fourth Amendment case, *Kentucky v. King*,³³ she dissented to underscore the dangers of police-created exigencies.³⁴ Likewise, she has been vigilant about

police manipulation when it comes to the requirement of *Miranda* warnings, favoring a broad definition of “custody.”³⁵ In addition, she has insisted that something more than an anonymous tip is required before an officer can claim reasonable suspicion for a stop,³⁶ and she recently expressed concern that police may dodge the warrant requirement by removing a party who refuses to consent to a search from the premises.³⁷ She has also opposed efforts to “constrict the domain of the exclusionary rule” to deterrence, fearing that would create perverse incentives for law enforcement to neglect the electronic databases that “form the nervous system of contemporary criminal justice operations.”³⁸

Overall, however, Justice Ginsburg proceeds from the premise that what happens in court matters more than how defendants got there. Her opinions suggest that individuals can best confront the power of the state from within the criminal justice process. And where the right to be heard has been vindicated,³⁹ then the adversarial system adequately protects equality and fairness. *Perry* helps to illuminate where her commitments lie. The core of her reasoning in *Perry* is that the trial process—including the right to counsel, the right to cross examine witnesses, the rules of evidence, expert testimony, carefully crafted jury instructions, and the requirement of proof beyond a reasonable doubt—suffices to caution juries against placing undue weight on flawed eyewitness testimony.⁴⁰

II. OPPORTUNITY JURISPRUDENCE AND AN INTERNAL PERSPECTIVE ON THE COURTS

Justice Ginsburg's contributions to criminal procedure stem primarily from her attention to the power of individual defendants within the trial process rather than constraints on the power of the state. Where she perceives a fair playing field, Justice Ginsburg has often authored or joined pro-government decisions.⁴¹ It is true that those decisions exist in some tension with her progressive instincts in other contexts.⁴² But adjudicative criminal procedure often upends expectations in this way because it can create unusual affinities. For example, although Justice Ginsburg and Justice Sotomayor vote together often, they diverge in many criminal procedure cases. Justice Sotomayor's focus on expanding constitutional rights can put her at odds with Justice Ginsburg's trial-process approach. In contrast, Justice Ginsburg's vigilance about procedural safeguards has led her to support a less-frequent ally, Justice Scalia, in his decisions redefining the Confrontation Clause and expanding the domain of the jury.⁴³

Moreover, Justice Ginsburg shares with some of her colleagues an internal perspective and a commitment to ensuring fairness within the existing system of criminal adjudication rather than changing its parameters. Even on a Court composed almost entirely of former appellate judges,⁴⁴ Justice Ginsburg stands out as a “lawyer's lawyer” and “judge's judge.”⁴⁵ Whether appellate judges bring common temperaments and techniques to the docket is an open question. When

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William Rehnquist joined the Court in 1972, former federal judges were in the minority, and earlier Courts had members with substantially more experience as governors, legislators, and cabinet members.⁴⁶ Empirical studies have questioned Chief Justice Roberts's contention that appellate judges on the Court are more likely to follow precedent and set aside policy preferences.⁴⁷ But he has recently made more nuanced statements about the justices' shared internal perspective on the Court's place in the American political process. In a 2013 appearance before the United States Court of Appeals for the Fourth Circuit, Chief Justice Roberts acknowledged that some of the questions before the Court might benefit from a broader view of public policy but could only be evaluated by the current Court through a "focused way of drilling in on the law."⁴⁸

A hallmark of Justice Ginsburg's jurisprudence is that she is indeed adept at "drilling in on the law," and even more so at closely reading the factual record.⁴⁹ A meticulous review of the details of a case and the procedural complexities comports with her deliberate approach. But even through that lawyerly lens, Justice Ginsburg has a long view. She fully understands how litigation relates to policy and how to patiently pursue a principle through individual cases that are sometimes many years apart. She is not only one of the most seasoned litigators on the current Court but also the Court's most significant social movement advocate at present. She has firsthand experience of the eventual interplay between judicial decisionmaking and increased opportunity.⁵⁰

Accordingly, over time, her constitutional criminal procedure decisions have helped to balance the government's power in the trial process. Even where she has not actively expanded defendant's rights, she has identified the "practical obstacles" to protecting those rights and has advocated the removal of those barriers.⁵¹ She has, for example, rejected executive branch attempts to shift prosecutions arising from the war on terror away from the purview of the federal courts.⁵² And she has guarded the right to be heard and mount a defense,⁵³ and the opportunity to cross examine witnesses and present facts to a jury.⁵⁴

Perhaps Justice Ginsburg's primary concern in criminal cases has been ensuring that neither lack of means nor limited procedural prowess shuts defendants out of court. She has been particularly dedicated to preserving the right to counsel.⁵⁵ In *Alabama v. Shelton*,⁵⁶ she extended the right to counsel to proceedings where the defendant receives a suspended sentence.⁵⁷ Defendants who decide to appeal from a guilty plea also require counsel, as she argued in *Halbert v. Michigan*.⁵⁸ The state should never, she wrote, "bolt the door to equal justice" when indigent defendants seek appellate review of criminal convictions.⁵⁹ Nor should defendants be left without counsel when confronted with the complexities of the adversarial system. Ever practical, Justice Ginsburg has noted that 68 percent of the prison population did not complete high school and may lack basic literacy skills, and that alone can bar entry to the courts.⁶⁰ She also has written separately to underscore that procedural requirements are "a tall order for

a defendant of marginal literacy,"⁶¹ to express concern about uncounseled convictions for driving under the influence,⁶² and to suggest that judges are obligated to warn pro se litigants about the consequences of their legal decisions.⁶³

The right-to-counsel cases fundamentally implicate Justice Ginsburg's commitment to fair access, and she views the function of public defenders broadly. She recognizes that there are "systematic failures across the country in the provision of defense counsel services to the indigent."⁶⁴ To begin to address those problems, she has argued for "expanding the situations in which the right to counsel obtains" and "policing the implementation of the right."⁶⁵ In *Maples v. Thomas*,⁶⁶ for example, she wrote a spare but searing description of the minimal resources and training supporting defense lawyers in capital cases in Alabama.⁶⁷ In that light, she found no procedural default when an attorney's abandonment of a client resulted in a missed deadline, which would have arbitrarily denied the defendant his "day in court."⁶⁸ And in *Vermont v. Brillon*,⁶⁹ she concluded that "delay resulting from a systematic breakdown in the public defender system" could be charged to the state.⁷⁰ She has also stated that she has "yet to see a death case, among the dozens coming to the Supreme Court on eve-of-execution stay applications, in which the defendant was well represented at trial."⁷¹ Because she entrusts defense lawyers with maintaining some balance in the adversarial process, Justice Ginsburg has also held counsel to a high standard.⁷²

Furthermore, a robust view of the jury's role follows from Justice Ginsburg's belief that safeguards in the adversarial trial best ensure fairness.⁷³ She has dissented in death penalty cases to underscore the importance of clear instructions to juries on the choices they confront.⁷⁴ And she allied herself with Justice Scalia in a series of decisions on jury determinations of sentencing facts. She voted with the majority in *Apprendi v. New Jersey*,⁷⁵ which requires jury findings of aggravating factors that increase criminal sentences beyond statutory maximums.⁷⁶ She later authored related opinions requiring that facts supporting a capital sentence be found by a jury,⁷⁷ and prohibiting judges from making factual findings giving rise to higher potential sentences.⁷⁸ In a 2005 sentencing case, *United States v. Booker*,⁷⁹ Justice Ginsburg's concern with mandatory sentencing guidelines encountered her resistance to abrupt systematic change.⁸⁰ She was the only justice to join the majority opinions on both substance and remedy, first agreeing that the mandatory federal Sentencing Guidelines violated the jury trial guarantees of the Sixth Amendment, but then joining with four different colleagues to conclude that the appropriate remedy was to give judges the discretion to apply them. Despite the decisive impact of switching her vote, she did not write at all in the case.

What may be the most telling criminal procedure opinion authored by Justice Ginsburg actually came in a civil case. Her dissent from the Court's decision in *Connick v. Thompson*⁸¹ highlights the connection between fair play by

prosecutors and the right to be heard. It involves a defendant first denied access to exculpatory evidence necessary to his criminal trial and then stripped of the remedy he received in civil court for his related constitutional claim.

The case arises from the wrongful conviction of John Thompson for robbery and murder. Thompson spent eighteen years in prison for those convictions, fourteen of them on death row in solitary confinement twenty-three hours a day.⁸² During his robbery trial, prosecutors withheld several pieces of exculpatory evidence, including a blood sample from the robbery crime scene establishing that the perpetrator's blood type was B.⁸³ Though prosecutors did not test Thompson's blood (which is type O), neither did they disclose to the defense that the forensic evidence, and a lab report conclusively identifying the perpetrator's blood type, existed. In fact, they took pains to conceal it by removing it from the property room during pretrial discovery. Prosecutors then used the robbery conviction to seek the death penalty in the subsequent murder trial, and to preclude Thompson from testifying in his own defense because of the impeachment effect of the prior conviction.

A defense investigator came across a microfiche copy of the laboratory report in police archives just before Thompson's sixth scheduled execution date in 2003.⁸⁴ The blood evidence ruled out Thompson's involvement in the robbery, and the trial court vacated that conviction. Thompson was also granted a new trial on the murder charge because the prosecution's "egregious" misconduct and intentional concealment of exculpatory evidence had prevented him from presenting a defense and testifying at trial. Upon retrial, Thompson was acquitted of the murder and released.

Thompson then sued for the violation of his federal civil rights under 42 U.S.C. § 1983. Pursuant to *Brady v. Maryland*,⁸⁵ due process requires the government to disclose to the defense any evidence in its possession that is both favorable and material to the defendant's guilt or punishment.⁸⁶ Thompson alleged that the New Orleans District Attorney's deliberate indifference to the need to train prosecutors on their constitutional obligations caused a constitutional violation. The central question was whether the harm to Thompson resulted from the District Attorney acting in his official capacity, or from the individual and independent violations of rogue prosecutors.⁸⁷ A jury found the District Attorney's Office liable and awarded Thompson \$14 million in damages. The Fifth Circuit sustained the award, but in a 5-4 decision authored by Justice Thomas, the Supreme Court concluded that the District Attorney's Office could not be held liable for a single incident of wrongdoing.

In order to prevail, Thompson needed to demonstrate that the District Attorney was deliberately indifferent to the need to train his prosecutors about *Brady*'s command, and that the lack of training led to the *Brady* violation. An earlier case, *Canton v. Harris*,⁸⁸ had established that deliberate indifference may be shown when a policymaker ignores a pattern of similar constitutional

violations by untrained employees.⁸⁹ The Court in *Thompson* held, however, that the District Attorney was entitled to rely on prosecutors' general professional training and ethical obligations. Although the case was the third before the Supreme Court concerning misconduct by the New Orleans District Attorney's Office,⁹⁰ the Court also concluded that Thompson failed to show the necessary pattern of deliberate indifference to the constitutional obligation.⁹¹

Justice Ginsburg would have upheld the damages award in light of the "gross, deliberately indifferent, and long-continuing violation of [Thompson's] fair trial right."⁹² The case serves as a self-contained demonstration of both the importance of enforcing *Brady* requirements and the role of section 1983 liability in doing so. Accordingly, Justice Ginsburg let the facts speak for themselves and dedicated her dissent—joined by Justices Breyer, Sotomayor, and Kagan—to a "lengthy excavation of the trial record."⁹³

By exposing the root causes and net effects of pervasive noncompliance with *Brady* violations, she refuted the majority's conclusions that only a single violation occurred, and that the District Attorney was anything but deliberately indifferent to it:

From the top down, the evidence showed, members of the District Attorney's Office, including the District Attorney himself, misperceived *Brady*'s compass and therefore inadequately attended to their disclosure obligations. Throughout the pretrial and trial proceedings against Thompson, the team of four engaged in prosecuting him for armed robbery and murder hid from the defense and the court exculpatory information Thompson requested and had a constitutional right to receive. The prosecutors did so despite multiple opportunities, spanning nearly two decades, to set the record straight. Based on the prosecutor's conduct relating to Thompson's trials, a fact trier could reasonably conclude that inattention to *Brady* was standard operating procedure at the District Attorney's Office.⁹⁴

Although the evidence at issue was one crime lab report regarding blood-type evidence, several prosecutors over many years engaged in various acts to suppress it. The only thing isolated or unitary about the constitutional violation was "the sense that it culminated in the wrongful conviction and near execution of only a single man."⁹⁵ Moreover, the District Attorney's cavalier attitude toward training was not just "deliberate" but "flagrant."⁹⁶ When the supervisor had long ago "stopped reading law books," and the office had never disciplined a single prosecutor despite "one of the worst records" in the country concerning *Brady* violations, then breaches were not just predictable but inevitable. According to Justice Ginsburg, "the *Brady* violations in Thompson's prosecutions were not singular and they were not aberrational. They were just what one would expect given the attitude toward *Brady* pervasive in the District Attorney's Office."⁹⁷ To conclude that a "culture of inattention" does not constitute disregard for "a known or obvious consequence" simply ignores the facts.⁹⁸

Justice Ginsburg's dissent is an effort to bring those facts to light, not only to expose the injustice to Thompson but also to explain the broader hindrance to enforcement that the Court's decision created. Lax training and monitoring allow, or even encourage, prosecutors to ignore a right "fundamental to a fair trial."⁹⁹ Because "explicitly illegal policies are rarely put in place," insisting that "liability flows only from an explicit policy essentially immunizes policymakers who simply adopt a facially constitutional policy, or institute no policy at all, and then fail to prevent or implicitly condone unconstitutional conduct."¹⁰⁰ And prosecutorial concealment "is bound to be repeated unless municipal agencies bear responsibility—made tangible by § 1983 liability."¹⁰¹

The intensity with which Justice Ginsburg writes in *Connick* emphasizes her faith in the rigor of the adversarial system, and her view that it can only function if defendants have full and fair access to court. For Justice Ginsburg, *Brady* "is among the most basic safeguards brigading a criminal defendant's fair trial right," and a *Brady* violation "by its nature, causes suppression of evidence beyond the defendant's capacity to ferret out."¹⁰² Because the absence of the withheld evidence may result in the conviction of an innocent defendant, "it is unconscionable not to impose reasonable controls impelling prosecutors to bring the information to light."¹⁰³ If a defendant does not know of a defense he might raise, then he has not been "let in" to court in the way that Justice Ginsburg envisions. Common sense dictates that defendants should not be compelled to "scavenge for hints of undisclosed *Brady* material when the prosecution represents that all such material has been disclosed."¹⁰⁴ Moreover, narrowing definitions of prerequisites like "indifference" unduly restrict liability, and again deprive the defendant of legal recourse. Arising together, those issues yielded Justice Ginsburg's most forceful piece of writing surrounding a question of criminal procedure.

III. COMMON COMMITMENTS AND UNEXPLORED CONNECTIONS

There is an unrecognized connection between remedying unfairness to individual defendants and Justice Ginsburg's resistance to "built-in headwinds" that have discriminatory effect.¹⁰⁵ At several points, links appear between the right to participate and be heard in the criminal justice process and her legacy on equality. Indeed, an opinion emphasizing prosecutors' duty to give defendants a fair opportunity to present a defense fits within Justice Ginsburg's small but significant collection of impassioned dissents.

Justice Ginsburg has stated that she writes separate opinions only where she believes them to be "really necessary."¹⁰⁶ She carefully "[c]hooses her ground" when dissenting,¹⁰⁷ and thus the decision to write at all is noteworthy. And *Connick* belongs in the even more select group of dissents so expressive of Justice Ginsburg's core constitutional concerns that she read from the bench to

underline the objection to the majority's decision. An oral dissent, she has explained, indicates "more than ordinary disagreement."¹⁰⁸ Most often she does not "announce," but when she wants to "emphasize that the court not only got it wrong, but egregiously so," reading a dissent can serve an "immediate objective."¹⁰⁹ It signals that the dissenter views the majority as "importantly and grievously misguided."¹¹⁰

Ledbetter v. Goodyear,¹¹¹ in which Justice Ginsburg delivered perhaps her best known dissent from the bench, sounds some of the same notes as her *Connick* opinion. The majority decision in *Ledbetter*, authored by Justice Alito, held that a woman had waited too long to sue for pay discrimination even though she was unaware for years that she was earning substantially less than her male coworkers at a tire plant. Justice Ginsburg emphasized that private sector employees do not ordinarily know what their colleagues are making:

Pay disparities often occur, as they did in *Ledbetter*'s case, in small increments; cause to suspect that discrimination is at work develops only over time. Comparative pay information, moreover, is often hidden from the employee's view. Employers may keep under wraps the pay differentials maintained among supervisors, no less the reasons for those differentials. Small initial discrepancies may not be seen as meet for a federal case, particularly when the employee, trying to succeed in a nontraditional environment, is averse to making waves.¹¹²

Because employees cannot "comprehend [their] plight," neither can they complain until the disparity becomes apparent. And as a result of the Court's decision, an employee's "initial readiness to give [the] employer the benefit of the doubt" would preclude a later challenge.¹¹³

What struck Justice Ginsburg about *Connick* relates to her central objection in *Ledbetter*. There, the plaintiff first suffered exclusion from full and fair participation in the workplace, and then was barred from court when she sought a remedy for that harm. *Ledbetter* did not know that she was paid less than her male counterparts until time extinguished her claim. Thompson's dilemma is substantively distinct but structurally similar. Thompson was unaware of exculpatory evidence that could exonerate him while he spent eighteen years in prison on a wrongful conviction. Then, though there was no question that he suffered a deprivation of his constitutional rights, the Court constructed a procedural impediment that precluded prosecutorial liability. Justice Ginsburg also understood and expressed in both cases how foreclosing a remedy would affect future employees seeking equal pay, or future defendants exposed to similar unfairness.¹¹⁴

Congress subsequently passed the Lilly Ledbetter Fair Pay Act of 2009, accepting an invitation that Justice Ginsburg extended from the bench and adopting the position she took in dissent. It is too soon to say whether her *Connick* dissent might similarly inspire new standards on the *Brady* front, but at a

minimum the decision has generated substantial commentary about the need to reconsider the mechanisms through which *Brady* is enforced.¹¹⁵

Justice Ginsburg's oral dissents have gathered strength across substantive areas,¹¹⁶ and their broader strokes connect to her criminal procedure decisions. Recently, she has engaged in some negative incrementalism on both affirmative action and abortion rights.¹¹⁷ In *Fisher v. University of Texas*,¹¹⁸ she agreed that the University of Texas's admissions plan should stay in place but objected to the decision to send it back for the lower court to judge it against a more demanding standard, expressing some concern about the majority's strategy to diminish affirmative action over time.¹¹⁹ Moreover, in *Gonzalez v. Carhart*,¹²⁰ she argued that treating women as incapable of making the difficult choices surrounding second-trimester abortions denied them equal protection.¹²¹ And she read her dissent aloud to emphasize what she called the majority's "alarming" ruling and "effort to chip away" at abortion rights.¹²²

Furthermore, Justice Ginsburg continues to make her strongest arguments through a scrupulous understanding of the record and a common sense view of the facts.¹²³ Her dissent in *Vance v. Ball State University*¹²⁴ challenged a restrictive definition of "supervisor," which in turn narrowed the conduct prohibited under Title VII of the Civil Rights Act of 1964.¹²⁵ In Justice Ginsburg's view, the majority's definition of supervisor—limited to the person with the authority to hire, fire, demote, promote, transfer or discipline an employee¹²⁶—exhibited "remarkable resistance" to "workplace realities" and would leave many employees defenseless against those in their chain of command who could make their work life miserable without having "tangible" authority.¹²⁷ The following day, in *Shelby County v. Holder*,¹²⁸ Justice Ginsburg read a dissent from the bench objecting that to conclude from the nation's progress in protecting minority voters that the voting rights law was no longer needed was like "throwing away your umbrella in a rainstorm because you are not getting wet."¹²⁹

Insisting on the realities—not only of workplaces and voting districts but of public defenders' and prosecutors' offices—has been a key feature of Justice Ginsburg's dissents. Employees do not ordinarily inquire about the salaries of their counterparts,¹³⁰ supervisory power is not confined to the individual who hires and fires,¹³¹ constitutional protections can achieve some gains and remain necessary at the same time.¹³² Nor do prosecutors suppress exculpatory evidence in coordination with several colleagues unless the office in which they work broadly tolerates circumvention of constitutional rights.¹³³ The *Connick* Court simply ignored the basic realities of a functioning District Attorney's Office to conclude that there was no deliberate indifference and that two decades of conduct involving many prosecutors constituted a single act.¹³⁴ A defendant deprived of the essential facts necessary to his defense, and then precluded from seeking recourse for that violation in court, has twice been excluded from the system. And when the Court relies on these fictions to hinder judicial enforcement

of constitutional rights, Justice Ginsburg views that as yet another failure of process.

There is thus an extent to which Justice Ginsburg's criminal procedure decisions harmonize with the underlying commitment of her broader jurisprudence. She is dedicated, she has said, to "the idea of essential human dignity, that we are all people entitled to respect from our Government as persons of full human stature, and must not be treated as lesser creatures."¹³⁵ According to Neil Siegel, this belief in "equal citizenship stature"¹³⁶ defines Justice Ginsburg's vision for "how government power should be exercised and how individual rights should be protected in the American constitutional order."¹³⁷ Her criminal procedure opinions are neither entirely consistent with each other nor perfectly consonant with the discrimination decisions, but there is an intriguing and important relationship between them.

Both sets of decisions, moreover, weave together fair process and equal access. In the gender discrimination cases, Justice Ginsburg has treated liberty and equality as interconnected values that "inform one another."¹³⁸ At times, she has used liberty arguments to protect equality,¹³⁹ and in the criminal procedure realm, she has shown how equality concerns can safeguard liberty interests. In a majority opinion in *M.L.B. v. S.L.J.*,¹⁴⁰ written early in her tenure on the Court, Justice Ginsburg recognized the relationship between equal protection and the illegitimacy of "fencing out would-be appellants based solely on their inability to pay core costs."¹⁴¹ There, she held that indigent parents must be afforded an opportunity to appeal termination of parental rights whether or not they can pay for preparation of the trial record.¹⁴² The rationale in the opinion was self-consciously imprecise because it comprehended more to the "essential fairness of the state-ordered proceedings anterior to adverse state action" than due process.¹⁴³

Justice Ginsburg also perceives some shortcomings to criminal procedure rights conceptualized as constraints and instead concentrates on the government's affirmative obligations to ensure fair process.¹⁴⁴ She recognizes, however, that fundamental liberty interests sometimes provide the strongest support for access to the courts.¹⁴⁵ Consequently, neither the canonical gender discrimination decisions nor the quieter criminal procedure opinions can be described through "resort to easy slogans or pigeonhole analysis."¹⁴⁶ The two groups of cases, however, seem to coalesce around an ideal of opportunity, and an understanding of the importance of a fair playing field.¹⁴⁷

CONCLUSION

Though they have received less attention than other areas of her jurisprudence, Justice Ginsburg's criminal procedure opinions resonate with her work against discrimination. Her conception of a fair criminal justice process is

infused with equality principles, and particularly with the conviction that the government should not foster inequality, and should work to remedy the effects of past injustices. She has focused on expanding opportunity within adjudication, more than on ensuring reliability or enlarging privacy in the ways that her progressive predecessors did. Once criminal defendants have access—to the exculpatory information that might allow them to mount a defense, to the attorneys necessary to do so, and to a duly empowered jury—then she believes that the adversarial process safeguards constitutional rights. That commitment is an insufficiently appreciated dimension of Justice Ginsburg's criminal procedure jurisprudence, and a connection that both informs and amplifies her other contributions.

* Professor of Law, Duke Law School. I am grateful to Sara Sun Beale, Sam Buell, Neil Siegel, and Christopher Slobogin for valuable comments and conversations; to Katelyn Saner for excellent research assistance; and to Scott Dodson for helpful editorial suggestions.

¹ See Kathleen M. Sullivan, *Constitutionalizing Women's Equality*, 90 CALIF. L. REV. 735, 739 (2002) (“American women’s equality is a story of creative interpretation of the Equal Protection Clause and of advocates’ bravado [l]ed with inventiveness and strategic brilliance by now-Justice Ruth Bader Ginsburg.”).

² See Christopher Slobogin, *Justice Ginsburg's Gradualism in Criminal Procedure*, 70 OHIO ST. L.J. 867, 870 (2009).

³ See, e.g., *United States v. Virginia*, 518 U.S. 515 (1996).

⁴ Neil S. Siegel, “*Equal Citizenship Stature*”: *Justice Ginsburg's Constitutional Vision*, 43 NEW. ENG. L. REV. 799, 825 (2009).

⁵ See generally Sarah E. Valentine, *Ruth Bader Ginsburg: An Annotated Bibliography*, 7 N.Y. CITY L. REV. 391 (2004). See also Slobogin, *supra* note 2, at 870 (“To date, no one has taken a sustained look at Justice Ginsburg’s approach to decision-making in the area of criminal procedure.”).

⁶ *Perry v. New Hampshire*, 132 S. Ct. 716 (2012).

⁷ *Id.* at 730.

⁸ *Connick v. Thompson*, 131 S. Ct. 1350 (2011).

⁹ *Id.* at 1370–87 (Ginsburg, J., dissenting).

¹⁰ Slobogin, *supra* note 2, at 870.

¹¹ Siegel, *supra* note 4, at 801.

¹² See Slobogin, *supra* note 2, at 876; see also *id.* at 887 (stating that some of Justice Ginsburg’s criminal procedure decisions may have been lost opportunities and that “a bit more willingness to push the envelope might be worthwhile even for a judge who tends to [be] gradualist”).

¹³ Her record is, however, in keeping with her resistance to affixing “conservative” or “liberal” labels to jurisprudential trends, which she has pointed out tends to be the practice of unsuccessful litigants. See generally Ruth Bader Ginsburg, *Interpretations of the Equal Protection Clause*, 9 HARV. L. & POL’Y REV 41 (1986).

¹⁴ Justice Ginsburg has written that “[m]easured motions” seem right “for constitutional as well as common law adjudication,” and that “[d]octrinal limbs too swiftly shaped” “may prove unstable.” Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. REV. 1185, 1198 (1992); see also Pamela S. Karlan, *Some Thoughts on Autonomy and Equality in Relation to Ruth Bader Ginsburg*, 70 OHIO ST. L.J. 1085, 1086 (2009).

¹⁵ Ginsburg, *supra* note 14, at 1209.

¹⁶ Slobogin, *supra* note 2, at 867.

¹⁷ *Nomination of Ruth Bader Ginsburg to Be Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 103d Cong. 56 (1993) (statement of Judge Ruth Bader Ginsburg) (internal quotation marks omitted).

¹⁸ *Roe v. Wade*, 410 U.S. 113 (1973).

¹⁹ Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. REV. 375, 376 (1985); see also Adam Liptak, *Court is ‘One of Most Activist,’ Ginsburg Says, Vowing to Stay*, N.Y. TIMES, Aug. 24, 2013, at A1 (recounting Justice Ginsburg’s view that the Court moved too fast in *Roe* because the decision “gave the anti-abortion forces a single target to aim at”).

²⁰ See *Miranda v. Arizona*, 384 U.S. 436 (1966); *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Mapp v. Ohio*, 367 U.S. 643 (1961).

²¹ See, e.g., *Herring v. United States*, 555 U.S. 135, 157 (2009) (Ginsburg, J., dissenting).

²² Slobogin, *supra* note 2, at 879.

²³ *Perry v. New Hampshire*, 132 S. Ct. 716 (2012).

²⁴ *Id.* at 730.

²⁵ *Id.* at 718 (quoting *Neil v. Biggers*, 409 U.S. 188, 201 (1972)) (internal quotation marks omitted).

²⁶ See, e.g., BRANDON GARRETT, CONVICTING THE INNOCENT 145 (2011).

²⁷ *United States v. Jones*, 132 S. Ct. 945, 956 (2012) (Sotomayor, J., concurring).

²⁸ *Berghuis v. Thompkins*, 560 U.S. 370, 400–01 (2010) (Sotomayor, J., dissenting).

²⁹ *Perry*, 132 S. Ct. at 730–40 (Sotomayor, J., dissenting).

³⁰ See *Crawford v. Washington*, 541 U.S. 36, 68–69 (2004); see also *Michigan v. Bryant*, 131 S. Ct. 1143, 1177 (2011) (Ginsburg, J., dissenting).

³¹ *Perry*, 132 S. Ct. at 728.

³² See *id.* at 726. Justice Ginsburg noted that the “crucial element of police overreaching” was missing, and therefore that the Due Process Clause was not implicated. *Id.* (quoting *Colorado v. Connelly*, 479 U.S. 157, 163, 167 (1986)).

³³ *Kentucky v. King*, 131 S. Ct. 1849 (2011).

³⁴ See *id.* at 1864 (Ginsburg, J., dissenting) (“The Court today arms the police with a way routinely to dishonor the Fourth Amendment’s warrant requirement in drug cases. In lieu of presenting their evidence to a neutral magistrate, police officers may now knock, listen, then break the door down, nevermind that they had ample time to obtain a warrant.”); see also *Arkansas v. Sullivan*, 532 U.S. 769, 773 (2001) (Ginsburg, J., concurring) (agreeing that officers’ subjective intentions are irrelevant for probable cause analysis but urging reconsideration in the event of an “epidemic of unnecessary minor-offense arrests”); *Minnesota v. Carter*, 525 U.S. 83, 108 (1998) (Ginsburg, J., dissenting) (“Human frailty suggests that today’s decision will tempt police to pry into private

dwellings without warrant, to find evidence incriminating guests who do not rest there through the night.”).

³⁵ See *Howes v. Fields*, 132 S. Ct. 1181, 1195 (2012) (Ginsburg, J., concurring in part and dissenting in part).

³⁶ *Florida v. J.L.*, 529 U.S. 266, 274 (2000).

³⁷ See *Fernandez v. California*, 134 S. Ct. 1126, 1140 (2013) (Ginsburg, J., dissenting).

³⁸ *Herring v. United States*, 555 U.S. 135, 155 (2009) (Ginsburg, J., dissenting); see also *Arizona v. Evans*, 514 U.S. 1, 30 (1995) (Ginsburg, J., dissenting) (asserting that deterrence is an empirical question rather than a “logical” one).

³⁹ Cf. *Smith v. Massachusetts*, 543 U.S. 462, 476 (2005) (Ginsburg, J., dissenting) (“As a trial unfolds, a defendant must be accorded a timely, fully informed opportunity to meet the State’s charges. I would so hold as a matter not of double jeopardy, but of due process.”).

⁴⁰ *Perry v. New Hampshire*, 132 S. Ct. 716, 721 (2012).

⁴¹ See, e.g., *Rivera v. Illinois*, 556 U.S. 148, 162 (2009) (holding that the erroneous denial of a peremptory challenge does not violate the Constitution because the defendant “received precisely what due process required: a fair trial before an impartial and properly instructed jury”); *Vermont v. Brillion*, 556 U.S. 81, 82 (2009) (attributing a public defender’s trial delay to the defendant because a “contrary conclusion could encourage appointed counsel to delay proceedings by seeking unreasonable continuances, hoping thereby to obtain a dismissal of the indictment on speedy-trial grounds”).

⁴² In the discrimination decisions as well, however, Justice Ginsburg has emphasized entitlements themselves less than the question whether a disqualification applies to one group but not another. See, e.g., *United States v. Virginia*, 518 U.S. 515 (1996).

⁴³ See *Crawford v. Washington*, 541 U.S. 36 (2004); *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

⁴⁴ Justice Kagan is the exception.

⁴⁵ See Joyce A. Baugh, *Ruth Bader Ginsburg: A Judge’s Judge and a Lawyer’s Lawyer*, in *SUPREME COURT JUSTICES IN THE POST-BORK ERA: CONFIRMATION POLITICS AND JUDICIAL PERFORMANCE* 61–80 (2002).

⁴⁶ In 1954, the Court included Chief Justice Earl Warren, a former governor of California; Hugo L. Black, a former United States Senator; Felix Frankfurter, a former law professor; William O. Douglas, who had served as chairman of the Securities and Exchange Commission; and Robert H. Jackson, who had been the United States Attorney General. See Adam Liptak, *Judging a Court with Ex-Judges Only*, N.Y. TIMES, Feb. 17, 2009, at A14.

⁴⁷ See, e.g., Lee Epstein, et al. *Circuit Effects: How the Norm of Federal Judicial Experience Biases the U.S. Supreme Court*, 157 U. PA. L. REV. 833, 853–64 (2009).

⁴⁸ Linda Greenhouse, *Justices on the Job*, N.Y. TIMES, July 24, 2013, <http://opinionator.blogs.nytimes.com/2013/07/24/justices-on-the-job/>.

⁴⁹ See David L. Shapiro, *Justice Ginsburg’s First Decade: Some Thoughts about Her Contributions in the Fields of Procedure and Jurisdiction*, 104 COLUM. L. REV. 21, 21–22 (2004) (discussing Justice Ginsburg’s “lawyerly” approach and narrow focus on analyzing the particular context and the facts at hand).

⁵⁰ See Wendy W. Williams, *Ruth Bader Ginsburg's Equal Protection Clause: 1970-80*, 25 COLUM. J. GENDER & L. 41, 41 (2013).

⁵¹ *Kowalski v. Temser*, 543 U.S. 125, 144 (2004) (Ginsburg, J., dissenting); see *id.* at 139–40 (objecting to the Court's conclusion that attorney lacked standing to sue on behalf of indigent criminal defendants because of the "incapacities under which these defendants labor and the complexity of the issues their cases may entail").

⁵² As Neil Siegel writes, "a Justice whose basic approach to constitutional law is oriented around the ideal of essential human dignity, of full human stature, might be expected to respond skeptically to a President's assertion that there are, in effect, no judicially enforceable constitutional limits on his authority to declare someone an 'enemy combatant' and to indefinitely detain the individual or try him before a military commission." Siegel, *supra* note 4, at 831 (citing *Boumediene v. Bush*, 553 U.S. 723 (2008), *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), *Rasul v. Bush*, 542 U.S. 466 (2004), and *Rumsfeld v. Padilla*, 542 U.S. 426 (2004)); see also Slobogin, *supra* note 2, at 875 (noting that Justice Ginsburg voted for the petitioner in "every one of the cases contesting the Bush Administration's attempts to exempt its war on terrorism from federal court jurisdiction"); cf. *Weiss v. United States*, 510 U.S. 163, 194 (1994) (Ginsburg, J., concurring) ("The care the Court has taken to analyze petitioner's claims demonstrates once again that men and women in the Armed Forces do not leave constitutional safeguards and judicial protection behind when they enter military service.").

⁵³ See, e.g., *Smith v. Massachusetts*, 543 U.S. 462, 475–80 (2005) (Ginsburg, J., dissenting); *Shafer v. South Carolina*, 532 U.S. 36, 54–55 (2001); see also, e.g., *Gray v. Netherland*, 518 U.S. 152, 171–86 (1995) (Ginsburg, J., dissenting); *Simmons v. South Carolina*, 512 U.S. 154, 174–75 (1994) (Ginsburg, J., concurring).

⁵⁴ See, e.g., *Bullcoming v. New Mexico*, 131 S. Ct. 2705, 2709–19 (2011); *Michigan v. Bryant*, 131 S. Ct. 1143, 1176–77 (2011) (Ginsburg, J., dissenting); *Cunningham v. California*, 549 U.S. 270, 293 (2007).

⁵⁵ See generally Carol S. Steiker, *Raising the Bar: Maples v. Thomas and the Sixth Amendment Right to Counsel*, 127 HARV. L. REV. 468 (2013).

⁵⁶ *Alabama v. Shelton*, 535 U.S. 654 (2002).

⁵⁷ See *id.* at 674.

⁵⁸ *Halbert v. Michigan*, 545 U.S. 605 (2005).

⁵⁹ *Id.* at 621 (quoting *Griffin v. Illinois*, 351 U.S. 12, 24 (1956) (Frankfurter, J., concurring in judgment)) (internal quotation marks omitted).

⁶⁰ See *id.*

⁶¹ *Kowalski v. Temser*, 543 U.S. 125, 142 (2004) (Ginsburg, J., dissenting).

⁶² *Nichols v. United States*, 511 U.S. 738, 765–66 (1994) (Ginsburg, J., dissenting).

⁶³ *Pliler v. Ford*, 542 U.S. 225, 235–37 (2004) (Ginsburg, J., dissenting).

⁶⁴ Steiker, *supra* note 55, at 471.

⁶⁵ *Id.* at 471 (discussing *Harrington v. Richter*, 131 S. Ct. 770 (2011), *Vermont v. Brillion*, 556 U.S. 81 (2009), *Halbert v. Michigan*, 545 U.S. 605 (2005), *Rompilla v. Beard*, 545 U.S. 374 (2005), *Wiggins v. Smith*, 539 U.S. 510 (2003), and *Alabama v. Shelton*, 535 U.S. 654 (2002)).

⁶⁶ *Maples v. Thomas*, 132 S. Ct. 912 (2012).

⁶⁷ *Id.* at 917.

⁶⁸ See also *Lee v. Kenna*, 534 U.S. 362, 366 (2002) (holding a state rule requiring a writing and specific showing to seek a continuance insufficient to bar federal habeas review because “caught in the midst of a murder trial and unalerted to any procedural defect in his presentation, defense counsel could hardly be expected to divert his attention from the proceedings rapidly unfolding in the courtroom and train, instead, on preparation of a written motion and affidavit”).

⁶⁹ *Brillon*, 556 U.S. at 81.

⁷⁰ *Id.* at 94 (internal quotation marks and citation omitted). Justice Ginsburg has not, however, been similarly supportive of the right to proceed pro se. See Slobogin, *supra* note 2, at 874.

⁷¹ Justice Ruth Bader Ginsburg, In Pursuit of the Public Good: Lawyers Who Care, the Joseph L. Rah, Jr. Lecture at the Univ. of the D.C., David A. Clarke Sch. of Law (Apr. 9, 2001) (transcript available at http://www.supremecourt.gov/publicinfo/speeches/viewspeeches.aspx?Filename=sp_04-09-01a.html).

⁷² See *Florida v. Nixon*, 543 U.S. 175, 190 (2004); see also *Maples v. Thomas*, 132 S. Ct. 912 (2012) (critiquing counsel's performance). Nor has Justice Ginsburg been forgiving of attorneys who make their own procedural errors. She once wrote that there was no need for a windfall when “counsel was not misled by any trial court statements or actions; rather, he neglected to follow plain instructions.” *Carlisle v. United States*, 517 U.S. 416, 436 (1996) (Ginsburg, J., concurring).

⁷³ See *The Supreme Court 2006 Term—Leading Cases*, 121 HARV. L. REV. 225, 230 (2007); cf. *J.E.B. v. Alabama*, 511 U.S. 127, 151 (1994) (holding that peremptory challenges to exclude jurors based on gender violate the Equal Protection Clause).

⁷⁴ See *Jones v. United States*, 527 U.S. 373, 413 (1999) (Ginsburg, J., dissenting) (arguing that juries should not be presented with choices “clouded by misinformation,” and that this jury was wrongly instructed that the defendant could receive a sentence other than life imprisonment if a death sentence was not imposed); *Romano v. Oklahoma*, 512 U.S. 1, 19 (1994) (Ginsburg, J., dissenting) (maintaining that the jury should not be relieved of responsibility for imposition of the death penalty); cf. *Perry v. New Hampshire*, 132 S. Ct. 716, 728–29 (2012) (explaining that careful jury instructions addressing the flaws in eyewitness identifications can educate and empower the jury).

⁷⁵ *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

⁷⁶ *Id.* at 475–76.

⁷⁷ See *Ring v. Arizona*, 536 U.S. 584, 602 (2002).

⁷⁸ See *Cunningham v. California*, 549 U.S. 270, 293 (2007).

⁷⁹ *United States v. Booker*, 543 U.S. 220 (2005).

⁸⁰ *Id.* at 244.

⁸¹ *Connick v. Thompson*, 131 S. Ct. 1350 (2011).

⁸² *Id.* at 1355.

⁸³ Other suppressed evidence in the case concerned a financial reward that the informant received from the victim's family and an eyewitness whose description of the perpetrator did not match Thompson. *Id.* at 1371–72 (Ginsburg, J., dissenting).

⁸⁴ Once the blood evidence surfaced, a former prosecutor also came forward to report that five years earlier, one of the original prosecutors on the Thompson case confessed to withholding evidence, after he learned that he was dying of cancer. *Id.* at 1374–75.

⁸⁵ *Brady v. Maryland*, 373 U.S. 83 (1963).

⁸⁶ *Id.* at 91–92.

⁸⁷ *Connick*, 131 S. Ct. at 1359 (citing *Monell v. Dep't of Soc. Servs. of N.Y.*, 436 U.S. 658, 692 (1978)).

⁸⁸ *Canton v. Harris*, 489 U.S. 378 (1989).

⁸⁹ *Id.* at 388.

⁹⁰ *See Smith v. Cain*, 132 S. Ct. 627 (2012); *Kyles v. Whitley*, 514 U.S. 419 (1995).

⁹¹ *Connick*, 131 S. Ct. at 1366. According to Justice Scalia's concurrence in *Connick*, *Canton* describes the *only* case in which a deliberate indifference claim could be premised on a single violation: the extreme circumstance of arming police officers untrained in the permissible use of deadly force. *Id.* at 1367–70 (Scalia, J., concurring).

⁹² *Id.* at 1387 (Ginsburg, J., dissenting).

⁹³ *Id.* at 1366 (Scalia, J., concurring). Similar “excavations” by Justice Ginsburg do not always yield the conclusion that procedures were unfair. In her opinion for the Court in *Skilling v. United States*, for example, Justice Ginsburg engaged in an extensive analysis of the trial publicity and the voir dire questions themselves to determine that neither a presumption of prejudice nor actual bias prevented a fair trial in Enron's home venue of Houston. 130 S. Ct. 2896, 2907 (2010). Justice Sotomayor disagreed, concluding that prejudicial information about the Enron case was “deeply ingrained in the popular imagination.” *Id.* at 2943 (Sotomayor, J., dissenting).

⁹⁴ *Connick*, 131 S. Ct. at 1370 (Ginsburg, J., dissenting).

⁹⁵ *See Susan A. Bandes, The Lone Miscreant, The Self-Training Prosecutor, and Other Fictions: A Comment on Connick v. Thompson*, 80 *FORDHAM L. REV.* 715, 721 (2011).

⁹⁶ *Connick*, 131 S. Ct. at 1380 n.14, 1387 (Ginsburg, J., dissenting).

⁹⁷ *Id.* at 1384; *see also* Bandes, *supra* note 95, at 726 (noting that there were thirteen additional pieces of evidence which, “once in [Thompson's] possession, helped [him] win an acquittal in his murder retrial”).

⁹⁸ *Connick*, 131 S. Ct. at 1382 (Ginsburg, J., dissenting).

⁹⁹ *Id.* at 1384.

¹⁰⁰ Bandes, *supra* note 95, at 717.

¹⁰¹ *Connick*, 131 S. Ct. at 1370 (Ginsburg, J., dissenting).

¹⁰² *Id.* at 1385.

¹⁰³ *Id.*

¹⁰⁴ *Banks v. Dretke*, 540 U.S. 668, 695 (2004).

¹⁰⁵ *See* Neil S. Siegel & Reva B. Siegel, *Struck by Stereotype: Ruth Bader Ginsburg on Pregnancy Discrimination as Sex Discrimination* (forthcoming chapter in this volume at 2) (2014).

¹⁰⁶ Hon. Ruth Bader Ginsburg, *The Role of Dissenting Opinions*, 95 *MINN. L. REV.* 1, 3 (2010).

¹⁰⁷ *Id.* at 8; *see also* Ruth Bader Ginsburg, *Remarks on Writing Separately*, 65 *WASH. L. REV.* 133, 142–44 (1990); Nancy Gertner, *Dissenting in General: Herring v. United States in Particular*, 127 *HARV. L. REV.* 433, 433 (2013).

¹⁰⁸ Justice Ruth Bader Ginsburg, *The 20th Annual Leo and Berry Eizenstat Memorial Lecture: The Role of Dissenting Opinions* (Oct. 21, 2007) (transcript available at http://www.supremecourt.gov/publicinfo/speeches/sp_10-21-07.html).

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007), *superseded by statute*, Lily Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (codified at 42 U.S.C. § 2000e-5(e)(3) (2012)).

¹¹² *Id.* at 645 (Ginsburg, J., dissenting).

¹¹³ *Id.*; *cf.* *Libretti v. United States*, 516 U.S. 29, 54 (Ginsburg, J., concurring) (noting that one cannot waive a jury trial right of which one is not fully aware).

¹¹⁴ *See, e.g.*, John Thompson, *The Prosecution Rests, but I Can't*, N.Y. TIMES, Apr. 10, 2011, at WK11 (maintaining that Thompson was not concerned about money damages but rather about accountability for the prosecutors involved, particularly given the 4,000 prisoners serving life without parole in Louisiana who do not have lawyers to seek post-conviction relief).

¹¹⁵ *See generally, e.g.*, Hadar Aviram, *Legally Blind: Hyperadversarialism, Brady Violations, and the Prosecutorial Organizational Culture*, 87 ST. JOHN'S L. REV. 1 (2013); Darryl K. Brown, *Defense Counsel, Trial Judges, and Evidence Production Protocols*, 45 TEX. TECH. L. REV. 133 (2012); Bruce A. Green, *Federal Criminal Discovery Reform: A Legislative Approach*, 64 MERCER L. REV. 639 (2013); Janet Moore, *Democracy and Criminal Discovery Reform After Connick and Garcetti*, 77 BROOK. L. REV. 1329 (2012); Ellen Yaroshesky, *New Orleans Prosecutorial Disclosure in Practice After Connick v. Thompson*, 25 GEO. J. LEGAL ETHICS 913 (2012).

¹¹⁶ *See* Linda Greenhouse, *Oral Dissents Give Ginsburg a New Voice on Court*, N.Y. TIMES, May 31, 2007, at A1.

¹¹⁷ *See* *Fisher v. Univ. of Texas*, 133 S. Ct. 2411, 2432–33 (2013) (Ginsburg, J., dissenting); *Gonzalez v. Carhart*, 550 U.S. 124, 169–71 (2007) (Ginsburg, J., dissenting). Some see positive incrementalism on substantive commitments—such as the death penalty—as well. *See* Slobogin, *supra* note 2, at 878–79 (citing *Kennedy v. Louisiana*, 554 U.S. 407 (2008), *Roper v. Simmons*, 543 U.S. 551 (2005), and *Atkins v. Virginia*, 536 U.S. 304 (2002)). Indeed, Justice Ginsburg herself stated in a 2013 interview with New York radio station WQXR: “If I had my way there would be no death penalty. But the death penalty for now is the law, and I could say ‘Well, I won’t participate in those cases,’ but then I can’t be an influence.” Interview by Marilyn Horne with Justice Ruth Bader Ginsburg, WQXR 105.9 FM (Feb. 2, 2013).

¹¹⁸ *Fisher*, 133 S. Ct. at 2411.

¹¹⁹ *See id.* at 2433 (Ginsburg, J., dissenting) (“I have several times explained why government actors, including state universities, need not blind themselves to the still lingering, every day evident, effects of centuries of law-sanctioned inequality.” (quoting *Gratz v. Bollinger*, 539 U.S. 244, 298 (2003) (Ginsburg, J., dissenting))).

¹²⁰ *Carhart*, 550 U.S. at 124.

¹²¹ *Id.* at 169–71 (2007) (Ginsburg, J., dissenting). *See generally* Reva B. Siegel, *The Right's Reasons: Constitutional Conflict and the Spread of Women-Protective Antiabortion Argument*, 57 DUKE L.J. 1641 (2008).

¹²² *Carhart*, 550 U.S. at 169 (Ginsburg, J., dissenting).

¹²³ *See* Vicki C. Jackson, *Lee v. Kemna: Federal Habeas Corpus and State Procedure*, 127 HARV. L. REV. 445, 448–49 (2013) (“In opinions across areas including gender equality, race equality, and reproductive freedom, Justice Ginsburg’s attention to the facts is a welcome font of common law judicial sensibility.”).

¹²⁴ *Vance v. Ball State Univ.*, 133 S. Ct. 2434 (2013).

¹²⁵ *Id.* at 2455–66 (Ginsburg, J., dissenting).

¹²⁶ *Id.* at 2434 (majority opinion).

¹²⁷ *Id.*

¹²⁸ *Shelby Cty. v. Holder*, 133 S. Ct. 2612 (2013).

¹²⁹ *Id.* at 2650 (Ginsburg, J., dissenting).

¹³⁰ *See Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 645 (2007) (Ginsburg, J., dissenting), *superseded by statute*, Lily Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (codified at 42 U.S.C. § 2000e-5(e)(3) (2012)).

¹³¹ *See Vance*, 133 S. Ct. at 2434 (Ginsburg, J., dissenting) (“The Court today strikes from the supervisory category employees who control the day-to-day schedules and assignments of others, confining the category to those formally empowered to take tangible employment actions.”).

¹³² *See Shelby Cty.*, 133 S. Ct. at 2634 (Ginsburg, J., dissenting) (“Although the VRA wrought dramatic changes in the realization of minority voting rights, the Act, to date, surely has not eliminated all vestiges of discrimination against the exercise of the franchise by minority citizens.”).

¹³³ *See Connick v. Thompson*, 131 S. Ct. 1350, 1370 (2011) (Ginsburg, J., dissenting); *cf.* Transcript of Oral Argument at 29, *Smith v. Cain*, 132 S. Ct. 627 (2012) (No. 10-8145) (statement of Justice Ginsburg) (“But how could it not be material? Here is the only eyewitness. Are you really urging that the prior statements were immaterial?”).

¹³⁴ *Connick*, 131 S. Ct. at 1370 (Ginsburg, J., dissenting).

¹³⁵ Ruth Bader Ginsburg, *Remarks of Ruth Bader Ginsburg at CUNY School of Law*, 7 N.Y. CITY L. REV. 221, 238 (2004).

¹³⁶ *See Siegel*, *supra* note 4, at 816 (“Affording ‘equal dignity’ to all Americans, including historically marginalized groups, constitutes the central purpose of Justice Ginsburg’s constitutional vision.”).

¹³⁷ *Id.* at 804.

¹³⁸ Karlan, *supra* note 14, at 1091; *see also* Siegel & Siegel, *supra* note 105, at 8 (explaining that Justice Ginsburg argued in sex discrimination cases both that “restricting women’s liberty may be a means to the end of communicating inequality” and that “discriminating against women may diminish their opportunities to fashion fulfilling lives”).

¹³⁹ *See* Reva B. Siegel, *Sex Equality Arguments for Reproductive Rights: Their Critical Basis and Evolving Constitutional Expression*, 56 EMORY L.J. 815, 823 (2007) (“In these early briefs, liberty talk and equality talk were entangled as emanations of different constitutional clauses.”); *see also* Siegel, *supra* note 4, at 840–41.

¹⁴⁰ *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996).

¹⁴¹ *Id.* at 120; *see also* Martha Minow, *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996), 127 HARV. L. REV. 461, 467 (2013).

¹⁴² *M.L.B.*, 519 U.S. at 120.

¹⁴³ *Id.*

¹⁴⁴ *See* Ginsburg, *supra* note 19, at 384 (reasoning that an autonomy-based abortion right “places restraints, not affirmative obligations, on government”).

¹⁴⁵ This would be true, for example, in cases concerning funding for the right to counsel. *See* Karlan, *supra* note 14, at 1092.

¹⁴⁶ *Id.* at 1091 (citing *M.L.B.*, 519 U.S. at 120).

¹⁴⁷ *See, e.g.*, Deborah Jones Merritt & David M. Lieberman, *Ruth Bader Ginsburg's Jurisprudence of Opportunity and Equality*, 104 COLUM. L. REV. 39, 45 (2004) (stating that Justice Ginsburg has "extended her commitment to opportunity and equality far beyond gender discrimination").