US Supreme Court Justice Ginsburg endorses #MeToo

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The #MeToo campaign received a prominent endorsement last week from Supreme Court Justice Ruth Bader Ginsburg. Ginsburg attached no qualifications or reservations to her endorsement, and her comments as a sitting Supreme Court justice effectively granted a quasi-official sanction to the campaign.

In an interview with National Public Radio's Nina Totenberg at the Sundance Film Festival, Ginsburg said of the #MeToo campaign, "Well, I think it's about time." She continued: "For so long, women were silent, thinking there was nothing you could do about it. But now the law is on the side of women or men who encounter harassment, and that's a good thing." The occasion was the premiere of a documentary film about Ginsburg's legal career titled "RBG."

The #MeToo campaign has taken place largely outside the courtroom, with prominent men (and some women) in the entertainment and media industries and in politics targeted and pronounced guilty in the newspapers and on television. In many cases, the accusations are of precisely the type that would not stand up to scrutiny in a court of law. Many of the accusations involve events that allegedly occurred decades prior or involve consensual sexual encounters, with a wide range of behaviors conflated with the crime of rape under the generic label of "sexual impropriety."

The witch-hunting atmosphere being whipped up around #MeToo by the Democratic Party and its supporters runs counter to democratic legal principles such as the presumption of innocence, the prosecution's burden of proof beyond a reasonable doubt, the right to confront one's accusers, the right to summon witnesses in one's defense, the right to respond to accusations, the right to equal treatment, the right to trial by jury and the right to due process of law. Instead, careers are ended, reputations are ruined and lives are destroyed without any kind of legal proceedings whatsoever.

It is significant that Ginsburg, the leading representative of the Supreme Court's so-called "liberal" bloc, did not express or acknowledge any concern over these questions. "So far it's been great," she said of the #MeToo campaign. "When I see women appearing every place in numbers, I'm less worried about a backlash than I might have been 20 years ago."

Ginsburg's remark that the law is now "on the side of" victims requires some deconstructing. While sexual abuse is (and should remain) illegal, there have been protracted efforts to undermine the presumption of innocence in prosecutions involving sexual allegations, replacing it with the accuser's "right to be believed." There is nothing progressive about these efforts to expand the powers of prosecutors and the state at the expense of democratic legal protections.

California's "affirmative consent" law of 2014, also known as the "yes means yes" law, is one example of this trend. The law, which applies to state colleges receiving public funds for financial aid, essentially makes all sexual encounters presumptively rape, unless it is shown that there was "affirmative, conscious, and voluntary agreement to engage in sexual activity." In practice, the law serves to shift the burden onto the accused person to prove that the accuser consented. The law expressly states, "Lack of protest or resistance does not mean consent, nor does silence mean consent."

One of the latest victims of the #MeToo sex police is comedian and actor Aziz Ansari, whose "crime" consists of having had a consensual sexual encounter with a woman who later accused him of "missing verbal and non-verbal cues" during the event. The woman, who remains anonymous, described the date in degrading detail in an online interview, after which Ansari became the focus of yet another round of denunciations of "sexually aggressive" men.

"Aziz, We Tried To Warn You," read the headline of an opinion column in the *New York Times*, which in the first two paragraphs included the words "rape" twice and "rapist" twice. The column approvingly cited an essay by Rebecca Traister in *New York Magazine* titled, "The Game Is Rigged: Why Sex That's Consensual Can Still Be Bad."

Ansari, the author of a light-hearted book about contemporary dating entitled *Modern Romance : An Investigation*, was compelled to stay away from the recent Screen Actors Guild awards, where the audience conspicuously refused to applaud his name.

The Democratic Party has long promoted Ginsburg as a paragon of liberal principles. In reality, her legal career, which includes founding the American Civil Liberties Union's Women's Rights Project in 1971, embodies the trajectory and fate of 1960s liberal reformism.

The ACLU's history is far from consistent on fundamental questions of democratic rights. It purged communists from leadership positions in the 1930s, and failed to defend leftists persecuted by Senator Joseph McCarthy and the House Un-American Activities Committee in the late 1940s and early 1950s. While the ACLU had historically defended the rights of racial, religious and sexual minorities, and correctly so, Ginsburg entered the organization as it was more and more shifting its emphasis toward what has become known as identity politics.

The basic formula of Democratic Party identity politics was to separate certain issues involving basic democratic rights—such as, for example, the fight against discrimination on the basis of race, gender or sexual orientation, or for the right to an abortion—from social inequality and class. This type of politics based on identity, divorced from any orientation to the working class and the struggle against capitalism, passed through a long period of decline and decay. The claims to oppose discrimination against minorities became more and more infused with open hostility to the working-class majority, which was held responsible for racism and bigotry. Identity politics now takes on entirely anti-democratic forms such as the #MeToo campaign, even as the Democrats continue to accommodate themselves to the Republicans on issues such as abortion rights, police brutality, domestic surveillance, the separation of church and state, and other vital issues of democratic rights.

This right-wing evolution is exemplified by Ginsburg's participation in the Supreme Court's unanimous *Plumhoff v. Rickard* decision in 2014. In

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that case, the police unleashed a hail of bullets at a car being driven away from them by Donald Rickard, killing him as well as Kelly Allen, who occupied the passenger seat. The crime for which Rickard was being pulled over was a single inoperable headlight.

When the case reached the Supreme Court, Ginsburg joined far-right justice Samuel Alito in handing down a decision in favor of the police. The Supreme Court ruled that Rickard, by trying to escape, was a "grave public safety risk," warranting his immediate execution by the police to "end that risk." The justices also declared that Rickard, by disobeying the police, was responsible for the death of Kelly Allen, echoing the "human shields" language employed by the US military.

The decision, which endorsed the authoritarian doctrine of "qualified immunity" for killer cops, was joined by all of the justices, including both Democratic and Republican appointees. The Obama administration, through solicitor general Donald Verrilli, Jr., emphatically and expressly sided with the police and endorsed qualified immunity. Supreme Court decisions like these have played a significant role in encouraging the epidemic of police murders in the US, which currently stand at 1,223 since the inauguration of President Trump.

The *Rickard* decision is by no means the only case on which the Court liberals have joined with their right-wing colleagues. Last year, Ginsburg signed on to a unanimous decision that permitted the Trump administration's flagrantly discriminatory anti-Muslim travel ban to go into effect.

In every election year, the Democratic Party insists that it needs votes to ensure the appointment of liberal justices to the Supreme Court. However, anything that might arguably be described as democratic consciousness has long since evaporated within this camp. On the contrary, Democratic Party "liberals," whether in Congress or the White House or on the Supreme Court, demonstrate no principled commitment to—and often simply evince no awareness of—elementary democratic conceptions that emerged from centuries of long and arduous struggle going back to the Enlightenment.

One of the many examples that could be cited is the landmark 1941 civil rights case of *The State of Connecticut vs. Joseph Spell*. In that case, which is the subject of the recent film entitled *Marshall* (2017), future US Supreme Court Justice Thurgood Marshall defended a black worker who was accused of rape, in a story that made sensational headlines around the country. The *New York Times* reported on its front page that the "chauffeur-butler," Joseph Spell, had admitted to the crime and to "hurling" the "victim" off a bridge. Other newspapers referred to a "night of horror" and to a "lurid orgy." Despite the odds, Marshall took the case and was able to persuade the jury that Spell was not guilty, that it involved consensual sex that the accuser, a wealthy white woman, was seeking to cover up.

Marshall went on to become the first African-American justice on the Supreme Court. One senses that the #MeToo crowd is simply ignorant of this history. Those #MeToo proponents who saw the movie probably saw its scenes of relentless cross-examination of a rape accuser as outrageous. If a Thurgood Marshall was practicing law today, those who are now leading the campaign against due process would be denouncing him as a "rape apologist."

A more recent case highlights the implications of the current campaign for harsher sentencing and the accuser's "right to be believed." Brian Banks, who would later play football for the Atlanta Falcons, was falsely accused of rape in 2002. Facing the prospect of conviction and 41 years in prison, Banks, who is African-American, accepted a plea deal that included five years in prison. He was later exonerated after the accuser admitted to fabricating the story.

The Warren Court, or the era of Supreme Court decisions under Chief Justice Earl Warren (1953-1969), featured a long line of decisions insisting upon the democratic rights of and constitutional legal protections for the accused, no matter how heinous the alleged crime: *Brady v. Maryland* (prohibiting prosecutors from hiding exculpatory evidence), *Mapp v. Ohio* (prohibiting the use of illegally obtained evidence), *Miranda v. Arizona* (the origin of the "Miranda warning"), *Escobedo v. Illinois* and *Gideon v. Wainwright* (affirming the right to an attorney), and *Katz v. United States* and *Terry v. Ohio* (affirming the right to privacy and restricting police searches). For a brief era in post-war America, a certain residual democratic sentiment animated these decisions, which were best summed up by the words of Benjamin Franklin in 1785: "That it is better 100 guilty Persons should escape than that one innocent Person should suffer, is a Maxim that has been long and generally approved."

Over the past half-century, it was traditionally the right wing that subjected these precedents to attack, alongside denunciations of "criminal-coddling," "bleeding-heart" liberals. Today, it is the supposedly "left" wing of the political establishment that is abandoning and attacking this legacy.

The world today is characterized by a lurch to the right by the ruling classes the world over, aided and abetted by their nominally "liberal" and "left" factions. This phenomenon is fundamentally a product of a profound crisis of the world capitalist system and its malignant expression in the form of staggering levels of social inequality and the escalating danger of world war. The bourgeoisie, together with highly privileged layers of the middle class, live increasingly in fear of social upheavals, and this fear expresses itself in an accelerating turn towards panic and repression. Democratic procedures and forms of rule are incompatible with this state of affairs.

The Democratic Party has made #MeToo one of its central political themes, together with anti-Russia hysteria and censorship of left-wing and anti-war views (under the fraudulent cover of combating "fake news") on the Internet. It has done nothing to oppose the Trump administration's attacks on immigrants and democratic rights in general, its preparations for nuclear war, its tax cuts for the rich, or its assault on health care, food stamps and other social programs. At the recent 2018 Women's March, the slogans of #MeToo were prominently merged with calls to vote for Democrats in the upcoming mid-term elections.

Meanwhile, in the population, there is growing opposition to the #MeToo campaign, including by many who initially supported it—which even the *New York Times* was compelled to acknowledge earlier this month in the form of a column by critic and novelist Daphne Merkin. People are looking ahead to where this "movement" is headed, and many do not like the destination.

The #MeToo campaign does nothing to elevate consciousness or advance the cause of equality. On the contrary, like many similar moral panics over the past century, it is quite compatible with a right-wing regime. The formula "guilty because accused," with the targeted person shamed and erased from public view without charges or trial, can and will be used to intimidate and discredit dissent, whistle-blowing, and other non-conforming conduct.

The authors also recommend:

"Scoundrel Time" returns: The neo-Puritan #MeToo censors and their predecessors
[31 January 2018]

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