

IN MEMORIAM

JUSTICE SANDRA DAY O'CONNOR

Toni M. Massaro*

Everyone reading this reflection already knows the biography of Justice Sandra Day O'Connor.

Just some of the images and words commonly invoked to capture the arc of her storied life are these:

- Southwestern cowgirl who grew up on the Lazy B Ranch and knew how to ride and do the work alongside other ranch hands;
- Gifted student who made her way to Stanford Law School and graduated third in her class, where she met lifelong friend and judicial colleague William H. Rehnquist;
- Young attorney turned away by leading western law firm with suggestion from partner there that she might instead consider career as a legal secretary;
- Lawyer who became a state legislator and a state court judge before getting the phone call from President Ronald Reagan that transformed her life and American history;
- Member of the Supreme Court of the United States, whose relative centrism made her the most powerful Justice for many years, because majorities needed to be shaped around her principles;

*Regents Professor, Dean Emerita, University of Arizona James E. Rogers College of Law; Executive Director of the University of Arizona Agnese Nelms Haury Program in Environment and Social Justice.

- Loving wife of prominent Arizona attorney John O'Connor, with whom she raised three sons;
- Conservative jurist whose conservatism often centered on federalism and states' rights, respect for civil liberties, respectful engagement across ideological divides, and key decisions that respected stare decisis and favored doctrinal incrementalism over lurches.

Finally, after leaving the bench to care for her husband after he was diagnosed with Alzheimer's, she became an activist for civic education.

Those who knew her more personally, and whose careers overlapped with her years in Washington, D.C., also have reflected on her social grace and ability to transcend the nastiness that politics and its culture can unleash. My friend and former University of Arizona Dean Paul Portney once reflected on this aspect of Justice O'Connor, and said that during his decades in D.C. she was both respected and admired in a town not known for either response to others with whom one disagreed (or even, he added, many with whom one did agree).

Former clerks of hers—including former Arizona Supreme Court Chief Justices Scott Bales and Ruth McGregor, and my former University of Arizona College of Law colleague Professor RonNell Anderson Jones—reflected on her mentoring, and how she taught them about the rule of law and dedication to fact-based analysis. Professor Anderson Jones added that Justice O'Connor taught her about patriotism in a nontrivial sense, a commitment to public service—but also a dedication to balancing work and family—relating the Justice's quip that “F.3d would not be there with you in your old age!” She also reminisced on how the Justice helped her work through the upheaval of a death penalty case and taught her respect for rule of law even when it is, at a deep personal level, crushingly difficult to maintain.

Many others remembered how it felt to hear her name announced for the Court—to see a woman ascend to the highest Court in the country. (I recall *exactly* where I was standing when I learned of her nomination—on La Salle Street in Chicago, outside the office of the large law firm where I was then a new attorney—and my sense of exhilaration, even wonder.)

Still others, my age and older, used to note the near miracle that no one graduating from *high school* had lived in a moment when there was not a woman on the United States Supreme Court. Today, we need to update that to include no one *under the age of 43* has lived in a moment when there was not a woman on the Court. Let me just add to this: I hope no person *ever* will, and that other firsts who help expand our collective horizons about who should and must govern us continue to join this pantheon.

But in this tribute, I would like to reflect on what it has meant to teach and do research in constitutional law for over 40 years, and to engage her judicial legacy. In my role as a professor, I had to consider just who she was in her role as a Supreme Court Justice. I worked hard to understand and explain her decisions to my students, to analyze their doctrinal impact, and to reflect on their influence on American law.

I had the privilege some decades ago of sharing my thoughts about this with Justice O'Connor directly, at a luncheon in her honor hosted by the University of Arizona's Rehnquist Center on the Constitutional Structures of Government. In attendance was her sister, Ann Day, who later told me that my sense of Justice O'Connor's work resonated with her, too—that this was her sense of her famous sister. That gives me confidence to now share below what I said then, and still believe, about Justice O'Connor's legacy.

The Danish author Karen Blixen, also known by her pen name Isak Dinesen, once wrote that our life paths are best (perhaps only) seen from above.¹ Even when we feel we are tangled in the undergrowth, hacking away in our daily endeavors and not headed to any clear destination, we are carving a path as we make our way through our lives, our professional careers, our personal journeys.

One part of yours, Justice O'Connor, is that you have cut a distinctive path of judging wisely.

I say this not based on my own or an idiosyncratic sense of wisdom—or even based on agreement with all or even most of your opinions, in terms of their holdings.

Rather, I say this based on the works that I have read on human wisdom—from poetry, to social science, to cognitive or “hard” science conclusions about this elusive quality.

We expect wisdom of judges—perhaps unfairly.

My takeaway on the elements of wisdom—agreed upon across disciplines—are as follows:

- Empathy (not sympathy)—decentering of self, to be able to listen to others’ experiences, to see what is before you, not just what is within you;
- Founded on knowledge—but shaped by uncertainty—context matters; humility; openness to other evidence, other possibilities;
- Respect for facts—for experience—and ability to learn from experience;
- Realistic appraisal of human nature—not dewy-eyed or romanticized, knowing that people are neither saints nor beasts, but profoundly imperfect, often limited;
- Independence—moral courage;
- Emotional resiliency;
- Tolerance—respect for pluralism.

1. ISAK DINESEN, *OUT OF AFRICA* 4 (1937).

Justice O'Connor, I believe this has been the straight line through the thicket of your opinions—practical wisdom. I also think you cut this path based on instinct, not self-conscious reflection. (I am told you would say, in the face of an especially difficult opinion, “Just work a little harder.” This rings true.)

Your judicial philosophy has been informed by context, but its unifying principles are apparent—and abiding ones.

Your judicial approach was not based on a priori theory of everything—but on a deep respect for the many places where theory runs out, and where experience and consequences and context all begin to matter more than abstract theory. In those cases, in those fissures, where law does not tell us clearly what the answer must be, all judges must depend on practical wisdom—judgment.

I think you would ask yourself: “Will this work?” And then, you would not shrink from the ultimate task of deciding.

I tell our law students on their first day that I hope they will be the last people in the room to make up their minds, but that they then too must decide. You would agree, I think, and then insist that they “Move on!”

You often traced this pragmatism and “dust yourself off” approach to law and life back to growing up on the Lazy B. These early experiences, the soil itself, all surely contributed to your identity—as did your education, your family, your marriage, motherhood, your many rich experiences beyond the Lazy B.

But the “O'Connor voice” that shines through in your judicial writing is more than the sum of these experiences, and you are all the more remarkable for that: *it is what you brought to all of these, and how you made the most of them, and took to heart the importance of your place in history—something you never asked for or even wanted—yet without placing yourself over history, over law, over the process of deciding these important issues.*

I miss that voice on the Court now.

I was struck by this recently, when I read the *Seattle School District* case²—which involved the persistence of racial isolation and public schools, and the intractable, “no perfect way” that some local districts have tried to undo these effects, without compounding the negative aspects of race consciousness.

I missed your voice there.

I miss your voice, too, in the deeply worrisome chapter on religion and law that has unfolded since you left the Court. I hear your rueful admonition in one of the cases that began the erosion of separation of church and state: “Why would we trade a system that has served us so well for one that has served others so poorly?”³

I am glad you still are offering your pragmatic wisdom up to our law students,⁴ to our country, in so many other ways. But I want to formally thank you here, for the record you left behind—and for the model it offers of a different voice. This is not a woman’s voice per se, though “woman” is clearly a component of your distinctive voice; rather, it is the voice of Sandra Day O’Connor—an American voice that is resonant and wise and very distinctively western, but also and simply, magnificently, distinctively—*yours*.

I miss this pragmatic and wise voice even more today, 18 years later.

Justice O’Connor put something beyond herself at the fore of her professional work: her commitment to public service.

She also did the work with refreshing intellectual humility. She did not lobby for this high post, yearn for

2. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007).

3. *McCreary Cnty. v. ACLU*, 545 U.S. 844, 882 (2005) (O’Connor, J., concurring) (“Those who would renegotiate the boundaries between church and state must therefore answer a difficult question: Why would we trade a system that has served us so well for one that has served others so poorly?”).

4. Justice O’Connor guest-lectured in a Constitutional Law I class taught at the University of Arizona James E. Rogers College of Law by her former clerk, Professor RonNell Anderson Jones.

it, or try to position herself for it: when she got the call from President Reagan, she often said that her first instinct was to decline consideration because she did not feel ready. She was not already a federal appellate judge, a former Harvard or University of Chicago law professor, or a candidate who arrived with an already-thought-through and articulated theory of constitutional interpretation, into which she would force the facts and issues of cases even when they fit poorly into her design.

Rather, she came prepared to listen and do her best. She did not ignore the facts, real-world consequences, or the people who make up a case to which justices must faithfully apply doctrine in light of precedent, history, text, evolving world, and yes, common sense.

And then, she moved on.

One last set of anecdotes. During a post-retirement visit to the College of Law, I saw Justice O'Connor in three settings that stand out vividly.

The first was when she entered a classroom to lecture to our law students. I am not sure I have ever seen such a commanding and charismatic presence, and I have had the privilege of hearing many Supreme Court justices speak to our students and wider community. She walked in front of the students, peering directly into their eyes as she strode across the room. They were captivated. It was a remarkable and powerful performance, and proof of how she had grown into her position as America's first female United States Supreme Court Justice and its most influential member. It was difficult to remain seated in her presence. All seemed to hear the imagined sound of a gavel and command, followed by: *All rise*.

The second anecdote involves a meeting that Justice O'Connor had during that same visit with Shirin Ebadi, who was in residence for a teaching visit at the College of Law. Ebadi is an Iranian lawyer-judge-writer-teacher, who received the Nobel Peace Prize in 2003 for her work on democracy, women's and children's rights, and rights

of refugees.⁵ Seated in the room with these two internationally acclaimed “first women” lawyers was awe-inspiring. Ebadi, through her interpreter, took the occasion to directly and forcefully challenge Justice O’Connor about American non-membership in the International Criminal Court. What followed was not only a remarkable exchange about a matter of international law, but a window into Justice O’Connor’s diplomatic skills, her elegance under pressure, her respectful engagement with a foreign dignitary, and her ability to represent the United States honorably. I almost saw an eagle fly above us in that room. Again, I suppressed the urge to stand in the presence of both women, hearing in my mind an imagined: *All rise*.

The third anecdote is a very different one in tone, and in the side of Justice O’Connor it reflected. Shortly before her visit ended, we had a final meeting at which I thanked her for her time and congratulated her on her retirement. Many ways of honoring her were then underway, and she surprised me by sharing some of them with me, then looking up for a response. I felt there was a question lurking behind her report and this pause: “On which of these opportunities should I act?”

What I saw in that moment was not the famous and commanding first woman Supreme Court Justice, the experienced politician, the brilliant student, or the skillful and fearless cowgirl. Rather, I glimpsed the woman before whom so many life opportunities had unfolded, some unbidden, and some quite daunting. I also saw the woman who had always tried to respond boldly, despite any doubts or uncertainties, and in ways that would be for the public good, not just for herself.

I answered thusly: “Respectfully, Justice O’Connor, you deserve the many ways in which others will ask to honor you; and they are right to believe that in doing so it will advance their good causes, and bring you the enduring recognition you have earned. I only hope in

5. See SHIRIN EBADI, *IRAN AWAKENING: ONE WOMAN’S JOURNEY TO RECLAIM HER LIFE AND HOMELAND* (2007), for a window into her views on human rights.

choosing among them, you now put yourself first in this sense: that you spend this time devoting yourself to the ideas, activities, and causes that bring you the most satisfaction and joy. Duty has called you so many times, and you have always answered faithfully and well. Now, I wish for you more time for your 'want to's,' not just the many 'have to's' that have accompanied your public life."

She was quiet, smiled wryly, and then cast a glance that said, "Time to move on!" and the glimmer I caught of the private woman within the many public roles and robes of her life disappeared. The personal moment had passed, and our meeting now had ended. The Justice was back.

She stood to leave. *I rose.*

