

LESSONS FROM WORKING FOR SANDRA DAY O'CONNOR

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Justice O'Connor doesn't like footnotes in her opinions. That was a bracing lesson for a young lawyer fresh from a law review where a legion of footnotes, packed with authorities and afterthoughts, marched halfway up almost every page. Holding my first memo, she started right in on teaching: "If you have something to say, just say it. Don't weasel around down in the brush." There would be many other straightforward lessons from a year working for Sandra Day O'Connor, but the most important were about decisiveness, theory, inclusivity, and religion.

Making Decisions. In my first month on the job, the Supreme Court wrestled with a difficult capital case. Justice O'Connor and my co-clerk worked late into the night on an emergency petition, and by a close vote the petition was denied. There was an execution after midnight. The next morning, Justice O'Connor was in the office early and was cheerful. She told me of her "fabulous" plans for an event later that day. ("Fabulous" is Justice O'Connor's most-often-used word.) Her cheerfulness that day seemed callous, and I confronted her about it. Even from a distance I had been torn up about both the substance and procedure of the decision, so how could she get over it so quickly? She wasn't "over it," she told me. She had been torn up too, but she had done the best job she could. The time to worry about a decision, she said, is before it is made. You work, read, and listen as hard as you can, and then when you have to decide—and no earlier—you choose. If you do that, your judgment is a good one, even if your decision later turns out to be mistaken, because you made sure it was the best you could do under the circumstances. Moreover, if you agonize over past decisions, you neglect the present ones, and judges always have many other people—and life-and-death decisions—waiting. Justice O'Connor taught that lawyers ought to go at a job full tilt, do the best job possible, and then move on.

Theory. Justice O'Connor's decisiveness rarely embraces deciding more than she has to. Over the years, she has infuriated many law professors by the

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narrowness of some of her opinions, and by her resistance to any new theory until its implications were tested out through the facts of a series of cases. She is a common law judge in an increasingly polarized and ideological age. In chambers, Justice O'Connor always wanted to know the facts of each case in excruciating detail. She wanted to know who the litigants were and why they behaved the way they did. She wanted to read every word of the trial judge's opinion, because that judge saw the witnesses and watched the jury. She wanted to know why the grand issue raised by the parties needed to be decided by the Court if the facts called for some simpler and narrower solution. Clerks had to scramble to master the record, and often an overlooked fact or argument became vital to the Justice's views.

It took me years to fully appreciate how important this was to our country. The Supreme Court can be a great pulpit for a Justice, a place for moving rhetoric that will be recounted in newspapers and blogs and taught in countless classrooms. It can be a place for sarcasm, for belittling humor, for uplifting phrases, for clear, grand theories that cut through the complicated maze of facts and circumstances that make up our country. For Justice O'Connor, this was all mostly beside the point, and her clerks knew it. In her fundamentally humble view, the Supreme Court is a court whose job is to decide cases on their messy facts.

Lots of folks appreciated this pragmatic common law approach by the time Justice O'Connor retired. Some appreciated it mostly because the alternative seemed worse: a judge who decides the narrow issue before her based on the particular facts of the case was attractive when the alternative may have been a judge whose theories you do not share. But for many like me in the country, confronting deeply uncivil and ideologically polarized politics in every branch of government, Justice O'Connor's approach to judging was attractive regardless of political persuasion.

Inclusiveness. Working for Justice O'Connor, you learned quickly that she listened to everybody, including people with whom she disagreed. Her strong views on federalism did not keep her from reading the scholarship of virtually every person who had ever written about state and federal powers. Her attitude was that she had something to learn from everybody. Her clerks over the years came from every conceivable ideological, racial, and personal background and from a wide range of law schools. She wanted you to argue with her and with one another—civily of course, but with no taboo subjects and no ideological blinders. Her attitude was that everyone, and every idea, had an equal chance to prove itself, but that there should be no pretending that a flawed idea or flawed effort made the grade. It was a challenging environment. She let you know if your work was poor or your ideas half-baked. She borrowed freely what she found persuasive and unsentimentally rejected the rest. She made you feel as if you were only as good as your latest effort and that every effort you made had to be the best you could do.

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At the same time, Justice O'Connor was a considerate boss. She was the first woman I worked for, and one of the first bosses I'd ever had who noticed I had a family and demands elsewhere in my life. She was welcoming to my parents, who had almost no exposure to law and lawyers and were curious why I was choosing to become a "clerk." Justice O'Connor called them and brought them to the Court so that they could see where I worked and why it mattered. When my first son was born during the clerkship, Justice O'Connor understood that my wife had an important career too and that I would have new responsibilities, which at times would require me to bring my son to work (a revolutionary notion at the time). The clerks' children became her "grandclerks," and her responsibility as well, and it showed in how she treated them and us each day at work and outside it.

Religion. Finally, I learned about religion from Justice O'Connor. The Court had many religion cases in October Term 1984, involving prayer in public schools, federal and state aid to parochial schools, and the treatment of religious beliefs by private employers and federal, state, and local governments. They were hard cases, and Justice O'Connor's views did not always prevail. Through the Term, she taught me two lessons—one through her opinions and one through her example. Her opinions were animated by a pragmatic realization that religion cannot be excised from all government and policy, especially given how expansive government has become. Kids in parochial schools may need remedial help from the government, just as those in public schools. Justice O'Connor taught that while there are many appropriate ways to manifest religious faith and to use that faith to inform policy, the Constitution nevertheless keeps the government from endorsing one faith and particularly from being mobilized with all its powers to favor one faith over another. In 1984, it seemed a subtle point in what was the most maddening area of constitutional doctrine. In 2006, it seems more vital than subtle, and not just in the United States.

Overlaying this lesson, however, was Justice O'Connor's example of a devout person who manifests her faith through action rather than through public pronouncements to the faithful in her public role as a Justice. There are thousands of people in all walks of life to whom Justice O'Connor has reached out and helped over her career—the editors of the *Stanford Law Review* could have assembled a set of tributes from virtually any sect or occupation in the country. In the United States, Justice O'Connor taught me, a public official can bear witness to faith in many ways without using her title or office to appeal to those of one faith (and thereby communicate exclusion to others).

In the end, Justice O'Connor's view of her limited role has precluded her from saying everything she could have said. Some things, like footnotes, ideology, and preaching have been left down in the brush. Thank goodness for that, as well as for all the fabulous things she has accomplished as a Justice.

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