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REFLECTIONS ON THE LIFE AND WORK OF JUSTICE BYRON R. WHITE

Lance M. Liebman[†]

I am honored to be at this distinguished law school. Lee Irish and I were law clerks for Justice White the same year, at a time when a Justice only had two law clerks. Those were the days when the people older than us, who had been clerks when there was only one clerk in each office, would say, “You don’t have the same experience, because the Justice is dealing with two of you so it is not as intense.” Of course, now with as many as four clerks in each office, it is different still.

Lee and I had a fascinating year together. It was 1967 and 1968, when, for the first time in a long time, a certain degree of chaos came upon this city and the country. During that year, both Martin Luther King, Jr. and Robert F. Kennedy, the Justice’s close friends, were killed. There were soldiers in the streets. It was an amazing time.

I want to mention three anecdotes because we are operating at several rhetorical levels today. First, there was a day in the early seventies, when my wife Carol and I were raising our children in Boston. We brought our two kids to see the Washington Monument, the Lincoln Memorial, and whatever else. We included a stop to introduce our two young children to Justice White. I, of course, was nervous because I did not want to take up more than two minutes of the Justice’s busy time. He was very gracious and showed the kids the courtroom. Carol and I and the two kids ended up on the street in front of the Supreme Court’s big, beautiful building. Our oldest, Jeff, was probably seven and commented that he saw a football on the shelf in the Justice’s office. I pompously said, “Well yes, Justice White was an All-American in Colorado; he led the National Football League in rushing.” I also mentioned that while he was a full-time law student at Yale, the Justice practiced with the team for an hour on Fridays and played on Sundays. Jeff replied, “Oh, I should have gotten his autograph!”

Second, Bill Wagner reminded me of a good point, something that I have not thought of in twenty or thirty years: the special status a Supreme Court Justice has in this country. The first time I was ever in the same room with a Supreme Court Justice was as a first-year student in law school. Justice Harlan was at Harvard Law School as a member of

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the Visiting Committee, and came to sit at the back of the room of my criminal law class. It was my first semester in law school, and his recent clerk, Charles Fried, was a young professor trying to teach us criminal law. The Justice came in, sat down, and over 150 of us kept looking around because he was behind us. We kept trying to look without being seen. We wanted Professor Fried to be brilliant, and we wanted not to get called on. It was scary.

Finally, I want to tell you about the first time I almost met Justice White. In 1962, I was a senior at Yale University and the editor of the school newspaper. The paper had a banquet every year, and I had to get a speaker. I was from a high school in Frankfort, Kentucky. I assure you I did not know anyone. My family did not know anybody who could come to speak at the banquet. Thank goodness there was a student two years behind me, Bob Kaiser, who has since become a prominent journalist at *The Washington Post*. Bob's father had been a Rhodes scholar with Justice White and he thought he could get then-Deputy Attorney General White to speak at this dinner. I wrote a letter, in which I later found out that I had gotten his middle name wrong, and Bob took it down on Christmas vacation. He was going to be in Washington with his family and would go see the White family. The not-yet Justice said he would attend. The event was all arranged for a date in May.

At the time Justice White was nominated to the Supreme Court, you did not get the news on a computer—or even on the radio. It must have been a Friday he was nominated, because on Saturday morning I went to Liggitt's Drug Store to have coffee for breakfast. I bought *The New York Times*, and the one-column headline said: "Kennedy Names Byron White To Succeed Justice Whittaker." I thought, "This is wonderful; our speaker has become famous after he agreed to speak for us!" Then it suddenly hit me like a cold chill. Maybe he could not keep his commitment. Sure enough, Tuesday or Wednesday, I got a telegram. I would give a lot to have it still. It said: "Dear Mr. Liebman, recent events make it impossible for me to speak." He did not reference what the recent events were.

Last Wednesday, I gave a talk just like this one at the University of Louisville School of Law, in my home state of Kentucky. An old friend of mine, Laura Rothstein, is the dean at the Louis D. Brandeis School of Law, and leads her school with the Brandeis tradition in mind. My visit to Louisville led me to reread several biographies of Brandeis.

Justices Brandeis and White represented two completely different models of the Supreme Court's function and attitude toward judging. Justice Brandeis viewed his law practice as a mission to achieve political and economic goals—liberal, progressive, redistributive goals. He had

started with no money. On some early cases, he quickly made a little money and was able to afford to take cases for political causes. When he was on the Supreme Court, that was his mission: to change and improve the government and the society of the United States with the influence he could exert from that position.

I would classify Justice Brandeis's approach as virtually the opposite of what Justice White said at his confirmation. The bottom line for Justice White was that the Supreme Court decides cases.¹ That is different from the Supreme Court being simply an avenue toward one's political goals. I am not ready to say one or the other of these is right. You have to decide that for yourself. Harold Laski, writing to Justice Holmes, described Justice Brandeis as "a prophet . . . rather than a judge, a grand player for a side in which he believes in both disinterestedly and with all his might."² The politics, or the legitimate political goals, came first, and the judging was the instrumentality.

Here is a letter Justice Brandeis wrote to Felix Frankfurter when Frankfurter was a law professor at Harvard. The letter was written June 25, 1926, from Washington, D.C., to Cambridge, Massachusetts, to Professor, not-yet long-time Justice, Frankfurter.³ Right after the First World War, Justice Brandeis was worried about infringements of liberty that occurred during the war and continued into the post-World War I period, when there was less justification for such intrusions by the government. The context of this letter is the military situation of the time. I cannot imagine any of today's nine Justices of the Supreme Court putting this even in an e-mail. Justice Brandeis writes to Professor Frankfurter:

Wouldn't it be possible to interest [Harvard teachers] directly & through them students, to make the necessary investigation & present in the [Harvard] Law Review articles bearing on the redress for the invasion of civil and political rights to arbitrary etc. governmental, action by means of civil suits? I think the failure to attempt such redress against government officials for the multitude of invasions during the war and post-war period is also as disgraceful as, the illegal acts of the government and the pusillanimous action of our people in enacting the statutes

1. See DENNIS J. HUTCHINSON, *THE MAN WHO ONCE WAS WHIZZER WHITE* 331 (1998).

2. HOLMES-LASKI LETTERS 1916-1935, 1448 (Mark DeWolfe Howe ed., 1953).

3. LOUIS D. BRANDEIS, *HALF BROTHER HALF SON: THE LETTERS OF LOUIS D. BRANDEIS TO FELIX FRANKFURTER* 243-44 (Melvin I. Urofsky & David W. Levy eds., 1991).

which the states and the nations put on the books. Americans should be reminded of the duty to litigate.⁴

Now, I am not speaking today about the issue of civil liberties, of war and terror. I am talking about a Supreme Court Justice. Justice Brandeis had been a member of the Court for five years at that point, and he was trying to stir up cases that he was ready to decide. We know that Justice Brandeis was very active in the New Deal, guiding Cabinet members and the President. Justice White, of course, was completely different. He saw his job as deciding the cases that were brought to him, certainly not to stir up those cases or to take them up one at a time. In addition, I believe that while he had no goal or political structure in his decisions, neither did he have a single jurisprudential framework. Various academics have tried to provide a structure around his work in different fields.⁵ Anytime I published anything about him, and we talked about it, I always felt he was smiling at me—laughing at me because I was trying to create explanations that were not exactly the way he was thinking. He was just starting with the case and working through it.

Nonetheless, underneath those decisions, and in every moment of his judicial work, appropriately and necessarily, there were deep ideas about the U.S. Government. I remember the separation of powers being mentioned, and the importance of the national government. These topics have always interested me. Justice White's belief in the national government of this country could be attributed to his being from Colorado at a time when that part of the country was young, and the federal government was extremely important. In contrast, one can look at Chief Justice Rehnquist, the greatest defender of the role of the states, coming from a state that borders Colorado. One might argue that both had a similar upbringing, and yet Justice Rehnquist came to the opposite conclusion regarding state versus national power.

I think Dean Kmiec named all the key cases that I tend to list with respect to Justice White: *Miranda v. Arizona*,⁶ *Roe v. Wade*,⁷ and *Bowers v. Hardwick*.⁸ Certainly, these cases show not just a view about government or a legislative role and certainly not solely a view of originalism—finding a solution in the text or other original source. I think they show his view of what was, at the time, the proper decision for

4. *Id.* at 243.

5. See generally Lance Liebman, *Swing Man on the Supreme Court*, N.Y. TIMES, Oct. 8, 1972, § 6 (Magazine), at 16; see also Address by Daniel Kramer, American Political Science Convention, Washington, D.C. (Sept. 1986).

6. 384 U.S. 436, 526 (1966) (White, J., dissenting).

7. 410 U.S. 113, 221 (1973) (White, J., dissenting).

8. 478 U.S. 186 (1986).

the Court to make for the good of this country. Professor Wagner used the phrase “the prudential judgment of the Framers.” I believe Justice White saw it as the prudential judgment of the current nine Justices. In his votes, opinions, and positions, the prudential judgment of Byron White spoke to where this country should be going and whether or not the Supreme Court should be interfering.

In the couple of minutes I have left, I want to get to the real topic on which I have written before and suppose I will again—the affirmative action or discrimination question. That is not the only dominant question, but it is one of the primary issues that arose within the thirty-one year period of White’s service from 1962 to 1993. Justice White’s term started just before the Civil Rights Act of 1964. *Brown v. Board of Education*⁹ had been decided. The questions of *Brown*’s enforcement and federal versus state authority still were very much alive. Justice White had been on the firing line in the South as a Justice Department official. He started fully committed to the cause of implementing the Supreme Court’s decisions—decisions hardly backed up by courageous congressional action or presidential support. Therefore, the Supreme Court had to do the heavy lifting.

Justice White enthusiastically supported affirmative intervention. He favored careful evaluation and looked not just for discriminatory intent but discriminatory impact. This philosophy led to the disestablishment of thousands of different rules for giving out jobs, the desegregation of the workforce, and creation of opportunities for African-Americans, Hispanic-Americans, and women. Then, at a certain point, White began to switch. I wrote about this in a University of Colorado law review article in the 1980s, before the process of change was over.¹⁰ He began to become much more cautious about affirmative action and issues such as reverse discrimination.¹¹ The change was gradual and reached its highest point in *Wards Cove Packing Company v. Atonio*.¹²

9. 347 U.S. 483 (1954) (overturning *Plessy v. Ferguson*’s “separate but equal” doctrine and holding that segregation was an unconstitutional denial of equal protection).

10. See generally Lance Liebman, *Justice White and Affirmative Action*, 58 U. COLO. L. REV. 471 (1987).

11. See *United States v. Paradise*, 480 U.S. 149, 196 (1987) (White, J., dissenting). In *Paradise*, a plurality of the Court held that a judge’s order awarding one-half of the supervisory positions to qualified African-American state troopers within the Alabama Department of Public Safety “was amply justified and narrowly tailored to serve the legitimate and laudable purposes of the District Court.” *Id.* at 185-86. Justice O’Connor provided a principled dissent, which Justice White joined, adding only that he found it “evident that the District Court exceeded its equitable powers in devising a remedy in this case.” *Id.* at 196.

12. 490 U.S. 642 (1989) (holding that minority employees must demonstrate specific examples of disparate impact on non-whites in order to establish a *prima facie* case of disparate impact in an employer’s hiring practices).

Looking at my article now, I almost predicted this result. Justice White would not constitutionalize the notion of discriminatory impact review, which would be very unsettling and cause a wide range of statutes and regulations to be examined for racial impact. At this point, he was still committed to letting Congress enforce that level of review through a judicial interpretation of the Civil Rights Act of 1964. But then in *Atonio*, he pretty much tried to take it back, or he took it back for a narrow majority interpreting the statute.¹³ Congress reversed him, and went at least halfway toward *Griggs v. Duke Power Co.*¹⁴ in the Civil Rights Act Amendments of 1991.¹⁵ President George H. W. Bush signed it, perhaps unhappily, heading toward his own reelection campaign. I think it is a very interesting story of Justice White being cautious about how the country should move, the role of the Court in stimulating that change, and the playing out of some of the crazy and exciting events that had been occurring in the country in the sixties and through his first decade on the Supreme Court. These are fascinating issues, still very much with us, and are well worth all of our attention.

13. *Id.* In *Atonio*, the Court split five-to-four with Justices White, Rehnquist, Scalia, Kennedy, and O'Connor in the majority and Justices Blackmun, Marshall, Stevens, and Brennan dissenting. *Id.* at 644.

14. 401 U.S. 424 (1971) (holding an employer's requirement that employees have a high school education or pass an intelligence test as a condition of employment was invalid because the requirement, though neutral on its face, operated to "'freeze' the status quo of prior discriminatory employment practices").

15. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991). The Act essentially attempts to change three major areas of Supreme Court civil rights analysis. First, the Act alters the plaintiff's duty to identify particular employment practices. *Id.* § 105. Second, the Act shifts the burden of persuasion back to the employer. *Id.* Third, the Act places an emphasis on "equally effective" alternatives, which is more consistent with pre-*Atonio* analysis. *See id.*