



SANDRA DAY O'CONNOR'S "FIRST" PRINCIPLES: A CONSTRUCTIVE VISION FOR AN ANGRY NATION

by LISA KERN GRIFFIN

Once upon a time in American public life, there were figures who achieved universal admiration. It was even possible to earn the trust of those with whom one disagreed. Justice Sandra Day O'Connor, who joined the Supreme Court as the first woman justice in 1981 and retired in 2006, may be the last such public person — an icon able to transcend partisan polarization. Look around and try to spot another one. This problem extends beyond the familiar, rancor-

First: Sandra Day O'Connor

BY EVAN THOMAS
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ous spaces occupied by the branches of government. Journalists and nightly news anchors no longer serve as shared sources of information. Entertainers and professional athletes often feel compelled to “choose sides.” Even the members of the U.S. women’s national soccer team angered some vocal

groups in the United States last year while they triumphed in the World Cup competition. Everyone always seems mad at someone.

In her day, however, O'Connor touched a chord that resonated with a wide and varied audience. When she appeared before the Senate Judiciary Committee in 1981, 100 million Americans watched on television, about the same number of people that tuned in for Super Bowl LIV on February 2, 2020. She was confirmed by the full Senate 99-0 and emerged from the pro-

ceedings as the first celebrity Supreme Court justice. Flashbulbs fired when she entered any event in Washington, and she received 60,000 letters from admirers in the first year after her confirmation. Over the next 25 years, she cast the decisive votes to resolve the most emotional debates that came before the Court, including a series of abortion and affirmative action cases. And across more than 300 majority opinions, O'Connor both achieved consensus among her colleagues and retained the public's high regard.

Fast forward to the present Court. In their most recent terms, the justices faced contentious questions about reproductive rights, discrimination, immigration, and executive power. The realignment since O'Connor's departure has left a void in the pragmatic middle spaces on many issues, yet the Court still maintains civil exchanges relative to the woeful state of the discourse in the political branches of the government and throughout our public life. Even in a time of bitter political division, Chief Justice John Roberts has crafted compromises and defied expectations in what seems to be an effort to demonstrate that the Court itself will not fracture hopelessly along partisan lines. Among themselves, the justices also tend to avoid personal vitriol, and they owe that norm in part to O'Connor's collegial influence on the institution during her years on the Court.

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Shortly after this announcement, historian and journalist Evan Thomas published an intimate biography of O'Connor. A bestselling author of ten nonfiction works — including biographies of Robert Kennedy, Dwight Eisenhower, and Richard Nixon — Thomas has a particular interest in American political culture, the legacies of noted and notorious figures, and the essence of leadership. With this project, Thomas portrays a woman leader for the first time and writes his first judicial biography. In collaboration with his spouse Oscie Thomas, he conducted more than 300 interviews of O'Connor's family, friends, colleagues, and clerks; drew upon unprecedented access to O'Connor's private papers (including 20 years of her husband John O'Connor's journals); reviewed internal Supreme Court documents;

and met with O'Connor and seven other Supreme Court justices.

While O'Connor no longer participates directly in the national conversation, *First* speaks for her and reintroduces her voice at a critical moment. It reveals both why O'Connor has been so admired and what she can still teach the country she loves. It does so by chronicling a legacy in three parts: a lived example of how to thrive in the face of challenges, a lesson about the courage that lies beneath compromises, and a theory about the long game of American democracy.

Here I describe O'Connor's exceptional personal strengths and suggest that Thomas's account of her trajectory could double as a guide to individual and professional development. I then explore the connection between O'Connor's character and her moderate — but also brave and consequential — jurisprudence. Finally, I discuss O'Connor's dedication to civility and continuing democratic discourse. Ultimately, I find that *First* sounds wistful notes about what seems a bygone era yet contains hopeful lessons about repairing American civic life.

O'CONNOR THE PERSON: BIOGRAPHY AS A LIVED SELF-HELP BOOK

Throughout *First*, Thomas considers whether O'Connor changed the world or just caught the moment when the world was changing around her. The answer becomes clear as Thomas paints his layered portrait. She served not only as the first woman on the Supreme Court but, in Arizona, as the first woman leader of any state legislature's upper house. And O'Connor ►

advanced not because she appeared at the right place and right time, but because her personal qualities made her precisely the right person for an extraordinary assignment. As Judge J. Harvie Wilkinson observed, “Someone to her right or her left, or without her flinty pragmatism and indefatigable public energy, could not have carried off the transition nearly so well.”

One could even read *First* as a sort of manual for leading a fulfilling and productive life: Seize opportunity, let go of regret, focus on the moment, try not to take things personally, do the work and do your best, and never be above caring for others. Unlike the fierce and fashionable Justice Ginsburg, O’Connor has never spawned lace-collared memes or inspired any tattoos, and she was not known for keeping pace with contemporary culture. Indeed, O’Connor’s occasionally prim demeanor and strict code of personal conduct could at times seem anachronistic. But in her approach to life and work, O’Connor modeled the tenets of self-improvement before bestsellers and podcasts even introduced buzzwords like “mindfulness” and “grit.”

No Regrets or Grievances

Though it is hard to picture O’Connor adopting an actual mantra, were she to have one, it would be: “Look only forward.” Upon her graduation from Stanford Law School in 1952, many employers rejected her because of her gender. But she never once looked back and expressed bitterness about that. Instead, she credited the need to pivot to different opportunities as the fortuity that landed her in the public sector and eventually launched her judicial career. She rigorously avoided regret, and she would often say that “[t]he time to worry about a decision . . . is before it is made.” Even with regard to the

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Bush v. Gore decision that stopped the Florida recount in the contested 2000 presidential election, a moment in the Supreme Court’s history that O’Connor rued, if not regretted, she told Thomas in a 2017 interview that “second thoughts don’t do you a lot of good.”

With both humor and force of will, O’Connor imposed forward momentum on her chambers. She pressed past contentious decisions at the Court and urged clerks to “move on” from their own disagreements and disappointments as well. Nor was O’Connor inclined to apologize for things she could not attend or accomplish given her taxing schedule; she simply said “no.” As Justice Stephen Breyer (her closest friend on the Court) relates, she

was fond of pointing out that “tomorrow is a new day.”

Superpowered Focus

First also captures O’Connor’s capacity for mindfulness, an indispensable skill in the face of today’s cacophony of noise and information and a talent she mastered long before the term itself was ubiquitous. Almost never relaxed, but always calm, O’Connor focused intently on every conversation. She would hold completely still and make an unnerving amount of eye contact. Throughout *First*, Thomas describes O’Connor’s “extraordinary ability to focus on work and tune out distractions.” Former clerks warned as I began my term working for O’Connor that she would digest documents at a blistering pace. When we left drafts with her to read, we raced back to our desks because she would appear in our office moments later with penetrating comments and instructions on next steps.

When O’Connor decided it was time to go, people left; when she pointed in some direction, others followed. Indeed, she seemed a magnet able to bend events to her will. I recall a particular Arizona gathering to honor her, when the desert weather took an unexpected turn, and it began to rain. “Can you believe it?” she intoned in her characteristic clipped speech. “What we can’t believe,” one of her clerks responded, “is that you did not make the rain stop.” The Justice’s eyes sparkled, as everyone within earshot nodded vigorously. To us, the power of her mind made it seem entirely possible that such a thing could happen.

Resilience and Self-Possession

O’Connor exhibits what contemporary commentators have labeled “grit” as well. The canonical origin stories about her tenacity emphasize a childhood

spent branding calves, firing rifles, changing truck tires, and encountering life and death on the Arizona range. Her particular strength was not just to be unyielding but also to identify the fights worth having. From a loving but severe father, with a mercurial temper, she learned to determine “which fires would flame out on their own.” Later, when she confronted the intransigence of the male legislators she led in Arizona or irascible colleagues on the Court like Justice Blackmun, O’Connor knew both how to stand up for herself and when not to take things personally.

I never once heard O’Connor complain about slights or dwell on obstacles, but that is not to say that she showed no emotion. Vulnerability and fragility are not, of course, the same thing. And perhaps the most poignant section of *First* describes O’Connor’s despairing reaction to her initial breast cancer diagnosis. She indulged in fear and grief only briefly, however, and then turned her attention to getting well. As a survivor, she has continued to hearten others who confront the disease, setting an example with her attitude: “[H]onest, practical, and ultimately optimistic.” O’Connor never denied that she faced challenges, but she never let adversity define her either.

This combination of self-awareness and self-assurance characterized O’Connor’s approach to every task. When she first joined the Court, she had no experience as a federal judge and little knowledge of constitutional law. Nor was she informed about the Court’s rules and traditions or

even advised on how to organize her chambers. At the first conference she attended — the justices’ regular meeting about which cases to hear — she arrived with the petitions for certiorari under consideration filed in the wrong order. In John O’Connor’s diaries, how-



AUTHOR LISA KERN GRIFFIN CLERKED FOR JUSTICE O’CONNOR IN THE 1997-98 TERM, EARNING ALL THREE OF HER CHILDREN “O’CONNOR GRANDCLERK” T-SHIRTS. (PHOTO TAKEN IN 2003.)

ever, he reported that, despite setbacks at the outset, she “never once suggested or implied that the job was, even for a moment, beyond her.” Though she questioned whether she was “on a par with some of the great intellectual justices of [the] history of the Court,” she also found that she understood the issues and could persuade her colleagues. From the beginning, O’Connor held her own.

“Do the Work”

When law students ask for advice on daunting projects or demanding new positions, O’Connor’s not-so-secret formula has become a refrain when I respond. As a student, a practicing lawyer, a public official, a judge, and then a justice, O’Connor followed a sim-

ple rule, which was to “do the work.” She neither sought nor used shortcuts for anything, and she counseled both preparation and determination.

As O’Connor would point out, her earliest jobs were not glamorous posts. While John O’Connor was stationed in Germany in the Army JAG Corps, she worked as a government procurement lawyer. She then opened a storefront law firm in a shopping center. When she served as State Assistant Attorney General in Arizona, she was first detailed to a windowless office in a hospital, where she “worked on legal problems arising in the state mental health system.” Yet she treated each case with meticulous professionalism. Thirty years later, she advised her new colleague, Justice Ruth Bader Ginsburg, who was disappointed that one of her first assignments

on the Supreme Court was a technical ERISA opinion: “Ruth, now you just do it! Just do it!” Whether processing minor cases in early career obscurity or drafting a tedious labor law decision when one would rather craft constitutional theory, O’Connor insisted that everyone just get to it and do the best work they could on the task at hand.

“Other People Matter”

Some of these examples might portray O’Connor as a stern striver, but *First* also depicts the sincere affection and deep connection between O’Connor and the people around her. Another useful mantra that she brings to life involves service to others. As positive psychology teaches, remembering that “other people matter” can be the ►

key to both equilibrium and joy. One of O'Connor's defining traits has been her empathy and her desire to care for people, listen to them, and take an interest in their lives. In the years after her law clerks left the Court, she never failed to celebrate personal and professional milestones with them. She welcomed my three children with a treasured "O'Connor Grandclerk" t-shirt when they were born, and she offered me advice on new positions in the government and later academia. She acknowledged what was important to each of us, and she could recall the details of an issue we had last discussed months or years before whenever we met again. Powerful people can make others feel less important. But not O'Connor. She elevated everyone around her. At any event, however grueling, she would work her way through the room and give each person the gift of a memorable moment with her.

She admired selflessness in others as well. As Thomas reports in *First*, she held Chief Justice John Marshall in particular esteem, in part because Marshall found the time each day to care for his spouse over the course of a long illness. And she often expressed gratitude for Justice Lewis Powell's welcoming advice during her early days on the Court. Although they did not always see eye to eye, her disagreements with Powell were amicable, and she regarded that collegiality as the essential ingredient in any professional relationship.

Of course, few people could match O'Connor's particular blend of focus, drive, equanimity, humility, and generosity. But Thomas's account of her astonishing achievements and her rich relationships contains some invaluable lessons for navigating any tough assignment or challenging time.

O'CONNOR THE PROFESSIONAL: JUDGING AND THE COURAGE IN COMPROMISE

Perhaps the least understood aspect of O'Connor's legacy is that, although she was indeed the perfect "first," it was not as easy as it looked. Most commentators, Evan Thomas included, highlight the flexibility of her jurisprudence. Few have noted the fortitude that it took to craft it and the connection between her personal qualities and the position she occupied on the Court.

Flexibility, Fairness, and Context

Moderation can require heroics because identifying and taking a centrist position does not occur by default. Some justices vote according to alliances or adhere to a method of interpretation like originalism. O'Connor proceeded without those signposts and was "not constrained either by rigid doctrine or by another justice." She rejected templates and formulas, and in her view, many "Grand Unified Theor[ies] . . . turn out to be neither grand nor unified." But she did not lack conviction, feel uncertain, or fall short of clarity. Rather, she sought just outcomes and desirable compromises. As a result, she had to weather crosscurrents and criticism from all sides. For example, both Justice Antonin Scalia (a forceful critic of *Roe v. Wade*) and Justice Harry Blackmun (its author) attacked the accommodations she made to protect *Roe's* core holding on reproductive rights.

Nor did O'Connor, once she achieved a desired outcome, feel the need to claim victory. To her, what mattered was how an opinion worked in the world, not how it sounded when announced from the bench. She was comfortable focusing on the facts and rarely appealed to lofty principles, or even tried to turn a phrase. While at

times her pragmatism left her open to charges of indecision, she was plenty resolved but not doctrinaire. And if she could reconcile competing demands, and "patch together five votes on an issue she cared about," then she embraced a hybrid or compromise decision that left room for later modifications. Like Judge Learned Hand, she understood that "the spirit of liberty is the spirit which is not too sure that it is right," and she was alert to competing points of view. Where Scalia would rely on "bright-line rules and fixed principles," O'Connor preferred to "set more flexible standards to accommodate the facts and changed circumstances." She recognized that tests "sensitive to context" might yield some inconsistent results, but she regarded them as necessary to express underlying constitutional principles. As Thomas writes, her methodology referenced real-world consequences, and for pragmatists, "the truth of a belief rests in the success of its practical application."

Incremental Steps

O'Connor's personal humility surfaced not only in the limited scope and practical methodology of her decisions but also in the measured pace of her jurisprudence. She avoided sweeping rulings and did not overstate the Court's role. She was willing to proceed incrementally and "preferred to live in the world of the possible, to go for better if best was not immediately obtainable." Among her predecessors, O'Connor had particular admiration for Justice Oliver Wendell Holmes, and like him, she saw the law not just as "logic" but as "experience."

When it came to affirmative action, for example, O'Connor felt her way case-by-case, "instinctively in sync with public attitudes, looking for

ways to balance competing interests.” “Context matters,” she wrote in *Grutter v. Bollinger*, which addressed whether the Equal Protection Clause prohibited a state law school from using race as a factor in admissions. O’Connor weighed how diversity in each context could contribute to “[e]ffective participation by members of all racial and ethnic groups in the civic life of our Nation.” She favored a “flexible, nonmechanical” consideration of race, and she embraced the goal of diversity but not the structure of a quota system. Considering how different approaches would affect the military, universities, workplaces, and other institutions on the ground, she affirmed racial preferences, while also suggesting that the practice might not be necessary in future generations.

Flexible and incremental decision-making does not mean minimal impact. Justice Ginsburg was also characterized as a moderate and centrist, but her calculated strategy on gender equality produced monumental shifts in the law over time. Although best known today for powerful dissents, delivered while wearing her symbolic dissenting collar, Ginsburg moved at a deliberate pace and constructed precedents with exquisite care. She often cited Justice Benjamin Cardozo’s observation that justice is not “taken by storm” but rather “wooed by slow advances.” For her part, O’Connor shaped the law with her narrow majority opinions, careful concurrences, and deft navigation through heated debates.

O’Connor’s restrained jurisprudence perhaps applied most consequentially to reproductive rights. Her “just-the-facts concurrence” in *Webster v. Reproductive Health Services* prevented the Court from overturning *Roe v. Wade* at a critical juncture. And the “undue burden” test she first advanced in her separate opinions became estab-

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lished law in the *Planned Parenthood v. Casey* plurality, rendering abortion restrictions unconstitutional when their “purpose or effect” was to “place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability.” For almost 30 years, the accommodations of the “undue burden” test have preserved the central right to an abortion while still allowing the issue to “evolve through the delicate balance between legislatures elected by the people and judges sworn to protect the Constitution.” In light of *Grutter* and *Casey*, legal scholars like Cass Sunstein described O’Connor as the Court’s “leading minimalist” during her tenure.

A Legacy of Pragmatism

Observing O’Connor’s focus on the facts, some commentators concluded that she lacked vision or had no theory of the Constitution. One such detractor, Jeffrey Rosen, disparaged her “split-the-difference jurisprudence” during her tenure — even calling each of her opinions “a ticket for one train only.” But he later published an essay, enti-

tled *Why I Miss Sandra Day O’Connor*, lamenting the loss of her sensible presence after she retired. O’Connor had a “knack,” Rosen wrote, “for expressing the views of the moderate majority of Americans more precisely than either Congress or the president.” Justice Elena Kagan likewise called her “unerring instinct for what the citizenry could accept” her unique brilliance.

O’Connor did trim her opinions strategically, and she would write separately, as she did in *Webster*, to blunt the impact of a majority decision she regarded as either too conservative or too liberal. Those moves, however, did not arise from timidity. They reflect both a unifying vision and a pragmatic methodology. The affirmative action and abortion cases, for example, express a theory of the Constitution: O’Connor saw the Court as a participant in an ongoing conversation that sustains democracy.

At first glance, shifts in the Court’s personnel in recent years seem to have “dismantled” O’Connor’s legacy of pragmatic decisions. Yet Chief Justice Roberts — who is significantly more conservative than O’Connor but appears to share her concern with institutional roles — acquired the same “minimalist” label after the October 2019 Term of the Court. Roberts authored decisions deferring the abortion debate in *June Medical Services L.L.C. v. Russo*, declaring that presidents are not “categorically above the common duty to produce evidence when called upon in a criminal proceeding” in *Trump v. Vance*, and concluding that courts enforcing congressional subpoenas must balance “the significant legislative interests of Congress and the ‘unique position’ of the President” in *Trump v. Mazars*. Whatever else these decisions portend, they account for some ►

practical and political realities and keep the conversation going. Perhaps like O'Connor, Roberts is demonstrating baseline commitments to dialogue, accommodation, and consensus.

**O'CONNOR THE PATRIOT:
DEMOCRATIC DISCUSSION
IN AN ANGRY NATION**

The central insight of *First* stems from this understanding of O'Connor's theory of the Constitution. She envisioned democracy as an enduring civic discussion that maintains the balance of power and ensures the government's accountability to the citizenry. The Supreme Court, in her conception, is engaged in a "centuries-long conversation with the other branches of government" about "the great and hard questions of fairness." Accordingly, she resisted categorical judicial decisions that cut off discussion and also rejected heavy-handed moves by the other branches that she regarded as disturbing "the proper constitutional balance."

In the *Hamdi v. Rumsfeld* case on the detention of "enemy combatants," for example, O'Connor felt moved to pen the most famous "line" to be found in all 643 of her published opinions for the Court, that "a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens." Moreover, she often sent cases back to the lower courts or deferred to legislatures, as in *Casey*, so that a debate could continue. And by far the most painful episode on the Court during her tenure was *Bush v. Gore*, in part because it cut off conversation about state control over election proceedings in the middle of Florida's 2000 recount.

O'Connor's intuitions about democratic discourse developed during her time in the Arizona legislature

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and the state court system. The current Supreme Court, for the first time in its history, has not one member who was elected to any legislative or executive position or has served as a cabinet official. When the Court issued its 1954 *Brown v. Board of Education* decision declaring segregated schools unconstitutional, only one of the nine justices had previous experience as a federal judge. On the day that Samuel Alito replaced O'Connor in 2006, he became the ninth justice then serving who was a sitting federal appeals court judge at the time of his elevation. With a narrower aperture to view the actions of the executive and legislature, the justices may also have a shallower understanding of political incentives and the necessary give-and-take between the branches.

Balancing forces and engaging on issues served not only as guiding jurisprudential principles for O'Connor but also as her touchstones in professional exchanges. She exhibited unfailing civility and decency, even when other justices denigrated her draft opinions. Collegiality was a daily, concrete expression of her dedication to civil discourse. When she received the initial assignment to draft a decision requiring the admission of women to the Virginia Military Institute, O'Connor suggested that Justice Ginsburg write the landmark discrimination opinion instead, saying simply and clearly: "This should be Ruth's." O'Connor's characteristic sense of community in this moment of generosity proved very significant. In the tributes to Justice Ginsburg following her recent death, the decision in *United States v. Virginia* topped the list of her noteworthy opinions.

Both honoring her colleagues' contributions and enduring critiques with composure paid dividends for O'Connor. In part because she withstood Scalia's acerbic edits without ever responding in kind, she would often achieve what she wanted in a given case, while Scalia lost cases that mattered to him. "She built coalitions. She tried for consensus. She never took a cheap shot at a colleague."

Indeed, Justice Clarence Thomas credits her with bringing him into conversation with his colleagues after his bruising confirmation battle because she insisted that the justices eat lunch together. And every Saturday during the Supreme Court's term, she would gather her clerks in chambers for her crockpot chili and assign them different sides of the week's cases to debate. She even famously (and fruitlessly) lectured senators on the need for more civil discourse in politics.

Mutual respect between decision-makers and reverence for the institutions of democracy may seem quaint to an observer of the current political scene, but it endures between the justices at One First Street. And if the relative stability and civility there play a pivotal role in sustaining the balance of power, that will be due in large part to the traditions that O'Connor established. As Justice Thomas observes, she was the "glue" that bound the justices together as people. Justice Breyer has similarly described the "special talent" she had for "helping to restore good humor in the presence of strong disagreement" and to "produce results that are constructive."

O'Connor's constitutional vision depends on channels of communication — not just within the Court, or among the branches of government, but throughout the country. In her October 2018 farewell to the public, she emphasized this commitment to democratic engagement. She called upon citizens to "participate actively in their communities," to "solve problems," to "put[] country and the common good above party and self-interest," and to "hold[] our key governmental institutions accountable." Democracy, O'Connor would say, "is not passed down in our gene pool" but must be taught to each generation, and she worried about public confidence in institutions. Like most of the justices, O'Connor hardly used a computer and did not even write her own emails, but she established a nationwide civics education initiative based on online games in 2009. iCivics provides resources for every middle and high school student in the country

— almost ten million annually, in all 50 states — to learn about the structure of their government. And O'Connor intends to pass on to those students what she called the "guiding lights" of her own education: an understanding of "the rule of law, the separation of powers, the balance of individual liberty and democratic rule."

Perhaps "America has always been an angry nation," born of revolution and steeped in combat "on battlefields, in newspapers, at the ballot box." But O'Connor reminds us that dialogue and discourse are quintessentially American too. Among the words I heard most often from O'Connor was "constructive." She endeavored to bring ideas together and build from the exchange. At a time of intense political tribalism, when one media environment seems hermetically sealed off from the facts reported in another, it may read as wildly aspirational to suggest that encouraging discussion can somehow leaven negative partisanship. But as public life seems to contract and grow smaller and meaner by the day, O'Connor's unwavering belief in looking beyond oneself, in doing something to help others, and in finding shared baselines provides some guidance. Anger ebbs and flows. It has long lay beneath the surface of civic discourse, and O'Connor recognized that. But she also understood the way in which the democratic ideal of engagement could hold the nation together.

Evan Thomas says that he finds his way into writing biographies by iden-

tifying the flaw in his subject. After reviewing thousands of documents and speaking to hundreds of people, he reported that he failed to locate a fundamental flaw in O'Connor. She inspired those around her and held the public's regard by being exceedingly rare and wholly ordinary at the same time. Confident but humble, possessed of both piercing intellect and generous heart, prone to blunt rhetoric but guided by diplomatic instincts, a clear-eyed pragmatist but also an idealistic patriot, traditional to the core but the boldest of trailblazers.

O'Connor has preferred setting an example to making a point. She felt she could help just by being "visible" to those who would follow, and she believed in showing up and being accessible. *First* brings her example to the forefront of the national conversation once again. O'Connor offers the simplest of lessons in the most complicated of times — look only forward, have the courage to compromise, keep the conversation going. Although it strikes wistful notes, *First* also tells a profoundly hopeful story about the difference that one individual can make.



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