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INSTITUTE OF JUDICIAL ADMINISTRATION (IJA)
Oral History of Distinguished American Judges

HON. GUIDO CALABRESI
U.S. COURT OF APPEALS FOR THE SECOND CIRCUIT

An Interview
with

Catherine M. Sharkey, Crystal Eastman Professor
of Law
New York University School of Law

Kenji Yoshino, Chief Justice Earl Warren Professor
of Constitutional Law
New York University School of Law

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INSTITUTE OF JUDICIAL ADMINISTRATION (IJA)
Oral History of Distinguished American Judges**

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Part I

**Interviewer: Catherine M. Sharkey,
Crystal Eastman Professor of Law, New
York University School of Law**

00:00:16 MS. CATHERINE SHARKEY: Guido, thank
you for meeting with me today. As
you know, I'm Catherine Sharkey, a
law professor at New York University.
I'm here with Kenji Yoshino, my
colleague. Both of us, as your
former law clerks, are delighted to
conduct this oral history for the
Institute for Judicial
Administration. I'd like to start at
the beginning of your life.

00:00:37 You were born in Milan in 1932, and
in 1939, you immigrated to the United
States for political reasons. I know
from talking with you that this was a
formative experience, and I wonder if
you would share with us how this has
affected you both personally and
professionally.

HON. GUIDO CALABRESI: Well, I've

**NEW YORK UNIVERSITY SCHOOL OF LAW –
INSTITUTE OF JUDICIAL ADMINISTRATION (IJA)
Oral History of Distinguished American Judges**

often said that the most important
00:01:00 part of my legal education is the
fact that I'm an immigrant - a
refugee, and people ask what does
that mean? Well, it means that here
was somebody who was totally an
00:01:17 insider. We were very well-off in
Italy, and we belonged in every way.
And all of a sudden, we found
ourselves in America, without a penny
and not fitting in at all. Having to
be ourselves, we didn't fit into any
group, because we were different.
And that experience of figuring out
who you were and knowing what it was
like not to belong was something that
has
00:01:58 made my whole career. Because as a
teacher, as a judge, I've always
thought what is it like for other
people who are in that situation?
So, that's the most important thing.
My family were academics. But at a
time when there were no academics at
Yale - virtually - who were Italian,

**NEW YORK UNIVERSITY SCHOOL OF LAW –
INSTITUTE OF JUDICIAL ADMINISTRATION (IJA)
Oral History of Distinguished American Judges**

Catholic, Jewish, whatever, we didn't fit. We came to New Haven [,Connecticut], and the real estate agents - because my dad was given a fellowship at Yale, which was how we were able to escape, and it didn't begin until after we had been here for a term, and so we were in New York without any money for a little while, which was not a bad experience either - but when we came, the real estate agents brought us around and showed us where Italians lived or Catholics lived or Jews lived. And the people from the medical school swept in and said no, no, you can't live there. You must live between Whitney Avenue and Orange Street, between Edwards Street and the park, because you're ethnically Yale and that's where the assistant professors and fellows lived then as they live now. But in those days, they were all white Anglo-Saxon Protestants, so we didn't

**NEW YORK UNIVERSITY SCHOOL OF LAW –
INSTITUTE OF JUDICIAL ADMINISTRATION (IJA)
Oral History of Distinguished American Judges**

fit there either. And it was that,
that has remained with me as part of
just who I am. The other is,
00:03:33 and I've noticed that in any number
of people who are refugees and
immigrants, you try to rebuild. You
try to reestablish somehow. I never
thought of myself as doing it,
00:03:47 but looking back on my brother's life
and on my life and many other people,
I've tried to rebuild here an
experience so that people kind of
know, he's an insider now. I've
never wanted to be that, but somehow
now we have rebuilt what was lost
there.

MS. SHARKEY: And I know you went to
Yale College and Yale Law School.
Before then, you were at
00:04:15 Hopkins.¹ I saw recently in a
reunion speech, you mentioned that
your time at Hopkins was the most

¹ The Hopkins School is an independent, coeducational, college-preparatory day school for grades 7-12 located in New Haven, Connecticut. Founded in 1660, it is the third oldest independent school in the United States.

**NEW YORK UNIVERSITY SCHOOL OF LAW –
INSTITUTE OF JUDICIAL ADMINISTRATION (IJA)
Oral History of Distinguished American Judges**

intellectually rewarding time. And I wonder if you could share a little..

HON. CALABRESI: Yes.

MS. SHARKEY: Some specific memories.

HON. CALABRESI: The funny thing

about that school is- here was a

00:04:32

school that was founded in 1660.

Maybe the oldest continuous privately endowed school in the country.

Boston Latin is older but has had

interruptions and things of that

00:04:46

sort. And yet throughout, that

school was open to newcomers to this

city. So that the Pintos,² early

Portuguese Jews, went to Hopkins, and

because they went to Hopkins, got

into Yale in the early 18th century.

And this was so throughout. I go to

this place, again, an outsider. My

brother had competed for a

scholarship there and won it, thanks

00:05:16

to some people who had urged him to

do it, and I went. What happened

² The Pintos are an influential family from Portugal. The earliest mention of the Pintos in Connecticut was in 1736.

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INSTITUTE OF JUDICIAL ADMINISTRATION (IJA)
Oral History of Distinguished American Judges**

then, I couldn't get that scholarship, because only one person in the family could. And so, I had with a lot of other kids work scholarships. We swept the floors and served the table and so on. Today, you could never do something of that sort. But at that time, the

00:05:42 people who had work scholarships tended to be outsiders again or often children of academics who didn't have any money. As against others, tuition wasn't that great, but it was

00:05:56 still high. So you had a small group of people who were working together who were very, very bright and that is always the first part of an intellectually exciting situation of being with peers who are bright. The teachers varied; some were terrific, and some were not. But there was a teacher in math who in some ways was not that great but who led me to

00:06:31 discover, invent radians. What are radians? I don't remember anymore.

**NEW YORK UNIVERSITY SCHOOL OF LAW –
INSTITUTE OF JUDICIAL ADMINISTRATION (IJA)
Oral History of Distinguished American Judges**

It is some way of measuring angles or things, and I figured it out. And he said well you know, it's all very nice, but somebody did it 3 or 400 years ago. And I thought well that's pretty good if I did it. There was a history teacher who spent most of his time teaching in the public schools but had come toward the end of his days to teach there, who could make history so exciting and so absolutely wonderful that I fell in love with it. And those two, math and history, were the things that kind of went with me when I went to college.

00:07:01

MS. SHARKEY: And was it at Yale College where economics came into play?

00:07:18

HON. CALABRESI: Yeah, you see what happened at Yale College was that I found that I wasn't a mathematician; that I loved math, and I could do it faster than most everybody in my class, and I would get things right, because I've got a very logical mind.

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**NEW YORK UNIVERSITY SCHOOL OF LAW –
INSTITUTE OF JUDICIAL ADMINISTRATION (IJA)
Oral History of Distinguished American Judges**

But there were a few people in the class who knew where they were going. When they started, they might make more mistakes, be more slow, but they had a view of the whole picture. I didn't. And I realized that if you didn't see the whole picture, you are not a mathematician. So I said, "too bad; I like math, but that's not it". So I tried history, and I loved history. History still is my hobby, but my problem with history was that I didn't like primary sources. I was not a historian. I didn't like to get into the primary sources and get dirty there. A history professor there who taught intellectual history was one of the best teachers I had in Yale College, and I loved it, but it was not going to be what I could do. So I thought well history and math, what does that mean? Maybe economics, and so I started doing that, and I loved it. And economics became what I did in Yale College. I

**NEW YORK UNIVERSITY SCHOOL OF LAW –
INSTITUTE OF JUDICIAL ADMINISTRATION (IJA)
Oral History of Distinguished American Judges**

was very, very lucky. The Yale economics department had fallen on hard times and was being completely redone. During my time, they named four people, Wallich, Triffin, Tobin, and Fellner,³ to remake the whole department. And

00:09:27 because there were too few of them to teach graduate students and undergraduates, they invented a major, a bachelor of science in analytic economics, which would be
00:09:38 available only to somebody rather special, who could take graduate courses while an undergraduate. I may have been the only person to have ever had that major, but I did. And so I had Tobin as a tutor and Fellner, who was a great old

³ Henry Wallich was a German-American economist who served as Assistant to the Secretary of the Treasury under President Dwight D. Eisenhower and as a Federal Reserve governor. Robert Triffin was a Belgian-American economist best known for the Triffin Dilemma, a critique of the Bretton Woods System. James Tobin won the 1981 Nobel Prize in Economics for his analysis of how financial markets affect business and family decision-making. William Fellner was a Hungarian-American economist and a member of the President's Council of Economic Advisers under presidents Richard Nixon and Gerald Ford. Wallich, Triffin, Tobin, and Fellner were all members of Yale University's economics faculty during the mid-20th century.

**NEW YORK UNIVERSITY SCHOOL OF LAW –
INSTITUTE OF JUDICIAL ADMINISTRATION (IJA)
Oral History of Distinguished American Judges**

Viennese. He was a Hungarian
refugee, but grand Viennese school as
a teacher. And I had had in first
year

00:10:05 economics Warren Nutter,⁴ who became
the founder of the Virginia School⁵,
which is even more conservative than
the Chicago School.⁶ He was out of
Chicago and very much Chicago. So I
got started learning the traditional
Chicago and arguing with him about it
right from the start. And he was
very nice, because he saw that we
were arguing, but he took to me. And
so in that

00:10:33 context, I found economics is
something that would really be fun to
do and that I would be good.

⁴ G. Warren Nutter was a professor at the University of Virginia specializing in the Soviet Union and the economics of defense, and co-founder of the Virginia School of political economy. Nutter was the Assistant Secretary of Defense from 1969 to 1974.

⁵ The Virginia School of political economy refers to an economic school of thought arising in the 1950s and 1960s which compares the economic role of private vs. public institutions, generally favoring free markets.

⁶ The Chicago School refers to a neoclassical economic school of thought originating from the University of Chicago in the 1940s, which espoused the benefit of free markets over government intervention in allocating resources.

**NEW YORK UNIVERSITY SCHOOL OF LAW –
INSTITUTE OF JUDICIAL ADMINISTRATION (IJA)
Oral History of Distinguished American Judges**

MS. SHARKEY: Do you have any stories, particularly regarding Jim Tobin?

00:10:43 He too was my economics professor at Yale several decades later. Did he always wear the red sweater?

HON. CALABRESI: Yeah.

MS. SHARKEY: Because that was sort of his signature.

HON. CALABRESI: He always went to football games. And we often would sit near each other at football games, and he would look at me and say no economists cheer. He was a wonderful man. There are many stories about him actually later when we debated Coase⁷. But that's another story.

00:10:59

MS. SHARKEY: After Yale, I know you were a Rhodes Scholar, which took you over to Oxford University. And did

⁷ Ronald Coase an economist who spent most of his career teaching law and economics at the University of Chicago Law School. He won the Nobel Prize "for his discovery and clarification of the significance of transaction costs and property rights for the institutional structure and functioning of the economy."

**NEW YORK UNIVERSITY SCHOOL OF LAW –
INSTITUTE OF JUDICIAL ADMINISTRATION (IJA)
Oral History of Distinguished American Judges**

you study economics there as well?

00:11:19 HON. CALABRESI: Yeah. What happened

there was kind of funny, because I was unsure if I wanted to do law or economics, because I was uncertain between the two. And actually Ronnie

00:11:33 Dworkin⁸ and I, who had won the same

scholarship in the same place, were in the same situation. And we went to see the chief tutor in law, who was the head tutor at Magdalen.⁹ And he first said how old are you? And we said 20, and he said well then you shouldn't read law simply to save a year. Because if you read law, then two of those years, count

00:12:00 as one of your years in law school.

But he said but you might want to do it anyway. And he turned to me, and he said where are you going to go to law school, if you go to law school?

⁸ Ronald Dworkin was a legal philosopher known partly for grounding constitutional interpretation in morality. He taught at Yale Law School and finished his career at New York University School of Law.

⁹ Magdalen College is one of thirty eight colleges that comprise Oxford University in the United Kingdom.

**NEW YORK UNIVERSITY SCHOOL OF LAW –
INSTITUTE OF JUDICIAL ADMINISTRATION (IJA)
Oral History of Distinguished American Judges**

Notice he said law school, so it showed he knew something about the United States, rather than where are you going to read law. And I said, bright-eyed and bushy-tailed, "Yale, sir." And he said, "Oh, no. You don't want to read law with me." Fine. He asked Ronnie the same question, and equally bright-eyed and bushy-tailed Ronnie said, "Harvard, sir." And he said, "Oh, you'd get a great deal from reading law with me." He had visited at Harvard and bought into the nonsense of that time, which was wasn't true then, hadn't been true before, but that Yale was just sociology and stuff, and Harvard was really law. So I thought fine, I'll do economics. Ronnie followed his advice and read law and didn't really like it. He spent all his time with philosophers. I instead decided then I do PPE, and I'd do politics, philosophy, and economics. I wanted

**NEW YORK UNIVERSITY SCHOOL OF LAW –
INSTITUTE OF JUDICIAL ADMINISTRATION (IJA)
Oral History of Distinguished American Judges**

to do philosophy some, because Yale was not very strong in philosophy, and this was a great moment for Oxford philosophy, so that say two of my eight exams were in

00:13:40 that. Politics, because I had had Bob Dahl¹⁰ as a very young teacher in Yale, people had told me he's boring - he isn't boring at all - but he's wonderful if you can stay awake and

00:13:54 listen to him. He's just starting out. And that had gotten me excited. And so I did two in politics with Ken Tite,¹¹ who was a wonderful tutor.

And then the other four, I was going to do in economics. But I had already done enough so that I could have taken "the schools", exams, the next day. And I convinced my tutors that I was already ahead of the game. And so

00:14:20 they said just spend these two years

¹⁰ Robert Dahl was a political scientist, and professor at Yale University. Dahl is known for his book *Who Governs? Democracy and Power in an American City*.

¹¹ Kenneth Tite was a politics professor at Magdalen College at Oxford University in the United Kingdom.

**NEW YORK UNIVERSITY SCHOOL OF LAW –
INSTITUTE OF JUDICIAL ADMINISTRATION (IJA)
Oral History of Distinguished American Judges**

playing in economics with us, with a guy at the Institute of Statistics¹², who also won the Nobel Prize later; with John Hicks,¹³ who was a friend of my great uncle and so took me as a tutor. I mean he was my tutor there. And so I spent two years just doing what I wanted in economics without really worrying about the exams. In the last moment I did a few things on that. And that was wonderful, wonderful fun, because I was able to really play at what being what an economist would be.

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00:15:02

MS. SHARKEY: When you came back and went to Yale Law School, at what point did you realize you were doing law and economics, which of course didn't exist at the time?

HON. CALABRESI: Yeah. What happened

¹² Lawrence R. Klein
<https://www.nobelprize.org/prizes/economics/1980/klein/facts/>

¹³ Sir John Richard Hicks was the winner of the Nobel Memorial Prize for Economics in 1972 for his work on economic equilibrium theory and welfare theory. Sir John Hicks was also a lecturer at the London School of Economics, the University of Manchester and Oxford University.

**NEW YORK UNIVERSITY SCHOOL OF LAW –
INSTITUTE OF JUDICIAL ADMINISTRATION (IJA)
Oral History of Distinguished American Judges**

with this, the economics people at
Yale wanted me very much to stay in
economics. I could have stayed at
00:15:23 Oxford and gotten a fellowship. They
offered me one in economics
immediately, and that would have been
my career. But my problem was one, I
didn't want to stay in England,
because England was too much a class
structure. And if I had wanted a
class structure, I would have gone
back to Italy and be there. And the
other was that economics, the part of
00:15:51 economics that I loved was the most
theoretical. That's what I did, and
that was fun. And I knew I was good
at it. But that left me unsatisfied.
It didn't have enough to do with
00:16:04 people, and I was looking for
something, a field where I would be
as theoretical as I could, because
that's what I am, and yet inevitably
it had to be normative and deal with
humans. And so kind of *faute de*

**NEW YORK UNIVERSITY SCHOOL OF LAW –
INSTITUTE OF JUDICIAL ADMINISTRATION (IJA)
Oral History of Distinguished American Judges**

*mieux*¹⁴ I tried law. I came to law school. The economics people wanted me to stay in economics, so they asked me to teach economics. And so I taught two

00:16:34 sections of Econ 10, the whole course, while I was going to law school. And that must have shaped me, because here I was taking all the first term law courses, and at the same time teaching kids basic welfare economics, microeconomics in the first term. One of my courses was torts. And the torts course was using materials which were Shulman and James,¹⁵ and I

00:17:05 was being taught by Fleming James. The materials, I later realized, derived from materials put together by Walton Hamilton, who was an institutional economist on the Yale

00:17:20 faculty back in the 1920s and 30s.

¹⁴ French phrase expressing "for want of a better alternative."

¹⁵ Harry Shulman and Fleming James were professors at Yale Law School.

**NEW YORK UNIVERSITY SCHOOL OF LAW –
INSTITUTE OF JUDICIAL ADMINISTRATION (IJA)
Oral History of Distinguished American Judges**

He had put them together with Shulman, and then he went into antitrust and became an antitrust lawyer. How he became a lawyer is interesting. He had put them together with Shulman. Then Shulman and James kind of revised them, but the structure was still part of what Hamilton had done. So

00:17:44 in torts, with a teacher who was a magnificent teacher, but knew no economics at all, we were constantly being given situations which asked economic questions, which I was thinking of because I was teaching economics. And which Jimmy James said we don't really know why that is. And I said, I know perfectly well why that is. But at the same

00:18:13 time, I saw some things which economics didn't explain. And yet I started asking myself right then is it that what we are doing is crazy, or is it that the economic theory is

00:18:32 not sufficient. And so at the very

**NEW YORK UNIVERSITY SCHOOL OF LAW –
INSTITUTE OF JUDICIAL ADMINISTRATION (IJA)
Oral History of Distinguished American Judges**

beginning I was not an economic analyst of law, but a lawyer economist who was playing the two things against each other. Then I got on the [Yale] law journal, and at the beginning of my second year, we were supposed to write a comment, an article to compete for officership. And I decided I would explain tort law on the basis of economics. And all the things that were going on, on the basis of economics, and explain where economic theory was not doing enough. And that was my comment, which was a draft of the article that I later published on *Some Thoughts on Risk Distribution*¹⁶ when I came back on the faculty. I should have published it when I became an officer, but it was clear that the outgoing board didn't like it. They made me an officer because I was a kind of class leader, and they loved

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00:19:40

¹⁶ Guido Calabresi, *Some Thoughts on Risk Distributions and the Law of Torts*, 70 Yale Law Journal 499 (1961).

**NEW YORK UNIVERSITY SCHOOL OF LAW –
INSTITUTE OF JUDICIAL ADMINISTRATION (IJA)
Oral History of Distinguished American Judges**

me and so on. But I could tell that
00:19:56 this great board, Arthur Liman¹⁷ was
one of them, didn't like the article.
That was the greatest piece of luck
for me, because if it had been
published as a student piece, nobody
would have ever noticed it. So I
said to them do you mind if I don't
publish it? And they said no, not at
all. And when I came back two years
later after clerking, I published it,
00:20:23 and it came out contemporaneously, a
few weeks before, Coase's article¹⁸,
and it got me tenure, and it started
the whole thing. But I was already a
lawyer economist from the time I was
in school.
MS. SHARKEY: And interestingly,
obviously you're also steeped in
philosophy, which girded you for some
of the debates...

¹⁷ Arthur Liman was a distinguished trial attorney and known for his work representing the Senate Committee during the Iran-Contra Affair.

¹⁸ R.H. Coase, *The Problem of Social Cost*, THE JOURNAL OF LAW AND ECONOMICS, Vol. III (Oct., 1960).

**NEW YORK UNIVERSITY SCHOOL OF LAW –
INSTITUTE OF JUDICIAL ADMINISTRATION (IJA)
Oral History of Distinguished American Judges**

00:20:44

HON. CALABRESI: Yes.

MS. SHARKEY: With the philosophers.

One thing I have read, I think it was in some notes you were writing back and forth with Ronnie

00:20:51

Dworkin, was you described

philosophers as being interested in the end point, and economists most focused on road posts.

HON. CALABRESI: Yes.

MS. SHARKEY: And I wonder if you can elaborate.

HON. CALABRESI: Well there is something of that, but I think it also was something else. It's odd

00:21:09

how often, and this is kind of peculiar, many, many philosophers are not religious. And their philosophy in some way serves them to do what religion might do for others. They have to find an answer to something. I happen to be religious, and I'm going to leave the ultimate answers to the Almighty. That's why I'm so comfortable in a way with means, and

**NEW YORK UNIVERSITY SCHOOL OF LAW –
INSTITUTE OF JUDICIAL ADMINISTRATION (IJA)
Oral History of Distinguished American Judges**

00:21:52 maybe that's why I think that that's
 what economists do. Looking back on
 it, it may have been more the
 difference between Ronnie and me than
 the fields in general.

00:22:04 MS. SHARKEY: I know you have
 thoughts on the field of law and
 economics. In your most recent book¹⁹
 about the future of law and
 economics, you've been critical of
 the impulse that economists have to
 make everything very highly
 theorized.

HON. CALABRESI: Yeah.

MS. SHARKEY: And divorced from
00:22:22 reality. So I wonder--

HON. CALABRESI: [Interposing] Well
 because again, in a way that's also
 autobiographical. That's why I moved
 away from economics. But there is,
 what I am critical of is not so much
 that impulse, if it really led
 economists to be like mathematicians,

¹⁹ Guido Calabresi, *The Future of Law and Economics, Essays in Reform & Recollection*, Yale University Press (2016).

**NEW YORK UNIVERSITY SCHOOL OF LAW –
INSTITUTE OF JUDICIAL ADMINISTRATION (IJA)
Oral History of Distinguished American Judges**

to play just with theory and not then
say something about the world.

00:22:50

What I don't like is, when
economists, because they have made
something which is theoretically
interesting, and it doesn't fit the
world, say the world is wrong or
irrational, and the

00:23:05

world must be changed. And from that
you get terrible policies, because
often it is not that the world is
irrational. It's that the theory is
incomplete, and it may be incomplete
for reasons that can be fixed, in the
same way that Coase fixed the theory
and made it much more relevant, in
many ways, I hope I have done the

00:23:33

same. There may be ways in which that
particular field's theory cannot be
fixed and still be true to itself.
But that means that they cannot speak
in policy terms and tell people what
they should do as if what the theory
said required it. And it's that that
bothers me. It bothers me when

**NEW YORK UNIVERSITY SCHOOL OF LAW –
INSTITUTE OF JUDICIAL ADMINISTRATION (IJA)
Oral History of Distinguished American Judges**

people, led by their theory, say that what common experience shows people do, must be wrong. Sometimes it is wrong. But the

00:24:04 notion that the theory is necessarily right is plain wrong. And that turns out to be something not just with economics, but with almost every other field. One of the fascinating things to me was to see

00:24:17 Frank Michelman's²⁰ retirement, in which philosophers were saying to him we don't understand how so able and so on a person as you are, when philosophical theory would lead to a result which you think is wrong in practice in constitutional law, you don't accept the theory. And I was seeing him do with philosophy exactly the sort of thing I'm saying about

00:24:44 economics. It isn't just economic theory that tends to lead

²⁰ Frank Michelman is the Robert Walmsley University Professor at Harvard University with scholarship in constitutional law and theory, comparative constitutionalism, and South African constitutionalism. He taught at Harvard Law School from 1963 until his retirement in 2012.

**NEW YORK UNIVERSITY SCHOOL OF LAW –
INSTITUTE OF JUDICIAL ADMINISTRATION (IJA)
Oral History of Distinguished American Judges**

theoreticians to want the world to follow them even though the theory may not be complete. I saw this dramatically when I was at Frank Michelman's retirement party, where philosophers were saying to him why don't you just follow philosophy when philosophy doesn't explain the world and say the world is wrong. What he was doing was exactly what I do in economics. He was law and philosophy, not philosophical analysis of law.

00:25:15

00:25:29 MS. SHARKEY: So let's explore your time as a law clerk. We know you clerked for Justice Hugo Black,²¹ and I'd love to hear some reminiscence from that time. But also today as a judge with myriad law clerks and all the experience of working with them, how does that make you reflect back on that experience?

²¹ Appointed by President Franklin D. Roosevelt, Hugo L. Black was an associate justice of the Supreme Court of the United States from 1937 to 1971.

**NEW YORK UNIVERSITY SCHOOL OF LAW –
INSTITUTE OF JUDICIAL ADMINISTRATION (IJA)
Oral History of Distinguished American Judges**

HON. CALABRESI: Justice Black was
00:25:52 one of the most sophisticated and
brilliant people I have ever known.
Now many people tend to think of him
as using simplistic language and so
on – none of that. If you got to
know him, you'd know what an
extraordinary mind and how subtle he
really was. He had, for instance,
the best understanding of what
fascism was and what it was not, of
anyone I ever met
00:26:27 in America. Only my parents could
have talked about it in the same way.
And he also was a person who almost
naturally looked at things in a
different way from other people. A
00:26:49 truly original mind is somebody who
sees a situation that everybody else
sees and looks at it differently.
And so again and again, when I
clerked, opinions would get written
ultimately whether they'd come out
his way or not, but from his
viewpoint, because he saw a way of

**NEW YORK UNIVERSITY SCHOOL OF LAW –
INSTITUTE OF JUDICIAL ADMINISTRATION (IJA)
Oral History of Distinguished American Judges**

00:27:17 looking at it which was new and original and different from other people. And that is one of the things that influenced me most, of trying to figure out how I can make myself look at things from a different point of view. Move the furniture so that you don't look at it in the canonical way, a terribly mixed metaphor. But try to do things in a way that is different. He also was a person for whom his clerks were

00:27:51 his family. I've often said that it was not surprising that when he died, and his funeral was in the National Cathedral, there was his family, his law clerks, and then the President of

00:28:07 the United States. And that, in terms of relationship with clerks, was what told me what you do as a judge with your clerks. My clerks as you well know are my family after my family. And it is that, that teaching, learning, as you can do only from your kids, and with your

**NEW YORK UNIVERSITY SCHOOL OF LAW –
INSTITUTE OF JUDICIAL ADMINISTRATION (IJA)
Oral History of Distinguished American Judges**

00:28:39 kids, was influenced by Black. There are any number of stories about Black and how he reacted to any number of things, to *Korematsu*,²² to the business of his having been in the Klan. There isn't time today to talk about them, but if I live long enough, one of the books I want to write is Hugo Black tales and just talk about some of the things that he said that influenced me and about what courts are like, why they're independent, what the

00:29:19 dangers to judicial independence are, the problems with liberals. I'll just tell that one. He once wrote an opinion which is extremely strong in a very difficult case. And I said to

00:29:36 him, "Judge, how can you be so sure?" And he said, "I'm not sure. I could change my mind tomorrow." And I said, "But look at how you've written

²² In *Korematsu v. United States* 323 U.S. 214 (1944). 65 S. Ct. 193, the Supreme Court upheld Fred Korematsu's criminal conviction for failing to report to an internment camp for American citizens and residents of Japanese descent.

**NEW YORK UNIVERSITY SCHOOL OF LAW –
INSTITUTE OF JUDICIAL ADMINISTRATION (IJA)
Oral History of Distinguished American Judges**

this. It's so strong." And he repeated, "I could change my mind tomorrow." And I said, "But then why did you write so strongly?" And he said, "Well, I don't think the people that would never change their minds should be

00:29:59

the only ones to write strongly."

And often liberals, because they see various sides of something, are unwilling to speak forcefully. And Black was saying no, speak forcefully and then be willing to change your mind.

MS. SHARKEY: So you mentioned your law clerks as a kind of extended

00:30:18

family. Certainly I know I

personally, and many of us feel that way. Your annual clerk reunions are a testament to that, to our affection towards you. But I want to

00:30:29

talk a little bit about your family.

I know your family is very important to you. And, in particular, your spouse Anne you've known a long time,

**NEW YORK UNIVERSITY SCHOOL OF LAW –
INSTITUTE OF JUDICIAL ADMINISTRATION (IJA)
Oral History of Distinguished American Judges**

and I wonder if you could talk a bit about the beginnings of your relationship and how it's flourished over the years.

00:30:51 HON. CALABRESI: Well Anne and I have been married 56 years. We met in my elementary school days. I was given a scholarship to the Foote School, which is a little private school, a magnificent school, made magnificent because of the bigotry of the time. Yale had no women teachers. And so the wives of the great professors who were brilliant, learned, and wanted to do something, tended to teach in places like this little school. So there were teachers who today would be the most distinguished professors, and back then they were teaching little kids. Well I was offered a scholarship there, for affirmative
00:31:22 action reasons. But not the
00:31:35 affirmative action reasons you might think of, all of which might well

**NEW YORK UNIVERSITY SCHOOL OF LAW –
INSTITUTE OF JUDICIAL ADMINISTRATION (IJA)
Oral History of Distinguished American Judges**

have applied to me, but because I was a boy. In seventh grade, enough little boys went off to boarding school, to prep schools, so that they found themselves short, and they went to the public school nearby, which was the Yale area public school, and

00:32:00 found me and offered me a scholarship. So I went to this school, and I saw two years behind me a little girl who had the biggest, fattest red brown braids that I had ever seen. You don't usually notice kids who are in younger classes, but I noticed those and thought gee, that is wonderful. And that was Anne. That's how we met. She talks about

00:32:34 this little Italian kid, because I was still totally Italian, still dressed as an Italian, not as an American elementary school kid. And we got to know each other. Not much,

00:32:52 but in school. Over the years, in high school and in college, we were part of the same group of people who

**NEW YORK UNIVERSITY SCHOOL OF LAW –
INSTITUTE OF JUDICIAL ADMINISTRATION (IJA)
Oral History of Distinguished American Judges**

would be together at parties. The world was such in those days that parents of young women would give dances at vacation time in their houses, and they would invite boys whom they thought were proper. About half the parents of these daughters who had

00:33:32

gone to the same school would invite me and about half would not. Some would think me proper; some would not. Anne's parents were among those who did. So we were all part of the same group. She was then considerably taller than I. She has shrunk with age. And she would

00:33:58

always try to arrange for me to meet, fix me up with friends who were short and bouncy. They were perfectly nice but that never got anywhere. So we remained friends but never really got to know each other until I came back to teach at the law school after

00:34:13

my clerkship. And then by an odd coincidence, a friend who had been my

**NEW YORK UNIVERSITY SCHOOL OF LAW –
INSTITUTE OF JUDICIAL ADMINISTRATION (IJA)
Oral History of Distinguished American Judges**

note editor had come back to New Haven to practice law. He had asked for the names, he was not from New Haven, of young guys and gals here, because he didn't know anybody, and I had given him a series of names, among them Anne, who by then had finished Radcliffe and was working in New York but coming back often to New Haven because her grandfather was ill, and so she wanted to be there. I came back to New Haven and decided to room with this guy, and he had taken Anne out once. She had found him incredibly boring. He was a nice man, but utterly monosyllabic. And he invited her out again, and she was too nice to say no. She said I'll give him another chance. And in the meantime, I had moved in with him, and he said I'm going out with her. We're going out to dinner; can you get a date and join us? So I did. And, at the last minute, I invited somebody who was almost as

**NEW YORK UNIVERSITY SCHOOL OF LAW –
INSTITUTE OF JUDICIAL ADMINISTRATION (IJA)
Oral History of Distinguished American Judges**

monosyllabic as he was. And so there we were at dinner. We knew each other well, but these guys were grunting, and so we started talking. And we talked, talked, and talked, and that was it. And from then on, we started going out together, and not much more than a year later, we

00:35:45 were engaged and married almost a year after that. We were very old at the time. That is, when I was married, I was 28, almost 29, and she was 26, almost 27. Today, that would be thought of as being much too young. Then we were old enough so that the president of Smith²³ who had been master one of the colleges here, and a very good friend of Anne's

00:36:17 family and the guy who had been the secretary of the Rhodes committee that had picked me, so he knew me, asked her to come and speak to the senior class at Smith and tell them

²³ Founded in 1971, Smith College is an all-women's college located in Northampton, Massachusetts.

**NEW YORK UNIVERSITY SCHOOL OF LAW –
INSTITUTE OF JUDICIAL ADMINISTRATION (IJA)
Oral History of Distinguished American Judges**

00:36:29 that it was all right if they were
not engaged by their senior year,
that they might still find somebody
good. And she said oh, you're crazy.
She was then as she has been ever
since a person who has always thought
for herself and is an amazing,
amazing human being.

MS. SHARKEY: Well, wonderful. Thank
you very much. This has been

00:36:52 delightful to have this opportunity
to sit down and talk with you about
your early years and formative
schooling years, thank you Guido.

HON. CALABRESI: Thank you, Cathy.

Part II

**Interviewer: Kenji Yoshino, Professor
of Law, New York University School of
Law**

MR. KENJI YOSHINO: So Guido, I'm so
delighted to be here on behalf of the
IJA Oral History Project to discuss
your life's influence and time on the
bench. I want to begin by talking
00:37:20 about your family and its long and

**NEW YORK UNIVERSITY SCHOOL OF LAW –
INSTITUTE OF JUDICIAL ADMINISTRATION (IJA)
Oral History of Distinguished American Judges**

00:37:34 storied record in the humanities. At a time when we hear in journal after journal and in institution after institution, that the humanities are in crisis, what role do you think the humanities have to play in the law?

HON. CALABRESI: Humanities are crucial to law because one way of seeing whether law makes sense is to see how the same situation has been treated all over time in the great canons of the humanities. When Dante says that, in Paolo and Francesca,²⁴ that they were reading a French novel and fell in love, the question of how does reading literature, television affect behavior is being treated in a particular way? Dante may be right; he may be wrong. But it is an insight on questions which we talk about today by somebody who is looking at it from another point of

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²⁴ Referring to the story of Francesca de Rimini and Paolo Malatesta's adulterous affair as depicted in Dante's *Divine Comedy*.

**NEW YORK UNIVERSITY SCHOOL OF LAW –
INSTITUTE OF JUDICIAL ADMINISTRATION (IJA)
Oral History of Distinguished American Judges**

view. And of course Shakespeare, but every one of the great writers tells you

00:38:45 something about a legal relationship in a somewhat different way. And that insight is as important as any insight from economic theory or philosophy. And people have to

00:39:00 understand that we can see what makes sense and doesn't make sense in the law from that point of view. And that's apart from the whole question of interpretation. When you know that Stravinsky,²⁵ *Rite of Spring* was totally different when he conducted it once and when he did it 20 years later, when you find that a

00:39:34 play about South Africa with the same players, the same actors, and the same writer is different 20 years later, because South Africa is different, you are saying something

²⁵ Russian composer Igor Stravinsky's *The Rite of Spring* debuted at the Théâtre des Champs Élysées in Paris in 1913 to mixed reviews and provoked an upheaval in the audience.

**NEW YORK UNIVERSITY SCHOOL OF LAW –
INSTITUTE OF JUDICIAL ADMINISTRATION (IJA)
Oral History of Distinguished American Judges**

about interpretation, which you cannot avoid, you cannot ignore when you're talking about legal interpretation. It just strikes me as bizarre that anyone would think that something

00:40:05 that is as much a part of us as all of humanities are, shouldn't tell us as much or more than anything else about what we're doing in law.

MR. YOSHINO: You, just as much as
00:40:20 anybody I know in the judiciary, have thought deeply about questions of interpretation. Are there modalities of interpretation that you would say that you would favor? We're often told that people are originalists or prudentialists or consequentialists or textualists. And in particular, could I get your view on originalism, which I think is much in vogue, not
00:40:44 only among conservatives, but even more recently among liberals.

HON. CALABRESI: A couple of different things. First, I think it

**NEW YORK UNIVERSITY SCHOOL OF LAW –
INSTITUTE OF JUDICIAL ADMINISTRATION (IJA)
Oral History of Distinguished American Judges**

is important to make a distinction between interpretation and construction. Interpretation as I view it is always a way, always retrospective, always a way of trying to find out what the people who made that law, whether it's the constitution or a statute, intended. Construction is a role that courts have of saying what something means today really not regardless of, but sometimes even despite what the people originally meant. And you see this dramatically in *Hively*,²⁶ the decision of the Seventh Circuit, in which the majority acts as if it is interpreting, as if the people, when they wrote Title VII, meant it to apply to same sex discrimination. They didn't back then. Posner quite rightly says that isn't what matters. What matters is what this statute must mean today, given all the things

²⁶ [Hively v. Ivy Tech Cmty. College of Ind.](#), 853 F.3d 339 (2017).

**NEW YORK UNIVERSITY SCHOOL OF LAW –
INSTITUTE OF JUDICIAL ADMINISTRATION (IJA)
Oral History of Distinguished American Judges**

that have changed. That's construction. And that's part of a role, a more limited role in some ways, but a role that courts have. It's when we construe to avoid a constitutional issue. It's when we construe to make a statute be updated, and there's nothing new about

00:42:29 that. Landis²⁷ pointed out that that is exactly what happened with children born out of wedlock and the wrongful death statutes in the 19th century, that they were construed to

00:42:43 cover these people after they had years before been interpreted to mean something else. Because the underlying conditions had changed courts construed the statutes differently. So that's something that is important and is what I talk about in Common Law for the Age of

²⁷ James M. Landis, Dean of Harvard Law School (1937-46), also served as Chair of the Security and Exchange Commission as well as Special Counsel to President John F. Kennedy.

**NEW YORK UNIVERSITY SCHOOL OF LAW –
INSTITUTE OF JUDICIAL ADMINISTRATION (IJA)
Oral History of Distinguished American Judges**

Statutes,²⁸ and it remains a
fundamental difference that one
should know because one then can ask
when is it appropriate to construe.
And it is certainly appropriate
00:43:05 to construe in *Hively*, given what
changed and what not. The question
of originalism is a different one.
Originalism, whether originalism is
originalism in terms of original
language, or originalism in terms of
what we think the framers were
thinking of, that doesn't interest me
so much. But are we bound, stuck
with what it was that they said and
00:43:38 then require that any changes not be
made by courts to update, but by
constitutional amendment. That's a
profoundly conservative attitude.
Profoundly conservative not in a
00:43:57 right-left sense, but just because it
says that what was done in the past
binds us. When you say about

²⁸ Guido Calabresi, *A Common Law for the Age of Statutes* (Harvard University Press 1985).

**NEW YORK UNIVERSITY SCHOOL OF LAW –
INSTITUTE OF JUDICIAL ADMINISTRATION (IJA)
Oral History of Distinguished American Judges**

liberals today looking to originalism, the reason is quite obvious. It is the same reason why in Italy in the 1920s, unlike Germany, all the great scholars were formalists. Because formalism was a form of conservatism that said you cannot change the law,

00:44:35 the law must remain, the great 19th century codes. What that did was preserve in the law the values of the 19th century, which may have been economically libertarian, but they were also libertarian as to civil rights in the face of fascism. So that formalism was a defense against the updating by the fascists. What happened was that the great scholars

00:45:11 in Italy were all formalists. When the war ended, two of them said now we can be functionalists. Now we can do what is better, have the law respond to the immediate wishes of

00:45:28 people. And another great anti-fascist scholar said what about the

**NEW YORK UNIVERSITY SCHOOL OF LAW –
INSTITUTE OF JUDICIAL ADMINISTRATION (IJA)
Oral History of Distinguished American Judges**

next dictatorship? He was more pessimistic and said we should preserve the past, be bound by it, because the future, following what people want, can be so awful. I'm not an originalist. I never can be. I'm too optimistic. I think in the end, we must do what people think is right. On the other hand, to create inertia so that momentary lapses into totalitarianism, into fascism, into bigotry, can be stopped, is one of the reasons for our constitutional structure. And I would love it if people like Justice Thomas²⁹ today would say there are some things that cannot be done, which are right wing wrongs, because of originalism.

00:46:01

00:46:37 MR. YOSHINO: So what do you do when you're in the position of these competing goods of faithfulness to the rule of law and your own moral

²⁹ Clarence Thomas is an Associate Justice on the Supreme Court of the United States, appointed in 1991 by President George H.W. Bush.

**NEW YORK UNIVERSITY SCHOOL OF LAW –
INSTITUTE OF JUDICIAL ADMINISTRATION (IJA)
Oral History of Distinguished American Judges**

00:46:48 conscience? Because you, as much as any jurist I know, again really care about these values so deeply. So what happens? For example, let's take the death penalty, when something that I know you are morally opposed to, is nonetheless law of the land.

00:47:10 HON. CALABRESI: Well that's the biggest question for any judge. Now first I want to make a distinction between a judge in a place like Nazi Germany or fascist Italy, where you reject the system, and then it is your job to do everything to undercut it. You're a revolutionary in a black robe, but you are a revolutionary. And that's what you must do, as against a judge who on the whole accepts the system, like me. There are many things that are 00:47:41 wrong in the American legal system, but by and large I accept it. I think it is as good as one is likely to have, so I cannot simply undercut

**NEW YORK UNIVERSITY SCHOOL OF LAW –
INSTITUTE OF JUDICIAL ADMINISTRATION (IJA)
Oral History of Distinguished American Judges**

00:47:57 it. In that situation, there's a big
problem. For you to nullify as a
judge is both being untrue to your
oath, but also saying that other
judges can nullify when they don't
like it. And frankly, much as I
respect my colleagues, I'd rather
that they were bound by the law than
by what their values are because
sometimes I think their values are
mighty peculiar. And if I don't do
00:48:22 it, then they won't. So I don't
believe in nullification. I also
don't believe in what happens to some
judges who because they don't like
something morally decide it isn't
them at all, it's the law. Remember
Bob Cover³⁰ writing about the judges
who were abolitionists but were
fierce enforcers of the fugitive
slave laws because they couldn't
stand the idea

³⁰ In *Justice Accused*, Robert Cover explores the reasoning of judges who enforce laws they believe are unjust. Robert M. Cover, *Justice Accused: Antislavery and the Judicial Process* (Yale University Press 1984).

**NEW YORK UNIVERSITY SCHOOL OF LAW –
INSTITUTE OF JUDICIAL ADMINISTRATION (IJA)
Oral History of Distinguished American Judges**

00:48:56 that they might have been able to do something but had failed to find the way, in such a situation. That won't do. That won't do. That's the worst of all. Nor am I willing to recuse myself to pull myself out,

00:49:10 because that leaves only the judges who aren't troubled by that to be making judgements. That's like death qualified judges. It would be wrong. So what do you do? You wake up in the middle of the night, and that can mean much before just the night before. So if it is really a difficult case, months ahead because you see it coming, as you see it coming. And see if really you

00:49:40 have to follow what people think is the law or whether they are wrong. Whether in fact if you use all the brains the good Lord gave you, you can find a way that is consistent with the law to come out the right way. And more often than you would think, because the law is pretty

**NEW YORK UNIVERSITY SCHOOL OF LAW –
INSTITUTE OF JUDICIAL ADMINISTRATION (IJA)
Oral History of Distinguished American Judges**

good, what people think is the law in
a particular case is not, when you
00:50:12 look at it with that fierce attempt
to see why it seems wrong. Buzz
Arnold,³¹ a conservative, and I were
judging a moot court once, and
somebody said does it do any good to
00:50:29 plead the equities? And we both
blurted out of course, it makes us
work harder. If a case seems wrong,
you really look to see if it is
wrong. And if you come up with
something the next day, and your
court is not an ideological court,
you'll say we can do this, and the
other judges are apt to say oh good,
Guido. Good, that case was really
bothering
00:50:56 me. Didn't bother them as much as
you, or they would have been up in
the middle of the night. And there
will be cases that bother them but
didn't bother me, and they will come

³¹ Morris "Buzz" Arnold is a judge on the Court of Appeals for the Eighth Circuit.

**NEW YORK UNIVERSITY SCHOOL OF LAW –
INSTITUTE OF JUDICIAL ADMINISTRATION (IJA)
Oral History of Distinguished American Judges**

up with something and say oh, good.
And that moves the law forward. And
when that happens, you sleep very
well the next night. Sometimes you
can't find a way. And then you may
00:51:24 write a concurring opinion saying why
the law is wrong and write for
history. But you know when you've
done that, that you failed, that you
have not found a way. And so though
00:51:37 it's very tempting to write that
opinion, which speaks to history in
saying how wonderful things are, or
would be if people followed me, you
know that then you have failed. And
there's a temptation to do that,
because it is tempting to say, I'm a
martyr, and I have to do it. It's a
little bit like T.S. Eliot's³²
temptation to martyrdom, only worse
00:52:03 because you think you're a martyr,
but it's the other person, the person
you have not been able to help, who

³² T.S. Eliot is considered one of the major poets of the Twentieth Century.

**NEW YORK UNIVERSITY SCHOOL OF LAW –
INSTITUTE OF JUDICIAL ADMINISTRATION (IJA)
Oral History of Distinguished American Judges**

really gets it in the neck. So it's a very easy martyrdom. So you should avoid that if you possibly can. But sometimes it is the thing to do if there's nothing else.

MR. YOSHINO: That's so fascinating, because Benjamin Cardozo ³³once said

00:52:24 that dissenting opinions are much more literary than majority opinions, because there's an inverse relationship between force and fancy, or coercion and imagination. But

00:52:35 what you're suggesting is that we should eschew the false martyrdom of imagination in an instance where you could actually exert power for the good. Is that correct?

HON. CALABRESI: That is right. That doesn't mean that there aren't, that there isn't a place for them. But that is kind of, you must be sure that that is the last straw. You

³³ Benjamin Cardozo, an influential jurist who served as Chief Judge of the New York Court of Appeals, as well an Associate Justice of the Supreme Court of the United States.

**NEW YORK UNIVERSITY SCHOOL OF LAW –
INSTITUTE OF JUDICIAL ADMINISTRATION (IJA)
Oral History of Distinguished American Judges**

00:52:56 know, you must be sure that you have done as much as you can. Some of my favorite opinions are ones in which I wrote concurring or dissenting, because having done all I could, that was all I could do. And then I could be more literary. And that's why I love them, because I could be freer. But precisely for that reason, they're a temptation.

00:53:27 MR. YOSHINO: One of the things I noted when I was clerking for you was what a literary person you are. I really think that you have the soul of the poet in many ways. And so can

00:53:36 you help me with that? Because oftentimes a field that you're known for founding, law and economics, is counter-posed against law and literature. So what is the relationship between the two in your mind?

HON. CALABRESI: Well, it is amazing how bad writers economists mostly are. When you find one who knows how

**NEW YORK UNIVERSITY SCHOOL OF LAW –
INSTITUTE OF JUDICIAL ADMINISTRATION (IJA)
Oral History of Distinguished American Judges**

00:53:55 to put a sentence together, (it's usually, someone who is English) and you start to cheer. So that's the first relationship. Wouldn't it be nice if you could get people to do economic analysis and do it in a way that used words in an elegant fashion? But a deeper relationship is these are all ways of looking at the world and trying to explain it. There is no

00:54:27 single way of understanding the complexity of our relationships, understanding whether we are doing it right or not. If we simply accept the relationship as it is, we become

00:54:44 originalists in that sense. And nothing can change unless there is a revolution, and you kick everything out and start from scratch, but that's not good. We have to have a place to stand on, to look at the world and criticize it. Economics is one leverage point. And it will tell you some things because of its

**NEW YORK UNIVERSITY SCHOOL OF LAW –
INSTITUTE OF JUDICIAL ADMINISTRATION (IJA)
Oral History of Distinguished American Judges**

structure and its theoretical power
that other

00:55:13 things will not tell you. Literature
is another place to stand on. What a
fantastic place to stand on to
understand what the world is and when
it is right and wrong. When they
both agree about something being
wrong or right, you have a tremendous
power. When they disagree, ask
yourself what it is about each
discipline that might cause it to
miss something important?

00:55:44 MR. YOSHINO: That's wonderful, thank
you. So you've had an unwavering
record of supporting LGBT rights.
And in fact, just after I was

00:55:56 clerking, I had a conversation with
you, in which you expressed regret
about having to recuse yourself from
one of the gays in the military
cases, the don't ask, don't tell
policy that banned individuals who...

HON. CALABRESI: I remember very
well.

**NEW YORK UNIVERSITY SCHOOL OF LAW –
INSTITUTE OF JUDICIAL ADMINISTRATION (IJA)
Oral History of Distinguished American Judges**

MR. YOSHINO: Right, who self-identified as gay from serving in the military, so long as they didn't rebut the presumption that they engaged in homosexual conduct. And we've talked about how you do not believe in recusal as a general matter, but in this case a recusal motion that came from the government was quite specific. You had made pro-gay comments, again to your credit as an academic, and felt like you should recuse yourself. Could you speak a little bit about that experience, because I believe you had a very ingenious way of thinking about this case, had you been able to write in it.

HON. CALABRESI: I thought at the time that it really wouldn't matter. The panel was a very strong panel. It was John Walker³⁴ and Will

³⁴ John M. Walker Jr. is a senior judge on the Court of Appeals for the Second Circuit.

**NEW YORK UNIVERSITY SCHOOL OF LAW –
INSTITUTE OF JUDICIAL ADMINISTRATION (IJA)
Oral History of Distinguished American Judges**

Feinberg.³⁵ In my place, we took Pierre Leval,³⁶ and it was a strong panel. And I thought probably my being there would not have made any difference. If I had dissented in that case, precisely because the government had made a motion to recuse myself, my dissent wouldn't be paid much attention to. What I later realized was that probably I did make a mistake, because I didn't need technically, necessarily to recuse myself. And it's interesting that most of the people who tended to agree with me on gay rights said I was right to recuse myself. Most of the ones who tended to disagree with me said no, you should've stayed in and written your point of view. So it's interesting about our court. But what I might have done had I been on that court would have been to say

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³⁵ Wilfred Feinberg was a judge on the Court of Appeals for the Second Circuit.

³⁶ Pierre N. Leval is a judge on the Court of Appeals for the Second Circuit.

**NEW YORK UNIVERSITY SCHOOL OF LAW –
INSTITUTE OF JUDICIAL ADMINISTRATION (IJA)
Oral History of Distinguished American Judges**

for the first time that sexual orientation was a category of people discriminated against. It was a suspect classification. I might then have gotten the panel to go along with that, even if they were going to decide against the individual soldiers, because the military situation made it okay to discriminate even against suspect classification. Now that would have been a fascinating thing, because the soldiers would not have appealed because they would have been so happy to have a court for the first time say sexual orientation is a suspect classification. The government, which would have been very unhappy, couldn't appeal, because they had won. The result would have been that this would stand long before anybody else said that, as a statement about the law, which would have been correct.

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So I think probably if I had known

**NEW YORK UNIVERSITY SCHOOL OF LAW –
INSTITUTE OF JUDICIAL ADMINISTRATION (IJA)
Oral History of Distinguished American Judges**

enough and thought enough, I wouldn't have recused myself, and I think it would have been a very interesting result.

00:59:42 MR. YOSHINO: Well fast forward about a decade, and it's 2009. And I'm going to use a point of personal privilege here, because you marry your clerks, and my husband and I were fortunate enough to be married by you. Before we got married, you sat us down and said the year is 2009, marriage is fully legal under state law in Connecticut. But the Defense of Marriage Act [DOMA], which defined marriage as between one man and one woman for federal purposes, had not been struck down yet. It was struck down in 2013³⁷, I believe. But
01:00:05 you said to me and my husband, I have thought about this, I have prayed about this, I've talked to Anne about

³⁷ [In United States v. Windsor, 133 S. Ct. 2675](#), 186 L. Ed. 2d 808, 2013 U.S. LEXIS 4921, the Supreme Court held the purpose and effect of DOMA was a violation of the Fifth Amendment's grant of equal protection.

**NEW YORK UNIVERSITY SCHOOL OF LAW –
INSTITUTE OF JUDICIAL ADMINISTRATION (IJA)
Oral History of Distinguished American Judges**

01:00:13 this, and I can't treat you any differently from the rest of my clerks. And when I marry heterosexual couples, I always say by the power vested in me by the state of Connecticut and the United States of America, I now pronounce you married. And I'll never forget this moment, because you said technically under DOMA, I should leave out the last bit, about by the power vested in me by the United States. But you

01:00:34 said I'm not going to leave it out because that would be differential treatment. So could you speak a little bit about that?

HON. CALABRESI: Well frankly, I thought then that DOMA was unconstitutional, and I was right. And I was saying that as a Court of Appeals judge, when I said that my power, and by the way, my power under

01:01:00 the state would have been enough to marry you, because I do have power under the state. So technically that

**NEW YORK UNIVERSITY SCHOOL OF LAW –
INSTITUTE OF JUDICIAL ADMINISTRATION (IJA)
Oral History of Distinguished American Judges**

01:01:10 was all I needed to say you would have been just as married if I didn't say the last part. But I wanted to assert that I as a judge had thought about it, and I had thought that that law was unconstitutional, and I should take every possible occasion to say so. And that's what I was doing. Because I was marrying you by the power vested in me, also by the United States of America.

01:01:41 MR. YOSHINO: So the human being in me was so moved by that. And I have actually written about this experience. But the lawyer in me and the former clerk in me was very anxious on your behalf on this one.

01:02:01 So I was very heartened when you also said and by the way, whenever I brush my teeth, it's by the power vested in me by the United States of America because I am after all a federal judge. So I want to make sure that you have the plausible deniability and running room there that you need.

**NEW YORK UNIVERSITY SCHOOL OF LAW –
INSTITUTE OF JUDICIAL ADMINISTRATION (IJA)
Oral History of Distinguished American Judges**

01:02:13 Could I ask which choice of yours do
you think has been most impactful on
your life?

HON. CALABRESI: What choice has
mattered most? Well of course my
marriage, because I believe there are
two things that make for a happy
life. One is to find something to
do, which is fun and useful.
Something that you can do, that
you're good at and that you enjoy,
and that helps other people. And the
01:02:43 other, to find somebody to spend your
life with. And that choice, I don't
know if it was my choice or her
choice, I've spoken about choices at
other times, in commencement
addresses, and often the choices are
not made by us. But that choice was
the most important. The other was
the choice to go into law. I could
choose to do many different things,
01:03:10 but here was something that it turned
out that I was good at, that I
enjoyed, but I could see the whole

**NEW YORK UNIVERSITY SCHOOL OF LAW –
INSTITUTE OF JUDICIAL ADMINISTRATION (IJA)
Oral History of Distinguished American Judges**

01:03:21 picture right from the start. And
which can do so much good for so many
people.

MR. YOSHINO: You've talked about
going into law as being a powerful
force for the good. And of course we
have all been the beneficiaries of
that along so many dimensions. And I
myself have talked to you about the
LGBT civil rights movement and your
role in that. What do you think the
next great civil rights movement will
01:03:40 be that will grab the nation and
require the law's intervention?

HON. CALABRESI: Well we have it
right now. It's the treatment of
refugees, immigrants, people who are
of religions and backgrounds that are
truly different. Now we started that
way with *Brown*³⁸ and with the
rejection of *Korematsu*³⁹ and the
treatment of people from an ethnic

³⁸ [Brown v. Board of Education, 344 U.S. 1](#), 73 S. Ct. 1, 97 L. Ed. 3, 1952 U.S. LEXIS 1953.

³⁹ *Supra*, Note 21.

**NEW YORK UNIVERSITY SCHOOL OF LAW –
INSTITUTE OF JUDICIAL ADMINISTRATION (IJA)
Oral History of Distinguished American Judges**

point of view.

01:04:13 But today, we have gone back to the kind of attitudes about religion that dogged this country before it was a country, that was what the first amendment went against, to say that

01:04:31 the evils of the 16th and 17th century were to be avoided by allowing everyone in. And today instead, we see a resurgence of a kind of partisanship in religion. And you see it within religions, Sunni and Shiite,⁴⁰ who are as fierce as

01:05:07 Protestants and Catholics were in the 17th century. It's strange, but it's not that surprising that the great issues of the past become again the great issues of the present and the future.

MR. YOSHINO: There are many people who say, I'm thinking about for example Justice Ginsburg⁴¹ saying that

⁴⁰ The two most prominent sects of Islam.

⁴¹ Ruth Bader Ginsburg is an Associate Justice on the Supreme

**NEW YORK UNIVERSITY SCHOOL OF LAW –
INSTITUTE OF JUDICIAL ADMINISTRATION (IJA)
Oral History of Distinguished American Judges**

our U.S. Constitution would not be a model for say Egypt in thinking about its own constitution building, because it was too old. But added to that of course has to be a tinge of it's not just old, it's very difficult to amend. Should our constitution be easier to amend, because that would make it more of a living constitutionalism that even originalists could live with? Or alternatively, have we found the right balance of difficulty of amendment precisely because we have these longstanding commitments that could be jeopardized by a fluctuating majority that wanted to take away fundamental rights?

HON. CALABRESI: I like the idea of a constitution that is difficult to amend. I find California fascinating, because there the constitution is amended by referendum in the easiest of possible ways. And there are advantages to it. But I

**NEW YORK UNIVERSITY SCHOOL OF LAW –
INSTITUTE OF JUDICIAL ADMINISTRATION (IJA)
Oral History of Distinguished American Judges**

much prefer a way that says the formal way of amending is there, but the inertia is very great. And then that courts can construe so that in that common law way, I'm

01:06:43

a common law lawyer, I teach torts, so that in that common law way, the constitution can also be brought up to date, not in one dramatic amendment change, but through the

01:06:58

development of what is a living constitution, as terms change and are updated, so that I like the notion of having a common law constitutional court be able to update slowly and bigger changes take place, but in a way that is difficult.

01:07:27

MR. YOSHINO: You're going to have to explain the term the simplicity of making mistakes, which I have found in some of your writings. What is that, and how has it influenced your judicial philosophy?

HON. CALABRESI: So it came up first in a commencement speech that I gave

**NEW YORK UNIVERSITY SCHOOL OF LAW –
INSTITUTE OF JUDICIAL ADMINISTRATION (IJA)
Oral History of Distinguished American Judges**

many, many years ago at Connecticut College, about making choices. I think that commencement speech is in a book of the ten best commencement speeches. That's not a compliment.

01:07:54 But there it is, and I was talking about choices, about choices for good and choices for the bad. And I was saying there that the banality of good is often ignored, but in fact many of

01:08:10 the best choices we make are made by, or are strongly influenced by, other people. They're not clearly our own choices. And then I went to the other side, how easy it is to make mistakes, to do things wrong, when you are in positions of authority and power. And of course, I was thinking of the people who put into place Korematsu.⁴² They were Earl Warren,⁴³ as you well

⁴² *Supra*, Note 21.

⁴³ Earl Warren was the Chief Justice of the United States Supreme Court from 1953-1969.

**NEW YORK UNIVERSITY SCHOOL OF LAW –
INSTITUTE OF JUDICIAL ADMINISTRATION (IJA)
Oral History of Distinguished American Judges**

01:08:43 know, since you are the Chief Justice Earl Warren Professor, not the Earl Warren Professor. And Hugo Black and Franklin Roosevelt, they were not bad people. They were good people, and yet they made a terrible mistake, I was thinking of people and of any number of situations, you know, where good people simply do things wrong. Now, I know they did their best to avoid it,

01:09:22 but the important thing is if you realize how easy it is to make mistakes, and how important it is to be open to change, to be open to recognizing mistakes, and to make things right.

01:09:40 That's what I had in mind with not the most elegant of phrases. But that's what I had in mind.

MR. YOSHINO: Is there anything in particular that we haven't covered in this interview that you would like to share about shaping influences in your life, or your thoughts on the

**NEW YORK UNIVERSITY SCHOOL OF LAW –
INSTITUTE OF JUDICIAL ADMINISTRATION (IJA)
Oral History of Distinguished American Judges**

judicial role?

01:10:01 HON. CALABRESI: Well, we began with Cathy about my coming to America and being an immigrant and what that meant. The greatest influences on my life as a judge were the fact that my parents were willing to give up all that they had on a matter of principle and start new in a new place and thinking about what led them to do that and worrying about whether I would have the courage to

01:10:41 do the same thing, if it came to it. Now remember it's very easy to make that look like an easy choice. Oh, if that happens, I will do it. It's equally easy to find that it must

01:11:01 never occur, that you always stay within. The important thing is to realize that no matter how good things seem to be, that possibility is always there, and you must always realize that when you're judging, you're at the fringe of making a mistake that you must not make,

**NEW YORK UNIVERSITY SCHOOL OF LAW –
INSTITUTE OF JUDICIAL ADMINISTRATION (IJA)
Oral History of Distinguished American Judges**

because you want to stay when you should leave. If you know that, you may be okay.

01:11:39

MR. YOSHINO: Thank you so much, Judge. It's been a great pleasure and an honor. I feel like, I mean I've known you more than half of my life, but the renovating estrangement of this interview has brought out even greater richnesses than I have experienced before. So I think of you as the Albus Dumbledore⁴⁴ of the federal judiciary. And I only hope

01:12:02

that you find that pesky 13th use of dragon's blood. Thank you.

HON. CALABRESI: Thank you.

[END RECORDING]

⁴⁴ Albus Dumbledore, a fictional wizard in J.K. Rowling's *Harry Potter* book series. Dumbledore was the school headmaster, a powerful wizard, and a wise mentor and protector to the title character.