ORAL HISTORY

of

PATRICIA M. WALD

Interviewer: Judith A. Winston

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This is the oral history of Judge Patricia Wald which is being taken on behalf of the Women Trail Blazers in the law: a project of the American Bar Association Commission on Women in the profession. It is being conducted by Judith Winston on June 5, 2006. Now we are going to begin this first interview on your early life and schooling. And I'm going to ask you first to state your full name, where you were born and when. And I'd also like to have your parents' names.

Ms. Wald: Okay, my full name is Patricia McGowan Wald. I was born in Torrington, Connecticut. That's T-O-R-R-I-N-G-T-O-N. It was a small manufacturing town. Most manufacturing has since left. It is in northwestern Connecticut. I was born on September 16, 1928. My mother's name was Margaret O'Keefe McGowan. My father's name was Joseph Francis McGowan.

Ms. Winston: Do you have any siblings?

Ms. Wald: No.

Ms. Winston: No siblings. Can you tell me a little bit more perhaps about your mother and father? I have their names of course. Is either of them still living?

Ms. Wald: No. My mother, with whom I was very close right up until she died, died in 1990. She was then 88, 89, it was never clear. Women of past generations were always a little vague about their exact age. She was that way and unfortunately had Alzheimer's for quite a while, about 10 years before she died. She was still in Torrington. My father is a different story.
It's an interesting story but sad in its own way. My mother left my father when I was about two years old, because he was, I guess the only word is, a hopeless alcoholic. They had a very unfortunate and for her quite sad life. She got pregnant very soon after marriage. And I think he couldn't keep a job and it was just impossible. So my mother left and went back to live with her family, which consisted of my grandmother and grandfather and four of her siblings: an older brother and three younger sisters. And we all lived in a very, very small little house, with one bathroom -- all eight of us at one point. One aunt got married, and one aunt died while I was still living there. My father disappeared and was never heard from again directly by my mother. And nobody really knew what happened to him. Even his own family. All contact with that side of the family was cut off, at least while I was growing up. In those days, there wasn't welfare or anything like that. So my mother went back to work in a local factory. It was a manufacturing town, my aunts and grandfather and everybody worked in the local factory.

Ms. Winston: Everyone was from the same town?

Ms. Wald: Well my father actually came from a town only five miles distant. Thomaston, that's where the clocks are made, and it's just down the line five or six miles. But there was just no contact. So nobody knew what became of him, actually nobody ever made any attempt to find out. I was under the impression from something my mother had said while I was in high school or maybe college, that she had received word from somebody
that he had died in an asylum in New York State. That was all I knew. She never tried to follow through on checking it out. But then I had a very determined, interested daughter. One of my daughters, who got into genealogy, just as a pastime was determined to find the answer. She interviewed a number of people and tracked down the third generation of his relatives who didn’t know what happened to him either. His mother died right after him. But even that generation, they all said: “oh Joe disappeared. We knew about these other brothers and sisters, but Joe disappeared.” But, she kept tracking and tracking and tracking. She was very ingenuous. She dealt with librarians and records and social security records. And only a year or two ago, she finally tracked it down to the fact that he had been, in fact, a kind of a derelict homeless person, but in New York City. And he didn’t die until 1975. She found a mission, one of those Catholic missions that he went in and out of, who said he died in Belleview.

Ms. Winston: It is amazing that you were able to discover these records.

Ms. Wald: It wasn’t easy. Nobody wanted to say. And, actually, the only way she found out was a social security librarian who said, “We can’t tell you,” even though I signed the papers saying I was his daughter and she had permission to find this out. They would still say no. Eventually she finished talking to one person in social security and hung up because they wouldn’t give her the information. Shortly, thereafter, she got a call from another person there, who had overheard the conversation and said, “I
Ms. Winston: Think you ought to know and I will give you the number.” And so having the number, she then went ahead and traced it down.

Ms. Wald: Someday when we’re not having this interview, I had a similar story with respect to my father’s family, but in any event. Your mother was born in Connecticut?

Ms. Winston: Yeah, she was born in Connecticut.

Ms. Wald: And what about her parents?

Ms. Winston: They were immigrants from Ireland. My grandmother came over I believe in 1895. My grandmother came over a few years ahead of my grandfather. They hadn’t known each other in Ireland they came out of Cork, but I think my grandmother was Upper Church and my grandfather was from Tipperary. And they ended up in Torrington, because as was the want with immigrants, they would always go to where there were other people from their home town in Ireland. And they would live in the house with the other people until they were able to get a job and establish themselves. They lived with one of my grandmother’s brothers; she came from a family of eight or nine. She was the only woman in a family with eight or nine brothers. And so she and her mother and six or seven of the brothers came over after one brother had gone ahead and ended up in Torrington. And so they built a house there where all their relatives came and stayed until they got themselves settled in. And then my grandfather — so the story goes -- I don’t know if it’s apocryphal. He saw my grandmother in the shipyard in Cork. He saw her and quote “fell in love” with her and
Ms. Winston: started corresponding with her and followed her over to the U.S. six or seven years later. Whether or not that's true, I don't know but anyway...

Ms. Wald: What were their names, what are their names?

Ms. Wald: Well my grandmother's name was Hayes, her name was Catherine Hayes. H-A-Y-E-S. Catherine with a C. My grandfather was Thomas O'Keefe. So they came over and they got married. She had some brothers, all of whom lived in Torrington. He had some sisters. Some parts of the family migrated up to Troy and Albany, New York. He had brothers in some parts down the line from Naugatuck Valley to Waterbury, Connecticut. Actually, my cousin from the Hayes family has traced four generations of this great history, all the way out to California. You know – they were all over the place.

Ms. Winston: Now you, you indicated or I read, that your mother and your grandparents worked in the mills and factories?

Ms. Wald: My grandfather shoveled coal into cast iron furnaces for most of his life. My uncle worked in the factory. The women, my mother and her three sisters, were able to get into office jobs in the factories. My mother was a cost accountant. But it wasn't a professional job. It was something she learned on the job.

Ms. Winston: What kind of factory was it?

Ms. Wald: They worked in different factories. But my mother and then two of my aunts were secretaries in the same factory. They worked for the Torrington Company, which was a ball bearing factory. I subsequently
worked there on my summer vacations. They made ball bearings, roller bearings, and sewing machine needles. My grandfather worked in a brass mill. And my other aunt worked for the Fitzgerald Company, which made some kind of machinery. But these were all machinery type, hard metal kind of factories.

Ms. Winston: Tell me more about your mother, what was she like? How would you describe her?

Ms. Wald: My mother never finished high school, but she was smart. She read, and, I think, that’s where I got my penchant for reading very early. We had one library in the town. My mother and my aunts, but my mother especially, and one of my aunts who was also very smart, were at the library all the time. They took out all the books that came in. One of my aunts belonged to the Book of the Month Club, back in the ’30s. And so there were always a lot of books around. And my mother liked poetry. At the time, she followed strictly the Catholic doctrine that prohibited divorce and remarriage; I think it’s been softened a great deal since. So even though my father had disappeared, they were still married, he was still alive, and she believed that she could never marry again inside the Church. She never dated. The way I figure it out, she was only about 28, when he left, but she lived the rest of her life without any romantic relationships. She obviously spent a great deal of it working to make opportunities for me. Fortunately, she had her sisters for company. They went every where together. We were growing up in the depression and even though we had
no money, to speak of, they could go to the movies or on walks together. It was pretty crowded, I can tell you, in that little house. I remember how old I was before I had a bed of my own. I was always sleeping with aunts.

Ms. Winston: Your aunts were all younger than your mother?

Ms. Wald: Yeah, but not a great deal. I mean my youngest aunt was finishing high school when I was born. And everybody ranged between my mother who was 26 when I was born and my youngest aunt who would have been about 16 or 17. So there was like a 10 year period between them.

Ms. Winston: And you went to school in Torrington?

Ms. Wald: I went to parochial school with the nuns for eight grades. Well actually no, I started in public school -- my mother worked, obviously, so she left me home with my grandmother who kept house for everybody. My grandmother, unlike my mother, wasn't an intellectually curious kind of person. She was very much wedded to the old world ways. She was certainly a hard worker. She had to do everything. This was before the modern days of washing machines. She would get out the old roller washing machine. She had to do all the washing for everybody, cook all the meals. So in retrospect, it certainly wasn't her fault that she wasn't a great source of enjoyment or stimulation for a little kid. My mother was. When she came home from work either we would go to the library or we would go visiting. One of my aunts got a car in the '30s and we would go by car to Waterbury or Hartford, the biggest cities nearby. We would occasionally go to the public beach at nearby lakes. But in growing up
what I remember well before I got to school, was having a lot of time on
my hands and not knowing what to do with it. There were some kids in
the neighborhood that I played with. I would set out in the morning
because I didn’t want to sit around all day in my grandmother’s kitchen.
Like most poor women in retrospect, she had her hands full and didn’t
have extra time to entertain me. I would just sort of wander the
neighborhood looking for someone to play with or some people in the
neighborhood I would just visit and talk to. I can remember just wanting
the time to pass until everybody came home from work to begin some
kind of activity. But of course eventually I did go to school --

Ms. Winston: What was the name of the school?

Ms. Wald: For six years, I went to St. Francis. But the first year I went to public
school. You were then supposed to be five before starting school. They
didn’t have kindergarten then. You went straight into first grade. My
mother realized that I was kind of at loose ends at home, and so she fibbed
about my age and I started in first grade at 4. In those days, you didn’t
have to produce birth certificates. And so I remember the first year not
liking school at all. I think in retrospect, I wasn’t ready for the first grade.

Ms. Winston: Right, right.

Ms. Wald: I remember the teacher in first grade was very kind of strict. The teacher
didn’t like me in particular; I wasn’t a troublemaker or anything. I don’t
know, I just hated it; I just didn’t like school at all. And so when I got
whooping cough in the spring I was relieved. In those days you got
whooping cough and scarlet fever and there weren’t any vaccinations.
And you didn’t even go to the doctor; you just had to live through it. I
was home for weeks with whooping cough. I remember when the teacher
came to see me, I hid under the bed. I just didn’t like the teacher. So
somehow I never went back that year, I don’t know quite how, I was able
to transfer to second grade in the parochial school the next year, even
though I had been out all spring with whooping cough. And the fact that I
was still a year behind age-wise, but that’s what happened.

Ms. Winston: And so you transferred into second grade--
Ms. Wald: Yes, in St. Francis, and I got on along very well in parochial school. The
nuns all liked me. By that time I think I probably reached some kind of
socially acclimated state. And so I was always able to get through, usually
at the head of the class. And the nuns were very encouraging. The
parochial school only went up to eighth grade. There were no high
schools, parochial high schools. So, there was only one public high school
in the whole town and they had hundreds of kids. It was the equivalent of
a big suburban high school, like my grandchildren go to now. Four or five
hundred kids attended.

Ms. Winston: Was it the Torrington High School is that what it is. And you liked school
after the second grade, beginning with the second grade?
Ms. Wald: I enjoyed it; I enjoyed the stimulation of it. And there were some good
teachers in high school. And I had friends. And so, what I do remember,
interestingly enough, about high school was -- when you went from eighth
grade into high school, you had to sign up for a particular course of study. And the courses of study were four: there was the classical course, which was for the kids who were headed for college. They would be what you would call an elite class, usually they were the sons and daughters of the factory managers and store owners. These people lived on one or two of the nice streets in town. The classical course included subjects like Latin, Algebra, and Ancient History. Then there was a course called normal primarily for girls who were going to be teachers and nurses. There were several teacher training and nursing schools in the State. Most of my friends from grammar school were in those courses. For the boys, there was a technical course, where they went to trade school to learn mechanics. Finally, there was a business course. That was almost all girls, who wanted to be secretaries and clerks. It included shorthand, typing, and Business English. I had always assumed that I would go along with my friends into the normal course for teachers but my mother said, “No, you’re signing up for the classical course.” I said fine. What else could I say? But I wondered where the money for college would come from.

Ms. Winston: No problem with doing it?

Ms. Wald: No, I mean it was a free choice. And you know I did very well. I look back at that as a turning point, because I think it is highly unlikely I would have been even eligible for the scholarships that I did get to go to college, if I had been enrolled in the nursing or the teaching training course. Inevitably my best friends began to be people who were going to college,
and as I got to go to their homes, I sort of picked up some new social know-how. Also the level of teaching and the level of subject matter were on a higher intellectual level for the classical students.

Ms. Winston: Did you have a conversation with your mother about this decision? Were you surprised that she was insisting on this education track?

Ms. Wald: I don’t remember a specific conversation. But I wasn’t adverse to it.

Ms. Winston: Because you had done well in school.

Ms. Wald: I wasn’t afraid of it, that’s for sure. And some of my best friends in grammar school, girls who are still good friends – we still see each other – were going to be in that course. One was the daughter of the only judge I ever knew, a local country court judge. Her two brothers were lawyers and they had a law firm in town.

Ms. Winston: What was her name?

Ms. Wald: Helene Wall.

Ms. Winston: Wall, W A L L?

Ms. Wald: Yes. She went on to Barnard, eventually. Her father was very nice. He wrote me, when the time came, a very nice recommendation letter for college. I had another friend, Mary Burns, who I still see. Her father ran a little insurance company. She was going to go on to a Catholic college. My mother just was determined, absolutely determined that I was going to go to college, too. Nobody in my family had ever gone to college, and she hadn’t finished high school. But she was absolutely determined I was going to go to college.
Ms. Winston: You don't know where that came from?

Ms. Wald: It was her determination pure and simple. She had worked in an office, and my aunts worked as secretaries for company bosses. And they knew that if you were going to get ahead, if you were going to have a different kind of life you had to go to college.

Ms. Winston: Let me just ask you, your friend Helene you met her in high school?

Ms. Wald: No, I met her in parochial school.

Ms. Winston: Oh okay.

Ms. Wald: She and Mary Page Burns .... They’re my good friends and they went to high school with me. They were from a higher economic class than I was. But we continued being friends through grammar and high school. And actually we just had a reunion up in Connecticut -- one lives in Rhode Island and one lives in Connecticut -- several months ago. They had very interesting lives. We were all good Catholic girls, the three of us, one went off to Barnard and she fell in love with a Jewish boy at Columbia University. They married her and he became a Professor of the Rhode Island School of Design. But my other friend --

Ms. Winston: Mary Page?

Ms. Wald: Mary Page married in the Church, and her husband took over her father’s insurance company. They had eight children and then she left her husband after the eight children had grown and just recently remarried. She does some editorial work for a scientific journal.

Ms. Winston: Did she also go to Barnard?
No, she went to a Catholic College in New Rochelle.

Oh, okay.

It's sort of interesting; none of us took the route . . .

That one would have predicted at that point. So you -- when did you finish high school?

1944. There was an elderly woman in town who gave a scholarship each year to one girl from Torrington High School, which paid tuition, room and board to Connecticut College for Women. It was called the Swayze Scholarship. I was the Valedictorian in my class in high school so I applied for it and got it. I never had to decide where to go to college. Although I applied to different places, because I didn't know until late in the year I was going to get the scholarship, there really was no choice to make, once it came through.

Okay.

As I recall, I did get into what was then Pembroke (now a part of Brown) and Radcliffe (now a part of Harvard). But when I got the full scholarship on to Connecticut College that's where I went.

How far away was Torrington from your college?

A couple of hours bus ride, 50 or 60 miles.

Because you had lived on campus?

Oh yes.

The scholarship was for room, board and tuition?

Yes. When I went home I had to take two buses.
There was no direct train ride.

Ms. Winston: So you went to a women's college?

Ms. Wald: It's now coed, but then it was a women's college.

Ms. Winston: Tell me something about your college experience? How did you feel, you are first generation, first person in your family going off to college?

Ms. Wald: Well I didn't think about those things much. You took what opportunity came along. I never dwelled on it as "oh I'm the first person to do this."

Ms. Winston: Well, let me ask you this then. What about your experience going away from home, the college experience?

Ms. Wald: It took a little bit of getting used to -- I mean it would have been the first that I was away from home. But that's true of anybody who goes to college. And the girls, in general, were a little more sophisticated than I was. Fortunately, most of the scholarship kids, at least in those days, were put in one dormitory.

Ms. Winston: Okay.

Ms. Wald: So my roommate was a nice daughter of Polish immigrants. Her parents were solid working class parents. But there were many more sophisticated New York types. I remember picking up my first notions of jazz and fashion from just the way they dressed and talked. They went to night clubs; they drank liquor, which I had never done, except occasionally to drain my grandfather's beer glass in the kitchen as a small child. And they had far more experience with dating and male relationships. I had very little experience with boys. I'd had occasional dates in high school but
they were very innocent. In those days the war was still on; and there was a submarine base with a lot of naval officers across the river. The Coast Guard Academy was just across the street. There was no shortage of social life. But there was not a lot of college dating from Yale and Wesleyan in the first two years, because most of the young men were still in the Services. Later on, by the time I was a junior, they were back in college. Then you’d get much more inter-college socializing. But in the beginning I was pretty naïve compared to some of these sophisticated gals.

Ms. Winston: My father worked in the New London Connecticut Shipyard, as a welder during those same years. But anyway....

Ms. Wald: So I can remember a couple of what one might call gigantic mismatches, nothing tragic or nothing awful but dispiriting at the time, when friends tried fixing me up with some poor guy, some guy who had been out in combat, on a submarine or some such, who gets me a 16 or 17 year old provincial.

Ms. Winston: Okay. That’s right; you were young to be in college?

Ms. Wald: I was sixteen in college. Well, actually fifteen at the beginning, but I turned sixteen soon thereafter. I was a kid in all senses of the word. I must have been the most boring kind of date for more worldly types. I certainly can remember feeling socially out of my depth, in the first year. However, intellectually I never felt out of my depth in the classroom even though many of these kids were from private schools. My roommate was
also from a public high school in Bridgeport. In short, I was able to get into my subjects quite quickly and be intellectually engaged.

Ms. Winston: Were you thinking about the law, becoming a lawyer. At what point?

Ms. Wald: I went in as a math major. I signed up because I was pretty good at math.

Ms. Winston: Okay.

Ms. Wald: I was into advanced calculus before I switched over to government. And what happened was I took a couple of history courses, they were okay, but I wasn’t, you know, engrossed. And then I took government and this is sort of key, I suppose. The faculty was a co-ed faculty. There was a woman called Marjorie Dilley who was a Government Professor. (It was Government then, not PoliSci.) The literary counterpart that I could think of was the Prime of Miss Jean Brodie. Have you read or seen that?

Ms. Winston: Yes, I have seen that.

Ms. Wald: Well she wasn’t a Miss Jean Brodie in the sense of romanticizing colleagues. But she had this kind of charisma. Her course was the hardest of course. If you were a Government major you were looked on as some kind of brain. And she was very difficult to keep up with. She flunked kids. But, she was very, very stimulating. She was a maiden lady; she had gotten a PhD and written a book actually called British Policy in Kenya, back in 1946 or 1947. And she was just very acerbic and very funny, I mean funny but in a very wry sort of way.

Ms. Winston: How old do you think she was at the point that you--
Ms. Wald: I would say she was probably; she must have been in her 50s. Maybe late 40s or 50s. And she, you know, ran a tough ship. But her classes kept you on your toes with baited breath to see how the class would go. It was never boring. And so I got very interested in government, and switched over and became a Government major. But, she was not easy to work with. The Government Department was very small than, it was just her and one other teacher -- and she changed this other teacher frequently. She went through two or three of them, in the course of my four years. Later on I met one of them, a very nice young man who taught Comparative Government. He left after a year and we all knew it was because they didn’t get on. When I saw him years and years later he said she was just impossible for any man to get along with. Apparently, she was quite dominant if you were working directly underneath her. She was always certain that all of her points were right by her way of thinking. She was so opposed to dictatorship, and anything else, that she didn’t want them taught. For example, at that time, Spain was going through its particular convolutions, and she didn’t want anything taught about Spain, or about the countries in which tyrannies had taken over, about their autocratic government. She did not want to legitimize these issues by teaching about them. Of course, he wanted to teach about what was actually going on and the different political currents that were currently in flow. It was that kind of thing they disagreed on -- so he left and then she had a woman come in. From the stand point of her students, however, Ms.
Dilley was extremely stimulating and she made her courses fun. I remember she said to me once that she was having this great problem with parents. When the parents would come in they would sometimes say, “What earthly good are these courses going to do for my daughter?” (She used to require us to subscribe to the New York Times, and to read it every morning before class and be ready to discuss any topic that was in the New York Times). So, it was in this context that some parent said “what earthly good is it going to do my daughter to read the New York Times?” Ms. Dilley said she couldn’t find any particular answer in terms of his daughter to give, but she offered this: “Well, she will be much more able to discuss current events at the breakfast table with her husband.” She said this, of course, with tongue in cheek.

There were some other very interesting teachers in college as well. I had one experience with ramifications in later life. It related to the fact that I had had a couple of years of French, high school French, and high school Spanish. And so when it came time to take a foreign language in college the counselor said well, if you’ve already taken French and Spanish and you don’t have any great desire to continue them, why don’t you take Russian. This was in 1945 or 1946. The College had a Russian teacher. He’d come over and was what we called a “White Russian” then. He had left the Communist regime. So I did take three years of Russian. He was not a very disciplined teacher. He was interesting and I got a smattering of knowledge that later proved useful to me when I worked in
Eastern Europe because I was familiar with the Russian alphabet, and could read words although I never really learned to speak the language well. The relevant part of the story is this. After I got out of college, I only saw him once more when I went back to the campus a year later. But while I was in college he was always very pleasant and he liked me a lot. He was married and had children and he had me over to dinner, usually with other students too. So time goes by -- ten years or so. I'm home with my kids. In fact this was in the sixties, I picked up the New York Times one day and I see he had defected while taking a group of Connecticut college students on one of those summer tours. Despite the Cold War, you could still go into Russia as long as you were participating in one of those college tours. Here again, I noted the event but didn't think about it much.

But still later in the late seventies when my confirmation hearing came up for the Court of Appeals, suddenly I hear from one of the Senate aides that they have a inquiry to the FBI from Senator Thurmond's office suggesting that I had been a protégé of this defector to the Soviet Union and possibly a sleeper or mole. Leaving the ridiculousness of the notion aside, the interesting question was how did they know this? This was 33 years later. What I suspect but don't know for sure -- but I've heard it from other people was that during the Cold War period there were a lot of people informing on other people. And there were a lot of these records stored in the archives of the House Committee on Un-American Activities and its Senate counterpart. These records were supposed to be destroyed at the
time the committees went out of existence. Well, all of them apparently weren't as my friend Ab Mikva can tell you because there were similar records of attendees at 1950s meetings referred to during his confirmation hearings. I figured somebody in that college community was informing on fellow students at the time. The letter didn't suggest that I had any illicit involvement with the teacher — which, of course, would have been really ridiculous; I was never alone with him. But he did have me over to dinner, several times. To counteract this implication, I had to call up the college President back then to respond to the confirmation committee. I tracked down Rosemary Park who had been the President of Connecticut College and was now a regent of the University of California system, and have her call the committee and assure them that nobody back then had any idea that Professor Kazem-Bek had Soviet connections. As it turned out, he didn't defect because he was a Communist or dissident — rather he found out he was going blind and he had a yearning for "Mother Russia" — that kind of thing. He just wanted to die in the Mother land.

Ms. Winston

so, did Professor Dilley, did she get you thinking about law school or just to study government?

Ms. Wald:

Actually it was because she taught a course in Constitutional Law which used the law school Socratic method. She used a law school case book, not a textbook. And so we actually read the cases themselves and discussed them just as you would in law school. And I really took off on that. I was fascinated by the process. When it was time for me to leave
college I had defined the choices available to me -- I could look for a job and or I could try to go to graduate school and get a PhD. or I could try to go to law school. I actually did apply and got into a couple of PhD programs. In that regard, there was another teacher whose husband was a Professor of Economics at Yale who was very helpful. She was another of those women who came and went from the Government Department.

When it came to applying to law school, there were just a few that admitted women. The law schools I applied to included Columbia which was taking women. Harvard was not taking women at the time. And, of course, Yale. I took the LSATs -- it was either the first year or the second year they were given. I had to go down to New Haven to take them. And then the question loomed even if I got in, what would I do in terms of money. Because I didn’t have any money. During college I had worked in the summertime.

Ms. Winston: This was their brass factory where you worked? I remember reading something about how you were polishing ball bearings.

Ms. Wald: Well actually the Torrington Company was a ball and roller bearing manufacturing company. They also made needles and other machinery as part of the war effort. In my first summer of college the war was still on and then we dropped the bomb on Hiroshima in August of 1945. The war ended soon thereafter. I worked on the night shift from 11 p.m. to 5 a.m. in the morning, greasing ball bearings, and the year after that I worked in the factory again. The third summer in college I got an internship in a
consumer cooperative community in Greenbelt, Maryland. Greenbelt was part of FDR’s and Rex Tugwell’s movement to build economically self-sufficient towns surrounded by greenery. There was no private housing, it was all cooperatively owned. Housing and stores in it were cooperatively owned. The summer interns were used mostly to work in the stores but we also toured cooperative farm producers and conducted seminars.

Ms. Winston: And where was this?

Ms. Wald: Greenbelt, Maryland

Ms. Winston: Greenbelt, Maryland. I heard you say that earlier but I just didn’t think it was the same place I know in this area.

Ms. Wald: There were six or seven of us from all over the country. We stayed there, worked in the stores, and studied the movement, and we were taking on some of the educational issues. It was a new kind of outside the classroom learning experience for me.

Ms. Winston: I guess that name then derived from that experience.

Ms. Wald: In fact, there was a book written by Rex Tugwell about the whole green towns experience. Gradually, over the years, the greenbelt towns became privatized.

Ms. Winston: So you didn’t make enough during those summers to finance your law school education?

Ms. Wald: No. My mother was always very generous about sending me any extra money she could. She was also a beautiful seamstress. While I was in college she made most of my clothes. But I could not have gone to law
school if I didn’t have other means. Fortunately, the Pepsi Cola Company took care of that.

Ms. Winston: What was that all about?

Ms. Wald: The Pepsi Cola Company then had a national fellowship program which was pretty generous. It paid for tuition and most of the room and board and could be used at any place you wanted to attend.

Mr. Winston: So, it could have been Law School or Graduate School?

Ms. Wald: Yes, my college teachers were very generous about recommending me for one of the fellowships -- including one person who worked for the consumer cooperative movement. His name was Hatley Cross and he was a national leader in the consumer cooperative movement. With the fellowship, I got to pick where I wanted to go, and I picked Yale Law School.

Ms. Winston: Did you know much about Yale University at that time?

Ms. Wald: Some, I had visited New Haven many times. It wasn’t that far away from Torrington, and when I was in high school, our basketball team at Torrington High won the state championship that year and the final game was played in New Haven. There were groups of us who would drive down to New Haven to the game, so I knew a little bit about New Haven and Yale. Sometimes, too, my family would go shopping in New Haven. I had this one memory of New Haven and Yale that is interesting. I was with a bunch of these high school kids, on our way to the sports arena, walking through the Yale campus. I remember Yale boys hanging out the
dorm windows, not looking at us high school kids particularly, just hanging out, but looking up at them I was thinking “oh, my God! – how great it must be to be a part of a college like Yale.” But I do remember discussing what I should do not only with Ms Dilley but also with this other government teacher whose husband taught at Yale. She said Yale Law School was really very good and a small school where you didn’t get lost. So, it was in great part on her recommendation that I applied to and was accepted at Yale. Now I should say that after my last year in college, during the summer before law school -- I had a job in the factory, but the factory went out on strike and my family was split on this. My uncle who worked in the factory who lived in the same house that I did stayed out on strike. My mother and her sister who were working in the offices were not part of the union so they went in to work. Some people in the Factory also went to work and some people didn’t. I decided to stay home with the strikers, and I actually worked with the Union. So in that process, I saw how important the unions were to working people. The Union’s lawyer lived in Bridgeport. His wife was a judge, but I didn’t know her. But, I saw how important the legal aspects were to workers rights and successful strikes and how before they could do anything, union leaders usually had to consult the lawyers. Thus, the summer of the strike was significant and cemented for me why I wanted to be a lawyer.

Ms. Winston: Let me ask you whether it occurred to you that since the wife of the union lawyer was a judge and you were going off to law school... did you
remember, did you think about being a woman lawyer? Was that something you thought about?

Ms. Wald: Perhaps it was my own naive sense of what was possible I believed that if you wanted to do something even if you were a woman you could do it. I knew of course that there were not too many women out there in the law but it didn’t mean you couldn’t do it, or you would be oppressed if you tried. See, for one thing, my family was completely encouraging and in some ways I’ve heard many women in my generation who came from much better endowed families economically, who would say that their fathers told them: “Well, you’re a girl – you can’t do that.” But my family didn’t say that, they said “go for it.” If you go back actually in the culture and start looking at films of the 30’s, it is interesting. You will find many women playing parts as women lawyers or women judges – Katherine Hepburn, Joan Crawford, Rosalind Russell. It was not something which, you know, was regarded as a taboo. True, most women didn’t do it, but you know, there was some precedent for it. My best friend Jodie Bernstein experienced the same thing, in a slightly different way. She grew up in a very traditional Jewish family out in the Midwest, but she said she had one Aunt who was a pediatrician, she was the only career professional woman in the family, the rest were all homemakers. But she said that the fact that there was that one woman role model meant that nobody said when Jodie’s time came “you can’t do it.”
Ms. Winston: And what about that law school experience itself, you were one of twelve women in that class, they had about 150 or so?

Ms. Wald: It was a little bigger because it was the returning class from the war. I think we were somewhere between 160 or 180. And we had between 11 or 12 women. This was a much larger component of women than it would be for many years afterwards because it was a transitional class. There were some women who were there on the GI Bill of Rights, including a WAVE commander.

Ms. Winston: What are your most vivid memories of law school, are there any particular memories that stand out?

Ms. Wald: First of all, we were segregated in housing: we couldn’t live with the guys in the ivy covered Gothic dormitories. Do you know the law school?

Ms. Winston: I’ve been there just a couple of times. I really don’t know it.

Ms. Wald: It’s all centered around the court yard and all the dormitory rooms and the classrooms along with the auditorium are located on the perimeter of the yard. And so the guys could just stagger out of bed and go across the courtyard to the dining rooms or to class. That was not true for the women. We had this one little dilapidated brick house over on Hillhouse Avenue which has since been torn down right next to the railroad track.

Ms. Winston: How far away?

Ms. Wald: Well it was several blocks away from the school. If we worked late in the library we had to be careful walking home. You either found someone to walk you home or paired up with some of the other women. The library
closed at 10 so we would be like walking home between 10 and 11. Sometimes on the way home we would see these lines of men in front of Skull & Bones who we would hoot at. There was one dark place, an alley, on the way where one girl unfortunately was chased and attacked; fortunately, she escaped. We also had break-ins at the women's lounge at the law school. They had one place in the law school which was the women's lounge where the women could go to rest (or smoke) and to keep their books and notes; the toilets were underneath the lounge, down a flight of stairs. I had my pocketbook stolen from the lounge, complete with my check -- my scholarship check -- at one point. As I said, all the women lived in this dormitory on Hillhouse Avenue. It was sparsely furnished and we always had to have a couple living there to chaperone us. They thought, you know, we were still women and so a married couple had to live with us, though there was no such arrangement for the boys. The couple had to live down in our basement which was dark and damp. They were supposed to keep track of what we did upstairs which they never did, of course.

Ms. Winston: Did all the women in the class live in this dorm?

Ms. Wald: If they wanted to take rooms outside the campus they could. There were one or two who did. One student was a married woman who lived with her Army husband. One or two others found apartments of their own. I didn't care where I lived. I had friends at Hillhouse so it was fine for me. During part of my time, Leon Higginbotham and his wife were the
chaperones. Years later he became the esteemed Chief Judge of the Third Circuit.

Ms. Winston: Oh really?

Ms. Wald: Yes, Leon and his wife were supposed to keep track of us. I am not sure how hard they tried. There was a fair degree of romancing in the bushes and on the fire escapes that everyone knew what was going on. As far as the classroom went, I don’t remember ever feeling oppressed the way that some women tell us they felt in the early classes in Harvard. We didn’t have anybody who talked about “Ladies’ Day” or anything like that. First of all, Yale had a few women almost every year since 1915 so we were not such a novelty to the profession. But there is no question that women got more attention and were called upon more because we stood out in the class. J.W. Moore (who authored Moore’s Federal Practice) often used a hypothetical about a rape plaintiff, of course he always called upon a woman to play the victim’s part. You just got used to being called on more frequently than the men. But I don’t remember anybody making nasty remarks about your being a woman. Actually in its way, it was a pleasant enough cocoon-like existence. [END OF TAPE 1 - SIDE A]

TAPE 1 - SIDE B

Ms. Wald: And at least for some of us, it was socially fun. I mean we had lots of dates. I paired up with a couple of women early on and we traveled together socially. The teachers, the law school professors at the end of the
three years, were instrumental in getting me a federal courtship. Fred Rodell was one. Do you know who he is?

Ms. Winston: Just the name.

Ms. Wald: He was a very liberal-activist who wrote several books, including one that took off on the legal profession. He was part of the legal realism school and he taught a legal writing course on how to write on legal topics in plain English. He liked me and he was very close to Jerry Frank, the New Deal agency head who was appointed to Second Circuit by FDR. Fred recommended me to Jerry Frank as a law clerk but so did Boris Bittker another Yale Law School professor who was much more traditional – a tax lawyer – then Fred.

Ms. Winston: I used his casebook in law school.

Ms. Wald: Bittker had been a clerk to Frank. All of those people were very helpful to me and so I don’t remember feeling rejected because of my gender at any time in the law school setting. I think my first encounter with reality was when it came time to get a job.

Ms. Winston: I want to talk more about that aspect, the notion of the clerkship. I mean it’s fairly unusual at that time, was it not, for women to be in a clerkship?

Ms. Wald: Unusual, but not unprecedented. Again, it was not common but neither was it something out of the question: nobody said “you can never do this because you are a woman.” I mean both of the professors I told you about recommended me to Judge Frank. Jerry Frank had already had one woman law clerk years before. (I didn’t know her but I knew about her.)
I think that at my time there had only been one woman who had held a Supreme Court clerkship, she was Tommy Cochran’s daughter. I don’t remember seriously thinking about a Supreme Court clerkship.

Ms. Winston: Did you have other options after the law school?

Ms. Wald: Yes. In those days you didn’t have those crazy clerkship races that you have now. The way it happened for me was this: I took Frank’s course; he came to Yale Law School from New York where he lived and held court every Friday night to teach a course on Fact Finding. Both Professors Rodell and Bittker recommended me to Frank and arranged an interview. Frank knew me from class although I wasn’t that outstanding in his class. And then he just offered me the clerkship. But in the meantime I was looking for other jobs in case the clerkship didn’t come through. At one point, this is before I had the clerkship, Jodie Bernstein and I got on a train — cold -- no prior appointments and we went down to Wall Street. And we just started knocking on doors of major firms. I ended up getting an offer from Chadbourne & Park a securities firm.

Ms. Winston: Okay.

Ms. Wald: Jodie and I were the only women from our class on Law Review. In those days you couldn’t even get in the competition for Law Review unless you were within a high grade range. So I got in on the basis of my first semester’s grades, which was a great surprise. You literally had no idea where you ranked in law school in the first semester because everything depended on the exams. Nothing was dependent upon classroom
participation. And I remember that first semester worrying about whether you were going to flunk out. The night before your grades were posted, we found out from the upper class that you could go to the downtown post office and get them. First year law students were going down in hordes. While my first term grades by no means put me at the very head of my class, I was at a very safe range up there and qualified me for the Law Review competition. At that time there were no women on Law Review but I’m not sure whether there had ever been any.

Ms. Winston: Okay.

Ms. Wald: It wouldn’t have been many, but there were none at the time.

Ms. Winston: Okay.

Ms. Wald: And, Law Review was considered quite a qualification. I’ll give you an example of who was on the Yale Law Review around that time. There was Charlie Wright – the dean of federal jurisdiction and practices, and Bayless Manning later Dean of Stanford. It was not that everyone who could compete for it chose to do so. One of the women in our class, Louise Evans, now dead, had a grade point average higher than mine or any other woman in the class. But she didn’t want to go out for Law Review. Law Review was thought to be this very exclusive but intellectually snobbish group and the competitions in writing that we had to go through to get on it could be very denigrating, especially if your work was ultimately rejected for publication. It devoured you time and could result in lowering your grades. I was the only woman in the
competition in the first year and I remember people I knew, upper
classmen I dated also said “Don’t do it. Just concentrate on making good
grades. Don’t do it, it’s a mean nasty experience and you will be
humiliated.” I did it anyway. But I will tell you that Jodie Bernstein, who
got into the competition the second year, and I were dating two upper
classmen both of whom were on the Law Review. That helped a bit. They
cued us into certain things to watch. They didn’t have the power to put us
on or keep us off but they could contribute helpful insights on our work.

Ms. Winston: Okay.

Ms. Wald: And I remember Toni Chayes – she was the Assistant Secretary of the Air
Force in the Carter administration.

Ms. Winston: Okay.

Ms. Wald: Anyway, she was married to Abe Chayes who was then a Chief Advisor to
Governor Bowles in Connecticut while Toni was at law school. And Abe
had been the Editor-in-Chief of the Harvard Law Review. So I remember
Toni who was very -- she was a class below us -- helpful. She would
offer Abe to read our drafts. There were a lot of drafts, a lot of
negotiating, revising, and networking to bring about the ultimate success
of acceptance for publication. I actually became an officer of the Law
Review, not the editor-in-chief or anything that high but a Case Editor.
An officership was something that gave one an edge with a firm. But
what I started to say earlier is I got an offer from Chadbourne & Park –
they were a primarily securities oriented firm – and my law review work
had been on securities.
I wrote on Chapter 11 and the bankruptcy code and corporate control
issues. I was also a research assistant to Louie Loss who was then the
General Counsel to the Securities and Exchange Commission, who came
up every Friday night to teach a course in securities. He was writing a
treatise and I was his research assistant for a period.

Ms. Winston: Okay while you were in law school he was teaching, okay.

Ms. Wald: I had this offer from a Wall Street firm. And, a good friend of mine from
the Law Review Dan Freed also got an offer from them. He and I were
both unmarried. And everything else about us except gender was roughly
equivalent, including our grades. He also had an officer position on the
Law Review. But they offered him a salary of $500 more than me. And
in those days that was a big difference. In those days, we started a law
firm with $4,000. So it was $4,500 versus $4,000. I had to assume it was
simply because I was a woman. So I didn’t take it.

Ms. Winston: So you took the clerkship?

Ms. Wald: Yes, clearly I wasn’t that thrilled about doing securities law for the rest of
my life.

Ms. Winston: So this is a clerkship with the Second Circuit Court of Appeals in New
York?

Ms. Wald: Yes with Jerome Frank. And by then I was dating my husband-to-be who
also had a clerkship for a U.S. District Judge in New York. So I wanted to
move there. But Frank who was teaching a course at the Law School
decided that year to move to New Haven. So he set up an office at the
Law School except for one week a month when we went down to listen to oral argument in New York. Three out of the seven judges in the Second Circuit were living in New Haven. Charlie Clark who had been a former Dean of the Law School was in New Haven and Tom Swan. The Chief Judge, who had been a former Dean of the Law School, lived in New Haven. Harry Chase and Augustus Hand lived in Vermont and New York. It was a very small court. (Learned Hand had just taken senior status.) And every judge had one law clerk.

Ms. Winston: Just one?

Ms. Wald: Just one. So I was the only woman clerk in the whole circuit. At that time there were no women being selected for district court clerks. Within a few years in the '50s you began to get a smattering of women in clerkships but even then until the seventies only a few. Frank was very, very pro-women -- ahead of his time. As I said he had had a woman law clerk before me. His daughter was not a lawyer but he wrote a book with her about criminal justice. He had also worked closely with women lawyers during the New Deal. It's not as though the dawn of creation for women lawyers came only in the 1960s and 1970s. Abe Fortas' wife, Caroline Agger, had worked with Frank in one of the agencies. The wife of Frank Shea (Shea & Gardner) was also a New Deal lawyer he had worked with at one of the agencies. So, it was not that unusual for Frank to be comfortable with smart women lawyers around him.
Ms. Winston: Well it is interesting to hear your remark that you know there are a lot of people today who think women’s involvement in the profession started with the 60’s and 70’s and Betty Friedan’s The Feminist Mystique.

Ms. Wald: Right exactly. I’m ashamed to say that my life was so full of other things at certain periods, that I didn’t get deeply into the “Movement” when it surfaced and it had no little or no influence on the early part of my career. It was interesting to read about but I didn’t perceive much direct effect on my career of that of any of the women I worked with, many of whom were doing important things on their own. But like all movements, individuals pursue paths on their own but they don’t all have to know about each other. All along the way I encountered people who were helpful to me and other women, who accepted the fact you were a woman and evaluated you on your merits. I’m not saying that in becoming a lawyer as a woman you didn’t run into obstacles. But it wasn’t like a light bulb going on or you were impotent until some “X” Big event happened before you were able to make any progress.

Ms. Winston: What you say is very interesting because I’ve had much of the same experience but I don’t want go on too long about this. This process -- this whole history process -- helped me to focus on that fact that in my own experience, of course, I was more conscience of issues of race as being barriers for me for lots of reasons. But I am very interested in hearing you say that – indeed -- your experience is such that I mean you were able to do a number of things that I’m sure would surprise some young women.
today who have this sense of, you know, there was nothing going on before 1970 or whenever Friedan wrote the Feminine Mystique was it 1962 or 1963?

Ms. Wald: There was certainly not the articulation of a movement before the 60s.

Ms. Winston: Right, and we know there were discriminations and all of that but it --

Ms. Wald: But you had -- you had women like Francis Perkins as Secretary of Labor. I remember reading about her when I was in high school and I had to go to the library to find out all the names of all the cabinet members. I remember noting that one of the cabinet members was a woman. So as I said it was a difference between something being taboo and something not being the usual course of business. There was the middle ground where it could -- it didn’t happen a lot but it could happen. It wasn’t outside the realm of reasonable ambition.

Ms. Winston: Well it would be interesting – and hopefully -- you will have a chance to talk about this aspect of women in the profession, in terms of balancing responsibilities for family and work. I mean that for lots of women that I’ve been associated with -- certainly for me -- and I wondered for you. That is the point where issues arise.

Ms. Wald: That’s the next half.

Ms. Winston: So that will be interesting to talk about then -- the consciousness of some of the limitations women faced in their careers.

Ms. Wald: I remember one of the women in the law school in the class ahead of me was a member of the Maritime Union and she would go out every summer
Ms. Winston: So you had your clerkship?

Ms. Wald: That clerkship was one of the defining experiences in my life. For one thing as I said I was the only clerk so I had a very, very intense working relationship with the judge. In some ways maybe more intense because we were up at the law school in New Haven and my desk was located in his office during all of this time. So I was privy to basically everything he did; I worked on his correspondence and speeches as well as the actual drafting of memos and decisions. I learned a lot about him. I got an apartment in New Haven, just two blocks away from Judge Frank’s house. We often had dinner together. He was a very endearing man, eccentric as all-get-out, but an endearing person. He had this vivid career in the New Deal and was general counsel or a member of a number of government agencies. He also told me about one experience which I still remember well. It involved the Leopold and Loeb case. Frank came from Chicago. At one point after the murder when the police were trying to trace the murderers of the boy, one of the key clues was a pair of glasses, they were trying to trace back to the owner. It turned out there were only a couple of people in the city who could have been the owners of the glasses and one
of them had the last name of Frank. So, according to Frank, the Chicago police at that time were known for their brutality and if they got a suspect they would go at him to obtain a confession. And Frank was one of three people to whom they had traced this pair of glasses.

Ms. Winston: Now this was the kidnapping?

Ms. Wald: Of the young boy. I have never seen the movie “Rope”. And one of the perpetrators involved just died recently -- maybe in the last decade or so.

Ms. Winston: Yes, I do remember it. Although, I confuse this case sometimes with the kidnapping of the --?

Ms. Wald: Lindberg case?

Ms. Winston: Lindberg, yeah, but this is a different case. This is -- okay.

Ms. Wald: Anyway his point was his close encounter with becoming a suspect caused him to think hard about the criminal justice system. He wrote many books, you know about criminal law and about the jury system. The last book he wrote with his daughter which was “Presumed Guilty” was about people who had been executed but later proved innocent.

Ms. Winston: But he was suspect because of his glasses?

Ms. Wald: Yes.

Ms. Winston: He was a suspect?

Ms. Wald: Yes, but eventually it was straightened out somehow but that was the story he told of his near involvement. Anyway, Frank was noted for his dissents. He was way ahead of his time in terms of identifying several problems in the justice system and he was a “legal realist.” He identified problems of
poverty and their relationship to the criminal justice system. That is, the inequity that existed for poor defendants in the criminal justice system. As a result of his perceptions, we were dissenting a large part of the time. He was 20 years ahead of the Warren Court in terms of legal rights for criminal defendants. Frank was a friend of Justice Douglas and Justice Frankfurter. Frank was also Jewish, and in the 1950s there was still prejudice against Jews although obviously they occupied a lot of significant places in America life and in the law. However, there was still significant social prejudice in the profession. And he was conscious of that and that he was the only Jewish judge on the Second Circuit Court of Appeals. There were a couple of Jewish judges on the District Court – Judge Edelstein and later Irving Kaufman during my period. But during the year that I worked for him the Rosenberg case came up. The first of many go rounds of that notorious case. The way the Second Circuit worked in those days is that we would hear an oral argument and a few days later the judges would have their conference. Judge Swann was the Chief Judge then. As Frank was going into the judges’ post-argument conference he said to me: “I know that they are going to assign me this opinion because I am Jewish.” And they did. People had and have many different views about the Rosenberg trial. Many historians thought there was enough evidence to convict and Frank and I agreed but he felt strongly that the death penalty was inappropriate. At that time there was no law or precedent authorizing appellate review of sentencing -- unless
the sentence was clearly outside of the statutory limits. Frank wrote a long and passionate opinion urging the Supreme Court to review (and implicitly in my view to reverse) the death sentences, which ultimately of course didn’t happen.

Ms. Winston: What was the basis for his argument against the death penalty?

Ms. Wald: Well, it was more of a policy argument, it was made to the Supreme Court and it was saying “look, in other countries this is so important...the death penalty is so important. How can you not review a death penalty clause since other countries do it, and the only reason we do not do it is that it’s a tradition of the court. There isn’t anything in the Constitution or there isn’t anything in the statute which specifically says an Appellate Court can’t review a death sentence. It’s a tradition that’s grown up and of course the Supreme Court could break that tradition. It was a “cri du coeur” – “please do it”! He also dissented on the rejection of a separate trial for Sobel; you may not remember he was a side defendant who was tried along with the Rosenbergs which Frank thought prejudiced his case.

Ms. Winston: Oh yes I do remember.

Ms. Wald: Years later, a professor who is writing Frank’s biography calls me and we have breakfast. I had little critical to add to his research. But he did have the good graces to send me a copy of the page proofs. Initially, I read anything attributed to me and it was perfectly fine, no problem. But then I just skimmed through the rest of it and I came upon this passage that read in essence despite the recommendation of his clerk that the conviction
should be overruled because of lack of evidence he went ahead and upheld it. I knew that was dead wrong (we agreed on the sufficiency of the evidence) so I called and spoke with him and I said, “where did you get that” and he said, “well I went through his papers at Yale and there was this memorandum, unsigned, and I assumed it was a clerk’s memorandum” – of course, it was not. I said, “If you would just send me a copy of it, I can tell you whether it was mine”. He said “of course you know your style and what you have written.” On receipt, I knew it was clearly not me; it wasn’t the way I write or reasoned. The author took it out. So, despite the fact it wasn’t attributed to me in the book, the experience always made me a little bit skeptical in later life about historical sources. Not that this small error would have mattered to anybody but me but still it would have been totally wrong. One possible explanation involved the state of judicial ethics at that time which was not nearly as well developed as now. During my tenure in the DC Court I sat on the Code of Conduct Committee for six years. We did not ever discuss (outside of the clerks or other colleagues on the court) anything that was actually going on regarding our cases – not with law professors or anyone else. But Frank had some close friends on the law faculty at Yale and my guess is he may have discussed it with one of them and they wrote him a memorandum about it. Things were much looser at the time; there was no formal Code of Conduct Committee to make interpretations of it.
Ms. Winston: Yes, things have definitely changed since then. Now, this is a bit of an aside, but I am curious about your reaction, your take on Judge Frank’s indication that he was sure that the Rosenberg case would be assigned to him because he was Jewish. Was it the notion that it would be ..... 

Ms. Wald: That it would be better -- if you are going to convict Jewish defendants in so notorious a case it would be better for a Jewish judge to write it. The situation was especially sensitive because the lower court Judge who sentenced them to death was Irving Kaufman and, of course, he was Jewish too. I am glad you brought that up again because I meant to say that what I found out from this biographer’s book is something I had not known before. That there were these big debates in the thirties while Frank was in the New Deal and doing hiring and bringing bright young people down to Washington. The debates were about how far you could go before the Jewish component of lawyers got “too big” in the agencies. It was a kind of a self-imposed quota. I had to say everybody was acutely conscious of the problem even in my law school time. I can tell you that when many law students in my class were applying for Wall Street jobs, there were law firms which were reputed not to hire Jews. There were also a few firms where the founders were Jewish and were known to be okay. One of our classmates was the first Jewish lawyer to get a job at Davis Polk. During that last year in law school if you wanted to change your name you had to go through the process in whatever state you were from but then it had to be publicly noted on the law school bulletin board.
The bulletin board was along a hallway in one of the entrances of the law school. There would frequently in that year be several notes up there about people who had changed their names from obviously Jewish to more neutral ones.

Ms. Winston: So they would have more opportunities to get jobs. At least they wouldn’t necessarily be recognized at least by name.

Ms. Wald: And my best friend was Jody Bernstein – who was both a woman and Jewish but she did not change her name. Her name then was Zeldes.

Ms. Winston: What was her name then?

Ms. Wald: Zeldes. And so she went down and she got a job at Sherman & Sterling.

Ms. Winston: Was that as a result of your going down to the Wall Street on your own?

Ms. Wald: Can we stop for just a moment?

Ms. Winston: Okay, so you mentioned that you began dating the person who became your husband in law school. Were you in the same class?

Ms. Wald: Well actually I waited on tables; I did research jobs in law school too. I mean, I did have tuition paid but you needed to pay for expenses too.

Ms. Winston: So you waited on tables in restaurants in ....

Ms. Wald: I waited for two out of the three years in the law school dining room. That got you all your meals free at the law school.

Ms. Winston: You were waiting tables in the dining room?

Ms. Wald: In the dining room in those days, now it’s like sort of a cafeteria thing, but it was all sit down meals, breakfast, lunch and dinner, seven days a week and I worked for two years waiting on tables.
Ms. Winston: Do you remember the first time you met your husband.

Ms. Wald: No, I don’t really remember because he was in my class. I knew him that first two years, but we didn’t date until the third year. Actually I had another boyfriend who was overseas with the AID program (the Marshall Plan). So, I had saved enough of my money to go to Europe in the summer after my second year. I went over on one of the troop ships; they use to convert troop ships for cheap student fares and I had one of the fifty berths on a deck. I went with a friend and we budgeted for and lived on $1.50 a day.

Ms. Winston: That’s a dollar fifty cents?

Ms. Wald: My boyfriend was with the Marshall Plan in Greece which was then still in civil war. That was my first taste of Eastern Europe. I visited him for a couple of weeks, but during the course of a couple of weeks things kind of petered out. So when I came back in the fall, I started dating Bob.

Ms. Winston: And would you just for the record tell us, it’s Bob Wald.

Ms. Wald: Yes.

Ms. Winston: Okay, Robert Wald.

Ms. Wald: Actually he waited on tables too. But it was more like... well, Jodie was dating a friend of his and for a while the four of us went out a lot and it sort of gradually became... it wasn’t one of these light bulb kind of things.

Ms. Winston: It was not love at first sight? I guess that’s what you are saying.

Ms. Wald: Well, yes.

Ms. Winston: Because you had another boyfriend, you had the left over boyfriend.
Ms. Wald: Fred Rodell liked us both very much. Bob is a very good writer and Fred really liked Bob's writing in the writing course, so Fred acting as a sort of romantic and impresario, tried to get Frank to take both of us as clerks. But a judge could only have one law clerk at that time. Nonetheless, Frank was also something of a romantic at heart and although he could not hire Bob as a clerk under existing job classifications he tried to get approval to have a court deputy position converted to a second law clerk. The deputy is the person who starts the Court proceeding, the one that introduces the judges and starts with "oyez, oyez" and it was already an obsolete position at that time for individual judges.

Ms. Winston: Yes, I know what you are talking about.

Ms. Wald: So, Frank asked the administrative office if he could do away with that position and have two clerks instead so we could both clerk for him.

Ms. Winston: Oh, I see. So he would have hired Bob as a clerk, too?

Ms. Wald: The administrative office said "no". However, Frank did work very closely with Irwin Kaufman and he persuaded Kaufman to take Bob as his clerk. This was after the Rosenberg trial was over.

Ms. Winston: Oh, I see, I see.

Ms. Wald: If there were ever two people who had different personalities it was Kaufman and my husband. But eventually they worked out a modus operandi. I grew to know and like Kaufman in later years. I served on several of the ABA commissions with him and I thought he did some good work on free speech and juvenile law but I thought the Rosenberg case
tainted him for the rest of his life at least until he got to the Second Circuit. He was constantly ... well, that's the way people always remember him. But I think he wouldn't have taken Bob -- because their personalities were so different -- except for Frank. And why did Frank and Irving Kaufmann bond (because they also had two completely different personalities)? Well, in part because they were the two Jewish judges on the court. They gravitated towards one another. Irving Kaufmann came to the district court as the youngest hot shot, a protégé of Tom Dodd. So he gravitates for advice and counseling to somebody who never would have philosophically akin to him but with whom he had other things in common. So he responded when Frank gave him some sort of push about hiring Bob, not that he couldn't have been hired on his own merit. But they probably wouldn't have been in contact except for Frank. We had a very interesting year, and I think Kaufman in later years felt affectionate toward him, although it was not an easy relationship in the beginning.

Ms. Winston: Not an easy relationship?

Ms. Wald: In the middle of that year, 1952, Bob was called back into the Naval Reserves for the Korean War. He had been in the Navy in World War II but he had never seen active duty. He was called back for active duty on ship in the Korean War. Kaufman was quite upset, because it meant losing a law clerk in the middle of the year.

Ms. Winston: Bob ruined it for the future of reservists who wanted to clerk.

Ms. Wald: So much for patriotism.
Anyway, so he went off, you all were still just dating. When did you marry?

That summer. It was 1951, no 1952. Just as I was finishing my clerkship, and then Bob was away for the next year after we were married.

What is the date of your marriage?

June 22, 1952, but the clerkship was very rewarding.

And you regard it as one of the more defining experiences in your life?

I wanted to see how the court works, to have that close a relationship in terms of role model with somebody who thought so independently, who was so intellectually curious -- more than I will ever be. I mean he was writing books on all these interesting issues and could see problems and didn’t mind taking stands on problems even when the rest of the court was much more reluctant. He and Judge Clark had a perplexing relationship. Clark was a nice man in his own right, Charlie Clark. They were both New Deal appointees. They should have been philosophically like this [Ms. Wald is holding two fingers closely together]. But, they were like oil on water. It seemed they couldn’t stand each other. In fact the clerks often had to act as their proxies in communicating with each other. They rarely ever discussed issues in person except through clerks. Fortunately, at that time all three of those judges Swan, Clark and Frank lived in New Haven and all took Yale clerks from the same class. So their clerks were people I knew and with whom I got along real fine. Charlie Clark’s clerk was Bill Rogers now at Arnold and Porter. Ed Snyder, who became the Chief
Counsel for the American Friends Service Committee for the rest of his life, was Swan's clerk. On the other hand, Learned Hand was very close to Frank and was a very aristocratic person, unlike Frank. If you read the biography of Hand by Gerry Gunther you know that Hand was a very thoughtful and reserved person. Yet, he and Frank got along beautifully. People would say that to him -- I think this is in Gerry Gunther's book -- they would say to Hand: "Now why did you sign on to that Frank opinion?" Frank would write these long opinions. They were discursive; they had numerous footnotes usually about books he just recently read. He saw new problems everywhere and discussed them – problems that other people didn’t see. Sometimes it seemed he was all over the place, in these cases there was nothing the clerks could do. On the other hand, he would sometimes let you -- if you were a clerk – draft an entire opinion if he didn’t care that much about that particular issue. But if he was really interested in a subject you could comment and you could critique but you couldn’t edit it. So people would say to Hand: "Darn, now why would you sign on to all that?" and Hand would say: "Oh Gerry is a good guy. If I agree with the bottom line of the decision, I just sign it and let it go."

They were very very close friends.

Ms. Winston:

Now tell me this. Did you begin at this point to see yourself on the bench?

Ms. Wald:

I didn’t see myself on the bench, but I had decided that was a really good spot to be on for the very reasons I have just outlined. I loved the independence, I loved the fact that even if you weren’t running with the
crowd, you were able to make a mark as long as you did a conscientious, honest job nobody could stop you or tell you that you couldn't do something. And I was never drawn to private practice, as such, I did do some later, but I was never drawn to a firm practice. I wasn't drawn to the entrepreneurial aspects of private practice. So a judgeship seemed to me ideal but I don't remember plotting on how I would get there. At that point, I knew there were women judges but there certainly weren't very many at that time in the federal system. There had only been one woman Court Appeals Judge Florence Allen on the Sixth Circuit -- a Roosevelt appointee -- who had long since been gone. And there may have been a couple elsewhere on trial courts but not in the Second Circuit. Over the next several years there would be another woman Judge who has just died, who was prominent in civil rights...

Ms. Winston: Constance Baker Motley?

Ms. Wald: Yes, she came on a bit later. Again, it was not an impossibility but I wasn't actively thinking about it at the time.

Ms. Winston: But the life of the Judge, I mean the intellectual life or the lawyering part of it or the judging part of it; it was something that you found attractive?

Ms. Wald: I loved getting the cases, sitting down and reading them and figuring out what you thought the problem was and then doing research on it. I really enjoyed that.

Ms. Winston: Now at this point, I should ask you at what point the notion of being a labor lawyer sort of took a back seat.
Ms. Wald: I was still thinking about it, but I’ll tell you what happened there. This is where my personal life begins to have a real effect upon my professional life. Because by the time I had left the clerkship I was married. My husband was on a ship that came and went from Norfolk, Virginia, a destroyer escort. So, my whole preeminent thought at that point was focused on knowing he was going to be on the ship and how do we make a personal life around that? That meant my moving South someplace around Norfolk, which was at the end of the world so far as I was concerned. So Washington, DC made the most sense and I began scouting what was available in Washington DC.

Ms. Winston: Well, it’s four thirty now, maybe this is a good place to break and then we can start next time with family and some of the challenges ....

Ms. Wald: We planned on three sessions; we should be able to finish up then. We will see.

Ms. Winston: We are ending this session.
ORAL HISTORY of
Judge Patricia M. Wald
June 19, 2006
Tape 2A and 2B

This is the oral history of Judge Pat Wald which is being taken on behalf of Women Trailblazers in the Law Project of American Bar Association commission on women in the profession. It is being conducted by Judith Winston on June 19, 2006.

Ms. Winston: Well we left off at point that I think just preceded your interview or your job with Arnold & Porter, if you would help us understand what happened ... this was after your clerkship?

Ms. Wald: During the period of the clerkship, my husband-to-be and I had been courting. He was clerking for Judge Kaufman.

Ms. Winston: I am going to close the door.

Ms. Wald: Okay. I wouldn't want to bore more than one person with this. (Laughter.)

In the middle of that year he was called-up by the Naval Reserve for active duty on a destroyer escort off Norfolk. So, he had to leave the clerkship and go serve. We got married that June and I had to find a job. I did have a couple of offers but I wanted to be as close as I could to where his ship came into harbor.

Ms. Winston: This was the summer of 1952?

Ms. Wald: Yes. And so I picked Washington because I didn't know anything about Norfolk and I don't believe there was as much going on for woman lawyers in 1952 in Norfolk. Washington was obviously the place with more opportunities. When I told Jerry Frank, for whom I had been clerking, about my plans, he couldn't have
been more helpful. He said, "Well, I'll write you some notes to my friends down in Washington." Many of his friends down there had worked for the New Deal -- worked for or with him. For instance Frank Shea was a close friend of his. But more relevant as it turned out were the lawyers who formed Arnold, Fortas & Porter. He was a good friend of Abe Fortas. Abe Fortas' wife was Carol Agger. They both worked with him at the Securities and Exchange Commission. So, when I followed up on Frank's offer to write me a letter of recommendation, he said, "Well you draft it." I know this is often done, but it's very hard for me (or anyone) to draft a letter in your own behalf. You're pulled by the fear of having it seem overly self congratulatory at the same time that you recognize that it needs to be strong to be useful. We [Judge Frank and I] were very friendly by this time... So, I said, "Judge, I would really rather if you would write it -- even if it is just one line that line would be yours -- rather than my doing it." He said, "Okay, I will." And so he wrote down the following recommendation -- "She is the best law clerk that I ever had. Signed, Jerry Frank" You can't get a better recommendation than that. I took that down to Washington and I did get interviewed. This is the beginning of the '50s and Arnold Fortas & Porter had just been founded for a few years -- around '46 I think. It was still small. I would say there were only nine or ten lawyers at Arnold & Porter. I saw all of them during the interview; including Thurman Arnold, Abe Fortas, Paul Porter, Harry Plotkin who was a labor lawyer, Milton Friedman who was a securities person, Norman Diamond. At that point, they only had two associates and eight partners. Bud Vleith, who later became a managing partner at A&P, was an associate. There
was another associate hired at the same time, his name is George Bunn. He later became a disarmament expert, after he left private practice. I think the main I have to say about the year at Arnold & Porter (it wasn’t really quite a year -- I left a couple of months before the baby was born in May) -- is that I was treated extremely well. Three or four of the partners had lawyers as wives, an unusual thing for that time. Abe Fortas’ wife was a lawyer. Bill McGovern’s wife was a lawyer. The point is they were used to the concept of women in the law.

Ms. Winston: Well, do you know if any of those women who were lawyers married to partners in the firm you were in, were they practicing at the time you were there?

Ms. Wald: Yes, Carol Agger certainly was. Carol Agger was with Paul Weiss Rifkin which was then a tax firm down here. She was a very high powered tax lawyer. I don’t remember whether Bill McGovern’s wife was in practice. I know that Frank Shea’s wife had been a lawyer in one of the New Deal agencies.

Ms. Winston: Okay. Do you remember anything about the interview process at Arnold & Porter that’s worth recalling or that stands out in your mind about the interview?

Ms. Wald: Well.

Ms. Winston: After that letter of recommendation, I assume you didn’t have any trepidation about the process.

Ms. Wald: No. I can remember Abe Fortas was very gentlemanly. I can remember somebody asking me about - my “plans” and I told them I was married. But the question wasn’t asked in a way that offended me; it was not as it somebody was trying to pin me down as to whether I wanted to have children right away. It was asked more as an inquiry about what my plans were for when my husband got out
of the Navy. But, I have to be frank with you, in those days, I don't think our feminist sensitivity antenna were up that much. Unless somebody said something to me that was downright nasty, I took it in my stride. At any rate, A&P did take me on. I went to work for them in July, when I finished clerking for Judge Frank. During the period that I was working here in Washington, I lived with my husband's younger sister for most of the time. We rented an apartment. She was not a lawyer and had come to Washington and got a job with a local radio station.

Ms. Winston: What was her name?

Ms. Wald: Lois. Lois Wehr. She's dead now. I think her family felt better about her coming to Washington because she was living with a respectable married woman.

Actually, we spent a lot of time ricocheting between apartments that year because I was never sure that I could sign a year's lease not knowing where I'd be in a year. I think we lived in three or four different apartments during that nine or ten month period. And in between apartments, there were a group of unmarried guys I knew from law school who had taken a house together in D.C. and we'd end up for a week or two staying in one of the empty bedrooms in their house.

Ms. Winston: Were these places in Washington, D.C. proper?

Ms. Wald: Yes. One was on Harvard Street. But most of the time, Bob's sister and I would rent on a kind of month-to-month lease basis. By September of that year which would be '52, I was pregnant. But I didn't tell anybody at Arnold & Porter because I was afraid they might say "Just as they say, you take your first woman associate and in three months, she's pregnant." And so I didn't tell anybody until it must have been Christmas or January -- when it became more than obvious.
All of that fall, because it was my first pregnancy, I remember being very nauseas. I remember driving to work with one of these guys in the house we were staying at, and every time we stopped to pick-up another person in the car pool, I would lean out the car door and throw up in the gutter. I also remember being enormously sleepy. So I would take my research project and go across the street from Arnold & Porter which was then in the Ring Building on Connecticut Avenue (it was before they moved to the 19th Street Pierce-Butler House) to the Home Loan and Bank Board library.

Ms. Winston: Okay.

Ms. Wald: I'd just put my head down on the table over in the Bank Board library and fall asleep. By the New Year, I had to tell them. Again, they were very nice about it. I said I wanted to go down to Norfolk to have the baby. And they said that was fine and we could talk about my coming back after the baby was born. Nothing was said about paid leave or anything like that. But the door was definitely open if I wanted to come back as it turned out I didn’t. I was the only woman in the firm. There were, of course, women secretaries. Many of them were the old fashioned type of secretary. They held their bosses in great reverence and behaved toward them like caretakers, ready to do whatever their bosses need whenever. There was also a very interesting woman there named Dorothy Bailey who was the plaintiff in the leading case that went to the Supreme Court on the loyalty program, Bailey v. Richardson. Now that case was over by the time I got to A&P, and she had been hired as the first administrator. The issue in the case was the constitutionality of the employee loyalty program and unfortunately she
lost. But the firm then took her on as their chief administrator in the office. She was a person I got to know well and enjoyed spending time with. I ran into her many, many years later in Africa, where she and her husband worked for the Ford Foundation. Just a word or two about what I did in that period, between morning sickness and fatigue. I worked on the Owen Lattimore case. I worked with Thurman Arnold and Joseph O’Mahoney former senator from Wyoming. They were defending Lattimore in the District Court against a “fellow traveler” charge that as a renowned scholar he was propagating the communist line. You know who Lattimore was?

Ms. Winston: No, I don’t, could you tell me something about him?

Ms. Wald: Lattimore was this very, well known and respected Asian scholar at Johns Hopkins, who wrote a lot about the Near East. He was accused of being, not a full-fledged Communist, but “a fellow traveler” who disseminated views parallel to the Soviet Union. In retrospect most commentators have agreed that the charges were pretty ridiculous. But this was during the McCarthy era. The Lattimore case was actually a prosecution by the Truman Justice Department. Truman appointed two very conservative, crusading anti-communists, [J. Howard] McGrath and [James P.] McGranery as attorneys general who were gung ho on this kind of case. I did a lot of the grunt work on the case during my time at the firm, working on the pleadings for Thurmond and O’Mahoney who were obviously the front men on the case. I worked on the motion to dismiss and on the bill of particulars. (They had bills of particulars in those days.) I left before the case actually got to trial. But, what happened eventually was it never got to
trial because a Republican-appointed judge — Judge Luther Youngdahl — from Minnesota (in those days there were moderate Republicans in greater abundance in positions of leadership in the Congress and on the courts) dismissed it. He dismissed the suit on First Amendment grounds. That dismissal was appealed and the dismissal sustained. It was an exciting time. I remember the question of whether we should even take the case was debated at a firm meeting. Arnold & Porter at that time had just moved to the Pierce Butler House on 19th Street. And we met around a big round table: everybody in the firm including the two young associates. We were all asked for our views. And everybody except one person voted to take the case. A&P had taken other loyalty cases — Fortas had defended witnesses accused under congressional contempt power. We also had John Service as a client: he was a State Department employee brought up on charges under the loyalty program. We were, if not the only, certainly the best known law firm in the city of Washington that would represent loyalty program cases.

Ms. Winston: Let me just take you back a moment out of curiosity. You've mentioned Dorothy Bailey who was the first plaintiff in one of these cases. And she came to work for the firm?

Ms. Wald: As an administrator.

Ms. Winston: Okay but it was after she was working for the government.

Ms. Wald: Right. I remember that when Lattimore came to the firm, we had to sneak him out the back door because of the press waiting outside. He was vindicated though I'm not sure just how that kind of experience affects the rest of your life.

Ms. Winston: And so your major work then from that period from point A . . .
Ms. Wald: Well, I worked on several other things. But the Lattimore case was certainly one that I remembered as reflective of the atmosphere during the McCarthy period. I recall personally the plight of one woman from Yale Law School caught up in its maze. I won’t mention her name.

Ms. Winston: Okay, that’s fine.

Ms. Wald: One of the women who had been instrumental in beginning a branch of the ACLU up in Yale law school was brought up on loyalty charges on that basis, so far as I know. I remember spending a couple of evenings with her before the loyalty hearing. She was really distraught and she eventually just quit her job before the loyalty hearing, went back to where she came from and never practiced law again. Just by happenstance, I too had gone to several meetings of the ACLU up at Yale law school, but for some reason, probably because I was tied up in my Law Journal work, I never officially joined. But even so – I am now jumping ahead in time – right after I was confirmed for the Court of Appeals, Bill Buckley wrote a column in which he complained about the liberals that had been appointed to the courts in the Carter administration. Specifically, he complained about me as a defender of Owen Lattimore. There was another interesting suit that I worked on there.

Ms. Winston: Okay.

Ms. Wald: There were two well-known nationally syndicated columnists who wrote about scandals in the United States, private and public. They wrote a column in which they said that all the models – they either used the word “all” or something equivalent to “all” -- all the models at Neiman Marcus were high class call girls.
Neiman Marcus was a client of Arnold & Porter and one of its biggest clients. So Neiman brought a libel suit against the columnists.

Ms. Winston: Wasn't that a Texas firm, they came to Washington, but only much later to Washington, D.C.

Ms. Wald: Yes. Well then it was in Texas.

Ms. Winston: Okay.

Ms. Wald: I remember doing a lot of research on libel. The issue was whether or not because they had not named any of the girls but instead used the group classification, a libel action could be sustained.

Ms. Winston: Evans and Novak? Were they the two columnists?

Ms. Wald: No, not Evans and Novak. It was before their time.

Ms. Winston: Okay.

Ms. Wald: So anyway, I had started working at A&P in July and I left two months before the baby was born at the end of May. My husband by that time had been transferred from the ship to the base JAG office. We rented the upper level of a house on Virginia Beach which was very cozy and for two months I didn’t do very much. I wrote book reviews for the Norfolk Pilot. My first daughter was born down there at the end of May.

Ms. Winston: May 1953?

Ms. Wald: Yes, Sarah. Sarah by the way also went to Yale law school, has worked as a civil rights lawyer in Atlanta and then as a deputy in Governor Dukakis’s Massachusetts Department of Consumer Affairs. She has also been the dean of students at Harvard Law School and then the assistant provost there for several
years. For three years after that she was in England with her husband and two sons. Her husband's a freelance writer and he was writing a book on the Beatles. They’ve just come back and settled in North Carolina where she is now an Assistant to the Dean at the University of North Carolina Law School.

Ms. Winston: Okay.

Ms. Wald: Anyway, Sarah was born in May 1953.

Ms. Winston: May 1953?

Ms. Wald: We stayed in Virginia Beach until January 1954 and then Bob's Navy time was up. I did go back and see the Arnold & Porter people. And it was clear to me as it was clear to them that I was not ready to return. I really was taken up by motherhood. It wasn’t even a question in my mind; I did not want to go back to work. Also, it would have been fairly futile for me to do so because as it turned out by January 1954, I was pregnant again.

Ms. Winston: Okay, January ’54?

Ms. Wald: Yes.

Ms. Winston: And you had come back to Washington after he left the service. What was your husband doing in Washington?

Ms. Wald: He was at the Federal Trade Commission.

Ms. Winston: Okay.

Ms. Wald: He worked for the Federal Trade Commission. And we lived in Northern Virginia. My son Doug was born in September 1954 and so I continued to stay home when our daughter Johanna was born in ’56, March of ’56. She works for Charles Ogletree up at Harvard in the Houston Center for Race & Poverty. She is
Ms. Winston: Wow.

Ms. Wald: Doug is a partner at Arnold & Porter, and part of the senior management group. He is a Harvard Law School graduate. I have to tell you one amusing thing going back to the Arnold & Porter days.

Ms. Winston: Okay.

Ms. Wald: That is when I was leaving to go down to Norfolk, Thurman Arnold, who was a real character, said I want to take you and your husband to lunch. At lunch, he said – “I’ve got one favor to ask you. You’ve got to promise to do it.” I said, “Sure”. So the Judge said (I always called him Judge because he had about a year and a half on the D.C. Circuit).

Ms. Winston: I didn’t know that.

Ms. Wald: Before he got together with Abe Fortas to start the firm, he had been appointed to what was then the predecessor to the D.C. Circuit Court of Appeals. And he was on the court for a year and a half, and then quit. He said he didn’t really enjoy being a judge. He’d much rather be an advocate. Anyway, he said at the lunch “I have four sons. I’ve never had a daughter. I have a feeling that you’re going to have a daughter. And I want you let me name her. I’ve always wanted to name a daughter ‘subpoena deuces tecum’”. So, I said “well…” But we did the next best thing. I gave him my first born son who has worked there since 1978. And then just to finish with the kids. So, Freddie was born two years later. She is a
business person. She was the head of a merchandising division at Time Warner. She has now left that to spend more time with her daughter. They’re all married.

Ms. Winston: Would you give me the first name of your second daughter and her birth date again? Her name is Freddie right?

Ms. Wald: She’s Frederica.

Ms. Winston: Frederica, okay.

Ms. Wald: She was born in ’58.

Ms. Winston: Okay, 1958. Okay. And I just want to make sure for the record we have the last names of your daughters if they’re different from yours.

Ms. Wald: Oh yeah. Although, I found that they mostly go by their maiden name professionally. But it would be Sarah Wald Stark.

Ms. Winston: Okay.

Ms. Wald: It would be Johanna Wald Gassler.

Ms. Winston: Okay.

Ms. Wald: Frederica Wald Sherman.

Ms. Winston: Okay.

Ms. Wald: My last son, Tom, was born in 1960, he runs a mutual funds business and lives in Birmingham, Michigan just outside of Detroit. I have ten grandchildren.

Ms. Winston: I should test you to see if you remember all of their names (laughter).

Ms. Wald: I do, I do because I just had six of them staying with me last week, two of the girls and the four boys. They range from a senior at Harvard to two four year olds entering kindergarten.
Ms. Winston: Oh, I'm glad. You had a house full, it's wonderful. And all of your children are married. And all of them have children, okay?

Ms. Wald: And from the woman's career point of view, all three of my girls are professionals -- I can say "girls" because they're my daughters.

Ms. Winston: Right.

Ms. Wald: They have all combined in variations the motherhood and career business. Sarah worked pretty steadily until she went to England. During the couple of years in England, she was mostly home. She did do some long distance work for Harvard and then she developed a talent and an enjoyment which she had let go for many years in art and began producing silk screens for museums that turned out to be quite saleable. Now she has a job that satisfies her desires to do good in the law as well as to have enough time to pursue her artistic talents and not to be as crisis bound as she was during the Harvard jobs. Her youngest is 7 and she just doesn't want to be so tied up she can't spend enough time with him. I'm not a great believer in what I think as the extremist positions of the "you're a traitor to your gender if you don't pursue a career relentlessly all through your life" school.

Ms. Winston: You're speaking of the "Mommy wars" debate currently going on now?

Ms. Wald: You know, the notion that motherhood is not a fulfilling job. I want to tell you. I think it is a false debate and is being done largely for publicity's sake. That debate has been going on for a long time. In my view, how you pursue your life as a parent and careerist is a question of individual personality and individual preferences and I've never seen any science that says definitely either full-time or stay-at-home mothers are a minus for mother or child. It's always a function – for
myself, at least — of all the circumstances. I did not want to go back to work until my kinds were in regular school. I respect other women's choices to go back earlier. I have two daughters who went back earlier. But then later on each reverted for a time to part-time work because they really thought there were periods when they didn’t want to be constantly rushing home at night for "quality time" instead of having a more consistent presence in their children's lives.

Ms. Winston: Well, I was smiling when you were talking about going back to Arnold & Porter in '54 just to let them know that you’ve decided not to come back because you wanted to devote your full time to being a mother of your child and you went to school to learn those word-for-word what I did when my eldest daughter was born, I was suppose to start graduate school out at Berkeley. But anyway that’s for another time. But I have exactly the same feeling; I mean it never occurred to me that somehow I was betraying the working woman. No, I agree with you, I agree with you.

Ms. Wald: My mother, as I remember, had to work all the time. There was no welfare. We were living in an extended family. And I could see how much she wanted to give me more time -- she gave me all of her extra time, but I could see how much she really would like to have had some additional time at home with me. So when I had the option, the economic option, of being at home with my children — I took it. Plus, there was one period when one of my kids was borderline in terms of his health. When Doug was four years old developed a sore throat regularly and they recommended a tonsillectomy. This was at Children's Hospital in 1959. He came
home and he was okay. for a couple of days and then he started hemorrhaging blood. We went down in an ambulance at night three different times to Children’s Hospital. The last time my husband was unavoidably out of town and my mother, thank god, was staying with me. In the middle of night he began hemorrhaging huge clots of blood. We called the Bethesda rescue squad. When they got him to the hospital, they called the doctors out of a medical meeting and they just took him into the operating room and slit him from ear to ear. And found he had some massive staph infection that had eaten away at the surgical area. The doctor told me later that he had to put his thumb in there to stop the bleeding. They sewed up the whole area, put him on a massive amount of antibiotics, and we all held our breathes. He was in Children’s Hospital for three weeks -- a four-year old with a tracheotomy so he couldn’t talk. Bob and I took turns so one of us was always at his bedside, day or night. For a year afterwards it was like living on tender hooks. I could no more have gone out of that house to work because every time he coughed, every time he blew his nose, every time he got up at night, we went into red alert mode.

Ms. Winston: So you don’t look back on that with any second thoughts about the time you spent at home? You were fortunate in being able to do that.

Ms. Wald: I was. Then Tom was born in 1960. By the time he was ready for kindergarten, and while I was still at home with my children, a couple of good friends from law school now in their peak years as lawyers, persuaded me with part-time opportunities to get back into the law. One of them, Fred Rowe, was a partner in a big firm. Anyway, Fred whom I had known at law school and on Law Review
was writing a book on the Robinson-Patman Act. He asked me if I had any time, to help with the research and footnotes. He would come by my home and give me these big packs of cases to read and turn into footnotes as well as a little bit of text drafting. I would say this was about 1962 or 1963. Along about 1963 or 1964, Dan Freed, also a YLS class mate and friend was doing some work in the Bobby Kennedy Justice Department. He started out as an antitrust lawyer but Bobby Kennedy decided that he was interested in the problems of poverty and criminal justice. He recruited Dan who was also interested in these issues and took him out of the antitrust division to work on these problems. Dan's specific assignments focused on bail and criminal justice. Dan was able to get a consultant's contract from the Justice Department for me to help. This was in 1963 and 1964. Dan and I worked very closely on the bail conference, the National Bail Conference of 1964 and he and I wrote the book for it. I did a lot of other pre-conferencing work, communications, speaker selection, etc. That was actually my first reentry into the outside world as I worked at the Department and did a little traveling. I met a lot of significant people at the conference. Chief Justice Warren did the opening keynote. I met Bobby Kennedy and Nick Katzenbach who later became the Attorney General.

Ms. Winston: This is the OEO conference?

Ms. Wald: No this was shared by Justice and the Vera Foundation. The next Conference I worked on a year later was an OEO project on Law and Poverty. But that opportunity definitely resulted from the Bail Conference experience. The sponsors of the OEO Conference which would focus on legal services for the poor
decided that the Book Dan and I had done which was called *Bail and Criminal Justice* in 1964 was a model for a similar publication they wanted to do for their conference. In the Bail report we pulled together all the information on bail projects in the United States so that it became a resource book used in law schools and local governments. I ended up agreeing to undertake a similar venture on legal services for OEO but this time alone, not as a co-author and I still had kids at home.

Ms. Winston: Were you doing most of this work at home?

Ms. Wald: A lot of it. Most of it I would do while the kids were in school or at night after they went to bed. Those were the days when I had energy to stay up until 2 or 3 in the morning. I could do that then.

Ms. Winston: Yes.

Ms. Wald: Yes. I discovered several years ago, that I was no longer capable of those all nighters. Jack Murphy who now teaches at Georgetown and Bruce Terris who practices in Israel were organizers of the Conference and the ones I worked most closely with. I had to produce the OEO book in two months. When I look back, I am amazed that I could have done it. I had no administrative help nor any household help.

Ms. Winston: Okay.

Ms. Wald: But still...

Ms. Winston: You did the book in a couple of months?

Ms. Wald: Yes. So, okay, that's what I did in the early and mid 1960's. I'll move through the 1970s fairly quickly. I received an appointment by President Johnson to the
D.C. Crime Commission, mostly as a result of the work I’d done on the bail project which lasted roughly two years. Jack Miller who had headed the Criminal Division in Bobby Kennedy’s time was the chairman. Bill Rogers the former Secretary of State was on it; Marjorie Lawson, a former juvenile court judge as well, Clyde Ferguson, the Dean of the Howard University Law School and Abe Krash from Arnold & Porter. I worked at two levels as a Commissioner and on the adjunct staff which gave me an advantage over others with full-time jobs. I went to the Commission meetings, but also came into the office a lot of days and worked with the staff; I drafted substantial parts of several sections. I did a lot of writing and a lot of editing that went into the final report.

Ms. Winston: Was this paid work?

Ms. Wald: No, the Commission was not. And neither was the extra staff work at that time. My husband was the breadwinner all during this period. There’s no question about that. My primary goal, aside from the gratification of the work itself, was to get re-launched back into the profession.

Ms. Winston: Was that on your mind at the time, the idea of sort of being relaunched into the law.

Ms. Wald: Yes, yes.

Ms. Winston: Okay.

Ms. Wald: I had women friends in similar positions during this period. Jodie Bernstein had three kids. After about a decade raising them, she ended going back to work at roughly the same time but we took different routes therefore we both benefitted from networking with former classmates. Jodie went to work for another
classmate of ours, Bill Wolf. She assisted him in a one-person practice. Then she went from there with the help of my husband and some other people to the Federal Trade Commission which is where she got her real start. First as a staff person, later as head of the Consumer Division. For both of us, the help of our male classmates deserves much credit for later success.

Ms. Winston: But it’s interesting that the contacts and associations, friendships that you made in law school became critical to both you and Jodie and I’m sure others.

Ms. Wald: Absolutely. And because friendships were available, they provided the flexibility necessary to arranging job schedules that we were comfortable with in transitioning. If you are working with strangers, you are more reluctant to say “I can’t come in tomorrow but I’ll make it up” or they are less likely to volunteer “I’ll drop this off at your house.” When you have known each other, worked together before and respect each other, you know that the other person is going to produce even if it is on a different time scale and in a different way than a regular employee. You don’t have this feeling that it’s got to be done just so. It made it possible to do projects on a more flexible level. At the same time I was working on the DC Crime Commission as an official member-staffer, there was a National Crime Commission going appointed by President Johnson that ran simultaneously, chaired by Nick Katzenbach and directed by Jim Vorenberg, later Dean of Harvard Law School. I did two major reports for the National Commission, one on the influence of poverty on criminal justice and the other one on the role of citizens in the criminal justice system. It was a very fun and fulfilling period. I used to come downtown every day to the Crime Commission
offices. By this time, Tom was in school full time, so basically, I was free until late after noon.

Ms. Winston: Those offices were in the New Executive Office Building?

Ms. Wald: No, they had rented space over behind the Labor Building.

Ms. Winston: Okay.

Ms. Wald: The National Commission. I'm trying to remember where the DC Commission was located.

Ms. Winston: There were some offices in the New Executive Office Building for the President's Commission on the Causes and Prevention of Crime. I worked for that too.

Ms. Wald: That was different. That was with Lloyd Cutler.

Ms. Winston: That's the one I'm thinking of.

Ms. Wald: That came after the 68 Riots.

Ms. Winston: Okay, so this is different.

Ms. Wald: Yes, this was 1965, 1966, and 1967.

Ms. Winston: We need to get the chronology straight first.

Ms. Wald: DC Crime Commission ran simultaneously with the National Crime Commission.

Ms. Winston: With the National and that was around 67.

Ms. Wald: No, it actually began in about 65 and run through the late 60s.

Ms. Winston: And the National Crime Commission Reports which were different from the reports I was talking about. Sorry about that. And those reports were issued also around the same time.

Ms. Wald: Yes.

Ms. Winston: Okay, Okay
Ms. Wald: I said they were fun times because you knew all the staff, worked with the staff, who were interesting people. We all went out to lunch together. Then came 1968 which was really a turning point year for the nation as well as for me. President Johnson went out of office of course and Nixon came in. So all the Justice Department people I had worked with like Dan Freed were gone. And a whole new crowd of which I was certainly not a part came in. All the people I’ve talked about here that I was working with pretty much went off in different directions. But I did work for the Violence and the Riot Commissions, which were appointed after the 1968 Riots.

Ms. Winston: There was the Commission on the Causes and Prevention of Violence and the Kerner Commission.

Ms. Wald: Yes, I worked for both.

Ms. Winston: They were established around the spring or summer of 1968 as I remember. I remember that the Commission on the Causes and Prevention of Violence had a big hearing the day after the election in which Nixon was elected President. That was why Pat Harris was so furious that the staff had set up the hearings for the day after the election. Because she had been working very hard for the election of Hubert Humphrey.

Ms. Wald: On the Kerner Commission, I wrote their chapter on what happened in the courts during the riots. I had actually been there and worked in the DC courts in the days afterwards and represented several defendants. I remember being down in the cellblock with tear gas and all that. Thousands were arrested in D.C. and the courts and Bar called for lawyers to come down to represent them at bail hearings.
At this point, I had really had no courtroom experience. Nonetheless, I ended up with several defendants down there which I took through to dismissal or up to the Grand Jury. And, as I say, I wrote the chapter for the Riot Commission on the court processing of people in riot conditions. For the Violence Commission, I wrote a chapter on the plight of poor people in the civil legal system.

Ms. Winston: They were going on simultaneously?

Ms. Wald: I am pretty sure they were going simultaneously.

Ms. Winston: What did they pay for this work? What about the work that you did for the National Commission.

Ms. Wald: I think I got a stipend for the one or two things I did for the National Crime Commission but not for the DC Commission. After the election, I worked some for the Vera Institute of Justice in New York. Again Herb Sturz was the director and had put together an effective reform outfit which is still a potent force in New York.


Ms. Wald: I worked here. For Vera – I worked on the bail issues, for proposals for the methadone alternatives, the alcohol treatment proposals and one or two other things. What I'd do in the late Sixties was to take the shuttle up to New York and meet with Herb, I'd get my assignment and do it back home. It was actually easy to travel back then, easier than now. By this time it was okay for me not to get home occasionally until the early evening. I would have someone there when the kids came home from school but they were pretty self-sufficient. My oldest
daughter was already in her teens. I worked this way for several years for the Vera Institute and I eventually went on their Board in the early 70's.

Ms. Winston: Okay.

Ms. Wald: I forgot to mention one other thing that happened while Johnson was still President and Warren Christopher was the Deputy Attorney General under Attorney General Ramsey Clark. This was after the Crime Commission so it must have been in 1966 or 1967. Christopher told me that they had a vacancy over in the juvenile court and asked if I would like to be considered for it. I thought about it but ended up saying "no, thank you very much" at that time. I felt that I did not have enough experience or practice behind me to be a judge. Nowadays, given what I know about judicial appointments I wouldn't have been that reticent. But I was still not sure whether I should become a full time judge with the kids at their various ages and stages. And Joyce Green got that appointment. We became good friends later on.

Ms. Winston: And was Abe Fortas involved in this?

Ms. Wald: I was told he recommended me for the position.

Ms. Winston: I see.

Ms. Wald: Still in 1968, I remember sitting on the beach, Bethany Beach (Delaware) with the kids wondering "what am I going to do now?" What is out there that I can do in my present situation? I had a chance conversation again with an old friend who was then heading up the test case litigation unit in the Neighborhood Legal Services Program. He needed someone to undertake backup research and the like.
I said, I’m not sure I can take a full-time job. So I ended up splitting a job with Maggie Farrell. I don’t know if you know her.

Ms. Winston: I don’t.

Ms. Wald: She was a Yale law school graduate. She’s done everything. White House Fellow. She’s taught. She worked in a law firm. Just a lovely person. Anyway she had a couple of kids and so they split a job between us. Actually it didn’t turn out at all the way I thought it would. It was one of those scenarios that illustrate the law of unintended consequences. I went to work for them and I did a couple of reports, one on truancy on the extent of the problem and what could be done about it, one on witness fees in civil cases. But then gradually I got moved into the mainstream of the litigation itself which was a great break for me. I stayed there for two years until 1970. During those two years, I ended up getting into court a lot. I argued the case in the U.S. Court of Appeals here that got free divorces for poor women, who had previously been denied them in the local domestic relations court. Remember this is a period before the D.C. Court Reorganization Act when cases went up through local courts but then could be reviewed by a writ of certiorari in the U.S. Court of Appeals. The U.S. Court of Appeals was in its progressive heyday, consisting of Judges David Bazelon, Skelly Wright, Spottswood Robinson, Harold Leventhal and Carl McGowan. It was just a wonderful place to go if you were representing the poor or disadvantaged. So, as legal services lawyers, we always had to swallow twice to get our cases through the DC systems and then get a writ of cert to the U.S. Court of Appeals. At the time, the domestic relations branch of the local courts was
headed by a judge who was not enthusiastic about divorces in general.

Furthermore, Legal Aid had a rule that their lawyers could not represent poor clients in divorce actions. They could represent them for separation, not divorce. Legal Services of course took a different attitude and brought a law suit against Superior Court on behalf of some of the women to obtain a ruling that poor women could obtain waivers of filing fees in divorce action. The prevailing rule of the Division was that when women went into court for a divorce, they would have to plunk down $100 not just to cover the court filing fees but also to pay the expenses of the defense lawyer if they lost the case. Needless to say, many poor women could not afford the $100. It was just a discriminatory set up, and it hadn’t been legally attacked before our suit.

Ms. Winston: I’m going to take you back since it’s almost an aside. But you talked about splitting a job with Maggie Farrell. I’ve been under the impression that this whole notion of job sharing was relatively new.

Ms. Wald: Well, it happened back then — perhaps not often. We worked the same hours just not so many of them. I was paid for half of a full-time job and she was paid the other half. We worked whatever time we could work.

Ms. Winston: I see. Did you need to work together? Did you have a different set of responsibilities?

Ms. Wald: Yes, we did completely different things.

Ms. Winston: So it was not shared responsibilities? They just took a position that was for one person and split it in terms of the pay?
Ms. Wald: Yes, we each worked 20 hours or more and we just did what we did. She was a health specialist.

Ms. Winston: I didn’t want to lose that piece of it because I think that would be particularly interesting in the context of women in the law.

Ms. Wald: During those two years at Legal Services I argued several other cases. I argued a three-judge court case on residency requirements for St. Elizabeth’s. Many of these poor, older women who had moved to D.C. to be with family from Alabama or some such place, would become mentally ill and go into St. Elizabeth’s. St. Elizabeth’s would automatically move them back to their home state mental institution. At that time the state mental institutions in Alabama and Georgia were pretty bad, worse than St. E’s. This was after the residency requirement for welfare recipients had been knocked down in the Supreme Court. We brought a three-judge court case on the St. E’s residency issue. And I argued it and won. There was another case in which I was on the brief but didn’t argue. This was a habitability case which is in all the law school textbooks (Javins v. First National Realty Corp case 428 F.2d 1071). I think Florence Roisman, my colleague at NLSP, argued it. So that’s where I got my litigation experience even though I’d originally been hired only to do back-up. The Legal Services lawyers I worked with were “the best and the brightest”, dedicated, idealistic, hard-working and despite the bare boned offices we had great esprit de corps that went on until well into the 70’s. Then Legal Services had this sort of internal convulsion. Actually it was kind of a black-white [racial] issue. It shouldn’t have been, because none of us were racists. It grew out of a directive issued by some of the leaders of UPO
saying that there were too many white people in the Legal Services offices. It's true if you looked at it numerically you would have found disproportionality between the population of D.C., maybe even the larger population, and our racial breakdown. I didn't do any recruiting so I don't know (though it's hard for me to believe) that the charges of discrimination were correct. But the press made a great deal of it and many of the people there decided to move on. The UPO leaders didn't handle it with a good deal of grace, whatever the right their cause might have been. As a result, many good people resigned. Florence Roisman left and went on to teach at Catholic University Law School. I left at the same time too. It was an unpleasant, unnecessary and nasty kind of internal confrontation.

Ms. Winston: And you were pushed out by the people in charge of Legal Services?

Ms. Wald: Well, a bit portion of the test case unit left as their cases ended – the flack came from the upper echelon of the UPO. The legal work was solid and good but the atmosphere just became too tense. We won a lot of victories and I think we did a lot of good. It wasn't our job to recruit or even in the bigger sense to strategize how the community could be more adequately represented in the unit but the situation was not handled well.

Ms. Winston: Right.

Ms. Wald: After I left in 1971 with whole host of other people, it was again a question of what am I going to do now. At this point the Ford Foundation, with which I had had no previous contact, came into the picture. Herb Sturz at Vera where I had worked had a lot of contact with the Ford Foundation because he got most of his money from it. Mike Svirdov who was head of the National Affairs Division in
the Ford Foundation wanted to do something on narcotics. At that point heroin not cocaine was the main focus. Herb and Mike came up with the proposal of having outside people take a dispassionate comprehensive look at what was going on in the narcotics drug area, with a view to coming up with some recommendations before they plunged into active programming. At this time, some groups were counseling abstinence, some were beginning to experiment with methadone, some were going the behavioral modification route and some sticking to criminal treatment. Peter Hutt – who was a partner at Covington & Burling – had an interest and expertise in alcoholism treatment and the two addictions had many things in common. Peter and I pared up to do the Ford Foundation survey. We worked for six or seven months to develop a broad overview of everything going on in the drug field, and then wrote a report for the Board to use to decide what they wanted to do next on the issue. Everything connects with everything else. Peter had argued in the Easter v. District of Columbia case in which the D.C. Circuit decided an alcoholic could not be prosecuted for public intoxication. This case was decided a couple of years before the Supreme Court case which went the other way. We worked together on the chapters in the Crime Commission reports on alcoholism and crime. So we knew each other well. We got one other staff person to work with us, Jim DeLong and we had an office on M Street. We went all around the country looking at all of the drug programs, and eventually produced a report which became a commercial book. The New York Times called it a seminal work on drug treatment and education.
Ms. Winston: And the name of the book is?

Ms. Wald: *Dealing with Drugs.* It was published in 1972. We worked on it in 1970 through 1971. I've still got the book. Before that and after the alcoholic case (the *Easter* case), Peter Hutt got tagged by the Lawyers' Committee to take a test case on narcotic addictions as a defense to prosecutions for possession of heroin. Actually we were invited to bring such a case by *dicta* in the *Easter* case, which suggested that if the prohibition applied to alcoholism maybe it should also apply to drugs. Originally, Peter had the case alone. I didn't work on the brief or do anything except to talk to Peter about the issues. But in September of that year, it was one of a very few cases scheduled initially for hearing before an *en banc* court in the DC Circuit. Peter was scheduled to argue it. However, about two weeks before the argument, Peter got appointed to be the General Counsel of the Food and Drug Administration. He filed notice with the court with the backing of the Food and Drug Administration saying there was no conflict to his going ahead with the argument. However, the court said: "sorry we do". The court said either you get somebody else to argue it now or it goes to the bottom of the schedule for argument next April or May. So on Monday, Peter calls me up and asks if I would argue it that Thursday. I hadn't even read the brief yet. I stayed up two nights and read the record and the cases and argued it. The argument seemed to go well but the story doesn't have an altogether happy ending. For two years, the ruling didn't come out. Eventually when it did I lost by a 5 to 4 vote. Although it was very clear that at one point in the process we had almost won. However, Congress had passed a statute in the meantime saying any first offender of drug
possession could get probation. Judge Leventhal who was apparently the swing vote used that to say “well maybe this is a problem that Congress should be given the chance to handle first”. So it was relatively clear from reading both the majority and dissenting opinions that the vote count had switched from an initial 5 to 4 in our favor to 5 to 4 against. Judge Leventhal who wrote on the majority side gave me a nice plaudit applauding my coming in at the last minute and doing a good job – which was nice.

Ms. Winston: What was the caption of the case? Was it Easter?

Ms. Wald: No, that was the alcohol case. This was the Lawyers' Committee case. This was U.S. v. Moore. I did a Law Review article on it later. We tried for certiorari but it was denied but Thurgood Marshall filed a dissenting opinion from the denial of certiorari. Going back to women in the law for a moment, I just want to note that the Legal Services office was a place full of talented women: Florence Roisman the housing expert, now a Professor at Indiana Law School, Margaret Farrell, the health expert, thorough, quiet and restrained but so good, Mary Beth Halloran who won the path breaking case on unconscionable consumer conditions in the Walker-Thomas case. She brought that case. We had really extraordinary women there. Mary-Ann Stein was there. She runs her own foundation now. It was just a very solid group. I remember that Mary-Ann Stein won an abortion case in the District Court, well before Roe v. Wade. So there was a lot going on. As a result of the drug report, I got elected onto the Ford Board of Trustees. They took two women on at once. When I did the report, we had to go up and report to the Board and there was a lot of interaction with the Board. In addition to myself,
Dorothy Marshall from academia, a former President of Bryn Mawr, was elected. She died in the 1980's. She was someone whom I liked very much. We did a lot of traveling abroad together to look at Ford projects. We were the first women elected to the Ford Board. That must have been in 1972. During this time I was also part of a founding group for the new integrated D.C. Bar. In the 1970's, following the D.C. Court Reorganization Act's passage, a group was organized to propose the first slate of officers for the new D.C. Bar. Of course, the reason the D.C. Bar provision was put into the Reorganization Act was that the Nixon administration thought it would be a conservative influence. They thought the voluntary bar was getting a little bit too liberal.

Ms. Winston: Okay.

Ms. Wald: Other states had integrated state bars. We put together a winning slate which could not have been welcome to the Administration. I served on the new Bar Board for several years. At that point I also joined up with a group of mostly young lawyers who were putting together one of the first public interest law firms; Charlie Halpern and Bruce Terris and several other young Turks; we had some Ford money, some other foundation money and it was set up to do test case litigation in the public interest. Many if not most of our lawsuits were against the government for their actions or inaction in several different fields. So between 1972 and 1977 I became affiliated with an offshoot of what was initially created as the Center for Law and Social Policy. This split off organization was the Mental Health Law Project which is now the Bazelon Mental Health Center. I worked with Joel Klein, the current Chancellor of the New York City Public
Schools and Ben Heineman, the former General Counsel of GE as well as others. Marsha Greenberger, the head of the National Women's Law Center and Joe Onek. We were a sort of shadow government for the upcoming Carter Administration.

Ms. Winston: All those names are very familiar.

Ms. Wald: While I was at MLSP, I did a lot of work on juvenile and mental health work. We brought a number of test cases. This experience constituted a big share of my practical experience in litigation. The cases were brought as class actions. Perhaps the most significant one was *Mills v. The Board of Education* which was a special education case. I litigated it with Stan Herr and Julian Tepper. It took us quite a while but in the end we had a real legal success – rights for all mentally and physically disabled children to publicly-supported education. Ben Heineman and I did the St. Elizabeth's case which attempted to get people into community mental health facilities rather than subjected to unnecessary institutionalizations. And, we were involved in lengthy litigation down in Texas in the *Morales v. Truman* case. This was a case brought against the conditions and lack of treatment in juvenile institutions all over Texas. We were before Judge William Justice. He was the presiding judge and known to be a great crusader for justice. We litigated in Tyler, Texas where we were treated like rank undesirables outside of the courtroom. It was a town where we had to take our own liquor with us if we wanted to have a drink. I didn't drink a lot but even if you just wanted one drink at the end of a hard day in court you had to have your own supply. It was a dry town and they wouldn't let us in any of the places that sold liquor. One of our
lawyers who had started this suit was actually at one of the rural institutions where we were conducting depositions when some of the “trustees” – older kids under the central guards – beat him up in the bathroom. It was a rough place.

Ms. Winston: This was one of the lawyers that was down there with you?

Ms. Wald: He had filed the original suit for the plaintiffs. The Mental Health Law Panel came in as litigating amici. We had a big group of lawyers involved and thousands and thousands of class members. I had a special responsibility for the part of the case involving the girls’ institutions; they were then called “PINS.” Most of the girls in the institutions hadn’t committed any crime but they were incarcerated as needing supervision as runaways or truants. We had a couple of years of depositions, a lot of pretrial activity and then a trial that lasted all of one hot summer in Tyler, Texas. And then the follow-up paper work in order to get the decree. And then several years after when everybody who was initially in the suit kind of disappeared, I was still trying to enforce the decree right up to the time I went into the Carter Administration in 1977.

Ms. Winston: So you were spending a lot of time away from home?

Ms. Wald: Yes, but by this time, a couple of my kids were in college. Only the last two were at home. I wasn’t away for months at a time. Except for the trial, I was away at most for a few weeks at a time.

Ms. Winston: I was just going to ask you about that.

Ms. Wald: By 1979, my youngest was going to college. But during the trial two were at home.
Ms. Winston: I first began seeing your name around 1973, 74 probably. I was helping the District of Columbia public schools develop a due process procedure.

Ms. Wald: Yes. Judge Waddy was overseeing the Mills case. I went to many of those individual hearings on special education for disabled children. It was a sticky wicket. The Board of Education never appealed the main ruling. They were really on our side. Remember Polly Shackleton?

Ms. Winston: Yes I do. A member of the City Council.

Ms. Wald: She backed us all the way through. And there was a member of the Board of Education, an older woman. She always had her husband with her. And he was kind of a quiet guy

Ms. Winston: She’s a neighbor of mine and she calls herself the “grandmother of the world”.

Ms. Wald: These were people who were embarrassed to be defendants in the suit on behalf of the kids. Frankly, we had to play a bit of theatrics in this case. Some of our plaintiffs were over 14 and had never been inside a school. I think the name of the woman we talked about was Hilda Mason.

Ms. Winston: Hilda Mason and her husband Charlie.

Ms. Wald: Right. So anyway, these were the three cases I principally worked on: St. Elizabeth’s, Morales, and Mills. Ben Heineman and I also did a case on the Youth Corrections Act which was before District Judge Barrington Parker.

Ms. Winston: Barrington Parker?

Ms. Wald: Yes. Barrington Parker. The Youth Corrections Act issue dealing with the degrees of punishments or treatments for young offenders later went up to the Supreme Court but without tangible results. I was also working on a Carnegie
Foundation project during this time dealing with policy for children. We produced a book from that. Also during that period I worked on the ABA Juvenile Justice Standards. We produced around 15 volumes on all the legal aspects of juvenile law. Aryeh Neier was on the Commission.

Ms. Winston: Who was?

Ms. Wald: Aryeh Neier now heads up the Open Society Institute and has been head of the ACLU and Human Rights Watch. And so that was a major effort, a major ABA effort.

Ms. Winston: Would you describe your attachment to this work. I'm sure it was both rewarding and frustrating given the subject matter. That is, dealing with rights of children, and the mentally disabled and their rights. You were obviously working very hard in order to do things that you were doing. And so characterize it.

Ms. Wald: They were enjoyable years because I still had my kids at home for most of the time. I enjoyed them but they weren't babies. So I had some freedom. I felt some times I was overly optimistic about what I was engaged in but I usually felt as though we were on the edge of getting the right kind of change. I enjoyed the people I worked with. I don't remember ever feeling that anybody, except opponents, presented insurmountable problems. I generally felt people I was working with were great allies and we were working pretty much together as a team. So, on the whole, I thought they were satisfactory years. And I loved learning how things worked in the lower courts so that I had some confidence that I could negotiate the court system and achieve good results.
Ms. Winston: Did you find yourself discussing your work with your children when they became young adults, or as they were becoming teenagers through this period? Did you talk a lot about your work life at home?

Ms. Wald: Not a great deal. I followed my kids’ lead. I’d be interested in what your experience is. Sometimes you’d have something especially colorful to talk about. I had a rape defendant that I had to represent in a juvenile court case the day before the family was scheduled to take a beach vacation. So, I had to share some of the situation with the kids. It was a rape case in juvenile court and it was kind of interesting culturally. This was in the late 60’s. I have to tell you that I wasn’t really tuned into women’s issues like Betty Friedan and others until much later. In other words, I wasn’t really into the philosophical aspects of feminism.

Anyway, at that time the Legal Services Corporation could represent juveniles in juvenile court although we didn’t do adult criminals. So this particular case came out of one of the neighborhood offices. Orm Ketchin was the juvenile court judge. He lived two streets down from us and our kids went to school together. It was a rape case involving an African-American kid who was 16 or 17 years old, a ghetto kid who didn’t speak good English and who was accused of raping a young matron on one of those nice upper class sections off of McArthur Blvd. The charge was that he was mowing the lawn and she invited him in for lemonade and he attacked her and ran away. She was a young educated matron. Her father was a well-known doctor and her father and mother lived up in Palisades. It was summertime and for some reason I was called to be a co-counsel at trial. The first thing was that the judge called us into chambers and said I want you to know the
plaintiff's father and I were classmates at Princeton together. At this point we didn't want to disqualify this judge as he had the most pro-defendants' rights reputation on the court. At that time you could expect the jury would probably be predominantly black. When the plaintiff arrived it was clear that she was very tense. It also became clear that this case would be highly racially charged. We ran our case conscientiously and honestly. But I thought afterwards, would I ever do that again? I don't know. How much of the dynamics in the case were a kind of a carry-over from other events in the city, I don't know. I think the incident could have come from the fact that this kid who was not too bright hung out with a bunch of guys at a nearby Esso gas station and there somebody may have suggested to him "why don't you go for it?" But he persistently denied that the intercourse was not consensual. So there was this blurry line between whether it was consensual or not. It was very hard to answer the question or to know what actually occurred. He never admitted it. I did put him on the stand. In some ways, against my better judgment but he had to have defense counsel. I was an outside person looking in but it's very hard to believe she -- the plaintiff -- would have made up the story. However, from his background and the way he thought it is possible that he simply believed she was inviting his attention. But he was acquitted. But it was one of the few cases where I wondered whether or not justice was being served.

Ms. Winston: You are saying that you had to take this case because the current NLSP lawyer needed some assistance but it was also summer and you to delay your vacation
with your kids. As a result you had to explain to them why the vacation had to be delayed.

Ms. Wald: I remember the kids were worried about that. However, they were old enough so we could talk to them about the situation. But mostly I followed my kids’ lead as to how much they wanted to be involved in what I was doing. They had their own lives to lead. They weren’t really into this business of what was happening in my work. Your children have their own lives and they want to think of you mostly as a parent. They might have some modest degree of happiness from the fact that you are doing well in your outside work, but they’re not really interested in your day to day life and they shouldn’t be. One of my kids was interviewed by the Legal Times in an article about lawyer children of mothers and fathers who were lawyers and they asked my son Doug about me. He said “when she was appointed to the DC Crime Commission, I thought, why did they appoint her to that? That’s my mom.”

Ms. Winston: I want to make sure we have the right dates. You were at the Mental Health Law Project from?

Ms. Wald: Roughly 1972 to 1977. The organization went through some permutations in the early years, that is to say, it was originally part of the Center for Law and Social Policy and then it spun off.

Ms. Winston: Okay, okay.

Ms. Wald: From 1975 to 1977, I was the Director of Litigation. In 1977, I did some work on the Carter campaign task force on criminal law issues. I remember meeting Stu Eisenstadt for the first time. I was a dedicated Democrat but I didn’t do anything
important in the campaign, just a few papers for the Task Force on criminal justice.

Ms. Winston: Were your family members always Democrats?

Ms. Wald: My husband came from a Republican family but they were pretty moderate and he, as long as I knew him, was a Democrat. My family all were Democrats.

Ms. Winston: So this was the Carter Presidential Campaign you worked on?

Ms. Wald: Yes, and right after the election I got a call from Margaret McKenna who was heading up a transition task force to identify women for policy positions in the Carter Administration.

Ms. Winston: She was married for a time to Arnie Miller, the headhunter

Ms. Wald: Right. I married them.

Ms. Wald: Anyway, she was compiling a list of woman that they wanted to interview for various, prospective Cabinet and sub-cabinet jobs. I got a call to go down to an interview with Griffin Bell at King & Spaulding in Atlanta which, of course, I did.

I had a pleasant interview with Bell. We really had never seen each other and I frankly had not known much about him until his name surfaced for Attorney General right after the campaign.

Ms. Winston: Griffin Bell had been nominated or selected by Carter to be his Attorney General.

Ms. Wald: Prospectively. He wasn’t yet nominated at this time. This was during the transition period. I remember running into other people in the foyer of King & Spaulding whose names I don’t know, other women many of whom eventually got positions in other places in the Carter administration. Probably more important than the interview was that he had a group of young assistants who he
later took over with him to the Justice Department. Terry Adamson was one, John Harmon who later became the head of the Office of Legal Counsel was another. They were the contact points for follow-up after the interview. The interview was in late November. I didn’t hear anything for a long time and I had these secret phone conversations with Barbara Babcock whom I had known from the days when she was head of the Public Defender Service and was then teaching at Stanford Law School. She said I can’t tell anybody, but I told Bell the only thing I would take was the Civil Division because she had been in the criminal field so long and wouldn’t want to do that again. I had heard roundabout, that several assistant AGs had already been selected. He wanted Ben Civiletti for Criminal because Ben Civiletti had appeared before him and he wanted Drew Days for Civil Rights and he wanted Wade McCree for SG. So there weren’t as many shots left for which I had any qualification. But his assistants liked me and we kept in touch and at one point Bell offered me the head of LEAA [Law Enforcement Assistance Administration]. I knew Jerry Kaplan was over at LEAA and he had been an old friend from the National Crime Commission and I called him and he said come on over. When I got here he said, “we can’t talk here” and so we had to go over to some coffee shop next store. He advised me that the triumvirate structure at the head of LEAA just doesn’t work. He said: “don’t take it. It’s just awful.” I told Bell, for good or ill, I didn’t think I would be good at that job. He said, “I don’t blame you, I wouldn’t take it either.” He was not one of those people like others who had the attitude that you were supposed to jump at the chance to be in the Administration whether or not you thought you
would be any good at the job offered. I really liked him for that. So I waited
some more and eventually they offered me an assistant AG position in the Office
of Legislative Affairs which is typically given to former lobbyists or someone
who has had a lot of Hill experience. I knew very little about the Hill. During
the Legal Services period, I had gone up there and testified dozens of times.
Legal Services could then offer testimony on their legal positions, an authority
later taken away from them. So I had a minimal working knowledge of the Hill --
not as much as I should have had as it turned out. I soon found out I really didn't
know much and had a lot of catching up to do. It was a very small office and
strangely enough, it didn't have a lot of politically savvy people in it. There were
some old-timers who mainly did paper reports not real lobbying and its reputation
in the Justice Department generally was not very good when I got there. People
told me that the big divisions, the Antitrust Division, the Natural Resources and
Criminal Divisions, would hire their own in-house legislative persons and by-pass
the Office of Legislative Affairs. I did my best to change that some and I think
succeeded to some degree in establishing its reputation as a substantive place with
people who could help the other divisions get things done on the Hill but I didn't
try to immediately take over everybody else's job. I found out that working
diligently with staff can be just as important as talking to Congress persons
directly. It wasn't so much be able to say, "Well, I had dinner last night with
Senator X" as it was being in the loop with his chief staff counsel. So, I worked
as cooperatively and honestly as I could generally with staff. I tried not to be
devious, indeed, I didn't now how to be devious in an area that I didn't know that
much about. I think I had pretty good relations with most of the Hill staff by playing it straight. I didn’t try to do anything dramatic or controversial to cut them out.

Ms. Winston: How large was your staff at that time?

Ms. Wald: It wasn’t more than 7 or 8, not counting a couple of clerical women who filed bills. But I worked a lot with people in other divisions. I remember one of the first times I was on the Hill at the time of the passage of the Independent Counsel bill. It was in Senator Ribicoff’s Committee, but it was the kind of bill that had a double committee assignment, so it was also over in the Judiciary Committee too. And Senator Jim Eastman was the Judiciary Committee chair for the first year I was there and he had the old-fashioned kind of lifetime staff. They were always courteous but their loyalty was solid to their boss. One of them came up to me after a hearing on the Independent Counsel bill and said: “We know what the official position of the department is (in favor of the bill). But you can just give us the nod and then we can get rid of this bill.” Because for sure a lot of people in the Department didn’t like it. When Phil Heymann came on as head of the Criminal Division, he didn’t like it. Civelletti, the Deputy Attorney General, didn’t like it. Bell didn’t like it. But one thing about Bell, even when he didn’t like something he played a really straight role with the White House. He never tried to undercut, a Carter initiative, whether he liked it or not. He would honestly support it, in this case he could have played along with the Judiciary staff because he had a comfortable Southern old-boy relationship with many of the Republicans
on the Hill, but he never did. Other people in the Department were not so pure.

One of the bills that went up there was a “motor-voter” bill.

Ms. Winston: I didn’t remember that that bill had been introduced that early.

Ms. Wald: Yes it was and they were having hearings on it. And one of the people -- not in my division, but from another division, had written an internal memorandum giving all of the negative arguments that had been put out by various people inside the Department and left it on a bench in the hearing room so people on the Hill got hold of it. Many of these sorts of games were being played. I was really not smart enough to play them even had I chosen to do this. Over the years on my watch, we passed the Foreign Intelligence Surveillance Act, and we passed the Omnibus Judgeship Act which got Carter his 158 new judges, established the International Trade Court and the Federal Circuit and a host of other legislation.

Ms. Winston: The Civil Service Reform Act came during your time.

Ms. Wald: You’re right there. Sometimes another department would have the lead. As in the case of the Panama Canal handover.

Ms. Winston: So you were appointed when?

Ms. Wald: I went to work in February of 77.

Ms. Winston: Okay.

Ms. Wald: February of 77 and I stayed until I went on the court at the end of July, 79.

Ms. Winston: And this Assistant Attorney General position was a Senate-confirmed position.

Did you have a hearing?

Ms. Wald: Yes I did but they confirmed four or five of us at one time. We weren’t subjected to a real hearing as there was nothing controversial about us, but I do remember
this funny incident. When we went in to meet Senator Eastman, I saw Senator Eastman eying Jim Moorman who had come out of the Sierra Club and had a long beard. Anyway, we all went in to meet with the Senator and it was sort of a general meeting; the Senator told us not to talk to the press under any circumstances between the time that we were meeting with him and the confirmation. Anyway he looked at Jim and he asked him: “would you walk over there for a moment and then walk back.” He then turned to Griffin Bell and said “do you really want this person for the job” and Bell said “yes”. He then said, “Well all right I guess you can have him.”

Ms. Winston: He didn’t say he better shave his beard?

Ms. Wald: No.

Ms. Winston: But there were no controversies involved in your confirmation?

Ms. Wald: No nothing like that.

Ms. Winston: Now, how long were you there?

Ms. Wald: Two and a half years.

Ms. Winston: Two and a half years. Okay, you were still in the Carter Administration when....

Ms. Wald: Ah: And then -- as a result of the Judgeship Act we had passed, all of these new Circuit Court positions were opened up and Carter, put into effect a new council process for picking appeals judges. These councils were made up of lawyers and lay people who would pass on their recommendations to the White House. This process got dropped in the next Administration. Anyway, DC had a council. Joe Tydings the Senator from Maryland was the Chair. I testified before him back in the Legal Services days innumerable times. I remember that Erwin Griswold was
also on the Council. He had been the Harvard Law School Dean but by that time he was working down here. There were some lay people on it. So all judicial applicants for the appellate court had to have the council's recommendation. A candidate had to fill out an application under this process. I was asked several times would I fill one out for the District Court and I said no. I didn't really want to be a district court judge. Not that I discount their importance, I just didn't want to leave the Department at that time to be a District Court judge. Bell's assistants knew I wanted the Circuit Court because I was quite friendly with most of them. So they let it be known to me that he would ardently support me for it and I applied. At the time I applied there were two new vacancies for the Circuit Court. So I got an interview and the interview seemed to go well.

Ms. Winston: And your interview with Council went okay.

Ms. Wald: Yes. And again, I knew this from my friends inside the Department -- Kelly Green when she was an assistant to Mike Eagan who was then Associate Attorney General. What happened is that Bell would get the recommendations out of these councils. There would usually be more than three, but they would be prioritized by the Council. Maybe they would pass on four or five names for two recommendations, but they would be prioritized -- and these would go to Bell and he was allowed to pass on his own choices among them. He would not consent to letting them go through the White House domestic staff for review. He would pass his choices through the political screening person, Ham Jordan, to make sure that a judicial candidate wasn't a kind of political death knell. He would not consult with the head of the domestic policy office.
Ms. Winston: Sarah Weddington?

Ms. Wald: Right, she had the domestic policy job. He refused to pass the names by her. He said, "I'm not doing that. I'll resign rather than go there, I'll take the names, give them to Ham Jordan, make sure that nothing's wrong politically with them and then walk them directly into President Carter's office, get my answer, walk out and tell the press." So Tyding's council came out with Ab Mikva and me at the top of this list. Griswold told me much later, that Bell had made it reasonably clear that he wanted me on the list but Griswold was very nice. He said, as a matter of fact I knew you were qualified but Bell made it clear what he wanted to happen. The Council sent its names over to Bell on a Monday night or Tuesday afternoon. There was a paper campaign going on by someone else on that list, but Bell wasn't having any of it. So, that was it. That was a great time. The publicity was favorable initially for both Mikva and me. Then the first reverberations of trouble came. I remember on April 1st one of the Congressional aides said to me the Congressional Republican Policy Group has decided to oppose you and Mikva. I was surprised because I had pretty good relations with the Republicans. Well, as it turned out they went after Mikva ultimately over his Gun Control vote -- the NRA was behind that. They went after me as anti-family because of the Ford Foundation drug book in which I had done a chapter on drug education which suggested there should be drug education in the schools. They characterized that as proof of my being anti-family. And I once gave a speech out of the University of the Minnesota about the rights of the child and I did say one time in passing that if you were looking at things entirely rationally you might
even consider whether or not children who evidenced the same degree of maturity as adults should be allowed to vote even below the 18 year age limit. That was probably a crazy thing to say. Anyway, I never pursued it but, they dug that out. The Republicans designated Senator Gordon Humphrey, a new Senator from New Hampshire (he only lasted one term) to be the point person against me. He started calling me “wild and wooly” in the press which got a certain amount of publicity. Conservative organizations sent out canned articles all around the country. Reagan who was then giving weekly morning radio addresses attacked me for five minutes. He followed the usual line about putting wild activists on the court. The *Washington Star* came out against me. The *Washington Post* and the *New York Times* supported me. As I candidate I couldn’t respond personally. My friends fortunately came to my rescue but, you know, it was a terrible time. Mikva told me he felt the same way. He said it was the worse period of his life. It was much worse than any of his Congressional campaigns where you can fight back.

Ms. Winston: Right.

Ms. Wald: And, you know, the period lasted between April and the time they got to a vote on my nomination which was the end of July. I was really distraught because everyday I picked up the paper and somebody was saying that I was zany. They couldn’t however get anything personally on me. I didn’t have any bad personal history. The children were all fine, none of them was in trouble with the law. But they just kept hammering on these couple of negative things. By the end of July, it was questionable if they would even get to the nomination before they recessed. It was just a wicked period. I stayed in the Department but I stepped down from
being the head of the Legislative Office. Because how could you be dealing on
substance with the very same Senate considering your nomination. So, I had an
office down the hall and did some routine background work until just before the
confirmation. That last month I was home a lot of the time. My son was
studying for the Bar. We were both grouches, leaping every time the phone rang.

Ms. Winston: Right, right.

Ms. Wald: And finally, they scheduled the hearing with only two hours advance notice. Now
this was the full Committee -- the Judiciary Committee. Birch Bayh, the
Committee Chairman was very sympathetic. The staff was fine. I had gone to see
everybody like Laxalt and Hatch and Simpson. They’d all been very polite and
pleasant. But Simpson had been especially nice. Alan Simpson -- he joked about
never lying and never putting anything down on paper. He said: “what you
should do is never put anything down on paper because now if you hadn’t written
down what you said it wouldn’t have made any difference.” He told me how he
once taken a car for a joyride when he was a kid and how it had haunted him. But
he couldn’t have been nicer. At the hearing they produced Bob Jones of the Bob
Jones University who had never met me before in his life. He was just pulled in
by the right wing. I remember he called me an “instrument of the devil.” And
Bayh turned to him and he said, “have you ever met Mrs. Wald?” and then he said
“look behind you. Tell me if she looks like an instrument of the devil.” All of our
children were asked to attend the hearing.

(END TAPE)

(Session continued on Tape 3A and #B)
Judge Wald: During my Senate confirmation hearing one of my children had a job as a waitress and was away, one was abroad and my youngest was finishing high school. This was during the seventies and he had hair down to his shoulders. We made him put on a suit but he still looked like a flower child. When it was all over some reporter came up to him and said, “Well how did you feel when they called your mother an instrument of the devil?” He said, “Well she burns the lamb chops, but otherwise she’s okay.”

Ms. Winston: That’s great.

Judge Wald: So, it didn’t bother the kids, one way or another and they had a sense of what was going on. I had served on the D.C. Bar Board of Directors for a number of years and the D.C. Bar was able to put together a panel of past and present D.C. Bar presidents who came up and testified on my behalf. Judge Kaufman and Reverend Bob Drinen also wrote to the Hill on my behalf because someone had charged me with being outside of the Judeo-Christian tradition. This is the kind of thing that I had to contend with during this period. Another interesting thing occurred concerning Senator Orrin Hatch, with whom I had always had perfectly
good relations. He had always been so gentlemanly towards me and others. However, he called me into his office, and said “now I have known you, and I think well of you, but...” he said, “you know it’s the United Nations Year of the Child,” and he said, “I have been getting a lot of mail on your nomination.” He went on to say, “I want you to tell you what I am going to do” He said, “I’ll vote for you if it’s close, but if it’s not close, I just may not vote. Meanwhile, I’d like you to go sit in my special gallery, you don’t have to sit in the public gallery, sit in my special gallery.” Getting back to Senator Simpson, at one point I heard that the Senate Committee had voted and that Simpson had voted against me. I was surprised but then I thought, “Well, gee, that’s Washington.” I thought why am I even surprised? Why was I so taken aback? However, two hours later I received a call at home from Senator Simpson himself. He said one of his staff members “had simply assumed I would vote against you,” and he said, “Because I was someplace else, he went in and put in a proxy against you.” He said, “When I found out I was furious,” and he said, “And I did fix the vote and I called the Washington Post and the Washington Star and told them.” Now that was very unusual I would say. Well, anyway my confirmation eventually was set for a vote at the end of July. On two hours’ notice, I had to rush down to the Senate with my husband. We brought along one or two of my kids who were home at that point. It was like one of those movies. At the beginning, during the floor debate, none of my friends were there. Senator Sarbanes who was the Chairman of the Senate Intelligence Committee was conducting a hearing of that Committee. It was also the day of the funeral of the conductor of the Boston Pops Symphony,
and Ted Kennedy was up in Boston at the funeral until very late in the day. He
came down at the tail end of the day and, of course, said some nice things about
me on the floor of the Senate. However, in the beginning it was very unnerving.
So I had to relax and wait for my supporters to appear. Senator Hatch never came
to the floor to speak against me, to his credit. I heard much later (and I don’t
know if it’s true or not) that because Carter had all these judicial appointments
that he could make over a year or two—around a hundred and fifty, it obviously
aroused a lot of anxiety and upset among the Republicans. They did not want to
let all of the nominations go through. So they started to look for people that they
could oppose. Initially, they were going to go after Delores Sloviter on the Third
Circuit who came up for confirmation before me. There were several women
appointees. I don’t mean to say that all the appointees were women, but there
were several women appointees before me. The bill providing for the additional
judicial appointments was passed almost a year or three quarters of a year before
my nomination came up.

Ms. Winston: Did they go after Judge Solviter?

Ms. Wald: No, because as I understand it Senator Laxalt, who was supposed to lead that
charge, wanted to go to the Paris Air Show. And so that’s the story, whether it’s
true or not, I don’t know. Her parents had come from abroad, and apparently it
was believed that they received certain kinds of newspapers from communist
countries. The accusations were always really ridiculous. In my case, on top of
everything else, there was one more part to this story. This was a really dreadful
period, because you never knew when something else was going to come up.
was at the Justice Department when a friend of mine who was on the Judiciary Committee staff called up said “I was just in Senator Thurman’s office and I looked over at the typewriter and I saw what was on the typewriter.” My friend said Thurmond was writing to the head of the FBI saying he thought there was evidence to show that I had had very close relations, while I was in Connecticut College, with a Russian professor.

Ms. Winston: He was the one who went back to Russia.

Ms. Wald: Yes, and therefore I might be a Communist mole or something like that. So, I rushed to talk with one of the top guys in the Justice Department and he called over to talk with Judge Webster (head of the FBI) and they looked up his files and determined that he was really just a harmless old guy who taught college classes. I eventually had the former President of the College call over to the Judiciary Committee to say that nobody had any reason possibly to suspect anything untoward or sinister about him or his relationship with me or other students.

Ms. Winston: It seems they were really grasping at straws....

Ms. Wald: It was exhausting. Anyway, eventually I was confirmed. Unfortunately, Mikva had to wait over the August recess before he was confirmed by the Senate. After the Senate confirmed my appointment, I was advised to get sworn in right away. People said, “Don’t wait, don’t wait for anything.” The next day, I had a private swearing in Judge Bazelon’s office. But they actually brought a law suit against Abe Mikva.
Ms. Winston: Oh no, I didn’t know that.

Ms. Wald: Oh yes, even though he got sworn in quickly too, they brought a three judge court lawsuit against him to say that his nomination and appointment was illegal because at the time the bill creating the judgeships was passed and enacted he had been a member of Congress. However, the lawsuit suit was thrown out for lack of standing or something like that.

Ms. Winston: I have some vague recollection of that.

Ms. Wald: My time on the Court of Appeals began and we can get started on that.

Ms. Winston: Okay, sure.

Ms. Wald: So, we took a week’s vacation, my husband and I, and then I came back and got started at the tail end of July.

Ms. Winston: You were the first woman to serve on the Court of Appeals for the District of Columbia.

Ms. Wald: Yes. There had been a woman on the District Court, and there were two women there when I got there, June Green and Joyce Green, both of whom I had known from bar days and both of whom I liked very much. There had been an early woman suffragette, who had been on the District Court, but nobody had been on the Circuit Court. Upon my arrival, I was told, Judge Tamm who was very gentlemanly – noted that there were two bathrooms in the robing room area and now they had to be converted into a bathroom for men and one for women. The
strange result was that you could have eight men -- lined up -- waiting for one bathroom. I often felt that I should have said, "Would you like to use mine?"

(Laughter.)

Ms. Winston: So that is the opposite of what usually happens in most places.

Ms. Wald: Several of the judges I knew, because I had gone to judicial conferences. I had worked on judicial conference committees. But Bazelon I knew quite well, because I was one of the people on his speech writing coterie. This was a group of people, mostly his old law clerks but a few others like me, who wrote drafts for him for his speeches and similar remarks. I had been to lunch with him many times. Judge McGowan I knew reasonably well as well as Judge Leventhal whom I also knew from attending judicial conferences. Skelly Wright I knew some. I didn't really know the others. In addition to the ones I mentioned, the other members of the Court were Spottswood Robinson -- whom I didn't know except that I certainly knew him by reputation not personally. The others included Judge Tamm and the more conservative members, Judge Wilkie, Judge Robb -- Roger Robb; you probably remember he had been the Chief Interrogator of Robert Oppenheimer.

Ms. Winston: I do not remember that.

Ms. Wald: There is a new book on Oppenheimer and it makes quite a thing of it. They were all extremely courteous, gentlemanly. Most were fairly formal. None were distant or exclusionary towards me. I would say during my first year, when I was the only woman, there was really no unpleasantness that I remember. I am not
saying that there were no occasions when I would pick up something. For instance, there were only a few women litigators in the early years arguing cases in the Court of Appeals. They were primarily from government offices. However, we had one or two occasional private counsel who were women. I can remember one occasion when a woman litigator came in and was arguing a case on which Judge Robb sat. He kept saying, "speak up, speak up!" When we got back in the robing room, he said, "another whispering canary." Once in a while, in the judges’ dining room, somebody would tell a joke with gender overtones, but then they would kind of half realize that I was present and pull back. So I think it was more like a transitional period than it was some kind of open discomfort with women. McKinnon was probably the most conservative judge on the court. Yet he had this fire brand of a daughter, Catherine McKinnon.

Ms. Winston: Oh, you know I didn’t realize that.

Ms. Wald: Yes, that’s his daughter, and he was very proud of her. He wasn’t one to put women down. I mean he didn’t put you down in any way. So, I don’t remember being uncomfortable. It’s a funny thing about jobs. There are some jobs that you get through and you do the best you can. Later on people will tell you that you did okay, but all during the time on the job you just did not feel right. You just don’t feel those jobs were right for you. The jobs I felt that way about were the legislative jobs and actually some of the parts of the Arnold & Porter position. I felt that I am not sure what I am actually doing here. Then there are some jobs which -- while you have to go through a learning process -- you feel immediately
at home with, and, believe it or not, that was the way I felt about being on the Court of Appeals and judging.

Ms. Winston: Is that right, because you know I was just thinking Judge Wald about what a pioneer you are and …

Ms. Wald: Well, there were other women judges before me on different Circuit Courts of Appeals.

Ms. Winston: Yes, I know, but in listening to you about where you started, that is, you were talking to me about being born into a relatively poor family, first generation college goer, and at almost every stage in your life you were going into places and positions where there were not many women, if any. And so I am really glad that you talked about the fact that there were some jobs that did not feel as comfortable to you as others.

Ms. Wald: You’re almost glad to get in and out of some of them. Barbara Babcock captured it for me when she once said to me, “this is a great job to have had.”

Ms. Winston: Interesting.

Ms. Wald: She and I have talked about it. She and I were the only two women in Assistant Attorney General positions. And we were friends, and we commiserated and confided in one another some, but she didn’t have an altogether happy time with that position. For some reason, I got along quite well, with Bell. I mean, I have had a few tense moments, but quite well. For some reason, he liked me, but he and Barbara just never hit it off as well.
Ms. Winston: You are going to get this transcript and you can decide what you want in.

Ms. Wald: Barbara was a very talented woman obviously. But, they had differences over litigation strategy. She would come right out with it if she had very definite viewpoints about litigation. They had differences over that Snepp case. Remember that?

Ms. Winston: No, which one?

Ms. Wald: And she wouldn't sign the briefs --

Ms. Winston: Snepp?

Ms. Wald: Snepp, S-N-E-P-P. It was all about the person who didn't sign or agree to an agency policy which required that the agency be allowed to review any book you wrote. I don't remember all the details, but it was a case that involved the First Amendment rights of government employees. He insisted that she go with the argument, but she refused to argue it. But, as I was saying, from the day I first sat on the bench I knew I liked appellate judging.

Ms. Winston: And of course you had some time to think about it too, I mean, you consciously made the decision that the District Court, the trial court was not the place for you.

Ms. Wald: I was basically like many women, I suppose, despite all that I'd done I was a little afraid. I had the chronic fear of failure, and I would make these appraisals, is this something I think I can do. And I usually have a sort of good sense about what I
can do well and what I can’t. Occasionally, I’ll take the risk on something I am not sure I can do well and hope it turns out, but all the while…..

Ms. Winston: So there are some butterflies in the stomach.

Ms. Wald: You know, you do the best you can, it’s not that you don’t make mistakes, but you know that that’s the right place for you. And that’s the way I felt about the whole twenty years, over twenty years, of judging. I have to say, however, there were some periods of crisis in terms of a particular case I was assigned to. So, it was not entirely all smooth sailing but very comfortable on the whole. Let me ask you this, how would like to proceed with the Court of Appeals period. Are there particular cases or aspects of my service there that you interested in? Obviously, I am not going to be able to talk about every case or decision. I wrote over 800 opinions, I am not going to talk about all of them. So what are the kinds of things over that period of time you would like me to cover? The court changed immensely over that period of time in terms of the personnel and who was in the majority during one Administration versus another. I had five years as Chief Judge.

Ms. Winston: Yes, I understand your point. I think what I’d like to do is to have you describe what you would consider the most significant, two or three challenges or experiences you had on the court. I mean, we can go back and we can get the names of the cases and all that. For this oral history, I think there is keen interest in understanding the significance of the experience to you as the first woman on
Ms. Wald: Well actually, I was the first one who had the job in a substantive sense. Prior to me, Florence Allen, in the Roosevelt Administration, had been a judge in the Sixth Circuit. She came out of the New Deal and her last four or five months, when it was known she would retire, they made her Chief Judge. So she was like a sort of symbolic or transitional Chief Judge, but there hadn’t been anybody who took the job for a period of time in a real substantive sense. Now, many came soon after, but I was the first one.

Ms. Winston: You obviously understood the significance of your appointment and the work you were doing for other women and other lawyers.

Ms. Wald: One thing I should say and may have left out in the earlier discussion of my appointment is the role played by women’s organizations. Some of them were very supportive of me, especially the local ones. At the time I was appointed, Marsha Greenberger might have been back in the Center, at least in the same building as the Mental Health Law project. Nan Aron headed one of the groups supporting me the National Alliance for Justice. I also worked with Judy Lichtman. They were all very supportive. In that sense, I was part of the women’s rights community. I just was not heavily into the feminist movement philosophy.

Ms. Winston: Right, I understand.
Ms. Wald: In the Justice Department, I chaired a Special Committee that looked at the hiring practices and track record of all the departments. We met twice a month, and if a department, for example, had five or six hires or maybe even fewer and none of them had been minorities or women, we couldn’t compel them, but we would ask them to come in and talk to us about it. So, we were able to increase the number of women and minorities hired. Even on my small staff, I was able to hire blacks, Hispanics, and women during my tenure there. While I was not active in the women’s movement at the ground level, women who were active both in the women’s bar and the District of Columbia Bar were very supportive of me. So, I shouldn’t have left that out.

Ms. Winston: I don’t expect, nor do I think we can take the time to have you talk about all of the cases you were involved in. However, if you’re amenable to do it, perhaps at this session, or maybe if we have the third session we can discuss those cases you believe were must significant during your tenure on the bench.

Ms. Wald: I can discuss some of them now. Then I can refresh my recollection of others before our next session. As I said, certainly in the beginning, I found the relations at the Court to be very good. The judges were very nice, and I didn’t really feel any sense of discomfort. Most of the judges in D.C. Circuit were not the type to go out and play golf together or even to have lunch together frequently. There was a judge’s dining room upstairs. You could go there to have lunch, but most of them didn’t have lunch up there. When I was Chief Judge I would go up there at least periodically, because I thought I should always check in. But most of them sort of went their own way, that’s inevitable in any court. Certain judges make
friends with certain judges. My closest friend was probably Ab Mikva. In the beginning, there some judges I knew only slightly. But after a couple of years I knew most of them quite well. I thought Judge McGowan was just great. He was one of the finest people I ever knew as well as one of the finest judges. Mikva was a real pal that you could go down the hall and visit and unburden yourself. He would do the same thing with me. Later on, during the last decade I was there, Judge Tatel and I had the same relationship. We would visit back and forth. Judy Rogers was appointed during the Clinton Administration. I had known her before. She had been Chief Judge of the District Court of Appeals. She had also been a law clerk in the juvenile court. So we went way back. I think I had pretty good relations with all the other judges. I had some tense relations early on with Judge Silberman, but we worked through that, in the nineties. We actually had especially good relations later on. In fact, he asked me to speak at his portrait ceremony later on. However, we did have some tense periods around the time of the Iran Contra affair. We had substantially different points of view, perhaps expressed a little acidly, maybe on both our parts. I actually had very good relations with many of the Republicans judges even when I might differ with their positions. I think probably Judge Silberman was the only one with whom I had difficulty at least early on. Of course, one judge would get mad at everybody sometimes but, I didn’t feel I was singled out by him.

Ms. Winston: It wasn’t a man/woman thing in other words.

Ms. Wald: I don’t know how much of this I’ll let you keep in the file, but let me express it. It wasn’t a man/woman thing on the Court of Appeals. You liked some men, you
didn’t like some men. Now the three women judges I served with while I was there were first Ruth Bader Ginsburg followed, then by Karen Henderson who came in as a [Senator Strom] Thurmond protégé, and Judy Rogers. Judy Rogers, I have always known and liked. At the time I was having that confirmation trouble, she sent me a lovely note. Karen Henderson was more distant. She spent a lot of her time in South Carolina and her viewpoint was so far different from mine. Ruth and I always had a cordial relationship, but we were never close.

Ms. Winston: Because you did receive a lot of important support and encouragement from women’s organization and people and from women that worked in women’s organizations, did you ever feel a sense of pressure or concern about, you know, how that should or would affect your judgment.

Ms. Wald: No, but I’ll tell you what I did. I felt a sensitivity to be on the alert for things, but I did not feel that I was their advocate, and there weren’t that many cases involving gender sensitive issues. I did decide one case, and I think rightfully so, but with a male clerk. When I look back I had over seventy clerks and roughly half were women. And that was conscious/unconscious. I was always conscious of gender but it was not determinative in individual cases. There was a year or two when I would have three men clerks, and then there was a year when I had a couple of women, and one man. So I was conscious about that. I thought the clerkship had meant so much to me, that given there are so many talented women out there, I would always kind of look over the field and figure I wanted that, at least one of them, very often, two women, as clerks, because it does give them
such a leg up if they want to go on to academia or other places. And I would try to be sensitive to gender issues where they genuinely existed. One case I really felt good about was a class action suit begun by women in the foreign service. This goes back to about the mid-eighties. It was one of those cases that took ten or twelve years to resolve and it had many incarnations. Anyway, they had sued on the basis that women foreign service officers were discriminated against by the U. S. State Department and the Foreign Service division because they were channeled into certain job categories that did not have the potential for promotion. The gravamen of the suit was that the women got pushed or channeled disproportionately into the consulate “combs”. The lower court had dismissed it saying that the evidence didn’t meet the appropriate standard because lots of times these women would follow their husbands and take positions in order to be placed in the same region that their husbands were assigned to. However, this was anecdotal evidence. When it got up to the U.S. Circuit Court of Appeals for the District of Columbia, I was one of a panel of three judges assigned to the case. Bork was one of the three; I cannot remember who the other judge was. I was the chief judge on the panel, and I had a really good law clerk working with me on the case. I couldn’t have done it without him, because I am not that much of a statistical person and a lot of statistical evidence had been submitted. We didn’t feel comfortable about the lower court’s analysis of the statistical evidence. That court took the position that the statistical evidence was insufficient to prove the case. We started from scratch to analyze the data that had been submitted and my law clerk – whose name is Ed Foley and who later became the solicitor general...
for the state of Ohio -- consulted all of these statistics books. In fact, we taught ourselves the statistics. I had once taken a course in statistics in college, but not this kind. We constructed bell curves and we developed other statistical analyses. We decided in the end that there was enough statistical data available -- at least for the case to go forward. Even if we were wrong about the analyses of what the data showed, we determined that there was enough statistical evidence, certainly, to make a prima facie case and to return the case to the lower court for trial. That was all we were talking about at that point. The lower court judge had dismissed it on the ground that there was not enough evidence to go to the next step. Bork went along with us. He thought we had written a good opinion and so we returned it to the District Court. It took years to try. Eventually, I picked up the paper and there was this big splashy headline. The women had finally won a big settlement from the government during the last remand. One of the women was quoted as saying, “my daughter was in the third grade when we began this suit and she is going to go college on this, on this remand.” It was things like this that I found rewarding.

Ms. Winston: Wasn’t Joe Sellers involved in that case?

Ms. Wald: He might have been. I don’t remember. He could have been, I know Joe but I don’t know if this was his case.

Ms. Winston: I was just thinking of a newspaper article I saw some years ago announcing a similar settlement and it was his case.
Ms. Wald: It could have been. I know it took a while, but we got it over the hump, and it was deserving. My guess is that’s exactly what was happening in those days in the State Department. So there were cases like that where you were sort of on the watch to make sure that something wasn’t going on, that shouldn’t, but I don’t ever remember feeling any pressure that I had to come out one way or the other.

Ms. Winston: Right.

Ms. Wald: I am trying to think of some of the Title VII cases we had and some of the affirmative action cases

Ms. Winston: Wasn’t the Hopkins v. Price Warehouse case argued before the D.C. Circuit?

Ms. Wald: Yes, but I didn’t have it. Some of the most difficult and controversial cases that came before us were the ones that tended to highlight the differences among the judges sitting on the court. I am not impugning anybody’s judgment or the legitimacy or their doing what they thought was right. They did their best, but let’s just say that people’s inclinations surfaced with cases like Iran Contra. I was on the panel with Judge Silberman and Judge Sentelle when they threw out the Oliver North conviction. And that was intense. In this and other cases, some judges wrote things in draft opinions that illustrated some of their deepest inclinations -- although most of the controversial language was excised later on.

Another thing I think about when reflecting on my days at the Appeals Court – as I mentioned earlier – is that even though in the beginning I was able to hire only one or two women clerks that had a trickle down effect during the 80’s. I was told this by some women lawyers. In other words, firms were more likely to have at
least one woman at the counsel table in cases where they were told ahead of time
that I or some other woman judge would be on the panel. Although it might have
happened anyway, it seems as though more women argued cases before the
Appeals Court. When I became Chief Judge, I was especially interested to make
sure that we had more women if possible in positions of supervisory authority.
We always had a number of women in the clerk’s office as file clerks. However,
a man was always the chief supervisor. So, I did begin to hire not only women
clers but also two women Circuit executives and appointed women to
supervisory positions. I didn’t say, of course, that we are going to have a woman
in this position but I made sure that women were in the pool of those considered
and that I was reviewing the candidates and making the decision about who would
be hired. I also made it a point to make women judges head of the judicial
conference planning committees, places where they would be visible. And I think
that gradually what I did in this regard on the D.C. Circuit was emulated in other
Circuits too. So that period was more like a sort of a quiet consciousness about
these things rather than any sort of dramatic revolution.

Ms. Winston: I think this may be a good place to stop this session.

Ms. Wald: I’ll tell you what I will do. I have a list of all my cases at home, I will just glance
and see if any deserves further discussion because I am sure there were more than
a couple that possibly had ramifications worth including in this oral history.
Although, if I were to give you the list of all of the cases I remember the most
vividly or the ones I’m the happiest with, they won’t all have been cases involving
women’s issues but many other issues as well.
Ms. Winston: Well, that's fine.

Ms. Wald: For example, I did a big executive privilege case in the mid-nineties that I think is still pretty much good law. I heard the *Sierra Club v. Costle* case, about the circumstances when the President can communicate with and make his influence felt on administrative agencies, which I know became a textbook case. Then there was the Iran Contra case in which I wrote the dissent. Another case involved a dissenting opinion on the Foreign Sovereign Immunities Act. It was a case concerning whether or not a holocaust victim who was made to work in the Krup Company in Nazi Germany, as a prisoner of the Nazis, whether or not he could sue under an exception to the Foreign Sovereign Immunities Act. So there were many cases like that that really enraptured your attention. They came along with the climate of the times.

Ms. Winston: I really am interested in hearing about those. I mean, as you've already done, I would like you to just indicate in terms of the time you spent on the court the cases you were particularly taken with for whatever reasons because of the nature of the facts involved or the intellectual challenges of the law. Two or three examples of that kind and I would love to be able to make a copy of the cases that you heard that we would then made part of this record. Is that possible?

Ms. Wald: Each year, my secretary would just take the slip opinions and send them out to the bindery. So you would have to have one of those machines to bind them, but I could bring you in the volumes that I have.

Ms. Winston: Maybe I could just get it from the court.
Ms. Wald: I can give you the cites. They won’t collect my cases, they’ll just give you the cites. I can give you those and the cites. So, we will talk about it.

Ms. Winston: Okay, that’s fine.
Ms. Winston: Judge Wald, would you share with me some of the highlights of your time on the Court of Appeals for the District of Columbia Circuit.

Ms. Wald: I am trying to pick out cases on a topic-wise basis since it's obviously hard to compress more than 20 years on the Court. But let me begin by talking about collegiality and my colleagues. Because you hear so much these days about collegiality not just on the Supreme Court but on the various Circuits. It's interesting to me because not all of the people who talk about collegiality, once you get to know them, turn out to be the most collegial people. I suppose it's better to have it on your mind even if you don't follow it in practice. And sometimes over the 20 years, there were some points at which the judges became irritating or out of sorts with one another. We had three different periods during my time on the court in my view. The court I went on to was a court, a kind of mini-Warren court. It had Bazelon, it had Leventhal, it had McGowan, it had Robinson, it had Skelly Wright and a couple of more moderate to conservative judges, Malcom Wilkey, George McKinnon, and Judge Tamm, but I kind of think
of them as old fashioned conservatives. Some of them were more populist and perhaps a little anti-government. They were very law and order oriented. But they were not agenda conservatives. That court was the one Judge Mikva and I came on and within a year Harry Edwards followed and then shortly thereafter Ruth Ginsberg. So you can see those were the four Carter appointments on the court which for a few years made the court even more liberal -- moderate to liberal. In statistical terms, that was a court in which the panels that I sat on were very likely to be ones just statistically that had one or two people from the same general philosophical part of the court that I was. Now, I don't have the notion that just because you were appointed by one administration you are going to be a liberal, or you're going to be conservative. There is likely to be some correlation between the general place you are on the philosophical spectrum and that of the administration appointing you. But not always, sometimes the President appoints people for different reasons. But in general, that's the way it worked out I'd say. We really only had one year under the Carter administration to make judicial appointments and then in 1980 the administration changed but the court remained pretty much the same for a couple of years. It takes a couple of years to effect change as administration policies sometimes change with new personnel and that change then affects the type of people appointed to the bench. So for the first several years, from my point of view certainly, we had not a very dispute-oriented court because realistically we were always in the majority. The way a court of appeals operates is that the panels operate in the shadow of the en banc court. I mean it is always in the back of your mind that either we went too far here or
we're staying within the general province of past precedent because if we're not staying within the general province our opinions are subject to review by the court en banc. It takes a majority of judges to en banc the panel decision, but at various times in the court’s history, you may have a lot of decisions subject to en banc review while in other periods there are far fewer subjected to en banc hearings. There was one period of time, we were having a dozen a year or so it was very high. Now it's gone way down. For the first few years I was on the court, I was able to legitimately work within the confines of being a conscientious judge, that is, I was able to make decisions that you felt good about not only because they were legally sound but also because they came to the conclusions that you felt were right. Beginning in the mid-80's, we got several new judges who were appointed by President Reagan. The first of these several judges that came on the court was Judge Bork. He was followed by Judges Silberman and Buckley (and I may not have the exact order) Judge Scalia, Ken Starr, later on we had Judges Douglas Ginsberg, and Judges Williams, Sentelle, Henderson and Randolph. I think I've got everybody in there. So you had in essence, a philosophical majority change on the court. Not that they voted all together all the time. They certainly didn’t’ but it was a more conservative court. And so, when you were on a panel, if you were a carryover from the earlier court, you were less likely to have a panel the majority of whom were on the same wave length as you were. This only becomes important in a small number of cases. But in the largely administrative law cases you are all going to come out the same way no matter who appointed you. In the civil rights cases, you encountered many of the differences among the
recently appointed judges and those who had been appointed earlier. It was
during this period we had a lot of en bancs. We had a dozen a year and at this
point we (members of the earlier more liberal court) were being en banced -- not
doing the en bancing. And so your judicial style sometimes changes. You tend to
write more about the law. You try to write a joint opinion and try to bring the
other two people along with you. If you are writing a dissent, you can be more
forthright and less restrained then when you are writing a majority opinion. I
tended to write a lot of dissents during this period. Ruth Ginsberg was interesting
during this period on the court. She was quite a conservative judge on the Court
of Appeals and she voted more often with Bork and the others, than she did with
us. I'm not saying consistently but in quite a few cases. Statistically that is what
she did. So that was a different court than the one to which I was initially
appointed.

Ms. Winston: Can I ask you a question about that? In terms of it becoming a different court,
was your enjoyment or satisfaction with judging at that point affected in any way?

Ms. Wald: No, I still loved judging but my strategies and style changed a little bit over time.
As a result of the changing personnel on the bench, you didn’t quite feel that you
could be as creative as you wanted – within the limits of the law, of course. You
tended to keep your holdings narrow because you didn’t want them en banced.
And you tended to be sitting with panels, a majority of whom were not
necessarily amenable to your position. I still remember toward the latter part of
my time on the Court of Appeals, I think it was the early 90s at the end of the first
Bush administration, some quirky things occurred. At that time panels were all
chosen randomly, we didn’t have anything to do with it. There was a software program in the clerk’s office that decided who you sat with when. That was the only way to do it right. It hadn’t always been that way, in the old days, when I was a lawyer, the Chief Judge laid out the panels. Very early on, before I became Chief Judge, we had a software program in the clerk’s office and nobody interfered with it and we didn’t have any say as to who would be on a panel. You just accepted the random assignment. However, through this software program, a panel was created that included Judges Mika, Judge Edwards and me. Of course, immediately, some began to wonder how could this have happened statistically. They believed it couldn’t have been random and that something funny had occurred. There wasn’t anything funny it was just a fluke. We had this software program in the clerk’s office which we had nothing to do with. Even if you were chief judge you could do nothing about who took what case. We were scrupulous to avoid those criticisms. But somehow the software assigned the three of us to that panel where a gays in the military case, an abortion gag rule case, and some kind of important environmental case were on the agenda. But they were big cases. The *Washington Times* wrote this article, that said, statistically (and it had this little box that illustrating the point) there was a greater chance of putting a monkey at a typewriter and having him type the Bill of Rights, of being killed by a terrorist if you were a tourist (in those days that was not so big a chance) or of being hit by lightening, when compared to the fact that the three of us could randomly be assigned to a panel and get those cases. So there was always this sort of behind the scenes activity creating a little bit of this tension that led
everybody to reading everything very carefully and paying scrupulous attention to
everything so that no one could say that the panel was fixed or that sort of thing.
And there was some sharpness during the period although it certainly wasn't an
everyday thing. We didn't, to my knowledge, have any personal disputes to the
extent that they had existed on other courts. I knew of some courts where
somebody wasn’t speaking to somebody else. When I was clerking on the 2nd
Circuit, I think I mentioned that Clark and Frank didn’t get along well. It was true
in the juvenile court when I was there. Judge Miller and Judge Ketcham had
virtually nothing to do with each other. In earlier times, in our own Court of
Appeals, it was pretty well known that Bazelon and Burger didn’t get along. We
didn’t have anything like that in my time but we had some situations where things
were fairly tight on particular cases. When some important cases come up,
obviously, there was often some tension among some of the judges. Judges
sometimes wrote memorandums back and worth. This is before email so the
memorandums served pretty much the same purpose. But a lot of people wish
afterwards they hadn't written certain memorandums, but there they are. A
question came up at one point after Thurgood Marshall died about who really
owned all of these papers. There is an opinion by the legislative person in the
Administrative Office declaring that the judges owned all of their own files and
could take them when they went off the court and could dispose of them as they
saw fit but not while they were still sitting. It was up to their discretion. This
caused a great stir. I think some of the judges did not like the idea that some of
their memoranda could subsequently be disclosed, and they talked about whether
that was going to deter people from sharing memoranda in the future.

Ms. Winston: So you owned of course the memos that you wrote but you also owned the ones
that you received.

Ms. Wald: Yes. When I left the court I put them in a depository up at Yale. And I
embargoed them for a long time. I'm not going to pull any out soon. I know
they're there. They are part of history.

Ms. Winston: You enjoy the fact that somehow they are there for future generations.

Ms. Wald: Just to finish this out, when Clinton became the President in 1993 he appointed,
during the period I was there, three additional judges, Dave Tatel became a very
close friend -- he had the chambers next to me and we were really quite close --
and Merrick Garland and Judy Rogers. I'd known Judy Rogers since way back.
She'd been a clerk in the Juvenile Court when I was on the DC Crime
Commission so we sort of crossed each other and were old friends. Then the
court became somewhat more balanced, a little more balanced. During the period
before the Clinton election, Judge Scalia was nominated to go onto the Supreme
Court and Judge Bork was nominated but didn't get confirmed and left soon
thereafter. Starr left to become Solicitor General. Finally, Ruth left to go up on
the Supreme Court during the Clinton Administration. After I left in late 1999
and after the election of George W. Bush, the Appeals Court had an influx of at
least three new Bush II judges. So during the last period that I sat on the Court,
you had another shot of having "like sorts" sitting on the panel with you. And, so,
the philosophical composition of the Court goes up and down. As I said, there
were some tense points. Sometimes, some people with whom you originally may have experienced some tense relationships, over a period of time, you get used to each other or you change your opinions. This happened to me with two judges that in prior times I seemed often to be at odds with. But over a period of time you sort of get used to each other or you change your opinions. By the time I left I was relatively good friends with judges with whom I originally had some difficulty. I have to say, however, the D.C. Circuit is in the spotlight a lot. I would not be straightforward if I didn’t say that I saw ambitious people on that court on both sides. They seemed to be always conscious of the possibility of a next appointment.

Ms. Winston: You mean they saw it as a stepping stone to some place else?

Ms. Wald: I wouldn’t say they saw it as a stepping stone but they were always conscious of the fact that it could be a stepping stone. Perhaps that had some subtle influence and perhaps it didn’t. But I’m not going to go into any of the details or particular actions that could be attributed to particular judges. Back to collegiality, I’ll just use one example without mentioning the judge. When I was Chief Judge, law clerks on occasion broke into tears in my office after dealing with the judge. As a result, I got to be a little bit wary about all this talk about collegiality. But, now, I want to cover a little bit the kinds of things I did outside the court which I think are very important because, during the 20 years of service on the Court, one really needs to have some outside interests. I had two. I was very active in the American Law Institute. I was the vice president for 10 years. So that was kind of an intellectual outlet. It was pretty intellectual work. But the one interest that I
think really opened up and helped to give way to the next stage of my life was the
ABA Central and European Law Institute which started up in the early 90s. It
was started during all of the revolutions, in the east when these countries were
coming out from under the Soviet Union. Starting in 1990, I did dozens of things.
I made several visits to Hungary, Poland, Russia, Ukraine, Lithuania, the Balkans,
Czechoslovakia, and later on when it was the Czech Republic, and Slovakia, and
Yugoslavia when it was still Yugoslavia -- that entire region. I worked with
judges and lawyers there. I did some work in the early days on some of the
constitutions but more often when they were restructuring their judiciary system.
I worked on a lot of the laws with some of judges and I worked with them on
ethics issues. That was a great opportunity. It was something like a mini-Peace
Corps experience. I would be over there for a week, a week and a half several
times a year. And it was very exciting to see and be a part of -- sort of being like
a "Founding Mother."

Ms. Winston: Let me just ask you, did those visits come about as these newly formed
governments were established and the judiciary invited the American Law
Institute to provide assistance?

Ms. Wald: No this was all done through CEELI. This was basically focused on
recodification of laws. Actually I did have some friends from ALI involved in
this but I didn't do any traveling with them. CEELI had been set up by the
American Bar Association and was a brainchild of Homer Moyer and several
other ABA people. It was a great opportunity. One of the very nice side things
that occurred during this time is that Justice O'Connor was on the board along
with me. We traveled together a fair amount. I really liked her. I thought her to be an extremely nice person, the way she treated staff and various other things. And she was just completely giving of her time. She went over there all the time. We had an annual meeting abroad. She went on other trips. She always did side trips to talk to law schools or to talk to groups of judges. I thoroughly enjoyed it. In turning again to women, when I first came on the court (I may have mentioned this before), you would not see too many women in the courtroom in the Court of Appeals arguing or even at Counsel table. I think when I came on the court and then Ruth after me, it did make a difference in terms of beginning to see more women at least at Counsel table. It probably would have happened anyway but gradually more began to actually argue cases. The other situation was that women had a lot of the clerical jobs but there weren’t very many women supervisors. So, especially when I became Chief Judge, while I didn’t purposefully insist on women filling the positions, I did try to make sure there were many women in the pool of candidates for supervisory positions at the court. As a result, I ended up choosing a woman clerk and two women circuit executives. And, with women in these positions, that kind of thing begins to trickle down and more women began to be hired and promoted into supervisory positions. As to my own law clerks, I should mention that over the whole period of time I had over 70 law clerks. Because when you are Chief Judge you get an extra law clerk and you can use the slot as an administrative assistant. I just took another law clerk. So I kept a full docket as did some chief judges before me. All of the law clerks were a great pleasure to work with. It was one of the great joys
of being on the Circuit that you did get the best and the brightest that applied. Most of them were quite ambitious too. Most of them saw it as a stepping stone that could mean they would be among the very small minority of law clerks to become a Supreme Court law clerk. We did get really top talent. When I look back over it in later years, although it wasn’t always purposeful, I had roughly half women, which was a significantly higher number of women clerks than were on the Circuit when I came.

I now would like to talk a bit about administrative law. Administrative law is the bread and butter of the DC Circuit because we’re the only court designated under many of the regulatory statutes to review the work of the agencies; this came about because of the DC Court Reorganization Act in the early 80’s. The Court of Appeals for D.C. used to act as a sort of “cert” court for all the cases coming up from the local courts. That was cut off by the DC Reorganization Act. The District of Columbia lower courts now have their own high court and any cases appealed from there go up to the Supreme Court. As a result, there was this vacuum in the D.C. Circuit which is such a little circuit that you don’t have the territorial expanse to create the number of cases that you have in other circuits. So they filled it in during the early 70’s when we had that plethora of regulatory statutes, Clean Air Act, Clean Water Act, dozens and dozens of similar statutes. While these statutes don’t account for every case within the jurisdiction of the D.C. Circuit, they generally provide all the agency rulemaking cases that come up to us. These generally are very complex, complicated rulemakings under the various statutes. As a result, it became primarily an administrative law court. In
the early years of the court, you can see some back and forth between Bazelon and Leventhal about big questions such as how deeply should the Court of Appeals second guess or review the administrators or the boards. If it was a board finding, Bazelon took the view that you should only look at procedures assuming the substance was sound but Leventhal, took a slightly more “get your feet in and make sure they have look at the substance right” position. I had no background in administrative law and Mikva didn’t either. He was in Congress. Anyway, in the beginning it was daunting, especially some of the federal communications and FERC cases. They were full of technological jargon and technical concepts. I thought “now how am I going to try to get a hold of this?” The Federal Judicial Center offered a program that judges could apply to attend during their summer vacations. We could take courses at various places. Most people took courses at Harvard or Stanford. A friend of my husband’s and mine knew administrative law quite well. I asked the friend where could you go to get a concentrated dose of the real technical stuff. He said, “Well, the Association of Regulatory and Utility Regulators holds this course two weeks a year at Michigan State in Lansing and that’s where all the new state regulatory commissioners come and they take the course in either the communications or the energy utilities areas. There are two tracks.” I said, “That sounds like exactly what I need.” The participants stay in the dormitories and the course consists of 8 or 9 hours of classes a day. It’s all very concentrated material. I applied to participate in the course through Leo Levin who used to be the head of the Federal Judicial Center; he said, “We never had, in the entire history of the Center an application for this
kind of training but I see the reason why it would be important for a circuit judge to go to a regulatory and utility commissioners association course of this kind.”

Ms. Winston: So he was saying he had never had this type of application from a judge?

Ms. Wald: Yes. It wouldn’t have come from anyone else either I don’t think because the Federal Judicial Center only handles judges.

Ms. Winston: Right, right.

Ms. Wald: They hadn’t had an application from a federal judge before.

Ms. Winston: I just wanted to make sure. Because, of course, the other participants applied, I assume.

Ms. Wald: But the difference is they aren’t going through the Federal Judiciary Center. I had to go to the Federal Judiciary to get the money.

Ms. Winston; I see.

Ms. Wald: That’s part of the judicial education, continuing education available to federal judges. I went out there for two weeks and I think the value of it was all the state regulators in attendance. I don’t remember how much of the substance I remembered, but I felt considerably more at home with the language that came up in the cases that we were hearing. I didn’t feel so much at sea or needing to ask “what are they talking about?” or “what do I not know?” It stood me in good stead and I ended up doing a lot of administrative law cases. I came to like them. Some of them are listed here in the list of cases you see in the document I’ve provided to you. They are very important. Administrative law is very important because a lot of the substance law comes through the agencies and gets reviewed in an administrative law format. It doesn’t come up through civil rights statutes
or constitutional cases. It comes up through review of the agency. And certainly
the environmental issues are all in the agencies. I like the environmental cases.
I've got a couple here in this list. I don't know what you want me to do with the
cases I've got here but I could provide a quick sentence or two about each of
them.

Ms. Winston: Yes, I would like you to provide at least a couple of sentences so that they are
actually referenced on the tape and we can probably append the list to the
transcript.

Ms. Wald: There was one in 1984 called *Farmers Union v. FERC*. This is one focusing on
the deregulation initiative begun under the Reagan administration. Some
deregulation cases were begun in the airline industry during the Carter
administration. FERC is the Federal Energy Regulatory Commission and it had
deregulated, basically completely deregulated oil pipeline prices and the question
was whether or not they had acted reasonably under the “just and reasonable”
standard for pipeline rates in the statute. I wrote the opinion saying that they had
not, and that basically the statute meant the agency was required to establish and
promulgate some standards. We didn’t say how strict or how substantive but some
standard had to be established to define what are “just and reasonable” prices.
There had to be a zone of reasonableness. They were leaving it completely up to
the market, basically saying “this is a market economy, the market should
control”. They wanted no regulatory restrictions on the market. We said, “If
Congress wants to do that they can. But, under the current statute you can’t do
that. You have to have some kind of standard. The agency has to give some kind
of agency imprimatur as to what falls within the zone of reasonableness.” It was an interesting case. It was interesting because the courts up to then mostly reviewed challenges brought by businesses arguing that agencies were over regulating. That is, in the 1970’s, agencies were accused of an escalation of regulations. This was the first time that the challenge was that a federal agency had lowered the regulation. They weren’t regulating. There is also a case called *State of Ohio v. Dept. of Interior* decided in 1989 which came out just about the time of the Valdez oil spill. It dealt with the Department of Interior regulations concerning the amount of damages polluters would have to pay. It was brought by the so-called public trustees who represented the states where the pollution had been found. The Supreme Court had earlier come down with a major case defining the scope of judicial review governing agencies’ actions in *Chevron*. This was one of the first major cases after that which dealt with how courts should look at what the agencies had done. We decided that the agencies hadn’t acted reasonably again. In deciding the case, we had to take *Chevron* apart. The government was interpreting *Chevron* very broadly to say basically that whatever the agency said was okay arguing that the court had only minimal review power in these circumstances. We had to parse the language of the *Chevron* finding to determine how the standard should be applied differently in disparate situations. I think probably the most well known case that I wrote in the administrative law area was one in my second year. It was called *Sierra Club v. Costle* and involved EPA clean air performance standards and utility plants’ use of soft coal. According to one of the textbook descriptions of the case, the decision was widely
hailed as setting out the cardinal principles for the kind of communications that have to go into the agency record. What it really is most well-known for is not the actual technical ruling we made about the actual rules but general rulemaking. Up to that time, the one case on rulemaking that had been in the DC Circuit took a pretty judicial approach to rulemaking essentially saying there should not be any \textit{ex parte} contact between Administration officials and the agency personnel involved in the rulemaking. This included not only the people in the rulemaking process during the course of rulemaking but also the higher government officials in the White House who oversee all agencies. In this case there were several communications from the Executive Office to the rulemaking agency which was EPA. This, of course, was not done in the open but within the agency only. Therefore, the whole question was where you drew the line. Actually, contrary to what you might think, the opinion came out with a somewhat more liberal notion of permissible discussion because we decided agencies did have to deal with the government at the highest ranks. Those White House officials did have to keep track of what was going on in the agencies. This is not a unitarian government but the higher levels of the Executive branch of the government did have a right to communicate at various intervals with people who were making policies and conducting the administrative process, but there had to be a record or a log. It didn't have to be done exclusively by taking witness testimony or appearing in the administrative hearings.

Ms. Winston: Did you say \textit{Sierra Club v. Costle}? 
Ms. Wald: Do you remember Doug Costle? He was the administrator of the EPA. This of course came to court in 1981 but it involved activities from the Carter administration which had taken place earlier. We established guidelines for the kinds of informal contacts that are permissible in the rulemaking area and under what circumstances they had to be recorded. Another case I talked to you about before so I don't know that I have to again. It was Palmer v. Schultz which was the discrimination case against female Foreign Service officers in which we ruled that the statistical presentation showing a significant numerical disparity in the assignment of women to the various (employment) cones was sufficient to raise an inference of discrimination along with some anecdotal evidence. The case had been thrown out below. We reviewed the statistical analysis and said the evidence was sufficient to raise a prima facie case and sent it back. The case went another 10 years but the women got a sizable settlement eventually. This certainly was the most in depth look I ever had to take at statistics which isn't my native habitat as I said earlier. But it's one of those interesting situations in which if you are a judge you are often thrown instantly into an area of the law that you know little about but at least you have the record. You also have law clerks to assist you in checking and writing the footnotes. However, as the judge, you have to get to where you understand it. I found out the most interesting thing about being a judge really was the wide, wide range of subjects that you could get into. You were never stuck on one thing for two years as were lawyers. You would go from EPA to FOIA. I did a lot of Freedom of Information Act cases. I could go from criminal cases to executive privilege cases, to drug testing cases. There was
just an infinite variety and a lot of administrative law. But as I said, I liked administrative law because that was just a window into an environmental problem or an energy problem or this problem or that problem. Administrative law was just a key for entry into these other areas of substantive law.

Ms. Winston: Right

Ms. Wald: I had two civil rights cases. One of them went up to Supreme Court, Fenzer v. Barry. This was in 1986 and involved the First Amendment and whether or not somebody demonstrating within 500 feet of the Russian Embassy contesting the Russian policy about letting Jews out of Russia violated a local ordinance. There was a D.C. ordinance which said you couldn't demonstrate within 500 feet of any embassy. This amount of distance was much greater than required in other circumstances. Everybody agreed and we all said in our decision, that obviously we can't permit persons to impede entrance in and out of the Embassy. Diplomacy must go on. But we indicated that whether it is 100 feet, more or less, there must be some kind of normal segment allowed for demonstrators similar to what is allowed in the picketing of abortion clinics, for example. However, 500 feet couldn't be justified. I was on a panel with Judge Bork, and we had a visiting judge who was very liberal who came over from the Federal Circuit. I don't remember his name. But they both wanted to uphold the ordinance and Judge Bork wrote an opinion basically on the ground of our responsibility internationally to foster dignity for foreign embassies. I looked at it as viewpoint discrimination and as an infringement of the First Amendment and I wrote a strong dissent. So it did go to the Supreme Court. The case we had involved the
Russian Embassy and somebody demonstrating on behalf of letting Jewish people out of that country. However, going on simultaneously during the same period many people were demonstrating in front of the South African Embassy about apartheid. Therefore, our case involved basically the same issue and became the vehicle for addressing the demonstrations at the South African Embassy. Anyway, it went up to the Supreme Court. By that time Justice Scalia was on the Supreme Court and, a bit surprisingly to me, he wrote the opinion for the Supreme Court upholding my dissent and overruling Bork.

Ms. Winston: It was an interesting configuration.

Ms. Wald: Scalia is big on free speech. Scalia is one who believes a lot in freedom sometimes. The other case that didn't come out so well and was interesting was the affirmative action case Sherburg Broadcasting v. FCC. It was one that dealt with an FCC rule on affirmative action which gave preference for minority ownership in the sale of a broadcast license under certain circumstances. When a broadcast owner violated a provision of its license for some reason or if they were going bankrupt or had to give up the license. The FCC had promulgated a regulation that would permit the transfer of the license under these circumstances to a potential new owner who would be awarded extra credits if it were minority owned. This regulation basing transfer or preference in ownership or licensing on affirmative action was challenged. It was a constitutional challenge. The challenger argued it was a racial preference case and required the application of the strict scrutiny standard. The panel was comprised of Judges Silberman, McKinnon and me. They said it was unconstitutional. I said no it wasn't. So I
wrote a dissent that it was okay, the government had justifiable interests for
giving a minority preference in that limited circumstance. It wasn’t purely a
racial preference it was a way of getting more minority-oriented programming on
the air. It went up to the Supreme Court and the majority in the Supreme Court
which included Byron White going along to make the 5th vote sided with me and
said it was okay. This is around 1990 when it got up to the Supreme Court. Then
a few years later, you will remember another similar case went up to the Supreme
Court and Justice White was no longer there and the Court said basically no
minority preference was constitutional on the part of the government if not tied to
actual past discrimination against the recipient. There was a case called Farm
Workers Justice Fund, in 1987 which dealt with the Secretary of Labor’s refusal
over a 14-year period to promulgate drinking water standards for agricultural field
workers. You will remember this. He just kept delaying it. We ruled that the
OSHA standard didn’t permit that kind of delay once the Secretary determined the
standards were necessary until the states got round to doing it. A lot of the states
weren’t getting around to it. So we said that after years and years, there had been
enough delay and we told them they had to get the rules promulgated in the next
month or so and they did. One of the cases that was probably the most
uncomfortable case I ever sat on in the Court was the Ollie North case [U.S. v.
North, 910 F.2d 843, 920 F.2d 940] the panel included Silberman and Sentelle
and me. The principal issue was whether the self-incrimination privilege, as
expounded by the Supreme Court in past cases, covered a witness who was
supposed to be testifying at trial from recollection alone, but who had seen, and
perhaps, therefore had been influenced in his memory of events by North's prior testimony at Congressional hearings. So the question presented was whether or not, if somebody had seen his testimony on TV and later was called as a witness, allowing this witness' testimony would be a violation of North's self-incrimination privilege because North had been required to testify in Congress. So it was a very sticky kind of institutional type case. The background to it was that the special prosecutor, Lawrence Walsh, recognized that once the Senate went ahead and held those hearing which they did for reasons related to the Senate institutional prerogative, they would endanger any possibility of a prosecution.

Ms. Winston: Judge Wald, this is the case for the record, this is the Iran Contra case?

Ms. Wald: Yes, the trial judge was Judge Gerhard Gesell. I felt he had done everything possible in the case to allow the testimony. I also felt that what the majority was doing was expanding prior self-incrimination privileges. For instance, if you went back to the beginning of an incident and say you are witnessing an accident or an attack, where something criminal happened so that the self-incrimination privilege would be implicated. So you watch and you see the now accused participant. You also hear his statements that are made to the police on the scene: "I didn't touch her, she attacked me." Later this incident comes up in court and you are called as a witness. Should the court say you cannot testify because you just happened to be there witnessing the exchange and heard his out-of-court statements which later could involve the same material as his in-court testimony. I thought it was a strange ruling. But apart from that, Judge Gesell had gone out
of his way, by scrupulously going over every witness’ testimony to make sure what they said was already in the record somewhere before the disputed North testimony and I think that 95% of it was already in the case before North testified in Congress.

Ms. Winston: In the depositions for example?

Ms. Wald: There were loads of depositions and grand jury testimony. Gesell would compare the deposition or grand jury testimony to the trial testimony and, to rule out influence, if there was any significant alteration or any change then it would be discounted. So he had gone to great pains. But the majority insisted on a line-by-line identity between before and after testimony and on remand one witness said “yes” he was influenced and the whole case went down the drain. Another majority later did the same thing in the related Poindexter case. So you can draw your own conclusions. In my view, the North and Poindexter cases became the basis for a great extension suddenly of the self-incrimination privilege. The feelings ran very high in that case. I said they had laid down a really stringent ruling burdening the prosecution and I felt that was unnecessary and it was a “for this day only” ruling.

Ms. Winston: Just as an aside. Did you participate in the D.C. Circuit Historical Society’s program on the Iran Contra Case which was presented recently?

Ms. Wald: No, I purposely didn’t.

Ms. Winston: Okay.

Ms. Wald: Neither Judges Silberman, McKinnon, Sentelle, nor I participated which was probably just as well. Brendan Sullivan kept referring to Judge Silberman's great
courage in the case. Anyway, cert was denied in that case. So that was an end to that. But I didn’t feel very good about the case. Let me go on quickly. I should be able to give you one or two sentences about other important cases on which I sat and wrote. One of the most important cases on which I wrote and was not controversial was the *In re Sealed Cases* [116 F.3d 550]. It was in the mid-90s and it was on executive privilege and I think it was probably the most elaborate discussion on the scope of executive privilege since *U.S. v. Nixon* where it came up in a criminal setting. This was a case that involved Mike Espy the Secretary of Agriculture under President Clinton. In the course of the prosecution by a special prosecutor some notes of a White House official were discussed. By this time Judge Mikva had gone off the DC Circuit to become White House Counsel to the President and he raised executive privilege on behalf of the President. I had a wonderful law clerk then. I would have never have been able to get it through this case without her. She now teaches up at Columbia, Gillian Metzger. We laid out a standard — which I won’t go into here — but everybody was happy with it. Doug Ginsburg was on the panel — Doug Ginsburg, myself and Judy Rogers. But anyway nobody was unhappy and the White House was happy with it and so was the other side because it laid out when you could and couldn’t raise executive privilege. So that was one of those issues where you feel you have contributed to the jurisprudence. One of the things the White House liked about it was that it addressed the question of whether executive privilege applied to something that had been prepared by White House officials to be seen by the President but had actually never gone to him or was something he had never seen. We said “yes”
that is part of the deliberative process. They would have liked us to expand this executive privilege down to the cabinet agencies. We left it at the White House level unless an agency official was called in to join in the discussion. But it couldn’t be that you were talking about it down in the Education Department.

Ms. Winston: Okay.

Ms. Wald: One of the cases I participated in as a dissenter involved the First Amendment and prisoners' rights. Prisoners were prohibited by Bureau of Prison rules and by statute from seeing any publications that featured nudity or sexually explicit activities. The case was Amatel v. Reno [156 F.3d 192]. The prohibition did not permit prison authorities to exercise any discretion to determine if the sexually explicit material was indecent or obscene and therefore whether it was protected under the First Amendment. In other words, they didn’t permit the use of any discretion. While I understood that they might not want some prisoners to see some sexually explicit material, they, on the other hand, also prohibited all prisoners from viewing sexually explicit material in an art book. The majority endorsed the government’s approach to this wide-reaching prohibition. In dissent, I indicated that the result set an unwise and arbitrary precedent that ran contrary to prior case law. As I recall, the 9th Circuit followed my reasoning. One of my last cases was U.S. v. Hubbell [167 F.3d 552] which was the special prosecutor’s case against Web Hubbell. The case was ultimately dismissed but one of the last parts of it came before a panel that included Steve Williams, Dave Tatel and me. In this part of the case, the special prosecutor Kenneth Starr and the group working with him had immunized Hubbell in exchange for certain documents. The
prosecutor said: "we want those documents and we will give you immunity for their production." Hubbell had been appointed by President Clinton to the position of Associate Attorney General in the Department of Justice. Eventually, he was prosecuted by the special prosecutor for a variety of alleged offenses. They gave him immunity and he produced the documents. But they would then ask him questions related to the documents which he had given them. The special prosecutor, who was joined by the Justice Department in this, said that the immunity ruling did not apply to the use of the documents against Hubbell. They claimed that the immunity applied only to the identification of Hubbell as the person who provided the documents. The prosecutor went on to claim that he could use the documents in a way similar to this; "if we opened the door one morning and there are the documents on the table and we would have access to all of these things including answers contained in the documents even if we couldn’t identify who left them there. There was nothing to prevent us from using them against the accused." This issue went up to the Supreme Court eventually. David Tatel and I wrote the section that said this was a violation of Hubbell’s privilege against self-incrimination. However, Williams dissented very strongly claiming the prosecutors could do that. When the case got up to the Supreme Court, Justice Stevens wrote an opinion upholding us. Okay I had two go rounds with the Hinckley case. [Hinckley v. U.S., 163 F.2d 6471 (1999); 140 F.3d 277] Actually, three but the first of those went back to the original finding of insanity. Hinckley was the young man who shot and attempted to assassinate President Ronald Reagan and who was acquitted on the grounds of insanity. However, the last two
hearings that I was involved in this case were the most interesting. Both occurred shortly before I left the Court. The question was whether he would have the right to have time outside of St. Elizabeth’s to visit his parents. He won the right to do so but this was the first of many such requests that he be permitted to have time out of the institution. In this first hearing on this question, the government sent us a psychiatrist saying “yes, he deserved those visits.” We agreed to this. However, my cases required that these visits be supervised. I see that recently the court is permitting him to have unsupervised visits and this represents a breakthrough for him. By the way, I forgot to mention that in one of those cases on which the three of us more liberal judges made up the panel and which led to the *Washington Times* comment I mentioned earlier, was a gag rule case against doctors receiving federal funding [979 F.2d 227 (1992)]. The gag rule prohibited these doctors from giving any information or advice on abortion. I ended up getting to write that one. We based the decision on the statute and the regulations – it was not a constitutional case. We indicated that the regulatory prohibition barring any mention of abortion was not authorized by statute. Although we did not plan it this way, the decision came out on the day of the 1992 election. The ruling actually went into effect, before anybody could appeal it. In fact, one of the first things President Clinton did was to reject or repudiate the original regulation.

Ms. Winston: And this is a panel of you, Tatel and Edwards?

Ms. Wald: Not Edwards, the third judge was Mikva. I’ll discuss a couple more of the big cases and I will be finished with the cases. I did sit on the Microsoft case [147
the first time it came up before a settlement was agreed to. We all agreed that Judge Jackson had done some things in the lower court that required a remand on the merits. I was, however, at odds with two of my conservative colleagues on what should happen in the remand in terms of what Microsoft could do in limiting the use of other search vehicles in its computers. I took a position that has subsequently been adopted by the European Union but not in the United States.

Ms. Winston: That appeal came up from Judge Jackson.

Ms. Wald: Yes, Judge Penn Jackson. Three more cases and I will be done with the cases. *Princz v. Germany* was a Foreign Sovereign Immunities Act case. The plaintiff Hugo Princz has since died, he was Jewish and an American Citizen who was living in Germany during World War II. He and his family were taken into custody by the Nazis and sent to a concentration camp and then finally he was farmed out to the Krups Company for hard labor. He tried to sue Germany after the War for damages and, of course, the Foreign Sovereign Immunities Act came up. The question was whether in fact what they were doing amounted to enforced slave labor which under international law would constitute a jus cogens violation. Under this concept, this would be a fundamental international law violation which includes things like carrying-out torture. These types of activities are called universal crimes and under international law they can be prosecuted by any country not only the country of the violator or even the country where are committed. They are considered crimes against humanity generally. Any way, the question was whether or not, since everyone agreed that this was a jus cogens
type of this kind of crime, it constituted an implied exception to the Foreign Sovereign Immunities Act which says you can’t sue a government unless it consents or it falls under one of the exceptions such as if it is engaged in a commercial operation. Judge Stan Sporkin who had heard the case down below developed a keen sympathy for the guy but couldn’t think of an appropriate legal theory on which to proceed. He simply said he couldn’t stand to see this happen. I am a judge; it’s not right, so I’m going to hold for him. I received the case on appeal and my law clerk and I looked at an elaboration of the jus cogens theory and found it was an implied exception. There were some things that were so bad that a country couldn’t do and so we felt we did the right thing. However, my two colleagues did not agree. I received a lot of kudos in the international world for the dissent but that’s where it ended.

Ms. Winston: It was Sentelle and Silberman?
Ms. Wald: No it was Ginsburg and Sentelle. I leave the citations here for you. [Princz v. Germany, 998 F2d 1, 26 F.3d 1166]. The nice thing about this one is that even though Judge Sporkin was not able to think of a legal theory upon which to base his decision, and the majority came out the other way, they had to remand for some findings. In the remand proceeding, the plaintiffs moved -- and Sporkin agreed -- to let in representatives of the Company -- the actual successors to the Krup Company. They didn’t want the bad publicity and so while they couldn’t give up Germany’s sovereignty, they agreed to work on a settlement and it grew into this big pot of money from which people who shared Princz’s status could be paid. That was the beginning of this fund which was administered by the Justice
Department. For many years, people could apply for funding from it and be repaid. The case did turn out satisfactorily for the people who were involved in bringing the suit, even though the legal theory of the case did not work out for them. Now we should move on to the next case I want to discuss. It came up on a motion, if you had "motions duty" that meant that in addition to the cases for which had already been assigned to sit every three months at a time for a period of about two weeks you would get 30 or 40 motions to decide. Usually the staff law clerks who are attached to the staff counsel prepare a memorandum on each motion and judges look at them. Once you get the memorandum to review, any judge can say "no, this is too important; we shouldn't decide it only on the papers." It only takes one judge to quickly put the motion on to the calendar. In this case, David Tatel and I were on the panel. I don't remember who the third judge was. Actually it was an emergency motion [*United States v. Xulum*, 84 F.3d 441]. If you are on the motions rotation you also get emergency motions. There was this young Kurd. He was here working in an office, a legitimate office. He also had a sponsor who was a wife of somebody in Congress. One day, the marshals had come in and grabbed him from his office. They arrested him and said they had found something wrong in his visa application. He had traveled from Canada to this area. They grabbed him, threw him in prison and they took him away and imprisoned him -- usually they don't throw people in prison like that on this kind of charge especially if they don't appear to be a danger to anyone. Somehow, he got a hold of a lawyer or maybe the wife of the Congressman did. He filed a motion for a writ for bail. So we sat on it right
away and we let the guy go on bail. However, before the bail writ that we signed could be executed, the government moved him to San Francisco. Of course, this was before terrorism concerns became so prevalent here. However, we got the signed writ mailed to the judge in San Francisco who looked at it and promptly freed him on bail. I see this man all the time; he is still in Washington, working. Of course, they would have had him out of the country and deported before you could have said "boo". The last case I will discuss is Stephan v. Perry [41 F.3d 677] which was one of the first gays in the military cases. Actually it was not a “don’t ask, don’t tell” case (which I have to tell you, I think was one of the worst concepts ever created).

Ms. Winston: I agree.

Ms. Wald: And it actually affected more people than under the prior law which required an automatic discharge if you were found to be gay in the military. We had an en banc hearing on it. The first time it came up, Mikva was on the panel. It was the one I told you about earlier. He wrote the opinion and we all agreed, but they promptly en banced it. By the time the en banc case came about, Mikva had left to become White House counsel, so the majority prevailed and I wrote a very long dissent. So that's it.

Ms. Winston: Thank you.

Ms. Wald: You can ask me any questions you may still have, although I do want to mention a few other things about being the Chief Judge. I was the first woman Chief Judge, certainly in the D.C. Circuit and in the country except for Florence Allen in the 1930s, who at the tail end of her career as a judge four months before it
ended, was made Chief Judge as a sort of a ceremonial gesture. So, when my
time came, I felt some responsibility and concern that I could blow it for
womankind. And since then, there have been many women chief judges, most of
whom were in the group appointed by Carter. I mean we’ve had in the 3rd Circuit,
Dolores Sloviter in the 4th Circuit and in the 5th you have Carolyn King, in the 6th,
Stephanie Seimer, Mary Schroeder is the Chief Judge of the 9th, in the Federal
Circuit we had Helen Reis. But at the time I was appointed there were none
actually. I wasn’t too apprehensive about it because I’d been on the Circuit for
seven years and although that’s a fairly short time for becoming Chief Judge,
during the last year or two, Chief Spotswood Robinson who was the prior Chief
Judge and a very kind man allowed me to participate in many of his chiefly
duties. During the last year or two, I worked on many of his orders for him. And
I’d done a lot of that so, while you cannot always anticipate all the problems that
will come up I wasn’t totally unprepared for the job. I had a notion of the three or
four probable things that I wanted to get done during my tenure. Nothing
dramatic necessarily but we finally did get a new cafeteria which took a lot of
effort. And we got a manual for practitioners before the Circuit.

Ms. Winston: How does one become chief judge?

Ms. Wald: Well the system is set. Seniority. Because of all the changes that had gone on in
the 70’s and 80’s, I was ahead of Mikva by about a month. I stepped down early
so he could become Chief Judge. We were good friends and I knew he wanted it.
I’d already had almost 5 years. He left after a few years to become White House
counsel. But yes, it’s by seniority on the court. I kept the full regular docket.
You become a member of the Judicial Conference, so I sat on two Judicial Conference committees, the Code of Conduct committee for six years, and the Case Management Committee for several years, too. But the position takes up a certain amount of your time. And you have to do a lot of things with the chief administrative officer. When I became Chief Judge in 1991, it was just around the period when computers were beginning to be used extensively and some people were way ahead of the curve like Edwards and Doug Ginsburg who were really into it and they wanted the best and the most up-to-date technology. You also had outliers like me and Judge Silberman who still doesn’t use his computer. And so they wanted the best and the latest and they wanted home computers. There was a lot of politicking that needed to be done at the administrative office level -- getting to know the right people and determining who is going to control certain areas and making sure that you don’t antagonize somebody to the detriment of the Court’s resources. It’s like any chief office. But I enjoyed it.

Ms. Winston: You said that you were, of course, the first woman, with the exception of Judge Allen in the 30s and that you didn’t want to blow it. Were there any other differences that you felt as a result of being the first, the first woman to be chief judge of a circuit court, any special tensions or responsibilities? For example, were you being called upon by lots of women’s groups to speak?

Ms. Wald: Yes, and not just women’s groups. I got a lot of invitations to speak at graduations and to speak at meetings and conferences. I did have one disturbing incident and I’m not even going to name the person involved. It came out of sharp feelings which eventually went away. I was challenged by another judge
about five or six things that were going on – all of them absolutely legitimate. But the fact of challenge -- that made me quite nervous, so I went around and saw the other judges to explain the situation. Here’s an interesting thing. I knew I had certain allies who would support me and also that the staff was with me. It wasn’t like I was cheating on how money was allocated, or that I was cheating on case assignments or things like that that this person didn’t like. I think it was just kind of an effort to dampen me down. So I knew I had allies in people like Mikva and Edwards. (Edwards is a good ally, he can be a sharp guy in the trenches.) But what was gratifying was that some of the conservative judges -- Starr and Williams were excellent too -- completely backed me up. That challenge eventually went away. I think it chastened me a bit however. I didn’t want to have anything like that again.

Ms. Winston: And you were Chief Judge for 5 years.

Ms. Wald: It was from 1991 to 1996. It wasn’t even quite 5 years. For my last years, I let Mikva have it. And he stayed for 3 1/2 years.

Ms. Winston: I do want to ask you this, did you did leave the Court in 1999 to go to the International Court at The Hague? And I wonder if you could just take some time to share how that came about.

Ms. Wald: Well I told you that I had been doing a lot of work with CEELI; I’d been going over to all these Eastern European countries so it was very exciting to see a country beginning anew. I knew about the International Court being formed. The first American judge went over in 93 for the International Criminal Tribunal for the Former Yugoslavia (the ICTY). However, they didn’t actually have their first
defendant in the dock for trial until 96. That judge was Gabby McDonald who was an African-American. She had been a federal district court judge in Texas. She left after 6 years. She went on the district court about the same time I went on the Court under Carter. She was on the District Court for about 8 years and she had been teaching and practicing since leaving the court. Conrad Harper, the former Legal Adviser at the State Department, was at this time in 1999 back at his law firm in New York, Simpson Thacher & Bartlett. I had had a conversation with Conrad way back in 1993 before they appointed Gabby. I decided for various reasons, that it was not the time or place for me. However, Gabby announced in the middle of her second term, that she wasn’t going to continue through the end of the term, she had, still has a neuropathy problem in her legs and I think it was giving her difficulty.

Ms. Winston: How long had she been there?

Ms. Wald: Six years. So the executive director, Mark Ellis at CEELI, asked me if I would be interested. But, perhaps more pertinent than that, was the woman who had been the staff person for Birch Bayh during my confirmation in 1979, Elaine Shacos. She later became the chief assistant to Madeline Albright during Madeline’s term both at the UN and as Secretary of State. She ran into my husband in the grocery store and said “is there any chance Pat would be interested in this vacancy that’s coming up?” And he said “ask her”, so she called me. And I said yes. By this time, I’d been on the court for 20 years and, the court had changed a lot. I thought this was a very worthwhile endeavor. I was interested in international
justice and advancement and so, Dave Andrews … I don’t know if you knew
Dave.

Ms. Winston: He became the Legal Adviser at State.

Ms. Wald: Yes. He and I had worked together in the Carter Administration but not closely.
He was EPA’s legislative person and I had been Justice’s legislative person. He
asked me to swear him in when he became Legal Adviser at State. So he called
and asked me too. And I said yes. This was mid-term in the appointment and I
was filling in at the end of the term for Gabby McDonald. Normally, you’re
elected. That is, people on the International Court are nominated by their
countries. Then the UN General Assembly votes for the member. In the case of
somebody going into fill someone else’s term, just the Secretary General of the
UN has to approve it. So the State Department nominates, thank God, it wasn’t
the White House. They would have to get an okay from the Senate. But it isn’t a
White House appointment per se but it goes up as a nomination from the State
Department through the White House and then to the Secretary General. So
Chuck Ruff was the White House counsel at the time. Chuck was a great guy.

Ms. Winston: Yes, he was. He was my first law school professor.

Ms. Wald: His death was such a tragedy. So, there was no problem there with that. So I
went up and had my interview with Kofi Annan who was very nice. So that was
it. I went over. The last day at the Circuit was a Friday and I was in The Hague
by Tuesday.

Ms. Winston: What month was this again?

Ms. Wald: November.

Ms. Wald: My husband was very, very supportive. The kids were all grown up but he was still practicing and he didn’t want to pick up and move to the Netherlands so I decided I would take an apartment and he would come over as much as he could. It was very generous of him. It turned out to be about a week a month. In preparation for the position, Gabby and I actually did a lot of stuff on the phone, and she left the day I arrived so I didn’t have a visit with her, but she’d been very helpful over the phone. I took over her lease which was in an apartment building just across the street from the tribunal in The Hague. Actually, I bought a lot of her furniture in sort of one packet. That’s the way people did things in that position. And my husband stayed the first week and we managed to get telephone service which usually takes about three months in The Hague. There were other things that we managed to rent. But it did require something of a big cultural adjustment. Let me just name a few things that are very different. There are 14 judges. They’ve since increased the number to 16 or 17. When I went there, it sat in panels of three. There’s no jury. And there are two languages that are spoken by both the lawyers and judges (actually, there are 3). There are two working languages, French and English. The other two judges on my panel spoke French. One could speak both French and English, but one spoke only French. I spoke only English and just a little French from high school. So, it was all high tech with earphones and simultaneous translation, but then the witnesses and all the defense lawyers mostly speak Serbo-Croatian. So, you had three banks of translators. It slows things down more than a little. You’re not always sure about
the translation and you’re at the mercy of the translator. You have screens in
front of us too. Gabby McDonald helped me in one important way. All the legal
assistants are the equivalent of law clerks and they are assigned to chambers and
they are picked by the registry which is sort of a glorified administrative office
that takes care of the courtroom stuff. However, the UN’s personnel policies
make the U.S. civil service look like a Taj Mahal. Anyway, they were so
interested in foreign diversity that they sacrificed to diversity not only
qualifications but also competence. Anybody in the legal assistant position is
supposed to speak fluent French or English but they don’t always. You get
memoranda that are just unusable, absolutely unusable. So Gabby said, you have
to work the system so you can hire one of your own law clerks and she helped me
to do that. So I brought over a really, really good woman, a Harvard Law
graduate who had clerked for Judge Calibresi and Justice Steve Breyer. She now
teaches out at Stanford.

Ms. Winston: Who is that?

Ms. Wald: Jenny Martinez. She’s already argued a case in the Supreme Court. Anyway, she
was great. It’s amazing if you have a close relationship with someone you really
trust; you can accomplish so many things and work them out. But basically, all
but one or two of the other legal assistants were of limited value due to language
differences. The other two judges on my panel were very nice. One was
Egyptian and one was Portuguese. The Egyptian one had never been in a
courtroom before he went on the Court. The people who are appointed to these
positions don’t necessarily have any courtroom or judicial experience. They may
be diplomats or academics. The Portuguese judge was the most senior. He had been there a couple of years before me and so therefore was the Presiding Judge. He had actually come from the Attorney General’s office and I think he was involved mostly in domestic family law issues and not much criminal law. Many of the judges really don’t have a great grasp on criminal law issues. Now there were some fine judges there. One was from Australia. He had been head of the criminal appeals court but he was on a different panel, but we became friends and the same with Judge May from the U.K. who was presiding over a significant case on the Tribunal’s docket later on. They really knew what they were doing. There was an African, who had come from the Supreme Court of Zambia who was very good. Judge Florence Mumba was the only other woman on the Court.

Ms. Winston: Again, her name again.

Ms. Wald: Mumba, M-U-M-B-A. She is not there anymore. She’s gone back to Zambia. But out of the fourteen judges -- the regular judges, there has never been more than two women. So the entire time the international court has been in existence no more than three women have been on the Court at one time. Although, I guess I shouldn’t speak disparagingly of that since there is only one on our own Supreme Court now. However, the Tribunal in The Hague later got a lot ad hoc judges to try to clean up the calendar and they were coming in just as I left. A lot of them are women, but they only come for one or two cases and they don’t have the regular privileges of the judges. Still, there are too few women, the U.S. has been pretty good, out of the three judges the U.S. has appointed two have been women. But many of the other countries are not at all good at naming women.
And actually when they had re-elections in 1999, Mumba who is a very good judge was up again. She just came in by the skin of her teeth. They had to get one other country to pull their candidate to make sure Mumba got back in; they make these deals with each other. But that caused enough attention in the press in and among the international women's groups that they screamed and yelled about the fact that the countries didn't put up women. This was good because when it came time for the International Criminal Court a couple of years ago to appoint their first group of women, these women's groups pushed and pushed so you had a lot of women candidates. Eight of the 16 are women on the international criminal court. So that's another example of pressure. They learned from the experience of the other courts.

Ms. Winston: Right.

Ms. Wald: The second thing, of course, is that the ICTY has a very different procedure. The rules for the criminal court are a meld of common law adversarial and civil law continental procedures and so you have to get used to them. There are various things that are different, for example, the prosecutor can appeal acquittals. The defendant doesn't have to take an oath. He can just give a statement on the merits without being cross-examined or under oath.

Ms. Winston: I see.

Ms. Wald: The evidentiary rules are much more lenient, you can bring in witness statements under certain circumstances without the opportunity for cross-examination which bothered me a lot, that bothered me more than the other two things. They have a theory that the reason that we have the hearsay rule here in the U.S. is because we
have lay juries and we don’t think ordinary people can draw these distinctions between what’s true and what’s not. Whereas, judges, are imbued with this great authority of taking a written statement and telling without ever seeing the witness or listening to a witness what’s true and what’s not. I said I didn’t really buy into that, but they do have much more lenient rules. The other thing I noticed, there is just much more stuff going on in the courtroom. Just imagine, everybody has a translator, the witnesses come in and you have a lot of emotional witnesses. I was put into the trial court, not the appellate court. Although I ended up doing a lot of appeals cases because judges were disqualified from hearing any case on appeal that they had heard as a trial judge. So I had a lot of experience in both chambers. In the trial court, I was glad actually that I was assigned there. Because that’s where you hear the actual witnesses and see the evidence and you have highly-emotional witnesses, many broke down on the stand. There was crying, violent exchanges, and some defendants speaking out against witnesses. So it was a very intense experience but I enjoyed it very much. I have just a couple of words about the cases.

Ms. Winston: Okay.

Ms. Wald: The two trials I had, one was the genocide at Srebrenica where 8,000 boys and men, young men, were executed in a week and then secretly buried over a 50-mile radius in eastern Bosnia. You can imagine what the testimony was like. It was the first genocide case brought to trial in the Yugoslavian tribunal. There had been several brought in the Rwanda tribunal, but Rwanda was clearly defined as a genocide right off the bat because it was the Hutus and the Tutsis. They were
clearly going after each other and there was all of this evidence of people getting on the radios and saying "kill the cockroaches". It was different with the Bosnian situation. You didn’t have that clarity to it. The whole war was not a mass genocide. There were parts of it that were and parts that were not and there were some very technical questions involved and that were still being debated outside of the court as to whether or not it was merely ethnic cleansing or had gone over the line to become genocide. Genocide requires technically that there be an intent to destroy a group, in whole or in part as such, rather than merely to get them out of the territory. We had big debates on that. We had to decide what happened there. We had a general who was in charge of the Drina Corps in whose territory all these executions took place.

Ms. Winston: He was in charge of the…?

Ms. Wald: He was in charge of the Drina Corps which was in charge of the whole territory in which all these executions occurred. That was a complicated case that lasted for a year. We did two cases in tandem, a couple weeks one case and then another then a rest. The other major case was the Omarska Prison case which had four or five joint defendants, all with their several counsel. The defendants were various officers in one of the prison camps where all kinds of tortures and rapes and atrocities and malnutrition and everything else horrible you can imagine occurred. It involved one of the prison camps where when the Serbs captured a village, they put all the men and some women, not all the women, but some women in camps. This presented an interesting question not unlike some that had arisen in Nuremberg earlier. How far down the line do you go on culpability for the
atrocities? They didn’t have the commandant of the camp because he had fled. He was actually found a year or two ago and taken to trial separately. But at this point, they just had people like the deputy commandant or shift commanders. So the question was whether or not they should be held accountable. Of course, they all pled that they didn’t do anything but were simply following orders. The question was how far down in terms of war crimes, crimes against humanity, you go. Then I also sat on several appeals including one in which I was the presiding judge. This was an appeal of four or five Croatian defendants. It was the first case in which we reversed the convictions which caused a great amount of consternation. That appeal still may be the only reversal in the history of the Tribunal, maybe there’s one or two more, but this was for insufficient evidence and not including the most relevant facts in the indictment. The real reason I think was the President of the Tribunal, Antonio Cassese, a very fine international scholar and a very fine humanitarian had no prior experience in the courts. So that accounted for some of the mistakes that were made in that trial, many of which could have been avoided, I think. You forget as lawyers, how technical some of these issues are because we live with them. Things like putting material facts in the indictments, and having to give notice of what you are going to rely on to prove something. The defense in this case wanted to call a critical witness -- a corroborating witness -- and she wouldn’t come, and the Court let her go without a medical excuse, so we reversed the conviction which brought some unhappiness. But some people said it was good to show that the Tribunal was actually straight, not just there to convict people. I enjoyed living abroad for the
two years. I made a lot of women friends over there. There were a lot of women both in the prosecutor’s office and around the Tribunal staff even though there was only one other woman judge, whom I liked very much. She was there with her husband and children and they lived in the apartment complex so I would see them socially. I had a lot of social intercourse with several of the women who became good friends who were working in various staff positions. It’s a great town to live in. The public transportation is great. We’d go out every night. There would be somebody at the door saying, well let’s go here today or let’s go there. It was like being in college. There were a lot of social activities.

Ms. Winston: Did you have any time to travel to other places in Europe.

Ms. Wald: Whenever my husband came, we usually planned a trip. We went to Germany and Spain. We had some friends in England and in Paris so that was great. Even when he wasn’t there, one or two of my women friends and I would on a weekend go down to the train station and get out and about. I mean Holland is full of these great towns which are picturesque. They all have a marketplace in the 15th century and a cathedral and this and that canal. So we invariably just went to one of those place and we’d either stay the day or stay overnight and come back the next day. So we really saw the area. There was always some special event going on -- the Christmas bazaar here or the Queen’s birthday there. The Hague is only twenty minutes from Amsterdam. Despite the sordid nature of the kinds of stuff that came up before you we managed to enjoy the period. Now we did have to work hard because at the end, I really couldn’t sign on to any judgment that basically I had not written most of. I really had to dig in to understand the
procedure and problems presented. This is jurisprudence and you can’t sign on to something that you don’t understand or don’t think is right. So my law clerk and I ended up writing on most of the cases.

Ms. Winston: How did you negotiate that in terms of the other judges involved?

Ms. Wald: Many judges were not dying to take on the work.

Ms. Winston: I see so they didn’t object to your deciding to write the opinion?

Ms. Wald: No, they had participated in arriving at the judgment. In addition, I presided in a couple of the cases so I would say, we’ll do a draft and you can get back to us with any problems you have with the draft. When there was a big appeal, it had to be decided fast. In the appeal of the Kupreskic defendants where we reversed the convictions it had been around for three or four years and I knew I was leaving that November and I just got appointed to be the presiding judge several months before because the former presiding judge was going off the court back to Morocco. I really had to not only get the hearings done but also get the judgment written and issued by the time I was leaving in November. So my law clerk -- I had a different a law clerk the second year, very, very good woman from Australia who’s still in the prosecutor’s office there -- we just got the legal assistants together and parcelled out the work. We had a meeting of the judges so we got a basic agreement with them and the agreement was that we had to reverse the convictions. After that it’s up to us to write the judgment. We got their legal assistants and we kind of parcelled it out. We said to each, you know what your part of the work is but you certainly should take it to your judge and make sure
you have complete agreement with your judge. We then put all of parts together.
You had to do a lot of reworking.

Ms. Winston: Would you spell for me the name of that case.

Ms. Wald: K-u-p-r-e-s-k-i-c. So I did some other cases which were smaller cases. The major ones were the Omarska prison camp case, the Srebrenica genocide and the Kupreskic appeal.

Ms. Winston: And you were there for two years? Was it the end of the term when you left?

Ms. Wald: The end of the term was also the election year. And here’s what happened. I wouldn’t have minded staying on, but in all honesty I felt that it was unfair to my husband. He had made 30 trips in a year and he has some peripheral neuropathy problems and I just had that feeling that you can’t ask him to continue to do that. He’s made a lot of sacrifices. So I would have come back anyway. But even had I not, it’s interesting to speculate about what would have happened. One can’t predict. Madeleine Albright first decided to put up the War Crimes Ambassador, I don’t know if you know him, David Scheffer. He was the War Crimes ambassador in the Clinton administration.

Ms. Winston: No, I didn’t know him.

Ms. Wald: He’s a very good scholar. So they put his name up for it. But then when the Bush administration came, they took it back and put up Ted Meron. He’s a NYU law professor. I think originally, he came from some European country or maybe it was Israel, I don’t know. They withdrew Scheffer’s name and put up Ted Meron and he’s still over there. I’m not sure they would not have done the same thing even if I had been willing to remain.
Ms. Winston: We're headed to the homestretch here.

Ms. Wald: I guess I can talk about the last 5 years in a couple of minutes.

Ms. Winston: Okay.

Ms. Wald: So I came back. I didn't have any clear notion of what I was going to do. I'd been over there for two years and it took awhile to kind of put together another life. You may have had similar experience coming out of the government.

Ms. Winston: Yes, yes.

Ms. Wald: One thing I think is interesting. I didn't have people clamoring to offer me something. I had a couple of offers from lawyers I had known from a law firm. I hadn't been in a law firm since Arnold & Porter. I had no proffers from any "think tanks". I had a notion that there haven't been in the past too many women -- certainly in the judicial field -- seeking or available for new challenges post-judicial appointment. We were the first generation of women judges. I think we don't really have any precedents for a post-judicial career for women, such as the men. I see men judges going out in the world and lots of them have spectacular landings or are grabbed up by firms, corporations or organizations. I didn't have that happening with me. I mean you get loads of invitations, lunch speeches and dinner speeches always for free. You are asked to join non-profit groups, where they want your name or your money. But I can't complain, people were very nice. I've not made very much money but two things happened. One, Aryeh Neier who is the President up at the Open Society called me and they were setting up the Justice Initiative which is a unique sort of sub-foundation that was established to set up on the ground projects about the rule of law and human
rights. He asked me if I would chair the Board and said I would have an office
down here in the OSI headquarters. I did that for two years approximately. I’m
still on the Board, but I’m no longer chair. That was a very rewarding experience
especially getting to know and work with the director in charge of it, who is one
of the most productive people around. His name is Jim Goldston. He’s been
active for decades in human rights work. He used to run the Roma Project
abroad. I think we have accomplished a lot in a few years at the Justice Initiative.
Then I was asked to join the American Constitution Society (ASC) Board and I’m
on the Board of the Mental Disability Rights Project which traces back to my old
mental law experience. It’s as though I am now connecting all of the dots in my
past life. I also was asked to undertake a remunerative job, an arbitration along
with two other people. I was asked initially if I wanted to join JAMS an
organization that provides arbitrators. Abe Mikva is one of their arbitrators.
However, they want you to make a commitment of six or seven arbitrations a year
and I wasn’t sure I wanted to make that kind of commitment. A lawyer that
appeared before me years and years before apparently nominated me for one of
the cases at the AAA, so I thought I’d do one and see. I’ve still got that
arbitration. I’ve been on it two years, it’s huge. I can’t tell the names of the
parties but it’s a huge cost allocation nuclear waste site and it has been
complicated. We’ve been remunerated for it, but I hope we’ll have it finished in a
couple of more months. We’ve brought done one interim decision and had to go
back to the Nuclear Regulatory Commission for one thing and then we got it back
and I hope we can clean it up. I’ve also gotten involved in the Skelly-Wright
public interest fellowship program at Yale Law School that Judith Resnik runs. Its
goal is to bring public interest people in to teach. One of the women I was very
fond of and worked on a couple of the cases with in The Hague, is now here and
working at OSI. So she and I co-taught for one year, we taught a course on
international courts up at Yale. But that’s a long commute.

Ms. Winston: How many days a week did you teach?

Ms. Wald: We’d go up for a couple days at a time. It was a regular year’s seminar. It was
interesting but it didn’t make me think I wanted to do teaching after retiring. A
lot of the students for the last couple of years have had their papers published.
One became a Supreme Court clerk. The seminar really has attracted a high-
quality level of students. Another important development: one of my colleagues
in the Court of Appeals, Larry Silberman was basically responsible for my getting
appointed to the WMD Commission. They had to have a bi-partisan Commission.
I think we finally amassed a very respectable record to show that the National
Intelligence Estate was dead wrong in concluding there were WMD in Iraq. But
we were criticized -- I don’t think fairly but I understand why. We were just
looking at what the intelligence was and not how it was used. Our mandate was
very specific. We were not supposed to do any thing beyond that otherwise you
never would have had that kind of commission in an election year appointed by Bush.

Ms. Winston: Is this the commission that former Senator Robb was also appointed to?

Ms. Wald: Yes, Robb and Silberman were the two co-chairs.

Ms. Winston: Okay.
Ms. Wald: And Senator McCain was on it. And the president of Yale, Rick Levin, and the outgoing president of MIT, Chuck Vest, and one former Clinton official, Walt Slocum, who was at the Defense Department as well as Bill Studeman, the former head of NSA and Harry Rowen, a well-known professor. It was a good group and we didn't have any internal dissension to speak of. But we were criticized for not becoming a run-away jury and going after the use of the intelligence -- I think the New York Times called us "timid". On the other hand most people thought the findings were quite legitimate and the recommendations good. The Intelligence Reform Act had been passed, but Negroponte had not yet been appointed as Director of National Intelligence. The Act itself had great holes -- kind of what do you do with this power -- how does this relate to this. Most people thought we did a reasonable job. However, I don't know that the intelligence community will ever be reformed in the usual sense of the word. It's something inherent in the culture. I mean, they just learn to lie so early and turf-protection is so much a part of their being, it's almost as if it's a different breed.

Ms. Winston: And they are not used to having that kind of scrutiny directed at them.

Ms. Wald: It was a very interesting experience. And then it was enjoyable at a personal level to get into something that you didn't know much about; I had some exposure to intelligence issues both during the time I was at Justice in a few cases we did at the international level, but I didn't have any in-depth exposure. It was funny though, my experience shows that government has the capacity to get things done well and quickly when it wants to. They announced our appointments in February and we had to have top, top secret clearance and I had the FBI investigator visit
me the next day. They were told to get those clearances done in 15 days — 15
days at the most — and these were top secret clearances. I hadn’t had a clearance
since I came on the court. They got them done. You know, if they want to get
them done, they do. I don’t how, but they can get them done. It’s amazing.

Ms. Winston: How long were on the Commission?

Ms. Wald: Just a year, actually we had a couple of the White House meetings with the
President. I still have one of those Oval Office pictures with the President,
Cheney, the other members of the Commission, Scooter Libby (laughter) and
Harriet Meiers in them. I keep it in my den. Also, a good friend of ours was the
Managing Partner in Piper DLA and they set up a separate sort of foundation, not
a foundation, but a separate endowment for a project called New Perimeter that
identifies people in the firm — associates and partners to undertake public interest
projects abroad. They will spend a full two years, both young associates and
partners, just on these pro bono projects, without having to do other work.

Ms. Winston: That’s great. Is that Jeffrey Liss?

Ms. Wald: Yes. Jeff Liss. He worked in my husband’s law firm. So they have a board of
advisors made up of the NGO heads which I’m co-chairing.

Ms. Wald: I did a trip to Kosovo for them in March. In January, all of the international
courts, Rwanda, Yugoslavia, and Sierra Leone and the ICC got together to
sponsor a training program in appellate advocacy for prosecutors which was held
in Arusha, I went over and did that.

Ms. Winston: Where is Arusha?

Ms. Wald: Arusha is in Tanzania, but that’s the site of the Rwanda Court.
Ms. Winston: I'm not sure of these spellings by the way. Let's see, do you have anything in the planning stage for the next year or so?

Wald: That's an open question. There certainly is no lack of interesting things out there to work on but I don't have any upwardly mobile aspirations at this point.

Ms. Winston: Okay.

Ms. Wald: I'd like to just continue doing things in the area where I think I have had reasonable success.

Ms. Winston: Do you have any hobbies, or play an instrument, anything like that?

Ms. Wald: No, I read a great deal. My husband and I like to go to movies a lot. I belong to a short story club which is different than a book club, but that goes back to my public interest days. We meet every third Tuesday and discuss short stories. We socialize a lot but I don't have any other organized hobbies or activities.

Ms. Winston: Well, I must tell you I have enjoyed this very, very much. I would just ask you that if there is anything that perhaps I didn't ask, or you would like to add to this oral history to let me know and we can have another session to include it.

Ms. Wald: We may both think of that especially as I read it over.

Ms. Winston: I would love the opportunity in reading the transcript if you think of anything just to do a sort of epilogue kind of thing in the fall perhaps when they get the transcripts to you and as time permits.

Ms. Wald: Now you've been very indulgent.

Ms. Winston: Not at all, I've enjoyed this a lot and I really appreciate your volunteering to do this for them.

Ms. Wald: That takes a lot of your time.
Judge Patricia Wald's Nine Designated Cases  
(Based on an Interview with Stephen Pollak on October 17, 1994)

   Overturned FERC's regulation of oil pipeline prices, concluding that FERC's action had contravened its statutory responsibilities.  
   Opinion said that the just and reasonable standard, and its entire history up to that date, suggested that the agency had to have some standards on just and reasonable prices—in other words, it had to establish a zone of reasonableness.  
   Chosen by Judge Wald because it presented an interesting administrative law problem which courts wrestled with during the first half of the 1980s (namely, how courts reviewed an agency's refusal to regulate or its lowering of a regulation), as opposed to what they were doing in the 1970s when there was an escalation of regulation.

   Dealt with Department of Interior regulations regarding the amount of damages polluters would have to pay so-called public trustees from the states—sometimes the federal government—once pollution had been found.  
   It required defining the precise question—that is, can the agency, consistent with the statute, promulgate a standard which sets up the "less of" the two damages, restoration or lost value?—to see if Congress answered it in the law, in the legislative history, as well as in other parts of the statute.  
   Chosen by Judge Wald:  
   1) to support her contention that although the court operates on the record and in insulation, it can never completely distance itself from the outside world. (The decision came out almost simultaneously with the 1984 Alaskan oil spill, so it drew a great deal of attention.)  
   2) to show what a lower court does with a big, broad doctrine like *Chevron* that cannot be applied without taking the whole context of
the dispute into account and trying to fit it to the case at hand. (No matter how much this court’s discretion is cabined, it still resides in thin things like defining the precise question.)


Armstrong tried to prevent outgoing an Administration from erasing documents from its computers during its final days. The majority reviewed the guidelines that the Archivist promulgated for the preservation of electronic records under the Federal and Presidential Records Acts.

Armstrong, represented by Public Citizen, got a TRO and preliminary injunction, near the end of President Bush’s term, to stop throwing out of all his Administration’s electronic records; as a result, the records were preserved, and the immediate emergency was over. The Clinton Administration, in place during the adjudication of this case, continued defending the old policies. The Bush Administration and the Clinton Administration wanted to abide by the Federal Records Act.

Judge Wald felt this was an important issue because it concerned taking old statutes, which were written in a paper age like the Federal Records Act and the Presidential Records Act, into the electronics age.


Involved EPA Clear Air Act performance standards regarding utility plants. The rulemaking had great significance upon the use of soft coal.

Judge Wald included this case because “[i]t’s still cited widely as setting down the cardinal principles for what kinds of communications have to go into the agency record.” She decided the *ex parte* contacts issue in the opinion, attempting to establish guidelines for the types of informal contacts permissible in the rulemaking area and under what circumstances they had to be recorded.

Discrimination case against female foreign service officers in which the court analyzed if the statistical presentation that had been made below—showing the numerical disparity of men and women assigned to the various tracks (cones)—was sufficient to raise an inference of discrimination.

The case had to be remanded since it was based on record evidence.

Judge Wald chose this case because “it was certainly the most in depth look I ever took at statistics which is not my native habitat,” serving as another example of having to go deeply into and master a non-legal discipline apart from help from the parties.


Involved a First Amendment issue—specifically, whether a priest demonstrating with a critical sign within five hundred feet of the Russian embassy was permissible.

Because Judge Wald could not justify a law allowing an individual to hold signs in favor of the embassy—but not against the foreign country’s position—within those five hundred feet, she dissented, suggesting instead an alternative law saying that there is a certain number of feet in front of the embassy where demonstrations of any kind are not permitted in order to facilitate persons coming in and out of the building to dispatch their business without being accosted; she was upheld by the Supreme Court.


Dealt with affirmative action, challenging an FCC rule giving preference for minority ownership in the sale of a license, promulgated in the interests of seeking a policy for diversity of programming, because an individual’s application to buy a station was denied (a minority instead was given preference).

The opinion said the agency couldn’t do this on constitutional grounds, that it was a racial preference and was therefore subject to strict scrutiny.

Dealt with the Secretary of Labor’s refusal over a fourteen-year period to promulgate toilet and drinking water standards for agricultural field workers. Majority tried to “establish[] that the OSHA statute[] did not permit, once the Secretary had determined that standards were necessary, delaying them until the States got around to” them. “OSHA did have a specific provision which dealt with the . . . so-called federalism relationship[] between State and federal standards. If the State was going to do a standard which would be as good as the federal standard, there was a procedure for it to get in there and tell the Department.”

Included because her panel got the case in 1987 after the litigation had been going for “years and years and years, it had been one of these things where they’d settle earlier litigation and say we’ll put out standards and theyre’d be a delays, and these rules had been in the making for 14 yrs.”


Dealt with whether or not the self-incrimination privilege, as expounded by the Supreme Court in past cases, covered a witness who was supposed to be testifying at trial from recollection alone, but who had seen, and perhaps therefore had been influenced in his/her memory of events, by North’s prior testimony at the hearings.

Judge Wald believes the North case laid down an overly stringent prosecutorial burden, not accommodating cases where Congress had gone its way and immunized a witness who later was criminally tried.
JOSEPH AMATEL, ET AL., APPELLEES v. JANET RENO, ATTORNEY GENERAL OF THE UNITED STATES, ET AL., APPELLANTS

No. 97-5293, Consolidated with Nos. 97-5294, 97-5295

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT


May 8, 1998, Argued
September 15, 1998, Decided

WALD, Circuit Judge, dissenting: The prohibition to all federal prisoners of publications "featuring nudity" or depicting "sexually explicit" activities indisputably raises First Amendment concerns. See, e.g., Reno v. American Civil Liberties Union, 117 S. Ct. 2329, 2346, 138 L. Ed. 2d 874 (1997) ("In evaluating the free speech rights of adults, we have made it perfectly clear that sexual expression which is indecent but not obscene is protected by the First Amendment.") (internal quotation omitted); Martin v. Struthers, 319 U.S. 141, 143, 87 L. Ed. 1313, 63 S. Ct. 862 (1943) (noting that the right of freedom of speech "necessarily protects the right to receive [publications]"). Indeed, if the First Amendment, at its core, is designed to promote the free exchange of ideas, the debate in this case goes to the very heart of its protections. The government argues that the reason all publications featuring nudity or sexually explicit material, whether or not they are pornographic or obscene, should be withheld from all federal prisoners is that any pictorial display of nudity or sexual activity communicates messages that are harmful to the rehabilitation of all prisoners. Relying on what it claims to be the inherent reasonableness of a legislative judgment that such materials are always inimical to rehabilitation, the government throughout this case has steadfastly resisted creating any kind of record to support such a wide-reaching incursion on the constitutional rights of incarcerated individuals. Today, the majority unquestioningly endorses the government's approach. Because I believe this result sets an unwise and arbitrary precedent that runs contrary to prior case law, I respectfully dissent.

I find it very significant that two of our sister courts have recently reached results opposite from that set forth by the majority today. In Mauro v. Arpaio, 147 F.3d 1137, 1998 WL 550190 (9th Cir. 1998), the Ninth Circuit invalidated a county prison system's ban on the possession of all materials containing "any graphic representation of frontal nudity." Although the county claimed that its interests in safety, the rehabilitation of inmates, and the reduction of sexual harassment of guards supported such a ban, the court held that the county had not "carried its burden to show that such a far reaching prohibition is 'reasonably related' to legitimate penological interests"; in particular, it had "offered no proof or reasoned explanation" for the ban. Id. at *7. And in Waterman v. Verniero, 12 F. Supp. 2d 378, 1998 U.S. Dist. LEXIS 11193, 1998 WL 416585 (D.N.J. 1998), a district court invalidated a state statute prohibiting inmates in a specialized facility for sex offenders from possessing or obtaining "sexually oriented materials" (defined as any description or depiction of "sexual activity or associated anatomical area"); see Waterman v. Verniero, 12 F. Supp. 2d 364, 1998 U.S. Dist. LEXIS 9748, 1998 WL 354932, at * 4 (D.N.J. 1998) (preliminary injunction)). Despite the state's claim that such materials would disrupt the rehabilitation of sex offenders at the institution, the court held that the state legislature that enacted the ban was motivated by public outrage over pedophilic crimes rather than rehabilitative interests. Waterman, 12 F. Supp. 2d 378, 1998 U.S. Dist. LEXIS 11193, 1998 WL 416585, at * 3. Moreover, the court noted, the literature on the effects of such publications was too unsettled to support a finding that a rational relationship existed between the ban and rehabilitative interests. Id. In both cases, the courts found the broad scope of the ban, in particular its application to publications featuring nudity, to be unjustifiable in light of any evidence advanced by the government to support it.

It appears to need restating once again that prisoners do not lose all their constitutional rights when the prison door swings behind them. While the prison gate may serve to isolate those inside from the outside world, it does not, as the
Supreme Court has taken pains to emphasize, "form a barrier separating prison inmates from the protections of the Constitution." *Turner v. Safley*, 482 U.S. 78, 84, 96 L. Ed. 2d 64, 107 S. Ct. 2254 (1987). Although the majority pays lip service to this canon, it ignores an important corollary: Whatever sentiments we might hold regarding prisoners for the crimes they have committed, these sentiments must not infect our determination of the prisoners' constitutional rights. Indeed, the Supreme Court has recently reaffirmed, albeit in a different context, that ""'a bare ... desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.'" *Romer v. Evans*, 517 U.S. 620, 634, 134 L. Ed. 2d 855, 116 S. Ct. 1620 (1996) (quoting *Department of Agriculture v. Moreno*, 413 U.S. 528, 534, 37 L. Ed. 2d 782, 93 S. Ct. 2821 (1973)) (invalidating state constitutional amendment prohibiting official action designed to protect homosexual persons from discrimination). So long as prisoners retain constitutional rights, including First Amendment rights, see *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 348, 96 L. Ed. 2d 282, 107 S. Ct. 2400 (1987) ("'Inmates clearly retain protections afforded by the First Amendment ...'"), our duty is to ensure that these rights are not impermissibly curtailed. n2

n2 As our Chief Judge has previously noted,

the special place of prisoners in our society makes them more dependent on judicial protection than perhaps any other group. Few minorities are so "discrete and insular," so little able to defend their interests through participation in the political process, so vulnerable to oppression by an unsympathetic majority. Federal courts have a special responsibility to ensure that the members of such defenseless groups are not deprived of their constitutional rights.


It is equally true, however, that the unique and difficult task of running a prison will often necessitate some incursion on inmates' constitutional rights. A prisoner's desire to leave the prison once a week to attend religious services, for example, or his desire to correspond with other inmates may conflict with the prison's need to maintain institutional security. In these instances, courts must give a large measure of deference to the prison administrators who are actively involved in the daily operations of the institution. Courts are not in the best position to judge when or in what manner certain institutional interests may require some action on the part of prison officials to respond to the "complex and intractable" problems of prison administration. *Procunier v. Martinez*, 416 U.S. 396, 405, 40 L. Ed. 2d 224, 94 S. Ct. 1800 (1974), *overruled in part by Thornburgh v. Abbott*, 490 U.S. 401, 104 L. Ed. 2d 459, 109 S. Ct. 1874 (1989). Most of these problems, as the Supreme Court reminds us, "require expertise, comprehensive planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government." Id.

As the majority has duly noted, the Court's standard in *Safley* recognizes the need to forge a balance between the competing interests of prison administration and prisoners' constitutional rights. As I read this standard, it embraces two principles. First, fundamental rights of prisoners must give way to governmental concerns more readily than the fundamental rights of nonprisoners. In adopting a test "less restrictive than that ordinarily applied to alleged infringements of fundamental constitutional rights," *O'Lone*, 482 U.S. at 349, the Court intended to ensure that "courts afford appropriate deference to prison officials," id. To require that prison regulations infringing upon fundamental rights undergo strict scrutiny, as they would outside the prison context, would place an inordinately high obstacle in the way of prison administrators' attempts to run their institution safely and efficiently. Second, and significantly, the Court did not intend *Safley's* lesser standard of review to negate prisoners' constitutional rights altogether, as the majority seems to suggest. The Court did not say, for example, that prison regulations are valid if there is any conceivable basis for their existence, as rational basis review is typically formulated. See, e.g., *United States R.R. Retirement Bd. v. Fritz*, 449 U.S. 166, 179, 66 L. Ed. 2d 368, 101 S. Ct. 453 (1980) (noting that where, under rational basis review, "there are plausible reasons for Congress' action, our inquiry is at an end"). Rather, the task for courts is to determine, while giving appropriate deference to the judgment of prison officials, whether a challenged regulation is, in fact, reasonable or whether it is an "exaggerated response" to the "legitimate governmental interest put forward to justify it." *Safley*, 482 U.S. at 89-90 (emphasis added); see also LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1445 n.21 (2d ed. 1988) ("Any limit placed on the Court's imagination vis-a-vis legislative purpose must be recognized as a tightened form of scrutiny."). A governmental institution is permitted "regulation more intrusive than what may
lawfully apply to the general public," Majority Opinion ("Maj.Op.") at 5, not simply because of its status but rather because of the identifiable, and unique, needs of that institution. And although the need for flexibility is perhaps at its highest in the prison environment, the need for limits on that flexibility is also paramount: Unlike government employees, students, or other participants in governmental institutions, prisoners have no choice about whether to be subject to the power of the state.

To read Safley--as the majority appears to--as permitting unblinking deference to any "plausible" legislative judgment about the "rehabilitative" benefits of denying a prisoner's most fundamental constitutional right, i.e., her freedom to read, renders any and all prisoners' constitutional rights a nullity. I had thought it went without saying that courts do not rely on the mere assertion of a regulation's drafters that the regulation is reasonable; to do so would amount to an abdication of our judicial role. See, e.g., Salaam v. Lockhart, 905 F.2d 1168, 1171 (8th Cir. 1990) ("We would misconstrue [Thornburgh, O'Lone, and Safley] if we deferred not only to the choices between reasonable policies made by prison officials but to their justifications for the policies as well."); Campbell v. Miller, 787 F.2d 217, 227 n.17 (7th Cir. 1986) ("Deference to the administrative expertise and discretionary authority of correctional officials must be schooled, not absolute."). Nor can the judicial role be diminished to the disappearing point solely because the original decisionmaking body in this case is Congress itself rather than the Bureau of Prisons ("BOP"). Cf. Sable Communications of California, Inc. v. FCC, 492 U.S. 115, 129, 106 L. Ed. 2d 93, 109 S. Ct. 2829 (1989) ("To the extent that the federal parties suggest that we should defer to Congress' conclusion about an issue of constitutional law, our answer is that while we do not ignore it, it is our task in the end to decide whether Congress has violated the Constitution. This is particularly true where the Legislature has concluded that its product does not violate the First Amendment.").n3 The Safley standard reconciles prisoners' constitutional rights with institutional needs and defers to prison administrators as the most appropriate articulators of those needs; so long as Congress acts with those same needs in mind, it is entitled to the same deference. But were we simply to defer to Congress' assertion that the Ensign Amendment ("the Amendment") was reasonably related to the interest asserted, there would be no need for judicial review at all, for no statute infringing on inmates' constitutional rights would fail to satisfy this test. The Court has reminded us that the Safley standard "is not toothless," Thornburgh, 490 U.S. at 414 (internal quotation omitted); more precisely, it is not a license for lawmakers, any more than prison wardens, to shortchange the constitutional rights that the Supreme Court has insisted prisoners continue to possess. Only if our assessment is not a cursory one can we give adequate weight to both concerns that underlie the Safley standard. See, e.g., Salaam, 905 F.2d at 1171 n.6 ("Reasonableness in this context refers not only to the relation between the goals of a regulation and its means, but also to the balance struck between the needs of the prison administrators and the constitutional rights of prisoners.").

n3 Of course, because the majority concludes that the BOP's regulations, and not the Ensign Amendment, are controlling in this case, the majority's focus on Congress's conclusions may be misguided. See, e.g., Maj. Op. at 11 ("It does not matter whether we agree with the legislature, only whether we find its judgment rational."). But see note 4, infra.

It is crucial, therefore, to ensure that although the strictness of our review is lessened, it is not eliminated altogether. Our task, ultimately, is to assess the fit between the interest proffered and the remedy adopted—whether the regulation under consideration is a reasonable means of addressing the legitimate penological interest put forward by the government. In Safley itself, for example, although the prisoner's asserted interests in security and rehabilitation were sufficient to justify some restriction on the right to marry, the Court held that the particular restriction adopted was too broad to be upheld. See Safley, 482 U.S. at 97-98 ("No doubt legitimate security concerns may require placing reasonable restrictions upon an inmate's right to marry, and may justify requiring approval of the superintendent. The Missouri regulation, however, represents an exaggerated response to such security objectives."); id. at 98 ("In requiring refusal of permission absent a finding of a compelling reason to allow the marriage, the rule sweeps much more broadly than can be explained by petitioners' penological objectives."). In Thornburgh, by contrast, the pre-Amendment version of the restrictions under consideration here were found to represent a reasonable response to institutional concerns because the "individualized nature" of the determinations ensured that the policy would not result in "needless exclusions." Thornburgh, 490 U.S. at 416-17; see also id. (noting that even a publication that met one of the criteria for exclusion would be rejected "only if it is determined to meet that standard under the conditions prevailing at the institution at the time"). These cases illustrate that the standard of review established by Safley sets some limits on the means the government may use to further penological interests. Although these limits are flexible, they are by no means as vapid as the majority rules them to be.
I agree that rehabilitation is, conceptually, a legitimate governmental interest, even if no one is sure how to achieve it and the Federal Sentencing Guidelines have abandoned it as an attainable goal. Compare Pell v. Procunier, 417 U.S. 817, 823, 41 L. Ed. 2d 495, 94 S. Ct. 2800 (1974) ("Since most offenders will eventually return to society, another paramount objective of the corrections system is the rehabilitation of those committed to its custody.") and Dawson v. Scurt, 986 F.2d 257, 260 (8th Cir. 1993) (noting that rehabilitation is a "legitimate objective") with Kerr v. Puckett, 138 F.3d 321, 324 (7th Cir. 1998) ("Congress abandoned 'rehabilitation' as a justification of imprisonment when it enacted the Sentencing Reform Act of 1984.") and S. REP. NO. 98-225 (1983), at 38, reprinted in 1984 U.S.C.C.A.N. 3182, 3221 ("Almost everyone involved in the criminal justice system now doubts that rehabilitation can be induced reliably in a prison setting, and it is now quite certain that no one can really detect whether or when a prisoner is rehabilitated.").

Where the majority and I part company is on the ultimate question: Has any "valid, rational connection" between the extremely broad ban on publications featuring nudity or explicit sexual activity and rehabilitation been shown in this case? And while I certainly do not discount the possibility that a ban more narrowly targeted on certain kinds of violent pornography or even on certain types of prisoners might satisfy this requirement, I cannot conclude, on the present record, that these regulations implementing the Amendment pass muster. n4

n4 The majority characterizes Amatel's attack on the Amendment itself as a "pre-enforcement challenge" that is invalid because, in promulgating implementing regulations, the government has "waived certain provisions of the law." Maj. Op. at 4, citing Salvation Army v. Department of Community Affairs, 919 F.2d 183, 192 (3d Cir. 1990). In contrast to Salvation Army, however, we have no "express assurance" that the BOP will not enforce the breadth of the Amendment, cf. Salvation Army, 919 F.2d at 192; indeed, the regulations state simply that "publications containing nudity illustrative of medical, educational, or anthropological content may be excluded" from the definition of "features," see 28 C.F.R. § 540.72(b)(3) (1997) (emphasis added).

Moreover, at oral argument, counsel for the BOP acknowledged that under the current regulations, wardens retain considerable discretion as to whether a publication "features" nudity. See Tr. of Oral Arg. at 6. The government's "waiver" of certain portions of the Amendment thus cannot be so blithely assumed and may in fact be an impermissible narrowing of the Amendment's mandate. See, e.g., Public Citizen v. FTC, 276 U.S. App. D.C. 222, 869 F.2d 1541, 1557 (D.C. Cir. 1989) ("While agencies may safely be assumed to have discretion to create exceptions at the margins of a regulatory field, they are not thereby empowered to weigh the costs and benefits of regulation at every turn; agencies surely do not have inherent authority to secondguess Congress' calculations."); Alabama Power Co. v. Costle, 204 U.S. App. D.C. 51, 636 F.2d 323, 358 (D.C. Cir. 1979) ("Categorical exemptions from the clear commands of a regulatory statute, though sometimes permitted, are not favored.").

I believe that the determination of whether a regulation (or statute) is reasonably related to a legitimate penological interest must depend, in all but the most obvious cases, on the evidentiary support for that nexus in the record before the court. Of course I recognize too that the question of what or how much evidence is necessary may depend on what logic or everyday experience show us to be the connection between the disputed means and the rehabilitative end. If the Amendment prohibited the distribution of publications containing escape plans, the connection between the ban and the penological interest in institutional security would be obvious, and we could uphold such a prohibition based on little or no demonstrated evidence. Where, as here, however, the connection (between nudity and rehabilitation) is far murkier, courts (and I would include legislators as well) far removed from the day-to-day operations of a prison are much less able to answer the question accurately on their own; indeed, the very reason that Safley prescribes a great measure of deference to prison administrators is that they are in the best position to provide answers involving means and ends in prison administration. See, e.g., Kennedy v. Los Angeles Police Dep't, 901 F.2d 702, 713 (9th Cir. 1989) ("The principle that courts must provide wide latitude to prison policies needed to maintain institutional order and security necessarily presupposes that the administrators have crafted those policies with careful deliberation."); citation omitted.

We would normally be expected to give a healthy dose of deference to the judgment of prison officials as to their experience and apprehensions in support of a regulation, but where, as in these regulations, these same officials were, so far as we can tell, never consulted on the Amendment's merits and under its terms are not allowed to exercise any judgment about what kinds of nudity or sexually explicit material are allowed inside the prison walls, I do not believe Safley permits us simply to assume the existence of evidence showing a connection between the regulation and a rehabilitative goal, as we might under rational-basis review and as the majority has in fact done here.
Safley itself provides a useful example of how too Spartan a record can doom a regulation. The Court's rejection of the marriage restriction at issue in that case clearly turned on the quality of the evidence before the Court; four times the Court concluded that the regulation was not reasonably related to penological interests based "on this record." See Safley, 482 U.S. at 97 ("We conclude that on this record, the Missouri prison regulation, as written, is not reasonably related to these penological interests."); id. at 98 ("Nor, on this record, is the marriage restriction reasonably related to the articulated rehabilitation goal."); id. at 99 ("Moreover, although not necessary to the disposition of this case, we note that on this record the rehabilitative objective asserted to support the regulation itself is suspect."); id. ("On this record, however, the almost complete ban on the decision to marry is not reasonably related to legitimate penological objectives.") (emphases added). This repeated qualification of the Court's negative conclusion about the validity of the regulation starkly suggests that while a reasonable relationship might possibly have been demonstrated between the marriage restriction and the interests asserted, the prison had failed to present sufficient evidence to establish that relationship.

The majority's apparent conclusion that the government bears no responsibility for compiling evidence to support the breadth of its ban--in other words, that the courts may simply hypothesize a rational connection--runs counter to the wisdom of other court decisions. See, e.g., Shimer v. Washington, 100 F.3d 506, 509 (7th Cir. 1996) (prison administration "must proffer some evidence to support its restriction of ... constitutional rights" under Safley standard); Mann v. Reynolds, 46 F.3d 1055, 1061 (10th Cir. 1995) (invalidating restrictions on contact visits with attorneys, noting that "defendants were unable to provide any evidence the restrictions on contact were reasonably related to prison security"); Muhammad v. Pitcher, 35 F.3d 1081, 1085 (6th Cir. 1994) (invalidating prison mail regulation because "there is no evidence in the record supporting Defendants' factual claim" that policy was reasonably related to interest in conserving resources); Walker v. Sumner, 917 F.2d 382, 386 (9th Cir. 1990) ("Prison authorities cannot rely on general or conclusory assertions to support their policies. Rather, they must first identify the specific penological interests involved and then demonstrate both that those specific interests are the actual bases for their policies and that the policies are reasonably related to the furtherance of the identified interests. An evidentiary showing is required as to each point."); Waterman, 12 F. Supp. 2d 364, 1998 U.S. Dist. LEXIS 9748, 1998 WL 354932, at *10 ("To establish that a legitimate penological interest supports a statute, a state must provide evidence that the interest it proffered is the actual basis for the statute."); Powell v. Riveland, 991 F. Supp. 1249, 1254 (W.D. Wash. 1997) (upholding restriction on sexually explicit incoming mail where "prior to implementing the policy, research was done on the effects of sexually explicit material and the policy/regulation was written to target those harmful materials"). In sum, it is clear, as Judge Posner has suggested, that the Safley analysis cannot be met simply on the basis of "pure conjecture." Reed v. Faulkner, 842 F.2d 960, 963 (7th Cir. 1988); see also id. ("To suppose that the wearing of dreadlocks as an expression of religious belief would lead to racial violence is, on this record, the piling of conjecture upon conjecture. The potential infringement of the free-speech clause of the First Amendment is too plain to warrant comment."). Safley certainly does not stand for the proposition that Congress or prison officials may "set constitutional standards by fiat." Whitney v. Brown, 882 F.2d 1068, 1074 (6th Cir. 1989).

I might, therefore, have been able to go along--as the majority does here--with deferring to Congress had the government seen fit to proffer evidence that links a ban on the prohibited publications to rehabilitation or if the connection between that ban and rehabilitation was so self-evident that no further evidence was necessary to demonstrate its reasonableness. But neither event has occurred, and the majority's once-over-lightly of the scientific literature that does exist certainly does not accomplish the task, as the majority itself admits. See Maj. Op. at 14 ("The point of this is not to suggest that a causal link has been shown. The array of academic authority on the other side is at least as substantial, and quite possibly more so."). At best, it can be said that a few studies have shown a causative relationship between violent pornography and short-term increases in aggression--perhaps a helpful finding with regard to the security interests of prison authorities but next to useless in determining the effect on any long-term interest in rehabilitation. n5 In all other respects, the relationship between pornography and criminal activity is merely correlational, n6 and there is no evidence that simply viewing nonpornographic nudity or depictions of sexual activities (as opposed to pornography) has any effect at all. n7 See, e.g., EDWARD DONNERSTEIN, DANIEL LINZ & STEVEN PENROD, THE QUESTION OF PORNOGRAPHY 177 (1987) (stating conclusion of Attorney General's Commission on Pornography that "in general, the scientific evidence shows no causal relationship between exposure to [nonviolent and nondegrading sexual] depictions and acts of sexual violence" and noting that the authors' "view of the scientific literature ... is in agreement with this conclusion"); id. at 40-48 (citing studies finding that exposing already angered men to nonviolent pornography can cause a short-term increase in their aggressive tendencies); Ernest D. Giglio, Pornography in Denmark: A Public Policy Model for the United States? in 8 COMPARATIVE SOCIAL RESEARCH 281, 285 (Richard F. Tomasson ed., 1985) ("[A] positive causal relationship between pornography and sex crimes has
Des Moines Indep. Community Sch. Dist., casting emerging prisoners in society's own image. This, of course, is the antithesis of First Amendment freedoms; mind to the shape of prevailing dogma."

The task of "character-molding" is inherently problematic in its First Amendment implications, for it presumably involves overregulation and invasion of the innermost recesses of the human mind and spirit. Indeed, undertaking the Herculean efforts involve therapy, drug and alcohol counseling, basic education, or job training, but even in these positive aspects, in

attitudinally and instilled with desirable values or whether it is sufficient that he be convinced that further criminal attempts, the results are far from reassuring. Against that backdrop, it is extremely difficult, if not impossible, to ascertain precisely if or how a particular publication may work to frustrate the rehabilitative goals of prisoners. To start with, there is no consensus on whether in order to transform a law violator into a good citizen, he must be "remolded" with, there is no consensus on whether in order to transform a law violator into a good citizen, he must be "remolded"

or by affidavit from prison psychiatrist).

Correlation cannot be sufficient to satisfy Safley's requirement of a "valid, rational connection." Even if it could be shown, for example, that the majority of those who commit violent crimes are also avid Bible readers, this finding would not constitute a basis for prohibiting all prisoners from reading the Bible.

By pornography, I mean "a depiction (as in writing or painting) of licentiousness or lewdness: a portrayal of erotic behavior designed to cause sexual excitement." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1767 (1976). There is, of course, much material that features nudity or depicts sexual activity that would not qualify as pornography under any definition, including many highly regarded works of art.

In this respect, I believe that it needs to be stressed that the assertion of "rehabilitation" as the reason for impinging on prisoners' First Amendment rights is particularly disconcerting in its potential for abuse. Unlike its interest in institutional security, the contours of the government's interest in rehabilitation are quite amorphous and ill-defined. At the most basic level, the goal of rehabilitation might be stated as returning the prisoner to society in a state so that he will henceforth behave in a law-abiding manner, but no one, not even Congress, is so immodest as to claim secure knowledge of how this goal is to be achieved in individual cases, let alone in the aggregate; most often, rehabilitation efforts involve therapy, drug and alcohol counseling, basic education, or job training, but even in these positive attempts, the results are far from reassuring. Against that backdrop, it is extremely difficult, if not impossible, to ascertain precisely if or how a particular publication may work to frustrate the rehabilitative goals of prisoners. To start with, there is no consensus on whether in order to transform a law violator into a good citizen, he must be "remolded" attitudinally and instilled with desirable values or whether it is sufficient that he be convinced that further criminal activity would be counterproductive in his own case, whatever his vision of society or the world. Rehabilitation may also be viewed--in the majority's parlance--as an effort to direct the "character growth" of prisoners by limiting the reading materials to which he has access. See Maj. Op. at 11. But, whatever the rehabilitative vision, it should not be possible to proceed on some vague assertion of an interest in "rehabilitation" without the need to define the term or to show a connection between the proscribed activity and the chosen definition; to do so runs an overwhelming risk of overregulation and invasion of the innermost recesses of the human mind and spirit. Indeed, undertaking the Herculean task of "character-molding" is inherently problematic in its First Amendment implications, for it presumably involves casting emerging prisoners in society's own image. This, of course, is the antithesis of First Amendment freedoms; indeed, "totalitarian ideologies we profess to hate have styled as 'rehabilitation' the process of molding the unorthodox mind to the shape of prevailing dogma." Sobell v. Reed, 327 F. Supp. 1294, 1305 (S.D.N.Y. 1971); cf., e.g., Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503, 511, 21 L. Ed. 2d 731, 89 S. Ct. 733 (1969) (noting "this

n5 Of course, the evidence to support a prison regulation need not be in the form of scholarly studies; affidavits from prison officials could also suffice as the basis for analysis. See, e.g., Safley, 482 U.S. at 98 (testimony of prison officials that they had experienced no problems with the marriages of male inmates relied on as evidence that ban was overbroad); Harper v. Wallingford, 877 F.2d 728, 733 (9th Cir. 1989) (finding prison regulation banning receipt of material espousing consensual sexual relationships between male adults and juvenile males to be reasonably related to rehabilitation based on affidavit from prison psychiatrist).

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Nation's repudiation of the principle that a State might so conduct its schools as to foster a homogeneous people")
(internal quotation omitted). Under this theory, lawmakers who believe that books on Russian history may lead to
disrespect for the United States may ban those books for prisoners; lawmakers who hold pro-life views may prevent
prisoners from reading publications describing Roe v. Wade; and lawmakers who hold an antiquated view of the role
women should play in society may ban the distribution in prisons of publications with feminist themes. Each of these
actions could logically be taken in the name of rehabilitation, broadly defined, and each, without doubt, would
contribute to a continual evisceration of the First Amendment rights of prisoners. Cf., e.g., Stanley v. Georgia, 394 U.S.
557, 565-66, 22 L. Ed. 2d 542, 89 S. Ct. 1243 (1969) ("Our whole constitutional heritage rebels at the thought of giving
government the power to control men's minds... It cannot constitutionally premise legislation on the desirability of
controlling a person's private thoughts."); McCabe v. Arave, 827 F.2d 634, 638 (9th Cir. 1987) ("Given the strength of
First Amendment protection for freedom of belief, prison authorities have no legitimate penological interest in
excluding religious books from the prison library merely because they contain racist views."); American Booksellers Ass'n, Inc. v. Hudnut, 771 F.2d 323, 330 (7th Cir. 1985), aff'd mem., 475 U.S. 1001, 106 S. Ct.
1172, 89 L. Ed. 2d 291 (1986) ("If the fact that speech plays a role in a process of conditioning were enough to permit
governmental regulation, that would be the end of freedom of speech."). These examples may sound extreme-they are--
but the majority's rationale easily encompasses them in its umbrella-like authorization for restricting prisoners' reading
material on the basis of a minimum plausibility test for tying the censorship to some vague rehabilitation concept.

Even if the goal of rehabilitation is a more modest one--to convince the prisoner his own best interest lies in
avoiding future crime--it is hard to see how that goal is furthered by returning him unequipped to be an intelligent
customer in the marketplace of ideas. And while serious questions may well be raised about the value of some of the
publications banned under the Amendment, there is much that falls under this broad ban that speaks intelligently to
mankind, including prisoners: Michelangelo's David, for example, or grim photographs of naked bodies piled in the pits
of Germany's concentration camps. n8 There is even a potential for such depictions of nudity to strike a life-changing
chord with some prisoners, a change that should not be prevented from coming to fruition. Malcolm X wrote of his
prison experience:

I have often reflected upon the new vistas that reading opened to me. I knew right there in prison that
reading had changed forever the course of my life. As I see it today, the ability to read awoke inside me
some long dormant craving to be mentally alive... My home-made education gave me, with every book
that I read, a little bit more sensitivity to the deafness, dumbness, and blindness that was afflicting the
black race in America.


n8 The majority suggests that the application of the regulations to prohibit artistic depictions of nudity or to
documentary photographs of wartime atrocities would be "bizarre." See Maj. Op. at 17. But, in fact, even the
regulations do not provide for any exceptions to the nudity ban based on a publication's artistic or political
content. See 28 C.F.R. § 540.72(b)(3) (providing possible exception only for nudity "illustrative of medical,
educational, or anthropological content"). And although the Victoria's Secret catalog and the Sports Illustrated
Swimsuit Edition are listed by the BOP as permissible publications, the basis for their exclusion from the ban is
left to conjecture. Cf. id. § 540.72(b)(2) (defining "nudity" as "a pictorial depiction where... female breasts are
exposed"). As for the notion that explicit descriptions of sexual activities and nudity are still permitted (an
illustrated version of Henry Miller's Tropic of Cancer is banned but a nonillustrated version is not), this only
underscores the arbitrariness of the rehabilitative nexus.

n9 Of course, lawmakers who believe that Malcolm X inspires separatism and racial consciousness may,
under the "remolding" theory of rehabilitation, prohibit prisoners from reading his writings as well.

If rehabilitation is to be deemed a legitimate penological interest, the term must be given some shape, at least when
it collides with fundamental liberties. Of course, as the majority notes, the Constitution has nothing to say about what
messages the government may choose to communicate as a speaker. See, e.g., Rust v. Sullivan, 500 U.S. 173, 193, 114
L. Ed. 2d 233, 111 S. Ct. 1759 (1991) ("The Government can, without violating the Constitution, selectively fund a
program to encourage certain activities it believes to be in the public interest, without at the same time funding an
alternate program which seeks to deal with the problem in another way.”). Congress or the BOP may make whatever recreational reading it wishes available in the prison libraries without offending the Constitution; they may even provide each prisoner with a tract on the harms of pornography in the hope that some readers will take its lessons to heart. But it is quite a different matter for prisons to deny all access to certain publications in the name of rehabilitation, particularly in such a broad and overreaching manner as this one. If prisoners are to retain any First Amendment rights, the mere assertion of “rehabilitation” as the interest to be served by a particular regulation cannot serve to extinguish those rights altogether.

Because the Amendment and the regulations eliminate the discretion of prison wardens to make individual determinations about how particular publications will affect particular prisoners in particular prison settings, even rehabilitatively, I believe it was incumbent upon the government to point to some evidence demonstrating a connection between all publications that are sexually explicit or that feature nudity and a tendency to engage in criminal or disruptive behavior, keeping in mind that our task is to determine whether such a connection is reasonably likely to exist, not whether one might be conceivable. Cf., e.g., Mauro, 147 F.3d 1137, 1998 WL 550190, at * 7 (considering whether all materials depicting nudity are “reasonably likely” to cause violence or to be used to harass guards). Neither the government nor the majority has pointed to any such evidence.

Indeed, the proposition that all material that is sexually explicit or that features nudity will have a detrimental effect on rehabilitation is belied by the prior actions of the prison officials under the pre-Amendment policy. At that time, prison officials were authorized to prohibit sexually explicit materials that they believed would negatively affect the discipline or “good order” of the institution. Significantly, the prison officials—to whose expertise the Supreme Court has repeatedly deferred on matters such as this—did not choose to prohibit all material that is sexually explicit or that features nudity. Rather, they evaluated the publications individually to determine which ones, in their expert opinions, posed a potential threat and which did not; indeed, as the majority notes, “explicit heterosexual material” was ordinarily admitted. See Thornburgh, 490 U.S. at 405 n.6 (quoting Program Statement 5266.5(b)(2)). It was this “individualized nature” of the determinations that led the Thornburgh Court to conclude that the regulations at issue in that case were rationally related to security interests, the nature of which, like rehabilitation, can change over time. See Thornburgh, 490 U.S. at 417 (“We agree that it is rational for the Bureau to exclude materials that ... are determined by the warden to create an intolerable risk of disorder under the conditions of a particular prison at a particular time.”).

n10 It should be noted in this respect that a seemingly innocuous publication may be quite detrimental to a prisoner’s rehabilitation, depending on the circumstances. See, e.g., Waterman, 12 F. Supp. 2d 364, 1998 U.S. Dist. LEXIS 9748, 1998 WL 354932, at *3, *4 (citing concerns of prison officials that pictures of children from the Sears catalog should not be seen by pedophile prisoners).

The need for individualistic determinations when behavior modification is at stake was also a concern in Washington v. Harper, 494 U.S. 210, 108 L. Ed. 2d 178, 110 S. Ct. 1028 (1990), in which the Court upheld a prison policy that permitted the involuntary administration of antipsychotic drugs to inmates, given that the policy was not unnecessarily broad and supported by a wealth of evidence:

Its exclusive application is to inmates who are mentally ill and who, as a result of their illness, are gravely disabled or represent a significant danger to themselves or others. The drugs may be administered for no purpose other than treatment, and only under the direction of a licensed psychiatrist. There is considerable debate over the potential side effects of antipsychotic medications, but there is little dispute in the psychiatric profession that proper use of the drugs is one of the most effective means of treating and controlling a mental illness likely to cause violent behavior.

Id. at 226.

Because I believe that, on this record, there is no basis for concluding that there is a rational connection between the interest asserted by the government—rehabilitation—and the restriction chosen to further that interest—a ban on the delivery to all federal prisoners of all publications that are sexually explicit or that feature nudity, I would affirm the decision of the district court. As the majority considers the remaining Safley factors, however, I will also offer a few thoughts.
The second Safley factor considers whether there are “alternative means of exercising the right that remain open to prison inmates.” Safley, 482 U.S. at 90. Although this right must be viewed “sensibly and expansively,” Thornburgh, 490 U.S. at 417, it cannot be viewed so broadly as to eliminate any reason for analysis (or as unhelpfully as the majority’s sardonic reference to an “entitlement to smut”). The Thornburgh Court, for example, noted that although the regulation under consideration in that case permitted the warden to make individualized determinations as to each publication, an exercise of discretion that might appear to produce inconsistent results, “greater consistency might be attainable only at the cost of a more broadly restrictive rule against admission of incoming publications,” which “might itself run afoul of the second [Safley ] factor.” 490 U.S. at 417 n.15. Because the Amendment eliminates a wide variety of publications that feature nudity for artistic or other reasons, prisoners do not have sufficient means of exercising their right to receive many constitutionally protected materials. Cf., e.g., Mauro, 147 F.3d 1137, 1998 WL 550190, at * 8 (“In direct contradiction of the Supreme Court’s cautionary language in Thornburgh, Maricopa County has enacted a regulation that sweeps too broadly, indiscriminately eliminating large categories of materials without individualized consideration.”).

The third factor considers “the impact accommodation of the asserted constitutional right will have on guards and other inmates.” Safley, 482 U.S. at 90. Where the institutional interest asserted for a publication ban is security, accommodation of the inmate’s First Amendment rights may indeed cause the “ripple effect” of which the Safley Court warned, see id. ; a breach of security with respect to one prisoner is likely to result in other breaches in the prison. In this case, however, there is no evidence by which to judge whether permitting certain inmates to view publications that are sexually explicit or that feature nudity will have an adverse effect on the rehabilitation of other inmates. Rehabilitation is a gradual process, and it is entirely possible that any momentary lapses caused by the inadvertent receipt of an inappropriate publication may be reversed with additional rehabilitative efforts. This is not true of security breaches: Once an inmate has received information on how to escape from the prison, he cannot be made to forget it. It thus cannot be concluded, on this record, that accommodation of Amatel’s First Amendment right will have a significant effect on the rehabilitation of other inmates.

Finally, the fourth factor considers whether there are “obvious, easy alternatives” that “fully accommodate[ ] the prisoner’s rights at de minimis cost to valid penological interests”; if so, this may be evidence that the regulation is an “exaggerated response” to prison concerns. Id. at 90-91. One such alternative comes immediately to mind: the pre-Amendment policy, under which wardens had discretion to examine each incoming publication and determine whether institutional interests favored its prohibition. The Court’s approval of this policy in Thornburgh eliminates any concerns the majority might have that such a policy would be deemed arbitrary or particularly burdensome; indeed, since prison officials under the current policy must examine each publication to determine whether it is sexually explicit or features nudity, the prior policy arguably represents no additional administrative burden.

Moreover, other aspects of the Amendment suggest that it is indeed an “exaggerated response” to rehabilitative concerns. The Amendment does not allow the warden to take into account whether a prisoner is in a high- or low-security institution, whether a prisoner is male or female, what kinds of crimes the prisoner has committed, n11 the nature of the prisoner’s sentence, n12 how long the prisoner has been incarcerated and how long he or she has left to serve, whether the prisoner is receiving rehabilitative treatment, n13 or even whether a prisoner is in a prison environment that provides an opportunity to share the material with anyone else (particularly with other prisoners convicted of sex crimes). In these respects, the Amendment “sweeps much more broadly than can be explained by [the government’s] penological objectives.” Safley, 482 U.S. at 98 (invalidating ban on all prisoner marriages by noting that prison officials had experienced no problems with marriages by male inmates or with inmate-civilian marriages; the prison’s rehabilitative concern “appeared from the record to have been centered almost exclusively on female inmates marrying other inmates or ex-felons,” id. at 99, and thus did not account for the ban on other inmate marriages).

n11 For example, the government has provided no evidence on why a ban on nudity is necessary to rehabilitate those convicted of nonsexual and/or nonviolent crimes. I can think of no reason why an embezzler, a tax evader, or a person held in contempt for refusing to testify will be rehabilitated if prevented from looking at publications that “feature” nudity. (The statements of the only two members of Congress who offered floor comments on the Amendment suggest that their concern was with sex offenders. See 142 CONG. REC. H8262 (daily ed. July 24, 1996) (“If we do not adopt my amendment, we are sending the message that it is OK to provide sexually explicit magazines and books to the very prisoners who have committed violent acts against women.”) (statement of Rep. Ensign); id. (“Far too often, those individuals convicted of crimes have the
opportunity, while in prison, to use materials that glamorize the very acts for which they were convicted.

Moreover, the Amendment’s ban may also extend to those inmates who have not yet been convicted but rather are imprisoned while awaiting trial. The government has not suggested any reason for it to take a rehabilitative interest in these individuals, nor do I think it can legitimately do so. See, e.g., McGinnis v. Royster, 410 U.S. 263, 273, 35 L. Ed. 2d 282, 93 S. Ct. 1055 (1973) (“It would hardly be appropriate for the State to undertake in the pretrial detention period programs to rehabilitate a man still clothed with a presumption of innocence.”).

n12 The government would seem to have less rehabilitative interest in, for example, prisoners who have been sentenced to life in prison without parole or to death.

n13 In some prisons, material featuring adult nudity is an effective part of a rehabilitative program. See, e.g., Waterman, 12 F. Supp. 2d 364, 1998 U.S. Dist. LEXIS 9748, 1998 WL 354932, at *7 (citing evidence that adult pornography may be helpful in turning pedophiles away from child pornography).

The majority’s decision to remand this case for further consideration of Amatel’s vagueness challenge leaves a scintilla of hope that this ill-conceived statute will ultimately fail. Because I cannot agree with the majority’s Safley analysis, however, or with its decision to lift the district court’s injunction in the interim, I respectfully dissent.

CONCLUSION

Justice Holmes once remarked that hard cases make bad law. See Northern Sec. Co. v. United States, 193 U.S. 197, 400, 24 S. Ct. 436, 48 L. Ed. 679 (1904) (Holmes, J., dissenting). Claims of prisoners to read magazines like Playboy or Penthouse may not be the ideal vehicles for the articulation of First Amendment rights. But, as Dostoyevsky observed, “the degree of civilization in a society is revealed by entering its prisons.” F. DOSTOYEVSKY, THE HOUSE OF THE DEAD 76 (C. Garnett trans., 1957). Today’s ruling that prisoners may be stripped of rights to view publications of their choice on the mere assertion of legislators or regulators—far removed from the prison scene and without supporting evidence of any kind—that those publications will hinder their “rehabilitation” goes well beyond prior precedent and the case law in other circuits. It is a most troubling precedent.