

Vermont Law School  
2011 Sterry Waterman Lecture:  
“A Life in Public Service:  
Finding Heroes in a Small World”  
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Being back in law school in September takes me back to the beginning of my own law school experience. Along with my new classmates, I was sitting in a lecture hall, waiting for my professor to speak the words that would launch my legal career. I was also praying that those words would not be the dreaded: “Ms. Brill, what do you think?”

Many of you will leave, in a few months or years, with recollections like this, a diploma – most likely – and with the traditional reoccurring nightmare of a newly minted lawyer: you will dream you’re sitting at a desk taking the final exam in contracts and you’ll realize that you haven’t opened the text book or attended one single class all semester. With that, you will be kin to generations of past law school graduates, myself included.

Where you and I differ is in the world that has shaped us, and the world that we shape once we leave.

I grew up in an era when one president opened China to the U.S., and was later impeached. In an era when another president struggled to free 52 American hostages in Iran. In an era when a third president began the end of the cold war with his cry: “Mr. Gorbachev: tear down this wall.”

You have come of age with the agonies and ecstasies of the last decade. The 9/11 attacks of ten years ago, and the ensuing wars. The mortgage crisis, the collapse of Wall Street, and the Great Recession with its continuing challenges. The election of the country’s first African American President. And even the great flood of 2011, which brought in its wake both devastation and a renewed community spirit, with Vermonters coming together to help one another rebuild.

So far this world has shaped you much more than you have shaped it. But I am here, as one who has traveled a similar path, to tell you that won’t be true for much longer. Soon, you will turn a bend, shift the balance, and start to remake the forces that made you. And as you cross that line, you will be working in, with, and on the law that will, to a great extent, shape the world of a future generation of law students who will sit in this very room someday.

For many of you, the biggest question you have now is “how do I get there?” Of course, as Glinda the Good Witch taught Dorothy, no one can answer that for you. But you have a leg up on so many of your peers. You are at a wonderful law school, with a strong commitment to public service. And when your time at Vermont Law School comes to an end, you will, I hope, have one thing that will distinguish you and give you opportunities that very few in our nation

enjoy. As the Wizard said to the scarecrow: “Back where I come from, we have universities, seats of great learning, where men go to become great thinkers. And when they come out, they think deep thoughts and with no more brains than you have. But they have one thing you haven't got: a diploma.”

With your diploma in hand, you will have many different and remarkable opportunities to create an exceptional career. And I know that the reason many of you are here, at Vermont Law School, and even at this talk tonight, is that you want to focus, at least in part, on public service. So let me tell you a bit about my path, and about those who inspired me along the way. With this, I hope to give you some ideas about how to find your own yellow brick road.

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Law is a literary field. As students of the law, we can find muses not only in our classrooms and workplaces, but also in the words and lives of those who came before us. Our mentors don't have to be present; they just have to be published. And that was certainly true of a jurist who has had a profound influence on my career path, a man who died almost 20 years before I was born.

At the beginning of the 20<sup>th</sup> century, Louis Brandeis led a crusade against the large steel trusts and other monopolies that were engulfing this country's economic system. His call to cut back on their economic power focused the 1912 presidential election on the “larger debate over the future of the economic system and the role of the national government in American life”<sup>1</sup> -- a debate remarkably similar to the one we are having today.

After Woodrow Wilson won, he asked Brandeis to recommend specifically how to solve the problem of the trusts. Brandeis conceived the Federal Trade Commission, which, at Brandeis's urging, Congress empowered to investigate and prohibit unfair methods of competition with a “broad and flexible mandate, wide-ranging powers, and the ability, at its best, to respond to the needs of changing times.”<sup>2</sup> Wilson later nominated Brandeis to the Supreme Court, where he became one of our most influential thinkers about privacy rights, an issue in which both I and the FTC take great interest.

I am privileged to now serve as one of the Commissioners running the FTC. Our mandate is to protect the nation's consumers, making sure they are not cheated or misled in the marketplace; and to protect competition, making sure that the marketplace is offering up a wide range of goods and services at the fairest price.

But just as I did not leave law school aiming for a seat at the top of a powerful federal agency, Louis Brandeis did not leave law school aiming for a seat on the Supreme Court. He

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<sup>1</sup> Link, Arthur S. *Woodrow Wilson and the Progressive Era, 1910-1917*, Harper and Row (1954), 1-24.

<sup>2</sup> Winerman, Marc. “The Origins of the FTC: Concentration, Cooperation, Control, and Competition”, 71 *Antitrust Law Journal* (2003), 5-6.

more likely was guided by an old Yiddish proverb that advises: “God created a world full of small worlds.”<sup>3</sup>

Brandeis began his career focusing on local issues in the small world he found in his adopted home of Boston. There, he opened up a practice with a law school chum, and, from this vantage point, eagerly took up local causes.

He worked to modernize the local rules for liquor distribution. He investigated the conditions of the local public poor houses. He fought against corruption among those building the Boston subway system. And, convinced that life insurance was “simply a bad bargain for the vast majority of policyholders”, he reformed the way it was sold in Massachusetts.<sup>4</sup> These crusades, in his small Boston world, won him a national reputation as the “people’s lawyer,”<sup>5</sup> and the attention of national policy makers like Woodrow Wilson.

I found my small world in the Vermont Attorney General’s office. I landed there after clerking for Vermont federal district judge Franklin Billings, and working briefly at a big law firm in New York City. The Vermont AG’s office employs about 60 attorneys, but like all State AG offices, its mandate is broader than its bench. State AGs, like the Boston Red Sox, play offense and defense, though unlike the Sox, the offense has to show up for every game. State AGs prosecute consumer protection, competition, environmental and civil rights, and other public protection matters on behalf of the state. They advise state agencies on how to comply with the law and defend them when their actions are challenged.

I joined the Vermont AG’s consumer protection unit in 1991 at a time when there were only two of us focusing on consumer protection and antitrust. I immediately began working with residents of Norwich and Woodstock, Bradford and Northfield, and residents of other small towns who, in large numbers and from all walks of life, were beginning to be rejected for mortgages and refinancing. Working with town clerks, we discovered that the large, national credit reporting agencies had misread Vermont’s town records, registering everyone who received a property tax bill as failing to pay. Entire towns were falsely listed as tax dead beats.

We focused on a local issue: big errors by big companies that impacted people in small towns across Vermont. My work to set things right here led me to the U.S. Senate and House of Representatives, which, at that time, were considering changes to the Fair Credit Reporting Act. I testified about the real life impact on Vermonters of inadequate national consumer protection laws, and that testimony was one reason Congress substantially revised the Fair Credit Reporting Act for the first time in 25 years.

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<sup>3</sup> Gott hot ein velt fill kleiner veltter bershaffen.

<sup>4</sup> See generally Lief, Alfred. *Brandeis: The Personal History of an American Ideal*, Stackpole Sons (1936); Mason, Thomas A. *Brandeis: A Free Man’s Life*, Viking Press (1946); Klebanow, Diana, and Franklin L. Jonas. *People’s Lawyers: Crusaders for Justice in American History*, M.E. Sharpe (2003); Strum, Philippa. *Louis D. Brandeis: Justice for the People*, Harvard University Press (1984)..

<sup>5</sup> Brandeis, Louis. *Opportunity in the Law*, address before the Harvard Ethical Society (May 4, 1905).

A few years later, I got to lead Vermont's efforts on tobacco issues. Vermont joined a group of State Attorneys General concerned that the tobacco industry had been engaged in deceptive practices, including advertising to children and misleading the public about the harm smoking causes.<sup>6</sup> Because we carefully crafted our case as a public protection lawsuit focusing on consumer protection issues, we were one of the few states that survived the industry's intense litigation onslaught. We also worked with the Vermont legislature to pass a state law clarifying the industry's responsibilities to reimburse the state for the tobacco-related health costs of Medicaid recipients.<sup>7</sup> These victories for Vermont were also victories for the larger, collective litigation effort by all the states. And they gave Vermont an important role negotiating a settlement with the industry.

In 1998, the Attorneys General of 46 states signed a landmark agreement with the largest tobacco companies that created restrictions on the advertising, marketing, and promotion of cigarettes, and recovered billions of dollars in costs associated with treating smoking-related illnesses.<sup>8</sup> Eleven years later, in 2009, Congress – building on the states' efforts -- passed legislation giving the FDA authority to regulate tobacco products by setting product standards, banning some chemicals, and implementing advertising restrictions.<sup>9</sup>

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I had the great privilege to find, within the small world of the Vermont Attorney General's office, issues of national import like credit reporting and tobacco. I also had the great pleasure to work with some wonderful role models.

Bill Sorrell, the Vermont Attorney General for the past 14 years, is a man who, no matter what the issue – tobacco, obesity, or a police officer's use of deadly force – deliberates and acts with reasoned consideration and bottomless integrity. And he is generous to his loyal staff.

Bill Sorrell gave me the opportunity to become a national expert on privacy, tobacco, and other issues, like pharmaceuticals. I travelled around the country, speaking to industry groups, consumer advocates, and law enforcement. I got to know many other wonderful leaders in the state Attorney General community. One who always stood out was Roy Cooper, Attorney General of North Carolina.

In 2008, Business Week called North Carolina Attorney General Roy Cooper one of the visionaries who had warned us that a mortgage crisis was on the horizon.<sup>10</sup> Back in 2003, he

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<sup>6</sup> See Summary of Vermont's Tobacco Litigation available at <http://www.atg.state.vt.us/assets/files/1997-98%20summary%20of%20litigation.pdf> .

<sup>7</sup> Id.

<sup>8</sup> 1998 Tobacco Master Settlement Agreement available at [http://www.naag.org/backpages/naag/tobacco/msa/msa-pdf/MSA%20with%20Sig%20Pages%20and%20Exhibits.pdf/file\\_view](http://www.naag.org/backpages/naag/tobacco/msa/msa-pdf/MSA%20with%20Sig%20Pages%20and%20Exhibits.pdf/file_view)

<sup>9</sup> Family Smoking Prevention and Tobacco Control Act, 21 U.S.C. §301 (2009)

<sup>10</sup> Berner, Robert and Brian Grow. "They Warned Us About the Mortgage Crisis", Business Week (Oct. 9, 2008), available at [http://www.businessweek.com/magazine/content/08\\_42/b4104036827981.htm](http://www.businessweek.com/magazine/content/08_42/b4104036827981.htm)

and his counterpart in Iowa, Attorney General Tom Miller, met with the United States Comptroller of the Currency to warn that lenders were pushing increasingly risky loans – with exorbitant interest rates and fine-print fees – on consumers who couldn't afford them. The Comptroller sided with the lenders and refused to give the states the power to reign in abuses.<sup>11</sup> General Cooper characterized Washington's attitude as taking "50 sheriffs off the job during the time the mortgage lending industry was becoming the Wild West."<sup>12</sup>

General Cooper asked me to come to North Carolina to lead his consumer protection division and join his fight against predatory lending and Washington's obstructionism. I was eager to take that on, and the challenge of managing a very large staff. I was on the job in North Carolina only a few months when the White House called and asked me to serve on the Federal Trade Commission. In the nine months it took my nomination and confirmation process to unfold, I watched with admiration how General Cooper wielded the power of an Attorney General of a large state with commitment, creativity, and humility.

I didn't land at the Federal Trade Commission because I worked on Wall Street or at a large corporate law firm. Political connections and wealth didn't get me to this point in my career, either. I assure you, I don't have those! No. It was working in small worlds that brought me to the Federal Trade Commission.

And now I have the opportunity to work in a larger world on many of the same issues I fought for in the states, including one that I've championed since my first days in the Vermont Attorney General's office: privacy and data security in the internet age.

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Because of innovations in the Internet, social media, mobile communications, and location-based apps, we can now become friends with people whose voices we've never heard. We can tweet our thoughts to a cyber café full of anyone who wants to listen. We shop for groceries online – share photo albums online – pay traffic tickets online – even date online. Health care workers deliver prenatal care in the farthest corners of the developing world using mobile phones. And populist movements, armed only with Twitter and the Internet, bring down dictatorships.

But all this cyber-wonder does not come for free. Just as technology is extending our reach to the limits of our imagination, many of those providing us with all of these advances are reaching back – harvesting and trading in information about us. The amount of tracking of our behavior online—the sites we visit, the ads we click on, the purchases we make, our online chats, and where we wander through the day—is unprecedented. It is also largely undetected by the consumer, raising serious privacy concerns.

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<sup>11</sup> Id.

<sup>12</sup> Id.

Granted, much of this data is collected to fuel targeted advertising, a practice that has solved the problem posed over a century ago by one of Brandeis's contemporaries, the great merchant and philanthropist John Wanamaker, who said "Half the money I spend on advertising is wasted; the trouble is I don't know which half." Companies are willing to pay significantly more for targeted advertising, so it is paying for much of the online free content we all enjoy.

If all the data collected online were just to sell movie tickets or shoes, I wouldn't make it the centerpiece of this speech. But what about the data brokers that market lists of elderly patients who suffer from Alzheimer's disease and similar maladies as "perfect prospects for holistic remedies, financial services, subscriptions and insurance?"<sup>13</sup>

Or how about the firms that "scratch and sniff" through social network sites and online search histories to provide to a future potential employer that unfortunate Halloween party picture of you as Sponge Bob No Pants? What if the data broker reports your interest in articles on reducing credit card debt to a bank where you are asking for a loan? Or how about the company that monitors your online purchases, including that deep fat fryer, for the guy who is going to set your health insurance rates?

This sort of use of your data is not conjecture. The Wall Street Journal reported last year on one life insurer who developed a way to use information about consumers' consumption patterns to make decisions about their life expectancy, and hence rates and coverage.<sup>14</sup> Other large insurers are also interested in using this technology.<sup>15</sup>

Furthermore, the sheer volume and vulnerability of personal data collected, traded, and stored has created significant problems. Data breaches are rampant. In the past few months alone, we saw the online marketing company Epsilon expose the email addresses of millions of customers of the nation's largest firms, including JP Morgan Chase, Citibank, Target, and Walgreens. We learned that Google and Apple used our smartphones to collect and retain detailed information about our daily movements. And we panicked when Sony's PlayStation online network was hacked, resulting in the exposure of the names, email addresses, passwords – and in some cases credit card numbers – of about 77 million gamers worldwide.

I feel fortunate to have joined the FTC just as the agency is grappling with revising Brandeis's law of privacy in light of the Internet revolution. Interestingly, Brandeis's own engagement with privacy issues was founded on his concerns about modernizing the law to address technologies that were new in his day. His famous law review article, "The Right to Privacy," successfully advocated for the creation of a tort for breach of privacy. It focused on the then-revolutionary phenomenon of "snapshot photography," which allowed the press to, as he put it, "overstep[ ] in every direction the obvious bounds of propriety and of decency."<sup>16</sup> And in *Olmstead v United States*, a case concerning nascent wiretap technology, Brandeis issued his

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<sup>13</sup> Karen Blumenthal, *How Banks, Marketers Aid Scams*, The Wall Street Journal, July 15, 2009.

<sup>14</sup> Leslie Scism, Mark Maremont, *Insurers Test Data Profiles to Identify Risky Clients*, The Wall Street Journal November 19, 2010.

<sup>15</sup> *Id.*

<sup>16</sup> Samuel Warren and Louis Brandeis, *The Right to Privacy*, 4 Harvard Law Review 193, 196 (1890).

famous and influential dissent, arguing that “against the government,” Americans have “the right to be let alone.”<sup>17</sup>

The Internet Revolution makes snapshot photography and wiretap technology look like child’s play. We at the FTC are playing both defense and offense in our work to protect consumer privacy online in this new digital age. We have brought a number of law enforcement cases against companies that failed to protect the vast amount of personal information they held about consumers, including sensitive financial information.<sup>18</sup> We have also brought law enforcement actions against companies that disclosed personal data that consumers expected to be private: we took action against Twitter when it made some private tweets public,<sup>19</sup> and action against Google when “Google Buzz” revealed identities of some consumers’ most frequent email partners.<sup>20</sup> And we stopped several online and mobile app services aimed at children from essentially tricking them into revealing personal data, in violation of laws protecting kids online.<sup>21</sup>

In addition to our law enforcement work, the FTC has launched an extensive policy initiative to consider whether the lens through which we examine privacy is adequate in the face of the Internet revolution. We are reconsidering our old notice and consent approach to privacy. It is not reasonable to expect consumers to read and understand privacy policies – most about as clear as the Rule Against Perpetuities – especially when all that stands between them and buying a new flat-screen TV, or playing the latest version of Angry Birds, is clicking the little box that says “I consent”. (And if you haven’t yet learned about the Rule Against Perpetuities in property class, you are in for a treat!) At the FTC, we are also calling on companies to build privacy and security protections into new products and not just to retrofit them after problems arise. And we are calling on companies to be clearer about how they collect, use, and retain consumer information.

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When I worked to solve Vermonters’ problems with credit reporting agencies, I didn’t think of it as a first step on a path in public service that has brought me to a job that allows me a part in reworking the nation’s privacy laws. I was simply working in my small world where I found issues and people that interested and inspired me.

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<sup>17</sup> *Olmstead v United States*, 277 U.S. 438, 478 (1928).

<sup>18</sup> See e.g., *In the Matter of Ceridian Corp.*, FTC Docket No. C-4325 (June 8, 2011), *In the Matter of Lookout Services, Inc.*, FTC Docket No. C-4326 (June 15, 2011); *In the Matter of Settlement One, et al.*, FTC Docket No. C-4330 (Aug. 17, 2011).

<sup>19</sup> *In the Matter of Twitter, Inc.*, FTC Docket No. C-4316 (Mar. 2, 2011).

<sup>20</sup> *In the Matter of Google, Inc.*, FTC File No. 102 3136 (Mar. 30, 2011) (consent order accepted for public comment).

<sup>21</sup> See *United States v. Playdom, Inc.*, No. SACV11-00724 (C.D. Cal.) (final stipulated order filed May 11, 2011); *United States of America v. W3 Innovations, LLC*, No. CV11-03958 (N.D. Cal.) (final stipulated order filed August 12, 2011). See also *FTC v. Echometrics*, No. CV10-5516 (E.D.N.Y.) (final stipulated order filed Nov. 30, 2010).

And I now work to develop the law that frames the world in which you will start your legal career – as you will someday end up working on the law that frames the world of future students.

Find your own small world in which to practice law, where – if you look hard enough – you will discover issues that have great significance for us all. And in those small worlds, find some heroes, just as I found Bill Sorrell, Roy Cooper, and Louis Brandeis.

You will all have the foundation to do what you set out to do – not just because you will have a law school diploma – but because you will have studied at Vermont Law School, with its unique and deep commitment to public service. Some of you will go in and out of public service, or find ways to serve the public while at the same time pursuing other career paths. The important thing is that you give back in some way, and make a difference. On a small scale or a large scale. If precedence serves as any indicator, many of you will dedicate your entire careers to answering Brandeis’ call to become a “people’s lawyer.”

And one day, one or more of you will be at this podium speaking to the next generation that will follow you, about how you found your own yellow brick road.

Thank you.