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# ESSAY

## CHANGE AND CONTINUITY ON THE SUPREME COURT: CONVERSATIONS WITH JUSTICE HARRY A. BLACKMUN\*

*Philippa Strum*\*\*

Justice Harry A. Blackmun used to enjoy telling a story about Supreme Court conferences during the Court's 1970 term, his first on the Court. Warren Burger was Chief Justice; Hugo Black was the most senior Justice. Court protocol, of course, is that the Chief Justice begins the discussion of each case, the most senior Justice speaks second, and the floor goes in turn to each of the other Justices according to descending seniority. Chief Justice Burger would present a case by laying out the issues involved as he saw them and the decision he believed the Court should reach. Then he would turn to Justice Black who, in a voice filled with sorrow and reproach, would lament, "Oh, Chief Justice!" and proceed to analyze the case in completely different terms.

Their disagreement was most noticeable in constitutional cases, and was indicative of the difficulties faced by the Justices as they attempted to apply the sweeping mandates of the Constitution to specific cases. When he joined the bench of the Supreme Court on

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\* This article is based on three taped conversations with Justice Blackmun at the Supreme Court: October 25, December 13, and December 14, 1993. Despite repeated questions about specific cases and doctrines, he chose to speak more informally about life on the Court. Upon reading the proposed piece shortly after the interviews took place, however, Justice Blackmun asked that it be withheld. He feared that it might be embarrassing to some of his colleagues with whom he still worked, and had decided on reflection that he preferred to save the material in it for a book he planned to write after he retired.

Anyone who had the good fortune to be charmed by the courtly and caring gentleman Blackmun will understand why I complied with his request. I hope I would have done so even had he not plied me with chocolates from his desk drawer and kissed me good-bye when our interviews ended.

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June 9, 1970, Blackmun said he was surprised and somewhat taken aback to realize the percentage of Court cases that involved constitutional issues, as this was not the situation on the U.S. Court of Appeals for the Eighth Circuit on which he had served. During the years between 1970 and 1993 he had come to take the long view of constitutional adjudication, referring in a number of lectures to the "trends and countertrends"<sup>1</sup> that manifest themselves on the Court as the Justices grope to interpret the Constitution while taking note of the current needs of society. The Constitution and the role of the Court in the American political system are phenomena providing continuity; change comes with every alteration of the Court's membership and from the ever-diversifying circumstances faced by the country at large. Blackmun's years on the Court can perhaps best be described as an attempt to ensure that the Court maintained the proper balance between continuity and change while seeing that justice was done.

The paragraphs below are offered largely without comment. They are not meant as an analysis either of Blackmun's jurisprudence or of his comments about the way the Court works and about the other Justices. Rather, they are a summary of his remarks, presented in the hope that they may be useful to scholars of the Supreme Court.

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Blackmun spoke with awe of the intelligence of the men who wrote the Constitution, calling them "wise beyond their years," and wondered at the luck of the country in their having assembled in Philadelphia during the hot summer of 1787. "I shudder when I hear suggestions about changing the Constitution," he commented. It is "the basic document that this country lives by," and it has served the country well. He and the other Justices considered it "a pretty good document." This scarcely suggested, however, that it was self-interpreting or even easy to interpret. Although the "average lay person thinks that there it is: that it is engraved in stone and there's no question about what it means," Justice Blackmun considered "one of the beauties" of the Constitution to be its writers' use of "great phrases with flexibility built into them. After all," he

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1. Philip Corrizosa, *Blackmun Says Changes at High Court, White House Should Not Stir Concern*, L.A. DAILY J., Nov. 18, 1988, at 22; see also Justice Harry A. Blackmun, *Movement and Countermovement*, The Dwight D. Opperman Lecture on Constitutional Law, Drake University Law School (Oct. 26, 1988), in 38 DRAKE L. REV. 747 (1989).

asked rhetorically, “what is due process of law? What is equal protection of the laws, and all of the contents of the amendments?” What the public failed to understand was that the Justices were called upon constantly to *interpret* the great phrases: when all was said and done, “the Constitution is what we’re here for in this Court.”

Blackmun, not a believer in original intent, nonetheless emphasized the Constitution rather than individual preference as the starting point of all constitutional jurisprudence: “It certainly governs the discussions and analyses that we here try to put into our thought.” The responsibility for applying the Constitution was a grave one. “Here we are, interpreting and working on the basic document that this country lives by. It is pretty important that we get it right.”

Getting it right meant, in part, turning to precedent first. The easiest cases were those where the precedents were clear and the case under consideration by the Court appeared to fall within those parameters. “It’s when we have to take a further step into the unknown that it becomes a little more difficult. Lots of times [that’s] where the Court splits, some saying we’re not willing to take that step, we’ve gone far enough on this issue . . . don’t think we should go any further,” he noted.

Self-restraint in judicial policy-making frequently might be wise, and yet taking a step into the unknown was “what the Warren Court [did] all the time,” much to the benefit of the country. So the precise balance to be struck between continuity and change would itself be in a constant process of metamorphosis, usually affected in good part by the differing constitutional philosophies of the various Justices.

“There’s a lot of volition on our part,” Blackmun said. “That’s what we’re here for.” Because the Constitution’s phrases contain important but insufficient guidance, members of the Court are largely dependent on their beliefs about what the Constitution was designed to do and the extent to which they can legitimately take note of societal needs. They “not only work with the written word, but with the preferences that the constitutional phrases permit them to draw on. It gets down really to the question of what’s one’s basic constitutional philosophy.” The result is frequently misinterpreted by the media. The media misleads, in part, by insistently labeling Justices as “liberal” or “conservative.” Blackmun pointed to

Justice Thurgood Marshall<sup>2</sup> as an example of a Justice who was usually characterized as “liberal” and who participated in many decisions that might well be typified as such, but whom Blackmun described as “basically conservative.” By that he meant that Marshall preferred to “work within the system” when it was at all possible—a preference with which Blackmun was in full sympathy, although he recognized that it was not one held by all the Justices. Anyone who believed the Constitution was open to only one interpretation, Blackmun pointed out, had only to contrast the philosophy of Justice William J. Brennan with that of Justice James McReynolds or Chief Justice Warren Burger—although Blackmun thought Burger had been “fairly liberal” at times.

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If individual philosophy was important in constitutional adjudication, Blackmun continued, the dynamics of the Court were no less so. Some dynamics were the same no matter who sat on the Court; others varied with particular personnel. The process of drafting, criticizing, and rewriting opinions would always be part of the Court’s work. It was of particular importance, however, on those occasions when the Justices were divided ideologically. In a Court as split as it was during Blackmun’s tenure, “one has to get that fifth vote,” and as a result, “many of our opinions are the result of compromise.”

Opinions for the Court changed during the drafting process because “sometimes one says what he’d prefer not to say in order to get that fifth vote.” Suggestions for language changes came most frequently from the Chief Justice and the senior Justices rather than from the newer members of the Court. When two Justices disagreed about the content of a proposed opinion, “they end[ed] up with something they negotiated about and a deal which neither one was happy about, but at least it [was] acceptable to both.” And perhaps, Blackmun mused, “that’s good constitutional interpretation.” Although the jockeying for votes could lead to acceptance of language a Justice really disliked, the process of give-and-take and the assessing of conflicting beliefs implicit in constitutional adjudication was valuable. Blackman said he strongly endorsed

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2. Justices Blackmun and Marshall served together until the latter’s retirement on June 27, 1991.

Justice Louis D. Brandeis's statement that "Man is weak and his judgment is at best fallible."<sup>3</sup>

The need for compromise, then, was built into the dynamic of the Court, and the institution benefited from the presence of Justices who could make the process work. Specific Justices were particularly praiseworthy for their ability to get agreement from as many of their colleagues as possible. Justice Lewis F. Powell was a "balancing factor" on the Court, liking to "pull the two sides together." Justice Hugo Black's years in the Senate made him a compromiser who knew how to negotiate.

Compromise could be overdone, however. "Some opinions are committee opinions . . . and they aren't very good." Blackmun particularly regretted having agreed to insert a passage in his opinion for the Court in *Roe v. Wade*<sup>4</sup> declaring that a fetus is not a person for constitutional purposes.<sup>5</sup> The language was not in his original draft, and was inserted only because Justice Potter Stewart conditioned his vote on its being added.<sup>6</sup> Blackmun saw the language as having created unnecessary complications and said that if he had it to do all over again, he would have opted to lose the seventh vote instead.<sup>7</sup>

Blackmun was a "firm believer in the author of the opinion presenting it the way he wants to," but he regretted the plethora of opinions the Court issued in many of its cases. "When I first came here, I think it was true that separate concurrences were a comparative rarity. Now they seem to be almost routine." Both Justices Antonin Scalia and Ruth Bader Ginsburg liked to write their own concurrences, and he thought that however worthwhile those might be as a guide to the thinking of specific Justices, they contributed to the plethora of opinions being written in many cases.

The number of opinions disturbed him because "sometimes readers, I suppose, wonder just what the Court is saying," and the Court had an obligation to make its thinking clear to the country.

3. See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 310 (1932) (Brandeis, J., dissenting).

4. 410 U.S. 113 (1973).

5. See *id.* at 156-59.

6. Justice Blackmun did not name Justice Stewart in the interview, saying only that "a Justice" had insisted on the language. See MARIAN FAUX, *ROE V. WADE* 293 (1988) ("Stewart accepted the new draft with the *proviso* that the fetus was not a person under the Fourteenth Amendment.").

7. *Roe* was decided by a vote of seven to two.

"Making it clear to the country" was one reason Blackmun wanted to write a book about the Court when he retired, although he admitted with a puckish smile that he enjoyed mentioning the potential project during Court conferences and watching his colleagues "turn pale."

Lower federal courts had a similar responsibility to the public, and Blackmun disapproved of the tendency among them not to publish opinions explaining many of the decisions they rendered.

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Blackmun frequently lamented to interviewers that "I suppose I'll carry *Roe* to my grave."<sup>8</sup> By this he meant that people automatically associated him with the abortion rights case and virtually ignored many of his other important opinions. He was asked about *Roe* so persistently by interviewers, he reported, that it came as a relief to be questioned about other cases instead. With the exception noted above, he was seemingly content with *Roe* and proud of having prevailed when he insisted that the Court have the case reargued so that the decision could be made by a full bench of nine Justices.

*Roe* was first argued and tentatively decided in December 1971, after the deaths of Justices Hugo Black and John Marshall Harlan, but before their successors had joined the Court. Justice Blackmun, "realizing what *Roe* was all about," thought that "it deserved a Court of nine." This was in part a matter of Court dynamics and the insight that two additional Justices might bring. It was equally important, he felt, "to assure the country that the decision was the work of a full Court." The case presented the gravest constitutional issues: "We were balancing the individual's rights against the compelling interest of the state." Justice William O. Douglas argued against postponing the announcement of a verdict, angry that the opinion had been assigned to Blackmun by Chief Justice Burger,<sup>9</sup> and fearful that what he saw as a very shaky five-two majority on the Court for articulating a constitutionally protected right to

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8. John A. Jenkins, *A Candid Talk with Justice Blackmun*, N.Y. TIMES MAG., Feb. 20, 1983, at 26.

9. Court protocol dictates that when the Chief Justice is in the minority, as Burger initially was in *Roe*, the most senior Justice in the majority assigns the opinion. In this instance, Douglas was senior, and had assumed he would write the opinion himself. Burger nonetheless assigned it to Blackmun. See FAUX, *supra* note 6, at 277-79 (describing Douglas's reaction).

abortion might be reversed with the additional votes and possible persuasiveness of Justices appointed by President Richard Nixon.<sup>10</sup> Douglas also feared that Blackmun might change his vote, in spite of the latter's draft opinion striking down the law prohibiting abortion. Blackmun knew his own position was firm, and "he wasn't concerned about the initial vote." He was less apprehensive than Douglas about new appointees, as he thought newly-appointed Justice Lewis Powell might join the majority.

The case was heard a second time, although the second argument was no improvement on the first. "I don't think the attorneys contributed very much to oral argument. They did the second one better but I don't think they helped us too much. [The lawyers for Roe] were too antagonistic to the state's position." But "I'll never forget those arguments, I guess," because of the importance of the case, and because of the way the vote came out. In the end, Chief Justice Burger voted with the majority and only then-junior Justice William H. Rehnquist and Justice Byron White dissented, making the vote seven-two.

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The addition of Justices Powell and Rehnquist altered the Court, as did the 1981 appointment of Sandra Day O'Connor.<sup>11</sup> "The Court changes every time there's a new face. The dynamics are different" whenever a new Justice is appointed; "that is the way the system works." But it was not only the dynamic that changed; so, sometimes, did votes in cases decided with the participation of the new Justice. Blackmun had said in 1983, "I'd like to regard myself as being a member of the center of the Court. When [Justice] Potter Stewart was here,<sup>12</sup> I lined the Court up as two-five-two on the spectrum. There were five of us in the center." Justice O'Connor, however, provided a third vote for the "conservative" wing, and the line-up became two-four-three.<sup>13</sup> Blackmun began to see his function as attempting to retain the center, "to keep the Court in balance."<sup>14</sup> By the end of 1993, further appointments by Republican presidents

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10. The Justices appointed by Nixon in 1971, both of whom took their seats on January 7, 1972, were Lewis F. Powell, Jr. and William H. Rehnquist.

11. Justice O'Connor, the first woman appointed to the Court, was appointed by President Ronald Reagan and took her seat on September 25, 1981.

12. Justice Stewart retired on July 3, 1981, and was replaced by Justice O'Connor.

13. See Jenkins, *supra* note 8, at 23.

14. See *id.* at 57.



had tilted the balance so far, Blackmun believed, that "the Court right now [in late 1993] is a conservative Court." He named Justices Rehnquist, Scalia, Clarence Thomas, and David H. Souter "with a question mark" as constituting its conservative core, with Justice O'Connor frequently providing the fifth vote. "They court her." Although Justice O'Connor did not always vote with the "conservative" Justices, "basically she's conservative . . . almost automatically there are five consistently conservative votes."

Justice Souter<sup>15</sup> merited a "question mark" because "while he may vote conservatively, he always goes along his own way. He doesn't say 'I agree with A or B.' He may reach the same conclusion, but he has his own reasons for it, and I have to respect that. He will grow as the years pass." It was too early to tell where Justice Ginsburg<sup>16</sup> would come out because "she's not a flaming liberal, but she's not a bend-over conservative either." Certainly, her presence would alter the Court in ways yet to be seen.

Blackmun was not entirely happy about that. He recognized that "the fact that she votes last is, for her, the disadvantage" of being the most junior Justice, because "by the time she speaks just about everything has been said." The implication was that Justice Blackmun disapproved of Justice Ginsburg's speaking nonetheless. "I could never do as a junior Justice some of the things she's doing. . . . She writes a lot in addition to the primary opinion . . . . She makes a lot of noise."

For all his apparent bewilderment over Justice Ginsburg, Blackmun acknowledged that her impact on the Court might prove to be positive, and compared it with that of Oliver Wendell Holmes. "I teased my law clerks at breakfast the other day, on the eighth day of December. I said, 'This is an anniversary, and of course you should know what it is' and they didn't." It was on December 8, 1902 that Justice Holmes joined the Court. Blackmun speculated about the manner in which Justice Holmes's presence must have transformed the dynamics of the Court in his day, jarring "some of the old-timers" as Justice Ginsburg seemed to jar him. (He also wondered in passing whether Holmes's dissents were so brief

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15. Justice Souter joined the Court on October 9, 1990.

16. Justice Ginsburg, the most junior Justice at the time of these conversations, took her seat on June 14, 1993.

because he wrote them at a standing-up desk similar to the one on display in Blackmun's chambers.)

The presence of new Justices resulted in differing votes because "we all come from different backgrounds, and we all have individual biases," although "we try to suppress them, of course." The 1993 justices did not agree, for example, on the respective power of the states and the federal government. In 1976, the Court decided *National League of Cities v. Usery*,<sup>17</sup> striking down a law that extended federal wage and hour regulations to almost all employees of state and local governments on the grounds that the statute intruded upon the states' integral governmental functions.<sup>18</sup> Blackmun indicated in his concurrence that if other factual situations had been at issue he might have voted differently.<sup>19</sup> He was concerned that the decision might have a negative impact on environmental protection, traditionally within the less-than-zealous jurisdiction of the states.<sup>20</sup> His vote was seen by supporters of federal power as one that could be reversed. When the issue was revisited in *San Antonio v. Garcia*,<sup>21</sup> he recalled feeling that much of the oral argument was directed at him. He did change his position and, with it, the majority.<sup>22</sup> As he subsequently explained, "In the

17. 426 U.S. 833 (1976).

18. *See id.* at 854.

19. *See id.* at 855-56 (Blackmun, J., concurring).

20. It was the first time since 1937 that the Court negated a major piece of federal economic legislation, and Blackmun's concurrence indicated that he was not entirely happy about the result. *See id.* (Blackmun, J., concurring). He was an advocate of environmental protection, a traditional area for state rather than federal action, and recognized that the states had been less than zealous in their concern for the environment. He nonetheless concluded that the *Usery* doctrine struck the appropriate balance between federal regulatory power and state autonomy. *See id.* (Blackmun, J., concurring).

21. 469 U.S. 528 (1985).

22. *National League of Cities v. Usery* upheld state control over "integral governmental functions" by a vote of five to four. *See* 426 U.S. at 854. *Garcia* involved federal power to set guidelines under the Fair Labor Standards Act for overtime wages paid by a metropolitan transit authority. *See* 469 U.S. at 528. In it, Blackmun reviewed the lower court cases on the subject, all attempting to apply *Usery*, but sufficiently confused to issue quite contradictory holdings about its meaning. *See id.* at 537-39. "We find it difficult, if not impossible," Blackmun wrote, "to identify an organizing principle that places each of the cases in the first group on one side of a line and each of the cases in the second group on the other side." *Id.* at 539. Attempts by lower courts "to draw guidance from this model [*Usery*] have proved it both impracticable and doctrinally barren." *Id.* at 557. The vote against it was 5-4, with Blackmun's changed vote clearly the crucial one. What is shown by *Usery* and *Garcia*, Blackmun commented, was

how the Court veers from one side to the other or, if one will, takes two steps ahead and one back or one step ahead and two back, depending on the point of view. If the issues were to arise again today, even with facts identical to those of *Garcia*, would the result be the same with the Court as presently constituted?

years that intervened between the two cases . . . I had become convinced that the 'traditional governmental function' test was unworkable."<sup>23</sup> This, he thought, was the way judging should be done, with the Justices aware of how their doctrines and decisions were working in reality rather than in theory. But in the absence of some indication that there had been a major societal transformation or that a Court decision had resulted in unexpected difficulties, he counted on the Court to rely upon *stare decisis*. If the kind of situation involved in *Usery* and *Garcia* had arisen in 1993, the outcome might have been "touch and go," but he hoped and expected that the justices would rest their decision on precedent.

Blackmun mentioned that Justice John Paul Stevens was a strong supporter of *stare decisis*, emphasizing its importance to the stability of legal rules and considering it to be almost essential in constitutional jurisprudence. He thought that Justice O'Connor, on the other hand, liked "to bounce around a little bit." Once again, he considered it too soon to tell about Justice Souter.

Among the reasons it was "too soon" to be certain how the newer Justices would affect the Court, Blackmun noted, was that many Justices developed a constitutional philosophy only after having joined it. Prior judicial experience did not necessarily affect this. Blackmun felt no compulsion to develop a constitutional philosophy during his years on the court of appeals, both because cases involving constitutional questions "weren't as frequent as they are here" and because "we always had the distinct comfort of knowing, however we decided, that Washington would straighten us out." The way the lower courts rely on the Supreme Court was "brought home to me distinctly" in the case of *Tinker v. Des Moines Community School District*,<sup>24</sup> which raised the question of whether students could be dismissed from school as disruptive when they wore black arm bands to protest the war in Vietnam.<sup>25</sup> The vote on the U.S. Court of Appeals for the Eighth Circuit was five to three. Judge Martin Van Oosterhout, who cast his vote with the majority, announced, "I'm going to change my vote and make it four to four

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In other words, the Constitution was not a static entity, the Justices were fallible people limited by their own viewpoints but trying to learn from experience and societal needs, and the Court's doctrine inevitably would change again. He announced himself "mildly surprised," and presumably pleased, when *Garcia* was explicitly reaffirmed in *South Carolina v. Baker*, 485 U.S. 505 (1988). See Blackmun, *supra* note 1, at 756.

23. See Blackmun, *supra* note 1, at 756.

24. 393 U.S. 503 (1969).

25. See *id.* at 505.

and let those jokers in Washington straighten this out.' That's what happened. We sense that [i.e., that the case will be taken by the Supreme Court], and in a way, it makes us lazy." Lower court judges were aware that "we're not the end of the line. We don't have to be 100% sure we're right in our minds because we can get reversed anyway." That particular luxury was not available to members of the Supreme Court.

Whatever their professional backgrounds, junior Justices reflected both the politics of the presidents who appointed them—at least in their early years—and the feelings of the population. "When there are second thoughts and political attitudes change and we get different occupants in the White House," Justices with new ideas, new approaches, and perhaps new constitutional philosophies would be appointed to the Court. While "I think personnel have an effect" on doctrine, however, the unique opportunity to develop one's constitutional philosophy made predictions about how a new Justice would vote problematic.

It was expected, for example, that Justice Burger would "ride roughshod" over the decisions of the Warren Court, but while many of those decisions were altered, most of the basic doctrines remained. Any tendency to undo the work of the Warren Court was resisted not only by Justices Brennan and Marshall, but by Justice Potter Stewart as well—and by Blackmun. "I like to think maybe I had a little influence" on that. Justice Powell worked hard at pulling together those who wanted to undo specific parts of the Warren Court's legacy and those who hoped to keep it alive. "It would have been a tragedy if the Court had just taken one Warren Court decision after another and thrown them down the drain." That did not mean, obviously, that decisions should never be reversed, but it did imply, as Blackmun said pointedly at a December 1992 banquet attended by then President-elect Bill Clinton, there should be no political litmus test for judicial appointees. A judicial appointment that reflected new societal thinking was fine; one made because of a particular political commitment was not.

The great respect with which Blackmun treated other people—himself part of the dynamic of the Court—was evident in his discussion of his fellow Justices, as was his sense of humor about both himself and others. He might have disagreed with their views or their style, but his remarks were almost invariably punctuated with the reminder that they were as entitled to their modes of thinking and acting as he. After commenting on another Justice's differing style,

he would add, "I can't be too critical of this; he [or she] is an equal participant." In discussing the judicial process he was careful to add, "I can't speak for anybody else." Respect for his colleagues appeared to be innate and unaffected by any doctrinal differences they may have had. He was "eternally grateful for the privilege of serving," if only for little more than a year, with Justices John Marshall Harlan and Hugo Black.<sup>26</sup> Black was a "canny individual" who was "fun to be with," and Harlan was "a thorough-going gentleman in every respect." Blackmun noted with approval that Black and Harlan, distant cousins, were "highly respectful of each other" despite their differences about cases.

Blackmun reminisced about Justice Harlan's last year on the Court, when he was "ninety-eight percent blind" and a high intensity light was placed at his seat at the conference table. He also spoke sadly of Justice Douglas's decline during his last years. On the afternoon of one of our talks, Blackmun had just come from one of his periodic visits to Justice Brennan's retirement chambers in the Court building. Blackmun's fondness for Brennan and his respect for Brennan's continuing intellectual prowess were as apparent as his own concern about the failure of powers with age, and the problem of knowing when the moment had arrived for a justice to step down. Blackmun worked for many years as counsel for the Mayo Clinic. While he was on the Supreme Court, he had regular check-ups with the clinic's doctors, whom he had charged with letting him know if they detected any sign of failing mental powers. Age-related changes in Court personnel clearly were on Blackmun's mind, even though he still reached the Court at 7:30 in the morning and worked out regularly in the Court's gym before he left for home.<sup>27</sup>

He enjoyed the human side of his colleagues and delighted in telling tales about them. One of his favorite anecdotes harked back to a day early in Chief Justice Burger's tenure, when Burger proudly took the elderly (and ideologically quite different) Hugo Black into Burger's chambers to show him the new lights Burger had installed. Black's only remark about the lights was a grumpy, "Too many things changing around here."

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26. Black retired on September 17, 1971, and Harlan retired on September 23, 1971.

27. Justice Blackmun announced his retirement on April 6, 1994, less than four months after the last of these conversations. He left the bench on June 30, 1994, and died on March 4, 1999.

Justice Douglas was skeptical about Blackmun, a Nixon appointee, because of politics and their different approaches to many of the early cases they decided. But Douglas gradually changed his attitude, and they eventually became “good friends at the end.” Blackmun described Douglas as “a rascal in many ways, but a very interesting, able person. At his best, Douglas was superb.” He was “always doing something totally unconnected” during oral argument. “I can well remember his sitting up there calling for books and piling them up in front of him until counsel could hardly see him.” On one occasion, Blackmun was amused to glimpse Douglas writing away behind his books as oral argument went on. Blackmun recalls that he “sent Douglas a note asking, ‘Bill, what are you doing, writing another opinion?’” Douglas sent back a reply saying “Yes—mainly because this lawyer was through twenty minutes ago and doesn’t know it.” But Douglas could do two things at once, Blackmun remembered, and it was a mistake for any attorney to assume that Douglas would not be quick to catch any error made in argument.

It was Blackmun’s wont to look at an atlas during oral argument in order to get a feel for the geographical origins about a case being argued. This reflected his awareness that cases involved real human beings with real problems. Eyes twinkling, he reported that he and Justices Rehnquist and White occasionally kept themselves awake during less than stimulating oral arguments by thumbing through the maps. Blackmun also recalled that Thurgood Marshall wore a hearing aid in one ear. Blackmun too wore one. Every once in a while, when oral argument flagged, Justice Marshall would lean over and mouth, “Harry, I’ll turn off mine if you’ll turn off yours.” Blackmun did not disclose whether the offer was ever accepted.

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Justice Blackmun spoke at length about oral argument, attributing his well-known reluctance to interrupt attorneys during them to something Justice Black did soon after Blackmun joined the Court. Walking into the junior Justice’s chambers and carrying an opinion that Blackmun had circulated, Black enthused, “Harry, I like it. It goes for the jugular. Always go for the jugular, but don’t agonize in public.” Then, Blackmun continued, “he went on and said, ‘As the senior on the Court, let me say to you as the junior, don’t ask many questions [during oral argument]. . . . If you don’t ask many questions, then you will not ask many foolish questions.’ I thought

that was pretty good advice.” He made an effort to adhere to it, feeling Black watching over his shoulder. Shortly after Justice Ginsburg participated in her first oral argument on the Court, he recalled, he repeated Justice Black’s advice to her, and he expressed himself as somewhat bewildered that it seemed not to affect the frequency of her questions thereafter.

Finding oral argument useful, Blackmun was disturbed by “the suggestion or two” heard from some members of the Court that it might be eliminated in relatively simple cases where the facts were not in dispute. “Some are almost ready to say it serves no function.” The idea that oral argument was *passé*, he noted, was fashionable among federal courts. Some lower courts heard arguments only in particular cases. He, however, had thought oral argument particularly important when he served on the U.S. Court of Appeals for the Eighth Circuit where, as in all circuit courts, only three judges normally heard a case, the setting was more informal and intimate, and there could be a great deal of give-and-take. “A good oralist can add a lot to a case and help [us] in our later analysis of what the case is all about,” Blackmun commented. “Many times confusion [in the brief] is clarified by what the lawyers have to say. Many times in oral argument concessions are made which are helpful.”

Attorneys responding to questions might move away from overly strong positions in order to gain the greatest number of votes. So, Blackmun said, while he chose not to participate frequently in oral argument, “I usually go into an oral argument having gone over the briefs and having a list of questions that I would hope would be asked either by someone else or by me.” He would make a point of asking them, but only if no other Justice did so first.

He continued to warn that questioning could be overdone. Oral argument sometimes “sharpens the focus of the case if we let the lawyers do that and don’t interrupt them with constant questions. . . . It’s hard to get everything out in thirty minutes, especially if Justices interrupt.” He could never, as a junior Justice, have been as active during oral argument as he considered Justices Scalia and Ginsburg to be. He smiled ruefully at what he saw as something of a “competition” between them to see who could ask more questions, but quickly added that a lot of questions could be a sign that a Justice was in thorough control of the facts and issues in the cases. “Justice Thomas,” he noted without further comment, “of course hasn’t opened his mouth this term.”

Blackmun welcomed the moments when questioning by the justices sharpened a line of argument that appeared “fuzzy” in the briefs or clarified a fact situation, because he particularly regretted the occasional necessity for the Court’s opinion to say something along the lines of “it is not entirely clear from the record but we assume . . . .” He was relieved when uncertainty about the facts was cleared up in oral argument. Besides, he declared with a grin, “clients like oral argument. They like to see their lawyers get up [and represent them in the Supreme Court, although] sometimes I can sense how disappointed they are.” He agreed with the lawyer’s conventional wisdom that cases can be lost but not won on oral argument, so good attorneys would do well to prepare themselves as thoroughly as possible.

While Blackmun was not particularly impressed by either the male or female lawyers in *Roe v. Wade*<sup>28</sup> and did not feel they helped the Court fashion doctrine in the case, he was pleased that it had become more common since then to see women arguing cases before the Supreme Court. He described them as particularly competent: “They don’t ask for or give any quarter.” On the rare occasion when they faltered, Justice O’Connor might “move in.” Blackmun had not asked her about it, but he had the feeling that this was because of an understandable eagerness to see the women lawyers appearing before the Court doing well.

In spite of his praise for oral argument, he predicted rather sadly that “the Court will reach the point” of giving it up, but only after he had left the bench.

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The third factor Blackmun emphasized about the process of constitutional adjudication, in addition to the constancy of the Constitution and the dynamic among the Justices, was the Court’s relationship with the citizenry. He favored oral argument in part because he believed it brought the Court closer to those involved. For the same reason, he enjoyed speaking at law schools or other gatherings away from the Court.

I like to find out what people are thinking about the Court and its decisions. After all, this is a country made up of individuals, of people.

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28. 410 U.S. 113 (1973).



. . . There are little people involved in so many of these cases—real people with real feelings of despair and other things that go with it.

It was of crucial importance, Blackmun believed, that the “little people” knew that the American judicial system could be responsive to them. Some of his colleagues “haven’t gotten out of the classroom and are wrestling with theory” instead of thinking of the impact their decisions are likely to have on human beings. “I can’t be critical of that,” he immediately injected, even though that approach was not his, “that’s the way the law builds.” He was too aware that “the buck stops here” to be contemptuous of those whose sense of responsibility led them to conclusions different from his own. That awareness affected his thinking and the almost oppressive sense of responsibility he brought to decisionmaking, as well as the lengthy hours he spent poring over the cases before the Court, both when he was at the Court and when he was home or away on what supposedly were vacations. He mentioned, as he had elsewhere, that he thought he worked hard when he was counsel at the Mayo Clinic; he worked even harder while he was on the court of appeals; but he had never worked as hard as he did on the Supreme Court, and as a result the demands on his time were close to overwhelming. He had acknowledged that in spite of Justice Black’s advice, “I probably agonize over cases more than I should, and more than most of my colleagues do.”<sup>29</sup> He elaborated on his reason: “There’s no other place” for people who feel abused by the political system to go once the Court has decided, no higher court to which they can appeal, and that meant “we’d better be right.”

Smiling as he quoted the comment made by Finley Peter Dunne’s fictional character, Mr. Dooley, that “the Court follows the election returns,”<sup>30</sup> he added that while that is a substantial overstatement, public feeling as reflected in elections “is a factor” in the Court’s assessment of societal needs. “This doesn’t mean we just follow public opinion, [of course] we can’t do that,” because then the Court would ignore its mandate as the guardian of the Constitution and never strike down any legislation. But the Court has a responsibility to be aware of the electorate’s concerns. Blackmun mentioned Alexis de Tocqueville’s comment that “scarcely any political question arises in the United States that is not resolved, sooner or later, into a

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29. Jenkins, *supra* note 8, at 26.

30. FINLEY PETER DUNNE, MR. DOOLEY’S OPINIONS 26 (New York, R.H.Russell 1901).

judicial question.”<sup>31</sup> The Court had to remember that it was making policy for the people.

Justices also had to be sensitive, a theme that was reflected in Blackmun’s remarks about the desirability of permitting lawyers to proceed with minimal interruption during oral arguments and his concern about the distance many people felt lay between themselves and the judicial system. “There’s nothing that gives me greater satisfaction than to have a lawyer tell me, after argument and after the opinions come down,” that even though the lawyer lost, “we feel we had a fair shake.” That and “getting it right,” to Justice Blackmun, was what judging was about.

The obligation to do the right thing was personal as well as collective, and a constant in his thinking. The Court might have been wrong and any one Justice might not have been able to prevent that, but he had a responsibility to work at a case until he was certain that he, at least, was as correct as was humanly possible. “I have to be sure in my position. The fact that there’s disagreement on the Court doesn’t cut any ice one way or the other. I don’t want my vote to be something that five years from now I’ll regret not having put enough effort into.” And there would be regret if the wrong thing was done to the “little people.” When Blackmun referred to “little people,” he was thinking not of “them” but of “us.”

He attributed his concern for “little people” to his own life, which began in “very modest circumstances”—but added immediately that of course he didn’t have the additional burden placed by this country on people of color. “[Although] my family didn’t have much,” Justice Burger’s family had even less. Blackmun and the former Chief Justice had been friends since they were five years old,<sup>32</sup> and Blackmun remembered Burger’s mother as having been close to a “saint” for managing to raise nine children “literally on nothing.”

Justice Burger’s fine upbringing did not result in his always having done the “right thing,” however. Blackmun told others that “I’ve always been more liberal than the Chief Justice [Burger] . . . Always.”<sup>33</sup> Disagreement among the Justices was not sufficiently rare to be remarkable. What was unusual, however, was the way Blackmun mentally distinguished his colleagues from their judicial

31. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 290 (Phillips Bradley ed., 1945).

32. The two men became close friends at home in Minnesota, and while the friendship lapsed after high school, Blackmun was the best man at Burger’s wedding in 1933.

33. Jenkins, *supra* note 8, at 26.

stances. Although he was not alone in this, he maintained his warmth for colleagues with whom he differed strongly about issues, and spoke emphatically against their positions without losing his delight in them as individuals.

Blackmun might have had any number of colleagues in mind when he told the 1990 graduating class of Washington and Lee Law School, "There are arrogant people in this world and arrogant lawyers and, what is worse, arrogant judges."<sup>34</sup> Respectful of his colleagues though he was, Blackmun was too committed to his vision of justice not to become angry when he saw it being violated, and Justice Burger had been one of his targets. This was the situation in *Bowers v. Hardwick*,<sup>35</sup> when the Court upheld a Georgia statute criminalizing sodomy between consenting adults in private as well as in public.<sup>36</sup> Initially, Blackmun remembered, the vote went the other way, and he mentioned Justice Powell's subsequent public statements that Powell regretted his final vote in *Bowers*—as, Blackmun implied, he should have. Blackmun got the sense from Justice Byron White's opinion for the Court that the majority was "reaching for a result and didn't get it by constitutional analysis." Justice Burger's concurrence showed that "he didn't know his history."<sup>37</sup>

That was a relatively mild Blackmun comment. Dissenting in other cases, he had spoken of a Rehnquist opinion as "wholly irrational" and "his exegesis of the Court's reasons . . . simplistic to the point of caricature."<sup>38</sup> He had written that one of Justice O'Connor's opinions was "unnecessary and unfair," "mischaracterizes the holding of the Court of Appeals, undertakes an intricate economic analysis of hypothetical situations not presented here," "simply and completely misstates the issue," "authorizes employers to make 'cheap offers' to the victims of their past discrimination," and shows "studied indifference to the real-life concerns of the parties."<sup>39</sup> He read White's opinion in *Bowers* as "relegat[ing] the actual statute being challenged to a footnote" and "distort[ing] the

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34. Tony Mauro, *20 Years With the 'Shy Person's Justice'*, LEGAL TIMES, June 25, 1990, at 10.

35. 478 U.S. 186 (1986).

36. See *id.* at 189.

37. See *id.* at 196-97 (Burger, C.J., concurring) (asserting that sodomy has been universally criminalized throughout Western history).

38. See *Toll v. Moreno*, 458 U.S. 1, 20, 23 (1982) (Blackmun, J., concurring).

39. See *Ford Motor Co. v. Equal Employment Opportunity Comm'n*, 458 U.S. 219, 242, 249, 255 (1982) (Blackmun, J., dissenting).

question this case presents.”<sup>40</sup> He told one interviewer, “[i]f one feels strongly about a major issue with social and economic overtones, I think it deserves some strong talk once in a while. Everybody gets surprised when I produce it. They think it’s out of character.”<sup>41</sup> It was not. Quite simply, Blackmun cared passionately about the people whose rights he believed the Court had an obligation to protect.

He spoke feelingly of the strides the country still had to make in racial equality, and he expressed great sympathy for the millions of people of many races who did not enjoy the jobs at which they had to labor. He was able to empathize with people who were not at all like himself. While, as he commented, some of his younger colleagues were so shocked at the idea of homosexuality that they wrote their opinions in *Bowers* as if they were unaware that the statute banned heterosexual as well as homosexual sodomy, there was real regret in his voice as he speculated that the vote probably would not have been different if it were taken in the Court of 1993. He was nonetheless certain that the decision eventually would be reversed; “it just has to [be].”

In his dissent in *Bowers*,<sup>42</sup> Blackmun referred to the Court’s holding in *Minersville School District v. Gobitis*<sup>43</sup> that forcing school children to salute the flag was constitutional<sup>44</sup> and its overturning of that decision a mere three years later.<sup>45</sup>

I can only hope that here, too, the Court soon will reconsider its analysis and conclude that depriving individuals of the right to choose for themselves how to conduct their intimate relationships poses a far greater threat to the values most deeply rooted in our Nation’s history than tolerance of nonconformity could ever do. . . . [T]he Court today betrays those values. . . .<sup>46</sup>

One got the sense that Blackmun balanced his view that a fight constantly had to be made for justice with the belief that, given the fight, justice ultimately will prevail. He had said, invoking Justice Benjamin Cardozo, that

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40. See *Bowers*, 478 U.S. at 199-200 (1986) (Blackmun, J., dissenting).

41. Jenkins, *supra* note 8, at 57.

42. See *Bowers*, 478 U.S. 213-14 (Blackmun, J., dissenting).

43. 310 U.S. 586 (1940).

44. See *id.* at 600.

45. See *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

46. *Bowers*, 478 U.S. at 214 (Blackmun, J., dissenting).

“we worry unduly about the consequences of our errors. He indicated that what was proper to decision making would endure and what was bad would be rejected when passed on in the laboratory of the years. We must do the best we can with the close and emotional issues; they and others like them always will be present.”<sup>47</sup>

And sooner or later, he was certain, the Court would get it right.

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John Marshall wrote, “we must never forget, that it is a *constitution* we are expounding,”<sup>48</sup> meaning that the document was designed to be sufficiently flexible to change along with the country that adopted it. Justice Blackman’s judicial opinions in effect added an enjoiner that “we must remember that it is the people for whom we are interpreting the Constitution.” The meaning and application of the Constitution’s phrases necessarily undergo alteration as the country does; change is inevitable. The Constitution itself, however, provides continuity. So does the effort of the Justices to discharge their never ending responsibility to the people and, in doing so, to recognize and perhaps affect what Blackmun called his “theme of constant development of the concepts of justice.”<sup>49</sup> To Justice Blackmun, that clearly was what the Supreme Court was all about: the Constitution, the people, and justice, and the attempt of each Justice to maintain a seamless web among them.

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47. Corrizosa, *supra* note 1, at 22 (quoting Justice Harry A. Blackmun).

48. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819)

49. Blackmun, *supra* note 1, at 750.