

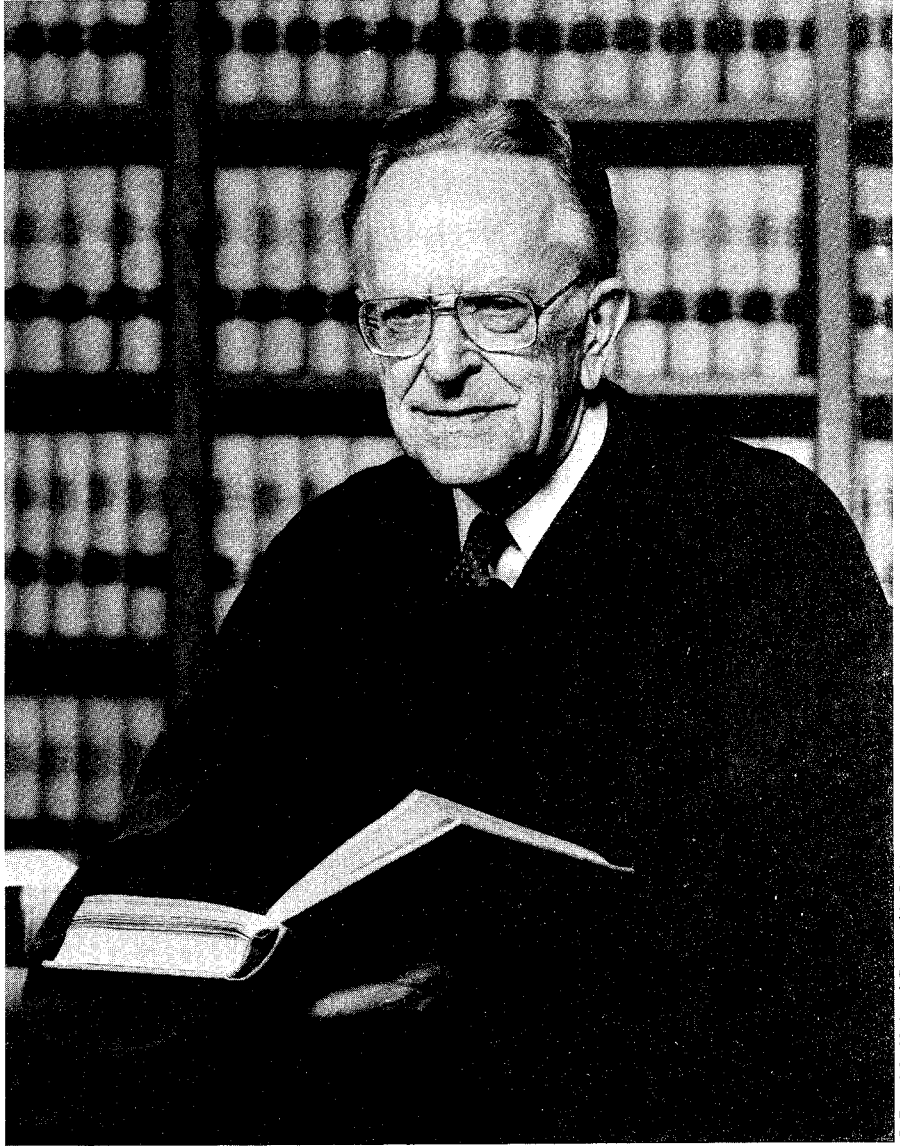
A TRIBUTE TO JUSTICE HARRY A. BLACKMUN: “THE KIND VOICE OF FRIENDS”

In this symposium my part is only to sit in silence. To express one's feelings as the end draws near is too intimate a task. But I may mention one thought that comes to me as a listener-in. The riders in a race do not stop short when they reach the goal. There is a little finishing canter before coming to a standstill. There is time to hear *the kind voice of friends* and to say to one's self: "The work is done." But just as one says that, the answer comes: "The race is over, but the work never is done while the power to work remains." The canter that brings you to a standstill need not be only coming to rest. It cannot be, while you still live. For to live is to function. That is all there is in living.

And so I end with a line from a Latin poet who uttered the message more than fifteen hundred years ago:

"Death plucks my ear and says, 'Live — I am coming.'"^{*}

* THE OCCASIONAL SPEECHES OF JUSTICE OLIVER WENDELL HOLMES 178 (M.DeW. Howe ed., 1962) (emphasis added) (printing text of Justice Oliver Wendell Holmes' radio address to the Nation on the occasion of his 90th birthday, March 8, 1931). Special thanks to Professor Paul R. Baier for bringing Justice Holmes' remarks to the attention of the Law Review.



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A TRIBUTE TO HARRY A. BLACKMUN

WILLIAM H. REHNQUIST*

Harry Blackmun is a son of the upper Mississippi Valley. He was born in Nashville, Illinois, in 1908, and grew up in St. Paul, Minnesota. His appointment to the Supreme Court by President Nixon on June 9, 1970 filled one of the most storied seats on the Supreme Court, one previously occupied by the likes of Joseph Story, Oliver Wendell Holmes, Benjamin Cardozo, and Felix Frankfurter. Although he often joked about being "old number three," the appointment was a deserved one, for then-Judge Blackmun's forty year career as a lawyer and jurist was exemplary.

After graduating with honors from the Harvard Law School in 1932, he clerked for Judge John B. Sanborn at the Court of Appeals for the Eighth Circuit. He then practiced law with the firm of Dorsey, Colman, Barker, Scott and Barber in Minneapolis until 1950, when he became General Counsel to the Mayo Clinic. President Eisenhower appointed him to be a judge of the Court of Appeals for the Eighth Circuit in 1959, where he served until his appointment to the Supreme Court.

Justice Blackmun will surely be remembered most for his opinion for the Court in *Roe v. Wade*.¹ That opinion has received so much notoriety that it is easy to forget that during his nearly twenty-five years on the Court he has authored more than three hundred majority opinions. As a result, his jurisprudential legacy includes not only the right of privacy embodied in *Roe v. Wade*, but opinions covering other areas of the law as well.

In *Complete Auto Transit v. Brady*,² he succinctly enunciated the modern rule that the Commerce Clause of the Constitution does not prevent interstate commerce from being required to bear its fair share

* Chief Justice of the United States.

1. 410 U.S. 113 (1973).
2. 430 U.S. 274 (1977).

of state taxation. His legacy includes *Flood v. Kuhn*,³ which sustained baseball's antitrust exemption and demonstrated the Justice's knowledge of, and love for, baseball.

Justice Blackmun was cautious, studious and meticulous in his opinions, always willing to view a case from every angle and to consider each argument made by the parties. His many writings on the meaning of the Fourth Amendment are illustrative. In *Wyman v. James*,⁴ his first majority opinion, Justice Blackmun rejected a Fourth Amendment challenge to a New York law conditioning welfare benefits on in-home visits by caseworkers. Non-adversarial visits, he concluded, were minimally intrusive and were designed to benefit dependent children. "The dependent child's needs are paramount, and only with hesitancy would we relegate those needs, in the scale of comparative values, to a position secondary to what the mother claims as her rights."⁵

Justice Blackmun's 1987 opinion in *New York v. Burger*,⁶ rejecting a Fourth Amendment challenge to New York's law authorizing warrantless inspections of junkyards, was similarly practical. With an eye toward overall reasonableness, Justice Blackmun concluded that the warrantless searches were permissible because (1) junkyards have reduced expectations of privacy, (2) government has a strong interest in combatting car theft, (3) inspections are necessary to uncover quickly disposable stolen parts, (4) the regulatory scheme provided an adequate substitute for warrants, and (5) inspections were carefully limited.

Four years later, in *California v. Acevedo*,⁷ Justice Blackmun ruled for the Court that police may search a bag found in an automobile without a warrant. Because of the practical difficulties associated with distinguishing a search targeting a car (which required no warrant) from one directed at baggage in a car (which after *United States v. Ross*⁸ still required a warrant), Justice Blackmun's majority opinion dispensed with the distinction. He concluded that *Ross* tended to "confuse[] courts and police officers and impede[] effective law enforcement."⁹

3. 407 U.S. 258 (1971).

4. 400 U.S. 309 (1971).

5. *Id.* at 318.

6. 482 U.S. 691 (1987).

7. 111 S. Ct. 1982 (1991).

8. 456 U.S. 798 (1982).

9. 111 S. Ct. at 1989.

Justice Blackmun's structural opinions exhibit similar practical traits. In *Mistretta v. United States*,¹⁰ for example, his majority opinion sustained the design of the United States Sentencing Commission. Taking a "pragmatic, flexible view of differential governmental power,"¹¹ Justice Blackmun's opinion concluded that the delegation of power to the Commission, the inclusion of federal judges in its membership, and the formal location of the Commission within the Judicial Branch, did not offend separation of powers. As a functional matter, Justice Blackmun observed, the Commission was really no different than any other independent agency.

Justice Blackmun's 1991 decision in *Freytag v. Commissioner of Internal Revenue*¹² sustained the authority of the Chief Judge of the United States Tax Court, an Article I tribunal, to appoint special trial judges. Justice Blackmun concluded that although the Tax Court was not a "department," it was a "court of law," and thus could appoint "inferior" officers of the United States. A contrary holding, he explained, would "undermine longstanding practice."¹³

Finally, in *Garcia v. San Antonio Metropolitan Transit Authority*,¹⁴ Justice Blackmun wrote to uphold the application of federal minimum wage and hour laws to local governmental employees. Taking care to explain his departure from precedent, Justice Blackmun's majority opinion held that under the special circumstances of the case it was best to overrule prior case law and leave to Congress and the political system the role of accommodating the interests of federalism.

Justice Blackmun's opinions convey only part of his legacy; he will also be remembered for the personal qualities he brought to the Court during his twenty-four years of service. His friend, Garrison Keillor, in his book *Lake Wobegon Days*, describes a small, fictional community in Minnesota nestled against a blue-green lake, with "one traffic light, which is almost always green."¹⁵ Just like the town itself, the motto inscribed on the town's crest is modest—"sumus quod sumus," (We are what we are).¹⁶ Harry Blackmun has much in common with the people who populate Lake Wobegon. He is genuinely self-effacing and modest; Keillor described him as the "shy person's Justice." Those of us who have served with him on the Court

10. 488 U.S. 361 (1989).

11. *Id.* at 381.

12. 111 S. Ct. 2631 (1991).

13. *Id.* at 2645.

14. 469 U.S. 528 (1985).

15. GARRISON KEILLOR, LAKE WOBEGON DAYS 1 (1985).

16. *Id.* at 6.

will miss his legal learning, his devotion to his craft, and his many contributions to our deliberations in Conference.

TRIBUTE TO JUSTICE HARRY A. BLACKMUN

RUTH BADER GINSBURG*

I write in praise of a gentle man, my dear colleague, Harry A. Blackmun, who taught us all that a person may grow in wisdom and humanity more than a generation past 63.

Hundreds, perhaps thousands of pages have been written about Justice Blackmun's opinion in *Roe v. Wade*,¹ a decision he was assigned to write for a Court that divided 7-2. I suspect, however, that he found far less troublesome, and relished much more, an assignment given him two years later, *Stanton v. Stanton*.² In that case, Justice Blackmun wrote, for a Court divided 7-1, that a state could not mandate parental support for sons until age 21, but for daughters, only until age 18. This is what he said:

[A] child, male or female, is still a child. No longer is the female destined solely for the home and the caring of the family, and only the male for the marketplace and the world of ideas If a specified age of minority is required for the boy in order to assure him parental support while he attains his education and training, so, too, it is for the girl. To distinguish between the two on educational grounds is to be self-serving: if the female is not to be supported as long as the male, she hardly can be expected to attend school as long as he does, and bringing her education to an end earlier coincides with the role-typing society has long imposed.³

Stanton v. Stanton typifies the Court's jurisprudence of the 1970s in cases involving sex-based classifications;⁴ it is fitting that the writing was done by a man who cherishes daughters fully as much as sons.

* Associate Justice of the Supreme Court of the United States.

1. 410 U.S. 113 (1973).

2. 421 U.S. 7 (1975).

3. *Id.* at 14-15.

4. See also *Califano v. Westcott*, 443 U.S. 76 (1979).

I count it my great good fortune to have been appointed to the Court while Justice Blackmun remained on the bench. We do not always agree⁵ and we approach oral argument differently,⁶ but he has been for me a model of the caring Justice. I join the legions who applaud Harry A. Blackmun for "his integrity, his high sense of justice and exemplification of decency, modesty and civility."⁷ Justice Blackmun loves beautiful music and fine theater. May he and his life's partner Dottie enjoy bright notes and pleasing scenes in the years ahead.

5. See *Ratzlaf v. United States*, 510 U.S. ___, 114 S. Ct. 655 (1994).

6. Justice Blackmun asks fewer questions, but those he asks are gems. See, e.g., Transcript of oral argument in *Kahn v. Shevin*, 416 U.S. 351 (1974), Feb. 26, 1974, at 48-49.

7. See Presentation of Honorary Membership to Justice Harry A. Blackmun with remarks by Barbara Paul Robinson and John D. Feerick, 49 *The Record of the Association of the Bar of the City of New York* 4, 5 (1994).

HARRY A. BLACKMUN

WILLIAM J. BRENNAN, JR.*

“The life of the law,” Holmes proclaimed in his most famous aphorism, “has not been logic: it has been experience.”¹ I do not understand Holmes to have claimed that abstract legal doctrine is irrelevant or unimportant in determining particular legal results; his point was less controversial—that the development of the law is inevitably influenced by

[t]he felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, [and] even the prejudices which judges share with their fellow-men [The law] cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics.²

Justice Blackmun’s jurisprudence has been marked by a similar insight: that judging is much more than a process of pristine deductive analysis; that compassion, wisdom, and common sense are no less essential to the judicial role than thorough scholarship and technical mastery of the law.

Justice Blackmun has eloquently expressed this notion in his opinions, honestly acknowledging the inevitable limitations of mortal judges, and at the same time exposing the cruel myth of law as “mathematics”—the scientific application of legal “axioms and corollaries,” utterly divorced from consideration of its impact in the real world on the lives of real people.³ His separate dissent in *DeShaney v. Winnebago County Department of Social Services*,⁴ from the Court’s rejection of a permanently injured child’s claim that welfare workers violated due process by recklessly placing him in the custody

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1. OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 1 (1881).

2. *Id.*

3. Harry might not entirely approve of this analogy; he was graduated from Harvard in 1929 with an A.B. degree *summa cum laude* in mathematics.

4. 489 U.S. 189, 212 (1989) (Blackmun, J., dissenting).

of an abusive father, provides a striking example. Justice Blackmun chided the majority for

purport[ing] to be the dispassionate oracle of the law, unmoved by "natural sympathy." But, in this pretense, the Court itself retreats into a sterile formalism which prevents it from recognizing either the facts of the case before it or the legal norms that should apply to those facts.⁵

Justice Blackmun observed that the Court's precedents left the question open and suggested a "sympathetic" reading of the Due Process Clause, "one which comports with dictates of fundamental justice and recognizes that compassion need not be exiled from the province of judging."⁶ Justice Blackmun eloquently and succinctly exposed the weakness of a formalistic reading of the other component of the Fourteenth Amendment in his fine concurrence in *Regents of the University of California v. Bakke*:

In order to get beyond racism, we must first take account of race. There is no other way. And in order to treat some persons equally, we must treat them differently. We cannot—we dare not—let the Equal Protection Clause perpetuate racial supremacy.⁷

There is perhaps no better illustration of Justice Blackmun's ability to expose the pretense of legal formalism than his powerful dissenting opinion in *Bowers v. Hardwick*:

This case is no more about "a fundamental right to engage in homosexual sodomy," as the Court purports to declare, than *Stanley v. Georgia* was about a fundamental right to watch obscene movies, or *Katz v. United States* was about a fundamental right to place interstate bets from a telephone booth. Rather, this case is about "the most comprehensive of rights and the right most valued by civilized men," namely, "the right to be let alone."⁸

Justice Blackmun insisted that *Hardwick*'s claim should be analyzed "in the light of the values that underlie the constitutional right to privacy."⁹ Viewed in this light, the Court in *Bowers* "refused to recognize . . . the fundamental interest all individuals have in controlling the nature of their intimate associations with others."¹⁰ The constitutional protection of privacy was also at the center of

5. *Id.*

6. *Id.* at 213.

7. 438 U.S. 265, 407 (1978) (Blackmun, J., concurring).

8. 478 U.S. 186, 199 (1986) (Blackmun, J., dissenting) (citing *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)) (other citations omitted).

9. *Id.*

10. *Id.* at 206.

Justice Blackmun's landmark opinion in *Roe v. Wade*,¹¹ yet another example of his gift for combining diligent scholarship with deep concern for the human consequences of legal decisions.

Justice Blackmun's compassion and humility are by no means evidenced solely in his judicial writings; they are the hallmark of the man in all of his personal and professional relationships. Harry Blackmun is much beloved by his family of current and former secretaries, messengers, and law clerks—and by all of the Court employees who have come to know him over the years—because he cares deeply about people and takes a genuine interest in their lives.

Just how that enormous generosity of spirit translates into every aspect of his work as a judge may have been best summed up by Justice Blackmun himself. The public area of the Supreme Court building includes a theater featuring a short film about the Court, and that film includes a discussion among several Justices of the Court's docket and its certiorari decisionmaking process. I pass the theater every day, and I often hear the compassionate voice of Justice Blackmun, lamenting about

comments in the press that appear so frequently [that] many cases are frivolous here. To the litigant, no case is frivolous. There's a person behind every one of those cases. He deserves consideration whether we grant certiorari or deny it.¹²

I have left for last some thoughts on Justice Blackmun's dissent from the denial of certiorari in *Callins v. Collins*,¹³ in which he concluded that the death penalty cannot be imposed fairly and with reasonable consistency, as required by the Constitution.¹⁴ I have recently written on Justice Blackmun's views at some length;¹⁵ but I want to amplify two points that I believe are extremely important. The first is that Justice Blackmun's position cannot fairly be described as an unreasoned personal reversal, or even a departure from the capital punishment jurisprudence of the Court. As a former clerk of Justice Marshall's has pointed out:

[T]he Court's 1976 opinions approving several capital schemes were in an important sense provisional. They were based to an unusually significant degree on specific empirical claims about the

11. 410 U.S. 113 (1973).

12. THIS HONORABLE COURT (WETA 1987).

13. 114 S. Ct. 1127 (1994) (Blackmun, J., dissenting from denial of certiorari).

14. See *Furman v. Georgia*, 408 U.S. 238 (1972); cf. *McGautha v. California*, 402 U.S. 183, 248 (1971) (Brennan, J., dissenting).

15. William J. Brennan, Jr., *Neither Victims Nor Executioners*, 8 NOTRE DAME J.L. ETHICS & PUB. POL'Y 1 (1994).

possibility of reliable and evenhanded administration of the death penalty.¹⁶

Justice Blackmun's "reversal" was based on the realization that the system of capital punishment that actually exists in this country is not administered in a reliable and evenhanded manner.¹⁷ Indeed, to make my second point, Justice Blackmun's *Callins* dissent is only the latest example of his great gift for combining rigorous legal reasoning and human compassion, for demonstrating the courage to follow his convictions and the humility to recognize his fallibility.

The nation owes Justice Blackmun an enormous debt of gratitude. He will be sorely missed. But our loss is his family's gain; Dottie and their daughters are no doubt thrilled at the prospect of spending more time with the Justice after he steps out from under the crushing hours that his tireless work ethic has always demanded. I share that sentiment myself, and I wish my dear friend Harry and his family good health and great happiness in the years to come.

16. Jordan Steiker, *The Long Road Up from Barbarism: Thurgood Marshall and the Death Penalty*, 71 TEX. L. REV. 1131 (1993).

17. See Brennan, *supra* note 15, at 1-4.

HARRY A. BLACKMUN

BYRON WHITE*

Justice Blackmun has had a long and illustrious judicial career, first on the Court of Appeals for the Eighth Circuit and then twenty-four years on the Supreme Court. His presence and influence on the Court are very evident from the many important opinions that he has authored. I enjoyed sitting with him over the years. I wish him well, and I suspect that he will neither be silent nor idle in his retirement.

* Associate Justice of the Supreme Court of the United States (retired).

JUSTICE HARRY BLACKMUN: SOME PERSONAL NOTES

RICHARD S. ARNOLD*

On April 6, 1994, Justice Harry A. Blackmun announced his decision to retire as an Associate Justice of the Supreme Court of the United States. Obviously this was an event of profound national significance. Justice Blackmun's voice on the Court has been uniquely one of conscience, calling us all to greater self-knowledge, to face and extirpate those habits of our society that urgently need correction. To assess his record adequately, to express our gratitude to him for his service, is not the work of a few days. It will take, and it deserves, time and attention. My purpose in this short piece is different: to offer a few personal observations about the Justice, his approach to the work of judging, and his relationships with other judges.

The Justice belongs, of course, to the whole country. But today I claim him for the Eighth Circuit. I speak from the special perspective of that Circuit, of which I have had the honor of being Chief Judge for a little over two years. The Justice started with us right out of Harvard Law School, as law clerk to Judge John B. Sanborn of Minnesota, who had come on the Court of Appeals just that year, 1932. Judge Sanborn had been on the United States District Court for the District of Minnesota since 1925, and had never had a law clerk. When Mr. Blackmun, as he then was, applied for a clerkship (he had a job offer in Boston, but chose to return to Minnesota because his father was ill), Judge Sanborn was reluctant: he had proved he could get along without a law clerk, and he wanted to save the United States some money. The applicant persisted, though, and the judge agreed to hire him.¹ The judge and the future Justice worked together in what is now the Landmark Center in St. Paul, a

* Chief Judge, United States Court of Appeals for the Eighth Circuit.

1. THEODORE J. FETTER, *A HISTORY OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT* 72 (1977).

wonderful example of authentic historic preservation. The Justice tells the story, prophetic perhaps in its meaning, of going to the judge with a petition from an inmate protesting cruel prison conditions. "I know, Harry," Judge Sanborn said, "but we can't do anything about it." Years later, the Justice did do something about it.²

Judge Sanborn was a circuit judge in regular active service for twenty-seven years. He decided to take senior status in 1959, and summoned Mr. Blackmun, the General Counsel of the Mayo Clinic in Rochester, Minnesota, to dinner. He told his old law clerk, who had never sought the position, that he wanted his successor to be named Blackmun. Judge Sanborn then wrote Lawrence E. Walsh, at the time Deputy Attorney General, more recently in the news as independent counsel in the Iran-Contra matter. Here is part of what the letter said:

I sincerely hope, as I know you do, that political considerations will not offensively enter into the selection of a successor. If they should, there might be no vacancy to fill.³

The story is that Judge Sanborn really meant this: "Appoint Harry Blackmun, or there will be no appointment to make." In any case, the desired effect did follow. President Eisenhower appointed Harry Blackmun a United States Circuit Judge for the Eighth Circuit, and he took his seat on November 4, 1959.⁴

More than ten years later, after Justice Fortas resigned, two nominations by President Nixon—Judge Clement Haynsworth and Judge G. Harrold Carswell—failed. Someone of unimpeachable integrity and legal ability was needed, and the President chose Judge Blackmun, who has ever since gloried in referring to himself as "Old No. 3," the President's third choice. He became an Associate Justice of the Supreme Court of the United States on June 9, 1970.⁵

More to the point for purposes of my present focus, the Justice also became Circuit Justice for the Eighth Circuit. Circuit Justices have certain formal duties, like ruling on stay motions which come from the Court of Appeals for their circuit, or from state courts geographically within the circuit. They also have a less formal role, and here Justice Blackmun has excelled. He has attended all but two of the Circuit Judicial Conferences during my 14 years on the Court of

2. See *Jackson v. Bishop*, 404 F.2d 571 (8th Cir. 1968).

3. Letter from The Honorable John B. Sanborn to Lawrence E. Walsh (Feb. 21, 1959) (in John B. Sanborn file, Department of Justice appointment files, Federal Personnel Records Center, St. Louis, MO) quoted in FETTER, *supra* note 1, at 73.

4. FETTER, *supra* note 1, at 93.

5. FETTER, *supra* note 1, at 73.

Appeals, and would have been with us both of those times if circumstances had not made his presence impossible. The Justice always delivers the climactic address of the Conference, an occasion not missed by a one of the several hundred judges and lawyers in attendance. These occasions are instructive—he goes through the docket for the Supreme Court Term just concluded, paying special attention to cases from our circuit that the Court has reviewed, and taking pains to be kind to our several faults. (“They don’t grant cert. to affirm,” as the saying goes.) These addresses are spiced with humor, one might almost say with mischief. The Justice is wont to say, in a crowded room freely open to reporters, “Now, this is off the record,” and then he serves up a few tantalizing tidbits that, one suspects, he knows will be reported. He is a man of quiet and effective humor. The occasions have also been, at times, emotional. Justice Blackmun knows his history and his human nature, he is deeply patriotic, and he is a faithful disciple of the better side of the law. Not a few times he has brought tears to my eyes. He is more than a Circuit Justice to us. He is our shepherd, with an almost ecclesiastical devotion to our welfare.

So I think first, and with pride, of Justice Blackmun as a man of the Eighth Circuit. We are all proud of him, and proud that he still claims us as his own. I think of him also as a man with a special place in his heart for Arkansas. One of his best friends on our Court was Pat Mehaffy of Little Rock, Arkansas, who came on the Court in 1963 and was Chief Judge in 1973 and 1974.⁶ Judge Mehaffy (I recount this history on the authority of Justice Blackmun himself) mentioned Judge Blackmun to Senator John L. McClellan after the Carswell defeat in 1970, and it was Senator McClellan who most forcefully brought the then circuit judge to the attention of President Nixon. The Justice, partly for this reason perhaps, has a soft spot in his heart for Arkansas. She is a small state, but there are those who love her,⁷ and Harry Blackmun is prominent among them. He maintained for years his close friendship with Chief Judge and Mrs. Mehaffy, and, after that, with many others of the bench and bar of this Southern outpost of the circuit. Just two years ago, though at the tail end of an illness, the Justice came with Mrs. Blackmun to the Law School of the University of Arkansas at Fayetteville. It was my good fortune to be with the Blackmuns for two days there and to see first-hand how

6. FETTER, *supra* note 1, at 74-75.

7. My apologies to Daniel Webster. See 15 THE WRITINGS AND SPEECHES OF DANIEL WEBSTER 11-12 (J. McIntyre ed., 1903) (recounting argument of counsel in *Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819)).

gracious they were to faculty, students, and citizens. In fact, I had the honor of helping to introduce the Justice before his principal address (delivered, by the way, complete with slides). I take the liberty now of repeating a little of what was said then—quoting, as it were, from my favorite authority: myself.

I think of certain salient qualities in Justice Blackmun's work and person. *First*, he is painstakingly, maybe sometimes even painfully, fair. He is a real craftsman, careful but not pedantic. His work is in the tradition of that famous dictum of Judge Learned Hand: "[I]t is as craftsmen that we get our satisfactions and our pay."⁸ I am reminded, too, of Justice Holmes's advice: Our task is "to hammer out as compact and solid a piece of work as one can, to try to make it first-rate, and to leave it unadvertised."⁹ Perhaps this is one of the reasons for Justice Blackmun's affection for tax cases, an affection not shared, it seems, by all of his colleagues. In tax matters, precision is important, and so is clarity. These qualities the Justice possesses in abundance.

Second, Justice Blackmun has shown a willingness to change. I like to quote two rather different authorities on this subject. It was Justice Robert Jackson of whom it was said, when he changed his mind about some legal propositions, that "it showed that he hasn't stopped thinking." And John Henry Cardinal Newman made a really wise observation when he said, "to improve is to change, and to be perfect is to have changed often." Whether Justice Blackmun has changed often enough to be perfect is a question I will leave to others. But changed he certainly has, and in important ways. The most recent example is his much-noted change of heart with respect to the constitutionality of the death penalty.¹⁰ Whether he was right in 1994, and wrong in *Furman v. Georgia*,¹¹ is for others to judge—certainly not the purview of judges of inferior courts. The point is that the Justice was not afraid to change, and, what is more, was not afraid to admit publicly that he had changed and to explain why. This is maturity, not vacillation. The law does not always stay the same, nor does one's view of it necessarily remain fixed. Consistency is a virtue, but not the only virtue. Especially in matters of constitutional interpretation, it may be more important to be right

8. LEARNED HAND, THE BILL OF RIGHTS 77 (1958).

9. Oliver W. Holmes, *The Class of '61*, in THE ESSENTIAL HOLMES 94 (Richard A. Posner ed., 1992).

10. See *Callins v. Collins*, 114 S. Ct. 1127, 1128 (1994) (Blackmun, J., dissenting from denial of certiorari).

11. 408 U.S. 238, 405 (1972) (Blackmun, J., dissenting).

than to be consistent, and Justice Blackmun has been unremitting in his pursuit of what is right.

Third, the Justice has integrity, perhaps the most important quality of a judge, or of any public servant. His word is good. He does not misrepresent his own mind. He forms his conscience carefully and then sticks to it. This is not done self-consciously or, maybe, even consciously at all. It is an innate, instinctive trait. For judges, whose results and reasoning are often questioned, and rightly so, their own integrity is the only complete defense. I like to quote Horace, maybe the greatest Latin poet:

*Integer vitae scelerisque purus
Non eget Mauris jaculis nec arcu.*

If readers will not feel that their intelligence is being insulted, I will supply my own free translation: "One who has integrity and is free of fault has no need of weapons of war." Fortunately, Supreme Court justices have not needed weapons of war. The attacks they suffer are (usually) verbal, not physical, but they are, I suspect, no less vexing. Justice Blackmun need not fear such attacks. His life and work need no defense except his own manifest integrity. He needs no other weapons.

Fourth, the justice is unfailingly considerate. Here I will be pardoned, I hope, if I recount a personal incident. I had the misfortune (you will understand why I use this word in a moment) of writing the opinion for the Court of Appeals in *National Bank of Commerce v. United States*.¹² I wrote the opinion while on vacation in St. Kitts, an island in the Caribbean. I was quite proud of it, perhaps too proud. I finished it in the middle of the night, having taken my own index cards with case abstracts with me (not being able to face a vacation without the law). Some time later, the Supreme Court granted certiorari on petition of the United States. Still later, on one morning in June, at the end of the Court's Term, my secretary came to tell me that Justice Blackmun was on the line to speak to me. I picked up the phone, and it was indeed the Justice, not a member of his staff, but the Justice himself. He told me that that day he had announced the opinion of the Court in *United States v. National Bank of Commerce*,¹³ and that the Court had reversed the judgment of the Court of Appeals. He was kind enough to add that the vote was five to four, indicating that I had not been wholly wrong. This was an uncommonly gracious thing to do, and quite rare, so far as I know,

12. 726 F.2d 1292 (8th Cir. 1984), *rev'd*, 472 U.S. 713 (1985).

13. 472 U.S. 713 (1985).

but it made me understand that part of greatness is a sort of deference to those under oneself. This same quality has shown through in all of the Justice's dealings with the judges and lawyers of this Circuit. He is, above all, considerate, and when his duty is to reprove, he does it gently.

So Justice Blackmun leaves the Court. He did not have to go. He was in good health and spirits and could have stayed. He is going because he has decided it is time, a decision that only he can make. He takes with him the love and respect of all of the judges and lawyers of the Eighth Circuit. I will add a selfish note: I have told the Justice that I never wish to convene a Judicial Conference of the Eighth Circuit without his presence, and that he has a standing invitation to sit with us any time he wishes. So maybe his career will come full circle, and he will find himself again a judge of the Eighth Circuit.

TRIBUTE TO HARRY A. BLACKMUN, ASSOCIATE JUSTICE, UNITED STATES SUPREME COURT

A.M. KEITH*

Associate Justice Harry A. Blackmun has served the nation well these last thirty-five years. Born in southern Illinois in 1908, Justice Blackmun spent most of his first sixty-two years in Minnesota. After graduating from high school in St. Paul, he attended Harvard University on a scholarship, graduating summa cum laude in mathematics in 1929. He then entered Harvard Law School, graduating in 1932. After law school, Justice Blackmun returned to St. Paul and clerked for United States Circuit Court Judge John B. Sandborn, whom he succeeded in 1959. He left the clerkship in 1933 to teach at the Mitchell College of Law in St. Paul—former Chief Justice Warren Burger's alma mater. After a year of teaching, Justice Blackmun went into private practice for 16 years. He married Dorothy E. Clark in 1941 and they were blessed with three remarkable daughters. In 1950 he became legal counsel for the famed Mayo Clinic in Rochester, Minnesota. In 1959, President Eisenhower appointed Justice Blackmun to the U.S. Court of Appeals for the Eighth Circuit. In 1970, President Nixon elevated Justice Blackmun to the Supreme Court.

I first met this remarkable friend in 1955 when he offered me a job as his legal assistant at the Mayo Clinic. No young lawyer just mustered out of the United States Marine Corps could have had a wiser and more understanding mentor.

Justice Blackmun fits few of the stereotypes of American legal or judicial giants. He was not a trial lawyer or a lawyer active in politics and he did not have a bold or extremely outgoing personality. He was not arrogant and was not blessed with an effortless pen or a biting tongue. Today, as in 1955, he remains a modest, self-effacing,

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sensitive, articulate, and disciplined legal practitioner. It is a political miracle he ever became a federal circuit judge and a justice of the United States Supreme Court.

As counsel for the Mayo Clinic and as a federal judge, he may have had more influence on the medical profession than if he had been a doctor, a profession he seriously considered while attending Harvard University. At Mayo he observed the long educational and ethical road traveled by the men and women who treat the sick and dying. He has always had, and I quote, "a sympathetic attitude toward the medical profession and for the medical mind." In his many opinions concerning medical matters, he has tried to allow doctors to practice medicine without undue state influence and to allow patients autonomy and privacy.

No federal judge in our lifetime has been subject to harsher criticism than Justice Blackmun since he spoke for the Court in *Roe v. Wade*. Whether one agrees with this decision or not, it has fueled a continuing debate concerning the proper function of our Supreme Court in the nation's constitutional system. Reading his opinions helps all of us understand his vision of the constitutional promise of privacy. These opinions attempted to set out the scope of governmental intrusion into our intimate sexual and social relationships, bodily integrity, and personal choices. They are the writings of a thoughtful person unafraid to show his anguish and doubt. The opinions are always scholarly and thorough, and they mirror the continuing evolution of his mind and spirit.

The right to privacy may be a central constitutional issue in the coming decades. With the enormous changes in science and technology and the immense growth of governmental power, this constitutional concept may be one of the essential legal and social glues that holds together the nation—a nation fast becoming one of the most diverse on this small globe in terms of religious, racial, and ethnic makeup.

I will always remember his words in the *Thornburgh* opinion: "Our cases long have recognized that the Constitution embodies a promise that a certain private sphere of individual liberty will be kept largely beyond the reach of government. That promise extends to women, as well as to men."¹

Few of us have the opportunity to know a person of such decency, common sense, and intellectual capacity. His words will be missed.

1. *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 771 (1986).

MR. JUSTICE BLACKMUN: REFLECTIONS FROM THE COURS MIRABEAU

PAUL R. BAIER*

Main Street in the old quarter of Aix-en-Provence, France, is the Cours Mirabeau, a golden archway of Platanes trees and mossy fountains. At one end stands the statue of the good Roi Renée, who was loved in his day for his kindness, his wisdom, his good works.

I recall Bastille Day, 1986, the summer of the dissent in *Bowers v. Hardwick*,¹ Justice Blackmun's ringing plea for human dignity and for freedom to differ in matters that count most. Harry and Dottie Blackmun were lost in a faceless crowd that watched fireworks explode ephemeral streams of red, white, and blue in the nighttime sky above the Grande Fontaine d'Aix. This was the summer the French press and *Le Monde* laughed at the spectacle of police invading an American citizen's bedroom.²

Our paths crossed that summer at Aix-Marseille-III University, its *Faculté de droit*, the school of Portalis:

[B]ut there must be a body of case law. In the host of subjects that make up civil matters, the judgments of which, in most cases, require less an application of a precise provision than a combination of several provisions leading to the decision rather than containing it, one cannot dispense with case law any more than he

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1. 478 U.S. 186 (1986).

2. Justice Blackmun made good use of his summer exposure to the French language, and to *Le Monde*, on a later legal occasion, The Haitian Refugee "refouler" Case, *viz.*:

It thus is no surprise that when the French press has described the very policy challenged here, the term it has used is "refouler." See, e.g., *Le bourbier haïtien*, *Le Monde*, May 31-June 1, 1992 ("[L]es Etats-Unis ont décidé de *refouler* directement les réfugiés recueillis par la garde côtière." (The United States has decided [de refouler] directly the refugees picked up by the Coast Guard)).

Salé v. Haitian Centers Council, Inc., 113 S. Ct. 2549, 2569 (1993) (Blackmun, J., dissenting).

My French colleague Alain Levasseur, who grew up outside Paris and who reads *Le Monde*, tells me that Justice Blackmun got it right in this Haitian "refouler" case.

can dispense with legislation. . . . It is for experience gradually to fill up the gaps we leave. The Codes of nations are the *fruit of the passage of time*, but *properly speaking*, we do not make them.³

Or in Harry A. Blackmun's own prophetic words: "Of course, times are different in 1970 than they were 200 years ago. No body of men 200 years ago could determine what our problems are today. That is, I suppose, what we have courts for, . . . to construe the Constitution in the light of current problems."⁴

Mr. Justice Blackmun's *Bakke* dissent quotes a similar thought, the words of Chief Justice Marshall: "In considering this question, then, we must never forget, that it is *a constitution* we are expounding."⁵

We were together at Aix teaching a course on Constitutional Interpretation, with a subtitle drawn from a little book by a great French law teacher and jurist, François Géný: *Les Procédés d'Elaboration du Droit Civil*, a lecture made by Géný at Nancy in 1910. I sensed a link between Géný's *Méthode*—his idea of "*libre recherche scientifique*" in judicial handling of a Code⁶—and Justice Blackmun's workways on the Court, his handling of what he characterized before the Senate Judiciary Committee as the "magnificent instrument" of the Bill of Rights.⁷ His painstaking researches at the Mayo Clinic on the

3. PRELIMINARY DISCOURSE ON THE PROJET OF CIVIL CODE (1800) (M. Shael Herman trans.), in Alain Levasseur, *Code Napoleon or Code Portalis?*, 43 TUL. L. REV. 762, 772-73 (1969).

4. *Hearing Before Comm. on the Judiciary, United States Senate on the Nomination of Harry A. Blackmun, of Minnesota, to be Associate Justice of the Supreme Court of the United States*, 91st Cong., 2d Sess. 35 (1970) [hereinafter *Blackmun Hearings*] (statement of Judge Blackmun).

5. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 407 (1978) (Opinion of Blackmun, J.) (quoting *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819)).

6. FRANÇOIS GÉNY, MÉTHODE D'INTERPRÉTATION ET SOURCES EN DROIT PRIVÉ POSITIF (Paris, 1899) (Ernest Bruncken trans.), reprinted in part in 9 SCIENCE OF LEGAL METHOD 1, 46 (1917). See generally Jaro Mayda, *Gény's Méthode After 60 Years: A Critical Introduction*, in FRANÇOIS GÉNY, MÉTHODE D'INTERPRÉTATION ET SOURCES EN DROIT PRIVÉ POSITIF, at v (Louisiana State Law Institute trans., 2d ed. 1954).

7. *Blackmun Hearings*, supra note 4, at 44 (statement of Judge Blackmun). Very early, in his first law review article, *The Marital Deduction and Its Use in Minnesota*, 36 MINN. L. REV. 50, 64 (1951), Harry Blackmun showed great promise working with a tool that ordinary minds would find mundane:

The marital deduction is an apt and excellent tool for planning in Minnesota and elsewhere but, as with any tool, it requires both the proper raw material of an adequate fact situation and good craftsmanship. The lawyer can retain his assumed position as the latter only by intelligent industry and a willingness to devote the time and energy which is required to gain complete knowledge of the scope and capacities of this legal tool and of its dangers and limitations. . . . Here is one of those rarely presented new legal tools of real substance and of fairly general application.

Thirty years later, he would say of § 1983:

What a vibrant and exciting old statute it is. As Edmond Cahn so aptly observed, "[F]reedom is not free." Whatever is the fate of § 1983 in the future, I do hope that it survives both as a symbol and as a working mechanism for all of us to protect the constitutional liberties we treasure.

Harry A. Blackmun, *Section 1983 and Federal Protection of Individual Rights—Will the Statute Remain Alive or Fade Away?*, Seventeenth James Madison Lecture on Constitutional Law, New York

Hippocratic Oath and on the history of abortion laws come to mind.

In his day, Mr. Justice Cardozo taught the connection between Code and Constitution in his 1921 Storrs Lectures at Yale, in what has come down to us as *The Nature of the Judicial Process*:

The same problems of method, the same contrasts between the letter and spirit, are living problems in our own land and law. Above all in the field of constitutional law, the method of free decision has become, I think, the dominant one today. The great generalities of the constitution have a content and a significance that vary from age to age. The method of free decision sees through the transitory particulars and reaches what is permanent behind them. Interpretation, thus enlarged, becomes more than the ascertainment of the meaning and intent of the lawmakers whose collective will has been declared. It supplements the declaration, and fills the vacant spaces, by the same processes and methods that have built up the customary law.⁸

Each generation must discover old truths for itself. Mr. Justice Blackmun has proved himself a worthy successor to Justice Cardozo, whose seat—that of Joseph Story, Benjamin Nathan Cardozo, Felix Frankfurter, and Oliver Wendell Holmes, Jr.—“H.A.B.” has adeptly filled for twenty-four years.

Aix-en-Provence is a serene setting of sunshine and of herbs, an ancient Roman outpost of warm springs for the troops. And all the while the Jurisconsults laid down their *regulae iuris* at Rome: “*Ex facto jus oritur*. That ancient rule must prevail in order that we may have a system of living law.”⁹ Justice Blackmun, like Louis Brandeis before him, has kept a keen eye on the facts as he has given voice to the living law of the Constitution.

The Justice returned to Aix the summer of his *Casey* dissent,¹⁰ slip opinions in hand, with Dottie—“Miss Clark,” as the Justice sometimes

University School of Law, November 14, 1984, 60 N.Y.U. L. REV. 1, 29 (1985) (quoting THE GREAT RIGHTS II (E. Cahn ed. 1963)).

8. BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 17 (1921). Justice Blackmun quoted Cardozo's thought, “The great generalities of the constitution have a content and a significance that vary from age to age,” in his *Bakke* opinion. *Bakke*, 438 U.S. at 407. Although he has said of himself, “I'm not a ‘jurisprude.’ I couldn't be an expert in jurisprudence if I wanted to be,” John A. Jenkins, *A Candid Talk with Justice Blackmun*, N.Y. TIMES, Feb. 20, 1983, § 6 (Magazine), at 61, Harry Blackmun, under the watchful eye of Professor Norval Morris, has co-moderated the Aspen Institute Seminar on Justice and Society for fourteen years. I was privileged to attend the latest installment, during the summer of 1993, and I have no doubt that Harry Blackmun is a reflective thinker about the nature of justice, with his feet firmly on the ground: “I get disturbed when we have a case that goes off on theory and does injustice to the litigant. I think we're there to try to do justice to him as well as to develop a great, overlying cloud of legal theory.” *Id.*

9. *Adams v. Tanner*, 240 U.S. 590, 600 (1917) (MR. JUSTICE BRANDEIS, dissenting).

10. *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2843 (1992) (Blackmun, J., dissenting).

calls her—and their daughter Nancy joining the students in class. Harry A. Blackmun's quiet voice, his restrained passion, his earnest conviction, his common touch—all added life to our learning. "I think that we should pursue justice," he told the students. "Some of us anyway, on the Supreme Court, ought to keep justice in mind, if not constantly every once in a while at least."

I've done it in the abortion cases when I speak of, "There is another world out there," which I think we should bear in mind. There is a person behind every case, usually a "little person," as I describe it, who needs attention and consideration rather than a legal theory of what is proper and what is right for all of us in the long run. I think cases involve people. And that they deserve a distinctive judgment, as well as the law itself.¹¹

We were told by Nancy what a great sacrifice to family is the grind of the Court. "He hardly sees his grandchildren."

What especially sticks in my mind is Justice Blackmun's teaching us that the work of the Court—"Your Supreme Court"—is an inescapably human enterprise, with its ups and downs, its competing intellectual personalities, its fray Term after Term. "One is locked in combat down there."¹²

For two summers, then, we talked in France of the timeless craft of judicial interpretation of written texts, from Napoleon's Code to America's Constitution, aside the aged fountains of Aix where Portalis played as a little boy. "We cannot live with original intent," he told his Cours Mirabeau students.

Gaps are inevitable; judicial choice is inescapable. Whether we will have more or less liberty, more or less equality, always depends on the workways of the judge. "There is no guarantee of justice except the personality of the judge."¹³ This from Eugen Ehrlich, another reflection from the Continent.

11. The quotations, and others in text, are taken from the transcript of the sound recordings of our Aix 1992 classes. Tape of LSU Law Center Summer Program (July 6-9, 1992, Aix-en-Provence, France) (recorded with Justice Blackmun's permission) [hereinafter Aix-'92 Trans.] (copy on file with author).

12. Justice Blackmun made this remark while teaching a special Saturday morning Constitutional Law class, with Dottie listening in, at LSU Law Center, March 9, 1985, recorded with the Justice's permission (transcript on file with author). And the combat continues:

Today we are faced with the question whether the Equal Protection Clause forbids intentional discrimination on the basis of gender, just as it prohibits discrimination on the basis of race. We hold that gender, like race, is an unconstitutional proxy for juror competence and impartiality.

J.E.B. v. T.B., No. 92-1239, 1994 WL 132232 (U.S. Apr. 19, 1994) (Blackmun, J., for the Court; Scalia, J., joined by Rehnquist, C.J., and Thomas, J., dissenting).

13. EUGEN EHRLICH, *FREIE RECHTSFINDUNG UND FREIE RECHTSWISSENSCHAFT* (Leipzig, 1903) (Ernest Bruncken trans.), reprinted in part in 9 *SCIENCE OF LEGAL METHOD*, *supra* note 6, at 47, 65.

We all know Justice Blackmun's *DeShaney* dissent, spoken from the heart for all America to hear: "Today, the Court purports to be the dispassionate oracle of the law, unmoved by 'natural sympathy.' But, in this pretense, the Court itself retreats into a sterile formalism . . ." ¹⁴ This is not Justice Blackmun's way to interpret the "broad and stirring clauses" of the Constitution:

On the contrary, the question presented by this case is an open one, and our Fourteenth Amendment precedents may be read more broadly or narrowly depending upon how one chooses to read them. Faced with the choice, I would adopt a "sympathetic" reading, one which comports with dictates of fundamental justice and recognizes that compassion need not be exiled from the province of judging. ¹⁵

And what of Justice Harry Blackmun viewed from this side of the Atlantic? I have read Justice Brennan's magnificent tribute to Harry A. Blackmun:

Above all, Justice Blackmun's vision focuses upon human details—on the problems and worries and predicaments of individuals—and this has been the hallmark not only of his approach to constitutional cases but of his interaction with the world around him. This practical yet compassionate view has added scope to the Court's work . . . ¹⁶

And Erwin Griswold has solidly underscored Harry Blackmun's wisdom and courage. ¹⁷ I'm sure *The American University Law Review's* symposium of salutes, which I am privileged to join, will be followed by many more to come.

I would add only a few personal observations, aimed at plucking a Spring '94 crocus for Minnesota's "shy person's Justice," ¹⁸ and for "Miss Clark," Dorothy Clark Blackmun, the Justice's conscience in our classroom. "Harry, you haven't answered the question."

I remember our first conversation, the day after I heard the *Danforth* ¹⁹ opinion announced in Court. Only because I was about to return home to teaching after my year as a Judicial Fellow did I make bold to say a word. The Justice was at breakfast with his clerks, as always, at 8:05 a.m. in the Court's cafeteria. Quickly passing the table, I mentioned that I admired his opinion in *Danforth*. The Justice

14. *DeShaney v. Winnebago County Dep't of Servs.*, 489 U.S. 189, 212 (1989).

15. *Id.* at 212-13.

16. William J. Brennan, Jr., *A Tribute to Harry A. Blackmun*, 1990 ANN. SURV. AM. L. xi.

17. Erwin N. Griswold, *Tribute*, 1990 ANN. SURV. AM. L. xvii.

18. This is fellow Minnesotan, of Powdermill Biscuit fame, Garrison Keillor's apt description of the Justice, quoted in Glen Elasser, *Courting Justice*, CHI. TRIB., June 6, 1990, § C, at 1.

19. *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52 (1976).

called me back: "Professor, what part of the opinion did you like?" I didn't think he knew I existed at the Court, much less that I was a law teacher. But he pays attention to other lives, I now know. I had done my homework. I recited from the Justice's mathematical breakdown: "IV-E." This was the hard, saline amniocentesis issue in the case. Justice Blackmun, as he has done for countless others, invited me to sit down at the table and join the dialogue. I wondered, "What am I doing here?" Justice Blackmun felt exactly the same way "the day the load of bricks fell on me":

I'll never forget the 9th day of June, 1970, when I was sworn in. Immediately after the swearing in we went into "the Conference," so called. I walked into that room and there was Hugo Black, William O. Douglas, William J. Brennan, Jr., John Marshall Harlan—and I said to myself "What am I doing here."²⁰

I sat down and told the Justice I thought the Court was wise in *Danforth* not to allow itself to be hoodwinked even by a sovereign state legislature—never mind Justice Byron White's biting criticism that the Court had made itself the Nation's *ex officio* Medical Review Board.

I remember showing a visitor the nooks and crannies of the Court; this was one of my duties as a Judicial Fellow. We stopped short at the Justices' Library, a quiet retreat that Justice Blackmun made his own. We watched the Cardigan Justice erase a word or two from a draft opinion. He penciled in a replacement, picked up the page, leaned back, and subjected the revision to his angle of vision. Years later, I would learn at Aix:

What I like most of all is writing opinions. There isn't any question about this in my mind. I don't know whether it's because it's a quiet enterprise or whether it's because it gives you a chance to think a little bit and the like. Writing opinions is a play with words. One can work on them, change them, refine them. I suppose the opinions that one writes are what he's remembered by.

Mr. Justice Blackmun is a jeweller of opinions. We left him undisturbed at his quiet enterprise.

The Justice's sympathy for the little person is preserved in the *U.S. Reports*, just as the good Roi Renée rests in bronze on the Cours Mirabeau.

Beneath the surface, the roots of Harry Blackmun's empathy run deep: "I dislike to talk about it, but I did not have very much to start with . . ."²¹ Christmas Eve 1931 was spent in New York City, with his

20. Aix-'92 Trans., *supra* note 11, at 40.

21. *Blackmun Hearings*, *supra* note 4, at 55 (statement of Judge Blackmun).

Law School roommate's family. Doctor Harry Emerson Fosdick invited him to climb the bell tower of Riverside Church late at night:

I agreed. We ascended the long stair in the cold night and finally reached the platform and looked out upon the lights of New York City, up and down the Hudson and across the East River. It was an impressive and beautiful sight. And yet Doctor Fosdick said: "Young man, there is more misery under those lights this Christmas than you will ever know." I have not forgotten.²²

As a Justice, Harry Andrew Blackmun made it a point of duty to rescue parties from anonymity by reciting their first, middle, and last names, *viz.*: "Jose Chavez-Salido, Pedro Luis Ybarra, and Ricardo Bohorquez are American-educated Spanish-speaking lawful residents of Los Angeles County, California. Seven years ago, each had a modest aspiration—to become a Los Angeles County 'Deputy Probation Officer, Spanish-speaking.'"²³ Countless other examples of this unheralded Blackmun touch are in the *Reports*.

Mr. Justice Blackmun is a master of doctrinal exposition and of tying up loose ends. His scholarship is enormous. Nowhere in the briefs in *United States v. Sioux Nation* is the story told of "the Black Hills of South Dakota, the Great Sioux Reservation, and a colorful, and in many respects tragic, chapter in the history of the Nation's West."²⁴ Rather, we learn of the Fort Laramie Treaty, of the Powder River War, and of the Sioux tribes, "led by their great chief, Red Cloud," only through the empathy of Harry Blackmun's opinion—painstakingly documented—for the Court.

Like other mortals, Justice Blackmun has changed his mind on vital subjects when experience and further reflection move him to do so. Joe Garcia's case comes to mind.²⁵ And then there is the death penalty, Justice Blackmun's *cri de cœur* the other day upon Bruce

22. Harry A. Blackmun, Remarks at the American Bar Association Prayer Breakfast in Dallas, Tex. 10-11 (Aug. 12, 1979) [hereinafter ABA Remarks] (copy on file with Chambers of Justice Blackmun).

23. *Cabell v. Chavez-Salido*, 454 U.S. 432, 448 (1982) (Blackmun, J., dissenting). Harold Hongju Koh, who clerked for Blackmun during the *Chavez-Salido* Term, has poignantly captured the spirit of his Justice as Harry Blackmun announced his dissent:

As the Justice spoke, I noticed that the spectators had become still, and were listening intently. For them, the case had suddenly become real; the Supreme Court had become a human institution. The concept of equal treatment for aliens had suddenly acquired a human face.

Harold H. Koh, *Equality with a Human Face: Justice Blackmun and the Equal Protection of Aliens*, 8 *HAMLIN L. REV.* 51, 104 (1985).

24. *United States v. Sioux Nation of Indians*, 448 U.S. 371, 374 (1980). Justice Blackmun has done the same thing for the Crow Nation, Chief Blackfoot, and the bed of the Big Horn River. See *Montana v. United States*, 450 U.S. 544, 569 (1981) (Blackmun, J., dissenting in part).

25. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985), *overruling* *National League of Cities v. Usery*, 426 U.S. 833 (1976).

Edwin Callins's petition:

From this day forward, I no longer shall tinker with the machinery of death. For more than 20 years I have endeavored—indeed, I have struggled—along with a majority of the Court, to develop procedural and substantive rules that would lend more than the mere appearance of fairness to the death penalty endeavor. Rather than continue to coddle the Court's delusion that the desired level of fairness has been achieved and the need for regulation eviscerated, I feel morally and intellectually obligated simply to concede that the death penalty endeavor has failed.²⁶

I have no doubt that Justice Blackmun has grown as a Justice over the years, as he himself described the endeavor, and that he has fulfilled his Aix hope:

I suspect that when one goes on the Supreme Court of the United States his constitutional philosophy is not fully developed. When one goes to Washington he has to develop a constitutional philosophy. What does "equal protection of the laws" really mean? And if one didn't grow and develop down there I would be disappointed in that person as a Justice. I would hope that in 1992 almost 20 years after *Roe against Wade* that I have grown a little bit in my constitutional philosophy and my constitutional resolution. I call that growth, not change, and I hope I'm correct.

Like the Doctors Mayo in Medicine, Justice Blackmun in Law has "loved the truth and sought to know it."²⁷ He has judged faithful to his own measure: "Must we not say that the law, in order to be true, at least must 'establish Justice,' within the meaning of the Preamble to the Constitution of the United States?"²⁸ And it is in the Preamble that Justice Blackmun finds "the basic prescription for the process of balancing"²⁹ that has been his hallmark all along: "to balance value against value to determine in a given context which is to prevail."³⁰ This balancing, he has told us, "lies at the very heart of

26. *Callins v. Collins*, 114 S. Ct. 1127, 1130 (1994) (Blackmun, J., dissenting from denial of certiorari).

27. Justice Blackmun explained:

Flanking the great stairs on the west side of the Supreme Court building in Washington are two pedestals. On them are figures carved by the well-known sculptor, James Earle Fraser. Another Fraser statue is in Rochester, Minnesota. It portrays the Doctors Mayo in their surgical gowns. Beneath those figures are the words: "They loved the truth and sought to know it."

Remarks of Harry A. Blackmun: Law Dedication Dinner, IOWA ADVOCATE, Fall/Winter 1986-1987, at 15.

28. *Id.*

29. *Remarks of Harry A. Blackmun: The Waterman Hall Addition Dedication*, 30 *ARK. L. REV.* vii, xxi (1976).

30. *Id.*

constitutional adjudication."³¹

Justice Blackmun has taken a quiver of arrows over the years. But there is an arrow of a different sort—Holmes's conviction that "while one lives there is neither logic nor joy in living languidly, that there is duty and delight in hard fighting, that while it is well to hit the mark, it is sometimes better to shoot an arrow into the sky if it takes fire there"³²

I like to think O.W.H., Jr., was a muse of sorts as Harry Blackmun worked alone in the Justices' Library.³³ "Only when you have worked alone,—when you have felt around you a black gulf of solitude more isolating than that which surrounds the dying man, and in hope and in despair have trusted to your own unshaken will,—then only will you have achieved."³⁴

This is enough, I trust, to show my high regard and affection for Justice Blackmun. Paul Freund said of Brandeis that he was the Court's Isaiah. Harry Blackmun's example of tenacity and of not giving up; his willingness to innovate, not merely to imitate, and to take the calculated risk; his joining in the fray; his moral courage; his love—all remind me of the example of Ruth, as Harry Blackmun described Ruth at an A.B.A. Prayer Breakfast, some fifteen years ago.³⁵

President Clinton has justly named Harry Blackmun as an ideal Justice. And the President's suggestion that what is needed on the Supreme Court is "somebody with a big heart"³⁶ stems directly, I believe, from Justice Blackmun's radiant example.

What is needed on the Court is character; learning, some of it acquired; experience; hard work; and wisdom. Harry Blackmun's example also shows us that human sympathy and compassion are vital

31. "Fashioning such accommodations between individual rights and the legitimate interests of government, establishing benchmarks and standards with which to evaluate the competing claims of individuals and government, lies at the very heart of constitutional adjudication." *Webster v. Reproductive Health Servs.*, 492 U.S. 490, 549 (1989) (Blackmun, J., dissenting).

32. Oliver W. Holmes, Jr., *Anonymity and Achievement* (1890), in *THE OCCASIONAL SPEECHES OF JUSTICE OLIVER WENDELL HOLMES* 59, 61 (M. DeW. Howe ed. 1962).

33. Sometimes Holmes as Muse shows up in Justice Blackmun's opinions. See, e.g., *Lewis v. City of New Orleans*, 415 U.S. 130, 136 (1974) (Blackmun, J., dissenting) ("All rights tend to declare themselves absolute to their logical extreme."); *New York Times Co. v. United States*, 403 U.S. 713, 759 (1971) (Blackmun, J., dissenting) ("Great cases like hard cases make bad law."). In *Lewis*, Justice Blackmun decried the Court's protecting profanity under the First Amendment and "[t]he extreme to which we allow ourselves to be manipulated by theory extended to the end of logic." *Lewis*, 415 U.S. at 136.

34. *The Profession of the Law* (1886), in *OLIVER WENDELL HOLMES, JUNIOR, SPEECHES* 22, 24 (1891).

35. ABA Remarks, *supra* note 22.

36. Ruth Marcus & Joan Biskupic, *Justice White to Retire After 31 Years*, WASH. POST, Mar. 20, 1993, at A1 (quoting President Clinton).

in the work of the Court.

And so the Court's Nehemiah will come down from the wall.³⁷ He has built well. His faith endures: "But the Court for me is a precious institution, and, in my estimation, even a heroic one."³⁸ Harry Blackmun has added a humanity to Justice that is uniquely his own.

I sent up a telegram to "Old No. 3" on the faithful day, April 6, 1994:

"WE CANNOT LIVE OUR DREAMS. WE ARE LUCKY ENOUGH IF WE CAN GIVE A SAMPLE OF OUR BEST, AND IF IN OUR HEARTS WE CAN FEEL THAT IT HAS BEEN NOBLY DONE."—O.W.H. to Boston Bar, 1900. THANK YOU FOR YOUR COURAGE, YOUR WISDOM, YOUR SYMPATHY FOR "POOR JOSHUA," YOUR HARD WORK. LOVE TO YOU AND DOTTIE.

Professor Baier, Kids, LSU. STOP

And even now my mind wanders back to our last class at Aix, to his closing words: a favorite passage from William Penn, read with poignancy by the Justice to the young people who gathered around him. Harry Blackmun has walked humbly through life—and he has shaped the cold corridors of the law—guided by these words: "I expect to pass through life but once. If therefore, there be any kindness I can show, or any good thing I can do to any fellow being, let me do it now, and not defer or neglect it, as I shall not pass this way again."

Mr. Justice Blackmun has given a sample of his best. It has been nobly done.

37. "Perhaps far off in another Persia, or nearby, within all of us, is, hopefully, a bit of the spirit of Nehemiah." Harry A. Blackmun, Remarks at the American Bar Association Prayer Breakfast in Washington, D.C. 11 (Aug. 5, 1973) (copy on file with Chambers of Justice Blackmun).

Will we be able to invoke the spirit of his day and of his people when under his leadership they said "let us rebuild" and "let us start"? Will it be said of us that "with willing hands" we "set about the good work"? 1:17-18. Will it be said of us that we "put [our] hearts into [our] work." 4:6-9, and that we proceeded, when necessary, with a weapon in one hand and a builder's tool in the other? Will it be said that, *despite* the opposition of announced displeasure, accusation, ridicule, anger, confusion, infiltration, blandishment, threat, temptation, and those repeated invitations to come down to the Plain of Ono and to delay and compromise and rationalize, we held steady and built again?

Id.

38. Harry A. Blackmun, Remarks at Renaissance Weekend at Hilton Head, S.C. 21 (Dec. 31, 1992) (copy on file with Chambers of Justice Blackmun).

IT'S BEEN A GREAT RIDE: A TRIBUTE TO JUSTICE HARRY A. BLACKMUN

ALLAN GATES*

It is a great honor for me to participate in *The American University Law Review's* tribute to Justice Blackmun. I do not propose to survey Justice Blackmun's long list of judicial opinions. Scholars more qualified than I have already started that task.¹ Nor do I claim any measure of objectivity. Former law clerks are rarely impartial when speaking of the judges with whom they have served; and I am shamelessly partial when it comes to Justice Blackmun. I propose to offer a few personal comments in hopes of suggesting why Justice Blackmun inspires such widespread respect and heartfelt affection among all those who have had the privilege of working with him.

Justice Blackmun offered me the opportunity to clerk in his chambers twenty years ago this spring. I clearly remember my interview. I was extremely nervous that morning. No one from my law school had ever been offered a Supreme Court clerkship. Although I had visited Washington, D.C. as a child, I had never been

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1. See, e.g., Richard S. Arnold, *Mr. Justice Blackmun: An Appreciation*, 8 *Hamline L. Rev.* 20 (1985); Randall P. Bezanson, *Emancipation as Freedom in Roe v. Wade*, 97 *DICK. L. REV.* 485 (1993); Randall P. Bezanson, *Fault, Falsity and Reputation in Public Defamation Law: An Essay on Bose Corporation v. Consumers Union*, 8 *HAMLIN L. REV.* 105 (1985); Lynn E. Blais, *Simple Justice/Simple Murder: Reflections on Judicial Modesty, Federal Habeas and Justice Blackmun's Capital Punishment Jurisprudence*, 97 *DICK. L. REV.* 513 (1993); Dan T. Coenen, *Justice Blackmun, Federalism and Separation of Powers*, 97 *DICK. L. REV.* 541 (1993); Pamela S. Karlan, *Bringing Compassion into the Province of Judging: Justice Blackmun and the Outsiders*, 97 *DICK. L. REV.* 527 (1993); Harold H. Koh, *Equality with a Human Face: Justice Blackmun and the Equal Protection of Aliens*, 8 *HAMLIN L. REV.* 51 (1985); Donald Lay, *The Cases of Blackmun, J. on the United States Court of Appeals for the Eighth Circuit 1959-1970*, 8 *HAMLIN L. REV.* 2 (1985); William A. McDaniel, Jr., *Public Trials*, 8 *HAMLIN L. REV.* 127 (1985); Karen N. Moore, *Justice Blackmun's Contributions on the Court: The Commercial Speech and State Taxation Examples*, 8 *HAMLIN L. REV.* 29 (1985); Karen N. Moore, *Justice Blackmun and Preclusion in the State-Federal Context*, 97 *DICK. L. REV.* 465 (1993); Mark C. Rahdert, *Preserving the Archives of Freedom: Justice Blackmun and First Amendment Protections for Libraries*, 97 *DICK. L. REV.* 437 (1993); Diane P. Wood, *Justice Blackmun and Individual Rights*, 97 *DICK. L. REV.* 421 (1993).

inside the Supreme Court building. The scale and drama of the building's architecture only heightened my anxiety. I was totally awed by the prospect of meeting privately with a Justice of the United States Supreme Court. As the hour for my interview approached, I became confident that Justice Blackmun would probe with surgical precision all of the weakest spots of my limited legal experience. I especially feared that Justice Blackmun would quiz me on some aspect of tax law, an area I knew he personally favored.

As events turned out, my fears regarding the interview were totally unjustified. Justice Blackmun greeted me in his trademark cardigan sweater. His gentle and unassuming personality immediately put me at ease. Although Justice Blackmun enquired about my training and experience, his questions were nothing like the interrogation I feared. In fact, Justice Blackmun spent much of the time in the interview explaining almost apologetically that the job could involve long hours and weekend work. When he learned that I was married and had a baby daughter, Justice Blackmun took special care to be sure that my wife and I understood the demands the clerkship might place on our lives. At the time, I was startled by Justice Blackmun's obvious concern over the personal life of a prospective clerk. I assumed that portion of my interview must have been unusual. Shortly after starting work, however, it became clear to me that Justice Blackmun had a solicitous interest in the personal lives of all who worked in his chambers. In subsequent years, other Blackmun clerks have described similar experiences in their interviews.

Towards the end of my clerkship, Justice Blackmun hosted a reunion for all of his former clerks. The number of clerks attending was surprisingly large because the group spanned Justice Blackmun's eleven years of service on the Eighth Circuit, as well as four terms on the Supreme Court. Despite the size of the group, Justice Blackmun was clearly familiar with, and genuinely interested in, the details of all of his former clerks' personal and professional lives. I was particularly impressed by the joy Justice Blackmun took in discussing the well-being and accomplishments of the clerks' spouses and children. In subsequent years, my wife and I have had the pleasure of attending several other Blackmun reunions. The number of former clerks has grown steadily, and I am now counted among the old clerks from the early years. Despite these changes, one aspect of the reunions has remained constant. Justice Blackmun always remembers the last news he had about careers, spouses, and children; and he inquires eagerly about more recent developments.

During the period of my clerkship, the popular press tended to take Justice Blackmun's contributions to the Court lightly. The Justice was labeled the "Minnesota Twin" by the media pundits, a vaguely derogatory tag suggesting lack of independent values and undue deference to Chief Justice Burger. In later years the press "discovered" a new Justice Blackmun, a man of strong and independent convictions.² I suspect that many former Blackmun clerks shared my amusement at the media's sudden discovery of the same Justice Blackmun we had known all along, a gentle and compassionate man who cared deeply about the impact of the Court's decisions. This is not to say that Justice Blackmun's views never changed. For example, just this Term Justice Blackmun dramatically departed from his prior decisions regarding the constitutionality of capital punishment.³ In doing so, however, Justice Blackmun did not change his personal views on the death penalty—something he has always opposed.⁴ Instead, Justice Blackmun reevaluated his longstanding concerns regarding the fairness, reasonability, and consistency with which death sentences have been imposed in the two decades since his dissent in *Furman v. Georgia*.⁵ Justice Blackmun's willingness to reevaluate positions and consider change is itself a consistent theme that is evident throughout his judicial career.⁶ In response to questions in his confirmation hearing about the importance of following judicial precedent, Justice Blackmun stated that:

Precedent, I think, is a very valuable thing in the law. A lawyer has to say, however, that it is not absolute. Judges, even Justices of the Supreme Court, are human and I suppose attitudes change as we go along.

I have made statements before that the overruling by the Supreme Court of a prior precedent is not a matter always of great alarm. I think this has happened throughout its history. As times have changed, Justices have changed. People take a second look.⁷

2. See, e.g., *Blackmun: Intellectual Openness Elicits Needed Respect for Judicial Process*, NAT'L L.J., Feb. 18, 1980, at 18.

3. *Callins v. Collins*, 114 S. Ct. 1127 (1994) (Blackmun, J., dissenting from denial of certiorari).

4. See, e.g., *Maxwell v. Bishop*, 398 F.2d 138, 154 (8th Cir. 1968), *vacated*, 398 U.S. 262 (1970).

5. 408 U.S. 238, 405 (1972) (Blackmun, J., dissenting); see *Callins*, 113 S. Ct. at 1131-38. See generally Blais, *supra* note 1.

6. See, e.g., Norman Dorsen, *A Change In Judicial Philosophy?*, NAT'L L.J., Feb. 18, 1985, at 13.

7. *Hearing Before the Comm. on the Judiciary, United States Senate on the Nomination of Harry A. Blackmun, of Minnesota, to be Associate Justice of the Supreme Court of the United States*, 91st Cong., 2d Sess. 43 (1970) (statement of Judge Blackmun).

Justice Blackmun works closely with his law clerks on almost all tasks in the chambers, but there is one task he does not delegate. Justice Blackmun reads his own mail, all of it, including the crank letters and hate mail penned by those who disagree with his opinions. In recent years Justice Blackmun has occasionally shared some of his "favorite" letters in public speeches. Sometimes these letters are genuinely amusing. Sometimes they are venomously hateful. For a long time I could not understand why Justice Blackmun bothered to read this junk mail. Now I believe I understand. I believe this practice reflects his desire to remain in touch with public attitudes about the Court and his fierce determination to avoid being insulated from any criticism of his decisions, regardless of its character or source.

No tribute to Justice Blackmun would be complete without mention of Mrs. Blackmun and the Blackmun's daughters, Nancy, Sally, and Susie. Mrs. Blackmun and the daughters were a source of great emotional support to Justice Blackmun, and they contributed powerfully to the sense that all of the Justice's staff were part of one large, extended family.

Justice Blackmun frequently reminds audiences that he was President Nixon's third choice to fill the vacancy created by the resignation of Justice Fortas. His self-description as "Old Number 3" is typical of Justice Blackmun's modesty, but it is historically misleading. Justice Blackmun's nomination admittedly followed unsuccessful efforts to confirm two other nominees, Clement Haynesworth and G. Harrold Carswell, but it is not accurate to suggest that being third choice amounted to being third best. The contemporary record of Justice Blackmun's confirmation clearly reflects that President Nixon appointed Justice Blackmun because his professional credentials and personal integrity were so exceptional that confirmation would be assured despite the ill will that lingered in the Senate from the previous confirmation fights.⁸ Indeed, Justice Blackmun's credentials were so exceptional that they neutralized questions that undoubtedly would have been raised against a less qualified candidate due to

8. For example, Senator Kennedy opened his questions at Justice Blackmun's confirmation hearing with the following statement:

I want to extend a word of welcome to you, Judge Blackmun, as extended by my colleagues here this morning. I believe your nomination vindicates what the Senate did on the prior two nominations. In those two instances the important thing was not so much that we rejected a particular man, but that we reestablished a very high standard of excellence in terms of Supreme Court nominations, and certainly it would appear to me that you meet this standard of quality, and I am pleased to welcome you.

Id. at 36 (statement of Sen. Kennedy); *accord id.* at 1 (statement of Sen. McCarthy); *id.* at 43 (statement of Sen. Bayh).

the recent appointment of Warren Burger, a close friend and fellow Minnesotan, to serve as Chief Justice.

During the year that I was privileged to work at the Court, the law clerks had nicknames that were occasionally used in private conversations about the justices. I am ashamed to say that a few of these nicknames were not particularly flattering. In retrospect the youthful arrogance that we displayed in using such nicknames still astonishes me. Justice Blackmun's sobriquet was "the Horse." I suppose that name caught on because it had a certain rhythmic symmetry when used with Justice Blackmun's first name. It also reflected the law clerks' healthy respect for Justice Blackmun's prodigious capacity for hard work. I was reminded of this nickname when I read Justice Blackmun's remarks at the press conference announcing his retirement. Justice Blackmun stated that, like Justice White, he felt his tenure on the Supreme Court "had been a great ride."⁹ However Justice Blackmun may view the matter, I am confident that it is we, the American public, who have enjoyed a great ride. Justice Blackmun has helped pull the Supreme Court's workload with wisdom, integrity, and tireless energy for almost a quarter century. I for one shall always be grateful to him for the great ride he has given us.

9. See *Statements on Retirement of Blackmun from Court*, N.Y. TIMES, Apr. 7, 1994, at A12.

HARRY A. BLACKMUN

ERWIN N. GRISWOLD*

The middle west has been the locus of twenty-eight justices and chief justices.¹ This is somewhat more than one-fourth of the members of the Court appointed from the beginning.

The first of these midwestern justices was John McLean. He was born in northern New Jersey, and then made a number of moves to Virginia and Kentucky, and finally to Ohio. As Burnett Anderson states, "Throughout his career he was identified politically and geographically with the West."² McLean served on the Court from 1830 to 1861. He was followed by Justice Noah H. Swayne, likewise from Ohio, who served from 1862 to 1881, and was succeeded by Justice Stanley Matthews, from Ohio, who was a member of the Court from 1881 to 1889, thus concluding fifty-nine years during which an Ohio lawyer was a member of the Court, during nearly twenty-five of which, from 1864 to 1888, the Court was led by Chief Justices Chase and Waite, from Ohio.

With the benefit of hindsight, and necessarily as a matter of personal choice, it may be said that of the twenty-eight midwestern members of the Court, there were three who were particularly outstanding. In chronological order, these were Justices Samuel F. Miller,³ from Iowa, who served from 1862 to 1890, the first John

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1. The allocation is necessarily arbitrary, and personal. As for "the middle west," I have included the states which now constitute the Sixth, Seventh and Eighth Circuits. The personal element in the allocation arises from the fact that in the early days, prospective justices were born in, or worked in, the east, and then moved west, often making several moves. In more recent years, they became known as residents of a particular state, but then came to Washington in various administrative capacities, and, since they lived in the Washington area at the time of their appointment to the Court, are sometimes listed as coming from the state of their residence at the time of appointment, though their professional reputations were made elsewhere.

2. Burnett Anderson, *John McLean*, in *THE SUPREME COURT JUSTICES: ILLUSTRATED BIOGRAPHIES*, 1789-1993, at 101, 101 (Clare Cushman ed., 1993).

3. See Charles E. Wyzanski, *Mr. Justice Miller and the Supreme Court, 1862-1890*, 53 *HARV. L. REV.* 696, 696 (1940) (book review). Mr. Wyzanski wrote that this is "the best biography of an

Marshall Harlan, from Kentucky, who served from 1877 to 1911, and Justice Harry Andrew Blackmun, who was born in Illinois, but made his basic professional career in Minnesota. He served on the United States Court of Appeals for the Eighth Circuit from 1959 to 1970, when he was appointed to the Supreme Court. As has been said, Justice "Blackmun established himself as a justice who preferred to focus on the pragmatic aspects of each case rather than the theoretical."⁴

The seat which Blackmun filled has been a distinguished one. It was occupied by Joseph Story, Nathan Clifford, Horace Gray, Oliver Wendell Holmes, Jr., Benjamin N. Cardozo, and Felix Frankfurter, among others. There is a curious analogy between Blackmun's appointment and the appointment of Justice Joseph P. Bradley. There were two vacancies at the time, and President Grant nominated E. Rockwood Hoar, his Attorney General, and Edwin M. Stanton, Secretary of War under Lincoln. Hoar encountered opposition in the Senate, and Stanton, who had an easy confirmation, died four days after being confirmed. Joseph P. Bradley was then nominated to fill one of these seats and was easily confirmed.⁵ Thus, Bradley was, in a sense, "No. 3," just as Blackmun designated himself when he came to the Court following the rejection of Judges Haynesworth and Carswell. Blackmun was unanimously confirmed by the Senate. He showed "a populist concern for the 'little guy,' the person who would be affected by the decision and whose modest circumstances may be foreign to many members of the Court."⁶

Blackmun will undoubtedly be most remembered because of his painstaking opinion in *Roe v. Wade*,⁷ affirming a woman's right to obtain an abortion during the first "trimester" of her pregnancy. This decision was based heavily on conceptions of "a right to privacy" not specified in any detail in the Constitution, and on the patient's right

American judge since Beveridge's *Life of John Marshall*." It proves the proposition "advanced by Chief Justice Chase and John F. Dillon that Associate Justice Samuel Freeman Miller was 'beyond question the dominant personality upon the bench whose mental force and individuality [were] felt by the Court more than any other.'" *Id.* (quoting CHARLES FAIRMAN, MR. JUSTICE MILLER AND THE SUPREME COURT, 1862-1890, at 3 (1939)) (alteration in original).

4. Alan S. Mayans, *Harry A. Blackmun*, in THE SUPREME COURT JUSTICES: ILLUSTRATED BIOGRAPHIES, 1789-1993, *supra* note 2, 486, 488.

5. Bradley dissented in the Slaughter House Cases, 83 U.S. (16 Wall.) 36 (1873), but one day later he produced the Court's decision in *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130 (1873), which refused to apply the Equal Protection provision of the Fourteenth Amendment to require the admission of a woman to practice law. In reaching this result, he relied on "the paramount destiny and mission of woman," which, he said, was "to fulfill the noble and benign offices of wife and mother. This is the law of the Creator." *Bradwell*, 83 U.S. (16 Wall.) at 141.

6. Mayans, *supra* note 4, at 488.

7. 419 U.S. 113 (1973).

to seek and follow the advice of a physician—any physician. Subsequent thinking has led many minds to reach the conclusion that the opinion might better have been based on the “equal protection” clause.

When all is said and done, though, it may be that Blackmun’s most important opinion is the one that he wrote in concurring with others to make up the majority in *Regents of the University of California v. Bakke*.⁸ His opinion there contains this deeply perceptive message:

In order to get beyond racism, we must first take account of race. There is no other way. And in order to treat some persons equally, we must treat them differently. We cannot—we dare not—let the Equal Protection Clause perpetuate racial supremacy.⁹

There are many other illustrations of the careful, thorough, and broad-visioned contributions of Justice Blackmun. He has written, “There is another world ‘out there,’ the existence of which the Court, I suspect, either chooses to ignore, or fears to recognize,”¹⁰ and he has challenged the “comfortable perspective from which the Court decreed that the effect of a regulation increasing the cost of an abortion by forty dollars was insignificant.”¹¹ As Alan S. Mayans has written:

Blackmun’s evolution shows a greater comfort with his role on the nation’s highest court and an increased willingness to allow his personal character and his concern for fairness to influence his decision-making.¹²

Even as he has grown during his years on the Court, there can be no doubt that the reputation of Harry Blackmun—“this gentle, careful justice”¹³—will continue to grow now that he has retired. He is, in my view, one of the truly great justices of our time.

8. 438 U.S. 265 (1978).

9. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 407 (1978) (Blackmun, J., concurring).

10. *Beal v. Doe*, 431 U.S. 439, 463 (1977) (Blackmun, J., dissenting).

11. *Planned Parenthood Ass’n v. Ashcroft*, 462 U.S. 476, 494 (1983) (Blackmun, J., dissenting).

12. Mayans, *supra* note 4, at 488.

13. Ellen Goodman, *Blackmun the Emancipator*, BOSTON GLOBE, Apr. 7, 1994, at 15.

THE CASE OF THE SEVERED ARM: A TRIBUTE TO ASSOCIATE JUSTICE HARRY A. BLACKMUN

EDWARD P. LAZARUS*

During October Term 1988, when I served as one of Justice Harry A. Blackmun's law clerks, it is fair to say that the Supreme Court handed down more landmark decisions in more areas of law than in any year since the New Deal watershed, 1937.¹ Justice Blackmun authored the opinion of the Court in several of the most heralded of these cases: *Mistretta v. United States*,² which upheld the constitutionality of the federal sentencing guidelines; *County of Allegheny v. ACLU*,³ which re-examined the Court's Establishment Clause jurisprudence; and *Browning-Ferris Industries v. Kelco Disposal, Inc.*,⁴ which rejected an Eighth Amendment limit to punitive damages in suits between private parties. The Justice also commanded the nation's attention with a series of trenchant dissents whose passionate phrases, such as "Poor Joshua!"⁵ and "the signs are evident and ominous and a chill wind blows,"⁶ already have passed indelibly into the lexicon of our legal culture.

* Law Clerk to Justice Blackmun, October Term 1988.

1. *E.g.* *City of Richmond v. J.A. Croson Co.*, 489 U.S. 469 (1989); *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989); *Wards Cove Packing Co. v. Antonio*, 490 U.S. 642 (1989); *County of Allegheny v. ACLU*, 492 U.S. 573 (1989); *Texas v. Johnson*, 491 U.S. 397 (1989); *United States v. Monsanto*, 491 U.S. 600 (1989); *Mistretta v. United States*, 488 U.S. 361 (1989); *Browning-Ferris v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989); *Penry v. Lynaugh*, 492 U.S. 302 (1989); *Teague v. Lane*, 489 U.S. 288 (1989); *Pennsylvania v. Union Gas*, 491 U.S. 1 (1989); *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989); *Webster v. Reproductive Health Servs., Inc.*, 492 U.S. 490 (1989).

2. 488 U.S. 361 (1989).

3. 492 U.S. 573 (1989).

4. 492 U.S. 257 (1989).

5. *DeShaney v. Winnebago County Dep't of Social Servs.*, 489 U.S. 189, 213 (1989) (Blackmun, J., dissenting).

6. *Webster v. Reproductive Health Servs., Inc.*, 492 U.S. 490, 560 (1989) (Blackmun, J., dissenting).

Yet, surprisingly, amid the giant sequoias of that term, a small sapling of a dissent, six pages in *Green v. Bock Laundry Co.*,⁷ an obscure case interpreting Rule 609(a)(1) of the Federal Rules of Evidence, stands out in my memory as perhaps the purest example of Blackmunesque jurisprudence. The petitioner, Paul Green, was an inmate at a county prison who, as part of a work-release program, had obtained a job at a local car wash. On his sixth day of work, Green reached into a large industrial dryer to stop the machine only to have the dryer's heavy rotating drum catch his arm and tear it off. Green sued Bock Laundry Co., the dryer's manufacturer, claiming that his maiming had resulted from inadequate instruction about the machine's operation and inherent dangerousness.

In anticipation of trial, Green filed a motion to prevent Bock Laundry from impeaching his testimony by introducing evidence of his felony convictions for burglary and conspiracy to commit burglary. The trial judge denied the motion and, at trial, Bock Laundry did indeed impeach Green as a convicted felon. The jury found for Bock Laundry and Green appealed. He argued that the trial judge had erred in denying his pre-trial motion, but the U.S. Court of Appeals for the Third Circuit summarily affirmed.⁸

When I started preparing a bench memo on the case for Justice Blackmun, the issue seemed pretty cut and dried. Federal Rule of Evidence 609(a) provided in relevant part: "For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime *shall* be admitted . . . if the crime (1) was punishable by death or imprisonment in excess of one year . . . and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the *defendant* . . ."⁹

Read literally, the rule mandated the absurd and perhaps unconstitutional result that a civil defendant could always impeach a civil plaintiff with evidence of prior felony convictions, but not vice-versa. Judges and scholars alike agreed that some other reading was required. And among clerks at the Court, a consensus quickly developed as to what that reading should be.

To a person, we concurred with the Court of Appeals that, based on the available evidence of legislative intent and doing least violence to the text of the Rule itself, the most appropriate alternative reading was that the Rule's use of the word "defendant" should be limited to

7. 490 U.S. 504 (1989).

8. 845 F.2d 1011 (3d Cir. 1988). The Court of Appeals was following its precedent established in *Diggs v. Lyons*, 741 F.2d 577 (3d Cir. 1984), *cert. denied*, 471 U.S. 1078 (1985).

9. FED. R. EVID. 609(a) (emphasis added).

defendants in criminal cases. Accordingly, Rule 609(a)(1) should be read to require the admission of felony convictions for the purpose of impeachment regardless of prejudicial effect against every type of witness except a criminal defendant. Under this interpretation, which I dutifully recommended to Justice Blackmun, Paul Green was flat out of luck.

Conference days were remarkable in the Blackmun Chambers. Around the Court a buzzer would sound indicating that the justices had completed their deliberations. I would move to the doorway of my office to watch their recessional down the long red carpet of the south corridor. Most times that Term, Justice Blackmun and Justice Brennan would walk together, slowly, as Brennan, who had been ill, steadied himself on Blackmun's arm. They would pause before the door to Brennan's chambers, framed against the light filtering in from the courtyard outside. Their heads, inclined slightly, would almost touch as they exchanged a few last words. After a moment, the brotherhood would part and Justice Blackmun, lost in thought, would complete his return journey, gliding wordlessly into his office, gently shutting the door.

A few hours later Justice Blackmun would call his clerks into his office to report on Conference. For the argued cases (as opposed to the certiorari dispositions), the Justice would summarize the remarks of each of the justices in order of their seniority. It was mesmerizing: Blackmun's rich, gravelly voice rumbling through the comments of his colleagues, punctuated occasionally by a sentence or two of brilliant imitation that never failed to astonish and amuse.

When it came to his own contributions, the Justice played a cagey game, but eventually we caught on. If he had adopted your recommendation in a case, he always would make clear that his remarks at conference had included the finer phrases from your bench memo. On those agonizing occasions when Justice Blackmun disagreed with a clerk's assessment of a case, he took a very different tack. When it came time to reveal his position at Conference, he would simply announce how he had voted and move swiftly on. The Justice never once embarrassed one of us by dwelling on what had left him unpersuaded.

On the day the Conference took up *Bock Laundry*, I remember facing the Justice across his immaculate desk in the half light of a winter afternoon as he started marching through the day's cases. In deciding *Bock Laundry*, as I expected, three of the four Justices senior to Blackmun (Chief Justice Rehnquist and Justices White and Marshall) had voted to affirm the Court of Appeals and interpret Rule

609(a)(1) as requiring the admission of past criminal convictions without consideration of prejudice except in the case of criminal defendants. Justice Brennan, concerned about the legislative history behind the Rule, was tentatively to reverse.

Turning to his own views, Justice Blackmun paused. He sighed, deeply, almost achingly. "I voted to reverse," he said. Then, immediately, he launched into an account of Justice Stevens' remarks. Stevens had voted to affirm as had Justices O'Connor, Scalia, and Kennedy in turn. The final tally was 7-2.¹⁰

In Justice Blackmun's view, the judicial rewriting of Rule 609(a)(1) was not to be accomplished on the basis of an exhaustive search for recondite snippets of legislative history to determine what Congress might have intended with its ambiguous and perhaps even inadvertent use of the word "defendant" in the Rule. A man had lost an arm. And that man had been denied compensation almost certainly in part because a jury had heard irrelevant and inflammatory evidence about his criminal past.

For Justice Blackmun, as reflected in his dissent from Justice Stevens' majority opinion, *Bock Laundry* was about Paul Green and the unfairness he had suffered. If the Court was going to jury-rig some cure for Congress' defective language, then Justice Blackmun was "persuaded that a better interpretation of the Rule would allow the trial court to consider the risk of prejudice faced by any party, not just a criminal defendant." That would "prevent similar unjust results until Rule 609(a) is repaired, as it must be."¹¹

"Neither result," Blackmun continued, "is compelled by the statutory language or the legislative history, but for me the choice between them is an easy one. . . . We cannot know precisely why the jury refused to compensate [Paul Green] for the sad and excruciating loss of his arm, but there is a very real possibility that it was influenced improperly by his criminal record. I believe that this is not a result Congress conceivably could have intended, and it is not a result this Court should endorse."¹²

Justice Blackmun's *Bock Laundry* dissent, ultimately joined by Justices Brennan and Marshall, brought Paul Green's face into focus. In 1990, Congress amended Federal Rule of Evidence 609(a).¹³ It

10. Papers of Associate Justice Thurgood Marshall Box 552, *Green v. Bock Laundry*, Library of Congress, Washington, D.C.

11. *Green v. Bock Laundry, Co.*, 490 U.S. 504, 530-31 (1989) (Blackmun, J., dissenting).

12. *Id.* at 535.

13. 28 U.S.C. § 609(a) (Supp. IV 1992).

codified Justice Blackmun's version of how the Rule should have been interpreted all along.

I have no doubt that Justice Blackmun has been the most empathic Justice in recent times, and very likely in the entire history of the Court. He has been the justice most concerned with and most understanding of the human drama behind the briefs and memoranda that flood his desk, the justice most appreciative that legal cases arise from the unseen anguish of real people that the law can either soothe or inflame, the justice most likely to weave silken threads of sympathy across the too often present gap between "law" and "justice."

The nation shall long be in Justice Blackmun's debt for his insistent reminders (as he wrote in another case) that "compassion need not be exiled from the province of judging."¹⁴ Those of us who enjoyed the extraordinary privilege of working for the Justice are equally in his debt for reminding us that the same holds true for the province of life.

14. *DeShaney v. Winnebago County Dep't of Social Servs.*, 489 U.S. 189, 213 (1989) (Blackmun, J., dissenting).

HAB

NORVAL MORRIS*

If I count correctly, for seventeen years Justice Blackmun has spent two weeks every summer at the Aspen Institute, in the first year as a member of a "Great Books" seminar and thereafter as a leader of a seminar on "Justice and Society." The latter, the Justice Seminar, was the product of his suggestion that mature and successful lawyers would gain from a period of intensive and formalized discussion of issues basic to their profession. I have been privileged to share all seventeen seminars with Justice Blackmun. They work well. Values are confirmed; a sense of purpose generated; and friendships formed. Harry Blackmun provides the philosopher's stone that transmutes our too-often self-serving words, if not to gold, at least to ideas of some value. And he does it not by preaching but by his own manifest, quiet, formidable intellectual integrity. Without affectation he exposes his knowledge, beliefs, and values to our criticism, and expects us to do likewise.

"We are colleagues for these two weeks," he says. "Call me Harry." "Yes, Justice Blackmun," they reply. But this soon changes and, though the respect endures, within days there is an ease of communication that generates a degree of openness rarely found among judges and senior lawyers. Blackmun really does treat the great and the humble of the world precisely alike. He has pride without hint of pretense, precise honesty without trace of affectation—in brief, absolute and unaffected integrity. It is a rare quality, and it gives vigor and truth to our seminar and, in my view, to everything else that he touches.

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HARRY ANDREW BLACKMUN

GREGG ORWOLL*

Garrison Keillor called him “the shy person’s justice.” Those who know his work habits call him a workaholic. His law clerks and secretary say he is extremely disciplined. Those closest to him call him very kind and thoughtful. He is an anathema to the anti-abortionists, but a hero to the supporters of abortion rights. When he was appointed, most Court watchers believed that he would be a “conservative” voice, yet the media and those same Court watchers now say he clearly is a leading member of the “liberal” wing of the Court.

The question of what is a “conservative” and what is a “liberal” is not easily answered. Whether the Justice has changed or society has changed more is a question I leave to the reader of the tributes in this issue.

The purpose of this brief tribute is to provide some of the Justice’s personal history and a few anecdotes which I hope will lead to a better knowledge and understanding of this man who will leave an enduring mark on U.S. judicial history.

Harry Andrew Blackmun was born on November 12, 1908, in Nashville, Illinois. In 1910 the family moved to St. Paul, where Blackmun attended grade school and high school. He continued his education at Harvard College, was elected to Phi Beta Kappa, and graduated summa cum laude in mathematics in 1929. He continued his studies at Harvard Law School, graduating in 1932. While there, he was a member of the group that won the Ames competition.

Judge John B. Sanborn of the United States Court of Appeals for the Eighth Circuit honored this young scholar, who would one day succeed him, by picking Blackmun as his law clerk. Years later, Judge Sanborn described Mr. Blackmun as his best-ever law clerk.

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When he completed his clerkship in 1934, Mr. Blackmun joined a prestigious Minneapolis law firm, now known as Dorsey and Whitney. His marriage to Dorothy Clark (whom he still affectionately calls "Miss Clark") in 1941 led to the birth of three lovely and talented daughters, Nancy, Sally, and Susie. He became a junior and then a senior partner at Dorsey before joining the Mayo Clinic as Resident Counsel in 1950. He thus became one of the pioneer attorneys in medicolegal matters, a field which has grown enormously and has attracted a large number of attorneys since that time. Justice Blackmun's decision to leave his highly successful legal practice for the Mayo Clinic melded two of his primary professional interests, law and medicine. In fact, before matriculating at Harvard Law, he seriously considered medical school.

Mr. Blackmun was recognized as an expert in estate, trust, and tax law while at the Dorsey firm, and he taught courses on these subjects at both St. Paul College of Law (now William Mitchell) and the University of Minnesota Law School. His career at Mayo included membership on the boards of Rochester Airport Company, Rochester Methodist Hospital (which he was instrumental in founding), and the Mayo Association (now Mayo Foundation). He also was a director of the Kahler Corporation, president of the Rochester Rotary Club (still an honorary member), and an active member of his church. Mr. Blackmun often has referred to those years in Rochester as his happiest.

In 1959, Mr. Blackmun was appointed by President Eisenhower to the United States Court of Appeals for the Eighth Circuit. In 1970, following his nomination by President Nixon and unanimous confirmation by the U.S. Senate, he was sworn in as an Associate Justice of the United States Supreme Court.

In Rochester, the Justice always mowed his own lawn (a large yard) with a push mower, and he painted his own house. Stories about the Justice's kindness, reasonableness, and unpretentiousness are legion. Two anecdotes, of the many which could be recited, demonstrate: one of the couples who lived near the Blackmuns in Rochester always had admired the Blackmun home, which the Blackmuns had built when they moved from Minneapolis to Rochester. The neighbors often mentioned their interest in purchasing the home, if and when the Blackmuns wanted to sell it. When the Justice's appointment to the Supreme Court was confirmed, the Justice asked the neighbors if they still would like to purchase the home. When asked for the price, the Justice's response was a reasonable figure, according to the neighbors, but one they could not afford. The Justice then asked

what they could afford. The neighbors thought for a moment, then gave a figure about \$20,000 less (a lot of money anytime, but especially so in 1970). The Justice's response was "fine," and the house was sold to the neighbors at that price without any haggling.

When the time to move to Washington, D.C. drew near, and moving plans were discussed with the FBI, Justice Blackmun indicated his intention to drive from Rochester to the Capitol in his Volkswagen Beetle. This probably would have been a first for a Supreme Court designee. Alas, objections from the FBI prevented the trip in this fashion, but he did take the Beetle to Washington, where he drove it for many years, even driving it to the White House for social events. A picture of his beloved Beetle still graces the mantel in his chambers.

Because of these and numerous other similar Blackmun stories, those who knew the Justice before his appointment were not surprised at his interests in the disadvantaged and in the protection of human rights for all.

An extremely disciplined man, the Justice arrives at the Court (always early), meets with his law clerks, eats lunch, exercises in the court gym and leaves for home (always late) at the same times each day. Some of his close friends have humorously claimed that his careful planning is evidence in the births of his three daughters, all of whom were born in the first week of July. As close Blackmun observers, his then partners in the Dorsey office kiddingly would say to him that they would not permit a vacation with his wife in the first week in October.

Despite the Justice's professional accomplishments and his countless honors, including numerous honorary degrees, he has managed to maintain his equilibrium—always self-effacing and good-humored. The Justice's presence on the Court will be missed in many ways.

THANK YOU JUSTICE BLACKMUN

ESTELLE H. ROGERS*

I have never met Justice Harry Blackmun, but this is a purely personal tribute. When I was a third year law student, the Supreme Court announced its decision in *Roe v. Wade*.¹ I must confess that I have absolutely no recollection of where I was, what I felt, or whether I read the opinion (then). *Swann v. Charlotte-Mecklenburg Board of Education*,² the case that validated busing as a method of achieving school desegregation, was also decided while I was in law school and is much more vivid in my memory.

I do not remember reading *Roe* then, but I have read it many times since, having spent the better part of my career as a proud member of the *Roe v. Wade* legal and political defense team. The significance of this opinion, and of all the elements of the ongoing debate it foreshadowed, is difficult to overestimate. It is true, as Justice Blackmun has often reminded us, that he was writing for a seven-man majority. Yet, no one else could have written it quite the way he did. It was clearly the product of his experiences, of his appreciation for the medical profession, and of his respect for women.

While the opinion's constitutional scholarship has been debated, its profound impact on women's equality is undeniable. The simple proposition that women are entitled to self-determination in private matters relating to childbearing profoundly changed our ability to participate in the economic, political, and social life of this country. The Court's recognition that the decision to terminate a pregnancy is fundamentally a medical decision for the patient in consultation with her doctor,³ subject to government regulation under limited

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1. 410 U.S. 113 (1973).

2. 402 U.S. 1 (1971).

3. Actually, Justice Blackmun said "the attending physician, in consultation with his patient," 410 U.S. at 163, but I doubt that he would put it that way today.

circumstances, expanded our life options as surely as any civil rights statute ever did.

Like any important decision of the Supreme Court, *Roe v. Wade* began a longer odyssey than it ended. Instead of merely settling a controversy between the parties, it unleashed a firestorm of opposition and resistance that continues to this day.

I suspect that the virulence of the reaction to *Roe v. Wade* was something of a surprise to Justice Blackmun. Surely he would not have predicted his personal vilification. Interestingly, however, he anticipated almost all of the attempts to derogate from this legal landmark, this great victory for women, in the text of the opinion itself. The role of women in society, the medical risks of abortion and childbirth, the point when life begins—these are the same issues we are still arguing about in the courts, in the legislatures, and, fortunately or unfortunately, in the streets.

The reason for the prescience of this opinion is simple. Contrary to the way it has been popularly portrayed, *Roe v. Wade* is the compromise that so many claim to be seeking. It struck a balance between the competing rights and interests in the matter. Consequently, it presaged the terms of the abortion debate to come with amazing accuracy.

Ever since January 22, 1973, and in every state in the Union, *Roe v. Wade* has been under attack. The battlegrounds and the results have varied, but the essential issues have remained constant: whether, when, where, and for what reason a woman will be permitted to exercise her right to terminate a pregnancy, the same right of privacy we thought we had won in *Roe*. As the attacks have grown more relentless, Justice Blackmun seems to have become ever more vigilant. The human consequences of forced pregnancy and excessive regulation of abortion have assumed a central role in his writing about reproductive rights. Moreover, his appreciation for the crucial importance of reproductive autonomy in the progress of women has deepened over time.

It is strangely fitting that Justice Blackmun has announced his retirement in the year that *Roe* has attained the age of majority. It is almost as if he cannot watch over it anymore; he must let it go. One only wishes that we could be more confident that *Roe's* longevity as an "adult" is secure. I, for one, do not wish to ascribe motives to the Justice. But, by making way for a younger Justice to be appointed by this President, he has perhaps made *Roe's* future more secure.

One thing is certain. That pivotal moment in legal history when *Roe v. Wade* was announced in the awe-inspiring Supreme Court

chamber irrevocably changed the lives of millions of American women: women who have babies, women who have abortions, and women who have both; women whose children are planned and women who make mistakes; women who have problem-free pregnancies and women for whom bearing children is the riskiest of propositions; and, perhaps the most important, women whose tender years hardly qualify them as women at all. On behalf of all of us, I thank him.

JUSTICE BLACKMUN

HERMAN SCHWARTZ*

Justice Blackmun's retirement from the Court removes a voice that will not easily be replaced. Humane, personal, with a sense of both current and past reality, he breathed life into what must often seem abstract and dusty stuff to non-lawyers. Few people manage to retain these qualities after donning their robes; stiff formality is the norm. Justice Blackmun was one of the exceptions.

When President Nixon named Justice Blackmun to the Court, *The New York Times* described him as "mildly conservative."¹ It noted, however, that he had shown a concern for civil rights and the underprivileged in several of his opinions.² This concern grew during Justice Blackmun's years on the Court, and by the time he had retired, he had become the most liberal member of the current Supreme Court.

Justice Blackmun's sensitivity to the plight of those on the short end of life's stick early in his judicial career supports his observation that he had not changed much, but the Court had.³ Nevertheless, the Justice Blackmun who repudiated his earlier support for capital punishment in *Callins v. Collins*,⁴ and protested the Court's refusal to find an affirmative obligation in state welfare authorities to protect little Joshua DeShaney against beatings by his father,⁵ seems to be a very different person indeed from the Justice Blackmun who wrote

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1. Robert Semple, Jr., *Judge Blackmun of Minnesota Is Named to Supreme Court Seat by the President*, N.Y. TIMES, Apr. 15, 1970, at A1.

2. *Id.*

3. See Joan Biskupic, *An Ideological Odyssey Nears End; Jurist Says He Was Not Transformed: 'The Court Has Changed'*, WASH. POST, Apr. 7, 1994, at A1 (describing Justice Blackmun's Supreme Court career).

4. 114 S. Ct. 1127, 1128 (1994) (Blackmun, J., dissenting from denial of certiorari) (arguing that death penalty is "fraught with arbitrariness, discrimination, caprice, and mistake").

5. *DeShaney v. Winnebago County Dep't of Social Servs.*, 489 U.S. 189, 212 (1984) (Blackmun, J., dissenting) (dissenting from decision that county had no affirmative duty to protect abused child).

United States v. Kras,⁶ which denied bankruptcy relief to someone who could not afford the filing fee, supported capital punishment in *Furman v. Georgia*,⁷ and approved censorship in the Pentagon Papers case, *New York Times Co. v. United States*.⁸

For these and other reasons, the Justice seems to confirm the conventional wisdom that Presidents are usually disappointed in how their Supreme Court appointments turn out. This, however, is not really true. Most justices act exactly as the Presidents who chose them wanted them to.⁹ While presidents may sometimes be unhappy with their nominees' legal positions, this disappointment will often be on new issues that the President did not foresee, or contemporaneous issues he did not care about. President Eisenhower, for example, did not use a philosophical test for his choices: Chief Justice Earl Warren was chosen because of a preelection arrangement that Warren would get the first available Supreme Court seat. Indeed, when Chief Justice Fred Vinson died, Eisenhower and his Attorney General Herbert Brownell tried to persuade Warren to let them appoint someone else and to take the next vacancy. Warren refused, and the rest, of course, is history.¹⁰

Nor could President Richard Nixon have been too surprised or upset by Justice Blackmun.¹¹ Abortion was not an issue to which Nixon paid any attention in 1970, and affirmative action, which Justice

6. 409 U.S. 434, 447 (1973) (holding that state requirement of filing fee for declaring bankruptcy has "rational basis" and is not violative of indigents' equal protection rights).

7. 408 U.S. 238, 375 (1972) (Blackmun, J., dissenting) (dissenting from decision that found death penalty to be "cruel and unusual punishment" under Eighth Amendment).

8. 403 U.S. 713, 752 (1971) (Blackmun, J., dissenting) (dissenting from opinion that refused to enjoin newspapers from publishing classified study of U.S. policy in Vietnam).

9. Two famous examples of this so-called "disappointment" are President Theodore Roosevelt's unhappiness with Justice Oliver Wendell Holmes over the latter's refusal to join the Court in striking down the Northern Securities merger under the Sherman Antitrust Act, and President Dwight Eisenhower's unhappiness with Chief Justice Earl Warren. But on the crucial issue of the early 20th century, the Court's interference in state efforts to regulate the economy, Holmes voted consistently as Roosevelt wanted. See, e.g., *Lochner v. New York*, 198 U.S. 45, 65 (1905) (Holmes, J., dissenting). Eisenhower did not deplore Warren's segregation decision, the most important case pending when Warren was chosen, STEPHEN E. AMBROSE, *EISENHOWER: THE PRESIDENT 128-29, 190-91* (1984), nor did he regret the choice of Warren as Chief Justice until the 1960s, when the Court issued its criminal law and national security decisions, *id.* at 190. By this time Eisenhower had moved sharply to the right.

10. See AMBROSE, *supra* note 9, at 128.

11. See, e.g., *Callins v. Collins*, 114 S. Ct. 1127, 1128 n.1 (1994) (Blackmun, J., dissenting from denial of certiorari) (noting that as Eighth Circuit judge, Blackmun had voted to enforce death penalty even while publicly doubting its "moral, social, and constitutional legitimacy") (citing *Pope v. United States*, 372 F.2d 710 (8th Cir. 1967) (en banc), *vacated*, 392 U.S. 651 (1968); *Maxwell v. Bishop*, 398 F.2d 138, 153-54 (8th Cir. 1968), *vacated*, 398 U.S. 262 (1970)).

Blackmun has consistently supported,¹² was originated by Nixon with the Philadelphia Plan in the construction industry.¹³

On the other hand, the primary reason Nixon chose Justice Blackmun for the Supreme Court was to help undo the Warren Court's protections for criminal defendants. And to a large extent, Justice Blackmun has done so. He has consistently supported the police in interrogation cases¹⁴ and opposed use of the Sixth Amendment to protect suspects from questioning after formal proceedings have commenced.¹⁵ In search and seizure cases, he has voted to adopt the good faith defense¹⁶ and joined with the majority in watering down probable cause in *Illinois v. Gates*,¹⁷ allowing broad inventory searches in *Colorado v. Bertine*,¹⁸ and in supporting random drug-testing.¹⁹

12. See, e.g., *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 600-01 (1990) (holding constitutional government program created to enhance minority ownership of radio stations); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 561 (1989) (Blackmun, J., dissenting) (dissenting from holding that city plan awarding construction contracts to "Minority Business Enterprises" was unconstitutional); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 324 (1978) (Blackmun, J., concurring in part and dissenting in part) (concurring in part in judgment upholding University affirmative action plan, but joining in dissent suggesting that majority should have gone beyond "ethnic diversity" argument and reversed lower court judgment in all respects).

13. RICHARD M. NIXON, *THE MEMOIRS OF RICHARD NIXON* 438 (1978) (expressing disappointment that national black leaders were not more supportive of Philadelphia Plan).

14. See, e.g., *Moran v. Burbine*, 475 U.S. 412, 422 (1986) (holding that defendant was not deprived of Miranda rights where police failed to tell him that attorney hired by defendant's sister was trying to reach him); *New York v. Quarles*, 467 U.S. 649, 655-56 (1984) (upholding "public safety" exception to Miranda rule); *Rhode Island v. Innis*, 446 U.S. 291, 301 (1980) (holding defendant's inculpatory statements admissible where it could not be said that police officers should have known that their conversation in defendant's presence was reasonably likely to elicit incriminating response); *Oregon v. Hass*, 420 U.S. 714, 722-23 (1975) (holding defendant's statements made after asking to telephone lawyer admissible at trial for impeachment purposes).

15. See, e.g., *Kuhlman v. Wilson*, 477 U.S. 436, 459 (1986) (holding that Sixth Amendment rights are not violated when paid informant is placed in cell, but makes no effort to stimulate conversations involving crime charged); *United States v. Henry*, 447 U.S. 264, 277 (1980) (Blackmun, J., dissenting) (dissenting from holding that defendant's Sixth Amendment rights were violated when government elicited incriminating statements from defendant through use of paid government informant placed in same jail cell); *Brewer v. Williams*, 430 U.S. 387, 429 (1977) (Blackmun, J., dissenting) (dissenting from holding that defendant's Sixth Amendment rights were violated when, despite agreement with attorney, officer transporting defendant made "Christian burial" speech designed to elicit incriminating testimony).

16. *United States v. Leon*, 468 U.S. 897, 927 (1984) (Blackmun, J., concurring) (concurring in judgment upholding good faith exception to exclusionary rule where officers acted in "objectively reasonable reliance on a search warrant").

17. 462 U.S. 213, 230 (1983) (rejecting two-pronged *Aguilar* and *Spinelli* test in favor of "totality of the circumstances" test).

18. 479 U.S. 367, 376 (1987) (Blackmun, J., concurring) (concurring in opinion that held, absent bad faith, evidence found during inventory search of van was admissible).

19. *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 677 (1989) (holding suspicionless drug-testing of employees applying for positions involving interdiction of illegal drugs or carrying of firearms to be reasonable under Fourth Amendment); *Skinner v. Railway Labor Executives Assoc.*, 489 U.S. 602, 624 (1989) (holding that where railway employees were

In short, where criminal procedure is concerned, Justice Blackmun has amply fulfilled Nixon's expectations. And, at least in the early years, he did so in other areas as well. Not only did he vote for the Government in the Pentagon Papers case²⁰ and in favor of capital punishment,²¹ but he also provided an indispensable fifth vote against city-suburban school desegregation orders in *Milliken v. Bradley*,²² a position explicitly supported by then-Solicitor General Robert Bork for the Nixon administration as *amicus curiae*.²³ This ruling effectively destroyed any realistic chance of desegregating our inner cities.

It is unlikely that Justice Blackmun would vote that way today. A measure of his flexibility and capacity for growth is his 1985 opinion in *Garcia v. San Antonio Metropolitan Transit Authority*.²⁴ In 1976, the Court in *National League of Cities v. Usery*²⁵ overturned *Maryland v. Wirtz*,²⁶ which had upheld application of the federal Fair Labor Standards Act to state employees under the Commerce Clause.²⁷ In the name of States' rights, a 5-4 majority joined an opinion by Justice Rehnquist ruling that the Commerce Clause could not be used to authorize direct federal regulation of traditional state activities of the "States *qua* States."²⁸ Justice Blackmun concurred uneasily, stressing that the ruling would not apply where "the federal interest is demonstrably greater."²⁹

Not surprisingly, judicially determining what is "traditional" turned out to be hopeless. Furthermore, as Justice Blackmun said in *Garcia*, it really has nothing to do with the purpose of *National League of Cities*, which was to allow the States room to manage those affairs that the

subject to warrantless, suspicionless drug tests, compelling government interest in public safety outweighed employees' privacy concerns).

20. See *supra* note 8 and accompanying text.

21. See *supra* note 7 and accompanying text.

22. 418 U.S. 717 (1974) (holding improper multidistrict remedy for single-district de jure desegregation).

23. Memorandum for the United States as Amicus Curiae, *Milliken v. Bradley*, 418 U.S. 717 (No. 73-434) (1973), microformed on U.S. Supreme Court Records and Briefs (Microform, Inc.).

24. 469 U.S. 528, 555 (1985) (overturning *National League of Cities v. Usery*, 426 U.S. 833 (1976), and holding that transit authority was not immune from minimum wage and overtime requirements of Fair Labor Standards Act).

25. 426 U.S. 833, 853 (1976) (holding that Congress may not exercise power to regulate commerce to force states to make essential decisions regarding exercise of integral governmental functions).

26. 392 U.S. 183 (1968).

27. *Maryland v. Wirtz*, 392 U.S. 183, 188-90 (1968) (finding that Congress had "rational basis" for applying FLSA to state employees).

28. *National League of Cities*, 426 U.S. at 847, 853.

29. *Id.* at 856.

Constitution entrusts to the States.³⁰ And so Justice Blackmun switched and joined the *National League of Cities* dissenters to overturn that decision and to leave such questions to the political process.³¹

Some commentators have mocked this resolution as unrealistic,³² but Justice Blackmun and the rest of the *Garcia* majority proved far wiser than their academic critics. In less than a year, and without even a roll-call vote, the cities and states adversely affected by *Garcia* succeeded in getting Congress to overturn the specific ruling of that case and to exempt them from the Act.³³

In at least three of the most controversial areas into which the Court has stepped during his tenure—privacy, affirmative action, and religion and the state—Justice Blackmun has been totally consistent. The first is, of course, highlighted by *Roe v. Wade*³⁴ and his powerful dissent in *Bowers v. Hardwick*.³⁵

As to *Roe*, little can be added here to what has been said elsewhere. It has been severely criticized, even by those who believe women should have a right to choose to have an abortion. But which great pioneering decision has not?³⁶ Some have suggested that the matter should have been left wholly to the states because legislative abortion-law reform efforts were underway in many parts of the country.³⁷ But what of the many women in Pennsylvania, Missouri, Minnesota, Ohio, and other states where Catholic and other pressure groups have fought bitterly and successfully—at least at the state and local legislative level—against any effort to lower the barriers to abortion? Why would people who profoundly abhor abortion because they consider it murder react with any less hostility and effort to *legislative*

30. *Garcia*, 469 U.S. at 531 (overturning *National League of Cities* having found that “attempt to draw the boundary of state regulatory immunity in terms of ‘traditional governmental function’ is not only unworkable but is also inconsistent with established principles of federalism and, indeed, with those very federalism principles on which *National League of Cities* purported to rest”).

31. *Id.*

32. See, e.g., William Van Alstyne, *The Second Death of Federalism*, 83 MICH. L. REV. 1709, 1724 n.64 (1985) (“[I]t is difficult to take the political science portion of the whole ‘safeguards’ argument [in *Garcia*] as other than a good-hearted joke.”).

33. Fair Labor Standards Amendments of 1985, 29 U.S.C. § 201 (1988); see also Herman Schwartz, *Federalism Then and Now*, CAL. LAW., Aug. 1987, at 52.

34. 410 U.S. 113 (1973) (establishing constitutional right to abortion based on trimester framework).

35. 478 U.S. 186, 199 (1986) (Blackmun, J., dissenting) (dissenting from decision that found state sodomy statute did not violate homosexuals’ fundamental rights).

36. See, e.g., WILLIAM B. LOCKHART ET AL., CONSTITUTIONAL LAW 8-14, 1236-37 (1980) (noting criticism of Supreme Court decisions in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), which gave federal courts right to find acts of Congress unconstitutional, and *Brown v. Board of Education*, 347 U.S. 483 (1954), which desegregated schools).

37. Frank H. Easterbrook, *The Bill of Rights and Regression to the Mean*, 15 HARV. J. L. & PUB. POL. 71, 77 (1992).

efforts to legalize abortion than to judicial? New York's legislature reformed its abortion law in 1970 during a midnight session by a one-vote margin.³⁸ George Michaels, the upstate New York legislator who switched sides at the last minute to cast the deciding vote, promptly lost his seat in the next election.³⁹

Justice Ruth Bader Ginsburg has suggested that the decision should not only have been limited to a simple annulment of the Texas ban but should also have "honed in more on the women's equality dimension of the issue" and on women's autonomy as *Planned Parenthood v. Casey*⁴⁰ did.⁴¹ But the law of equality for women was still very undeveloped in 1973, with only *Reed v. Reed*⁴² on the books. And would basing the decision on so vague a legislative fact as women's increasing role in the world have drawn any less criticism in 1973?

As to gradualism, the history of "all deliberate speed" in the school desegregation area offers at least one historical example where the gradual approach probably did more harm than good.⁴³ Such gradualism seems particularly inappropriate where abortion is concerned, for multitudes of women would have been denied legal abortions while this gradualism, this "dialogue with legislators" that Justice Ginsburg apparently prefers,⁴⁴ was going on. And how fruitful would that dialogue have been? One cannot help wondering how many dialogues Justice Ginsburg has had with state and local legislators on politically or socially controversial matters.

The other two incendiary areas where Justice Blackmun has been quite consistent are affirmative action and religion and the state. With respect to affirmative action, Justice Blackmun saw the essence of the problem right from the beginning. In his opinion in *Regents of the University of California v. Bakke*,⁴⁵ he wrote, "In order to get

38. Act of Apr. 11, 1970, ch. 127, 1970 N.Y. Laws 852; see also Wolfgang Saxon, *George Michaels, 80, Legislator Who Changed Abortion Law, Dies*, N.Y. TIMES, Dec. 5, 1992, at A27 (describing legislator George Michaels' emotional last-minute switch of vote from "yes" to "no," allowing legislation to pass, and his subsequent loss in June 1970 primary).

39. See Saxon, *supra* note 34, at A27.

40. 112 S. Ct. 2791 (1992) (replacing trimester abortion framework with "undue burden" test).

41. Ruth B. Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. REV. 1185, 1200 (1992).

42. 404 U.S. 71 (1971) (holding statute giving preference to males over females in administering estates unconstitutional on equal protection grounds).

43. See, e.g., *Green v. County Sch. Bd. of New Kent County*, 391 U.S. 430 (1968) (criticizing three-year-old "freedom of choice plan" that had failed to integrate schools and ordering creation of new plan that would promptly desegregate system).

44. Ginsburg, *supra* note 41, at 1205 (suggesting that *Roe v. Wade* "seemed entirely to remove the ball from the legislator's court").

45. 438 U.S. 265, 324 (1978) (Blackmun, J., concurring in part and dissenting in part).

beyond racism, we must first take account of race. There is no other way. And in order to treat some persons equally, we must treat them differently."⁴⁶ Eleven years later, a new majority reversed course and in a cruelly myopic opinion by Justice Sandra Day O'Connor, implicitly equated the denial to a white contractor of a Richmond, Virginia construction contract with lynchings and the other atrocities inflicted on blacks by white racism.⁴⁷ Justice Blackmun wrote:

I never thought that I would live to see the day when the city of Richmond, Virginia, the cradle of the Old Confederacy, sought on its own, within a narrow confine, to lessen the stark impact of persistent discrimination. But Richmond, to its great credit, acted. Yet this court, the supposed bastion of equality, strikes down Richmond's efforts as though discrimination had never existed or was not demonstrated in this particular litigation.⁴⁸

In the church-state area, he has been less vocal but equally consistent. Since his earliest days on the Court, he has voted to maintain a significant barrier between "the garden and the wilderness."⁴⁹ Starting with the landmark decision in *Lemon v. Kurtzman*,⁵⁰ which established the now much-criticized three-part test, through his dissent in *Zobrest v. Catalina Foothills School District*,⁵¹ he has supported a high wall of separation.

Justice Blackmun's concern for the free exercise of religion has also produced strongly voiced views. In *Goldman v. Weinberger*,⁵² and the much criticized peyote case, *Employment Division v. Smith*,⁵³ he issued powerful, closely reasoned dissents on behalf of the individual religious conscience against a regulation and a law that suppressed religious practices.⁵⁴ In both cases, however, he was closer to what

46. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 407 (1978) (Blackmun, J., concurring in part and dissenting in part).

47. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (holding city plan awarding construction contracts to "Minority Business Enterprises" unconstitutional).

48. *Id.* at 561-62 (Blackmun, J., dissenting).

49. See MARK D. HOWE, *THE GARDEN AND THE WILDERNESS: RELIGION AND GOVERNMENT IN AMERICAN CONSTITUTIONAL HISTORY* 5 (1965) (describing Roger William's reference to separating "the garden of the church and the wilderness of the world").

50. 403 U.S. 602 (1971) (creating three-part "purpose," "effect," and "entanglement" test for deciding Establishment Clause questions).

51. 113 S. Ct. 2462, 2469 (1993) (Blackmun, J., dissenting) (dissenting from decision that found that for State to provide interpreter to deaf student attending Catholic high school was not violation of Establishment Clause).

52. 475 U.S. 503 (1986) (holding that First Amendment did not prohibit military regulation that prevented Orthodox Jewish serviceman from wearing yarmulke while on duty or in uniform).

53. 494 U.S. 872 (1994) (holding that Free Exercise Clause did not prohibit application of drug laws to ceremonial ingestion of peyote).

54. *Goldman*, 475 U.S. at 524 (Blackmun, J., dissenting); *Smith*, 494 U.S. at 907 (Blackmun, J., dissenting).

the American people believed than the current Court majority—in both cases, Congress overturned the Court decisions, thereby allowing servicemen to wear headgear for religious reasons,⁵⁵ and reestablishing a compelling state interest test in free exercise cases.⁵⁶

The opinion of which Justice Blackmun is proudest is not *Roe v. Wade*, as one might expect, but an obscure prisoners' rights decision in 1968, which stopped Arkansas prison officials from whipping prison inmates as punishment.⁵⁷ Although it may not seem like much today, in 1968 it was one of the earliest federal decisions to impose any limitations on prison administrators.⁵⁸ As one of his law clerks recently wrote,

Judge Blackmun could not rely on well-established precedents; he had to "glean" from earlier Supreme Court decisions a constitutional commitment to "flexibility and improvement in standards of decency as society progresses and matures." His belief that "broad and idealistic concepts of dignity, civilized standards, humanity, and decency are useful and usable" in interpreting specific constitutional provisions lay at the heart of "one of the first, possibly *the* first appellate opinion[s] examining prison practices and holding them unlawful under the eighth amendment."⁵⁹

This early indication of humaneness and courage found its fullest opportunity to develop and expand on the Supreme Court, and we are a better people for that.

55. 10 U.S.C. § 774 (1988) (stating that member of armed forces may wear an item of "religious apparel" while in uniform, unless the Secretary determines that wearing the item would "interfere with the performance of the member's military duties" or "is not neat and conservative").

56. Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (to be codified at 42 U.S.C. § 2000bb).

57. *Jackson v. Bishop*, 404 F.2d 571 (8th Cir. 1968).

58. Herman Schwartz, *The Burger Court and the Prisoner*, in *THE BURGER YEARS* 97 (Herman Schwartz ed., 1987).

59. Pamela S. Karlan, *Bringing Compassion into the Province of Judging: Justice Blackmun and the Outsiders*, 97 DICK. L.R. 527, 531 (1993) (citing *Jackson*, 404 F.2d at 579; Richard S. Arnold, *Mr. Justice Blackmun: An Appreciation*, 8 *HAMLIN L. REV.* 20, 21 n.3 (1985)).

HARRY A. BLACKMUN: THE CONSCIENTIOUS CONSCIENCE

NINA TOTENBERG*

When I was twenty-six years old, I found myself in Rochester, Minnesota researching the life and times of a little-known appeals court judge named Harry A. Blackmun. I had a tip he was President Nixon's choice to fill a Supreme Court vacancy, and I was frantically trying to figure out, before the hordes descended, just what sort of a man the judge was.

What I learned was, in hindsight, rather prescient. On the Eighth Circuit, Harry Blackmun was a moderate to liberal judge on social issues. On the burning issue of the day, civil rights, he was a tough enforcer. On the subject of prison conditions, he was a reformer, writing a particularly noteworthy decision outlawing "the strap" in Arkansas prisons.¹ And on matters involving the criminal law, he was a moderate to conservative judge, a trend that has continued to the present, except for the death penalty.

But when Harry A. Blackmun initially ascended to the Supreme Court bench back in 1970, the new Justice seemed not much like the centrist, kind-hearted man I had written about. The new Justice was conservative enough to be paired in the press with Chief Justice Warren Burger as "The Minnesota Twins," and perhaps more surprisingly, he seemed to lack any generosity of spirit, lashing out at the poor in a case involving court fees for bankruptcy filings,² lashing out at the press as unpatriotic in the pentagon papers case.³

The psychological and intellectual puzzle of Harry Blackmun has always been: what made him change, or is it as he has always maintained, that he did not change, the Court did. The answer, I think, is both, and neither. It has always seemed to me that Justice

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1. *Jackson v. Bishop*, 404 F.2d 571 (8th Cir. 1968).

2. *United States v. Kras*, 409 U.S. 434 (1973).

3. *New York Times v. United States*, 403 U.S. 713, 759 (1971) (Blackmun, J., dissenting).

Blackmun's first couple of years on the Court were an aberration in his legal career.

The judge who served for eleven years on the Eighth Circuit would never have written the gratuitously unkind words that Justice Blackmun wrote in *United States v. Kras*⁴ upholding a \$50 bankruptcy filing fee. "If the payment period is extended for the additional three months as the Order permits, the average weekly payment is lowered to \$1.28. This is a sum less than the payments Kras makes on his couch of negligible value in storage, and less than the price of a movie and little more than the cost of a pack or two of cigarettes."⁵ (Justice Marshall noted in dissent that there was no evidence that Kras smoked.) Contrast those harsh words about a \$50 filing fee to words he wrote about a \$40 pathology requirement in *Planned Parenthood v. Ashcroft*⁶ ten years later:

I cannot agree with Justice Powell that Missouri's pathologist requirement has "no significant impact" on a woman's exercise of her right to an abortion. It is undisputed that this requirement may increase the cost of a first-trimester abortion by as much as \$40. Although this increase may seem insignificant from the Court's comfortable perspective, I cannot say that it is equally insignificant to every woman seeking an abortion. For the woman on welfare or the unemployed teenager, this additional cost may put the price of an abortion beyond reach.⁷

So what accounts for that brief aberrational period, the period in which Justice Blackmun was categorized by the press as a lockstep conservative, something he had never been before and would never be again?

My theory, after talking to many Blackmun law clerks and friends of that period, is that he was simply overwhelmed by the enormity of the new job, and that for a brief moment in his judicial career, he was frozen in an uncharacteristic posture—unforgiving of the human condition.

I tested this theory many years ago while on one of those TV talking-head shows. A couple of months after the show, I had occasion to speak to the Justice. To my surprise, he said he had "caught my act," and with a twinkle, commended me for my "perceptiveness." I hope I read him correctly.

4. 409 U.S. 434 (1973).

5. *Kras*, 409 U.S. at 449.

6. 462 U.S. 476 (1983).

7. *Planned Parenthood v. Ashcroft*, 462 U.S. 476, 497-98 (1983) (Blackmun, J., dissenting) (citations omitted).

The Blackmun odyssey is, of course, more complicated than that. He said as much when I interviewed him last November. "When one reaches here," said Blackmun, "he has to decide where he's going." "After all, what do these broad phrases of our Constitution really mean? What is due process of law? What is equal protection of the law and all the other great phrases that the Founding Fathers put in there?"

"On the court of appeals, sure, every now and then we had constitutional issues and we'd do the best we could to decide them. But we always had the comfort of knowing that there were nine persons down in Washington who could straighten this out if we were wrong and who had the last say anyway. This is the end of the line. So, I think as each constitutional case comes along, one makes his mind up over the years, his constitutional approach and philosophy become a little more fixed."⁸

While there is no doubt that the Court's center of gravity has moved dramatically to the right since Justice Blackmun joined the Court, there is also no doubt his center of gravity has moved too. As many have observed, his emphasis in *Roe v. Wade* was on the physician's right to counsel his or her patients and on the health consequences of making abortion illegal. But by the 1980s, Blackmun saw abortion principally as a women's rights issue, "I fear for the liberty and equality of the millions of women who have lived and come of age in the 16 years since *Roe* was decided."⁹ And while he initially seemed to harbor no doubts about the constitutionality of the death penalty, he has for the past six or seven years talked privately about his increasing doubt as to whether capital punishment could be fairly and equitably administered. Indeed, an opinion to that effect has circulated for several years in his chambers. Finally, this term, he made the leap, and dissented from a denial of certiorari in *Callins v. Collins*.¹⁰ "From this day forward I shall no longer tinker with the machinery of death."¹¹

Blackmun's one-time law clerk Harold Koh tells a story that says much about the Blackmun transformation on the death penalty, and on other issues too.¹² Koh wrote that he was working late one night

8. Interview with Harry A. Blackmun, Associate Justice of the Supreme Court of the United States (Nov. 1993).

9. *Webster v. Reproductive Health Servs.*, 492 U.S. 490, 538 (1989) (Blackmun, J., dissenting).

10. 114 S. Ct. 1127 (1994).

11. *Callins v. Collins*, 114 S. Ct. 1127, 1130 (1994) (Blackmun, J., dissenting from denial of certiorari).

12. Harold H. Koh, *A Justice for Passion*, 1990 ANN. SURV. AM. L. xxxi.

on petitions for certiorari. The last of the pile seemed simple enough. The case had been up twice before and been denied. Koh looked at the pool memo and scrawled "Deny" at the top. "But something nagged," said Koh. "It occurred to me—as it did every day that year, and as it has every day since—that Justice Blackmun would care more than this."¹³

Koh went back to check the earlier denials and found all the records, of course in perfect order in the Blackmun files. The old pool memos at first looked straightforward. The defendant was seeking habeas corpus relief from the death sentence. He had been convicted, along with an accomplice, of murdering a family of four while the accomplice's teenaged children watched. But written on the last page of the first certiorari denial in the Justice's "perfect handwriting" were the words, "What happened to the children?" and below that a series of Supreme Court docket numbers.¹⁴

"The next hour was a blur," wrote Koh, "as I searched for and found all of the old certiorari pool memos, each covered with the Justice's detailed notations. 'Did the accomplice's children get the death penalty?' he asked. 'Did they have criminal intent? Could they?' 'Does the 8th [Amendment's cruel and unusual punishment clause] permit execution of minors? Of accomplices to felony murder?'"¹⁵ The list of tiny citations and scribbled notes ran on for pages. And at the bottom Blackmun had written in large letters, "This is a certworthy issue."¹⁶

As Koh so accurately observed, "this was just one of perhaps a million petitions for *certiorari* that Justice Blackmun disposed of"¹⁷ during nearly a quarter century on the Court, and it well illustrates not only the man's passion for justice, but his devotion to it.

His devotion required him to look at every case, not just in theoretical terms, but in human terms, and while it is a trait that sometimes won him disdain, it also earned him respect. One suspects that it is through the process of looking at the world through the eyes of others less fortunate that he travelled the road from Harry Blackmun, the "White Anglo-Saxon Protestant Republican Rotarian Harvard Man from the Suburbs,"¹⁸ to Harry Blackmun, the defender of the poor, the defenseless, those whom fortune has not smiled

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.* at xxxii.

18. Waltz, *The Burger/Blackmun Court*, N.Y. TIMES, Dec. 6, 1970, § 6 (Magazine), at 61, quoted in Koh, *supra* note 12, at xxxii.

upon. He became their advocate as he did in *DeShaney v. Winnebago County Department of Social Services*,¹⁹ when he dissented from the Court's holding that a government social services organization was not liable for the continued brutal abuse of a child even though the agency knew of the abuse. Deriding the Court majority for what he called its "formalistic" and "rigid" interpretation of the Constitution,²⁰ Blackmun wrote: "Poor Joshua! Victim of repeated attacks by an irresponsible, bullying, cowardly, and intemperate father, and abandoned by respondents who placed him in a dangerous predicament and who knew or learned what was going on, and yet did essentially nothing except, as the Court revealingly observes, 'dutifully recorded these incidents in [their] files.'"²¹

Scholars will disagree, probably forever, about the Blackmun approach, but it seems to me to be important to have at least one voice like his on the Nation's highest court, one set of eyes that views the law not just in theoretical terms.

"I like to know what people are thinking and what they're worried about," he said in our interview a few months ago. "I think that's important, because behind every case there are some individual people, many times so-called little people, if I can use the phrase, rather than just a name of Smith against Jones with a lot of legal theory behind it. It's their Supreme Court. It doesn't belong to the Congress or to the Chief Justice or to the Justices. It's the people's Supreme Court, and to the extent we can keep it that way I prefer it."

19. 489 U.S. 189 (1989).

20. *DeShaney v. Winnebago County Dep't of Social Servs.*, 489 U.S. 189, 212 (1989) (Blackmun, J., dissenting).

21. *Id.* at 213 (alteration in original).

PARTING PRAISE FOR JUSTICE HARRY A. BLACKMUN

SARAH WEDDINGTON*

United States Supreme Court Justice Harry A. Blackmun has had a greater impact on the lives of American women than any other person in at least the past half century. For twenty-one years, the 7-2 opinion he authored, *Roe v. Wade*,¹ has been the epicenter of personal, social, and political change. Because of it, women in the United States have had the right to decide whether to continue or terminate a pregnancy and therefore to determine many other aspects of their lives.

I was reminded of the powerful impact of his opinion recently while in Orlando, Florida to speak to the B'nai B'rith Women Biennial Convention. My remarks included comments about the past and future of the abortion issue and about Justice Blackmun's retirement. Once we feared this moment, but with President Clinton making the appointment, it is predictable that a pro-*Roe* Justice will take that seat. For the near future, I believe abortion will continue to be legal; the question is whether it will be available.

Among those in Orlando who crowded around me afterwards for discussion and further questions was a dark-haired woman with a sparkling personality, a leader in her local young-adult chapter. As she began to talk to me, her eyes filled with tears and her voice choked. She was finally able to lean forward and say in my ear, "Thank you for *Roe v. Wade*. You saved my life." I do not know the specifics of her situation; I do not inquire in front of others about information not volunteered.

As I think of her, other faces that have leaned forward through the years flood back to me. Today I wish that I had a videotape of those people to send to Justice Blackmun as he retires. I wish I could share

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1. 410 U.S. 113 (1973).

with him their heart-felt comments about what a positive force *Roe* has been in their lives.

I saw Justice Blackmun for the first time on December 13, 1971, the day of the first *Roe* oral argument, and again on October 11, 1972, the second argument. The group of lawyers asking the Court to declare the Texas statute outlawing abortion (except to save the life of the woman) unconstitutional had worked to include arguments that would appeal to each Justice. We were aware that Justice Blackmun had previously been counsel for the Mayo Clinic, an outstanding medical facility in Minnesota. We had no information about what Justice Blackmun's position on the case was likely to be, but he was the Justice we had in mind as we crowded medically related information into the primary brief and organized a separate *amicus curiae* brief signed by leading doctors and medical professors.

The drama of the Supreme Court's consideration of the abortion issue drew key participants in the debate from far and wide. I was a young lawyer of twenty-six arguing my first contested case, a case I wanted desperately to win. My memory of Justice Blackmun is of a kindly, reserved man with greying hair, dark-framed glasses, and a soft voice. His questions were scholarly and inquiring but neither belligerent nor friendly. I was especially alert to his questions during the second hearing because, by then, rumors were flying that Justice Blackmun was writing the opinion, that he had spent part of the 1972 summer at Mayo Clinic researching case issues, and that the Court was preparing to overturn the Texas statute.

On January 22, 1973, Justice Blackmun read the *Roe* opinion from the Supreme Court bench. It concluded that a woman's fundamental right of personal privacy was "broad enough to encompass a woman's decision whether or not to terminate her pregnancy." It also held that the State of Texas had not proven a compelling reason to regulate abortion. The immediate effect of the decision was to overturn anti-abortion statutes in forty-six of the fifty states. Later I pictured the decisionmaking ability of women expanding exponentially as Justice Blackmun read the words of *Roe*.

I learned about the decision when a reporter from Washington, D.C. called my Austin office. Moments later I received a three-line telegram from the Court—collect. I don't remember the cost. My phones went crazy: reporters wanted comments, supporters called to celebrate, and the curious called to see exactly what the opinion said. Many people tell me that they can still remember exactly where they were and what they were doing when they heard about the decision in *Roe v. Wade*.

Surely that day Justice Blackmun never expected the *Roe* opinion to be headline news at the time of his retirement. He, like I, probably thought the basic issue was settled that day in 1973. A year after the decision, I wrote to thank him for his role as draftsman. In his response, Justice Blackmun wrote: "It meant much to have this supportive letter from you at this time. There is always controversy round about us, and this one seems to be particularly deep."² How prophetic his words were. With hindsight we now know that defending the decision and its impact would occupy a great deal of judicial time throughout his career.

For example, the issue of financial access to abortion has been before the Supreme Court. In *Beal v. Doe*,³ the Court held that Medicaid did not require states to pay for poor women's abortions. In his dissent, Justice Blackmun demonstrated his understanding of the viewpoint of women in poverty:

The Court concedes the existence of a constitutional right but denies the realization and enjoyment of that right on the ground that realization and enjoyment are separate and distinct. For the individual woman concerned, indigent and financially helpless, as the Court's opinions . . . concede her to be, the result is punitive and tragic. Implicit in the Court's holdings is the condescension that she may go elsewhere for her abortion. I find that disingenuous and alarming, almost reminiscent of: "Let them eat cake."⁴

By 1989, the lasting power of *Roe* seemed tenuous because of Supreme Court appointments made by anti-*Roe* Presidents Ronald Reagan and George Bush. Justice Blackmun must have felt under siege as he valiantly sought to defend *Roe*. In *Webster v. Reproductive Health Services*,⁵ the Supreme Court approved new state restrictions on abortion procedures and signaled that it might overturn *Roe*. Justice Blackmun wrote in dissent:

I fear for the future. I fear for the liberty and equality of the millions of women who have lived and come of age in the 16 years since *Roe* was decided.⁶

Many citizens shared his fear. Blackmun, the oldest Justice, and John Paul Stevens were the only Justices defending the original *Roe* decision, four others were saying, "Let's get rid of *Roe*," and the

2. Letter from Justice Harry A. Blackmun to Sarah Weddington, Representative, Texas House of Representatives 1 (Mar. 8, 1974) (on file with *The American University Law Review*).

3. 432 U.S. 438 (1977).

4. *Beal v. Doe*, 432 U.S. 438, 462 (1977) (Blackmun, J., dissenting).

5. 492 U.S. 490 (1989).

6. *Webster v. Reproductive Health Servs.*, 492 U.S. 490, 538 (1989) (Blackmun, J., dissenting).

remaining three Justices were essentially saying, "We're not ready to overturn Roe, but we are prepared to weaken it." One more anti-Roe Justice could doom the decision. Justice Blackmun had commented that he could not last forever.⁷ I believe many voters had Blackmun's comment in mind as they cast their 1992 ballots for the presidential candidate who pledged to protect privacy, Bill Clinton.⁸

Even as this Tribute goes to press, Justice Blackmun will once again participate in deciding a case regarding access. In *Madsen v. Women's Health Center Inc.*,⁹ the Court will review a Florida case involving restrictions placed on clinic picketers who sought to hamper access to an abortion clinic and to disrupt the doctors and patients inside.

At what cost has Justice Blackmun defended privacy and women's right to make choices? He has read over 60,000 pieces of "hate mail" received in the intervening years. He has been picketed, cursed, threatened, and denounced. Even in announcing his retirement, he commented that a Justice can choose when to retire but not the "tag" assigned him or her. "Author of the abortion decision," he once said. "We all pick up tags. I'll carry this one to my grave."¹⁰

I hope it is a tag that he wears with pride. His opinion, to a significant degree, has been the source of expanded roles for women in such areas as education, employment, and politics since 1973. As Justice Blackmun retires, I wish we could fire a 21-gun salute, the tribute this country extends to its highest and bravest. Then I wish I could give him a videotape of the comments of millions of women, and those who care about them, who thank him for the choices that were theirs, not those of strangers or of government. Their faces have kept me going all these years.

In this issue, various writers laud a diverse collection of characteristics and opinions of Justice Harry A. Blackmun. I write in praise of Justice Blackmun and his opinion in *Roe v. Wade*. Many prior Justices have been forgotten, but history and especially American women will never forget his work as a U.S. Supreme Court Justice. On behalf of many, I send a hug and a heart-felt "Thank you, we're glad you were there." May your days of retirement pleasures be many, and may you always know and relish the valuable difference you have made in the lives of so many!

7. *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2854 (1992) (Blackmun, J., dissenting).

8. Mitchell Locin, *With Court Choice, Clinton Gets a Chance to Regain Momentum*, CHI. TRIB., Apr. 7, 1994, at A15 ("[M]any—particularly women—. . . voted for (Clinton) . . . because they did not want a Republican president to nominate any more justices.").

9. *Operation Rescue v. Women's Health Ctr. Inc.*, 626 So. 2d 664 (Fla. 1993), cert. granted, *Madsen v. Women's Health Ctr. Inc.*, 114 S. Ct. 907 (1994) (No. 93-880).

10. *Blackmun Accepts Aftermath of Writing Abortion Opinion*, N.Y. TIMES, Jan. 18, 1983, at A20.

