1994

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Harold Hongju Koh*

Harry Blackmun taught by example. The first time I met him, he was the honored guest at my sister's college graduation, and we were part of the milling crowd. When we called his name, he turned, smiled, and graciously shook hands with our whole family. He seemed so ordinary, soft-spoken, slight of build. Could this be one of the most powerful men in America?

We next met in his office, during my clerkship interview. "I'm Harry Blackmun," he said, as if I did not know, and extended his hand. I later learned that when strangers asked what he did for a living, he would answer, "I'm a lawyer in Washington."

In law school, we had learned to revere the larger-than-life Justices — Holmes, Frankfurter, Douglas — brilliant, arrogant men (always men) with slashing pens, free of indecision and self-doubt. Harry Blackmun hardly fit that mold. During the Term I clerked, he never gave an order. He worked constantly, arriving at seven, leaving at seven, and reading at home until midnight. He never cut corners. He never pretended that decision was effortless. No case was beneath his dignity, nor any task so trivial that it could be done carelessly. "This is the end of the line," he often said, and everything we did mattered.

Because he never forgot about the people behind the cases, neither could we. "[W]hen was the last time your clients saw [their] children?" he would ask at oral argument.1 In dissents read from the bench, he would mention litigants' names and how the cases affected their aspirations.2 "How will this affect real people?" he would ask, in tiny, perfect handwriting in the margins of cert pool memos.

In Justice Blackmun's eyes, the Court belonged to the people. He would speak at a university's graduation if no Supreme Court Justice had ever spoken there, traveling great distances without fanfare. He read and pondered his mail, even the most vicious hate letters. After lunch, he would stroll around the block to see who was demonstrating, and end by walking up the courthouse steps to remind himself of his responsibilities.

Justice matters, we learned, but doing justice exacts its price. To protect the privacy of others, he sacrificed his own. Almost daily, he and his loving wife, Dottie, received hate mail, death threats, and once, a bullet through their living room window. They came to travel with bodyguards. As the Term wore on, the Justice's deeply lined face showed the strain of decision. At breakfast one morning, I asked, "If

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you had not become a judge, what would you be doing now?” “If I had not become a judge,” he answered wistfully, “I could have retired years ago.”

He served twelve more years after that. “What drove him?” I often wondered. During that year, I would sometimes slip into his office to leave a bench memo or to borrow a book. Over his writing desk hung two framed documents. The first was a certificate of sale. It noted that on February 21, 1853, S.E. Cotterliss of South Carolina had bought a twelve year-old boy named Titus for the sum of $625. The second, a quotation entitled “Duty As Seen By Lincoln,” read:

If I were to try to read, much less answer, all the attacks made on me, this shop might as well be closed for any other business. I do the very best I know how — the very best I can; and I mean to keep doing so until the end. If the end brings me out all right, what is said against me won’t amount to anything. If the end brings me out wrong, ten angels swearing I was right would make no difference.

When the Term ended, my co-clerks and I walked the Justice to his Volkswagen “beetle” to say goodbye. Although we were exhausted, he suddenly seemed strong and vigorous, ready for another Term. I realized that I now saw him differently: not just as a modest man, diligently doing his work, but as a strong, wise man, driven by an unremitting sense of duty and a fierce, tangible passion for justice.

These are the qualities that made Harry Blackmun grow. He did not know why he had come to sit on the Supreme Court. Early on, he wondered whether he was worthy. But he soon decided he had no choice but to do the very best he knew how, the very best he could, and to hope it would bring him out all right in the end. As he worked, he listened. As he read, he heard. With humility came compassion. With real-world sensitivity came a conviction to use his voice for the powerless.

Blackmun became perhaps the first Justice to become less isolated from the real world by sitting on the Court. Duty made a shy man bold. Caring and commitment made him the conscience of the Court in the late twentieth century.

Some now fault him for “sentimentalism,” claiming that he reasoned with his heart and not his head. But what would the Burger and Rehnquist Courts have been without him? Think of the Court, “free” of his emotion and caring. Would Roe have survived without him there to defend it, fighting for the “full emancipation of women”?

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5 Statements on Retirement of Blackmun from Court, N.Y. TIMES, Apr. 7, 1994, at A24 (“I think [Roe] was right in 1973, and I think it was right today. I think it’s a step that had to be taken as we go down the road toward the full emancipation of women.”).
Who else would have argued in *Bakke* that "[i]n order to get beyond racism, we must first take account of race"?6 Would another Justice have written a defense of privacy more powerful, more understandable to the average American, than Blackmun's dissent in *Bowers*?7 Without him, who would have spoken up for the Haitians8 or against the death penalty?9 *DeShaney* would be remembered as a technical case about municipal liability, not about the Joshuas of the world and how we treat them.10

Faced with a choice between broad or crabbed readings of the Constitution, Justice Blackmun urged that the Court "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."11 The Court, he said, cannot "purport[] to be the dispassionate oracle of the law, unmoved by 'natural sympathy.' . . . [T]he 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."12

Harry Blackmun taught us that, by example. For years, he gave the Court its natural sympathy, its human face. His passion for justice made him our Justice for passion. To ask what the Court will be without him is to realize what we've lost, and what we gained.

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11 *Id.* at 213.
12 *Id.* at 212.