1-1-1994

A Tribute to Justice Harry A. Blackmun

Harold Hongju Koh

Yale Law School

Follow this and additional works at: http://digitalcommons.law.yale.edu/fss_papers

Part of the Law Commons

Recommended Citation
http://digitalcommons.law.yale.edu/fss_papers/2086

This Article is brought to you for free and open access by the Yale Law School Faculty Scholarship at Yale Law School Legal Scholarship Repository. It has been accepted for inclusion in Faculty Scholarship Series by an authorized administrator of Yale Law School Legal Scholarship Repository. For more information, please contact julian.aiken@yale.edu.
he had hired more female clerks than any Justice in history.29 And his correspondents and visitors included the inmate editors of prison newspapers, all sorts of doctors, and Andy Pafko from the old Chicago Cubs and Brooklyn Dodgers, as well as a series of lawyers, judges, and academics.

Robert Cover invented a game not unrelated to the tribute genre. In *Your Law-Baseball Quiz*,30 Bob asked his readers to figure out which baseball figure a Justice most closely resembles. For example, Earl Warren was more like Yogi Berra than Roberto Clemente, Tris Speaker, or Willie Mays, and Felix Frankfurter was more like Bobby Murcer than like Ted Williams, Wayne Terwilliger (who?), or Cleon Jones.31 Justice Blackmun was a serious baseball fan, and I’ve thought quite a bit about what baseball players he takes after. For a while, I leaned toward Charlie Gehringer — a rough contemporary, slightly built, admired as much for his humility as his skills — or perhaps Bobby Brown, another infielder who always wanted to be a doctor. But ultimately, although he plays right field rather than left, I’ve settled on Dave Winfield. He too was raised in St. Paul, Minnesota. He too played well long after his age cohort had retired.32 And he too had a long and distinguished career that no doubt surprised a pardoned Watergate felon who helped him achieve eminence but definitely underestimated his independence of spirit.33 Justice Blackmun was never Babe Ruth or Sandy Koufax, but unlike other teammates, he never pretended to be, and down the road, his fans will remember him as much for the way he played the game as for the impressive record he racked up.

29 In fact, when he retired, Justice Blackmun had hired more female clerks than the rest of the sitting Justices combined. Over his entire career — stretching back to 1958, only a few years after Harvard Law School first admitted women — one-third (32 of 96) of his clerks were women and in his last ten Terms, a majority of his clerks were female.


31 Was it Jones’s playing career or his arrest for indecent exposure that prompted Cover to include him on the list?

32 Justice Blackmun was the third oldest person ever to sit as a Justice. But as he explained at his confirmation hearings in response to a question about whether there should be a mandatory retirement age for judges, “I think some of us are old at a younger age than others are.” *Harry A. Blackmun: Hearing Before the Sen. Comm. on the Judiciary*, 91st Cong., 2d Sess. 53 (1970). After a year of keeping up with the Justice’s punishing schedule, we looked his age more than he did. And like Winfield, who made the majors at an early age, Justice Blackmun came to the Court — albeit not as a Justice — quite early on. He was on the brief in the first case argued in the new building, *Douglas v. Willcuts*, 296 U.S. 1 (1935).

33 George Steinbrenner and Richard Nixon, in case you were wondering.
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. In dissents read from the bench, he would mention litigants’ names and how the cases affected their aspirations. “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

---

* Gerard C. and Bernice Latrobe Smith Professor of International Law and Director, Orville H. Schell, Jr., Center for International Human Rights, Yale University; Law Clerk to Justice Blackmun, October Term 1981.

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 com-
passion. 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 rea-
soned 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”?

3 See, e.g., Jeffrey Rosen, Sentimental Journey, NEW REPUBLIC, May 2, 1994, at 13; Stuart
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"? Would another Justice have written a defense of privacy more powerful, more understandable to the average American, than Blackmun's dissent in *Bowers*? Without him, who would have spoken up for the Haitians or against the death penalty? *DeShaney* would be remembered as a technical case about municipal liability, not about the Joshuas of the world and how we treat them.

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." The Court, he said, cannot "purport[] to be the dispassionate oracle of the law, unmoved by 'natural sympathy.' ". 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.

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.

---

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