

A JUSTICE FOR PASSION

I was reading *cert.* pool memos late one night, as I did almost every night the year I clerked for Justice Blackmun. After several months, the endless stream of petitions for *certiorari* had worn away some of the job's novelty. Just one more and I could go home.

A state prisoner was seeking federal habeas corpus relief from his death sentence. Five years earlier, he had been convicted along with an accomplice for murdering a family of four, while the accomplice's teenaged children had stood by. The Supreme Court had twice denied *certiorari* to the prisoner's earlier petitions. The pool memo, authored by a law clerk from another chambers, sketched the facts, cited the earlier denials, and recommended that *certiorari* again be denied. It all seemed fairly routine.

I scrawled "Deny" on top of the pool memo, threw it atop the Justice's file cabinet, and reached for the light. But something nagged. 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. I took the memo back and went to check the earlier denials of *certiorari*.

Although now years old, the pool memos were, of course, in meticulous order. Justice Blackmun demanded nothing less. The first denial seemed straightforward—detailing the facts of the grisly murders—until the last page. Written at the bottom, in the Justice's tiny, perfect handwriting, were the words: "What happened to the children?" Below these words appeared a series of Supreme Court docket numbers.

The next hour was a blur, 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 Eighth [Amendment's cruel and unusual punishments clause] permit execution of minors? Of accomplices to felony murder?" he wondered. And from there, a list of tiny citations and scribbled notes ran on for several pages. At the bottom, he had written in large letters: "This is a certworthy issue."

He was right, of course.¹ But that is not the point. What

1. See *Thompson v. Oklahoma*, 487 U.S. 814 (1988) (reviewing constitutionality of execution of minors); *Eddings v. Oklahoma*, 455 U.S. 104 (1982) (same); *Tison v. Arizona*, 481 U.S. 137 (1987) (reviewing constitutionality of

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matters is that this was one of perhaps a million petitions for *certiorari* that Justice Blackmun has disposed of during his more than two decades on the Supreme Court, along with thousands of stays, memorandum opinions, and argued cases. I have written elsewhere of this shy man's remarkable passion for justice.² More remarkable still is how he has become our Justice for passion, our Justice Compassion. Once dismissed as an inconsequential Minnesota Twin, a privileged "White Anglo-Saxon Protestant Republican Rotarian Harvard Man from the Suburbs,"³ Harry Blackmun is now recognized as our Justice who cares: about "the little people," and how the Court's decisions will affect "another world 'out there,' the existence of which the Court . . . either chooses to ignore or fears to recognize."⁴

He seems so ordinary, eating breakfast in the Court cafeteria every morning: Everyman become Supreme Court Justice. But how many of us could do what he has done? How many of us would have had the capacity to grow at age sixty-one, after full careers as a practicing attorney and appellate court judge? How many of us would have had the courage to sacrifice our personal privacy to protect a constitutional zone of privacy for others? How many of us would have had the compassion—much less the energy and discipline—to care so deeply after twenty punishing Court years?

Our constitutional system stands on the naive belief that judges care. Without that belief, the words "Affirmed" and "Reversed" would be mockeries, and the words "*Cert. Denied*" proxies for heartless and thoughtless dispositions.

I still believe. One reason why is that I have met Harry Blackmun and seen how he cares, so much more than this.

HAROLD HONGJU KOH
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execution of accomplices to felony murder); *Enmund v. Florida*, 458 U.S. 782 (1982) (same).

2. See Koh, *Rebalancing the Medical Triad: Justice Blackmun's Contributions to Law and Medicine*, 13 *Am. J. L. & Med.* 315 (1988); Koh, *Equality with a Human Face: Justice Blackmun and the Equal Protection of Aliens*, 8 *Hamline L. Rev.* 51 (1985).

3. Waltz, *The Burger/Blackmun Court*, *N.Y. Times*, Dec. 6, 1970, § 6 (Magazine), at 61.

4. *Beal v. Doe*, 432 U.S. 438, 463 (1977) (Blackmun, J., dissenting).