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# Unveiling Justice Blackmun

*Harold Hongju Koh*<sup>†</sup>

I am delighted to have attended this illuminating symposium about Linda Greenhouse's wonderful book, *Becoming Justice Blackmun*.<sup>1</sup> The symposium covered two distinct subjects. The first is the story of Justice Blackmun, the Justice he became, and how we came to understand him. The second is the story of how the public learns about our Constitution and the Supreme Court Justices who interpret it. This Article focuses on the relationship between those subjects: how the process of unveiling Justice Blackmun and his work can help us as Americans to understand better our own Supreme Court.

One could imagine at least three different attitudes toward how the public should learn about its Supreme Court. First, one could envision the mindset that the Court should be a total black box before, during and after the time a case is decided. Imagine a scenario where no Justices reveal how they might vote on a case before they vote, where none of their discussions are ever revealed while they are still on the bench, and where afterwards all their papers are burned. All we would ever know about the case would have to be gleaned from the public documents and argumentation. Like the parol evidence rule, this approach would prevent observers from looking outside the four corners of the document (in this case, the published opinion) to determine its meaning. The advantage of this scheme would be clarity; the disadvantage

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<sup>1</sup> LINDA GREENHOUSE, *BECOMING JUSTICE BLACKMUN: HARRY BLACKMUN'S SUPREME COURT JOURNEY* (2005).

would be limiting our understanding of the Court's workings to a small fraction of the available evidence.

In contrast, a second mindset might take the opposite approach—total disclosure—whereby reporters might quiz Justices intensively and expect them to answer substantive questions about a case well in advance of its argument, where all deliberations would be made transparent, and where after the fact, as soon as a decision came down, the entire file and all the correspondence would be released immediately for public examination. Such a total disclosure regime would almost surely have a chilling effect on the Court's deliberative decision making, by likely diminishing robust and honest discussion of a case while it was still pending.

So instead, imagine a third approach, a compromise between regimes of total nondisclosure and total disclosure, which would counsel a policy of nondisclosure about deliberations before a case is argued and during the decision making process, but permit some disclosure about internal decision making processes at some point after the decision is handed down. Handled properly, such a third approach might well strike the best balance between protecting the Court's deliberations and allowing the Court's workings to be more comprehensible to the American people. Finding the right balance raises the questions of how much disclosure after the fact would be the right amount, and at what point in time that post hoc disclosure should be made.

Seeking to strike the right balance between disclosure and nondisclosure is where the fascinating story of Justice Blackmun's papers comes in. Through an accident of history, I was privileged to become part of the deliberative process regarding the unveiling of Justice Blackmun's papers. After he, his family, and a number of his former law clerks discussed the process of disclosure over a number of months, he made two important decisions. First, he agreed to what eventually became thirty-eight hours of videotaped interviews, The Harry A. Blackmun Supreme Court Oral History Project,<sup>2</sup> which we conducted from July 6, 1994—the day he stepped off the bench—until December 13, 1995. Second, in his retirement, he executed a deed of gift that delivered all of his papers,

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<sup>2</sup> The Justice Harry A. Blackmun Oral History Project: Interviews with Justice Blackmun, conducted by Professor Harold Hongju Koh, Yale Law School, July 6, 1994-Dec. 13, 1995, at 146, *available at* <http://lcweb2.loc.gov/cocoon/blackmun-public/page.html?FOLDERID=D0901&SERIESID=D09> [hereinafter Oral History].

including the Oral History transcripts and all of the videotapes, to the Library of Congress as of the fifth anniversary of his death, a date that turned out to be March 4, 2004.

How, precisely, did Justice Blackmun's papers end up getting to the Library of Congress? How were these decisions about disclosure and public access made, and were the right decisions made at the right time? These are the questions this Article will address.

## I. THE MAKING OF THE BLACKMUN ORAL HISTORY

As our ninety-ninth Supreme Court Justice, Harry Blackmun sat on 3,875 cases in the seat occupied by Justices Story, Holmes, Cardozo, Frankfurter, Goldberg, Fortas, and now Breyer. His personal papers now number some half million items, including thirty-eight hours of Oral History, which now sit in some 1,600 boxes on more than 600 feet of shelf space in the Library of Congress. As a whole, the Blackmun papers really tell not one, but three, distinct stories.

The first is the story of the workings of the United States Supreme Court during the last quarter of the twentieth century. Justice Blackmun not only maintained every scrap of paper relevant to the Court's decision making, he also maintained them—with the help of his brilliant and devoted assistant Wanda Martinson—in utterly meticulous order, thus creating the authoritative paper archive of the Court's inner workings during this period. Linda's book graphically demonstrates what a very able journalist and historian can do by working assiduously with these materials. There is no case decided during this period that cannot be reconstructed or understood in a different light, so long as one is willing to put in the time. For Supreme Court lawyers, the Blackmun papers represent a treasure trove, the ultimate legal archaeological dig.

The second story the papers tell is of one man's journey through twenty-four testing years on the Court. The papers describe, in Justice Blackmun's own words, how he experienced and understood the transformational process of moving from one political wing of the Court to the other—or, as he preferred to say, "the Court shifting beneath him"<sup>3</sup>—a path followed in subsequent years, to greater and lesser extents, by such

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<sup>3</sup> Fred Barbash & Al Kamen, *Blackmun Says "Weary" Court Is Shifting Right*, WASH. POST, Sept. 20, 1984, at A1.

colleagues and successors as Justices John Paul Stevens, David Souter, and Anthony Kennedy.

The third and final story found in these papers tracks how one individual Justice's life journey contributed to the parallel journey of the Court and the Constitution as pivotal institutions in American political and social life. Often, these three narratives intertwine in unexpected ways. For me, one of the most enjoyable and exciting elements of conducting the Oral History was hearing how Justice Blackmun's own memory tied together historical events whose connection I had previously never understood.

How many of us knew, for example, that Chief Justice Burger delayed the release of the decision in *Roe v. Wade*<sup>4</sup> until January 1973 so it would not come down until after President Richard Nixon's second inauguration? Or that when *Roe* actually came down, it happened to fall on the day that former President Lyndon B. Johnson died, so the case got virtually no press attention that day? The newspapers did not begin to comprehend the significance of the ruling until many weeks later. These are not the kind of connections between public events that one usually makes when one reads these landmark Supreme Court cases in a law school casebook.

Or, to take one of my favorite Oral History moments: one reason that the announcement of Justice Blackmun's nomination to the Supreme Court was delayed was that at the same moment the nomination was being considered, Apollo 13 was caught on the other side of the moon, a story beautifully told in Ron Howard's later movie of the same name. So President Nixon told Justice Blackmun that he would not be able to announce the nomination until Apollo 13 was either lost or came back safely, and advised him to keep his pending nomination quiet until then. In the Oral History, Justice Blackmun tells the hilarious story of boarding his flight back from Washington to Minnesota, after having received President Nixon's admonition of secrecy. As the Justice tells it:

I got to the airport just in time, and went in, sat on an aisle seat back in the steerage. Pretty soon I was putting my bag underneath the seat in front of me, and a couple of feet came up, stomped right by me and looked to the other side. The occupant of the seat on the other side said to the man standing there, "Who is this guy, Blackmun, whose photograph is in today's paper?"

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<sup>4</sup> 410 U.S. 113 (1973).

And the answer was, “Oh, he’s just another old conservative.” And here I was underneath. I could tell who it was. What do I do? Do I stay underneath, or do I make my presence known? I finally pulled on his trouser leg, and said,

“Walter, I’m here.” It happened to be Senator [Walter F.] Mondale [of Minnesota, later Vice President of the United States].

Then the hostess said, “Will everyone please take his or her seat? Senator Mondale, will you please return to your seat?”

He said, “Harry, I’ll be right back.” Sure enough, as soon as we were airborne he came back. . . . [T]he senator came back and said, “I want you to know that I’m all for you, but I can’t always say so in public.”

I said, “Walter, I understand perfectly well.” So it worked.<sup>5</sup>

Exactly how did Justice Blackmun decide to engage in this exercise of disclosure? He started thinking about this toward the end of his active time on the Court, around 1993, after a number of authors had contacted him asking to write his authorized biography. In trying to decide what to do, he asked a number of his former clerks, including myself, for counsel. At one point he asked me, “Do you think any of my law clerks would want to write my biography?” This was around the time when Professor John Jeffries came out with his biography of Lewis Powell, for whom he had clerked,<sup>6</sup> and Gerry Gunther of Stanford had recently published his magisterial biography of the judge for whom he had clerked, *Learned Hand*.<sup>7</sup> Despite the excellence of these two volumes, I said to the Justice something that I believed then and now: that, as a clerk, it is hard to write a credible and objective biography, because you simply cannot be objective about your boss. If, for example, you say that your Justice is wonderful, everybody will think that you have whitewashed his life and career. But if you say that your Justice was a jurist with the inevitable human warts and flaws, you look like an ingrate. It is hard for any clerk to win under these circumstances. And so I told him that I did not believe it was wise for him to ask any clerk, even those who were law professors, or historically minded, to take up this project.

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<sup>5</sup> Oral History, *supra* note 2, at 173.

<sup>6</sup> JOHN C. JEFFRIES, JR., *JUSTICE LEWIS F. POWELL, JR.: A BIOGRAPHY* (1994).

<sup>7</sup> GERALD GUNTHER, *LEARNED HAND: THE MAN AND THE JUDGE* (1994).

Instead, we turned to a different idea: doing an oral history. We learned that the Federal Judicial Center and the Supreme Court Historical Society have a policy of financially supporting an oral history for any Supreme Court Justice willing to have one done, but that very few Justices actually take advantage of this offer. Justice Thurgood Marshall had one done, with his former clerk, my Yale Law School colleague Stephen Carter, serving as interviewer, but it lasts only about eight hours and ended up focusing far more on Justice Marshall's time as a litigator and Solicitor General than on his time on the Supreme Court. Justice Lewis Powell gave a brief oral history to Professor John Jeffries, but then Jeffries's own biography overtook the oral history in scope and magnitude. Justice William Brennan also apparently gave a very brief oral history, which has become part of a much larger authorized biography project being conducted by Stephen Wermiel.

Against this background, I suggested to Justice Blackmun that he consider doing an oral history, rather than a biography, as a way of telling his own story in his own words. Characteristically, he responded that he had to think on it, and that he was reluctant to have anyone "go to all that trouble." While we were having this discussion in the fall of 1993, unbeknownst to me, he was also thinking about his own retirement, which he finally announced the following spring. His decision to retire, I think, finally moved him to begin the Oral History. He knew that he would be moving his chambers and organizing his files for posterity, and conducting the Oral History made good sense as a way of ordering that process.

One of the first questions that arose was whether we should use audiotape or videotape to record the Oral History. All previous Supreme Court oral histories had been recorded on audiotape, some long before adequate videotape technology had even been developed. Justice Blackmun, however, was an excellent candidate for videotaping, because he had already done a number of video interviews on national news programs such as ABC's *Nightline*, in which he came across as the humane and kindly person he was. Once again, the frugal Justice Blackmun initially hesitated, fearing that "videotape would be too expensive, and I don't want to create a bother." But we soon learned that there was an excellent videotape facility right in the new Federal Judicial Center building, just a few minutes' walk from his new office, where we could record with little fuss, and in the same setting for all interviews. What finally sealed the decision in favor of videotape was the

fortuity of my watching the Disney animated movie *The Little Mermaid* one weekend with my daughter. During the trailer for the movie, the announcer said that “videotaped movies are evergreen.” When I related this to Justice Blackmun the next week, he smiled and—perhaps thinking of Minnesota forests—said: “Evergreen. I like that.” And with that, the decision in favor of videotaping was made.

This decision, I think, turned out to be a happy one. During the taping, things that the Justice said with a visual attached came across as more heartfelt, more profound and simply more human than they could ever have with simple audio or a written transcript. After thirty-eight hours, we even closed the Oral History with this winsome colloquy, which could never have been fully captured on audio:

H[arold] K[oh]: Thank you very much, Mr. Justice [for these interviews].

H[arry] A[.] B[lackmun]: You didn’t ask me to wiggle my ears.

HK: Will you do it?

HAB: I can.

HK: Okay.

HAB: And that has been a great attribute for little children, because if they come to visit the chambers, and I wiggle my ears at them, they’re much more fascinated with that than they are with what’s hanging on the wall or the history of the Court or all those things. So I wiggle my ears in farewell.

HK: Mr. Justice, had this not been on videotape, we could never have captured you wiggling your ears. Thank you so much, Mr. Justice. It’s been great.<sup>8</sup>

In hindsight, it is even more fortunate that we chose to record Justice Blackmun’s Oral History on video because those tapes have now been digitized and are publicly available on the Internet. And so, for generations to come, the man I remember as Justice Blackmun will be “evergreen” to any student who wants to see what the Justice was really like at the end of his career.

Unexpectedly, the decision to videotape also jump-started the beginning of the Oral History tapings. Upon retiring, Justice Byron White had dismantled his chambers

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<sup>8</sup> Oral History, *supra* note 2, at 483.



and moved out of the Supreme Court building and into the new Federal Judicial Center building next to Union Station in Washington, D.C. It soon became clear that upon retiring, Justice Blackmun would be obliged to do the same. I told him that I thought it was a shame that nobody would ever see his judicial chambers as they were arranged during his twenty-four years on the Court as an active Justice. He quickly decided to start the Oral History sooner rather than later, so that we could capture his office on video. And so, on July 6, 1994, just one week after his last active term on the Court ended, we taped the first few Oral History sessions in the Justice's chambers, the Supreme Court courtroom, and in the Justices' library where he often worked. We began filming on the day before his active chambers were broken down, and we filmed him in the courtroom, talking about his experiences while sitting there.

During the taping he filled with emotion, recalling all of the years that he had sat on the bench in that courtroom. Deliberately, the camera focused entirely on Justice Blackmun during the interview; as interviewer, I am heard only as a voice asking him the questions. Once we began taping, a number of people, including his secretary Wanda Martinson and his family, encouraged us to complete the project quickly on the theory that his memory might fade rapidly as time passed. And so we taped as often as our schedules could bear, and finished the thirty-eight hours in seventeen months.

## II. THE MISUNDERSTOOD ROLE OF THE BLACKMUN LAW CLERKS

In conducting the Oral History interviews, former law clerks played an invaluable role. At the outset of the project, I sent a letter to each of the other Blackmun law clerks, asking them for remembrances of memorable cases and events from each of their terms.<sup>9</sup> That request triggered a flurry of touching and evocative letters, which refreshed the Justice's memory and directed me to myriad, otherwise hidden, nuggets in the case files. In recounting these memories, the clerks

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<sup>9</sup> Justice Blackmun was served during his career by 103 extraordinarily able law clerks, a number that now includes five judges, thirty-one law professors or deans, thirty private practitioners, twelve in government, six in business, six in public interest law, and the rest in related professions.

showed discretion, affection, and touching loyalty for the Justice.

My own belief is that when you become a law clerk, you essentially give up your right to be a journalist, to report on the year in which you are given an insider's access. When I was clerking, someone said to me that reading a book about the Supreme Court written by a law clerk to a Justice is a bit like watching the World Series from the perspective of the batboy. To be sure, you are close to the center of the action, but often your sense of the importance of your own role vis-à-vis the real players in the game can be vastly inflated. This observation may sound demeaning to the clerks, who are as talented and able lawyers as one can find, but as time has gone on, I believe that it is in fact close to the truth, for a few simple reasons.

First, every clerk tends to believe that the year that he or she serves as a law clerk is the most important year of the Justice's career, because it is the only year in which that individual clerk happens to be there. But in fact, what is most humbling is just how fungible clerks really are. In the grand scheme of things, over twenty-four years, the Justice may not even remember if it was one or another law clerk who worked on a particular case. The way one understands things as a law clerk is likely to be quite different from the way one's Justice actually remembers them in the broader context of an entire judicial career.

Second, as a law clerk one tends to be utterly obsessed with one's own relationship with the Justice. It is hard to develop meaningful perspective on that relationship. Little things he says are taken as huge praise; moments of silence are taken as great insults. One of the great joys for me in conducting the interviews was the rare chance to return to see Justice Blackmun on an almost weekly basis for seventeen months when I was a mature lawyer—no longer working for him. It was really then—not as a clerk, but later—that I felt that I finally developed a real friendship with him, and could see him in a more balanced and objective light.

Third, we clerks often forget that the Justices themselves sometimes change their views about controversial cases over time. I remember asking Justice Blackmun in the Oral History about cases in which I personally remember him being furious at one or more of his colleagues. But when he discussed the same cases many years later, that fury was nowhere to be seen; he had forgotten his pique about a particular case, and had with time set that case within the

broader scheme of his relationship with the other Justice, a relationship which spanned many more years and encounters than I as a law clerk could ever have witnessed in a single year. And since he agreed with most of the other Justices about seventy or eighty percent of the time, it distorted history to focus obsessively on one or two cases in which they may have strongly disagreed, and to draw broad general conclusions about their entire relationship from those few isolated instances.

Finally, and I believe this very strongly, clerks rarely appreciate until much later in life just how much a Justice really set the tone for his or her chambers. The clerks operate within that atmosphere, and adopt that tone, and therefore every law clerk's work product strongly takes on the Justice's voice. To me, the best image is the School of Michelangelo. As we all know, the myriad students in Michelangelo's school of painting produced marvelous works of Renaissance art, many of which can barely be distinguished from the master's own work. Michelangelo himself did not personally put paintbrush to canvas on all of these works, but they nevertheless all look like the work of Michelangelo for the simple reason that he set the tone; he was the guiding intelligence behind the work of the entire school.

In the same way, I look now at opinions published in the *U.S. Reports* where I can remember typing many of the words myself, but now they do not seem like my words at all. They were ideas that I got from Justice Blackmun, the result of conversations we had within the chambers. For a year, I was under the influence of Justice Blackmun, I was doing what I was directed to do, and so what I produced was much more a part of his jurisprudence than it was any part of mine. I was not a free agent; I worked as a student in his School, and like the many students of Michelangelo, there is now no meaningful way for me to extricate my own contribution from Justice Blackmun's pervasive influence.

On this score, Professor David Garrow's recent overblown claim that the law clerks were really "the brains behind Blackmun" operates under quite a significant and serious misunderstanding.<sup>10</sup> What Professor Garrow simply misses is that Justice Blackmun always communicated with

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<sup>10</sup> See generally David J. Garrow, *The Brains Behind Blackmun*, LEGAL AFF., May/June 2005, at 27.

his clerks orally, while the clerks always replied in writing. In going through a tiny portion of the Blackmun papers, Professor Garrow read only what the clerks wrote and erroneously assumed that he was seeing the entire conversation, rather than only half of it. In fact, however, he never heard all of the instructions, all of the oral messages from Justice Blackmun, all of the ways in which he guided his law clerks and inspired their responses. At the end of the day, in virtually every case, Justice Blackmun wrote notes to himself, or came to pivotal decisions without any help from the clerks at all. As Linda Greenhouse's book chronicles,<sup>11</sup> there are large areas of his jurisprudence where the Justice consistently disagreed with or did not accept the clerks' recommendations at all, particularly in the area of criminal law and procedure.

### III. THE RELEASE OF THE BLACKMUN PAPERS

Let me turn to the next question: how did we decide to release the Justice's papers? As we were getting to the end of the Oral History tapings, I asked the Justice, "What are you going to do with all your papers?" At the time, the Thurgood Marshall papers, which had been released upon Justice Marshall's death based on a tersely worded deed of gift, had created a lot of public controversy. Justice Blackmun told me that he could release the papers on his death, as Justice Marshall had done, but he felt that that timing would be too soon. At the opposite extreme, he could wait and release them at the point when the last Justice with whom he served retired from the Court. But since that Justice, presumably Justice Thomas, could continue on the Court for decades to come, that date could conceivably be many, many years into the future.<sup>12</sup> So as a compromise, the Justice decided simply to pick a bright-line date: he chose five years from the date of his death as the official release date for all of his papers.

In picking the five-year release date, the Justice consulted first and foremost Sally Blackmun, his second daughter, an able lawyer who also served as his literary executor. Justice Blackmun also wanted a number of former law clerks—who were familiar with exactly what documents were actually in particular case files—to advise him on this

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<sup>11</sup> See, e.g., GREENHOUSE, *supra* note 1, at 221-22.

<sup>12</sup> In his years on the Court, Justice Blackmun sat with seventeen other Justices, running from William O. Douglas to Ruth Bader Ginsburg.

decision. One day, not long after the Marshall Papers were released, at the Justice's request, Dick Meserve<sup>13</sup>—a former law clerk who acted as the Justice's lawyer for the deed of gift—and I went over to the Library of Congress to look at Justice Marshall's file on *Roe v. Wade*. We realized with a shock that the Marshall file was only a quarter to one-half of the size of Justice Blackmun's own file on the same case! One reason was that Thurgood Marshall's clerks, and not his permanent secretary, maintained his files, and because the clerks changed from year to year, the Marshall organizational system was not nearly as inclusive or systematically maintained as the Blackmun system. Thus, the facts that *Roe v. Wade* was re-argued and that there was a prior draft opinion in the casefile were not obvious from perusing the Marshall file on *Roe*. With a start, Dick and I realized that Justice Blackmun's files were authoritative in a way that the other Justices' files simply were not. When we went back and explained this to the Justice, we soon all agreed that we would not well serve the public interest by releasing fragments of the collection. To allow an honest assessment of particular cases, the cleanest decision was to release the entire collection in one fell swoop.

With the blessings of the Blackmun family, we created an informal advisory group of former Blackmun clerks to implement the Justice's will with regard to the release of his papers. On the committee were myself; Dick Meserve; Wanda Martinson, Justice Blackmun's longtime secretary and a de facto member of his family; Pam Karlan, a professor at Stanford Law School; and Bill McDaniel, a criminal defense lawyer in Washington who also serves as founder and president of the Justice's Scholarship Fund.

Justice Blackmun eventually passed away on March 4, 1999. Faster than any of us could have imagined, five years flew by, during which time each of us focused our attention on other things. But in the fall of 2003, with the March 2004 release date fast approaching, we decided collectively that the best way for us to serve the Justice's donative intent was to make a plan to implement the impending release of these documents. We knew how big the collection was, we sensed how great its magnitude was, and we decided that if we did not

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<sup>13</sup> Dick was then a partner at the Washington office of Covington & Burling; he is now president of the Carnegie Institution.

make a plan for the papers' orderly release, we would engender havoc and confusion, the last thing our former boss would have wanted.

After some discussion, the committee decided that we did not want to release the papers only to have them mined selectively for gossip, or for journalists to make sensationalist headlines by plucking and publishing one isolated memo out of more than a million pieces of paper. And so what we began looking for were journalistic intermediaries who could provide the public with a "reader's guide" to these papers: persons with a well-established understanding of the Court as an institution, and of the Justice as a public person, to whom reading these papers would add an additional layer to an already nuanced historical understanding. Over the months of Oral History taping, this was something that I had discussed on and off with Justice Blackmun, and in various ways he had expressed to me his particularly high admiration for two journalists. One was Linda Greenhouse of the *New York Times*, who is by acclamation the authoritative Supreme Court reporter of our day. The other was Nina Totenberg, the longtime Supreme Court reporter for National Public Radio (NPR), whom the Justice had known from Minnesota from the time of his initial confirmation to the Supreme Court decades earlier. And so the idea arose of giving some journalists—perhaps Linda Greenhouse and Nina Totenberg—early access to the papers, as the Justice's will permitted.

At that point, the question arose: why should we give some journalists early access and not others? In thinking this question through, we were driven entirely by the notion that Justice Blackmun revered the public. He thought the Court belonged to the people, and he wanted to advance their understanding of that institution. One metaphor I found useful in thinking the issue through was a hypothetical: suppose that suddenly, one hundred previously undiscovered Rembrandts were discovered in a warehouse in Europe. Should the curator of this historical find simply open the doors and let every journalist in the world run in, taking pictures of whichever "new" Rembrandt he or she happened to see? Would such an approach responsibly educate the public about the real historical significance of the entire collection? Clearly, a far more orderly process would be to have one or two talented art historians of unimpeachable reputation go in first, survey the paintings, determine which paintings were more artistically significant than others, and write an introductory story giving

the public an overview of the collection in light of the painter's entire career. Then, when the new treasure trove of paintings was finally opened to the public, these chosen historians' head start would disappear, and everybody else would gain equal access—but with the benefit of the historians' early spadework to guide their own explorations.

While we were discussing this idea among ourselves, we decided to make contact with Linda, Nina, and representatives of both NPR and *The Newshour with Jim Lehrer* to see whether this idea might be of interest to them. Both NPR and *The Newshour* ended up turning to the same person, Nina Totenberg, for their presentations. Let me caution that although we made an initial approach to Linda and Nina, we did not make a final decision to give them early access for some time. Before we committed early access to them, we wanted to ensure that they and their news organizations were ready to make the commitment of resources necessary to give Justice Blackmun and his papers their due.

Before we had reached a final decision on access, several other journalistic organizations—including, most prominently, the *Washington Post*—contacted us seeking early access to the Blackmun Papers. We did not tell them we were having preliminary discussions with Linda and Nina; we simply invited them—as we had previously invited Linda and Nina—to submit proposals describing how they planned to use any early access to the papers. Some of the organizations responded promptly with proposals; others did not, but none of the competing proposals were nearly as careful or as well thought-through as those ultimately presented to us by Linda and Nina.

Linda, for example, came back to us with an extraordinarily well thought-out idea of how to explore the archive with the research support of Francis J. (Frank) Lorson, known to generations of Supreme Court advocates as the uniquely able Chief Deputy Clerk of the Supreme Court. To us, his participation ensured the accuracy of the Greenhouse proposal. We on the Clerks Committee were comfortable that with Frank Lorson on board, there was no chance that the *New York Times* would misunderstand the significance of an internal Court document, or misread the paper flow that may have led to a decision in a particular case.

Based on Linda's and Nina's proposals, we commissioned them to go forward, and we granted them early access to the papers as of January 1, 2004, only two months

before the eventual release of the entire collection. Once we gave them early access, we did not attempt to influence the stories they produced in any way. Linda Greenhouse and I did not speak from the moment that we formally agreed that she and Frank Lorson should have early access to the papers until she had essentially finished with the introductory articles that were to come out in March 2004, when all of the papers were finally opened to the public. Let me also say, for the record, that none of the clerks on the advisory committee, or even the literary executor Sally Blackmun herself, had access to the Blackmun papers before the formal date of release. The access given to Linda Greenhouse, Frank Lorson, and Nina Totenberg during January and February of 2004 was superior to our own. So, even though I conducted the Oral History, I have still never looked at more than ninety percent of the documents in the collection. We quite literally did not know what Linda was going to find. The diaries, the memos that the Justice wrote to himself, and myriad other documents uncovered through Linda's painstaking research were all news to us, as well as to the rest of the world.

The final question, then, is: did we make the right decision in granting early access to Linda Greenhouse and Nina Totenberg? Of course, that is a judgment that history should make, and I am sure that reasonable observers will have different opinions. My own view at the end of the day is that we served the Justice's goal. He thought the Court belonged to the people, and that the papers should belong to the public. He thought that transparency was a good thing. He firmly believed that the Supreme Court would be more respected by the people if they saw that it was not a black box. Justice Blackmun understood that the Court was a human enterprise carried out by fallible people, who nevertheless were utterly dedicated to doing justice, each in his or her way, working as hard as they could to interpret the Constitution faithfully. Anyone who goes through the papers carefully soon concludes that if all the instruments of our government functioned as well and diligently as the Supreme Court, and if every one of our government officials took his or her duties as seriously as Harry Blackmun and his colleagues did, we would be a much, much better country, indeed.



## IV. EXPLAINING JUSTICE BLACKMUN'S EVOLUTION

Reading the Blackmun papers, one gains an overwhelming sense of how much of a burden we, as a nation, place upon mere mortals when we place them on the Supreme Court. This point was driven home to me during the term when I was clerking, when there was a case in which the vote at conference was tentatively five to four. The opinion was assigned to Justice Blackmun and he assigned it to me, as the responsible law clerk. We drafted a majority opinion and circulated it in November. Immediately, three Justices joined our opinion. But the dissent circulated its opinion almost immediately thereafter, and three Justices joined that dissent. So it was four to four on November 15.

For the next five months, until April 15, we did not know the outcome of the case, because the ninth Justice would not cast his vote. And every day, as that ninth Justice would walk by our office, my co-clerk, Frank Holleman, would say, "Harold, there goes a walking constitutional amendment!"

All of this was happening in the wake of the failure of the Equal Rights Amendment, which had of course secured majorities in large parts of the country, but nevertheless did not secure the requisite support among the states. As Frank's observation made clear, while even a broad social movement with the backing of a large segment of the population could not amend the Constitution by ordinary means, the vote of a single Justice could redetermine the meaning of a constitutional provision.

One morning in April, while we clerks were sitting at breakfast with Justice Blackmun, the undecided Justice came in to get a cup of coffee. As usual, Frank, my co-clerk, said, "Why Mr. Justice, there goes that walking constitutional amendment." Justice Blackmun turned to us, and with a winsome look, asked, "Do you think that's fun?" For the first time, it really dawned on us what magnitude of personal responsibility we place upon these able, devoted, but painfully human individuals.

How did this great responsibility affect Justice Blackmun? Did his experience on the Court change him, and if so, how? Does the fact that Justice Blackmun changed suggest that our new Chief Justice, John Roberts, will also change with the years, and if so, what can we predict about the likely evolution of Chief Justice Roberts from Harry Blackmun's story? The excellent papers presented at this symposium have

unearthed no fewer than seven explanations for Justice Blackmun's judicial evolution. Let me briefly review these explanations, which I will call for shorthand purposes: (1) the *Roe* explanation; (2) the Warren Burger explanation; (3) the "personal qualities of Justice Blackmun" explanation; (4) the law clerk explanation; (5) the Aspen explanation; (6) the "changing Court" explanation; and (7) finally, the "changing world" explanation.

Each of these explanations has some credibility, and of course everyone has an interest in promoting his or her own particular view of which was really the most critical factor. The most plausible answer, as always, is that all of these factors collectively played a role in bringing about the change in Justice Blackmun.

Linda Greenhouse deserves enormous credit for isolating and connecting factors one and two—*Roe v. Wade* and Warren Burger—and even positing an academic explanation for the change: path dependence.<sup>14</sup> It seems pretty clear that Justice Blackmun was headed in a certain direction as a Supreme Court Justice when *Roe* came before the Court: the favored approach based on modest incrementalism and moderate conservatism. But once Chief Justice Burger assigned that opinion to him, that fateful decision pushed Justice Blackmun in a different direction. In the beautiful closing of her book, Linda Greenhouse puts it this way:

[I]n so many ways *Roe v. Wade* was not just another case. The world attached [*Roe*] to Blackmun in a manner that few Supreme Court decisions are ever linked to their authors. . . . Eventually, . . . he locked *Roe* in a tight embrace and never let it go. Its defense carried him in new directions: to commercial speech in . . . the abortion advertising case; to the other world "out there" of poverty and need in the abortion-funding cases; and, most significant, to his eventual commitment to the struggle for women's equality in the sex discrimination cases. Warren Burger could never have suspected that in turning to his reliable friend for one unwelcome assignment, he was launching Blackmun on a journey that would open him to new ideas and take him far from their common shore of shared assumptions. Burger sent Blackmun into dangerous waters without

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<sup>14</sup> The concept of path dependence posits that persons and institutions become set on certain historical paths by enduring regularities of human action, regularly reconstituted by human interaction in frequently occurring or repetitive situations. See generally Paul A. David, *Why Are Institutions the 'Carriers of History?': Path Dependence and the Evolution of Conventions, Organizations and Institutions*, 5 STRUCTURAL CHANGE & ECON. DYNAMICS 205 (1994); Mark J. Roe, *Chaos and Evolution in Law and Economics*, 109 HARV. L. REV. 641, 643-44 (1996) (explaining path dependence).

a life preserver, and then turned aside. But Blackmun kept swimming. In defending his legacy, he created his legacy. He became Justice Harry Blackmun.<sup>15</sup>

As Linda correctly intuit, the relationship between Justices Burger and Blackmun was far more complex than anyone had previously understood. Two days after Warren Burger died, Justice Blackmun and I had an Oral History session. I asked him about Warren Burger, expecting to hear some negative things. Instead, Justice Blackmun happily recalled their early days together and said, “[T]here was a lot of good in Warren Burger.”<sup>16</sup> The long and the short of it was that the twenty-four years they spent together on the Supreme Court formed only part of a much fuller eighty-five-year-long relationship. Although Justice Blackmun ended up feeling that he and Burger followed very different judicial philosophies, at the end what he remembered was not their conflict or their differences, but their lifelong personal friendship.

This brings me to Justice Blackmun’s personal qualities, which were so important in guiding his judicial transformation. A legendary workaholic, Harry Blackmun was an absolute glutton for information. When he came to the Court, his passion for work exposed him vicariously to a picture of America that he could never have known from his relatively comfortable adult life in Minnesota. Unlike some Justices, he came to see a much deeper and richer slice of American life, because he was actually reading all the certiorari petitions and briefs. Always a compassionate person, before he went on the Supreme Court, he had developed great faith in mainstream

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<sup>15</sup> GREENHOUSE, *supra* note 1, at 250-51.

<sup>16</sup> I began by asking:

“Mr. Justice, on a personal level, [Chief Justice Burger] was one of your oldest friends. On the other hand, as your time on the Court went on, you moved apart from one another. What were the best parts of your friendship with the chief?”

Justice Blackmun answered:

“Of course, I knew Warren Burger since we were four or five years old. We both grew up on the East Side of St. Paul, and that translates into the fact that I knew him for over eighty years, and that indeed is a lifetime. We went to the same elementary school, not the same high school, and then I went off to college, so our lives were separated during those seven college and law school years, but it didn’t affect our friendship basically. I think I knew Warren Burger intimately, maybe in some ways better than he knew himself, but there was a lot of good in Warren Burger.”

Oral History, *supra* note 2, at 243.

institutions. Here was someone who had been to Harvard College and Harvard Law School, who worked for the best law firm in Minnesota, who then worked for the Mayo Clinic, as fine a medical institution as exists, and who both clerked for and sat on the Eighth Circuit, one of the most collegial courts in America. These experiences persuaded Justice Blackmun early on of the simple faith that institutions work. Understandably, he considered it to be the duty of judges to defer to those institutions, a theme that resounds throughout his early, naïve Supreme Court opinions.<sup>17</sup>

But the more he read, the more he focused, the more problems were brought to his attention, and the more pain that he felt, the more he came to appreciate how often institutions do not do their job. His lament in *DeShaney v. Winnebago Department of Social Services*—“Poor Joshua!”<sup>18</sup>—makes about as clear a statement of this realization as you can find. You see it first and most profoundly in *Beal v. Doe*, where Blackmun writes,

For the individual woman concerned, indigent and financially helpless, . . . 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.” . . . There is another world “out there,” the existence of which the Court, I suspect, either chooses to ignore or fears to recognize. And so the cancer of poverty will continue to grow. This is a sad day for those who regard the Constitution as a force that would serve justice to all evenhandedly and, in so doing, would better the lot of the poorest among us.<sup>19</sup>

So Justice Blackmun decided at a certain point—and surely, *Roe* was the turning point—that the job of a judge was not simply to defer to imperfect institutions, but to use the institution of judicial oversight to force them to be better.

Another of Justice Blackmun’s distinctive personal qualities was his status as an insider-outsider: someone from a very poor family, who eventually entered into the elite and lived there, but never really felt a part of an elite social

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<sup>17</sup> See, e.g., *United States v. Kras*, 409 U.S. 434, 450 (1973) (upholding fifty-dollar bankruptcy filing fee against equal protection claim by indigent); *New York Times v. United States*, 403 U.S. 713, 759-63 (1971) (Blackmun, J., dissenting) (voting for government in Pentagon Papers case); *Wyman v. James*, 400 U.S. 309, 419 (1971) (rejecting Fourth Amendment challenge to New York law conditioning welfare benefits on in-home visits by caseworkers).

<sup>18</sup> *DeShaney v. Winnebago County Dep’t of Soc. Servs.*, 489 U.S. 189, 213 (1989) (Blackmun, J., dissenting).

<sup>19</sup> 432 U.S. 438, 462-63 (1977) (Blackmun, J., dissenting).

structure. In any situation, he instinctively related to the underdogs, the people who were being hurt by the system. Justice Blackmun, in his Supreme Court confirmation hearing, said, “[M]y record and the opinions that I have written . . . will show, particularly in . . . the treatment of little people, what I hope is a sensitivity to their problems.”<sup>20</sup> Compare this with the statement made by John Roberts, in his confirmation hearing to be Chief Justice: “[I]f the Constitution says that the little guy should win, the little guy is going to win in court before me. But if the Constitution says the big guy wins, then the big guy wins.”<sup>21</sup> In these two worldviews lies the possibility of a real difference of opinion over time.

A third notable personal quality of Justice Blackmun was his profound sense of duty. Hanging on Justice Blackmun’s wall was a quotation entitled “Duty as Seen by Lincoln,” which 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.<sup>22</sup>

Justice Blackmun assiduously followed his notion of duty. In the early 1970s, Justice Blackmun realized soberly that he would be on the Supreme Court for most of the rest of his life. In my experience, Justice Blackmun was never, as some commentators have falsely suggested, a weak, painfully emotionally insecure, indecisive person. By the end of his life, he was very confident, he knew what to do, he was extremely well organized, he was politically savvy, and he was strong. The clerks arrived each year and left exhausted, but Justice Blackmun kept going. That is the mark of an extremely strong man.

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<sup>20</sup> 8 THE SUPREME COURT OF THE UNITED STATES: HEARINGS AND REPORTS ON SUCCESSFUL AND UNSUCCESSFUL NOMINATIONS OF SUPREME COURT JUSTICES BY THE SENATE JUDICIARY COMMITTEE, 1916-1975, at 37 (compiled by Roy M. Mersky & J. Myron Jacobstein 1977) (testimony of J. Harry A. Blackmun).

<sup>21</sup> *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 448 (2005) (testimony of J. John G. Roberts).

<sup>22</sup> Lincoln is said to have made these remarks at a time the Committee on the Conduct of War had recently criticized him as president. LINCOLN’S OWN STORIES 182-83 (Anthony Gross, ed., Harper & Brothers Publishers 1912).

Some commentators depict Justice Blackmun as a kind of willow in the wind, being pushed around by a range of extraneous factors. What they fail to recognize is that you do not succeed your whole life, and then arrive at the Supreme Court, without being a person of considerable moral compass and direction. And it was that moral compass, coupled with a sense of duty and love of his family, that sustained him.

At the same time, Justice Blackmun was unusually honest. While on the Eighth Circuit, he wrote an opinion in a death penalty case in which he expressed his moral opposition to the death penalty, but nevertheless upheld it as a matter of law.<sup>23</sup> At the Supreme Court, Hugo Black urged him never to let his anguish show when deciding a case.<sup>24</sup> For a few years, he proceeded to “edit his anguish out.” But, as Linda’s book shows, he later decided that was a mistake; if it was difficult, he was determined to let the anguish show, and never to hide it again.<sup>25</sup>

This decision showed his deep commitment to transparency. For if there was a hard decision, he wanted people to see that it was hard; he did not want to pretend that all decisions were easy. His openness earned him ample criticism for sentimentalism, for being overly compassionate.<sup>26</sup> But at the end of the day, there is something refreshing about our highest government officials actually acknowledging that

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<sup>23</sup> *Maxwell v. Bishop*, 398 F.2d 138, 153-54 (8th Cir. 1968) (noting that the fact that this case involves the death penalty “makes the decisional process . . . particularly excruciating for the author of this opinion who is not personally convinced of the rightness of capital punishment and who questions it as an effective deterrent. But the advisability of capital punishment is a policy matter ordinarily to be resolved by the legislature or through executive clemency and not by the judiciary.” (footnote omitted)), *vacated*, 398 U.S. 262 (1970).

<sup>24</sup> Justice Black advised him:

“[W]hat I don’t like about it is that you talk about how difficult the case is, you agonize. Never agonize in an opinion. Make it sound clear as crystal and we’ll get along better.” Well, I took his advise [sic] and took the expression I had in that opinion about how hard it was and how we agonized over it, took it out. But I broke that advice in *Roe against Wade*. Paragraphs two and three, I think, I set forth that it was an agonizing opinion. I’m glad I did.

Oral History, *supra* note 2, at 126.

<sup>25</sup> *See Furman v. Georgia*, 408 U.S. 238, 405 (1972) (Blackmun, J., dissenting) (confessing that “[c]ases such as these provide for me an excruciating agony of the spirit. I yield to no one in the depth of my distaste, antipathy, and, indeed, abhorrence, for the death penalty, with all its aspects of physical distress and fear and of moral judgment exercised by finite minds.”).

<sup>26</sup> *See, e.g., Jeffrey Rosen, For Arnauld*, NEW REPUBLIC, May 2, 1994, at 16; Stuart Taylor, Jr., *Justice Blackmun’s Jurisprudence of Compassion*, LEGAL TIMES., Apr. 11, 1994, at 26.

they are making difficult decisions, and that they are doing their best to make sure that those hard decisions are ones we can live by.

Other explanations that have been offered about the role of Justice Blackmun's law clerks and the Aspen Institute in promoting his evolution strike me as quite overstated. But taken together, they do add up to a "social network" explanation, which is that over time, Justice Blackmun's "epistemic community" significantly changed.<sup>27</sup> A Justice of the Supreme Court has unusual freedom to choose the people with whom he spends time. Over the course of his career, Justice Blackmun clearly changed the kinds of people with whom he spent time and the kind of people whose approval he sought. For all the talk of the role his law clerks played in changing his philosophy, we must remember that it is Justice Blackmun who selected those law clerks, and that over time, he clearly began to choose clerks who were more and more like-minded in his direction. Aspen may also have been part of the change, as Dennis Hutchinson has pointed out,<sup>28</sup> but we should recall that Justice Blackmun only went there a few weeks out of each year—many fewer weeks than he spent each year with, for example, Justice Scalia and Chief Justice Rehnquist, whose exposure to him clearly did not transform his views. So while Aspen clearly became an important event in his life, Aspen did not so much change him, as it became a safe place where he could voice ideas and concerns that he already had.

Unlike some Supreme Court Justices, Justice Blackmun went out to listen to the people whom his opinions were affecting, and he became deeply moved personally by their plight. I was at a talk at Yale Medical School that Justice Blackmun gave shortly after *Bowers v. Hardwick*<sup>29</sup> came down in 1986, and I watched a woman race up to him. She identified herself to him as a lesbian, and thanked him profusely for his dissenting opinion in *Bowers*. I could tell that he was

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<sup>27</sup> One commentator has defined an epistemic community as "a network of professionals with recognized expertise and competence in a particular domain and an authoritative claim to policy-relevant knowledge within that domain or issue-area." Peter M. Haas, *Introduction: Epistemic Communities and International Policy Coordination*, 46 INT'L ORG. 1, 3 (1992). Haas's introduction leads off a volume of ten articles that explore the role that various epistemic communities play in the making and coordination of international policy.

<sup>28</sup> See generally Dennis J. Hutchinson, *Aspen and the Transformation of Harry Blackmun*, 2005 SUP. CT. REV. 307.

<sup>29</sup> 478 U.S. 186 (1986).

uncomfortable with her openness, and a bit uncomfortable with being publicly aligned with her position. Yet only a few years later, I sat with him in another setting in which a number of gays and lesbians came up to him and thanked him for his *Bowers* dissent, and he responded to them warmly and comfortably. Clearly over time, he had come to understand his role in the debate in a different way.

Much the same could be said about how women were affected by *Roe v. Wade*. As I have noted elsewhere, he did understand *Roe* initially to be a case about the discretion of doctors.<sup>30</sup> But by the end of his career he had fully come to understand it as an important step down the road to the full emancipation of women, in no small part because he listened to women who told him that that is how they view the case.<sup>31</sup>

Two final explanations for Justice Blackmun's evolution are the changing Court and the changing world. During his years on the bench, the Court plainly did move to the right underneath him.<sup>32</sup> A majority of the Justices who were appointed after him—Chief Justice Rehnquist, and Justices Powell, O'Connor, Kennedy, Scalia, and Thomas—were all clearly to his ideological right.

Moreover, the changing world deeply affected Justice Blackmun, because of his adaptability and interest in emerging issues such as globalization, gay rights, abortion, and technological change. Justice Blackmun was nothing if not flexible and open-minded, and he wanted the Court to adopt a flexible approach to novel issues. Dissenting in *Loretto v. Teleprompter*, for example, he wrote: "In the end, what troubles me most about today's decision is that it represents an archaic judicial response to a modern social problem."<sup>33</sup>

Justice Blackmun's jurisprudence reflects his foresight about the need to adjust to a changing world. In the affirmative action case *Bakke*, he recognized that "[i]n order to

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<sup>30</sup> See Harold Hongju Koh, *Rebalancing the Medical Triad: Justice Blackmun's Contributions to Law and Medicine*, 13 AM. J.L. & MED. 315, 320-21 (1987).

<sup>31</sup> *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.").

<sup>32</sup> See Barbash & Kamen, *supra* note 3.

<sup>33</sup> 458 U.S. 419, 455 (1982) (Blackmun, J., dissenting).



get beyond racism, we must first take account of race.”<sup>34</sup> His foresighted dissent in *Bowers*<sup>35</sup> led directly to the opinion in *Lawrence*, which later recognized that *Bowers* had been wrongly decided from the start.<sup>36</sup> In each of a broad array of doctrinal areas—separation of powers,<sup>37</sup> federalism,<sup>38</sup> the Commerce Clause and taxation,<sup>39</sup> international law,<sup>40</sup> empirical methods and juries,<sup>41</sup> and commercial speech<sup>42</sup>—his decisions signaled a direction that the Court would later follow.

The ultimate question, of course, is whether Justice Blackmun really held a constitutional theory. One can imagine two models of constitutional adjudication: a narrow image of the Justice as an umpire deciding claims of private right, put forward in his confirmation hearing by Chief Justice Roberts; and a broader, more contextualized version of adjudication,

<sup>34</sup> *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 407 (1978) (Blackmun, J., concurring).

<sup>35</sup> *Bowers v. Hardwick*, 478 U.S. 186, 199 (1986) (Blackmun, J., dissenting).

<sup>36</sup> *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

<sup>37</sup> *See, e.g., Mistretta v. United States*, 488 U.S. 361, 381 (1989) (upholding the federal sentencing guidelines under a “flexible understanding of separation of powers”).

<sup>38</sup> *See, e.g., Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 531 (1985) (overruling *National League of Cities v. Usery*’s “traditional governmental functions” test as “not only unworkable but . . . inconsistent with established principles of federalism”).

<sup>39</sup> *See, e.g., ITEL Containers Int’l Corp. v. Huddleston*, 507 U.S. 60, 85, 86 (1993) (Blackmun, J., dissenting) (disagreeing with Court’s willingness, in applying “one voice” test, to “infer permission for [a] tax from Congress’ supposed failure to prohibit it”); *Japan Line, Ltd. v. County of L.A.*, 441 U.S. 434, 451 (1979) (developing Court’s foreign Commerce Clause test in state tax cases).

<sup>40</sup> *See, e.g., Société Nationale Industrielle Aerospatiale v. U.S. Dist. Court*, 482 U.S. 522, 548 (1987) (Blackmun, J., concurring in part and dissenting in part) (calling majority’s view “of this country’s international obligations . . . particularly unfortunate in a world in which regular commercial and legal channels loom ever more crucial”); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 629 (1985) (upholding international arbitration clause of agreement in light of “need of the international commercial system for predictability in the resolution of disputes”). *See generally* Harry A. Blackmun, *The Supreme Court and the Law of Nations*, 104 YALE L.J. 39, 40 (1994); Harold Hongju Koh, *Justice Blackmun and the “World Out There,”* 104 YALE L.J. 23 (1994).

<sup>41</sup> *See, e.g., Callins v. Collins*, 510 U.S. 1141, 1153-55 (1994) (Blackmun, J., dissenting) (referring to a statistical study showing that juries are more likely to sentence an accused to death if he or she is black, at issue in *McKleskey v. Kemp*, 481 U.S. 279 (1987), and declaring that, given this fact of pervasive racism among jurors, there is no way for the Court to administer the death penalty in a way that is both consistent and fair); *Ballew v. Georgia*, 435 U.S. 223 (1978) (relying upon statistical data to show that smaller juries are more prone to error).

<sup>42</sup> *See* William S. Dodge, *Weighing the Listener’s Interests: Justice Blackmun’s Commercial Speech and Public Forum Opinions*, 26 HASTINGS CONST. L.Q. 165 (1998); Karen Nelson Moore, *Justice Blackmun’s Contributions on the Court: The Commercial Speech and State Taxation Examples*, 8 HAMLINE L. REV. 29, 31-43 (1985).

which envisions the role of the Justice as reaffirming the public rights that are at the center of our Constitution. Over the course of his career, Justice Blackmun shifted from the narrower model of the passive adjudicator of private rights, to the more activist model of the public rights adjudicator, inspired by such cases as *Roe*, among others.

In the end, John Hart Ely best described the kind of Justice that Justice Blackmun finally became: a *Carolene Products* Justice.<sup>43</sup> The posture that he took resembled the role for judges described in footnote four of the famous *Carolene Products* case: defending discrete and insular minorities and clearing channels for political change.<sup>44</sup> Indeed, during his career Justice Blackmun cited *Carolene Products*, footnote four, three times in the context of protecting aliens, who are excluded from the political process.<sup>45</sup>

At the end of the day, we must give Justice Blackmun credit for this: he arrived at the Supreme Court when he was sixty-one years old. Only then did he start to grow and change. How many of us, starting an around-the-clock job at that age, under constant stress and national examination, could work extraordinarily hard, pay attention, absorb new inputs, travel internationally, meet new people, deal with conflict on the Court, and still change and grow? Justice Blackmun not only did all of those things, he did them in a way that will leave him remembered as the conscience of the Supreme Court in the late twentieth century. For nearly a quarter of a century, in a testing time, he gave the Court its human face.

Let me illustrate with this closing story. Justice Blackmun liked to read his mail to his law clerks. One letter he particularly liked arrived in 1995. It read:

Dear Mr. Blackman [sic],

What is it like being a judge? Are you the boss of anyone? How did you become a judge? Do you ever get nervous?

From, Patrick Jackson<sup>46</sup>

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<sup>43</sup> See JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 75, 76 (1980).

<sup>44</sup> *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

<sup>45</sup> See *Toll v. Moreno*, 458 U.S. 1, 23 (1982) (Blackmun, J., concurring); *Sugarman v. Dougall*, 413 U.S. 634, 642 (1973) (Blackmun, J.); *Graham v. Richardson*, 403 U.S. 365, 372 (1971) (Blackmun, J.).

<sup>46</sup> Oral History, *supra* note 2, at 453.

Now how many of us, if we got that letter today, would simply throw it in the wastebasket? Here, instead, is what Harry Blackmun wrote back:

Dear Patrick,

Thank you for your nice letter of July 7. You asked what it is like being a judge. It is like anything else, I guess, but not too much fun. I am not boss of anyone. Everyone bosses me. And you ask whether I ever get nervous. I am nervous most of the time. Are you? I hope you are doing well at school.<sup>47</sup>

Those are the words of a humble man, a man who believed that those who write to their government officials deserve a respectful answer. It is the voice of a man who believed that the Court belongs to the people. What Justice Blackmun was saying is that the Court is not above you. It speaks to you. "In my world," he was telling Patrick and others like him, "the job of the Court is to speak to you." For if the Court can speak to you, Justice Blackmun believed, it will do a much better job speaking for you. And that, I think, is how all of us should remember Justice Harry Blackmun.

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<sup>47</sup> *Id.* at 453-54.