Justice Defined - It Takes More than a Single Opinion to Understand How Legal Reasoning and Personal Experience Shape a 24-Year Career

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It takes more than a single opinion to understand how legal reasoning and personal experience shape a 24-year career

BY RICHARD C. REUBEN

Harry Blackmun may have never stepped up to home plate, shifted his weight in the batters box and waited to test slugger Ted Williams' contention that sports' hardest task is to hit a round ball with a round bat, but he definitely proved that Williams was wrong.

Williams had failed to consider how hard it could be for Blackmun to get other justices of the U.S. Supreme Court to agree on a list of baseball's greatest players that Blackmun wanted as a tribute to the sport in an opinion upholding baseball's antitrust exemption.

Always the baseball fan, Blackmun started with nearly 70 players. As his draft opinion circulated, one justice asked to add a curve-ball pitcher with 174 career wins; Blackmun decided that a pitcher with 373 wins was more deserving. Another justice declined to join the opinion unless it included a player from his hometown team; Blackmun complied. A third protested the omission of black players; Blackmun added three.

Finally the Court emerged with a 5-3 opinion in Flood v. Kuhn, 103 U.S. 258 (1972). For Blackmun, the victory was more than a sporting triumph that affirmed a foundation of the professional game and crafted consensus for an all-time dream team. It was the harbinger of a 24-year career of traditions and changes, in which he would affirm established rules on most criminal issues and accommodate such dramatic views on individual rights that his reasoning often carried slim majorities with him.

With his retirement in June after participating in more than 800 cases—including his career-identifying 7-2 opinion in Roe v. Wade legalizing abortion—the definition of his tenure lies in the seeming contradiction of commitment and flexibility.

Along with a steadfast defense of the right to abortion in Roe, 410 U.S. 113 (1973), and successive cases, Blackmun's significance was in the power of his vote, says Jesse Choper, a constitutional law professor at the University of California at Berkeley. "For most of his years on the Court he was one of a bloc of four liberal justices that, in a great number of highly important cases, was able to bring in one of the
conservatives to achieve a liberal result," Choper says. "The law would be a lot different today if a conservative had been in Blackmun's seat."

Often overlooked in the public's emphasis on Roe is an appreciation of Blackmun's reflective, methodical, if not occasionally pointed, jurisprudence.

"By whatever standards one chooses to measure a justice—intelligence and modesty, courage and compassion, hard work and the authorship of great opinions—Justice Blackmun's legacy should cause him to be regarded as one of the truly great justices in American history," maintains Erwin Chemerinsky, a professor at the University of Southern California Law Center in Los Angeles.

Plainly, Blackmun has picked up his share of critics, primarily from conservative camps and primarily for Roe. He was recently excoriated in The New Republic as being an intellectual lightweight and an overly sentimental agonizer pulled to the left by clerks and other justices. The characterization, though, may falter on simplistic vehemence.

For his own assessment of his place in the philosophical spectrum and decisions of the Court, the 85-year-old Blackmun repeatedly quotes the late Justice Felix Frankfurter: "I haven't changed; it's the Court that changed under me" (obliquely pointing to the more conservative justices appointed by Presidents Ronald Reagan and George Bush). Ironically, when Blackmun arrived on the Court in 1970, neither supporters nor detractors expected him or the Court to change much of anything.

He was the nontechnical third choice of President Richard Nixon after the Senate successively rejected the politically motivated nominations of judges G. Harrold Carswell and Clement F. Haynesworth Jr. (To this day, Blackmun refers to himself as "Old Number 3," and sent Justice Anthony M. Kennedy Jr. a note welcoming him to the club after his confirmation following failed nominations of judges Robert Bork and Douglas Ginsburg.)

Blackmun was immediately viewed as the conservative sibling of fellow Minnesotan and chief justice Warren Burger and given the mildly derisive (although baseball-oriented) label of "The Minnesota Twin." During his first year on the Court he joined Burger in 96 percent of his votes, according to an analysis by the "Harvard Law Review." During the first five years he twined with Burger in 84 percent of votes.

Blackmun was always most at home with the Court's conservatives on criminal justice issues, the majority of the Court's docket. A fact-sensitive justice, he preferred a case-by-case, totality-of-circumstances approach. He was also a strong proponent of the harmless error rule as long as it was not treated as "merely a formula to incant before affirming the results of constitutionally infirm prosecutions." Wright v. Florida, 106 S. Ct. 3101 (1986).

Blackmun tended to defer to legislative intent in statutory cases defining crimes and their consequences. In constitutional cases, he generally took a dim view of such judge-made standards as the exclusionary rule for tainted evidence and the Miranda warnings on right to silence.

"[There comes] a point at which courts, consistent with their duty to administer the law, cannot continue to create barriers to law enforcement in the pursuit of a supervisory role that is properly the duty of the executive and legislative branches," he wrote in United States v. Janis, 428 U.S. 433 (1976).

Blackmun contributed to many conservative victories on substantive criminal issues throughout his career, including decisions to:

- Bar defendants from raising Fourth Amendment claims in habeas corpus proceedings if the issues had been fully and fairly litigated at the state trial. Stone v. Powell, 428 U.S. 465 (1976).
- Uphold the general constitutionality of the federal sentencing guidelines (as the case came to the Court on separation-of-powers grounds). Mistretta v. United States, 109 S. Ct. 647 (1989).

To his early detractors—then the liberal ideologues who would later revere him—his predictable law-and-order votes with Burger and other conservatives made him nothing more than "Hip-Pocket Harry." Blackmun resented it. "I have a little anger underneath it all ... from being categorized over the last 12 years I've been here in a way I never think fit," Blackmun acknowledged in a 1983 interview with The New York Times Magazine.

But just as Roe cannot define a 24-year career, neither can other opinions in a single area of the law.

Despite the comfort traditionalists found in his appearance as a scion of the Establishment, Blackmun had a common-man's aversion to the trappings of power in official Washington and worried about how judicial opinions would affect the ordinary people involved in extraordinary cases.

His professional development began after he was graduated summa cum laude in mathematics from Harvard College in 1929, called honors from Harvard Law School in 1932, and clerked with Judge John B. Sanborn on the 8th U.S. Circuit Court of Appeals.

At the Minneapolis firm of Dorsey & Whitney, Blackmun gained a reputation as a top tax and estate lawyer, and was a popular lecturer for continuing legal education courses and an adjunct

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professor of wills, property and tax.

Blackmun became general counsel for the Mayo Clinic and Mayo Association, and in 1959 President Dwight Eisenhower appointed him to the 8th Circuit. There he emerged as the court's tax expert and most studious member.

But what impressed Nixon at the height of Vietnam War protests in 1970 was Blackmun’s tough stand on crime and social order. His appellate court opinions rarely disturbed criminal convictions or sentences, according to an analysis by former 8th Circuit Chief Judge Donald Lay. In the circuit court appeal of a conscientious objector to the military draft, Blackmun scolded that “it may be hard [for people such as respondent] to grow up these days. Others, however, seem to manage.” United States v. Cummins, 425 F.2d 646 (1970).

As blunt as he might have been, Blackmun also placed great emphasis on the factual, legal and social context of a case. Compassion was another factor in his judicial equation. On the Supreme Court he often criticized colleagues for refusing to recognize that “compassion need not be exiled from the province of justice.” DeShaney v. Winnebago Department of Social Services, 489 U.S. 189 (1989).

"Because I grew up in poor surroundings," he once told an interviewer, "I know there is another world out there that we sometimes forget about."

Born into a blue-collar family, he worked part-time for spending money and expenses, including stints as a janitor and a milkman. Even in Washington he followed his Midwestern commonsense approach to life. He drove an old Volkswagen (until Court security convinced him otherwise), rented an apartment in Virginia, and did his own income tax returns.

His sense of how most people live echoed throughout his jurisprudence. In 1977 he pleaded in a habeas corpus case that "there is another world out there," a world inhabited by the poor, the powerless and the oppressed. "That's how Justice Blackmun lived his life, and it certainly affected how he looked at cases at the Supreme Court," recalls former law clerk Al Lauber, now a tax lawyer at Caplin & Drysdale in Washington, D.C. For Blackmun, Lauber says, it was a "constant struggle for the right answer in close cases, particularly those involving important personal rights."

The evolving Harry Blackmun who struggled for those answers may be most apparent in the death penalty debate. Blackmun personally opposed the death penalty, but enforced it as a judge, believing "...we should not allow personal preferences as to the wisdom of legislative action, or our distaste for such action, to guide our judicial decision[s]." Furman v. Georgia, 408 U.S. 238 (1972). Twenty-two years later he announced in Callins v. Collins, 114 S. Ct. 1127 (1994), that he could no longer condone the death sentence. He refused to "tinker with the machinery of death." This spring he cast the only vote to review a last-minute appeal by an Illinois serial killer executed in May.

His evolution from personal to judicial opposition to the death penalty followed both belief and the edges of a path in which the Court did "change under" him.

Blackmun brought with him an appellate judge’s appreciation for the potential abuse of habeas corpus, which allows federal review of state criminal convictions, as a stalling tactic. In the Burger and early Rehnquist Courts he joined movements to trim the Warren Court’s willingness to allow those appeals.

For the cautious, process-oriented Blackmun, habeas corpus was still a crucial tool for ensuring the proper administration of the death penalty in an inexact world. The more aggressive the Rehnquist Court became in its assault, the more Blackmun drifted from the majority.

By 1992 he had moved to a concurring stand because of his "ever-growing skepticism" that the Court’s new habeas corpus doctrine assured the death penalty would be constitutionally administered. Sawyer v. Whitley, 112 S. Ct. 2415 (1992).

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insensitive, caustically upholding a $5 filing fee for indigents seeking bankruptcy protection as "less than the price of a movie and little more than the cost of a pack or two of cigarettes." United States v. Kras, 409 U.S. 434 (1973). He was remonstrated by Justice Thurgood Marshall, who wrote, "The desperately poor ... have more important things to do with what little money they have—like attempting to provide some comfort for a gravely ill child.

But Blackmun matured into one of the Court's most consistent and articulate champions of individual rights, often drawing on the sense of compassion that was cultivated at the Mayo Clinic.

In contrast to his votes during his first five years on the Court, during his final five years he joined the conservative Chief Justice William Rehnquist in 53 percent of the cases and paired with the liberal Justice William Brennan in 76 percent.

But even before a philosophical shift (or change in the Court itself) that would characterize his tenure, his identifying moment came in his third term with Roe v. Wade, which brought together Blackmun's interests in law and medicine, and reflected his judicial style and philosophy. Blackmun did most of the research on the opinion himself, laboring on it for nearly two years—including work during the 1972 summer recess at the Mayo Clinic—before delivering it Jan. 22, 1973, with his wife, Dorothy, in the audience.

The opinion exhaustively traced the history of medical knowledge about abortion and the law of privacy, both of which led Blackmun to conclude the privacy right, while not specifically identified in the Constitution, was sufficiently grounded either in the 14th Amendment's concept of liberty or the 9th Amendment's reservation of rights to the people, "to encompass a woman's decision whether or not to terminate her pregnancy."

The 54-page decision concluded by recognizing its own boundaries with characteristic Blackmun humility: "We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer."

The decision, of course, thrust Blackmun into the public spotlight as few judges have been catapulted before or since. He has been hailed by women's rights activists as a hero and vilified by anti-abortion activists as a demon.

Former Harvard dean Griswold praises Blackmun for his stoicism in the face of such a protracted and political outcry over an opinion routinely assigned him.

"He has not complained, reacted or spoken out, but I know that this has been a heavy burden, which he has accepted with grace and dignity," Griswold says.

For Blackmun, the Roe decision concerned more than abortion.

"It's a step that had to be taken down the road toward the full emancipation of women," Blackmun told reporters when asked about it after announcing his retirement in March.

On the bench, he championed women's rights across the legal spectrum. He wrote, for example, the opinion of the Court in a case of enormous symbolic value, holding that employers could not bar women from higher-paying assembly jobs in lead-battery factories, even to safeguard maternal health. UAW v. Johnson Controls, 111 S. Ct. 1196 (1991).

Within the Court, too, Blackmun opened avenues for women as law clerks, hiring more females than any other justice, including Sandra Day O'Connor. Blackmun knew the importance of female law clerks was not limited to providing a different perspective. He also thought it was crucial to training role models for important positions in the legal profession, says Sherry F. Colb, a 1992 clerk who teaches law at Rutgers University in Camden, N.J.

Blackmun's insistence on equality was not limited to women. A constant theme of his jurisprudence was protection of the less powerful.

He had little tolerance for racial discrimination, a point signaled by his vote in several important decisions during his first term, including one banning non-job-related employment tests that had racially discriminatory effects. Griggs v. Duke Power Co., 401 U.S. 424 (1971).

Similarly, in affirmative action, he took the more liberal view in Regents of the University of California v. Bakke, 438 U.S. 265 (1978), a decision which, like Roe, was influenced by his regard for medicine. Citing the scarcity of minority doctors, he wrote "if ways are not found to remedy that situation [including medical school admission policies,] the country can never achieve its professed goal of a society that is not race conscious. ... In order to get beyond racism, we must first take in account race."

He continued to support most voluntary affirmative-action programs, and strongly dissented when the Court made them much more difficult for local governments to sustain, in Richmond v. J.A. Croson Co., 488 U.S. 469 (1989).

As the Rehnquist Court began to stymie judicial protections for minorities in the late 1980s, Blackmun joined Brennan and Marshall in leading the dissent. "One wonders whether the majority still believes that race discrimination ... is a problem in our society, or remember that it ever was," he wrote.
The Blackmun brief

Key opinions since joining the Supreme Court June 9, 1970:

McKeiver v. Pennsylvania (June 21, 1971) Wrote for majority that juveniles did not have criminal defendants' right to jury trial.


Bilgev v. Virginia (June 16, 1975) Wrote for majority upholding a newspaper's right to publish an advertisement for an organization that assisted women in obtaining abortions.

Beal v. Doe (June 20, 1977) Dissented from holding that Medicaid program did not require states to pay for low-income women's abortions.


Regents of the University of California v. Bakke (June 28, 1978) Dissented in part from holding that struck down minority admissions program at a California state medical school.

Garcia v. San Antonio Metropolitan Transit Authority (Feb. 19, 1985) Wrote for majority holding local governments to minimum wage requirements.


DeShaney v. Winnebago County (Feb. 22, 1989) Dissented from holding that public welfare officials did not have constitutional obligation to protect a child against parental abuse.

Webster v. Reproductive Health Services (July 3, 1989) Dissented from holding allowing state abortion restrictions.

Allegeny County v. ACLU Greater Pittsburgh Chapter (July 3, 1989) Wrote for majority holding a predominantly religious Christmas display could not be placed on government property.

Planned Parenthood v. Casey (June 29, 1992) Concurring in reaffirming a constitutional right to abortion.

Callins v. Collin (Feb. 22, 1994) Dissented from death penalty decision, writing "I feel morally and intellectually obligated simply to concede that the death penalty experiment has failed."

ABA AWARD

The ABA will honor Justice Harry A. Blackmun through a new award to individuals or groups that develop innovative solutions for problems in the justice system.

The Harry A. Blackmun Award will be administered annually by the ABA Coalition for Justice, which promotes citizen involvement in efforts to improve the justice system.

ABA Award

While he was able to forge close majorities with the Court's more moderate justices, Blackmun openly opposed what he saw as the Rehnquist Court's conservative activism and became one of the Court's most stirring dissenters. In the end, his was the role of elder statesman, who, finally, was in a position to take such steps as announce a change of heart on the death penalty or praise justices O'Connor, Kennedy and David H. Souter for their courage in reaffirming the Court's support for the right to an abortion in Planned Parenthood v. Casey, 112 S. Ct. 2791 (1992).

Indeed, by that time, Blackmun could empathize as Kennedy absorbed the predictable assault from abortion opponents for failing to cast the deciding vote in Casey to reverse Roe. When critics accused Kennedy of being "Blackmunized," the senior justice wrote him a note confiding "don't worry, it's not fatal."

For Justice Harry Blackmun, it was always just part of the commitment and flexibility in 24 years on the Court.