PROCEEDINGS IN THE SUPREME COURT OF THE UNITED STATES IN MEMORY OF JUSTICE BLACKMUN*

WEDNESDAY, OCTOBER 27, 1999

Present: CHIEF JUSTICE REHNQUIST, JUSTICE STEVENS, JUSTICE O'CONNOR, JUSTICE SCALIA, JUSTICE SOUTER, JUSTICE THOMAS, JUSTICE GINSBURG, and JUSTICE BREYER.

THE CHIEF JUSTICE said:

The Court is in special session this afternoon to receive the Resolutions of the Bar of the Supreme Court in tribute to our former colleague and friend, Justice Harry A. Blackmun.

The Court recognizes the Solicitor General.

The Solicitor General addressed the Court as follows:

MR. CHIEF JUSTICE, and may it please the Court:

At a meeting today of the Bar of this Court, Resolutions memorializing our deep respect and affection for Justice Blackmun were unanimously adopted. With the Court's leave, I shall summarize the Resolutions and ask that they be set forth in their entirety in the records of the Court.

RESOLUTION

Justice Harry A. Blackmun often joked that he came to the Supreme Court as "Old Number Three," having been the third nominee proposed by President Richard M. Nixon for

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*Justice Blackmun, who retired from the Court effective August 3, 1994 (512 U. S. VII), died in Arlington, Virginia, on March 4, 1999 (526 U. S. V).

the fabled seat once held by Justices Joseph Story, Oliver Wendell Holmes, Jr., Benjamin Cardozo, and Felix Frankfurter. At his confirmation hearings, he was asked by Senator James O. Eastland, the chairman of the Senate Judiciary Committee, whether he thought judges ought to be required to take senior status at the age of seventy. He replied that he was concerned that "[a]n arbitrary age limit can lead to some unfortunate consequences. I think of Mr. Justice Holmes and many others who have performed great service for the country after age 70. So much depends on the individual. I think some of us are old at a younger age than others are."[1]

The Justice was prescient. When he left the seat twenty-four years later, he was "Old Number Three" in a different sense: the third oldest Justice ever to serve on the Court. And much of his legacy is the product of his years on the Court after he turned 70: his opinions for the Court in *Santosky* v. *Kramer*, 455 U. S. 745 (1982), *Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U. S. 528 (1985), *Daubert* v. *Merrell Dow Pharmaceuticals*, 509 U. S. 579 (1993), and *J. E. B.* v. *Alabama*, 511 U. S. 127 (1994); his concurrences in *Planned Parenthood* v. *Casey*, 505 U. S. 833 (1992), and *Lee* v. *Weisman*, 505 U. S. 577 (1992); and his dissents in *Bowers* v. *Hardwick*, 478 U. S. 186 (1986), *McCleskey* v. *Kemp*, 481 U. S. 279 (1987), and *Callins* v. *Collins*, 510 U. S. 1141 (1994). If some men are old at a younger age than others, Justice Blackmun remained young to an older age, retaining until he died the intellectual curiosity, passion for hard work, and openness to new ideas and people that had been the hallmarks of his life.

The future Justice was born in Nashville, Illinois, on November 12, 1908. His family soon moved to St. Paul, Minnesota, where his father owned a grocery and hardware store in a blue-collar neighborhood. The Justice's early life, during which he experienced or observed economic, social, and

[1] *Harry A. Blackmun: Hearing Before the Sen. Comm. on the Judiciary*, 91st Cong., 2d Sess., 53 (1970).

familial hardships, proved a source of empathy in recognizing that "[t]here is another world 'out there,'" *Beal* v. *Doe*, 432 U. S. 438, 463 (1977) (Blackmun, J., dissenting), a world inhabited by the poor, the powerless, and the oppressed, the "frightened and forlorn." *Ohio* v. *Akron Center for Reproductive Health*, 497 U. S. 502, 541 (1990) (Blackmun, J., dissenting).

In 1925, one of his high school teachers, who recognized an intellectual spark in her pupil, persuaded Blackmun to seek his fortunes in the wider world, and he won a scholarship from the Minnesota Harvard Club to Harvard College. But because the scholarship paid only his tuition, the future Justice worked as a janitor and a milkman, painted handball courts, ran a motor launch for the coach of the Harvard crew team, and graded math papers to make ends meet. Despite this grueling schedule, he received his A.B. *summa cum laude* in mathematics in 1929. Although he had long planned on going to medical school, he decided instead to attend Harvard Law School. At the law school, his future colleague William J. Brennan, Jr., was a class ahead of him, and he counted his predecessor Felix Frankfurter among his professors. During his final year at law school, his team won the prestigious Ames Moot Court competition.

After graduation, Blackmun returned to Minnesota to clerk for Judge John B. Sanborn of the United States Court of Appeals for the Eighth Circuit. His year and a half with Judge Sanborn gave him a model for his own career as an appellate judge, and also gave him exposure to some of the problems that occupied his judicial career.

In 1934, having finished his clerkship, Blackmun joined the prestigious firm of Dorsey, Colman, Barker, Scott & Barber in Minneapolis. Fortuitously, the new associate was assigned to the firm's tax department, where he soon found his niche and had his first brush with the institution where he would spend more than a quarter century.

On October 14, 1935, this Court convened for the first time to hear oral argument in the magnificent building where it now sits. The first case on the docket was *Douglas* v. *Will-*

cuts, 296 U. S. 1 (1935). The litigation involved the question whether income from a trust established by a soon-to-be ex-husband in lieu of paying alimony was taxable to the grantor rather than to the recipient. Down in the lower left-hand corner of the taxpayer's reply brief was the name of a new associate, who had apparently joined the litigation team after the opening merits brief had been filed. It was Harry Blackmun. Less than a month after the argument—and on the day before the future Justice's twenty-seventh birthday—Chief Justice Hughes delivered a unanimous opinion rejecting the position taken by Blackmun's client.

On Midsummer's Day 1941, Blackmun married "Miss Clark," his beloved wife Dottie. They had three daughters: Nancy, Sally, and Susie. Blackmun's sixteen years at the Dorsey firm ended when he was named the first resident counsel of the famed Mayo Clinic in Rochester, Minnesota. He remembered his time there as the happiest decade of his life. Not only was he able to make connections between law and medicine but he and Mrs. Blackmun also cemented friendships that were to last for a lifetime.

In 1959, when Judge Sanborn decided to take senior status, he decided that his former law clerk, Harry Blackmun, should succeed him. He then wrote to Deputy Attorney General Lawrence E. Walsh, saying "I sincerely hope, as I know you do, that political considerations will not offensively enter into the selection of a successor. If they should, there might be no vacancy to fill."[2] According to Judge Richard S. Arnold of the Eighth Circuit, "[t]he story is that Judge Sanborn really meant this: 'Appoint Harry Blackmun, or there will be no appointment to make.'"[3] The hint worked, and President Eisenhower appointed Blackmun to fill Judge

[2] Letter from the Honorable John B. Sanborn to Lawrence E. Walsh (Feb. 21, 1959) (on file in John B. Sanborn file, Department of Justice appointment files, Federal Personnel Records Center, St. Louis, Missouri), quoted in Theodore J. Fetter, *A History of the United States Court of Appeals for the Eighth Circuit* 73 (1977).

[3] Richard S. Arnold, *A Tribute to Justice Harry A. Blackmun*, 108 Harv. L. Rev. 6, 7 (1994).

Sanborn's seat. Judge Blackmun took office on November 4, 1959.

Judge Blackmun wrote over 200 signed opinions during his time on the Eighth Circuit.[4] In light of his experience in practice, it is hardly surprising that over a quarter were tax-related; his taste for, and expertise in, intricate questions involving the Internal Revenue Code were well known. But the opinion he later described as the one of which he was proudest, *Jackson* v. *Bishop*, 404 F. 2d 571 (8th Cir. 1968), reflected a very different side of the judge's temperament. The case harkened back to his time clerking for Judge Sanborn, when he brought a petition from an inmate protesting cruel prison conditions to his judge's attention. "I know, Harry," Judge Sanborn said, "but we can't do anything about it." This time, Judge Blackmun *could* do something about the problem: *Jackson* was one of the first appellate opinions to hold prison practices unconstitutional under the Eighth Amendment. *Jackson* was a pioneering decision under the Eighth Amendment. Three inmates challenged the Arkansas prison system's essentially unregulated practice of whipping prisoners. In one of the first, if not *the* first, appellate opinions applying the Eighth Amendment to state prison conditions (rather than simply to the types of punishment for crime), Judge Blackmun declared that the prisoners were entitled to an injunction barring further use of corporal punishment. His scholarly and measured opinion powerfully conveyed Judge Blackmun's commitment to the inherent dignity of all people:

> "[W]e glean a recognition of, and a reliance in part upon, attitudes of contemporary society and comparative law. And the emphasis is on man's basic dignity, on civilized precepts, and on flexibility and improvement in standards of decency as society progresses and matures. . . .

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[4] For a thorough discussion of the Justice's career on the Court of Appeals, see Chief Judge Donald Lay, *The Cases of Blackmun, J., on the United States Court of Appeals for the Eighth Circuit 1959–1970*, 8 Hamline L. Rev. 2 (1985).

> [T]he limits of the Eighth Amendment's proscription are not easily or exactly defined, and we also have clear indications that the applicable standards are flexible, that disproportion, both among punishments and between punishment and crime, is a factor to be considered, and that broad and idealistic concepts of dignity, civilized standards, humanity, and decency are useful and usable." *Jackson*, 404 F. 2d, at 579.

At the same time, although he was prepared for bold doctrinal innovation when he saw support in the existing Supreme Court precedent, Judge Blackmun understood the constrained role of court of appeals judges. At the 1968 investiture of his colleague, Judge Myron H. Bright, Judge Blackmun reflected:

> "The concern [of a judge] is with what is proper law and with what is the proper result for each case. . . . There's always some uncertainty in the law and for you, . . . there will be periods of uncertainty in your work. There will be moments of struggle in trying to ascertain the correct from the incorrect. . . . There will be the awareness of the awfulness of judicial power, and although you will be on a multiple-judge court, you will experience the loneliness of decision. And there will be the embarrassment which occasionally comes when you have to conclude that a fine District Judge just might be wrong in his decision, and there will be the greater embarrassment which inevitably comes when the Supreme Court concludes that after all the District Judge was right and we were wrong. . . . And there will be the realization that an individual Circuit Judge is not important after all, that he is lost in the library, and that it does take two, not one, to make a decision. Judge Sanborn, John B., reminded me, not once but many times, that a United States Circuit Judge is just about as unimportant as an honorary pallbearer. . . . But there also will be—and I say this genuinely and seriously—the inner satisfaction and the inner reward which one

> possesses in being permitted to work on matters of real substance, in feeling that one's decision, at least in his own conscience, is right, and in knowing that hard work and hard thought and practical and positive scholarship are about all and about the best that anyone can offer. I'm certain that no part of the legal field is capable of providing any higher sense of satisfaction in its work and in its spirit than is the federal bench."[5]

This combination of humility and insight is illustrated by *Jones* v. *Alfred H. Mayer Co.*, 379 F. 2d 33 (8th Cir. 1967), which was later reversed by this Court. 392 U. S. 409 (1968). The case concerned the question whether 42 U. S. C. § 1982 outlawed private racial discrimination in the sale of real property. The existing Supreme Court precedent, Judge Blackmun felt, barred using § 1982 to reach purely private conduct: "It is not for our court, as an inferior one, to give full expression to any personal inclination any of us might have and to take the lead in expanding constitutional precepts when we are faced with a limiting Supreme Court decision which, so far as we are told directly, remains good law." 379 F. 2d, at 43. Nonetheless, Judge Blackmun essentially invited the Supreme Court to revisit the question—"It would not be too surprising if the Supreme Court one day were to hold that a court errs when it dismisses a complaint of this kind," *id.*, at 44—and he laid out the different analyses that might support such a result. Finally, Judge Blackmun expressed a desire for political solutions to pressing social problems:

> "Relief for the plaintiffs lies, we think, in fair housing legislation which will be tempered by the policy and exemption considerations which enter into thoughtfully considered statutes. Recent cases indicate that, if properly drawn, such legislation would encounter little constitutional objection. The power exists but its exercise is absent. The matter, thus, is one of policy, to be

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[5] Judge Myron H. Bright, *Justice Harry A. Blackmun: Some Personal Recollections*, 71 N. D. L. Rev. 7, 8–9 (1995).

> implemented in the customary manner by appropriate statutes directed to the need. If we are wrong in this conclusion, the Supreme Court will tell us so and in so doing surely will categorize and limit those of its prior decisions, cited herein, which we feel are restrictive upon us." *Id.*, at 45 (citations omitted).

The meticulousness and modesty of Judge Blackmun's approach to difficult questions made him an appealing prospect for elevation to the Supreme Court when President Richard M. Nixon's first two attempts to fill the seat left vacant by Justice Abe Fortas' resignation failed in the Senate.

The most striking thing about the future Justice's confirmation hearings—which lasted only one day and at which he was the only witness—was the virtual absence of pointed consideration of any of the issues with which he would become most closely identified during his time on the Court, save for a few questions about whether he could apply the death penalty given his personal opposition.

Nonetheless, the reported comments presaged some significant characteristics of Justice Blackmun's approach to his work. The Report of the Senate Judiciary Committee, which unanimously recommended his confirmation, described him as a "man of learning and humility."[6] And the letter from the American Bar Association's Standing Committee on the Federal Judiciary, which also unanimously endorsed Blackmun's nomination, described him as "one who conscientiously and with open mind weighs every reasonable argument with careful knowledge of the record, the arguments and the law."[7] It also reported the comments of a district court judge from the Eighth Circuit that Blackmun was "a gifted, scholarly judge who has an unusual capacity for the production of opinions . . . which present learned treatises of the factual and legal questions involved. And coupled with all of his erudition, he is unassuming, kind and considerate

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[6] S. Exec. Rep. No. 18, 91st Cong., 2d Sess., 2 (1970).

[7] Hearing, *supra*, note 1, at 9.

in all of his associations with the Bar and the public."[8] The Senate unanimously confirmed the nomination on May 12, 1970, and Justice Blackmun took the oath of office on June 9, 1970.

Justice Blackmun served on this Court for twenty-four years. Perhaps more than any other Justice in modern times, he became identified in the popular mind with a single decision: his opinion for the Court in *Roe* v. *Wade*, 410 U. S. 113 (1973). In *Roe*, this Court held that the Due Process Clause of the Fourteenth Amendment protects, under certain circumstances, a woman's decision whether to carry a pregnancy to term. Throughout his service on the Court, the Justice vigorously defended the principles laid out in *Roe*. His last opinion for the Court in an abortion case, *Thornburgh* v. *American College of Obstetricians and Gynecologists*, 476 U. S. 747, 772 (1986) (citations omitted), offered a particularly eloquent expression of this commitment to individual freedom:

> "Our cases long have recognized that the Constitution embodies a promise that a certain private sphere of individual liberty will be kept largely beyond the reach of government. That promise extends to women as well as to men. Few decisions are more personal and intimate, more properly private, or more basic to individual dignity and autonomy, than a woman's decision—with the guidance of her physician and within the limits specified in *Roe*—whether to end her pregnancy. A woman's right to make that choice freely is fundamental. Any other result, in our view, would protect inadequately a central part of the sphere of liberty that our law guarantees equally to all."

Justice Blackmun and his family paid a heavy price for his commitment to a constitutionally protected zone of privacy for others: he was the subject of fierce protests, hate mail, repeated picketing, death threats, and a bullet fired through

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[8] *Id.*, at 10.

his living room window into a chair in which his wife had recently been sitting.

The Justice often referred to *Roe* as a landmark in the emancipation of women. This view was borne out by the joint opinion of three of his colleagues who joined the Court after *Roe*, JUSTICES O'CONNOR, KENNEDY, and SOUTER, in *Planned Parenthood* v. *Casey*, 505 U. S. 833, 856 (1992) (citation omitted):

> "[F]or two decades of economic and social developments, people have organized intimate relationships and made choices that define their views of themselves and their places in society, in reliance on the availability of abortion in the event that contraception should fail. The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives. The Constitution serves human values, and while the effect of reliance on *Roe* cannot be exactly measured, neither can the certain cost of overruling *Roe* for people who have ordered their thinking and living around that case be dismissed."

Near the beginning of his opinion for the Court in *Roe*, Justice Blackmun quoted Justice Holmes' statement that the Constitution "is made for people of fundamentally differing views," 410 U. S., at 117 (quoting *Lochner* v. *New York*, 198 U. S. 45, 76 (1905) (Holmes, J., dissenting)). That imaginative empathy informed far more than the Justice's abortion jurisprudence. In his dissent in *Bowers* v. *Hardwick*, 478 U. S. 186 (1986), for example, the Justice argued that the liberty guaranteed by the Due Process Clause protected the intimate decisions of gays and lesbians:

> "The fact that individuals define themselves in a significant way through their intimate sexual relationships with others suggests, in a Nation as diverse as ours, that there may be many "right" ways of conducting those relationships, and that much of the richness of a relation-

> ship will come from the freedom an individual has to *choose* the form and nature of these intensely personal bonds. . . . [A] necessary corollary of giving individuals freedom to choose how to conduct their lives is acceptance of the fact that different individuals will make different choices." *Id.*, at 205–206 (citation omitted; emphasis in original).

He ended the dissent by maintaining that "depriving individuals of the right to choose for themselves how to conduct their intimate relationships poses a far greater threat to the values most deeply rooted in our Nation's history than tolerance of nonconformity could ever do," *id.*, at 214, echoing a point he had made once in paraphrasing Pogo: " 'We have met the enemy and he is us,' *he is us.*"[9]

This recognition that the true measure of the Constitution lies "in the way we treat those who are not exactly like us, in the way we treat those who do not behave as we do, in the way we treat each other,"[10] was a hallmark of the Justice's thinking. In the Justice's first Term on the Court, he wrote the Court's pathbreaking opinion in *Graham* v. *Richardson*, 403 U. S. 365 (1971). The case involved challenges to several state welfare programs that either excluded aliens altogether or severely restricted their eligibility for benefits. Justice Blackmun saw that aliens presented "a prime example of a 'discrete and insular' minority for whom . . . heightened judicial solicitude is appropriate." 403 U. S., at 372 (quoting *United States* v. *Carolene Products Co.*, 304 U. S. 144, 152–153, n. 4 (1938)). The Justice's opinion for the Court was the first to invoke the now-famous and influential, but then obscure, "footnote four" from *Carolene Products* to explain the reason for heightened judicial scrutiny of discrete and insular groups. But just as significant as the Justice's

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[9] Harry A. Blackmun, *Some Goals for Legal Education*, 1 Ohio N. U. L. Rev. 403, 405 (1974) (emphasis supplied by Justice Blackmun).

[10] Harry A. Blackmun, *John Jay and the Federalist Papers*, 8 Pace L. Rev. 237, 247 (1988).

recognition of aliens' need for judicial protection was his celebration of the special contributions aliens can make to American life: they represent "some of the diverse elements that are available, competent, and contributory to the richness of our society." *Ambach* v. *Norwick*, 441 U. S. 68, 88 (1979) (Blackmun, J., dissenting).

Similarly, the Justice's many opinions regarding the rights of Native Americans illustrate his view that judgment requires both knowledge and empathy. Perhaps in no other area did the Justice's longstanding interest in American history intersect so completely with his judicial approach. The Justice's opinion for the Court in *United States* v. *Sioux Nation of Indians*, 448 U. S. 371 (1980), for example, set out in scrupulous detail how the Sioux had been stripped of the Black Hills of South Dakota and of their way of life. Strictly speaking, the detail might have been unnecessary to resolving the technical issues of congressional intent, Court of Claims jurisdiction, and principles of claim and issue preclusion that determined the outcome of the case. But it was critical nonetheless to the Justice's central mission: grounding the judgment for the Sioux in the "moral debt" arising out of the dependence to which the United States had reduced a proud and self-reliant people. *Id.*, at 397.

This sense of promises betrayed was even more pointed in the elegiac tone of the Justice's dissent in *South Carolina* v. *Catawba Indian Tribe, Inc.*, 476 U. S. 498 (1986), which rested on the premise that statutory ambiguities should be resolved in favor of Native Americans' claims because of "an altogether proper reluctance by the judiciary to assume that Congress has chosen further to disadvantage a people whom our Nation long ago reduced to a state of dependency." *Id.*, at 520 (Blackmun, J., dissenting). The Justice argued that interpretation of the statute should take into account how "*the Indians* would have understood" it. *Id.*, at 527 (emphasis added). By moving from the abstract principle to the concrete inclusion of the Catawbas' perspective, Justice Blackmun moved from a sympathetic to an empathetic viewpoint. As Judge Richard Arnold has remarked, the Justice's

writing reflects "a struggle to put oneself in other people's shoes."[11]

The Justice's concern with prison conditions continued along the path on which he first set out as a law clerk and then as a judge on the court of appeals in *Jackson* v. *Bishop.* In his last Term on the Court, the Justice summed up his approach in his concurrence in *Farmer* v. *Brennan*, 511 U. S. 825 (1994):

> "Although formally sentenced to a term of incarceration, many inmates discover that their punishment . . . degenerates into a reign of terror unmitigated by the protection supposedly afforded by prison officials.
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> "The fact that our prisons are badly overcrowded and understaffed may well explain many of the shortcomings of our penal systems. But our Constitution sets minimal standards governing the administration of punishment in this country, and thus it is no answer to the complaints of the brutalized inmate that the resources are unavailable to protect him from what, in reality, is nothing less than torture. I stated in dissent in *United States* v. *Bailey:* "It is society's responsibility to protect the life and health of its prisoners. '[W]hen a sheriff or a marshall *[sic]* takes a man from the courthouse in a prison van and transports him to confinement for two or three or ten years, *this is our act. We* have tolled the bell for him. And whether we like it or not, we have made him our collective responsibility. We are free to do something about him; he is not." *Id.*, at 853–854 (Blackmun, J., concurring) (citations omitted; emphasis in original).

The Justice's jurisprudential sense of connection with and responsibility towards prisoners was accompanied, as was so characteristic of him, by a personal sense of connection as well. He regularly received, and read, a prison newspaper—the Stillwater (Minn.) *Prison Mirror.* Indeed, the

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[11] Richard S. Arnold, *Mr. Justice Blackmun: An Appreciation*, 8 Hamline L. Rev. 20, 24 (1985).

Justice traveled to Minnesota to present an award to Robert Morgan, the inmate-editor of the *Mirror*. And the Justice also included prison administrators and officials in the Justice and Society seminar he and Norval Morris led for nearly twenty summers at the Aspen Institute. He hoped both that these officials would educate the other participants about the concerns of the world inside the walls and that the seminar would press them to think critically about their work and its relationship to broad issues of justice and decency.

Finally, the Justice was a pioneer in thinking about the constitutional rights of the mentally ill and mentally disabled. In *Jackson* v. *Indiana*, 406 U. S. 715, 738 (1972), his opinion for the Court advanced the proposition that "[a]t the least, due process requires that the nature and duration of [an involuntary] commitment [to a mental institution] bear some reasonable relation to the purpose for which the individual is committed." He elaborated on this theme in his concurrence in *Youngberg* v. *Romeo*, 457 U. S. 307, 326 (1982):

> "If a state court orders a mentally retarded person committed for "care and treatment," however, I believe that due process might well bind the State to ensure that the conditions of his commitment bear some reasonable relation to each of those goals. In such a case, commitment without any "treatment" whatsoever would not bear a reasonable relation to the purposes of the person's confinement."

Thus, if a mentally disabled person lost his minimal self-care skills because of the State's failure to provide him with training, he might suffer "a loss of liberty quite distinct from—and as serious as—the loss of safety and freedom from unreasonable restraints. For many mentally retarded people, the difference between the capacity to do things for themselves within an institution and total dependence on the institution for all of their needs is as much liberty as they ever will know." *Id.*, at 327.

One of the Justice's most widely quoted images evoked the presence of "another world out there," that an overly comfortable Court might either "ignore or fea[r] to recognize." *Ohio* v. *Akron Center for Reproductive Health*, 497 U. S. 502, 541–542 (1990) (Blackmun, J., dissenting); *Harris* v. *McRae*, 448 U. S. 297, 346 (1980) (Blackmun, J., dissenting); *Beal* v. *Doe*, 432 U. S. 438, 463 (1977) (Blackmun, J., dissenting). While he used this precise phrase only in his dissents in abortion rights cases, it reflected a broader commitment to learning about, and facing, facts in the world. For example, in his separate opinion in *Regents of the Univ. of California* v. *Bakke*, 438 U. S. 265, 407 (1978), the Justice expressed his support for race-conscious affirmative action in higher education with these words: "The sooner we get down the road toward accepting and being a part of the real world, and not shutting it out and away from us, the sooner will these difficulties vanish from the scene." Similarly, in his dissent in *City of Richmond* v. *J. A. Croson Co.*, 488 U. S. 469 (1989), the Justice chided the Court for ignoring the historical context in which the city's affirmative action plan had been developed:

> "I never thought that I would live to see the day when the city of Richmond, Virginia, the cradle of the Old Confederacy, sought on its own, within a narrow confine, to lessen the stark impact of persistent discrimination. But Richmond, to its great credit, acted. Yet this Court, the supposed bastion of equality, strikes down Richmond's efforts as though discrimination had never existed or was not demonstrated in this particular litigation. . . . History is irrefutable . . . So the Court today regresses. I am confident, however, that, given time, it one day again will do its best to fulfill the great promises of the Constitution's Preamble and of the guarantees embodied in the Bill of Rights—a fulfillment that would make this Nation very special." 488 U. S., at 561–562 (1989) (Blackmun, J., dissenting).

This understanding of the Constitution as a living document was also powerfully expressed in the Justice's dissent in *Lassiter* v. *Department of Social Services*, 452 U. S. 18, 58–59 (1981), where the Justice argued that the Due Process Clause required the State to provide counsel to indigent parents before terminating their parental rights:

> "Ours, supposedly, is "a maturing society," *Trop* v. *Dulles*, 356 U. S. 86, 101 (1958) (plurality opinion), and our notion of due process is, "perhaps, the least frozen concept of our law." *Griffin* v. *Illinois*, 351 U. S. 12, 20 (1956) (opinion concurring in judgment). If the Court in *Boddie* v. *Connecticut*, 401 U. S. 371 (1971), was able to perceive as constitutionally necessary the access to judicial resources required to dissolve a marriage at the behest of private parties, surely it should perceive as similarly necessary the requested access to legal resources when the State itself seeks to dissolve the intimate and personal family bonds between parent and child. It will not open the "floodgates" that, I suspect, the Court fears. On the contrary, we cannot constitutionally afford the closure that the result in this sad case imposes upon us all."

The Justice had a special wisdom and sensitivity about the relationship among history, race, and gender. He knew when the law ought to take account of race or gender: consider his often-quoted statement in *Bakke*, that "[i]n order to get beyond racism, we must first take account of race. There is no other way. And in order to treat some persons equally, we must treat them differently. We cannot—we dare not—let the Equal Protection Clause perpetuate racial supremacy," 438 U. S., at 407 (separate opinion of Blackmun, J.). But he also knew when the continued use of race or gender would serve only "to ratify and perpetuate invidious, archaic, and overbroad stereotypes about the relative abilities of men and women." *J. E. B.* v. *Alabama*, 511 U. S. 127, 131 (1994).

In a related vein, it was the Justice's exposure to the actual operation of the capital punishment system that prompted his conclusion, expressed in his dissent in *Callins* v. *Collins*, 510 U. S. 1141 (1994), that "[e]xperience has taught us that the constitutional goal of eliminating arbitrariness and discrimination from the administration of death . . . can never be achieved without compromising an equally essential component of fundamental fairness—individualized sentencing." *Id.*, at 1144:

> "From this day forward, I no longer shall tinker with the machinery of death. For more than 20 years I have endeavored—indeed, I have struggled—along with a majority of this Court, to develop procedural and substantive rules that would lend more than the mere appearance of fairness to the death penalty endeavor. Rather than continue to coddle the Court's delusion that the desired level of fairness has been achieved and the need for regulation eviscerated, I feel morally and intellectually obligated simply to concede that the death penalty experiment has failed. It is virtually self-evident to me now that no combination of procedural rules or substantive regulations ever can save the death penalty from its inherent constitutional deficiencies. The basic question—does the system accurately and consistently determine which defendants "deserve" to die?—cannot be answered in the affirmative. . . . The problem is that the inevitability of factual, legal, and moral error gives us a system that we know must wrongly kill some defendants, a system that fails to deliver the fair, consistent, and reliable sentences of death required by the Constitution." *Id.*, at 1145–1146.

On a more abstract level, the Justice's commitment to learning about and facing the facts was expressed by his widely praised and influential opinion for the Court in *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 509 U. S. 579 (1993). In *Daubert*, the Justice addressed one of the central

issues in contemporary litigation: the standard of admissibility for expert testimony. Federal Rule of Evidence 702 provides that "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert . . . may testify thereto . . . ." The Justice interpreted this rule to require that the content of the expert's testimony be "scientific" in the sense that it be "ground[ed] in the methods and procedures of science," 509 U. S., at 590, and that it concern "knowledge," not merely "subjective belief or unsupported speculation," *ibid.* The Justice understood that science is a method or a procedure rather than simply a body of facts. *Daubert*'s discussion of the factors that make knowledge "scientific"—falsifiability, peer review, error rates, and general acceptance within the relevant scientific community, *id.*, at 592–594—reflected the Justice's longstanding comfort with and receptivity to scientific and social scientific ways of understanding complex events. Other examples of his approach include *Barefoot* v. *Estelle*, 463 U. S. 880, 920–929 (1983) (Blackmun, J., dissenting) (discussing the validity of predictions regarding future dangerousness); *Ballew* v. *Georgia*, 435 U. S. 223, 230–239 (1978) (opinion of Blackmun, J.) (discussing studies of jury size); and *Castaneda* v. *Partida*, 430 U. S. 482, 496–497, and n. 17 (1977) (discussing models of statistical probability and standard deviations).

No account of the Justice's time on the Supreme Court would be complete without a discussion of his tax opinions. Many observers, including the Justice himself, remarked on the large number of tax cases he was assigned. The Justice sometimes joked that these opinions were the result of his being "in the doghouse with the Chief," but in fact he retained both an interest and an expertise in taxation throughout his judicial tenure.

One recent study concluded that during his time on the Court Justice Blackmun wrote majority opinions in thirty-three federal tax cases and concurring or dissenting opinions

in an additional twenty-six federal tax cases.[12] The Justice also wrote many significant opinions in cases involving state taxation schemes, the Commerce Clause, and the Due Process Clause.[13] As Robert Green, one of the Justice's former clerks and a prominent tax scholar has noted, "[m]any of Justice Blackmun's tax opinions are legendary among tax lawyers and academics. It is no coincidence that law school casebooks in federal income taxation typically include more cases written by Justice Blackmun than by any other Supreme Court Justice."[14] For example, the Justice wrote a series of influential opinions on the Internal Revenue Code's treatment of capital expenditures and its connection to the matching principle: *Commissioner* v. *Lincoln Savings and Loan Association*, 403 U. S. 345 (1971); *Commissioner* v. *Idaho Power Co.*, 418 U. S. 1 (1974); *Thor Power Tool Co.* v. *Commissioner*, 439 U. S. 522 (1979); *INDOPCO, Inc.* v. *Commissioner*, 503 U. S. 79 (1992); and *Newark Morning Ledger Co.* v. *United States*, 507 U. S. 546 (1993).

His opinions reflected a pragmatic, yet economically sophisticated, approach to the issue and drew on a broad range of sources: the text of the Code provisions involved and their legislative history, the broader legislative purpose of the Code, post-enactment developments, including the Internal Revenue Service's interpretations, and the practical effects different decisions would have. They employed a perceptive "tax logic," which interpreted the Internal Revenue Code in a sensible and coherent way. As with so many areas of the Justice's jurisprudence, his approach to tax law was beautifully summarized in the eulogy delivered at his memorial service by his former minister, the Reverend William Holmes:

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[12] Robert A. Green, *Justice Blackmun's Federal Tax Jurisprudence*, 26 Hastings Const. L. Q. 109 (1998).

[13] See Dan T. Coenen, *Justice Blackmun, Federalism and Separation of Powers*, 97 Dick. L. Rev. 541 (1993); Karen Nelson Moore, *Justice Blackmun's Contributions on the Court: The Commercial Speech and State Taxation Examples*, 8 Hamline L. Rev. 29 (1985).

[14] Green, *supra*, note 12, at 110.

> "Harry Blackmun excelled at math, and he knew the difference between mathematics and the law. What he brought to both the law and Scripture was neither an absolute subjectivism nor an absolute relativism, but creative fidelity marked by humility, with a twinkle in his eye."

That twinkle in the Justice's eye occasionally made its way into the pages of the United States Reports. For example, in his opinion for the Court in *Flood* v. *Kuhn*, 407 U. S. 258, 260–264 (1972), the Justice took his readers for a tour through his beloved game of baseball, complete with a list of notable players—he apparently forgot to include Mel Ott, for which his clerks repeatedly teased him. But the twinkle was especially familiar to the many people whose lives he touched personally: his colleagues on the Eighth Circuit, whom he delighted with his annual appearance at the Circuit Conference; his law clerks, who became members of his family and whose professional lives were changed forever by their year with the Justice; the police officers, staff in the clerk's office, and other Court personnel, whom he treated with an affection and respect they returned twofold; his secretaries and messengers, who became close professional and personal companions; and, most of all, his family—his wife Dottie, his daughters Nancy, Sally, and Susie, and his grandchildren.

Justice Blackmun had a deep and abiding passion for American history. Above his desk, he kept a copy of a statement by his hero, Abraham Lincoln:

> "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."

Through his commitment to a living Constitution and to careful interpretation of the law, Justice Blackmun gave voice to what Lincoln called, in his First Inaugural Address, "the better angels of our nature." We will miss him.

Wherefore, it is accordingly

RESOLVED that we, the Bar of the Supreme Court of the United States, express our admiration and respect for Justice Harry A. Blackmun, our sadness at his death, and our condolences to his family; and it is further

RESOLVED that the Solicitor General be asked to present these Resolutions to the Court and that the Attorney General be asked to move that they be inscribed on the Court's permanent records.

THE CHIEF JUSTICE said:

I recognize the Attorney General of the United States.

Attorney General Reno addressed the Court as follows:

MR. CHIEF JUSTICE, and may it please the Court:

The Bar of the Court met today to honor the memory of Harry A. Blackmun, Associate Justice of the Supreme Court from 1970 to 1994. Justice Blackmun was best known for his opinion for the Court in *Roe* v. *Wade*. Throughout his tenure, Justice Blackmun continued to write frequently, both for the Court and in dissent, reaffirming his belief in the correctness and the importance of the *Roe* decision. As the Solicitor General's description of the Bar Resolution reminds us, Justice Blackmun also made significant contributions to the law in a variety of other areas, in fields as diverse as Indian law and tax law.

Justice Blackmun's tenure on the Court reflected his strong, midwestern work ethic. It can be traced to the values he developed during his childhood in Minnesota. In-

deed, that work ethic characterized his entire academic and professional career.

During his early years of law practice, Justice Blackmun met and married his beloved wife, Dottie, with whom he spent the remainder of his life. They had three daughters, Nancy, Sally, and Susie, whose success in school, careers, and families no doubt served as early support for the Justice's commitment to equality of opportunity for women. That commitment was reflected in many of his opinions for this Court involving, for example, sex discrimination in employment, state law limitations on child support recipients, jury selection, eligibility for AFDC benefits and, of course, the regulation of abortion at issue in *Roe* v. *Wade*.

The *Roe* v. *Wade* decision also reflected Justice Blackmun's belief that the Constitution protects a range of intimate and personal choices from intrusion by the state. That belief was at the core of his dissenting opinion in *Bowers* v. *Hardwick*, in which the Justice argued that the Constitution affords protection of a right to engage in consensual homosexual activity. Justice Blackmun's jurisprudence often reflected a distrust of abstractions and absolutes. That judicial attitude took various forms. Perhaps most importantly, it was manifested in his careful attention to the facts and the records of individual cases and in a conviction that the Supreme Court was obligated to resolve fairly the claims of particular litigants rather than simply announce broad legal principles to guide future adjudication.

Justice Blackmun's pragmatic approach underlay this concurring opinion in *Regents of the University of California* v. *Bakke*, in which as the Solicitor General has noted, the Justice expressed his commitment to the ultimate goal of a race-blind society. He concluded that the achievement of that goal required the temporary use of race-conscious measures. His statement, quoted by the Solicitor General, 'in order to get beyond racism, we must first take account of race,' is reflective of his view that the just solution of constitutional problems may depend less upon abstract theorizing than on a dispassionate assessment of the world as it is, and

emphasizing that the Court must take account of facts on the ground. Justice Blackmun stressed in particular the need to appreciate the circumstances of persons who often seem invisible to judges and lawyers.

From the outset, Justice Blackmun spoke for the Court in giving meaning to the guarantee of equal protection in cases involving aliens and the mentally ill. He also discussed the gratuitous suffering sometimes visited upon prison inmates and cautioned that society as a whole bears responsibility for their humane treatment.

At the same time, however, Justice Blackmun's real world approach led him to recognize the deference due prison officials in implementing legitimate prison interests to insure prison security and order. Justice Blackmun's Fourth Amendment jurisprudence similarly recognized that intrusions on personal privacy that are not unduly onerous are a necessary cost of living in a safe and orderly society. In a related vein, it was the Justice's exposure for more than 20 years to the actual operation of the capital punishment system that prompted him to conclude, as expressed in his dissent in *Callins* v. *Collins*, that the constitutional goal of eliminating arbitrariness and discrimination from the administration of death can never be achieved without compromising an equally essential component of fundamental fairness, individualized sentencing.

Most people strongly disagree with his conclusion, but no one who watched Justice Blackmun move from dissent in *Furman* v. *Georgia* to dissent in *Callins* can doubt the sincerity or effort this dedicated jurist made to reconcile his own views about the death penalty with his responsibilities as a judge.

Many of Justice Blackmun's notable opinions for the Court in areas as diverse as federal and state taxation, expert evidence, separation of powers, due process, and the Commerce Clause are discussed in the Resolution. One area in which the Justice's opinions has had a particularly lasting impact is the sphere of commercial speech. Justice Blackmun wrote the opinions for the Court in *Bigelow* v. *Virginia*, *Virginia*

State Board of Pharmacy v. *Virginia State Consumers Council*, and *Bates* v. *State Bar of Arizona*. These decisions marked this Court's first recognition that speech proposing a commercial transaction is entitled to First Amendment protection and they have provided the foundation for the Court's commercial speech jurisprudence.

Characteristically, Justice Blackmun did not ground his analysis in abstract theory or in an absolutist conception of the First Amendment. Rather, his opinions for the Court emphasized the substantial practical interest of ordinary citizens in making informed choices concerning possible uses of their money.

Justice Blackmun was a human being of deep and great kindness and compassion, who remained always aware of the profound impact of the law upon the community and the consequent responsibilities of judges to the litigants who appear before them and to the community at large. In his performance of those responsibilities, he epitomized the highest ideals of public service.

MR. CHIEF JUSTICE, on behalf of the lawyers of this Nation, and in particular, of the Bar of this Court, I respectfully request that the Resolutions presented to you in honor and in celebration of the memory of Justice Harry A. Blackmun be accepted by the Court and that they, together with the chronicle of these proceedings, be ordered kept for all time in the records of this Court.

THE CHIEF JUSTICE said:

Thank you, Attorney General Reno and Solicitor General Waxman, for your presentations today in memory of our late colleague and friend, Justice Harry A. Blackmun. We also extend to Chairman Pamela S. Karlan and the members of the Committee on Resolutions, Chairman David W. Odgen, and members of the Arrangements Committee, and Harold H. Koh, Chairman of today's meeting of the Bar our appreciation for these appropriate Resolutions.

Your motion that these Resolutions be made a part of the permanent records of the Court is granted.

Harry Blackmun's service on this Court and his contribution to American law will long be remembered. He was born in Illinois in 1908 and grew up in St. Paul, Minnesota. He was known when he first came here along with Chief Justice Burger as the Minnesota twins, but Bill Douglas always said they had the wrong people as the Minnesota twins, because he was born in Minnesota so that he and Chief Justice Burger should have been the Minnesota twins.

Harry Blackmun received a scholarship to Harvard University where he majored in mathematics and graduated *summa cum laude.* He began his legal career serving as a clerk to Judge John Sanborn on the Court of Appeals for the Eighth Circuit. He practiced law for 16 years with the Dorsey firm in Minneapolis, and then he went to the Mayo Clinic, became the first resident counsel there, where he combined his love for both law and medicine.

In 1959, President Eisenhower nominated him to serve on the Court of Appeals for the Eighth Circuit filling, appropriate enough, the vacant seat of Judge Sanborn, for whom he had clerked 26 years earlier. After serving nine years on the Eighth Circuit, he was appointed by President Nixon to a seat on the Supreme Court in 1970. He was the 98th Justice to serve on the Court and served for nearly a quarter of a century. He was a worthy successor, as pointed out by the Solicitor General, to the predecessors in the seat which he occupied, Joseph Story, Oliver Wendell Holmes, Benjamin Cardozo, and Felix Frankfurter.

During his years on the bench, Justice Blackmun spoke for the Court in more than 250 opinions. The publicity which attended the *Roe* v. *Wade* opinion, overshadowed some of the other important decisions which he authored. These included *Mistretta* v. *United States*, in which the sentencing guidelines were held to be constitutional, *Daubert* v. *Merrell Dow Pharmaceuticals*, which you mentioned, Solicitor General, concerned the admissibility of scientific evidence in federal courts, and *Virginia State Board of Pharmacy* v.

Virginia Citizens Consumer Council—you mentioned that, Attorney General Reno—which was a very seminal opinion dealing with commercial speech. And in *Complete Auto Transit* v. *Brady*, he enunciated for the Court the modern rule that the Commerce Clause of the Constitution doesn't prevent interstate commerce from being required to bear its fair share of state taxation.

His legacy also includes *Flood* v. *Kuhn* which both held fast to baseball's antitrust exemption and demonstrated Justice Blackmun's knowledge of the game and all its accompanying lore.

Moving to Washington from Minnesota in 1970 in no way diminished his enthusiasm for the Minnesota Twins or the Minnesota Vikings, even when they were playing the Washington Redskins.

Justice Blackmun was cautious and methodical in his judicial work. He was the statistician for the conference, telling us at the close of each meeting how many cases we had granted certiorari on in the present Term compared to the number we had granted in the preceding Term. He also brought a practical eye to the Court, as his many opinions interpreting the Fourth Amendment illustrate, and in *Wyman* v. *James*, which is one of his first opinions, in fact, it was his first majority opinion on the Court, he rejected a challenge on behalf of the Court of a Fourth Amendment challenge to a New York law conditioning welfare benefits on in-home visits by caseworkers. Non-adversarial visits, he wrote, were minimally intrusive and were designed to benefit dependent children. In 1987, he authored the opinion for the Court of *New York* v. *Burger*, in which a Fourth Amendment challenge to New York's law authorizing warrantless inspections of junkyards was rejected. And in *California* v. *Acevedo*, Justice Blackmun wrote for the Court that police may search a bag found in an automobile without a warrant.

Justice Blackmun's opinions convey only a part of his legacy. He will also be remembered for the personal qualities he brought to the Court during his 24 years of service. He

was a pensive and a compassionate man. He will be remembered for this integrity, his high sense of justice, and his exemplification of decency, modesty, and civility.

His friends here and on the Court and throughout the judiciary and indeed, throughout the country, will continue to miss him.