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## A Tribute to Justice Harry A. Blackmun

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## Richard Blumenthal\*

For any former Supreme Court law clerk to pay tribute to his one time boss certainly is a rare treat and opportunity — a special one for me and Cynthia today — and I welcome the honor.

I will try to be brief for it has been a long day, and the hour grows late. Yogi Berra perhaps said it best. (By the way, no tribute to Justice Blackmun could be complete without an allusion to baseball.) When Berra was still playing left field, before he became a great catcher, and was bothered by the lengthening afternoon shadows at the stadium, especially toward the end of the season, he said, “It gets late early out there.”

Harry A. Blackmun himself values brevity. In conversation, as in life in general, he is a man more inclined to listen than speak, choosing words, like friends, sparingly and with care.

Our conversations at the beginning of my clerkship consisted in large part of an exchange of silences, punctuated by my reminiscences about my grandfather’s farm in Nebraska, and his recollections of growing up in Minnesota. The weather can be pretty cold in both places. But even at the beginning of our friendship, the silences notwithstanding, what impressed me most about him was his genuine warmth and caring.

In the weeks and months that followed there were fewer silences, and I came to know and respect beyond words the personal qualities of this great listener: his keen intellect, his unimpeachable integrity, and his powerful loyalty and love for those who lived with him, at the Court as well as at home.

Living with him at the Court meant breakfast *every* morning at 8:00 a.m., with religious regularity, no continuances accepted. I was skeptical about the value of these morning breakfasts, as only rarely was business discussed and there was so much *real* work that could have been done during this hour. Years later, I appreciated their purpose — not to shape opinions, the Court’s or our own, but to nurture relationships.

Also in later years, I came to realize how profoundly my relationship with Justice Blackmun has shaped my own career. From the outset of my involvement in public service — as United States Attorney, State legislator and now Attorney General of Connecticut — I have proudly and prominently stated my belief in a woman’s right to

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\* Attorney General, State of Connecticut.

choose as a matter of a fundamental constitutional right to privacy. I stated it emphatically and unequivocally even in the days when that view was far less politically acceptable than it is now. And I emphasized, equally proudly and prominently, that my position was formed long ago as a law clerk for Justice Harry Blackmun.

Now that I am a father of 3 boys, ages 7, 4 and 1, I contemplate and care increasingly about our country's future, and how their lives will be affected by our actions or inaction today. Breakfast now begins in our household at 6:00 a.m. and I remember with great fondness and respect — and some envy — the very civilized 8:00 a.m. breakfasts at the Court. But our program is very similar — more the nurturing of relationships, holding a hand or patting an arm or simply making sure things are O.K., than the shaping of opinions. And their world will have been inexorably and inevitably influenced for the better by Harry Blackmun.

A federal court of appeals judge whom both Justice Blackmun and I know once said to me that Justice Blackmun had, at the time of his appointment to the Court, three of the "prime requisites" for a great Justice: a good intellect, an open mind, and capacity for growth.

Indeed, the common and now conventional wisdom about Harry Blackmun is that he has "grown" as a member of the Court. As with any widely proclaimed wisdom, that view is partially true. But the whole truth, I believe, is more complex. He had those prime requisites — a good intellect, an open mind, and a capacity for growth — but he also had strongly imbued values, a core philosophy of life, and a powerful sense of the pre-eminent importance of the individual and of individual freedom and privacy. And if Harry Blackmun has changed, so too has the Court, and the country, perhaps even more.

Mark Twain once said that he was absolutely astonished at the age of sixteen how little his father knew, and even more amazed when he reached the age of twenty-one how much his father had managed to learn in five short years. In much the same way, it may be that our perception and appreciation of Justice Blackmun has grown as much as the man.

The fact is that two decades ago Harry Blackmun was largely unknown and misperceived. Certainly, he was misperceived by the President who selected him for his reputation as a proponent of judicial restraint, in an attempt to build a conservative bulwark of so-called strict constructionists against the liberalism of the Warren court. He was misperceived by the commentators and media who

focused narrowly on the number of votes he cast with his fellow Minnesotan and Nixon appointee, Chief Justice Warren Burger.

The prediction of a Supreme Court Justice's future at the time of his appointment or early years, of course, is always a hazardous undertaking. The phenomenal "growth" of Chief Justice Warren and Justices Frankfurter, Black, and Brennan are cases in point. But the difficulty in making such predictions is not always due only to inadequate data or the pitfalls of wishful thinking. Supported by great resources of institutional independence, such as life tenure, and challenged to make and articulate decisions of staggering difficulty and importance, some members of the Supreme Court — most of the great ones — have a remarkable capacity for growth and development in ways and directions that even they might not have predicted or foreseen. Justice Blackmun, to whom we pay tribute on this occasion, is, I think, a prime example of just such a Justice.

The breach that developed between Justice Blackmun and his more conservative brethren, including Chief Justice Burger, can be illustrated by their starkly opposing views in the 1986 case of *Bowers v. Hardwick*,<sup>1</sup> in which the Court rejected a substantive due process challenge to the Georgia sodomy statute. In his concurring opinion, Chief Justice Burger curtly remarked that "there is no such thing as a fundamental right to commit homosexual sodomy," and that to hold otherwise "would be to cast aside millennia of moral teaching."<sup>2</sup>

In a blistering dissent, Justice Blackmun wrote, "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 relationship will come from the freedom an individual has to *choose* the form and nature of these intensely personal bonds."<sup>3</sup> He concluded, "The right of an individual to conduct intimate relationships in the intimacy of his or her own home seems to me to be the heart of the Constitution's protection of privacy."<sup>4</sup>

And yet, while his dissent may have been seen or perceived as a departure or rift or drift from the conservative majority, it certainly was clearly presaged by Justice Blackmun's position in *Roe v. Wade*<sup>5</sup>

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1. 478 U.S. 186 (1986).
  2. *Id.* at 196-97 (Burger, C.J., concurring).
  3. *Id.* at 205 (Blackmun, J., dissenting).
  4. *Id.* at 208 (Blackmun, J., dissenting).
  5. 410 U.S. 113 (1973).

and his subsequent role in shaping right to privacy jurisprudence.

On issues relating to privacy and choice, the country has come around to Justice Blackmun's stance, even as the Court has moved away. The nation has grown greatly. The Court has changed without growing.

Comparable to Justice Blackmun's extraordinary impact on the right to privacy has been his role in First Amendment jurisprudence — reflected, for example, in the commercial speech trilogy that he authored: *Bigelow v. Virginia*,<sup>6</sup> *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,<sup>7</sup> and *Bates v. State Bar of Arizona*.<sup>8</sup> The approach in *Bates* to the question of regulating truthful, as opposed to deceptive speech, became a basic source of conflict between Justice Blackmun and the conservative wing of the Court. Indeed, this issue provided the opening for establishing a lower level of protection for commercial speech, a development Justice Blackmun subsequently opposed.

To be sure, the shape of the Court's commercial speech doctrine changed after Justice Blackmun's trilogy, but his opinions exemplify his commitment and contribution to First Amendment jurisprudence, as well as his preference for gradual, case-by-case development of the law. His leadership in these cases may not have been anticipated at the time he wrote that the expletive-laden critique at issue in *Cohen v. California*,<sup>9</sup> and the wearing of the American flag on the seat of one's pants in *Smith v. Goquen*<sup>10</sup> should be regarded as "immature antics" rather than protected speech.

Hence, his later opinions demonstrate growth — in the best sense, growth in the law itself as well as the individual Justice. But they also express core values and principles that were imbued in Justice Blackmun long before the cases or he came to the Court. His opinions provided the opportunity and occasion for explicit case-by-case application of those values. Misperceived at first, he is now correctly seen as an ardent and articulate advocate of freedom of expression, as was rightly recognized recently when he was selected to deliver the Hugo Black Lectureship at Wesleyan University in Connecticut.

In his Hugo Black lecture, he recalled the days when censorship cases involving pornographic films were very frequently before the

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6. 421 U.S. 809 (1975).

7. 425 U.S. 748 (1976).

8. 433 U.S. 350 (1977).

9. 403 U.S. 15 (1971).

10. 415 U.S. 566 (1974).

United States Supreme Court, and the Justices were summoned to view them in the basement studio. During the early days of Justice Blackmun's tenure, he attended such sessions with Justice John Harlan near him. Justice Harlan, by then almost completely blind, would ask another member of the Court to narrate what was happening as the movie was shown. As recounted by Justice Blackmun, one of the brethren would describe in detail the proceedings on film, much to the interest of Justice Harlan, who exclaimed repeatedly, "Oh, you don't say."

No longer do such obscenity cases crowd the Court's docket. Like the members of the Court, the First Amendment issues on today's docket are different from those of two decades ago.

Justice Blackmun's bedrock — then as now — has been a sense of basic fairness and concern for the plight of the individual, most especially individual freedom and privacy, threatened by big, often insensitive and intrusive, and ever more powerful institutions and technology. Whether in dissent or in the majority he has expressed these core values with growing eloquence and exuberance. He has never grown away from them. Again, the country, if not the Court, has grown toward them and toward him.

Vintage Blackmun — expressing this bedrock essence — is his dissent in *DeShaney v. Winnebago County Department of Social Services*.<sup>11</sup> Joshua DeShaney brought a Section 1983 action against a local social service agency for the severe injuries he suffered from abuse by his father after complaints of such abuse were received by the agency, which then failed to act. The Court held that there was no affirmative duty to protect the individual under the due process clause in such circumstances. Justice Blackmun criticized the Court for rejecting a "sympathetic" reading of the Fourteenth Amendment in which judicial compassion could play a role in constitutional interpretation. He wrote:

Poor Joshua! Victim of repeated attacks by an irresponsible, bullying, cowardly, and intemperate father, and abandoned by respondents who placed him in a dangerous predicament and who knew or learned what was going on, and yet did essentially nothing except, as the Court revealingly observes . . . "dutifully recorded these incidents in [their] files." It is a sad commentary upon American life, and constitutional principles — so full of late of patriotic fervor and proud proclamations about "liberty and justice for all" — that this child, Joshua DeShaney, now is

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11. 489 U.S. 189 (1989).

assigned to live out the remainder of his life profoundly retarded.<sup>12</sup>

We all need heroes. Indeed, whether we are lawyers, public officials, teachers — or some combination thereof — we *should* have heroes. Harry Blackmun is one of mine — applying the definition of hero that *he* gave in a speech at the Shippensburg University Commencement on December 19, 1992: “A person who has stood as a beacon in one’s experience, who has carried the torch or shown the way, who has influenced one for the better, who has touched one’s life tenderly and helpfully.”<sup>13</sup>

Harry Blackmun has heroes of his own, and he spoke of a few of them in that same speech: John Jay for his “ability, firmness, patriotism and integrity”; Joseph Story for his contribution in making “the law luminous and easy to understand”; and Abraham Lincoln, whose greatness he described this way:

I hope you feel as I do that Lincoln, by any measure, was a true professional. He believed in hard work, he sincerely held a doubt about his own ability. He possessed the faith that sustained him, had confidence in the future, and was firm under stress, and he was attached to those he loved and to what he thought was right.<sup>14</sup>

The same may be said, I submit, about Harry Blackmun. He is a “true professional,” possessed of the work ethic, some self-doubt, strong faith and confidence in the future, firm under unrelieved and constant stress, and fervently and furiously faithful to what and whom he has loved.

At the end of that speech at Shippensburg University, he suggested to the graduates a way of saying farewell to that “significant place” and “chapter” in their lives, quoting the final passages from the movie, “A River Runs Through It.” The words were particularly appropriate for him in light of his well-known love for the woods, lakes, and streams of his native Minnesota. As I close, I would like to read them to you:

The father said, you like to tell true stories, don’t you. And I answered, yes, I like to tell stories that are true. And then he asked, after you have finished your true stories sometime, why don’t you make up a story and the people to go with it. Only

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12. *Id.* at 213 (Blackmun, J., dissenting).

13. Justice Harry A. Blackmun, Address at Shippensburg University Commencement (Dec. 19, 1992).

14. *Id.*

then will you understand what happened and why. It is those we live with and love and should know who elude us. Now nearly all those I loved and did not understand when I was young are dead. But I still reach out to them, and of course now I am too old to be much of a fisherman, and now of course I usually fish the big waters alone, although some friends think I shouldn't. Like many fly fishermen, I often do not start fishing until the cool of the evening. Then all existence fades to a being with my soul and memories and sounds of the big Blackfoot and a four-count rhythm, and the hope that a fish will rise and eventually all things merge into one, and a river runs through it. The river was cut by the world's great flood, and runs over rocks from the basement of time. And on some of the rocks are timeless raindrops, under the rocks are the words, and some of the words are theirs.<sup>15</sup>

Two decades of Justice Blackmun's words have coursed through the Court's and country's canyons. Under the words are the bedrock beliefs of the man. And the words, carrying a message of hope and caring, convey a timeless message to the future.

Whether because of his growth or the country's Harry Blackmun should be in harmony and at peace with himself, if not the world. Much like the fly fisherman, he is one who has waited, and waded, in the deep waters. At this moment, when all things have merged into one, and the country he has served so greatly has come to realize his greatness, he deserves much praise and some peace.

In future years on the Court, which I pray will be many, I wish him an abundance of both peace and praise. And we who appreciate and admire him may take from his life a lesson; in the words of Sophocles, "You must wait until the evening to know how beautiful the day has been."

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15. A RIVER RUNS THROUGH IT (Columbia Pictures 1992).

