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Mr. Justice Blackmun

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MR. JUSTICE BLACKMUN

HONORABLE FLOYD R. GIBSON*

I welcome this opportunity to share my remembrances of Justice Harry Blackmun, whose recent retirement marks the end of thirty-four years of distinguished service on the federal bench, the last twenty-four as an Associate Justice of the United States Supreme Court. He served eleven years as a member of the Eighth Circuit Court of Appeals, following his appointment in 1959. It was my privilege to serve alongside him as a member of that court until his elevation to the Supreme Court in 1970.

In the 1960's our Eighth Circuit Court was then composed of seven judges who met bi-monthly at the seat of the court in St. Louis, Missouri. It was a closely knit group. We all stayed at the Mayfair Hotel and usually left for the courthouse in the morning as a group, following usually the same course to the courthouse, held two panel sessions, then went as a group to lunch at the old Jefferson Hotel, about three blocks from the courthouse, where a table was reserved for us. In the afternoon we returned to the courthouse and then later, individually or in small groups, went back to the Mayfair. We had a social session around 5:00 or 5:30 in the afternoon for about an hour and then went as a group to dinner at either the delightful main dining room of the hotel or to an equally pleasant dinner at the top of the hotel, which was then occupied and run by the St. Louis Bar Association. On the weekends we would often attend Cardinal football and baseball games together. Around 1968, the court abandoned the two-week bi-monthly format in favor of a one-week session each month (except for July and August). In later years, we moved as a group over to the Missouri Athletic Club where we still assembled as a group for departure to the courthouse in the morning, following the same routine for lunch and would retire for a social hour late in the afternoon in the steamroom and then the swimming pool followed by a group dinner at the Club.

I recall an incident in which then Judge Blackmun was hearing a case alongside then Chief Judge Martin D. Oosterhout, a splendid individual who was also known for his booming voice. During the course of the argument, Chief Judge Van Oosterhout reputedly leaned over and asked Judge Blackmun if he would mind taking a recess. Judge Blackmun, always accommodating, replied that he had no objec-

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tion. Judge Van Oosterhout then announced to the crowd, "Judge Blackmun has requested that the court take a recess."

My primary impression of Judge Blackmun is one of conscientious legal scholarship. During his tenure on the Eighth Circuit Court of Appeals, I always considered him to be one of the foremost legal scholars on our court. He always approached legal issues objectively, frequently engaging in thorough discussions in order to determine whether the legal issue in question had been foreclosed by the Supreme Court. His concern was not limited to merely following the letter of the law, but also extended to effectuating the rationale and intent behind those Supreme Court decisions. As a result, his opinions were consistently among the most well-reasoned on our court.

It would be misleading, however, to convey the impression that Justice Blackmun's tenure as a circuit judge was formalistic or rigid. Although his opinions always rested on a solid legal foundation, Justice Blackmun exhibited compassion for the disadvantaged and genuine concern for human rights. These attributes would later become his hallmark on the Supreme Court. I believe the impetus for this compassion stems from his background. Although he graduated from Harvard College *summa cum laude* and later Harvard Law School, Justice Blackmun was a man of modest means who relied on a scholarship for tuition and worked odd jobs to cover his living expenses. Justice Blackmun once told a reporter that because he grew up in poor surroundings, he knew there was "another world out there that we sometimes forget about."¹

That compassion is apparent in his decision in *Jackson v. Bishop*.² In that case, three prisoners challenged Arkansas prison officials' practice of punishing inmates by beating them with a strap. Justice Blackmun wrote that the use of a strap, regardless of precautionary conditions, ran afoul of the Eighth Amendment's prohibition against cruel and unusual punishment. This case stood for the proposition that corporal punishment was no longer tolerable as a constitutional means of enforcing discipline.

Justice Blackmun's decision in *Jones v. Alfred H. Mayer Co.*³ is another prime example of his keen sense of justice. That case involved a real estate development company's refusal to sell a residential lot to an African-American couple. Justice Blackmun realized that in the absence of state action, Supreme Court precedent compelled him to affirm the

1. John A. Jenkins, *A Candid Talk with Justice Blackmun*, *New York Times Magazine*, Feb. 20, 1983 at 24.

2. 404 F.2d 571 (8th Cir. 1968).

3. 379 F.2d 33 (8th Cir. 1967).

district court's dismissal of the plaintiffs' 42 U.S.C. § 1982⁴ claim. However, he was concerned enough to invite the Supreme Court to reconsider its decisions in the area and suggested several alternative means of finding state action under the facts of the case. The Supreme Court accepted that invitation and reversed the panel's decision by holding that § 1982 barred all racial discrimination, public or private, in the sale or rental of property.

Another decision that comes to mind is *Billingsly v. Westrac Co.*,⁵ a wrongful death suit in which Justice Blackmun and I found ourselves on opposite sides of the decision. The decedent had been killed when his truck collided with the defendant's tractor trailer truck. The defendant had attempted to change directions by backing his rig out of a private driveway across the highway, and was straddling both lanes when the decedent's truck struck it. The issue was whether or not the decedent's contributory negligence for speeding barred his widow's suit under the Arkansas contributory negligence statutes.⁶ Those statutes barred recovery unless the negligence of the victim was of a lesser degree than the negligence of the tortfeasor. Justice Blackmun's opinion conducted an exhaustive analysis of Arkansas contributory negligence statutes before upholding the district court's finding that the decedent's negligence was equal to or greater than the defendant's. I dissented, believing that the trial court had erroneously equated the decedent's mere negligence with conduct on the part of the defendant that rose to the level of gross negligence. But despite my disagreement, I recognized the thoughtful analysis that Justice Blackmun had put into the opinion, and felt compelled to voice my appreciation of "Judge Blackmun's fine analysis of the Arkansas comparative negligence statutes."⁷ Regardless of whether I agreed with his ultimate conclusions, it was impossible to fault Justice Blackmun's legal methodology.

Despite his commitment to excellence and the high standards to which Justice Blackmun held himself, I remember him to be a considerate and thoughtful colleague. While he always demanded full consideration of every issue, he was always willing to hear new ideas and to consider different points of view.

4. "All citizens of the United States shall have the same right . . . as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property." 42 U.S.C. § 1982.

5. 365 F.2d 619 (8th Cir. 1966).

6. ARK. STAT. ANN. §§ 27-1730.1 & 27-1730.2.

7. 365 F.2d at 624.

Some commentators have recently referred to Justice Blackmun "as one of the four liberals" on the Court.⁸ I personally don't view Justice Blackmun as being so easily labeled as he is a more complex and independent thinker in his approach to different issues. He carefully weighs the pros and cons of these issues rather than approaching them with a general liberal or conservative bias. He is definitely not, in my mind, a committed liberal or conservative, but a deep thinker interested in arriving at valid decisions. His decisions will withstand the test of time and the scrutiny of an historical perspective.

Because Justice Blackmun has always been a realist rather than an idealogue, his judicial career has defied most expectations. Originally pigeonholed as a conservative, he has proven to be anything but former Chief Justice Burger's "Minnesota Twin." His tenure on the Supreme Court has been marked by the same empathy for the disadvantaged and disenfranchised members of our society that characterized his career on the Court of Appeals. He has faced some of the most divisive and complex issues ever seen in a court of law. Regardless of whether one agrees with his protection of women's right to abortion in *Roe v. Wade*,⁹ his assertion of homosexuals' right to privacy in *Bowers v. Hardwick*,¹⁰ or his recent renunciation of the death penalty in *Callins v. Collins*,¹¹ Justice Blackmun's respect for human rights and individual freedom has been apparent throughout his twenty-four years on the highest court. As Justice Blackmun once said, "Law and morality are not necessarily the same . . . [we need to keep] an open mind since there are two sides to almost every question."¹²

Justice Blackmun has weathered well the storm of controversy and dissent posited by the more divisive issues of our time during the past three decades. He has steered a straight course in recognizing and giving meaning to human values that form the predicate of our civilization.

Justice Blackmun has been our Circuit Justice for the Eighth Circuit ever since he became a member of the Supreme Court and he has attended all but one of our annual Judicial Conferences over these past decades. His appearance and remarks as a speaker at our annual conference have always been the highlight of the meeting. His scholarly and candid presentation of the then current Supreme Court term, which has

8. William H. Frelvogel, *Longtime Jurist Held Conservative Agenda at Bay*, *St. Louis Post Dispatch*, April 7, 1994.

9. 410 U.S. 959 (1973).

10. 478 U.S. 1039 (1986) (Blackmun, J., dissenting).

11. "From this day forward, I shall no longer tinker with the machinery of death." 114 S. Ct. 1127, 1130 (1994) (Blackmun, J., dissenting).

12. Judge Floyd R. Gibson, *A Tribute to Harry Blackmun*, 97 *DICK. L. REV.* Spring (1993).

always been scheduled at the end of the conference, has generated the highest attendance and has held the presence of the conference members to the end, all because of the excellent and informative value of his comments.

As Justice Blackmun steps down from a distinguished career on the federal bench and on our High Court, he will be remembered publicly as the author of *Roe v. Wade*. Those who know him personally will remember him as a respected colleague and talented legal scholar. But for all those who are more familiar with the great expanse of his work, Justice Blackmun leaves behind a judicial legacy of common sense tempered with compassion. History will ultimately remember Justice Blackmun as one of the greatest jurists of our time.

