North Dakota Law Review

Volume 71 | Number 1 Article 10

1995

Bringing Compassion into the Province of Judging: Justice Blackmun and the Outsiders

Pamela S. Karlan

BRINGING COMPASSION INTO THE PROVINCE OF JUDGING: JUSTICE BLACKMUN AND THE OUTSIDERS*

PAMELA S. KARLAN**

> Hear the cases between your brethren, and judge righteously between a man and his brother, and the stranger that is with him. Ye shall not respect persons in judgment; ye shall hear the small and the great alike; ye shall not be afraid of the face of any man . . . .[1]

I. INTRODUCTION

On paper, Harry Blackmun seems the consummate insider—a "White Anglo-Saxon Protestant Republican Rotarian Harvard Man from the Suburbs"[2] who until recently held the Supreme Court seat once filled by Justice Oliver Wendell Holmes. But the further inside the Establishment Justice Blackmun moved, the more sensitive he became to the fact that "[t]here is another world 'out there,'"[3] a world inhabited by the poor, the powerless, and the oppressed. No Justice sitting on the Court today, and few in its history, did more to sear the conscience of the people, or his or her Brethren, with the plight of "the unfortunate denizens of that world, often frightened and forlorn."[4]

This tribute to the Justice discusses his treatment of "outsiders" as the distinctive, recurring theme that represents his major contribution to American law. While he was on the Court of Appeals, then-Judge Blackmun pioneered the application of the eighth amendment's prohibition of cruel and unusual punishment to prison conditions.[5] As a rookie on the Supreme Court, Justice Blackmun became the first Justice since Chief Justice Stone to write an opinion for the Court using

---

* Reprinted with permission from the *Dickinson Law Review*. 97 DICK. L. REV. 527 (1993). The article has been slightly altered to reflect Justice Blackmun's retirement from the Court.

** Roy L. and Rosamond Woodruff Morgan Professor of Law, University of Virginia; Visiting Professor of Law, Harvard Law School. I thank Cate Stetson for her research assistance, and Eben Moglen and Beth Heifetz for their comments and suggestions. I clerked for Justice Blackmun in October Term 1985.

1. Deuteronomy 1:16-17.

2. Harold H. Koh, *Equality with a Human Face: Justice Blackmun and the Equal Protection of Aliens*, 8 HAMLINE L. REV. 51, 51 (1985).

3. Beal v. Doe, 432 U.S. 438, 463 (1977) (Blackmun, J., dissenting).

4. Ohio v. Akron Center for Reproductive Health, 497 U.S. 502, 541 (1990) (Blackmun, J., dissenting).

5. Richard S. Arnold, *Mr. Justice Blackmun: An Appreciation*, 8 HAMLINE L. REV. 20, 21 n.3 (1985). For a discussion of Jackson v. Bishop, 404 F.2d 571 (8th Cir. 1968), see *infra* notes 15-20 and accompanying text.

Carolene Products' famous footnote 4 to justify special constitutional protection for a "discrete and insular" minority.[6] And, of course, Justice Blackmun is perhaps best known to the general public as an impassioned defender of individual freedom of choice, for poor women and pregnant teenagers who seek control over their reproductive lives, as well as for gay men and lesbians.[7] This essay explores the connection among the various strands of Justice Blackmun's solicitude for those who differ in ways "that touch the heart of the existing order."[8]

II. BREAKFASTS OF CHAMPIONS

I have already alluded to the fact that Justice Blackmun occupied perhaps the most distinguished seat on the Court: one held earlier by Justices Story and Frankfurter, as well as the great Realists—Justices Holmes and Cardozo. Since the days of the Realists, it has often been said that "the law is what the judges had for breakfast."[9] I hardly want to suggest that Justice Blackmun is simply the sum total of the thousands of scrambled eggs accompanied by an equivalent number of slices of raisin toast and an ocean of coffee that he has consumed during his daily breakfasts with his law clerks, but we can gain at least a little insight into his compassionate, empathetic approach by looking at the early morning years of his life.[10]

---

6. Graham v. Richardson, 403 U.S. 365, 372 (1971). In *Graham*, Justice Blackmun used the concept to justify heightened scrutiny of laws discriminating against aliens. *See* John Hart Ely, *The Supreme Court, 1977 Term--Foreword: On Discovering Fundamental Values*, 92 HARV. L. REV. 5, 7-8 (1978). For a discussion of *Graham*, see *infra* notes 30-36 and accompanying text.

7. For a discussion of Justice Blackmun's treatment of abortion and homosexuality, see *infra* notes 55-75 and accompanying text.

8. Bowers v. Hardwick, 478 U.S. 186, 211 (1986) (Blackmun, J., dissenting) (quoting West Virginia Board of Education v. Barnette, 319 U.S. 624, 642 (1943)).

9. Despite extensive research, I have been unable to determine the originator of this aphorism. *Cf.* ROBERT K. MERTON, ON THE SHOULDERS OF GIANTS (1965) (trying to trace the origin of the aphorism, "If I have seen farther than those who came before me, it is because I sit on the shoulders of giants."). The source in most books of legal quotations seems to be the ever-prolific "Anonymous." *See, e.g.*, A DICTIONARY OF LEGAL QUOTATIONS 85 (Simon James & Chantal Stebbings eds., 1987). *Cf.* THE OXFORD DICTIONARY OF AMERICAN LEGAL QUOTATIONS 287 (Fred R. Shapiro ed. 1993) (attributing the phrase to Robert Hutchins' *criticism* of legal realism in *The Autobiography of an Ex-Law Student*, 7 AM. L. SCHOOL REV. 1051, 1054 (1934)). Perhaps the idea can ultimately be traced to the following exchange in the *Pickwick Papers*:

> 'I wonder what the foreman of the jury, whoever he'll be, has got for breakfast,' said Mr. Snodgrass . . . . 'Ah!' said Perker, 'I hope he's got a good one.' 'Why so?' inquired Mr. Pickwick. 'Highly important—very important, my dear Sir,' replied Perker. 'A good, contented, well-breakfasted juryman, is a capital thing to get hold of. Discontented or hungry jurymen, my dear Sir, always find for the plaintiff.'

CHARLES DICKENS, THE POSTHUMOUS PAPERS OF THE PICKWICK CLUB 499 (Heritage Press 1938) (1836).

10. For a warning against theorizing beyond one's knowledge in Supreme Court biographies, particularly while dealing with the subject of a Justice's relationship to outsiders, see Eben Moglen, *Jewishness and the American Constitutional Tradition: The Cases of Brandeis and Frankfurter*, 89

The "other world out there" is where Justice Blackmun spent his childhood, growing up in poor surroundings in St. Paul, Minnesota.[11] His introduction to the world of power and privilege—his stint as a scholarship student at Harvard College and Harvard Law School—carried with it what must have been a daily reminder that he was not *entirely* an insider. While his more affluent college classmates enjoyed the last years of the Roaring Twenties, he worked as a janitor, a milkman, a handball court painter, and a boat driver for the Harvard crew coach to cover living expenses that were not defrayed by a tuition scholarship from the Harvard Club of Minnesota.[12] Although his career after his *summa cum laude* graduation from college moved from triumph to triumph—partner at the preeminent firm in the tonier of the Twin Cities, a decade as counsel to what he repeatedly reminds me is the foremost medical organization in the nation, his beloved Judge Sanborn's seat on the Eighth Circuit, and ultimately a place on the Supreme Court[13]—one can discern in his work memories of the loneliness of being an outsider, and a commitment to including the stranger within the institutional family.

III. THE STRANGERS WHO ARE WITH US: PRISONERS, ALIENS, AND NATIVE AMERICANS

During the Term I spent with the Justice, my co-clerks and I watched a television interview he was taping in his office. The interviewer asked him which of his opinions he was proudest of, expecting him to say *Roe v. Wade*.[14] The Justice surprised him, by naming instead one of his Eighth Circuit decisions, *Jackson v. Bishop*.[15] Although *Jackson* was a relatively early case in a long judicial career, it is, in many ways, quite typical of the Justice's approach.

COLUM. L. REV. 959 (1989) (reviewing ROBERT A. BURT, TWO JEWISH JUSTICES: OUTCASTS IN THE PROMISED LAND (1988)).

11. *See* John A. Jenkins, *A Candid Talk with Justice Blackmun*, N.Y. TIMES, Feb. 20, 1983, § 6 (Magazine) at 20, 24 ("And because I grew up in poor surroundings, I know there's another world out there that we sometimes forget about . . . . We lived in a blue-collar neighborhood . . . . And we didn't have very much, but nobody complained because everybody was in the same state in our neighborhood. And it didn't do me any harm at all.").

12. *Id.*

13. The Justice's sense of the contingency of good fortune came with him to the Court. Nominated after the defeats of Judges Haynesworth and Carswell, he modestly refers to himself as "Old Number 3." *Id.* Indeed, when Justice Anthony M. Kennedy was confirmed for the seat vacated by Justice Lewis F. Powell after the defeat of Robert Bork's nomination and the withdrawl of Douglas Ginsburg's, the Justice welcomed him to the Court with a humorous message, noting their shared distinction as "Number 3's."

14. 410 U.S. 113 (1973).

15. 404 F.2d 571 (8th Cir. 1968). *See also* Harry A. Blackmun, *Section 1983 and Federal Protection of Individual Rights--Will the Statute Remain Alive or Fade Away?*, 60 N.Y.U.L. REV. 1, 21 (1985) (noting the pride he takes in *Jackson*).

In *Jackson*, then-Judge Blackmun held that Arkansas' practice of whipping inmates for prison infractions violated the Eighth Amendment:

> [T]he use of the strap in the penitentiaries of Arkansas is punishment which, in this last third of the 20th century, runs afoul of the Eighth Amendment; . . . the strap's use, irrespective of any precautionary conditions which may be imposed, offends contemporary concepts of decency and human dignity and precepts of civilization which we profess to possess; and . . . it also violates . . . standards of good conscience and fundamental fairness . . . .[16]

Today, *Jackson's* holding seems a routine application of well-developed principles, but in 1968 it was far from obvious. Judge Blackmun could not rely on well-established precedents;[17] he had to "glean" from earlier Supreme Court decisions a constitutional commitment to "flexibility and improvement in standards of decency as society progresses and matures."[18] His belief that "broad and idealistic concepts of dignity, civilized standards, humanity, and decency are useful and usable" in interpreting specific constitutional provisions[19] lay at the heart of "one of the first, possibly *the* first, appellate opinion[s] examining prison practices and holding them unlawful under the eighth amendment."[20]

Prison inmates may be the least sympathetic group of "outsiders" in our constitutional jurisprudence, since their banishment from free society is the result of their willful criminal behavior. Nevertheless, Justice Blackmun has recognized that their very isolation paradoxically renders us particularly responsible for the conditions in which they must live.[21] So, for example, in *Cannon v. Davidson*[22] Justice Blackmun

---

16. *Jackson*, 404 F.2d at 579.

17. Indeed, the Justice tells a poignant story along these lines about his clerkship with Judge Sanborn: the two men reviewed

> a sad petition from a state prisoner complaining about [the] conditions of his incarceration. The petition evoked sympathy, and we did sympathize. But the almost inevitable conclusion at that time, less than 50 years ago, was that the American prisoner's problem was one solely within the discretion of the state prison authorities and that federal courts should not and could not intervene. It was not even a close question.

Note, *The Changing Social Vision of Justice Blackmun*, 96 HARV. L. REV. 717, 733 n.104 (1983).

18. *Jackson*, 404 F.2d at 579. *Cf.* Harry A. Blackmun, *Allowance of In Forma Pauperis Appeals in § 2255 and Habeas Corpus Cases*, 43 F.R.D. 343, 359 (1967) ("As in medicine . . . so in law, although more slowly, there is constant movement. We should be aware of this, anticipate it, and not resent it.").

19. *Jackson*, 404 F.2d at 579. Of course, the same approach informs his treatment of privacy and due process interests as well. *See, e.g., infra* note 65 and notes 73-76 and accompanying text.

20. Arnold, *supra* note 5, at 21 n.3.

21. United States v. Bailey, 444 U.S. 394, 423 (1980) (Blackmun, J., dissenting).

22. 474 U.S. 344 (1986).

argued that prison officials' heedless failure to protect a prisoner from attack by another inmate gave rise to a cause of action under section 1983,[23] precisely because of the officials' heightened responsibility:

> When the State of New Jersey put Robert Davidson in its prison, it stripped him of all means of self-protection. It forbade his access to a weapon. It forbade his fighting back. It blocked all avenues of escape . . . . [The State] therefore assumed some responsibility to protect him from the dangers to which he was exposed.[24]

Similarly, in *United States v. Bailey*[25] the Justice dissented from the Court's holding that prisoners who have fled from intolerable prison conditions are foreclosed from advancing a duress defense unless they can show that they sought to surrender as soon as they had escaped. He confronted his colleagues with the "atrocious and inhuman conditions of prison life in America,"[26] in an attempt to shake them out of their "pious pronouncements fit for an ideal world"[27] about the real-life hell that all too many prisoners inhabit.

The Justice's jurisprudential sense of connection with and responsibility towards prisoners is accompanied, as is so characteristic of him, by a personal sense of connection as well. He is probably the only Justice who regularly received, and read, a prison newspaper—in his case the Stillwater (Minn.) *Prison Mirror*. Indeed, the Justice traveled to Minnesota to present an award to Robert Morgan, the inmate-editor of the *Mirror*.[28] It is as true, I think, of individual justices as of society as a whole, that the treatment of criminal offenders is one of "the measures by which the quality of . . . civilization may be judged."[29] By this measure, Justice Blackmun has served as a deeply civilizing voice.

---

23. *Id.* at 349-55 (Blackmun, J., dissenting). For a more detailed discussion of the Justice's perspective on section 1983 and prisoners' rights cases, see Blackmun, *supra* note 15. With characteristic modesty, the Justice writes that improvements in prison conditions are "traceable in large part, and perhaps primarily, to actions under § 1983," *id.* at 21, without highlighting his central role in bringing about judicial openness to such actions.

24. *Davidson*, 474 U.S. at 349, 350 (internal citations omitted).

25. 444 U.S. 394 (1980).

26. *Id.* at 421-24.

27. *Id.* at 420.

28. The unassuming Justice, of course, traveled in a smaller entourage than Mr. Morgan, who attended under guard. Telephone interview with Wanda Martinson, Secretary to Justice Blackmun (Jan. 26, 1993).

The Justice has also included prison administrators and officials in the Justice and Society seminar he and Norval Morris lead each summer at the Aspen Institute, both, I am sure, in the hope that they will educate the other participants about the concerns of the world inside the walls and in the hope that the seminar will press the prison officials to think critically about the relationship of broad issues of justice and decency to their work.

29. Coppedge v. United States, 369 U.S. 438, 449 (1962).

The Justice's treatment of the civil and the constitutional rights of aliens was equally pathbreaking. When the Justice wrote *Graham v. Richardson*,[30] the contours of the equal protection clause looked very different than they do today. The Justice's invocation of strict scrutiny for governmental classifications that discriminate against aliens preceded the application of heightened scrutiny to gender-based classifications, the flowering of modern political process theory,[31] or the contemporary understanding of the tiers of the equal protection doctrine.[32]

Graham involved challenges to several state welfare programs that either excluded aliens altogether or severely restricted their eligibility vis-à-vis the eligibility of United States citizens. The Court could have decided the cases on pre-emption grounds: the federal government having permitted these individuals to live in the United States, the states lack the power to discriminate against them. In a variety of contexts, the Justice has been quite friendly to pre-emption arguments. But rather than relying on federalism, he understood that *Graham* involved claims of individual rights. He recognized aliens as "a prime example of a 'discrete and insular' minority for whom . . . heightened judicial solicitude is appropriate."[33]

What makes aliens a discrete and insular group? For the Justice, there seemed to be two answers. One answer focused on the way in which aliens are outsiders to the normal political processes by which individuals can join together to demand equal treatment from the government and to defend themselves against discrimination.[34] The other answer focused on the extent to which they are likely to be the victims of irrational parochialism and prejudice.[35] Just as important as his recognition of aliens' outsider status and the ensuing need for judicial protection was the Justice's celebration of the special contributions aliens

---

30. 403 U.S. 365 (1971).

31. *See* Koh, *supra* note 2, at 57. For accounts of modern process theory, see, e.g., JOHN HART ELY, DEMOCRACY AND DISTRUST (1980); Michael Klarman, *An Interpretive History of Modern Equal Protection*, 90 MICH. L. REV. 213 (1991); Michael Klarman, *The Puzzling Resistance to Political Process Theory*, 77 VA. L. REV. 747 (1991); Daniel R. Ortiz, *Pursuing a Perfect Politics: The Allure and Failure of Process Theory*, 77 VA. L. REV. 721 (1991).

32. *See, e.g.* Gerald Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972); Klarman, *An Interpretive History*, *supra* note 31.

33. *Graham*, 403 U.S. at 372 (quoting United States v. Carolene Products Co., 304 U.S. 144, 152-53 n.4 (1938)).

34. *See* Toll v. Moreno, 458 U.S. 1, 21-23 (1982) (Blackmun, J., concurring).

35. *See* Cabell v. Chavez-Salido, 454 U.S. 432, 463 (1982) (Blackmun, J., dissenting) (stating that "California's exclusion of . . . [aliens] from the position of deputy probation officer stems solely from state parochialism and hostility towards foreigners who have come to this country lawfully."); Ambach v. Norwick, 441 U.S. 68, 82 (1979) (Blackmun, J. dissenting) (tracing New York's ban on alien schoolteachers to "the frantic and overreactive days of the First World War when attitudes of parochialism and fear of the foreigner were the order of the day.").

can make to American life. They represent "some of the diverse elements that are available, competent, and contributory to the richness of our society . . . ."[36]

For much of our history, we have treated Native Americans worse than we have treated criminals or aliens. We alternated between exterminating them and exiling them on bleak reservations. As the Justice noted, one of the "glaring defects" of the original Constitution was its "complete exclusion" of Native Americans from political life.[37]

Unlike his jurisprudence in prisoners' rights, aliens' rights, or the right to privacy, the Justice's writings on Native Americans are not pathbreaking. Nevertheless, these writings shed a special light on the centrality of his view that judgment requires both knowledge and empathy. Perhaps in no other area has the Justice's long-standing interest in American history intersected so completely with his judicial approach.[38] Although the Justice's frequent opportunities to write on these issues may have been somewhat fortuitous (the folk wisdom being that he wrote so many Indian and tax cases largely because of Chief Justice Burger's somewhat hostile assignment policies),[39] they were fortunate as well, because they gave him an occasion for expressing his solidarity with a people exiled within their own land.

The Justice's opinion for the Court in *United States v. Sioux Nation of Indians*,[40] for example, set out in painstaking detail how the Sioux had been stripped of the Black Hills of South Dakota and of their way of life.[41] Strictly speaking, the detail might have been unnecessary to resolve the technical issues of congressional intent, the Court of Claims' jurisdiction, or the principles of claim and issue preclusion that determined the outcome of the case. Nonetheless, it was critical 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.[42] This sense of promises

---

36. *Norwick*, 441 U.S. at 88; *see also* Koh, *supra* note 2, at 71 (finding that the Justice's opinion for the Court in Nyquist v. Mauclet, 432 U.S. 1 (1977), reflects his view "that resident aliens as a class . . .[have] something important *as aliens* to contribute to American society").

37. Harry A. Blackmun, *John Jay and the Federalist Papers*, 8 PACE L. REV. 237, 246 (1988). Indeed, as the Justice goes on to note, this exclusion has not yet been fully remedied.

38. *Cf.* Note, *supra* note 17, at 723 n.36 (noting how the Justice's opinions in both Roe v. Wade, 410 U.S. 113 (1973), and United States v. Sioux Nation of Indians, 448 U.S. 371 (1980), involved detailed historical research).

39. *Cf.* Stephen L. Wasby, *Justice Harry A. Blackmun in the Burger Court*, 11 HAMLINE L. REV. 183, 197 (1988) (noting that according to one political scientist's measure, Justice Blackmun was ranked next to the bottom in the number of important cases he had been assigned).

40. 448 U.S 371 (1980).

41. *See id.* at 374-84; *see also* EDWARD LAZARUS, BLACK HILLS WHITE JUSTICE: THE SIOUX NATION VERSUS THE UNITED STATES, 1775 TO THE PRESENT (1992).

42. *Sioux Nation*, 448 U.S. at 397.

betrayed and our ensuing responsibility was even more pointed in the elegiac tone of the Justice's dissent in *South Carolina v. Catawba Indian Tribe, Inc.*[43] Justice Blackmun began from the premise that statutory ambiguities are to 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."[44] He then advanced the more inclusionary claim that the interpretation of the statute should take into account how "*the Indians* would have understood" the relevant law.[45] 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."[46]

Most recently, the Justice expressed this respect for the distinctive perspective of Native Americans in the notorious peyote case, *Employment Division, Department of Human Resources v. Smith*.[47] The majority held that the free exercise clause of the First Amendment did not preclude the application of a categorical ban on peyote use to Native Americans who used the drug as part of a religious ritual. Unlike the majority, which treated the respondents' claims as if they involved some eccentric cultic practice, Justice Blackmun's dissent pressed the point that the respondents' claims had to be assessed in light of the special position occupied by Native Americans.[48] Thus, he went beyond general First Amendment free exercise theory to discuss the special role of ceremonial peyote use for Native Americans.[49] He argued that the Court's decision would perpetuate a pervasive history of religious persecution and intolerance of Native American beliefs.[50] The Justice demanded that the Court take into account our as yet "unfulfilled and hollow promise" of equal dignity and respect for Native Americans.[51] Just as the Justice's treatment of prisoners is a measure of the man, so, too, is his approach toward Native Americans, for as Felix Cohen once wrote:

> Like the miner's canary, the Indian marks the shift from fresh air to poison gas in our political atmosphere; and our treatment

43. 476 U.S. 498 (1986) (Blackmun, J., dissenting).
44. *Id.* at 520.
45. *Id.* at 527 (emphasis added).
46. Arnold, *supra* note 5, at 24.
47. 110 S. Ct. 1595 (1990).
48. *See id.* at 1621-22.
49. *See id.* at 1618-20, 1622.
50. *See id.* at 1622.
51. *Id.*

> of Indians, even more than our treatment of other minorities, reflects the rise and fall in our democratic faith.[52]

Unlike the *Smith* majority, which seemed to believe "that the repression of minority religions is an 'unavoidable consequence of democratic government'"[53] and that the legal suffocation of such religions is the prerogative of the majority, Justice Blackmun recognizes that our democratic faith requires particular care for the religious faiths of those with whom we have so often broken our political faith in the past.[54]

IV. RESPECTING *ALL* PERSONS IN JUDGMENT: POOR WOMEN, PREGNANT TEENAGERS, AND GAYS AND LESBIANS

Justice Blackmun rightly views *Roe v. Wade*[55] as "a landmark in the emancipation of women."[56] After the Court's decision in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[57] it seems safe finally to say that at least some version of *Roe* is now firmly embedded in American constitutional law.[58] Nonetheless, Justice Blackmun's other abortion opinions remind us that the emancipation of women is still incomplete, that there are in fact a large number of women effectively barred from exercising the right *Roe* seemed to promise them. Due to their poverty or fear, these women live in "another world 'out there,' the existence of which the Court, I suspect, either chooses to ignore or fears to recognize . . . ."[59] The Justice's central mission over the past generation was to confront the Court and the Nation with the lives of these invisible women and to bring them inside *Roe v. Wade*'s protective circle.

This mission is made clear by examining two of the Justice's dissents. In *Poelker v. Doe*,[60] the Court upheld St. Louis' refusal to perform

---

52. Felix S. Cohen, *The Erosion of Indian Rights, 1950-1953: A Case Study in Bureaucracy*, 62 YALE L.J. 348, 390 (1953).

53. *Smith*, 110 S. Ct. at 1616 (Blackmun, J., dissenting).

54. *See id.* at 1622 (reflecting on the "unfulfilled and hollow promise" of religious tolerance for Native Americans); *cf.* Harry A. Blackmun, *Movement and Countermovement*, 38 DRAKE L. REV. 747, 752-53 (1988-1989) (stating that "some among us know the unease that often is felt when one lives as a member of a minority in a culture and in an area dominated by another religious inclination").

55. 410 U.S. 113 (1973).

56. *See* Ruth Marcus, *Author of* Roe *Remains Proud, Protective of It*, WASH. POST, April 20, 1992, at A1, A4 (quoting the Justice).

57. 112 S. Ct. 2791 (1992).

58. *See id.* at 2804 (stating that "the essential holding of *Roe v. Wade* should be retained and once again reaffirmed").

59. Beal v. Doe, 432 U.S. 438, 463 (1977) (Blackmun, J., dissenting). Since *Beal*, the Justice has often returned to this phrase in his dissents from the Court's restrictions on women's freedom of choice. *See, e.g.*, Ohio v. Akron Center for Reproductive Health, 497 U.S. 502, 541 (1990) (Blackmun, J., dissenting); Harris v. McRae, 448 U.S. 297, 348-49 (1980) (Blackmun, J., dissenting).

60. 432 U.S. 519 (1977) (per curiam).

nontherapeutic abortions in municipal hospitals. The majority treated the issue as simply one of governmental resource allocation, insisting that its holding did not restrict the right recognized in *Roe*. But, as Justice Blackmun explained in his dissent, St. Louis' policy was directed at "punitively impress[ing] upon a needy minority its own concepts of the socially desirable, the publicly acceptable, and the morally sound, with a touch of the devil-take-the-hind-most."[61] Indeed, only the fact that poor women already lived on the edge of society enabled St. Louis' policy to have any meaningful effect.

In *Ohio v. Akron Center for Reproductive Health*,[62] the Justice's attack on Ohio's onerous parental-notification and judicial-bypass provisions rested precisely on the way in which the provisions exploited the estrangement of young women subjected to the law and forced them to deal with "an unfamiliar and mystifying court system on an intensely intimate matter."[63] The Justice highlighted how the provisions ignored the sad truth that many children find themselves strangers even within their own families:

> Sadly, not all children in our country are fortunate enough to be members of loving families. For too many young pregnant women, parental involvement in this most intimate decision threatens harm, rather than promises comfort. The Court's selective blindness to this stark social reality is bewildering and distressing. Lacking the protection that young people typically find in their intimate family associations, these minors are desperately in need of constitutional protection. The sexually or physically abused minor may indeed be "lonely or even terrified," not of the abortion procedure, but of an abusive family member. The Court's placid reference to the "compassionate and mature" advice the minor will receive from within the family must seem an unbelievable and cruel irony to those children trapped in violent families.[64]

The Justice's language, as well as his sentiments, confront us with the condition of outsiders. Some children are excluded from membership in loving families; others are trapped in private worlds that society seems unwilling or unable to conquer.[65] They find themselves lonely even

---

61. Beal v. Doe, 432 U.S. 438, 462-63 (1977).

62. 497 U.S. 502 (1990).

63. *Id.* at 527 (Blackmun, J., dissenting).

64. *Id.* at 536-37 (internal citations omitted).

65. *Cf.* DeShaney v. Winnebago Dept. of Social Servces, 489 U.S. 189 (1989). *DeShaney* involved a § 1983 suit on behalf of Joshua DeShaney, who was beaten so repeatedly and severely by his father that he suffered permanent brain damage. *Id.* at 193. The suit claimed that the Department

within what should be a supportive and nurturing private world. Therefore, courts and the Constitution must step in to protect those who are cast outside the more private forms of protection.

At the very outset of his abortion jurisprudence, Justice Blackmun quoted Justice Holmes' statement that the Constitution "is made for people of fundamentally differing views . . . ."[66] In no area of law has the Justice's commitment to this principle been stronger than in his willingness to extend the Constitution's "promise that a certain private sphere of individual liberty will be kept largely beyond the reach of government"[67] to the rights of gays and lesbians. The Justice has identified the flaw in our constitutional reasoning as lying "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."[68] Indeed, the Justice's language, far from distinguishing "us" from "them," teaches us that when "we" mistreat "one another" we are in fact mistreating *ourselves*.

The Justice's dissent in *Bowers v. Hardwick*[69] powerfully expresses his inclusive and empathetic constitutional vision. From his opening line that "[t]his case is no more about 'a fundamental right to engage in homosexual sodomy,' as the Court purports to declare, than *Stanley v. Georgia* was about a fundamental right to watch obscene movies, or *Katz v. United States* was about a fundamental right to place interstate bets from a telephone booth,"[70] Justice Blackmun sought to show that the rights of homosexuals cannot be disengaged from the rights of all other

---

of Social Services was responsible because it had knowingly left him in his father's custody despite repeated warning signals. *Id.* The Court held that Joshua had not been deprived of any "liberty interest" protected by the Fourteenth Amendment because the state was not affirmatively responsible for his welfare. *Id.* at 195. In a short, and blistering, dissent, the Justice first attacked the Court for "retreat[ing] into a sterile formalism which prevents it from recognizing . . . the facts," and then compared the majority to "the antebellum judges who denied relief to fugitive slaves." *Id.* at 212. In contrast to the majority's narrow reading of the Fourteenth Amendment, Justice Blackmun advanced a more capacious understanding: "Faced with the choice, I would adopt a 'sympathetic' reading, one which comports with dictates of fundamental justice and recognizes that *compassion need not be exiled from the province of judging*." *Id.* at 190 (emphasis added). To drive home this sense in which he sought to erase the boundary, he ended: "Poor Joshua! . . . [A]bandoned by respondents who placed him in a dangerous predicament and who knew or learned what was going on, and yet did essentially nothing . . . ." *Id.*

66. Roe v. Wade, 410 U.S. 113, 117 (1973) (quoting Lochner v. New York, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting)).

67. Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747, 772 (1986).

68. Blackmun, *supra* note 37, at 247.

69. 478 U.S. 186 (1986).

70. *Id.* at 199 (internal citations omitted).

Americans.[71] The Court's holding, he emphasized, restricts the rights "*all* individuals have."[72]

Justice Blackmun's central message is tolerance:

> 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 . . . . 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.[73]

And his conclusion—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"[74]—drives home a point the Justice once made in paraphrasing Pogo: "'We have met the enemy and he is us,' *he is us*."[75] When we deny "outsiders" the constitutional dignity we accord to ourselves, *we* are our own worst foes. As Harold Koh once wrote in discussing the wisdom of the Justice's treatment of aliens:

> Tolerance of the participation of *others* in community life is a value as fully embodied in the notion of citizenship as participation itself. Thus, citizens act more truly as citizens when they accord a stranger in their midst "a generous and ascending scale of rights as he increases his identity with our society,"

---

71. *See, e.g., id.* at 200 (rejecting the Court's assumption that "homosexuals are so different from other citizens that their lives may be controlled in a way that would not be tolerated if it limited the choices of those other citizens").

In trying to locate gays among the groups entitled to protection of their divergence from the majority, the Justice analogized them to religious minorities, *see id.* 206 (relying on Wisconsin v. Yoder, 406 U.S. 205 (1972)) (the Amish); *id* at 211 (relying on West Virginia Board of Education v. Barnette, 319 U.S. 624 (1943)) (Jehovah's Witnesses), as well as racial ones, *see id.* at 210 (relying on Brown v. Board of Education, 347 U.S. 483 (1954) and Loving v. Virginia, 388 U.S. 1 (1967)).

72. *Bowers*, 478 U.S. at 206 (emphasis added).

73. *Id.* at 205-06. The Justice's personal espousal of this philosophy is reflected in a comment he made to Bill Moyers: although the Justice still believed sodomy was wrong, and "I would be distressed to see my children indulge in it . . . but who am I to say? I recognize my limitations." Wasby, *supra* note 39, at 189 n.27 (internal quotation marks omitted).

74. *Bowers*, 478 U.S. at 214.

75. Harry Blackmun, *Some Goals of Legal Education*, 1 OHIO N.L. REV. 401, 405 (1974) (emphasis supplied by Justice Blackmun).

than when they limit the participation of aliens in community life.[76]

V. CONCLUSION

The judicial enterprise is a profoundly lonely business.[77] Its very loneliness, which some judges have used as an excuse for escaping the messiness and pain of the world, can deepen the reservoirs of empathy in a sensitive person. This, I think, is what happened to Justice Blackmun. He transformed the knowledge and experience that came his way into judgment, truly taking to heart Justice Holmes' observation that:

> If [a lawyer] is a man of high ambition, he must leave even his fellow adventurers and go forth into a deeper solitude and greater trials . . . . In plain words, he must face the loneliness of original work. No one can cut new paths in company. He does that alone.[78]

I know that Justice Blackmun does not view himself as an ambitious man, let alone a man of "high ambition." Nevertheless, he truly has cut new paths for prisoners, aliens, women, and gays. We would fail to have learned all that his work teaches if we do not recognize that he has cut new paths for us all.

---

76. Koh, *supra* note 2, at 95 (quoting Johnson v. Eisentrager, 339 U.S. 763, 770 (1950)).

77. *See, e.g.*, Blackmun, *supra* note 75, at 405-06; Jenkins, *supra* note 11, at 61.

78. OLIVER WENDELL HOLMES, *Brown University—Commencement 1897*, in COLLECTED LEGAL PAPERS 164, 165 (1920) (quoted in Blackmun, *supra* note 75, at 405-06).