

5-1-1999

## Mr. Justice Blackmun: Reflections from the Cours Mirabeau

Paul R. Baier

*Louisiana State University Law Center*, paul.baier@law.lsu.edu

Follow this and additional works at: <https://digitalcommons.law.lsu.edu/lalrev>



Part of the Law Commons

---

### Repository Citation

Paul R. Baier, *Mr. Justice Blackmun: Reflections from the Cours Mirabeau*, 59 La. L. Rev. (1999)

Available at: <https://digitalcommons.law.lsu.edu/lalrev/vol59/iss3/2>

This Article is brought to you for free and open access by the Law Reviews and Journals at LSU Law Digital Commons. It has been accepted for inclusion in Louisiana Law Review by an authorized editor of LSU Law Digital Commons. For more information, please contact [kreed25@lsu.edu](mailto:kreed25@lsu.edu).

## Mr. Justice Blackmun: Reflections from the Cours Mirabeau\*

Paul R. Baier\*\*

Main Street in the old quarter of Aix-en-Provence, France, is the Cours Mirabeau, a golden archway of Platanes trees and mossy fountains. At one end stands the statue of the good Roi Renee, who was loved in his day for his kindness, his wisdom, his good works.

I recall Bastille Day, 1986, the summer of the dissent in *Bowers v. Hardwick*,<sup>1</sup> Justice Blackmun's ringing plea for human dignity and for freedom to differ in matters that count most. Harry and Dottie Blackmun were lost in a faceless crowd that watched fireworks explode ephemeral streams of red, white, and blue in the nighttime sky above the Grande Fontaine d'Aix. This was the summer the French press and *Le Monde* laughed at the spectacle of police invading an American citizen's bedroom.<sup>2</sup>

Our paths crossed that summer at Aix-Marseille-III University, its *Faculté de droit*, the school of Portalis:

[B]ut there must be a body of case law. In the host of subjects that make up civil matters, the judgments of which, in most cases, require less an application of a precise provision than a combination of several provisions leading to the decision rather than containing it, one cannot dispense with case law any more than he can dispense with legislation. . . . It is for experience gradually to fill up the gaps we

---

\* Originally published in A Tribute to Justice Harry A. Blackmun: "The Kind Voice of Friends," 43 Am. U. L. Rev., No. 3, Spring 1994, with William H. Rehnquist, Ruth Bader Ginsburg, William J. Brennan, Jr., Byron R. White, Erwin N. Griswold, and others. Copyright 1994, by AMERICAN UNIVERSITY LAW REVIEW. Copyright 1999, by LOUISIANA LAW REVIEW.

\*\* George M. Armstrong, Jr., Professor of Law, Paul M. Hebert Law Center, Louisiana State University. Judicial Fellow, Supreme Court of the United States, 1975-76. Editor, Mr. Justice And Mrs. Black: The Memoirs of Hugo L. Black and Elizabeth Black (Random House, 1986); Constitutional Interpretation: *Les Procédés d'Elaboration*: Teaching Materials for a Summer Course on American Constitutional Law at Aix-en-Provence, France, June/July 1986, 1992, with Harry A. Blackmun. Sec./Treas. Bill of Rights Section, LSBA.

1. 478 U.S. 186 (1986).

2. Justice Blackmun made good use of his summer exposure to the French language, and to *Le Monde*, on a later legal occasion, The Haitian Refugee "refouler" Case, viz.:

It thus is no surprise that when the French press has described the very policy challenged here, the term it has used is "refouler." See, e.g., *Le bourbier haïtien*, *Le Monde*, May 31-June 1, 1992 ("[L]es Etats-Unis ont decide de *refouler* directement les refugies recueillis par la garde cotiere." (The United States has decided [de *refouler*] directly the refugees picked up by the Coast Guard)).

Sale v. Haitian Centers Council, Inc., 113 S. Ct. 2549, 2569 (1993) (Blackmun, J., dissenting).

My French colleague Alain Levasseur, who grew up outside Paris and who reads *Le Monde*, tells me that Justice Blackmun got it right in this Haitian "*refouler*" case.

leave. The Codes of nations are the *fruit of the passage of time*, but *properly speaking*, we do not make them.<sup>3</sup>

Or in Harry A. Blackmun's own prophetic words: "Of course, times are different in 1970 than they were 200 years ago. No body of men 200 years ago could determine what our problems are today. That is, I suppose, what we have courts for, . . . to construe the Constitution in the light of current problems."<sup>4</sup>

Mr. Justice Blackmun's *Bakke* dissent quotes a similar thought, the words of Chief Justice Marshall: "In considering this question, then, we must never forget, that it is a *constitution* we are expounding."<sup>5</sup>

We were together at Aix teaching a course on Constitutional Interpretation, with a subtitle drawn from a little book by a great French law teacher and jurist, Francois Gény: *Les Procédés d'Elaboration du Droit Civil*, a lecture made by Gény at Nancy in 1910. I sensed a link between Gény's *Méthode*—his idea of "*libre recherche scientifique*" in judicial handling of a Code<sup>6</sup>—and Justice Blackmun's workways on the Court, his handling of what he characterized before the Senate Judiciary Committee as the "magnificent instrument" of the Bill of Rights.<sup>7</sup> His painstaking researches at the Mayo Clinic on the Hippocratic Oath and on the history of abortion laws come to mind.

3. Preliminary Discourse on the Projet of Civil Code (1800) (M. Shael Herman trans.), in Alain Levasseur, *Code Napoleon or Code Portals?*, 43 Tul. L. Rev. 762, 772-73 (1969).

4. *Hearing Before Comm. on the Judiciary, United States Senate on the Nomination of Harry A. Blackmun, of Minnesota, to be Associate Justice of the Supreme Court of the United States*, 91st Cong., 2d Sess. 35 (1970) [hereinafter *Blackmun Hearings*] (statement of Judge Blackmun).

5. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 407 (1978) (Opinion of Blackmun, J.) (quoting *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819)).

6. François Gény, *Méthode d'Interpretation et Sources en Droit Prive Positif* (Paris, 1899) (Ernest Bruncken trans.), reprinted in part in *Science of Legal Method* 1, 46 (1917). See generally Jaro Mayda, *Gény's Méthode After 60 Years: A Critical Introduction*, in François Gény, *Méthode d'Interpretation et Sources en Droit Prive Positif*, at v (Louisiana State Law Institute trans., 2d ed. 1954).

7. *Blackmun Hearings*, *supra* note 4, at 44 (statement of Judge Blackmun). Very early, in his first law review article, *The Marital Deduction and Its Use in Minnesota*, 36 Minn. L. Rev. 50, 64 (1951), Harry Blackmun showed great promise working with a tool that ordinary minds would find mundane:

The marital deduction is an apt and excellent tool for planning in Minnesota and elsewhere but, as with any tool, it requires both the proper raw material of an adequate fact situation and good craftsmanship. The lawyer can retain his assumed position as the latter only by intelligent industry and a willingness to devote the time and energy which is required to gain complete knowledge of the scope and capacities of this legal tool and of its dangers and limitations. . . . Here is one of those rarely presented new legal tools of real substance and of fairly general application.

Thirty years later, he would say of § 1983:

What a vibrant and exciting old statute it is. As Edmond Cahn so aptly observed, "[F]reedom is not free." Whatever is the fate of § 1983 in the future, I do hope that it

In his day, Mr. Justice Cardozo taught the connection between Code and Constitution in his 1921 Storrs Lectures at Yale, in what has come down to us as *The Nature of the Judicial Process*:

The same problems of method, the same contrasts between the letter and spirit, are living problems in our own land and law. Above all in the field of constitutional law, the method of free decision has become, I think, the dominant one today. The great generalities of the constitution have a content and a significance that vary from age to age. The method of free decision sees through the transitory particulars and reaches what is permanent behind them. Interpretation, thus enlarged, becomes more than the ascertainment of the meaning and intent of the lawmakers whose collective will has been declared. It supplements the declaration, and fills the vacant spaces, by the same processes and methods that have built up the customary law.<sup>8</sup>

Each generation must discover old truths for itself. Mr. Justice Blackmun has proved himself a worthy successor to Justice Cardozo, whose seat—that of Joseph Story, Benjamin Nathan Cardozo, Felix Frankfurter, and Oliver Wendell Holmes, Jr.—“H.A.B.” has adeptly filled for twenty-four years.

Aix-en-Provence is a serene setting of sunshine and of herbs, an ancient Roman outpost of warm springs for the troops. And all the while the Jurisconsults laid down their *regulae iuris* at Rome: “*Ex facto jus oritur*. That ancient rule must prevail in order that we may have a system of living law.”<sup>9</sup> Justice Blackmun, like Louis Brandeis before him, has kept a keen eye on the facts as he has given voice to the living law of the Constitution.

The Justice returned to Aix the summer of his *Casey* dissent,<sup>10</sup> slip opinions in hand, with Dottie—“Miss Clark,” as the Justice sometimes calls her—and their

survives both as a symbol and as a working mechanism for all of us to protect the constitutional liberties we treasure.

Harry A. Blackmun, *Section 1983 and Federal Protection of Individual Rights—Will the Statute Remain Alive or Fade Away?*, Seventeenth James Madison Lecture on Constitutional Law, New York University School of Law, November 14, 1984, 60 N.Y.U. L. Rev. 1, 29 (1985) (quoting *The Great Rights* 11 (E. Cahn ed. 1963)).

8. Benjamin N. Cardozo, *The Nature of the Judicial Process* 17 (1921). Justice Blackmun quoted Cardozo's thought, “The great generalities of the constitution have a content and a significance that vary from age to age,” in his *Bakke* opinion. *Bakke*, 438 U.S. at 407. Although he has said of himself, “I'm not a ‘jurisprude.’ I couldn't be an expert in jurisprudence if I wanted to be,” John A. Jenkins, *A Candid Talk with Justice Blackmun*, N.Y. Times, Feb. 20, 1983, § 6 (Magazine), at 61, Harry Blackmun, under the watchful eye of Professor Norval Morris, has co-moderated the Aspen Institute Seminar on Justice and Society for fourteen years. I was privileged to attend the latest installment, during the summer of 1993, and I have no doubt that Harry Blackmun is a reflective thinker about the nature of justice, with his feet firmly on the ground: “I get disturbed when we have a case that goes off on theory and does injustice to the litigant. I think we're there to try to do justice to him as well as to develop a great, overlying cloud of legal theory.” *Id.*

9. *Adams v. Tanner*, 240 U.S. 590, 600 (1917) (Mr. Justice Brandeis, dissenting).

10. *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2843 (1992) (Blackmun, J., dissenting).

daughter Nancy joining the students in class. Harry A. Blackmun's quiet voice, his restrained passion, his earnest conviction, his common touch—all added life to our learning. "I think that we should pursue justice," he told the students. "Some of us anyway, on the Supreme Court, ought to keep justice in mind, if not constantly every once in a while at least."

I've done it in the abortion cases when I speak of, "There is another world out there," which I think we should bear in mind. There is a person behind every case, usually a "little person," as I describe it, who needs attention and consideration rather than a legal theory of what is proper and what is right for all of us in the long run. I think cases involve people. And that they deserve a distinctive judgment, as well as the law itself.<sup>11</sup>

We were told by Nancy what a great sacrifice to family is the grind of the Court. "He hardly sees his grandchildren."

What especially sticks in my mind is Justice Blackmun's teaching us that the work of the Court—"Your Supreme Court"—is an inescapably human enterprise, with its ups and downs, its competing intellectual personalities, its fray Term after Term. "One is locked in combat down there."<sup>12</sup>

For two summers, then, we talked in France of the timeless craft of judicial interpretation of written texts, from Napoleon's Code to America's Constitution, aside the aged fountains of Aix where Portalis played as a little boy. "We cannot live with original intent," he told his Cours Mirabeau students.

Gaps are inevitable; judicial choice is inescapable. Whether we will have more or less liberty, more or less equality, always depends on the workways of the judge. "There is no guarantee of justice except the personality of the judge."<sup>13</sup> This from Eugen Ehrlich, another reflection from the Continent.

We all know Justice Blackmun's *DeShaney* dissent, spoken from the heart for all America to hear: "Today, the Court purports to be the dispassionate oracle of the law, unmoved by 'natural sympathy.' But, in this pretense, the

11. The quotations, and others in text, are taken from the transcript of the sound recordings of our Aix 1992 classes. Tape of LSU Law Center Summer Program (July 6-9, 1992, Aix-en-Provence, France) (recorded with Justice Blackmun's permission) [hereinafter Aix-'92 Trans.] (copy on file with author).

12. Justice Blackmun made this remark while teaching a special Saturday morning Constitutional Law class, with Dottie listening in, at LSU Law Center, March 9, 1985, recorded with the Justice's permission (transcript on file with author). And the combat continues:

Today we are faced with the question whether the Equal Protection Clause forbids intentional discrimination on the basis of gender, just as it prohibits discrimination on the basis of race. We hold that gender, like race, is an unconstitutional proxy for juror competence and impartiality.

*J.E.B. v. T.B.*, No. 92-1239, 1994 WL 132232 (U.S. Apr. 19, 1994) (Blackmun, J., for the Court; Scalia, J., joined by Rehnquist, C.J., and Thomas, J., dissenting).

13. Eugen Ehrlich, *Freie Rechtsfindung und Freie Rechtswissenschaft* (Leipzig, 1903) (Ernest Bruncken trans.), reprinted in *part in* 9 *Science of Legal Method*, *supra* note 6, at 47, 65.

Court itself retreats into a sterile formalism. . . ."<sup>14</sup> This is not Justice Blackmun's way to interpret the "broad and stirring clauses" of the Constitution:

On the contrary, the question presented by this case is an open one, and our Fourteenth Amendment precedents may be read more broadly or narrowly depending upon how one chooses to read them. 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.<sup>15</sup>

And what of Justice Harry Blackmun viewed from this side of the Atlantic? I have read Justice Brennan's magnificent tribute to Harry A. Blackmun:

Above all, Justice Blackmun's vision focuses upon human details—on the problems and worries and predicaments of individuals—and this has been the hallmark not only of his approach to constitutional cases but of his interaction with the world around him. This practical yet compassionate view has added scope to the Court's work. . . .<sup>16</sup>

And Erwin Griswold has solidly underscored Harry Blackmun's wisdom and courage.<sup>17</sup> I'm sure *The American University Law Review's* symposium of salutes, which I am privileged to join, will be followed by many more to come.

I would add only a few personal observations, aimed at plucking a Spring '94 crocus for Minnesota's "shy person's Justice,"<sup>18</sup> and for "Miss Clark," Dorothy Clark Blackmun, the Justice's conscience in our classroom. "Harry, you haven't answered the question."

I remember our first conversation, the day after I heard the *Danforth*<sup>19</sup> opinion announced in Court. Only because I was about to return home to teaching after my year as a Judicial Fellow did I make bold to say a word. The Justice was at breakfast with his clerks, as always, at 8:05 a.m. in the Court's cafeteria. Quickly passing the table, I mentioned that I admired his opinion in *Danforth*. The Justice called me back: "Professor, what part of the opinion did you like?" I didn't think he knew I existed at the Court, much less that I was a law teacher. But he pays attention to other lives, I now know. I had done my homework. I recited from the Justice's mathematical breakdown: "IV-E." This was the hard, saline amniocentesis issue in the case. Justice Blackmun, as he has done for countless others, invited me to sit down at the table and join the

14. *DeShaney v. Winnebago County Dep't of Servs.*, 489 U.S. 189, 212 (1989).

15. *Id.* at 212-13.

16. William J. Brennan, Jr., *A Tribute to Harry A. Blackmun*, 1990 Ann. Surv. Am. L. xi.

17. Erwin N. Griswold, *Tribute*, 1990 Ann. Surv. Am. L. xvii.

18. This is fellow Minnesotan, of Powdermilk Biscuit fame, Garrison Keillor's apt description of the Justice, quoted in Glen Elasser, *Courting Justice*, Chi. Trib., June 6, 1990, § C, at 1.

19. *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52 (1976).

dialogue. I wondered, "What am I doing here?" Justice Blackmun felt exactly the same way "the day the load of bricks fell on me":

I'll never forget the 9th day of June, 1970, when I was sworn in. Immediately after the swearing in we went into "the Conference," so called. I walked into that room and there was Hugo Black, William O. Douglas, William J. Brennan, Jr., John Marshall Harlan—and I said to myself "What am I doing here."<sup>20</sup>

I sat down and told the Justice I thought the Court was wise in *Danforth* not to allow itself to be hoodwinked even by a sovereign state legislature—never mind Justice Byron White's biting criticism that the Court had made itself the Nation's *ex officio* Medical Review Board.

I remember showing a visitor the nooks and crannies of the Court; this was one of my duties as a Judicial Fellow. We stopped short at the Justices' Library, a quiet retreat that Justice Blackmun made his own. We watched the Cardigan Justice erase a word or two from a draft opinion. He penciled in a replacement, picked up the page, leaned back, and subjected the revision to his angle of vision. Years later, I would learn at Aix:

What I like most of all is writing opinions. There isn't any question about this in my mind. I don't know whether it's because it's a quiet enterprise or whether it's because it gives you a chance to think a little bit and the like. Writing opinions is a play with words. One can work on them, change them, refine them. I suppose the opinions that one writes are what he's remembered by.

Mr. Justice Blackmun is a jeweller of opinions. We left him undisturbed at his quiet enterprise.

The Justice's sympathy for the little person is preserved in the *U.S. Reports*, just as the good Roi Renée rests in bronze on the Cours Mirabeau.

Beneath the surface, the roots of Harry Blackmun's empathy run deep: "I dislike to talk about it, but I did not have very much to start with. . . ."<sup>21</sup> Christmas Eve 1931 was spent in New York City, with his Law School roommate's family. Doctor Harry Emerson Fosdick invited him to climb the bell tower of Riverside Church late at night:

I agreed. We ascended the long stair in the cold night and finally reached the platform and looked out upon the lights of New York City, up and down the Hudson and across the East River. It was an impressive and beautiful sight. And yet Doctor Fosdick said: "Young

---

20. Aix-'92 Trans., *supra* note 11, at 40.

21. *Blackmun Hearings*, *supra* note blackmun hearings, at 55 (statement of Judge Blackmun).

man, there is more misery under those lights this Christmas than you will ever know." I have not forgotten.<sup>22</sup>

As a Justice, Harry Andrew Blackmun made it a point of duty to rescue parties from anonymity by reciting their first, middle, and last names, viz.: "Jose Chavez-Salido, Pedro Luis Ybarra, and Ricardo Bohorquez are American-educated Spanish-speaking lawful residents of Los Angeles County, California. Seven years ago, each had a modest aspiration—to become a Los Angeles County 'Deputy Probation Officer, Spanish-speaking.'"<sup>23</sup> Countless other examples of this unheralded Blackmun touch are in the *Reports*.

Mr. Justice Blackmun is a master of doctrinal exposition and of tying up loose ends. His scholarship is enormous. Nowhere in the briefs in *United States v. Sioux Nation* is the story told of "the Black Hills of South Dakota, the Great Sioux Reservation, and a colorful, and in many respects tragic, chapter in the history of the Nation's West."<sup>24</sup> Rather, we learn of the Fort Laramie Treaty, of the Powder River War, and of the Sioux tribes, "led by their great chief, Red Cloud," only through the empathy of Harry Blackmun's opinion—painstakingly documented—for the Court.

Like other mortals, Justice Blackmun has changed his mind on vital subjects when experience and further reflection move him to do so. Joe Garcia's case comes to mind.<sup>25</sup> And then there is the death penalty, Justice Blackmun's *cri de coeur* the other day upon Bruce Edwin Callins's petition:

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 the 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

22. Harry A. Blackmun, Remarks at the American Bar Association Prayer Breakfast in Dallas, Tex. 10-11 (Aug. 12, 1979) [hereinafter ABA Remarks] (copy on file with Chambers of Justice Blackmun).

23. *Cabell v. Chavez-Salido*, 454 U.S. 432, 448 (1982) (Blackmun, J., dissenting). Harold Hongju Koh, who clerked for Blackmun during the *Chavez-Salido* Term, has poignantly captured the spirit of his Justice as Harry Blackmun announced his dissent:

As the Justice spoke, I noticed that the spectators had become still, and were listening intently. For them, the case had suddenly become real; the Supreme Court had become a human institution. The concept of equal treatment for aliens had suddenly acquired a human face.

Harold H. Koh, *Equality with a Human Face: Justice Blackmun and the Equal Protection of Aliens*, 8 *Hamline L. Rev.* 51, 104 (1985).

24. *United States v. Sioux Nation of Indians*, 448 U.S. 371, 374 (1980). Justice Blackmun has done the same thing for the Crow Nation, Chief Blackfoot, and the bed of the Big Horn River. See *Montana v. United States*, 450 U.S. 544, 569 (1981) (Blackmun, J., dissenting in part).

25. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985), *overruling* *National League of Cities v. Usery*, 426 U.S. 833 (1976).



and the need for regulation eviscerated, I feel morally and intellectually obligated simply to concede that the death penalty endeavor has failed.<sup>26</sup>

I have no doubt that Justice Blackmun has grown as a Justice over the years, as he himself described the endeavor, and that he has fulfilled his Aix hope:

I suspect that when one goes on the Supreme Court of the United States his constitutional philosophy is not fully developed. When one goes to Washington he has to develop a constitutional philosophy. What does "equal protection of the laws" really mean? And if one didn't grow and develop down there I would be disappointed in that person as a Justice. I would hope that in 1992 almost 20 years after *Roe against Wade* that I have grown a little bit in my constitutional philosophy and my constitutional resolution. I call that growth, not change, and I hope I'm correct.

Like the Doctors Mayo in Medicine, Justice Blackmun in Law has "loved the truth and sought to know it."<sup>27</sup> He has judged faithful to his own measure: "Must we not say that the law, in order to be true, at least must 'establish Justice,' within the meaning of the Preamble to the Constitution of the United States?"<sup>28</sup> And it is in the Preamble that Justice Blackmun finds "the basic prescription for the process of balancing"<sup>29</sup> that has been his hallmark all along: "to balance value against value to determine in a given context which is to prevail."<sup>30</sup> This balancing, he has told us, "lies at the very heart of constitutional adjudication."<sup>31</sup>

Justice Blackmun has taken a quiver of arrows over the years. But there is an arrow of a different sort—Holmes's conviction that "while one lives there is

26. *Callins v. Collins*, 114 S. Ct. 1127, 1130 (1994) (Blackmun, J., dissenting from denial of certiorari).

27. Justice Blackmun explained:

Flanking the great stairs on the west side of the Supreme Court building in Washington are two pedestals. On them are figures carved by the well-known sculptor, James Earle Fraser. Another Fraser statue is in Rochester, Minnesota. It portrays the Doctors Mayo in their surgical gowns. Beneath those figures are the words: "They loved the truth and sought to know it."

*Remarks of Harry A. Blackmun: Law Dedication Dinner*, Iowa Advocate, Fall/Winter 1986-1987, at 15.

28. *Id.*

29. *Remarks of Harry A. Blackmun: The Waterman Hall Addition Dedication*, 30 Ark. L. Rev. vii, xxi (1976).

30. *Id.*

31. "Fashioning such accommodations between individual rights and the legitimate interests of government, establishing benchmarks and standards with which to evaluate the competing claims of individuals and government, lies at the very heart of constitutional adjudication." *Webster v. Reproductive Health Servs.*, 492 U.S. 490, 549 (1989) (Blackmun, J., dissenting).

neither logic nor joy in living languidly, that there is duty and delight in hard fighting, that while it is well to hit the mark, it is sometimes better to shoot an arrow into the sky if it takes fire there. . . ."<sup>32</sup>

I like to think O.W.H., Jr., was a muse of sorts as Harry Blackmun worked alone in the Justices' Library.<sup>33</sup> "Only when you have worked alone,—when you have felt around you a black gulf of solitude more isolating than that which surrounds the dying man, and in hope and in despair have trusted to your own unshaken will,—then only will you have achieved."<sup>34</sup>

This is enough, I trust, to show my high regard and affection for Justice Blackmun. Paul Freund said of Brandeis that he was the Court's Isaiah. Harry Blackmun's example of tenacity and of not giving up; his willingness to innovate, not merely to imitate, and to take the calculated risk; his joining in the fray; his moral courage; his love—all remind me of the example of Ruth, as Harry Blackmun described Ruth at an A.B.A. Prayer Breakfast, some fifteen years ago.<sup>35</sup>

President Clinton has justly named Harry Blackmun as an ideal Justice. And the President's suggestion that what is needed on the Supreme Court is "somebody with a big heart"<sup>36</sup> stems directly, I believe, from Justice Blackmun's radiant example.

What is needed on the Court is character; learning, some of it acquired; experience; hard work; and wisdom. Harry Blackmun's example also shows us that human sympathy and compassion are vital in the work of the Court.

And so the Court's Nehemiah will come down from the wall.<sup>37</sup> He has

32. Oliver W. Holmes, Jr., *Anonymity and Achievement* (1890), in *The Occasional Speeches of Justice Oliver Wendell Holmes* 59, 61 (M. DeW. Howe ed. 1962).

33. Sometimes Holmes as Muse shows up in Justice Blackmun's opinions. See, e.g., *Lewis v. City of New Orleans*, 415 U.S. 130, 136 (1974) (Blackmun, J., dissenting) ("All rights tend to declare themselves absolute to their logical extreme."); *New York Times Co. v. United States*, 403 U.S. 713, 759 (1971) (Blackmun, J., dissenting) ("Great cases like hard cases make bad law."). In *Lewis*, Justice Blackmun decried the Court's protecting profanity under the First Amendment and "[t]he extreme to which we allow ourselves to be manipulated by theory extended to the end of logic." *Lewis*, 415 U.S. at 136.

34. *The Profession of the Law* (1886), in *Oliver Wendell Holmes, Junior, Speeches* 22, 24 (1891).

35. ABA Remarks, *supra* note 22.

36. Ruth Marcus & Joan Biskupic, *Justice White to Retire After 31 Years*, *Wash. Post*, Mar. 20, 1993, at A1 (quoting President Clinton).

37. "Perhaps far off in another Persia, or nearby, within all of us, is, hopefully, a bit of the spirit of Nehemiah." Harry A. Blackmun, Remarks at the American Bar Association Prayer Breakfast in Washington, D.C. 11 (Aug. 5, 1973) (copy on file with Chambers of Justice Blackmun).

Will we be able to invoke the spirit of his day and of his people when under his leadership they said "let us rebuild" and "let us start"? Will it be said of us that "with willing hands" we "set about the good work"? 1:17-18. Will it be said of us that we "put [our] hearts into [our] work." 4:6-9, and that we proceeded, when necessary, with a weapon in one hand and a builder's tool in the other? Will it be said that, despite the opposition of announced displeasure, accusation, ridicule, anger, confusion, infiltration, blandishment, threat, temptation, and those repeated invitations to come down to the Plain of Ono and to delay and compromise and rationalize, we held steady and built again?

built well. His faith endures: "But the Court for me is a precious institution, and, in my estimation, even a heroic one."<sup>38</sup> Harry Blackmun has added a humanity to Justice that is uniquely his own.

I sent up a telegram to "Old No. 3" on the faithful day, April 6, 1994:

"WE CANNOT LIVE OUR DREAMS. WE ARE LUCKY ENOUGH IF WE CAN GIVE A SAMPLE OF OUR BEST, AND IF IN OUR HEARTS WE CAN FEEL THAT IT HAS BEEN NOBLY DONE."—O.W.H. to Boston Bar, 1900. THANK YOU FOR YOUR COURAGE, YOUR WISDOM, YOUR SYMPATHY FOR "POOR JOSHUA," YOUR HARD WORK. LOVE TO YOU AND DOTTIE. Professor Baier, Kids, LSU. STOP

And even now my mind wanders back to our last class at Aix, to his closing words: a favorite passage from William Penn, read with poignancy by the Justice to the young people who gathered around him. Harry Blackmun has walked humbly through life—and he has shaped the cold corridors of the law—guided by these words: "I expect to pass through life but once. If therefore, there be any kindness I can show, or any good thing I can do to any fellow being, let me do it now, and not defer or neglect it, as I shall not pass this way again."

Mr. Justice Blackmun has given a sample of his best. It has been nobly done.

---

*Id.*

38. Harry A. Blackmun, Remarks at Renaissance Weekend at Hilton Head, S.C. 21 (Dec. 31, 1992) (copy on file with Chambers of Justice Blackmun).