

Changed by the Court

The evolving jurisprudence of Justice Blackmun and the Supreme Court

by MORTON J. HORWITZ

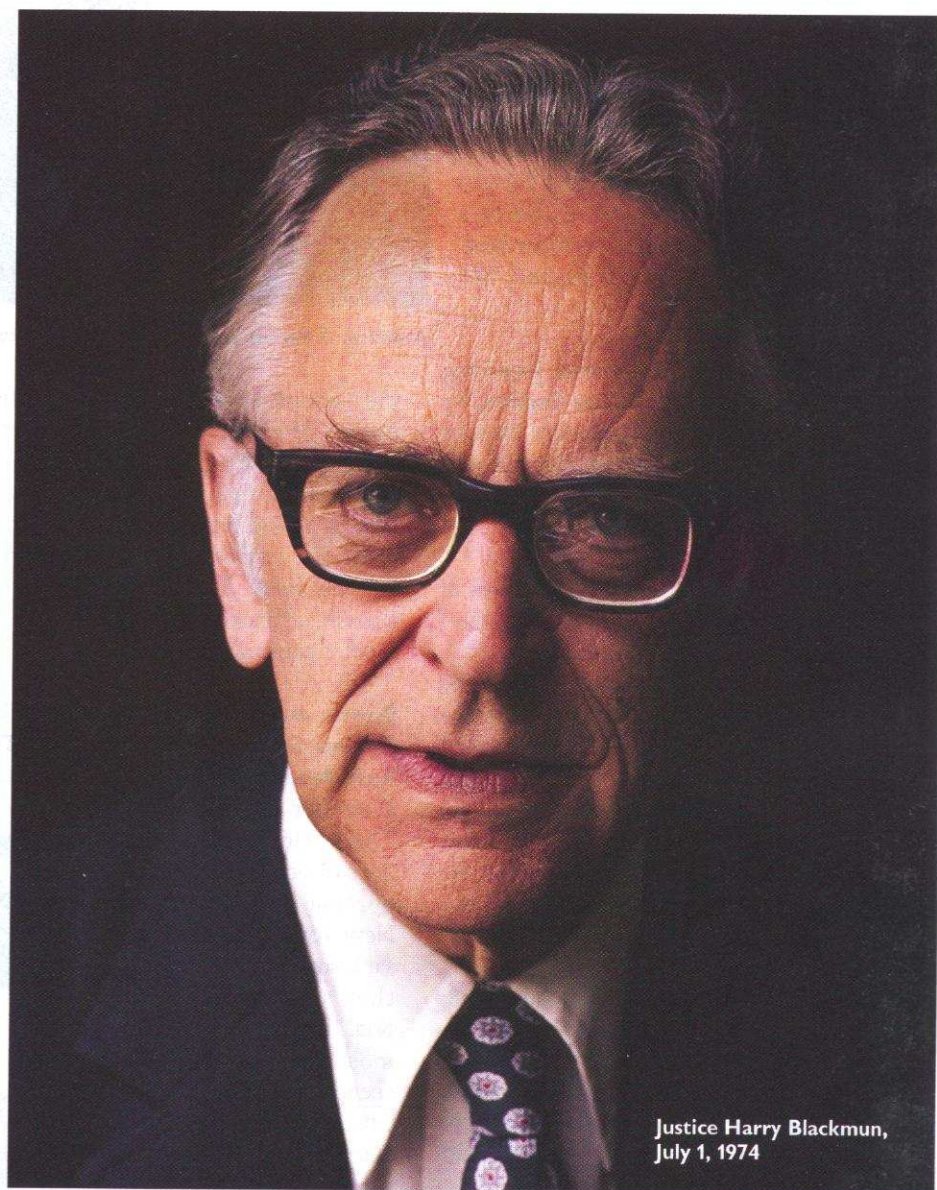
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FEW SUPREME COURT justices, after their appointments, have drastically changed their fundamental views of law and life. Most jus-

tices, after all, have been nominated to the Court at a time in their careers when their basic patterns of belief have already become more or less settled. For this reason alone, Harry Blackmun's lonely transformation over the 24 years (1970-1994) he served on the Supreme Court would be especially fascinating. Indeed, it is difficult to think of another justice who changed as profoundly as did Blackmun during his time on the Court.

Named to the Supreme Court after two unsuccessful efforts by President Richard Nixon to secure Senate confirmation of a nominee, Blackmun's life was suddenly changed forever during his third term after he "got hit" with writing the majority opinion in *Roe v. Wade* (1973), which recognized a woman's constitutional right to an abortion. From the moment he announced that decision, he involuntarily became its leading public symbol, accused by an increasingly organized and strident antiabortion movement of being no less than an accomplice to murder. For most of his remaining two decades on the Court, he endured a regular stream of abusive let-

ters and hostile demonstrations, as well as a number of death threats—including a gun shot that shattered a window of his apartment—which



restricted his movements and cast a melancholy pall over his existence.

This book offers an unusually intimate portrait of Blackmun [’29, LL.B. ’32, LL.D. ’94], who had jotted down daily diary en-

tries from the time he was 11 years old, and continued the practice after he joined the Court. Thus he has left us glimpses into the inner workings of the Court as well as candid judgments of his col-

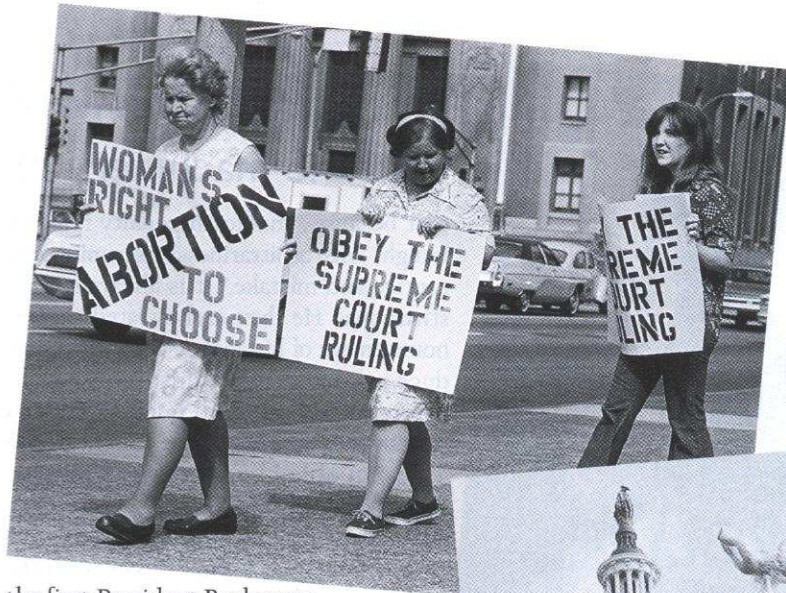
Linda Greenhouse ’68, *Becoming Justice Blackmun: Harry Blackmun's Supreme Court Journey* (Times Books, \$25).

leagues, especially of Chief Justice Warren Burger, his closest friend for 55 years. Through his diary, Blackmun poignantly portrays the slow but steady disintegration of their friendship due both to his growing estrangement from Burger's conservative constitutional views and to his increasing disdain for Burger's dysfunctional leadership.

Linda Greenhouse '68, the author of *Becoming Justice Blackmun*, is the Pulitzer Prize-winning Supreme Court reporter for the *New York Times*. After being granted two months' advance research into the Blackmun papers before they were opened to the public in 2004, on the fifth anniversary of the justice's death, she originally published the core of this book in three articles in the *Times*. Given the vast quantity of material that needed to be digested, it is simply remarkable that Greenhouse was able to craft such a compelling narrative in the short time available. She focuses on three major themes: *Roe v. Wade*, Blackmun's changing attitude toward capital punishment, and his evolving relationship with Warren Burger.

Greenhouse offers a rich account of the 1973 decision that permanently identified Blackmun with the cause of a constitutional right to abortion. She shows how Blackmun's original formulation, ironically, focused primarily on a doctor's right to engage in good medical practice, not a woman's right to an abortion. Indeed, for 20 years there was a disconnect between Blackmun's views on abortion and his mostly retrograde views on emerging constitutional protections against gender discrimination. Greenhouse is brilliant in identifying the moments at which Blackmun finally sees the connection and comes to realize that *Roe v. Wade* rests squarely on a woman's constitutional rights. "[I]t was in the course of protecting *Roe*," Greenhouse concludes, "that he began to see himself as protecting the rights of women."

A major part of the *Roe* story is how Blackmun, perhaps in reaction to years of accumulated abuse, came passionately to identify the decision as his own personal legacy. "[T]he world's view that he was the creator of abortion rights in America, gradually, perhaps inevitably, shaped his self-image," Greenhouse writes. Preventing *Roe* from being overruled became his own personal mission, even obsession. As appointments by President Reagan and

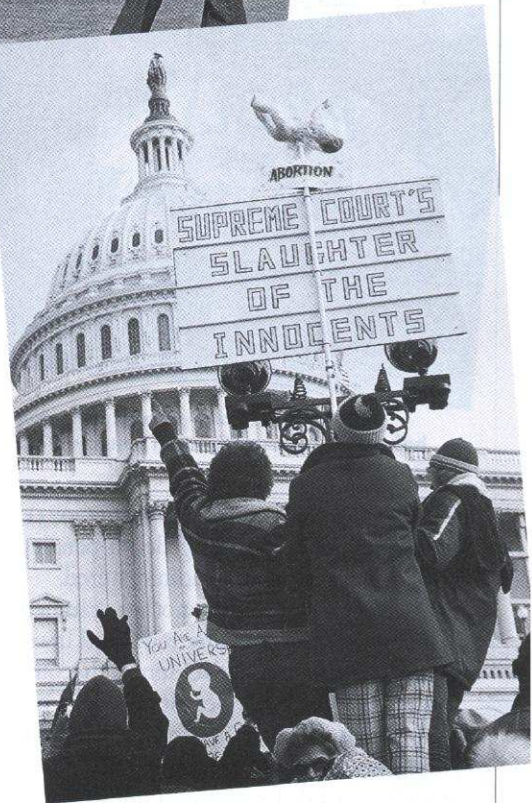


A three-generation abortion-rights protest in St. Louis, and (below) a third-anniversary protest against the *Roe* decision in Washington, D.C.

the first President Bush were widely thought to have created an overruling majority, Blackmun prepared himself for the worst. Twice, in 1989 and 1992, as the Court seemed about to overrule *Roe*, Blackmun composed emotional dissents, from which he was spared by last-minute shifts among his fellow justices.

BLACKMUN'S REALIZATION that *Roe* could not be isolated from issues of gender discrimination is but one example of how his growing attachment to *Roe* became the catalyst for his more general transformation.

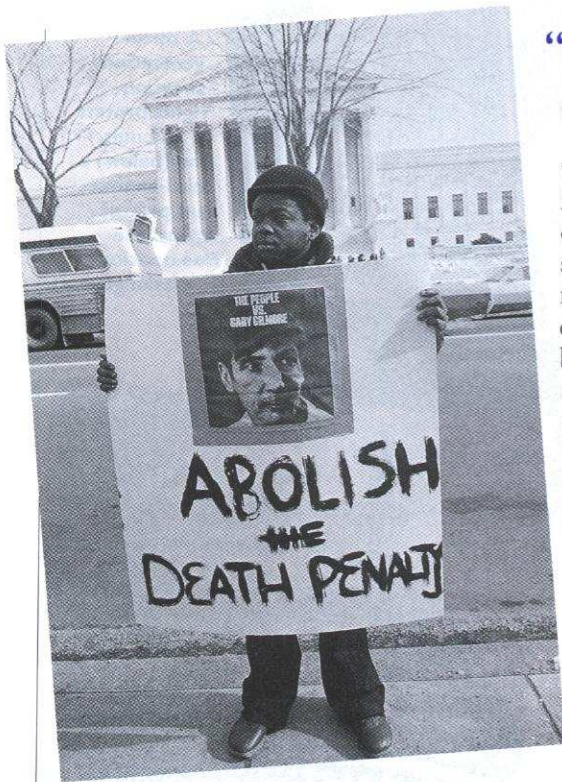
The change was dramatic. At the time Blackmun was appointed, his long-time association with Burger led to immediate speculation that he would provide an automatic second vote for his fellow Minnesotan. "He was acutely sensitive to the 'Minnesota Twin' label that the press had been quick to pin on him when he joined the Court," Greenhouse writes. But there was some reason to see his early votes just that way. During his first term, he joined Burger (and John M. Harlan) in dissent in the Pentagon Papers case (*New York Times Co. v. United States*), which "solidified his reputation as a clone of the chief justice." During his first five terms on the Court (1970-75), he voted with Burger in 87.5 percent of closely divided cases, while he agreed with the Court's leading liberal, William Brennan, in only 13 percent of the cases. In the next five-year period, he had shifted to 54.5 percent agreement with Brennan's views and only 45.5 percent with Burger's. During the final five years that Burger and Blackmun sat together, they agreed only 32.4 percent of the time, while Blackmun voted with Brennan in 70.6 percent of closely divided



cases. "After Brennan and Marshall retired," Greenhouse notes, "Harry Blackmun was, by wide consensus, the most liberal member of the Supreme Court."

I doubt that there is another example of such a substantial long-term metamorphosis by a sitting Supreme Court Justice. Taken together, it amounted to a profound revision of his world view, involving both his conception of the judicial role and his understanding of how the world worked.

His long-term inner struggle over the legitimacy of capital punishment is perhaps the best example. Though he was personally opposed to capital punishment, in his prior job on the court of appeals, he had regularly upheld the death penalty on the grounds that it was a question of legislative policy. In one of his early death-penalty votes after joining the Court, he dissented from the path-break-



A death-penalty protestor before the Supreme Court in January 1977.

ing decision in *Furman v. Georgia* (1973), striking down all existing death-penalty laws as being arbitrarily administered.

But as one state after another resumed capital punishment under redrafted laws, Greenhouse writes, “Blackmun’s discomfort with the death penalty grew with each passing term.” In *McCleskey v. Kemp* (1986), he dissented from a 5-4 opinion rejecting a racial discrimination challenge to Georgia’s administration of the death penalty. The majority upheld the capital sentence despite statistical evidence showing that a black defendant who killed a white victim was 4.3 times more likely to receive a death sentence than a white defendant who killed a black victim. Blackmun’s dissent represented a sharp reversal of views he had expressed on the Court of Appeals in 1968, upholding the death penalty for rape of a white woman by a black defendant. Despite statistical evidence in that case showing that a black man was 3.5 times more likely to receive the death sentence for raping a white woman than a white defendant was for raping a black woman, Blackmun nevertheless refused to find racial discrimination “on the basis of broad theories of social and statistical injustice.”

By 1993, the year before his retirement, Blackmun finally arrived at the conclusion

“From this day forward, I no longer shall tinker with the machinery of death.”

that because “the death penalty remains fraught with arbitrariness, discrimination, caprice and mistake,” it is always unconstitutional. He then orchestrated the announcement of his change of heart to produce maximum effect. Just four months before he retired, Blackmun delivered a solitary, passionate 22-page dissent from a decision upholding the death penalty, concluding with what would become his most famous words: “From this day forward, I no longer shall tinker with the machinery of death.”

In *Becoming Justice Blackmun*, Linda Greenhouse has given us her customarily lucid analysis of the major legal issues before the Supreme Court during Blackmun’s 24-year tenure. Her accessible narrative puts legal issues in the broader social context. But it is her touching portrayal of the sad collapse of the Blackmun-Burger friendship that is the most striking contribution of this book.

From the time Burger and Blackmun attended kindergarten and Sunday School together in their Minneapolis neighborhood until Blackmun’s appointment to the Supreme Court 55 years later, they were close, probably best, friends. During the periods they were apart, they exchanged hundreds of warm and mutually supportive letters. When they worked in the same city, they frequently lunched together. When Blackmun, who had been the best man at Burger’s wedding 30 years earlier,

attended Burger’s swearing-in ceremony at the Court of Appeals, Burger wrote can’t tell you how much it meant to me have you on hand last Friday—again my Best Man in a sense.”

Both of Blackmun’s appointments—the Court of Appeals and the Supreme Court—probably would not have occurred without Burger’s political clout and active support. As he was about to be sworn in as Supreme Court Justice, Blackmun received a letter from Burger rejecting in what a “great way...it will be...for to finish our judicial stint [together].” Blackmun recalled “that law firm idea of 35-40 years ago now comes into fruition in a way I never dreamed of—at least until lately.” More or less the same moment, however, Blackmun’s 85-year-old mother was warning the new justice that the Burger-Blackmun relationship inevitably would change. Blackmun later recorded his reaction: “Mother, it just can’t. We’ve been friends for a long time.”

Becoming Justice Blackmun is a sensitive and perceptive narrative of the progressive breakdown of their friendship. Greenhouse observes, “the strains between...Blackmun and...Burger intensified with each passing term.” By his account the rift occurred quite early, during Blackmun’s fifth term on the Court, in the Watergate tapes case, *United States v. Nixon* (1974). After Burger had assigned himself to write the Court’s opinion, Blackmun collaborated with other justices in effectively taking the case away from Burger, with

CHAPTER & VERSE

A correspondence corner for not-so-famous lost words

Mike Kempson requests a source for the following exchange, possibly from an old poem: “It was just the other day that the *Gray Swan* sailed away.” “The other day? ’Twas 20 years ago!”

“die a little each day” (May-June). Thomas Finucane suggests as a possible source “a prominent subtext in geriatric medicine,” the following excerpt from Shakespeare’s *King Lear*: “O, our lives’ sweetness!/That we the pain of death

would hourly die/Rather than die at once!” (5.3.184-6).

“heights of joy, depths of sorrow” (May-June). John Hostage and Helmut Joel both suggested in reply Clara’s song, from the second scene of the third act of Goethe’s play *Egmont*.

Send inquiries and answers to “Chapter and Verse,” Harvard Magazine, 7 Ware Street, Cambridge 02138.

was suspected of being a Nixon partisan. Years later, Blackmun believed that Burger “always resented” that move, and “from then on we grew apart.” “I think I knew Warren Burger intimately,” he added, “maybe in some ways better than he knew himself.” By the time Burger resigned in 1986, the friendship had “vanished” under the burden of increasing ideological difference. Its dissolution, Greenhouse concludes, was complex: “not one or several events, not clashes over particular cases, but an accretion of disappointments, like water dripping on stone and, over the years, wearing it away.” Each brought expectations to the friendship that may have been unrealistic.

“Having spent the crucial decades of their adult lives a thousand miles apart, each carried an image of the other that no longer reflected reality.”

During his final interview for an oral-history project of the Supreme Court Historical Society, Justice Blackmun was asked whether writing *Roe v. Wade* was “a piece of bad luck or good luck.” “I think one grows in controversy,” he replied. His successor, Justice Stephen Breyer, observed at Blackmun’s funeral that “it is not often that a man or woman of sixty-one, in a cloistered office, manages through the years to find, not a narrowing, but a broadening of mind, of outlook, and of spirit. But that is what Harry Blackmun

found.” In assigning Blackmun the opinion in *Roe v. Wade*, Greenhouse concludes, “Warren Burger could never have suspected that in turning to his reliable friend for one unwelcome assignment, he was launching Blackmun on a journey that would open him to new ideas and take him far from their common shore of shared assumptions.”

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Norse Calypsos, et Cetera

Not to be mythed, a new song collection mixes whimsy with erudition.

THE POLYMATHIC Nicholas D. Humez '69—silversmith, author, banjoist, classical philologist, composer of operas and string quartets, poet, cartoonist, music critic, professor of mythology—has a new opus, a suite of tunes unlike anything else you’ll hear. It’s not that the music itself is unusual. Far from it: the 17 ditties on his *Myth Songs*, 16 of them composed by Humez (he adapted the seventeenth from a folk song), are by turns bouncy, plaintive, and moody, in the manner of folk music. They’re the kind of foot-tapping melodies one might hear on, say, *Prairie Home Companion*. The singular part of the just-released CD (available at www.myth-songs.com) is the lyrics. Each song recounts one of the world’s great myths, in a style simultaneously funny, erudite, and bracingly down-to-earth.

Greek mythology informs nine of the songs; the rest range through Norse, Egyptian, Sumerian/Babylonian, Canaanite, and Irish myths; one, *The Triple Goddess*, even expresses “Proto-Indo-European metamythology.” Regarding this cut, the

CD’s brief liner notes observe that “Frazerian Ritualists get all dewy-eyed when anyone

whispers ‘Maiden! Nymph! Crone!’ Archaeologists counter that there is evidence for ‘plenty of goddesses, but no single Goddess.’ You decide.”

Humez forges some odd couplings of text and music: *Sleipnir*, for example, may be the only recorded example of a Norse calypso. It is difficult to capture the astonishing effect of a lilting Caribbean beat under lyrics like:

Sometimes I would fight with the
strength of mighty Thor:
I always believed I would fall in
combat as Vikings do in war.

And all the boys sang:
“Odin, don’t make me ride,
don’t make me ride with you to Niflheim;
Odin, don’t make me ride on your horrible
horse with the eight legs.”

An enclosed booklet, which provides complete song lyrics, helpfully explains that “To ride the ‘eight-legged horse’ was an ironic euphemism among the Norse and others for being dead and carried by four pallbearers.”

Yes, listening to *Myth Songs* teaches you things; it’s a basic mythology course compressed onto a single CD. Indeed, the album began as a series of “didactic ditties” that Humez wrote and sang to his students of Western mythology at Montclair State University in New Jer-



Odin, chief god among the Germanic peoples, seated on his throne in Valhalla

sey, where he has been an adjunct professor in the department of classics and general humanities since 1999. For the recording, Humez enlisted 10 accomplished musicians to accompany his solo vocals on instruments including violin, guitar, mandolin, harpsichord, piano, dulcimer, string bass, and Irish penny-whistle. The overall effect is something

Nick Humez,
Myth Songs (Oasis
MS-101, \$16).