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IN PRAISE OF JUSTICE BLACKMUN: (CORRECTED)  
TYPOS AND ALL

*Michael C. Dorf\**

If we are to search Justice Harry A. Blackmun's constitutional oeuvre for an appropriate epitaph, the leading candidate would be his statement in *DeShaney v. Winnebago County Department of Social Services*, that "compassion need not be exiled from the province of judging."<sup>1</sup> Those of us who had the good fortune to know Justice Blackmun<sup>2</sup> may be tempted to say that he brought to the profession of judging the same remarkable warmth, sensitivity, and humility that characterized his personal relationships.<sup>3</sup> Yet this observation strikes me as too facile. Many of those who devote their professional lives to labors on behalf of "the people" have no great fondness or respect for actual people, and personally decent individuals sometimes do great evil when wearing official hats (or robes). Thus, although there is undoubtedly some relation between everyone's public and private selves, the relation is often quite complex and subtle. In this essay I try to shed a bit more light on the wellsprings of Justice Blackmun's jurisprudence. The exercise is necessarily speculative, but I believe my conclusions to be at least as plausible as the conventional wisdom that Justice Blackmun was a compassionate Justice because he was a compassionate man.<sup>4</sup>

I begin with the personal. Harry Blackmun was a kind and decent man, not only toward those with whom he was personally close, but to

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\* Vice Dean and Professor of Law, Columbia Law School. I am very grateful to Sherry Colb for her comments on a draft of this essay and for sharing Justice Blackmun with me. Ben Torrance provided excellent editorial advice.

1. 489 U.S. 189, 213 (1989) (Blackmun, J., dissenting). See Pamela S. Karlan, *Bringing Compassion into the Province of Judging: Justice Blackmun and the Outsiders*, 71 N.D. L. Rev. 173 (1995); Nina Totenberg, *Harry A. Blackmun: The Conscientious Conscience*, 43 Am. U. L. Rev. 745 (1994); Benjamin Zipursky, Note, *DeShaney* and the Jurisprudence of Compassion, 65 N.Y.U. L. Rev. 1101 (1990).

2. I first met Justice Blackmun when I was a law clerk for Justice Kennedy during the October 1991 Term. I became an honorary member of his extended family the following year, when my wife was his law clerk. See Sherry F. Colb, *Breakfast with Justice Blackmun*, 71 N.D. L. Rev. 13 (1995).

3. See, e.g., Lynn E. Blais, *Simple Justice/Simple Murder: Reflections on Judicial Modesty, Federal Habeas, and Justice Blackmun's Capital Punishment Jurisprudence*, 97 Dick. L. Rev. 513, 517 (1993) (connecting "Justice Blackmun's personal and jurisprudential modesty"); Floyd R. Gibson, *Mr. Justice Blackmun*, 71 N.D. L. Rev. 15, 16 (1994) (attributing Justice Blackmun's "compassion for the disadvantaged and genuine concern for human rights" to "his background"); Jeffrey Rosen, *Sentimental Journey: The Emotional Jurisprudence of Harry Blackmun*, *New Republic*, May 2, 1994, at 13 ("the qualities that made Blackmun an admirable man ultimately condemned him to be an ineffective justice").

4. Of course, to do the job properly would require a full biography.

everyone he encountered.<sup>5</sup> He also had a wry sense of humor and a delightful sense of mischief. He exhibited the latter in his imitations of his colleagues<sup>6</sup> and practical jokes at their expense. In his own accounts, Justice Blackmun derived the greatest pleasure from pranks pulled on his boyhood friend, Chief Justice Warren Burger.

It should not diminish Justice Blackmun's greatness to note that despite his many admirable qualities, he often seemed glum. I can recall the twinkle in his eye when entertaining children or discussing a pennant race, but the image that comes more readily to mind is of the Justice walking the hallways of the Court, looking wanly into the distance, as if weighted down by the seriousness of his work.

I do not know whether Justice Blackmun appeared this way before he came to be identified as the "author of *Roe v. Wade*," although he always took his work extraordinarily seriously. An Eighth Circuit colleague recalled that then-Judge Blackmun was "a hard taskmaster, hard on himself and hard on his colleagues who sat with him,"<sup>7</sup> to the point of exacting proofreading of everyone's drafts.<sup>8</sup> As a Justice, he insisted on checking every citation personally. Before a draft opinion, concurrence, or dissent left his chambers, Justice Blackmun would review it in excruciating detail, a cartload of sources by his side. No detail was too small for Justice Blackmun's scrutiny.

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5. As one former clerk put it, "Justice Blackmun is a person who truly cares about the 'little people,'" the quotation marks meant to convey that Justice Blackmun himself would not divide the world into great and little people. Richard A. Meserve, A Tribute To Justice Harry A. Blackmun, 71 N.D. L. Rev. 21, 22 (1995).

6. See Edward P. Lazarus, The Case Of The Severed Arm: A Tribute To Associate Justice Harry A. Blackmun, 43 Am. U. L. Rev. 725, 727 (1994). I cite this source reluctantly because Lazarus has become persona non grata since the publication of his kiss-and-tell account of the Court. See Edward Lazarus, *Closed Chambers* (1998). I do not wish to enter the debate over the propriety or accuracy of Lazarus's account. Compare Alex Kozinski, Conduct Unbecoming, 108 Yale L.J. 835, 836-38 (1999) (arguing that the breadth and scope of Lazarus's disclosures are unprecedented), and Richard Painter, Keeping Confidences: A Response to Edward Lazarus, 1 Jurist (May 1998) <<http://jurist.law.pitt.edu/lawbooks/revmay98.htm#Painter>> (contending that Lazarus may have "breached the Code of Conduct for Supreme Court Clerks" and used material that was illegally removed from the Court), with Erwin Cheimerinsky, Opening *Closed Chambers*, 108 Yale L.J. 1087, 1088 (1999) ("Kozinski's accusations are completely unfounded"), and David J. Garrow, "The Lowest Form of Animal Life"?: Supreme Court Clerks and Supreme Court History, 84 Cornell L. Rev. 855, 886 (1999) ("*Closed Chambers* is repeatedly guilty of name-calling, gratuitous insults, and mane exaggerations, but measured against the historical record of what former clerks have, and have not subsequently disclosed about case deliberations, Justices' private remarks, and opinion-drafting practices during their clerkships, Lazarus has violated no norm or standard."). I am saddened by the fact that Lazarus, whom I know to be quite devoted to Justice Blackmun, apparently did not realize that *Closed Chambers* would be understood as a betrayal of his former boss.

7. Myron H. Bright, Justice Harry A. Blackmun: Some Personal Recollections, 71 N.D. L. Rev. 7, 9 (1995).

8. See *id.* at 9-10.

There is much to admire in Justice Blackmun's attention to detail: His careful review of each certiorari petition, especially in capital cases, reflected a deep concern that justice be done in every case that crossed his desk;<sup>9</sup> his perfectionism on matters of grammar and style reflected a commitment to craft and excellence that should be, but unfortunately is not, shared by every lawyer. And yet, I want to suggest here, Justice Blackmun's hyper-conscientiousness and stoic attitude toward his work generally precluded the expression of emotions in his official writings. I have no doubt that Justice Blackmun *had* strong feelings about the cases that came before him, nor do I doubt that those feelings played an important role in how he resolved the cases. But for all the talk of emotionalism in Justice Blackmun's work, I find that his opinions, concurrences, and dissents generally express his feelings rather poorly. A brief consideration of Justice Blackmun's opinions shows that his was not, as it has sometimes been described, a jurisprudence of emotion.

Any discussion of Justice Blackmun's jurisprudence must begin with *Roe v. Wade*.<sup>10</sup> According to one standard critique of that case, the Court erred by taking a controversial moral issue away from the political arena without a clear warrant in the Constitution's text or history for doing so.<sup>11</sup> Relatedly, it is often said that the decision in a case like *Roe* rests on value judgments which are as inevitably subjective as, if not indistinguishable from, emotions.<sup>12</sup> Here I put to one side the irony that people who typically denounce moral relativism in all other spheres appear to embrace it in constitutional adjudication,<sup>13</sup> to note a different irony: Justice Blackmun's opinion in *Roe* is emotionally empty.

It is impossible to imagine that any Supreme Court opinion regarding abortion would be convincing to all those with strong views on the subject. As a matter of style, however, *Roe* disappoints even those of us who agree with the outcome, perhaps because the opinion succeeds in the task Justice Blackmun sets for the Court: "to resolve the issue . . . free

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9. See Harold H. Koh, A Justice for Passion, 1990 Ann. Surv. Am. L. xxxi (describing Justice Blackmun's detailed notes on one, not at all atypical, capital petition).

10. 410 U.S. 113 (1973).

11. See *id.* at 174 (Rehnquist, J., dissenting) (comparing *Roe* to *Lochner v. New York*, 198 U.S. 45 (1905)); see generally John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 Yale L.J. 920 (1973) (distinguishing *Roe* from Warren Court counter-majoritarian decisions that reinforce the democratic process).

12. See, e.g., Robert H. Bork, *The Tempting of America: The Political Seduction of the Law* 111 (1990) ("The subject of abortion . . . raises profound moral issues upon which people of good will can and do disagree.").

13. See, e.g., Robert H. Bork, *Slouching Towards Gomorrah: Modern Liberalism and American Decline* 272-77 (1996). One might reconcile embracing relativism in the courts while decrying it elsewhere on epistemic grounds: There are moral truths but we humans have no means for resolving disagreements about what they are other than by the counting of votes. But this approach seems more readily available to liberal critics of judicial review like my colleague Jeremy Waldron, see Jeremy Waldron, *Law and Disagreement* (1999), than to the conservative critics of *Roe* whose epistemic doubts vanish when it comes to exercising political power over their fellow citizens.

of emotion and of predilection."<sup>14</sup> *Roe* fails to explain, in emotionally evocative terms, the scope and magnitude of the burden imposed upon a woman whom the state forces to carry an unwanted pregnancy to term. Here is the entirety of the opinion's discussion of this crucial point:

The detriment that the State would impose upon the pregnant woman by denying this choice altogether is apparent. Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved. All these are factors the woman and her responsible physician necessarily will consider in consultation.<sup>15</sup>

This is a clinical, almost antiseptic catalogue of the burdens caused by an unwanted pregnancy. Contrast it with the considerably more evocative account given by Justices O'Connor, Kennedy, and Souter in *Planned Parenthood v. Casey*:

The mother who carries a child to full term is subject to anxieties, to physical constraints, to pain that only she must bear. That these sacrifices have from the beginning of the human race been endured by woman with a pride that ennobles her in the eyes of others and gives to the infant a bond of love cannot alone be grounds for the State to insist she make the sacrifice. Her suffering is too intimate and personal for the State to insist, without more, upon its own vision of the woman's role, however dominant that vision has been in the course of our history and our culture. The destiny of the woman must be shaped to a large extent on her own conception of her spiritual imperatives and her place in society.<sup>16</sup>

As Justice Blackmun grew more accustomed to his role as defender of abortion rights, he began to pepper his decisions with more emotive statements, but they bore no clear relation to the substance of the issue. Thus the image he painted of chill winds and flickering candles in *Webster v. Reproductive Health Services*<sup>17</sup> and *Casey* could as easily have applied to any line of precedent that was under attack.<sup>18</sup> It bore no clear relation to

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14. *Roe*, 410 U.S. at 116.

15. *Id.* at 153.

16. 505 U.S. 833, 852 (1992) (opinion of the Court).

17. 492 U.S. 490 (1989).

18. See *Casey*, 505 U.S. at 922-23 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part) ("now, just when so many expected the darkness to fall, the flame has grown bright [but] I fear for the darkness as four Justices anxiously await the single vote necessary to extinguish the light."); *Webster*, 492 U.S. at 559 (Blackmun, J., concurring in part and dissenting in part) ("For today, the women of this

the emotion that drove Justice Blackmun to care about the substantive decision in the first place.

Two other subjects that ordinarily evoke strong emotions—affirmative action and gay rights—further illustrate the absence of expressed emotion in Justice Blackmun's writing. In affirmative action cases, Justice Blackmun rejected the view that the Constitution requires color-blindness. Here is his pithy statement of his perspective: "In order to get beyond racism, we must first take account of race. There is no other way. And in order to treat some persons equally, we must treat them differently. We cannot—we dare not—let the Equal Protection Clause perpetuate racial supremacy."<sup>19</sup> The point is a logical and practical one: Formal equality can perpetuate substantive inequality. Whether one agrees or disagrees, the argument Justice Blackmun provides, even supplemented by the caution that the issue is too important to be relegated to formalism, can hardly be called a *cri de coeur*, especially when one considers by contrast an injection of personal anguish on the question of race, like Justice Thomas's concurring statement in *Missouri v. Jenkins*: "It never ceases to amaze me that the courts are so willing to assume that anything that is predominantly black must be inferior."<sup>20</sup>

Next consider gay rights. Justice Blackmun's dissent in *Bowers v. Hardwick*<sup>21</sup> is, in my view, quite persuasive as a matter of logic and precedent, showing the majority's distinction between "homosexual sodomy" and other, constitutionally protected intimacies, to be highly arbitrary. But does it emote? The dissent's two most memorable lines are quotations of Justices Brandeis and Holmes.<sup>22</sup> Indeed, the dissent is so effective because it lays bare the inadequate basis for the majority's assumption that the Constitution should protect sexual intimacy for heterosexual but not homosexual couples. Justice Blackmun shows that this assumption can only be based on an unexamined prejudice or reli-

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Nation still retain the liberty to control their destinies. But the signs are evident and very ominous, and a chill wind blows.").

19. *Regents of the Univ. of Calif. v. Bakke*, 438 U.S. 265, 407 (1978) (Blackmun, J., concurring in the judgment in part and dissenting in part).

20. 515 U.S. 70, 114 (1995) (Thomas, J., concurring). Justice Blackmun's dissent in *Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), comes close to matching Justice Thomas in rhetorical fire, but not in personal investment. See *id.* at 561 (Blackmun, J., dissenting) ("I never thought that I would live to see the day when the city of Richmond, Virginia, the cradle of the Old Confederacy, sought on its own, within a narrow confine, to lessen the stark impact of persistent discrimination.").

21. 478 U.S. 186 (1986).

22. *Id.* at 199 (Blackmun, J., dissenting) ("[T]his case is about 'the most comprehensive of rights and the right most valued by civilized men,' namely, 'the right to be let alone.'" (quoting *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)); *id.* ("Like Justice Holmes, I believe that '[i]t is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV.'" (quoting Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 *Harv. L. Rev.* 457, 469 (1897))).

gious tenets.<sup>23</sup> His calm reason contrasts with the emotionalism of his colleagues in the majority.<sup>24</sup>

To be sure, we can find an occasional emotional statement in Justice Blackmun's jurisprudence. In *Callins v. Collins*, for example, he announced: "From this day forward, I no longer shall tinker with the machinery of death," vowing that he would henceforth follow the example of Justices Brennan and Marshall (albeit on somewhat different grounds) in voting to reverse all death penalties to come before the Court.<sup>25</sup> Justice Blackmun expressly allowed that after twenty years of administering the Court's capital jurisprudence, he could no longer keep a stiff upper lip while doing his distasteful duty. And yet the real outpouring of emotion in Justice Blackmun's capital punishment jurisprudence came much earlier, in *Furman v. Georgia*,<sup>26</sup> in which he explained why he *could not*, in his view, decide the case on the basis of his true feelings. Although voting to uphold the death penalty, he wrote:

Cases such as these provide for me an excruciating agony of the spirit. I yield to no one in the depth of my distaste, antipathy, and, indeed, abhorrence, for the death penalty, with all its aspects of physical distress and fear and of moral judgment exercised by finite minds. That distaste is buttressed by a belief that capital punishment serves no useful purpose that can be demonstrated. For me, it violates childhood's training and life's experiences, and is not compatible with the philosophical convictions I have been able to develop.<sup>27</sup>

Justice Blackmun changed course in *Callins* just months before he retired from the Court. Although in his later years Justice Blackmun frequently voted to reverse death sentences, it was only with the end of active service in sight that he felt sufficiently liberated from his sense of duty to follow his heart and express what was truly in it. Given this timing, the shift from *Furman* to *Callins* tends to confirm that as an active Justice, Blackmun was quite reluctant to connect his feelings with his jurisprudence.

And what of poor Joshua? For the most part, the process of opinion-writing was for Justice Blackmun a torturous one focused on technical details that tended to obscure rather than express his emotions.<sup>28</sup> Thus,

23. See *id.* at 211-12.

24. Cf. *id.* at 197 (Burger, C.J., concurring) (approvingly quoting Blackstone's description of sodomy as worse than rape).

25. 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting from the denial of certiorari).

26. 408 U.S. 238 (1972).

27. *Id.* at 405-06 (Blackmun, J., dissenting).

28. To be sure, Justice Blackmun, like most of his contemporaries, typically relied on his law clerks for the preparation of first drafts. However, law clerks learn to write in the style of their bosses. Further, though they loved him dearly and genuinely, Justice Blackmun's law clerks were every bit as overworked as he was. If I am correct that envisioning the productive process as drudgery leads to a somewhat emotionally desiccated product, the point would be true of Justice Blackmun's law clerks as well.

a genuine outpouring of emotion such as one sees in Justice Blackmun's *DeShaney* dissent stands out as unusual. There he wrote movingly:

Poor Joshua! Victim of repeated attacks by an irresponsible, bullying, cowardly, and intemperate father, and abandoned by respondents who placed him in a dangerous predicament and who knew or learned what was going on, and yet did essentially nothing except, as the Court revealingly observes, . . . "dutifully recorded these incidents in [their] files."<sup>29</sup>

These words echo an exchange between Justice Blackmun, who rarely questioned lawyers during oral argument, and the government attorney. The latter was arguing that no federal constitutional liability attaches when government officials knowingly return a child to dangerous surroundings, so long as those surroundings are no more dangerous than those in which the child found himself before the state intervened. Justice Blackmun asked what difference it made "to poor Joshua" what his circumstances were prior to state intervention if, given the new status quo, the state was about to place him in grave danger. When the attorney answered that the absolute harm done was constitutionally irrelevant, Justice Blackmun simply stated "Poor Joshua," and resumed his customary silence.<sup>30</sup> Perhaps because he had, on this rare occasion, expressed his feelings during the oral argument, Justice Blackmun was able to do the same in his written dissent.

Justice Blackmun leaves a substantial legacy, but it is not, for the most part, a jurisprudence of emotion. If there is a consistent theme in Justice Blackmun's opinions, it is anti-formalism. That is a noble legacy, and a fitting one for a Justice who occupied the same seat as Oliver Wendell Holmes, Jr.<sup>31</sup> The opposite of formalism, however, is not emotionalism.<sup>32</sup> It is a willingness to see the unique demands of justice presented

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29. *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189, 213 (1989) (Blackmun, J., dissenting).

30. 184 Landmark Briefs and Arguments of the Supreme Court of the United States 415 (Philip B. Kurland & Gerhard Casper eds., 1990). Although the transcript does not identify the speaker, Justice Blackmun's voice is clearly identifiable on the audiotape, which may be found on the Oyez Project website of Northwestern University, <[http://oyez.nwu.edu/cases/cases.cgi?command=show&case\\_id=634](http://oyez.nwu.edu/cases/cases.cgi?command=show&case_id=634)>. The exchange occurs at 37:38-37:51 of the recording.

31. Of course I do not contend that Justice Blackmun was in any way a disciple of Justice Holmes, notwithstanding Blackmun's somewhat tendentious citation of Holmes's *Lochner* dissent in *Roe*. See 410 U.S. 113, 117 (1973). Nor do I deny that Holmes's own fondness for broad and general principles may suggest a certain affinity for formalism, at least when his thought is contrasted with more committed legal realists. See Grant Gilmore, *Some Reflections on Oliver Wendell Holmes, Jr.*, 2 Green Bag 2d 379, 392-93 (1999); Frederick Schauer, *Principles, Institutions, and the First Amendment*, 112 Harv. L. Rev. 84, 118-19 (1999). Nonetheless, both Holmes and Blackmun may be regarded as anti-formalists because of their shared commitment to the view that the law must respond to the world as it is.

32. Indeed, Justice Scalia, the Court's leading champion of formalism these days, often wears his heart on his sleeve. For Justice Scalia's formalist manifesto, see Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal*

by the reality of each case. This willingness to look beyond formal theory and see the messy facts is apparent in Justice Blackmun's rejection of color-blindness in equal protection (his *Bakke* dissent) and status quo neutrality in state action (his *DeShaney* dissent). It is also clear in other, less emotional areas, as in his ruling for the Court that a firm may be engaging in an anti-competitive practice even though economic theory predicts that it would be irrational to do so.<sup>33</sup> In general, hard-headed realist seems a more fitting title for Justice Blackmun than does soft-hearted emotionalist.

Justice Blackmun did indeed welcome compassion into the substantive work of judging. His compassion for everyone he encountered or whose case came before him was manifest in many ways—although usually not in the language of his opinions. Because he took his work so very seriously and drove himself so terribly hard, his opinions only rarely expressed the remarkable fullness of his heart.

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Courts in Interpreting the Constitution and Laws, *in* *A Matter of Interpretation* 3, 25 (Amy Gutmann ed., 1997) ("Long live formalism."). Among the issues about which Justice Scalia has and expresses strong views are abortion, gay rights, and psychotherapy. See, e.g., *Planned Parenthood v. Casey*, 505 U.S. 833, 980 (1992) (Scalia, J., concurring in the judgment in part and dissenting in part) (asserting, in typical formalist fashion, that abortion is unprotected because "the Constitution says nothing about it," in the same paragraph that describes the abortion right as that "of a woman to abort her unborn child"); *Romer v. Evans*, 517 U.S. 620, 652 (1996) (Scalia, J., dissenting) (stating that gays and lesbians "enjoy[ ] enormous influence in American media and politics"); *Jaffee v. Redmond*, 518 U.S. 1, 22 (1996) (Scalia, J., dissenting) ("Would your mental health be more significantly impaired by preventing you from seeing a psychotherapist, or by preventing you from getting advice from your mom?").

33. See *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451 (1992).