

Justice Blackmun's Brave New World

BY TERENCE P. JEFFREY



"I'll carry this one to my grave." Supreme Court Justice Harry Blackmun often said of his opinion in *Roe v. Wade*.

Blackmun, who died last week, better hope that's as far as he carries it. He was directly responsible for *Roe*, and *Roe* is directly responsible for the death of more than 35 million babies. That is a heavy burden

to carry—wherever you think you are going.

Nonetheless, Blackmun's obituaries in the liberal press followed a definite elegiac pattern.

In the Christian tradition, there is the archetype of the convert. St. Paul is the earliest example. He persecuted Christians until God struck him blind on the road to Damascus. When Paul regained his sight, he became not just a believer, but the greatest evangelist of them all.

Justice Blackmun, apostle of abortion, is the modern liberal's answer to St. Paul. He is the convert in reverse. The press eulogies make this clear, painting the myth of a man who travelled from a humdrum life of Middle-American rectitude to an ideological fast lane that led to secular liberal martyrdom. He dedicated his life to the Culture of Death. Thus he is sanctified by the liberal establishment.

"When Harry Blackmun took his seat on the Supreme Court on June 9, 1970," wrote Linda Greenhouse in the *New York Times*, "few people would have predicted that this soft-spoken, 61-year-old judge, a lifelong Republican never

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known for breaking new ground or challenging the status quo, was about to embark on an extraordinary personal journey that by the time he retired 24 years later would find him one of the last liberal voices on a transformed court."

The fact that this myth isn't completely true does not lessen its significance in defining what liberals have really cared about in the late 20th Century. Blackmun was no conservative when he was named to the court, nor was he particularly Republican. Even the *Times* admits that Blackmun had "quietly supported" Hubert Humphrey, and that "as his admiration for the liberal Humphrey indicated, his approach to politics and public affairs was nonpartisan and nonideological."

This Humphreyphilic angle is admitted, presumably, to show readers that Blackmun had a germ of salvageability in him even when he was a card-carrying member of the GOP. It shewed a potential for "growth."

Stress that angle too much, however, and you might lose the chance to mold his life story into the saga of a true convert and martyr. So, as the *Times* explains it, Blackmun's "evolution was quite swift."

Two years after he had been confirmed to the Supreme Court by a 94-to-0 vote, Blackmun was assigned the job of writing the majority opinion in *Roe v. Wade*.

At that time, killing unborn babies was a crime in most American states. Blackmun wrote an opinion, joined by six other justices, that in one bloody sweep of the judicial hand made abortion legal from conception through birth in every jurisdiction in the land. He did so by declaring that when a woman pays a doctor to perform a surgical procedure that kills the child in her womb she and the doctor are engaging in a private act that cannot be regulated by the state—because it is protected by a constitutional "right to privacy."

Blackmun conceded that this "right to privacy" could not be found in the text of the Constitution itself, but was sure the Framers had tucked it between the lines somewhere. It had simply gone unnoticed for 200 years.

"The Constitution does not explicitly mention any right to privacy," he wrote. But it "is broad enough to encompass a women's decision whether or not to terminate her pregnancy."

The *Washington Post* noted in its elegy that Blackmun's opinion in *Roe* "led to seismic social changes" in America. "The 7-to-2 ruling," said the *Post*, "ignited the culture wars that have come to dominate American politics."

In unguarded moments, Blackmun revealed he understood the moral and cultural gravity of what he had done.

When talking to liberal groups, for example, he frequently boasted of the revulsion his opinion inspired among conservatives and Christians. He spoke whimsically of the negative mail he received from those who rejected *Roe*. "Think of any name, I've been called it in these letters," he said. "Butcher of Dachau, murderer, Pontius Pilate, Adolf Hitler."

Nor did Blackmun's assault on the once-settled moral order of America end with his legalization of abortion. His anti-constitutional vision was a seamless garment.

'The Machinery of Death'

Dissenting from the 1986 decision in *Bowers v. Hardwick*, for example, Blackmun claimed there was a right to commit homosexual sodomy that derived from "the most comprehensive of rights and the right most valued by civilized men." That, of course, was the "right to privacy" Blackmun himself had invented in *Roe*.

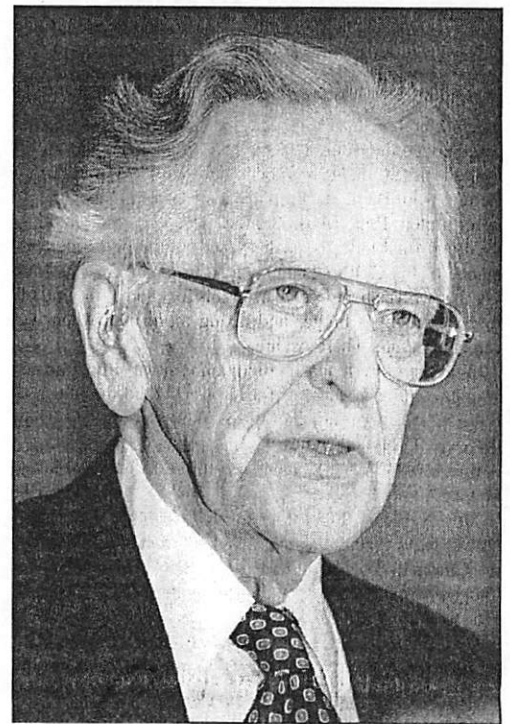
In *Bowers*, Blackmun preached a new morality to be revealed by judicial fiat. Attacking the majority's opinion that the government could, as it always had, criminalize sodomy, Blackmun said, "Essentially, petitioner argues, and the court agrees, that the fact that the acts described [in a Georgia anti-sodomy law] 'for hundreds of years, if not thousands, have been uniformly condemned as immoral' is a sufficient reason to permit a state to ban them today.

"I cannot agree that either the length of time a majority has held its convictions or the passions with which it defends them can withdraw legislation from this court's scrutiny."

"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," decreed Blackmun, "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."

Homosexual unions, concluded the man who legalized abortion, are a good thing, and, thus, should be given the status of an inalienable human right by the Supreme Court, even if 2000 years of Christian law and the Constitution of the United States say otherwise.

By the time Blackmun retired from the court in 1994,



U.S. Supreme Court Justice Harry Blackmun, who died last week, will be remembered for legalizing abortion.

two of the leading causes of death in America were abortion and AIDS. The wages of sin are death, said St. Paul—invoking a law even Blackmun could not overturn.

In his later years, Blackmun clung to his job as a justice precisely because he feared that if he retired from a divided court during the term of a Republican President even he would outlive the era of legalized abortion. "I am 83 years old," he wrote in concurring with the court's 1992 opinion in *Planned Parenthood v. Casey*. "I cannot remain on this court forever, and when I do step down, the confirmation process for my successor well may focus on the issue before us today. That, I regret, may be exactly where the choice between the two worlds will be made."

He achieved martyrdom for his "world" by unselfishly holding off retirement until that world's savior, Bill Clinton, arrived in the White House.

In his early days, Blackmun's "conservative" reputation was hung largely on his commitment to the death penalty. His crowning act of conversion came in a dissent filed in the 1992 death penalty appeal of convicted murderer Bruce Callins. Here the author of *Roe v. Wade* derided a justice system that had the arrogance to decide who "deserved" to die. "I feel morally and intellectually obligated simply to concede that the death penalty experiment has failed," he wrote.

"From this day forward," he said in words that should be carved into his tomb, "I no longer shall tinker with the machinery of death."

In another age it would have been comical to conjure up a judge who decreed that murderers must live and babies die. In Washington these past two decades, such a man became a paragon.