

"I don't know the key to success. But the key to failure is trying to please everybody."

— Comedian/actor Bill Cosby.

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Justice Harry Blackmun's legacy . . .

. . . Minnesotan was a man of justice

BY ELLEN GOODMAN

BOSTON — The news stories all described him the same way: "Justice Harry Blackmun, the author of the abortion decision."

The byline on one decision followed him through his years on the bench. Now it follows him into retirement.

It's the byline that brought protesters to the courthouse. It's the name that brought hate letters to the mailbox.

It's the name that bred a score of malicious nicknames: butcher, Hitler, Pontius Pilate.

Surely, there are labels this gentle, careful justice would have preferred.

He liked to call himself "Old Number Three," a humble reminder of the fact that he was chosen by Richard Nixon after two other nominees were rejected by the Senate.

He wanted to be known "as a good worker in the vineyard who held his own and contributed generally to the advancement of the law." He rejected labels — left, right or center — in favor of justice.

But from the day the Minnesota son of a grocer reluctantly agreed to write the decision of a lifetime, he became "Justice Blackmun, the author of the abortion decision." "We all pick up tags," he once said later and philosophically. "I'll carry this one to my grave."

This pivotal opinion that heaped so much emotion — so much gratitude and so much vitriol — at his doorstep was conceived with caution and compromise.

Though Justice Hugo Black had once told Blackmun never to display agony in his decisions, Blackmun broke with this cool legal tradition in an opening that rings true today:

"We forthwith acknowledge our awareness of the sensitive and emotional nature of the abortion controversy, of the vigorous opposing views, even among physicians, and of the deep and seemingly absolute convictions that the subject inspires.

"One's philosophy, one's experiences, one's exposure to the raw edges of human existence, one's religious training, one's attitudes toward life and family, and their values, and the moral standards one establishes and seeks to observe, are all likely to influence and color one's thinking and conclusions about abortion."

When these words were first published, back-alley abortion wasn't just an expression and the coat hanger wasn't just a symbol on a political button.

They were real. So were the women. Unlike others on the Supreme Court, Blackmun never narrowed his range of vision to see only abstract principles.

"We're dealing with people," he liked to say. One of them was a Texas woman known as Jane Roe.

In 1973, Blackmun was among the seven

Justice Harry Blackmun, who announced his retirement this week, was one of the most controversial public figures of our time. Two columnists offer appraisals of his career.

justices who voted to overturn the law in 48 states. He was just one in a solid majority who determined that a woman's fundamental right of privacy was "broad enough to encompass a woman's decision whether or not to terminate her pregnancy."

But over the next years, Justice Blackmun, the author, became Justice Blackmun, the defender. Through the 1980s, the pro-choice majority slipped to a margin of three, two, and then one.

When someone wrote asking if he would retire so a Republican president could appoint someone more conservative, he responded: "Dear Mr. So-and-So: No. Sincerely, Harry A. Blackmun."

As a new court nibbled and then chewed away at the right to abortion, he warned again and again: "I fear for the future . . . the signs are evident and a chill wind blows." But as

pro-choice activists worried about his health and age, Blackmun held on tenaciously into his 80s and the 1990s, until the tide turned.

This modest, conservative father of three daughters also grew in his own understanding of what abortion meant.

The right to abortion wasn't just a matter of privacy, not just the business of doctors and patients, but a matter of liberty.

On Thursday he said: "I think it was right in 1973, and I think it is right today. It's a step that had to be taken as we go down the road toward the full emancipation of women."

Today, pro-choice people worry less about the Supreme Court overturning *Roe v. Wade* and more about the statehouses undermining it. The pro-life attempt to make abortion illegal has turned into an attempt to make abortion unavailable.

The controversy that Blackmun described eloquently in his opening words continues and so does the longing in the country to move on.

Soon, attention will turn to his successor. But those of us who remember the bad old days owe a lot to the man named, tagged, labeled "Harry Blackmun, the author of the abortion decision" — and a man of justice.

• Boston Globe



Justice Harry Blackmun announcing his retirement from the Supreme Court.

. . . He was an agent for the 'virus of immorality'

BY CAL THOMAS

WASHINGTON — Commenting on the 10th anniversary of *Roe v. Wade* in 1983, Justice Harry Blackmun said: "I still think it was a correct decision. We were deciding a constitutional issue, not a moral one."

But morality cannot be separated from law, any more than the body can be separated from the mind and still maintain life. When judges seek to separate the two, they create an authoritarian elite in which judges themselves become gods, dictating from their own minds and experience what is right.

This is precisely what has occurred in modern jurisprudence. It is instructive that Justice Blackmun, during his "Nightline" interview last December, singled out Chief Justice Charles Evans Hughes for special praise. It was Hughes who said "the Constitution is what the justices say it is."

Blackmun's name will forever be linked to *Roe*, a decision that remains not only a milestone but a millstone for America and American law. Like Roger Taney, who wrote for the majority in the *Dred Scott* case a century ago (in which he said that "Negro slaves" were

less human than white people), Blackmun's discovery of a "penumbra" in the Constitution that allows a woman to legally take the life of her unborn child will, as he has said, follow him to his grave. Yes, and beyond.

Blackmun is not an evil man; he is part of an age in which a virus of immorality has touched us all. Still, he cannot wash his hands of personal responsibility for *Roe*, any more than Pontius Pilate could wash his hands of the decision he made 2,000 years ago.

Blackmun, so decisive on issues such as the death penalty — against for already born criminals, but in favor for unborn innocents — waffled on *Roe*.

Rather than making a firm decision about why the state should value human life at all stages ("to secure these rights, governments are instituted among men," wrote Jefferson), Blackmun tried to lateral the hot potato to others: "When those trained in respective disciplines of medicine, philosophy and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer."

It may have been the first instance in which

the Court demanded that public and "expert" opinion be uniform. In *Brown v. Board of Education*, public opinion was anything but uniform on segregated schools. Surely that was more than a constitutional decision. It was the immorality of segregated schools, not the polls, that led the Court to act.

Archbishop Roger Mahony of Los Angeles had it right when he wrote five years ago: "We also need to reflect on the foundations of law in a just society. Belief in democracy does not mean that the truth, the good and the just are always what the majority says they are. To the contrary, our Bill of Rights means that some things in our democracy aren't up for a vote — like freedom of religion, freedom of the press, the right to peaceably assemble, the right to petition government for a redress of grievances.

"Viewed from another angle, our democracy's laws are bounded by a higher law: All of us, as human beings and as citizens, are accountable not simply to civil law, but to concepts of truth and justice that stand in judgment on our laws, and on us. Jim Crow laws may have been duly enacted by legally elected legislatures, but they were morally hateful;

they violated our common sense of justice and were thus legally indefensible in the full meaning of 'the law.'"

But we have lost this common sense of justice because we have expunged the law-giver from the center of our nation.

Blackmun's abortion legacy will not be solved entirely by changes in the law — but by changes in the human heart. When sufficient numbers of us decide to live again by selfless principles instead of what suits us at the moment, then the stain of blood unleashed by Blackmun in *Roe* will be washed clean like the stain of slavery in the last century.

It takes time to turn a nation on moral issues. More than 100 years elapsed between the Emancipation Proclamation and the first civil rights legislation in 1964.

The struggle to repair the damage caused by Blackmun in *Roe* will be long, but principled people must not give up. They must continue to proclaim the truth about life, about alternatives to abortion and to the promiscuous sexual activity that is the cause of so many of our social ills.

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