



BLACKMUN'S BOOKS

WHAT A JUSTICE READ AND WHAT IT MEANS FOR A JUSTICE TO "READ"

Ross E. Davies

JUSTICE HARRY BLACKMUN DESCRIBED Benjamin N. Cardozo's *The Nature of the Judicial Process* as "a somewhat disappointing book."¹ A rummage in the folder labeled "Books – Read by Blackmun, lists – 1973-1997" in the Blackmun Papers at the Library of Congress² turns up a possible reason for Blackmun's less-than-friendly reaction to Cardozo's great book – the book that brought Cardozo "national fame as well as that idolatrous regard of the law schools which eventually propelled him to the highest court of the land."³ Possibly, Blackmun's disappointment was a matter of context. Possibly, *The Nature of the Judicial Process*, as great a work as it may be, just did not measure up to some of the other books Blackmun was reading at the time – books that he might have seen as better-written, or more thought-provoking, or more informative, or more fun. It is certainly possible, because the bibliographic competition for Blackmun's admiration was both diverse and high-powered during the summer he read Cardozo.

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¹ See pages 204-206 below for Blackmun's memorandum of comments on and excerpts from *The Nature of the Judicial Process*.

² Box 1374, Papers of Harry A. Blackmun, Library of Congress, Manuscript Division, Washington, DC.

³ Charles E. Clark and David M. Trubek, *The Creative Role of the Judge*, 71 YALE L.J. 255, 255 (1961).

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It was the summer of 1975, the third summer during which Blackmun kept a handwritten list of the books he read. The 1975 list is reproduced below, with a fleshed-out transcript on the next page. The list tells us a little bit – what he read, or says he read, during that summer – but not enough for us to know why he thought what

Reading Summer 1975

The Hobbit - J.R.R. Tolkien

Upon Summer readings

Sophocles Antigone

The Scarlet Letter - Hawthorne

The West - Shimmatt

Every Day - Perle

See What's A Day of Life

Waterbury Down - Richard Adams

Thomas More - Red Chambers

Saturday the Little Saint Henry - Harry Houdman

A Man for All Seasons - R. Bolt

My Father - a Remembrance - H.L. Hunt Jr

The Nature of the Judicial Process - Lewis & Cardozo

The Day of the Jackal - Freytag

READING SUMMER 1975

[with author names and book titles completed]

J.R.R. Tolkien, *The Hobbit*
Aspen Seminar readings⁴
Sophocles, *Antigone*
Fyodor Dostoyevsky, *The Grand Inquisitor*
Friedrich Dürrenmatt, *The Visit*
Encyclopedia Britannica, *Persia*⁵
Sir William Osler, *A Way of Life*
Richard Adams, *Watership Down*
R.W. Chambers, *Thomas More*
Harry Kemelman, *Saturday the Rabbi Went Hungry*
Robert Bolt, *A Man for All Seasons*
Hugo Black, Jr., *My Father: A Remembrance*
Benjamin N. Cardozo, *The Nature of the Judicial Process*
Frederick Forsythe, *The Day of the Jackal*

he thought about Cardozo. In the mid-1980s, Blackmun's lists would evolve into a lengthy, year-round catalog not only of authors and titles, but also of his ratings of many of them.⁶ In the mid-'70s, however, his lists were sketchier. Thus, for 1975, we are left without any specific evidence about whether Blackmun's negative re-

⁴ Blackmun attended a seminar in Aspen, Colorado, in the summer of 1975, and by 1979 he was back as a moderator. See Dennis J. Hutchinson, *Aspen and the Transformation of Harry Blackmun*, 2005 SUP. CT. REV. 307, 309-10.

⁵ Thanks to Wanda Martinson for deciphering this item, which may have made the list because reading the "Persia" entry in the *Encyclopædia Britannica* would have felt like reading a book. In the *Britannica* used in the Davies household at the time the list was made, Persia filled almost 50 pages (543 to 592) of rather small type. See Kenneth Caron Buss, *Persia*, in 17 ENCYCLOPÆDIA BRITANNICA 543 (1963).

⁶ The grading scale was the A-to-C characteristic of collegiate life. In 1985, for example, the low grade (a C-minus) went to Allen Drury (*Decision*) and Michael Underwood (*Death in Camera*), while the high grade (an A) went to Ellis Peters (*The Virgin in the Ice*), Erich Segal (*The Class*), and Sol Stein (*The Touch of Treason*).

view of *The Nature of the Judicial Process* was based at least in part on some sense that it was inferior to his other reading. It is not difficult, however, to come up with reasons why he might have preferred, for example, Hugo Black, Jr.'s *My Father: A Remembrance*. The recently deceased Justice Hugo Black was "the justice [Blackmun] had admired most," and yet he had struggled to collaborate with Black as a colleague.⁷ A better understanding of Black might have been more important to Blackmun, both personally and professionally, than a dose of Cardozo's thoughts on the judicial process. Or how about *The Hobbit*? In 1975, its literary status was more controversial than it is today. But for a judge interested in the youth culture of the 1960s and '70s, some minimal familiarity with Tolkien's work could have been viewed as important, or at least more important than more Cardozo, about whom Blackmun surely knew something from his years at law school, in law practice, and on the bench. Besides, *The Hobbit* is a fun and exciting story, and for anyone who likes to play with words, Tolkien is an interesting companion. Likewise, for most of the other books on Blackmun's summer 1975 list, a plausible rationale can be constructed for an imagined judgment by Blackmun that in comparison, *The Nature of the Judicial Process* was "a somewhat disappointing book."



What to make of these scraps and speculations about Blackmun's books depends in part on what we seek. Four reasons to study the reading habits and judgments of Supreme Court Justices come to mind (and there are surely more):

1. Our perennial and important interests in understanding both why they did what they have done – that is, their decisions and opinions in cases past – and what they might do next – that is, their decisions and opinions in pending and future cases. As Eleanor Little observed in *The Early Reading of Justice Oliver*

⁷ LINDA GREENHOUSE, BECOMING JUSTICE BLACKMUN: HARRY BLACKMUN'S SUPREME COURT JOURNEY 64-65 (2005).

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Wendell Holmes, "The importance of [Holmes's] reading lists is that they reflect the influence of other minds on Holmes's own thought"⁸

2. A general interest in learning something about the minds and characters of our public leaders from how they speak and write about books, reading, and learning, with an eye to choices we might make as citizens and role models we might emulate as individuals.
3. A far less important but not unreasonable interest in the reading (and listening, and watching, and traveling, and so on) choices made by clever, thoughtful, accomplished individuals, because we might want to try some of the same things.
4. A perennial but trivial interest in every detail of the lives of celebrities, the Justices being among the biggest celebrities in the law. Why else would we need to know about every opera or baseball game or seminar they attend?

Alas, all of these topics are beyond the scope of this little article, because they all depend on the resolution of the preliminary issue addressed below: The quality and reliability of the evidence.⁹



Blackmun is not the only member of the Supreme Court about whom we have reading-habit intelligence. An ancient example is Chief Justice John Marshall, who wrote an autobiographical letter in 1827 in response to a request from his colleague Justice Joseph Story. The letter mentioned Marshall's reading of the classics and other weighty works as a student, but also confessed that as a revo-

⁸ Eleanor N. Little, *The Early Reading of Justice Oliver Wendell Holmes* 8 HARV. LIBR. BULL. 163, 167 (1954).

⁹ The evidence issue may overlap with the "general interest in learning something about the minds and characters of our leaders" when the question is whether a justice has said or written something not true about his or her reading, but that too is beyond the scope of this article.

lutionary outlook gained strength in colonial Virginia and in Marshall himself, “I engaged in it with all the zeal and enthusiasm which belonged to my age; and devoted more time to . . . the political essays of the day, than to the classics or to Blackstone.”¹⁰ A modern example is Justice Stephen Breyer, who last year discussed “five books that have influenced his thinking” at *The Browser*.¹¹

These ancient and modern disclosures (and all the many unmentioned others that have come in between) are potentially useful for all the purposes listed above. But these are autobiographical reports. A reader generally cannot know (and perhaps even the autobiographer does not know) how accurate such self-portrayals are, absent corroboration. Self-serving misremembrance is an undeniable phenomenon (albeit of uncertain scope and frequency), and our leaders in the law have not in the past shown themselves to be immune.¹² And so the reader must be cautious.

This problem was on Grant Gilmore’s mind as he worked on his never-completed biography of Justice Oliver Wendell Holmes:

Holmes also kept, over a great many years, a list of the books he had read. I have never been sure how much faith and trust we should put in the book list. Suppose I kept such a list and had spent a day indulging myself in detective stories or risqué French novels. When I came to make my entry the thought might cross my mind that, vis-à-vis posterity, I would look better if I had spent the day reading Greek philosophy or the latest book on the forms of action in the early common law. And in any event “reading a book” is a tricky concept. I can leaf through a large volume in half an hour, picking out a phrase here and a phrase there, or I can spend days poring over a short text. There can be no

¹⁰ John Marshall, *An Autobiographical Sketch* (1827), in *THE MARSHALL READER* 8 (1955) (Erwin C. Surrency, ed.).

¹¹ Eve Gerber, *FiveBooks Interviews: Stephen Breyer on Intellectual Influences*, thebrowser.com/interviews/stephen-breyer-on-intellectual-influences, June 28, 2011.

¹² See, e.g., Ross E. Davies, *A Tall Tale of The Brethren*, 38 *BASEBALL RES. J.* 117, 120 (Fall 2009) (lapse by Blackmun); Ross E. Davies, *The Reluctant Recusants: Two Parables of Supreme Judicial Disqualification*, 10 *GREEN BAG 2D* 79, 81-91 (2006) (lapses by Chief Justice William Rehnquist and Justice Thurgood Marshall).

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doubt that Holmes was as prodigious a reader as he was a letter-writer – it is hard to see how he had any time left over for working on his cases and writing his opinions. But we have no way of knowing how Holmes read or what his reading meant to him.¹³

Gilmore has a point. Holmes could be a bit of a showboat about his reading.¹⁴

Just as interesting and vexing, however, is the converse of the problem that concerned Gilmore. What of Justice X, who has a very high but very narrow brow – he or she reads only Great or Important or Difficult Works, and rarely in translation – but also has either (a) a politician's sense that in a democratic-republican culture it is important to have (or appear to have) the common touch, or (b) a grudging awareness that wisdom and knowledge can come from works neither created nor adored by the best and the brightest. Might Justice X deign to strike the occasional plebeian pose? Consider Holmes again, this time in his own words:

[Justice Louis] Brandeis the other day drove a harpoon into my midriff with reference to my summer occupations. He said you talk about improving your mind, you only exercise it on the subjects with which you are familiar I have little doubt that it would be good for my immortal soul to plunge into them, good also for the performance of my duties, but I shrink from the bore – or rather I hate to give up the chance to read this and that, that a gentleman should have read before he dies.¹⁵

So much for the common touch or the devotion to knowledge and wisdom whatever their sources. But perhaps the reluctance to stoop

¹³ Grant Gilmore, *Some Reflections on Oliver Wendell Holmes, Jr.*, 2 GREEN BAG 2D 379, 383 (footnote omitted).

¹⁴ See, e.g., Oliver Wendell Holmes to Frederick Pollock, July 27 and Aug. 9, 1924, in 2 HOLMES-POLLOCK LETTERS 140-42 (1941) (Mark DeWolfe Howe, ed.) (describing “Tolstoy *La Guerre et la Paix*” and “the Loeb Thucydides” as his casual summer reading and mentioning, “I read books 1, 2 and 7 in the Greek, for the rest I mainly contented myself with the translation, as I didn’t care to spend more time on it”).

¹⁵ Oliver Wendell Holmes to Frederick Pollock, May 26, 1919, in *id.* at 13-14.

is itself a pose. Consider Holmes yet again, this time as remembered by his law clerk Donald Hiss:

His tastes varied from Giorgio Vasari's *Lives of the Painters*, which we read continuously with very few interruptions, to E. Phillips Oppenheim. In between we read Bertrand Russell and Alfred North Whitehead. Occasionally he would observe, "Sonny," as he called all of his secretaries, "at ninety-one, one outlives duty. Let's read E. Phillips Oppenheim." He was very fond of Oppenheim and the lighter things. But the reading and the discussion were always varied.¹⁶

Maybe underneath it all Holmes was blessed with just a tad of that middle-brow taste for light, well-composed popular fiction and the like. Holmes's library at his summer place in Beverly, Massachusetts did indeed contain a couple of books by Oppenheim, as well as thrilling fare by authors more familiar to modern readers, such as Arthur Conan Doyle ("The sign of the four" and "Tales of Sherlock Holmes") and Jules Verne ("The tour of the world in eighty days").¹⁷ But even their presence in the library does not settle anything about Holmes's relationship to books of that sort, except that they were taking up some of his shelf space.¹⁸

Chief Justice Harlan Fiske Stone, for example, kept popular fiction in his library, but:

"I cannot recall at home seeing him read any of the works of Dickens, Thackeray, and Poe which were on our library shelves, [Stone's] son Marshall has recalled. "How delightful

¹⁶ See G. EDWARD WHITE, JUSTICE OLIVER WENDELL HOLMES: LAW AND THE INNER SELF 468 (1993) (quoting Hiss).

¹⁷ See Estate of Justice Holmes: The Library: Beverly Farms, Massachusetts, Papers of Oliver Wendell Holmes, Jr., Box 20, Harvard Law School Library (inventory of Holmes's library in Beverly, taken shortly after his death in 1935).

¹⁸ Yes, "Mr. Herbert Spencer's Social Statics" (*Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting)), was in one of Holmes's libraries – the one in his D.C. home. See Estate of Justice Oliver Wendell Holmes: The library: A list compiled at his late residence [at] 1720 I street, N.W., Washington, D.C., Papers of Oliver Wendell Holmes, Jr., Box 58, Harvard Law School Library.

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it would be," the Justice once remarked, "if I could have about three days each recess time when I could read books that are a little off the beaten path."¹⁹

So, Stone may have been in fact the kind of reader-of-only-weighty-works that Gilmore suspected Holmes of being only in posture.

But there's more. The puzzle of what might or might not have been read by a Justice is compounded by what Gilmore quite rightly refers to as the "tricky concept" of what it means to read a book. Holmes, for example, enjoyed being read to:

A symptomatic ritual of the Holmeses' marriage was Fanny's reading aloud in the evenings, from "light" books selected by Wendell, while Wendell played solitaire. The ritual was designed to save Holmes' eyesight and enable him to reserve his solitary reading for selections that he felt improved his mind.²⁰

Reading is, of course, not an exclusively visual exercise. It can be tactile (via Braille, for example) or auditory (via audio recordings, machine-translation, or live readings). The most prominent current example of a judge who reads without visual aids is David Tatel of the U.S. Court of Appeals for the D.C. Circuit. He has long used both tactile and auditory methods of reading and writing.²¹ The critical point here is that Holmes treated listening lightly, as a way to enjoy "light" books while also distracting himself with other entertainment – not at all the way, say, a diligent, visually-impaired lawyer or law student would read a law book with ears or fingertips.²² In other words, a reader can use not just eyes but also ears or fingertips to, as Gilmore put it,

¹⁹ ALPHEUS THOMAS MASON, HARLAN FISKE STONE: PILLAR OF THE LAW 747 (1956) (endnotes omitted).

²⁰ See White, note 16 above, at 108 (endnotes omitted). After Fanny's death in 1929, Holmes's law clerks took up the task of reading to him. G. Edward White, *Hiss and Holmes*, 28 OHIO N.U. L. REV. 231, 233-34 (2002).

²¹ See David Tatel, *Assisting Law Students with Disabilities in the 21st Century: Brass Tacks – Lunch Address*, 15 AM. U. J. GENDER SOC. POL'Y & L. 847, 849-51 (2007).

²² See generally *id.*; see also, e.g., Tony Mauro, *Blind Attorney Goes From Supreme Court Clerk to Appellate Advocate*, NAT'L L.J., Oct. 25, 2010.

. . . leaf through a large volume in half an hour, picking out a phrase here and a phrase there, or . . . spend days poring over a short text . . .²³

By that standard, did Holmes truly, attentively “read” those light works that he heard from the lips of his wife (and later the lips of his clerks) while he relaxed and chatted and played solitaire, or did he merely leaf through them? And what are we to make of the fact that his clerk Donald Hiss also read to him in that same context at least some of the not-so-light work of Bertrand Russell and Alfred North Whitehead?²⁴ If in fact Holmes was “reading” everything from Oppenheim to Russell to Whitehead to who knows what else without opening an eye or turning a page or lending more than half an ear, then perhaps Gilmore was insufficiently skeptical, even naïve, about the nature of Holmes’s reading habits and the meaning of his list of books he had read.

How should the modern reader view Holmes’s reading-listening habits? The retail audiobook may be the best analogue. Do I “read” Justice Breyer’s *Active Liberty: Interpreting Our Democratic Constitution* if I use my ears to absorb an “unabridged” audiobook edition instead of using my eyes to take in a print or electronic edition? Surely the answer is “yes” if I am a listener as practiced as Judge Tatel and I devote my undivided attention to what I am hearing. But what if I am not and I do not? Perhaps just as importantly, does it matter that the print and ebook editions of *Active Liberty* feature many endnotes, while the audio edition labeled “unabridged” has none? (The endnotes are simply absent, as is notice of their absence.)²⁵ Similarly, when Hiss read Whitehead to Holmes, did the reading include the formulas, figures, and footnotes, or did Holmes and his reader make

²³ Gilmore, note 13 above, at 383.

²⁴ See text accompanying note 16 above.

²⁵ Compare STEPHEN BREYER, *ACTIVE LIBERTY* (Vintage Books 2006), with STEPHEN BREYER, *ACTIVE LIBERTY* (Recorded Books 2006). At the end of the audiobook there is a consolation for the loss of the endnotes. *Hear id.* at tracks 3p-3t. Relatedly, does it matter that the audio edition is “narrated by the author,” with whatever endorsement that might imply?

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do with the more easily articulated narrative parts?²⁶ And if Hiss did elide, did Holmes know, or care?

And so the reader is left to wonder about all these good books and all these good judges – about Marshall and Holmes and Stone and Blackmun and Breyer and others: What do their lists and their letters and their libraries signify?



Blackmun's lists provide a promising starting point for work on an answer to this puzzling question. Promising because they come in the company of corroborating evidence of a sort. The fragrance of accuracy that complements Blackmun's reading lists emanates from a document that, like the lists themselves, is in the Blackmun Papers at the Library of Congress. In early 1994, in a memo to Blackmun about what would become his famous death penalty dissent in *Collins v. Collins*,²⁷ his law clerk Michelle Alexander wrote of her work on a revision of that opinion, "I have *not* altered any of the cites. It is therefore unnecessary for you to recheck the cites for accuracy."²⁸

Some scholars view Alexander's note as one of several pieces of evidence that in his last years on the Court Blackmun "increasingly ceded far too much of his judicial authority to his clerks,"²⁹ permitting them too great a role in the judicial work of formulating and drafting opinions while he spent too much time on clerical tasks. As one commentator put it, "Blackmun sometimes served as little more than a cite-checker of his clerks' work – a division of labor that effectively made the judge a clerk to his own clerks."³⁰

²⁶ See, e.g., A.N. WHITEHEAD, AN INTRODUCTION TO MATHEMATICS (1911), listed in Estate of Justice Holmes: The Library: Beverly Farms, note 17 above.

²⁷ 510 U.S. 1141, 1143 (Blackmun, J. dissenting).

²⁸ Michelle Alexander to Harry Blackmun, Jan. 29, 1994, in Papers of Harry A. Blackmun, note 2 above, Box 648 (emphasis in original).

²⁹ David J. Garrow, *The Brains Behind Blackmun*, LEGAL AFFAIRS, May/June 2005, at 34.

³⁰ Jim Lindgren, *Blackmun a Clerk to His Clerks*, VOLOKH CONSPIRACY, Apr. 19,

Alexander's note may, however, simultaneously support another conclusion: Blackmun was committed to understanding everything that had his name attached to it, including his judicial opinions and everything cited in them, and that commitment required him to read all that stuff. According to one of his former clerks, responding to the criticism of Blackmun summarized above,

In the course of editing our work, the justice [Blackmun] literally read every case cited in every draft opinion to ensure the opinion was properly grounded. I can guarantee that is not a practice followed by every other judge.³¹

A judge who would not let an opinion go out before he had read everything cited in it might well be the kind of judge who would not record a book as read until it had actually been read. It is not proof, but it does make sense.

So, at least with respect to Justice Harry Blackmun, we can suppose, not unreasonably, that reading a book meant starting on page one and absorbing the words on that page, then turning to the next page and carrying on in the same way until he got to The End. Only then would he add that book – perhaps with a grade – to his reading list. Which in turn means that the books Blackmun said he read might have made a difference in his work as a judge, because the words in those books were inside his head, rather than just on his

2005, volokh.com/posts/1113928611.shtml; see also Ed Whelan, *This Day in Liberal Judicial Activism – February 22*, NATIONAL REVIEW ONLINE, Feb. 22, 2011, www.nationalreview.com/bench-memos/258210/day-liberal-judicial-activism-february-22-ed-whelan.

³¹ David W. Ogden to Legal Affairs, undated (circa 2005), www.legalaffairs.org/issues/May-June-2005/feature_response_mayjun05.msp. This does suggest another intriguing question: Which is the greater act of judicial delinquency – spending lots of time seeking to understand everything cited in one's opinions, or opting not to? (And can a judge understand a constitution or statute or opinion or regulation or book or law review article without reading it?) Reasonable minds might answer differently. If Ogden is correct – if some judges do not read the authorities cited in their opinions – then maybe the Court should establish a judicial opinions-of-the-Court pool (like the clerical cert. pool) to ensure that at least one Justice in a majority knows what is actually said in the authorities cited in support of whatever is issuing from the Court as the law of the land.

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bookshelf. And thus his reading lists, and the books on them, are worth reading, at the very least for what they might reveal about "the influence of other minds on [his] own thought."³²

BLACKMUN'S A-LIST

[works that earned an "A" grade on his reading lists, with the year of first publication followed by the year they were read by Blackmun in parentheses]

- Charles Dickens, *A Tale of Two Cities* (1859, 1996)
William Faulkner, *Tomorrow* (1940, 1989)
Frederick Forsyth, *The Devil's Alternative* (1979, 1984)
Dick Francis, *For Kicks* (1965, 1989)
John Grisham, *The Firm* (1991, 1995)
Anthony Hyde, *The Red Fox* (1985, 1986)
Anthony Gross, *The Wit and Wisdom of Abraham Lincoln* (1992, 1994)
Hubertus of Löwenstein, *A Basic History of Germany* (1965, 1991)
Norman Maclean, *A River Runs Through It* (1976, 1993)
Michael Malone, *Time's Witness* (1989, 1990)
Patrick O'Brian, *Post Captain* (1972, 1994)
Ellis Peters, *The Virgin in the Ice* (1982, 1985)
Barry Reed, *The Choice* (1991, 1993)
Erich Segal, *The Class* (1985, 1985)
Michael Shaara, *The Killer Angels* (1974, 1990)
Murray Smith, *The Devil's Juggler* (1993, 1994)
Sol Stein, *The Touch of Treason* (1985, 1985)
Valmiki, *Ramayana* (unknown, 1996)
Alice Walker, *The Color Purple* (1982, 1988)
Robert James Waller, *The Bridges of Madison County* (1992, 1994)
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³² Little, note 8 above, at 167.



NOTES ON A SOMEWHAT DISAPPOINTING BOOK

Harry A. Blackmun

Reviewing
BENJAMIN N. CARDOZO,
THE NATURE OF THE JUDICIAL PROCESS
(Yale University Press 1921)

THIS BOOK CONSISTS OF the addresses delivered by the Justice in the William L. Storrs lecture series at Yale Law School in 1921. This is the first time I have read them carefully. Frankly, I find them somewhat disappointing. In any event, the following are a few notes.

The great generalities of the Constitution have a content and a significance that vary from age to age.

All agree that there may be dissent when an opinion is filed. Some would seem to hold that there must be none a moment thereafter. Plenary inspiration has then descended upon the work of the majority. Page 29.

Logical consistency does not cease to be a good because it is not the supreme good. (The Justice is here speaking of what he calls the rule of analogy or the method of philosophy.)

Harry Blackmun was a judge on the U.S. Court of Appeals for the Eighth Circuit from 1959 to 1970 and on the U.S. Supreme Court from 1970 to 1994. The original of this review is in Box 1374 of the Papers of Harry A. Blackmun, Manuscript Division, Library of Congress.

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The method of philosophy comes into competition, however, with other tendencies. One of these is the historical method or that of evolution. There are fields where there can be no progress without history. The law of real property supplies the readiest example. History built up the system and the law that went with it. Page 54. Their development in order to be truly logical must be mindful of their origins. There are vogues and fashions in jurisprudence as in literature and art and dress. Page 58. Constitutions are more likely to enunciate general principles which must be worked out and applied thereafter to particular conditions. In every department of the law, the social value of a rule has become a test of growing power and importance. Page 73. In our judicial history liberty was conceived of at first as something static and absolute. The Declaration of Independence had enshrined it. Page 77.

Statutes are designed to meet the fugitive exigencies of the hour. A constitution does not state rules for the passing hour but principles for an expanding future. Page 83. New times and new manners may call for new standards and new rules. Page 88.

The Justice then turns to the method of sociology. The juristic philosophy of the common law at bottom is the philosophy of pragmatism. Law is an historical growth, for it is an expression of customary morality which develops silently and unconsciously from one age to another. The patterns of utility and morals will be found by the judge in the life of the community. Page 105.

My analysis of the judicial process comes then to this and little more: logic, and history, and custom, and utility, and the accepted standards of right conduct, are the forces which singly or in combination shape the progress of the law. Page 112.

The judge must get his knowledge just as the legislator gets it, from experience and study and reflection; in brief, from life itself. Page 113. Here is the point of contact between the legislator's work and his. Each is working within the limits of his competence. The law which is the resulting product is not found but made. Today the use of fictions has declined. Page 117. A judge is under a duty, within the limits of his power of innovation, to maintain a relation between law and morals. Page 133. There is judicial legislation, and

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the judge legislates at its peril. Nevertheless, it is the necessity and duty of such legislation that gives to judicial office its highest honor. No brave and honest judge shirks the duty or fears the peril. Page 135. The judge, even when he is free, is still not wholly so. He is not to innovate at pleasure. He is not to yield [to] spasmodic sentiment and to vague and unregulated benevolence. Page 141.

On the New York Court of Appeals, the majority of the cases could not be decided in any way but one. In another considerable percentage, the rule of law is certain and the application alone is doubtful. Often these cases provoke differences of opinion among judges. But jurisprudence, as such, remains untouched regardless of the outcome. Finally, there remains a percentage, not large, and yet not so small as to be negligible, where a decision one way or the other will count for the future and will advance or retard the development of the law. These are the cases where the creative elements in the judicial process find its opportunity and power. Page 165. The judicial process in its highest reach is not discovery but creation. Page 166. Chief Justice Marshall said in *Osborne v. Bank of the United States*, 9 Wheat. 738, 866, that judicial power is never exercised for the power of giving effect to the will of the judge but always for the purpose of giving effect to the will of the legislature. This sounds fine, but it is no more than partly true. Marshall's own career illustrates this. He gave the Constitution the impress of his own mind. The form of our constitutional law is what it is because he molded it while it was still plastic and malleable in the fire of his own intense convictions. Pages 169-170.

We worry over much about the enduring consequences of our errors. They may work a little confusion for a time, but in the end they will be modified or corrected or ignored. The future takes care of such things. Page 179.

H.A.B.
10/3/75

