



JUSTICE BLACKMUN'S BLOOD OATH

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JUSTICE HARRY BLACKMUN is remembered for many reasons. He is perhaps best known for authoring the Supreme Court's opinion in *Roe v. Wade*.¹ In addition to *Roe*, however, Blackmun wrote over 300 majority opinions during his time on the Court,² and his jurisprudential contributions are wide ranging.³ Furthermore, Blackmun's "ideological drift" to the left over time continues to provide intellectual fodder to legal scholars interested in preference change.⁴ Blackmun even played a role in a major motion picture, portraying Justice Story in Steven Spielberg's critically acclaimed

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¹ 410 U.S. 113 (1973).

² The Supreme Court Database (available at scdb.wustl.edu) records Blackmun as having authored 314 majority opinions and 850 total opinions during his tenure on the Court.

³ See, e.g., Joseph F. Kobyłka, *Tales from the Blackmun Papers: A Fuller Appreciation of Harry Blackmun's Judicial Legacy*, 70 MO. L. REV. 775 (2005); Harold Hongju Koh, *Justice Blackmun and the 'World Out There'*, 104 YALE L.J. 23 (1994).

⁴ See, e.g., LINDA GREENHOUSE, *BECOMING JUSTICE BLACKMUN: HARRY BLACKMUN'S SUPREME COURT JOURNEY* (2005); Lee Epstein et al., *Ideological Drift Among Supreme Court Justices: Who, When, and How Important?*, 101 NW. U. L. REV. 1483 (2007); Theodore W. Ruger, *Justice Harry Blackmun and the Phenomenon of Judicial Preference Change*, 70 MO. L. REV. 1209 (2005).

film *Amistad*.⁵ But Blackmun was also “famously . . . a wordsmith [and] grammarian.”⁶ This article tells the story of Blackmun the wordsmith, and a blood oath he took to uphold the English language’s integrity in two particulars.



The Supreme Court’s landmark decision in *Illinois Brick Co. v. Illinois* sharply limited the ability of indirect purchasers to sue for damages under antitrust law.⁷ Blackmun dissented from Justice White’s majority opinion in *Illinois Brick*, joining Justice Brennan’s dissent and authoring a brief dissent of his own. Following custom, Blackmun indicated that he joined Brennan’s dissenting opinion in a note to Brennan with copies to the Conference. Appended only to Brennan’s copy of the join note, however, was an addendum that read in part: “[Reporter of Decisions] Henry Putzel and I have a blood oath to fight ‘parameter’ and ‘viability.’ Do you think the latter word could be replaced with something of greater integrity?”⁸

That Blackmun was a wordsmith does not by itself explain why he devoted particular attention to ensuring proper usage of the words “viable” and “parameter” (as well as their variants such as “viability” and “parameterize”). However, one need not dig deep into Blackmun’s background to account for his interest in their integrity. According to *Webster’s Revised Unabridged Dictionary* (published in 1913,

⁵ See TINSLEY E. YARBROUGH, HARRY BLACKMUN: THE OUTSIDER JUSTICE 330-333 (2008) (detailing the events surrounding Blackmun’s participation in *Amistad*).

⁶ Randall P. Bezanson, *Good Old Number Three: Harry Blackmun and His Clerks*, in IN CHAMBERS: STORIES OF SUPREME COURT LAW CLERKS AND THEIR JUSTICES 338 (Todd C. Peppers & Artemus Ward, eds., 2013).

⁷ 431 U.S. 720 (1977).

⁸ Docket #76-404, Letter from Blackmun to Brennan (May 30, 1977). Unless otherwise noted, the memoranda discussed in this article are available electronically as part of The Supreme Court Opinion Writing Database. Paul J. Wahlbeck et al., *The Supreme Court Opinion Writing Database* (2011), available at supremecourttopinions.wustl.edu. Brennan substituted “effectiveness” for “viability.” Andrew I. Gavil, *Antitrust Remedy Wars Episode I: Illinois Brick from Inside the Supreme Court*, 79 ST. JOHN’S L. REV. 553, 607 n. 309 (2005).

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five years after Blackmun's birth), the only definition of "viable" was: "Capable of living; born alive and with such form and development of organs as to be capable of living; said of a newborn, or a prematurely born, infant."⁹ Thus, while later usage allowed for "viable" to mean "capable of being done or used" or "capable of succeeding," traditional usage made it solely a medical term of art.¹⁰ Blackmun suffered myriad medical maladies early in life, and developed a "lifelong fascination" with his bout of appendicitis as a child – even going so far as to note the anniversary of his appendectomy into adulthood.¹¹ Blackmun considered attending medical school before settling on law school, but lamented later in life, "If I had it to do over again, I'd probably go to medical school."¹² He also proudly proclaimed "his happiest time was the decade he spent with the doctors at the Mayo Clinic" as its resident legal counsel.¹³ And of course Blackmun's well-known toil over the Court's opinion in *Roe*, where medical "viability" plays a central role in the trimester framework, likely exacerbated his interest in the word's proper usage.

Blackmun's keen interest in the proper usage of "parameter" can be traced to his interest in mathematics. While many in the law suffer from "innumeracy,"¹⁴ Blackmun excelled as a math major at Harvard.¹⁵ One of Blackmun's former clerks noted, "he displayed an unusual interest in scientific and quantitative issues."¹⁶ Upon requesting that

⁹ WEBSTER'S REVISED UNABRIDGED DICTIONARY (Noah Porter, ed., 1913), available at machaut.uchicago.edu/websters.

¹⁰ MERRIAM-WEBSTER'S COLLEGIATE® DICTIONARY (11th ed. 2003), available at www.merriam-webster.com.

¹¹ GREENHOUSE, *supra* note 4, at 4.

¹² YARBROUGH, *supra* note 5, at 27.

¹³ GREENHOUSE, *supra* note 4, at 249.

¹⁴ Edward K. Cheng, *Fighting Legal Innumeracy*, 17 GREEN BAG 2D 271 (2014).

¹⁵ YARBROUGH, *supra* note 5, at 22.

¹⁶ Pamela S. Karlan, *From Logic to Experience*, 83 GEORGETOWN L.J. 1, 1 (1994). Blackmun may have found something of an outlet on the Court for his quantitative intuition by assigning grades or numerical scores to books he read and the attorneys participating in oral arguments. See Ross E. Davies, *Blackmun's Books: What a Justice Read and What It Means for a Justice to 'Read'*, 15 GREEN BAG 2D 191 (2012) (discuss-

Justice O'Connor remove the word "parameter" from a draft opinion, Blackmun explained: "I feel particularly sensitive about this because of my immersion in mathematics during college years long, long ago."¹⁷ The 1913 *Webster's* defines "parameter" in purely mathematical terms, as a word "applied to some characteristic magnitude whose value, invariable as long as one of the same function, curve, surface, etc., is considered, serves to distinguish that function, curve, surface, etc., from others of the same kind or family."¹⁸ In addition to the mathematical definition, contemporary definitions refer to "a rule or limit that controls what something is or how something should be done" or a "boundary."¹⁹ However, in a statement that would very much please Blackmun, the online *Oxford Dictionary* notes that "[c]areful writers will leave parameter to specialists in mathematics" because it "blurs more than it clarifies" when used to describe a "boundary," suggesting "perimeter" for this purpose instead.²⁰

Blackmun informed the Conference of his blood oath to protect "viable" and "parameter" from incorrect usage as early as 1975. Along with a note asking Justice Marshall to find a substitute for the word "viable" in a draft opinion, Blackmun added: "You recall my announcement at the first conference in October 1975 that I was with Henry Putzel in outright warfare against this word and 'parameter.'"²¹ Blackmun's commitment to the blood oath was no small matter in part because of the Supreme Court's norm that grammatical choices and other stylistic matters are left to an opinion's author. Indeed, longtime friend and fellow "Minnesota Twin" Chief Justice Burger once lectured Blackmun for requesting that he find a replace-

ing Blackmun's practice of assigning letter grades to the books he read); Timothy R. Johnson et al., *The Influence of Oral Arguments on the U.S. Supreme Court*, 100 AM. POL. SCI. REV. 99, 104 (2006) (noting Blackmun's practice of assigning letter grades and numerical scores to the attorneys at oral argument).

¹⁷ Docket #81-1273, Letter from Blackmun to O'Connor (March 11, 1983).

¹⁸ See *supra* note 9.

¹⁹ See *supra* note 10.

²⁰ The online Oxford Dictionary is available at www.oxforddictionaries.com.

²¹ Docket #75-904, Letter from Blackmun to Marshall (January 10, 1977).

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ment for “crabbed,” writing: “I regularly join opinions whose style and adjectives I don’t particularly fancy but I ‘go along’ because the style is for the author of an opinion.”²² Blackmun, of course, understood and generally respected this norm, having written to Justice Brennan less than three months earlier: “The following comments have to do primarily with style and, for the most part, are trivial. Nevertheless, I would appreciate your considering them.”²³ That Blackmun persisted with the blood oath despite this norm illustrates his commitment.



Shortly after announcing the blood oath it became clear to Blackmun that he was losing the battle against “viable.” Rather than dig in on both fronts, Blackmun fell back from his position somewhat on “viable,” but did not waver against “parameter.” Not one year after reminding Marshall about the blood oath, Blackmun wrote again to nudge him gently in a different case: “Your proposed new footnote certainly has my approval, except that I have the usual discomfort with that word ‘viable.’ Yet it is not so bad as counsel’s use of ‘parameter’ this morning.”²⁴ A few years later, Blackmun reminded Brennan, who had inserted “viable” into a draft opinion, lamenting: “My old friend

²² Docket #83-1075, Letter from Burger to Blackmun (March 5, 1985).

²³ Docket #83-1378, Letter from Blackmun to Brennan (December 10, 1984). Blackmun directed other linguistic complaints toward Brennan in this letter. One read: “Kentucky . . . likes to think of itself as a Commonwealth rather than a state.” Another read: “The first sentence in the first full paragraph on page 13 shows up every Fall [sic] with a new generation of clerks. It is one of my ‘least favorites.’ Do you think it could be omitted or replaced?” The offending sentence is not clear from the records. Blackmun’s repeated references to clerks in these letters may have been a way for him to signal his respect for the norm regarding style and soften the tone of his requests while nonetheless conveying his concerns about improper linguistic usage. See *infra* notes 25-26 and accompanying text. In any event, clerks were aware of Blackmun’s oath in at least certain particulars. See Karlan, *supra* note 16, at 1 (“Law clerk legend had it that he would never join an opinion that used the word ‘parameter’ in any but its precise mathematical sense”).

²⁴ Docket #77-832, Letter from Blackmun to Marshall (December 4, 1978).

‘viable’ is constantly misused and every generation of clerks makes me fight the battle all over again. It drove Henry Putzel to distraction, and he finally gave up only to hold the line on ‘parameter.’”²⁵ Whether due to forgetfulness or indifference, Brennan earned another note from Blackmun two years later after another transgression: “I [join] with a certain amount of anguish in view of that word ‘viable’ in the fourth line on page 16. You don’t appreciate how you make me suffer. I go through this with every generation of clerks. But they better not use ‘parameter.’”²⁶ Indeed, Brennan was a regular offender. One lapse reduced Blackmun to begging: “Because . . . of my solemn pledge to Henry Putzel, jr. [sic], and because of my compact with the shade of Noah Webster, my joinder is expressly conditioned upon the elimination of ‘that word.’ . . . As they have always said out here in Bloomer, Wisconsin, ‘parameter don’t mean boundary.’ Please?”²⁷

In addition to altering language in several formal opinions, Blackmun’s blood oath once made its mark on the *U.S. Reports* by indirectly contributing to his loss of what would have been a unanimous opinion. The story begins with Blackmun using the phrase “plea bargain” in his opinion for the Court in *Army and Air Force Exchange Service v. Sheehan*.²⁸ This prompted a rebuke from Chief Justice Burger in a private note similar to those regularly delivered by Blackmun to his colleagues. Burger wrote: “I have tried – and I think succeeded in getting almost everyone to avoid the term plea ‘bargain.’ That word has no place in the judicial vocabulary.”²⁹ Burger went on to suggest replacing “bargain” with “negotiations” and concluded with an ultimatum: “So, show me accordingly as joining or joining the judgment.”³⁰ Blackmun responded that the use of “bargain” is “far more accepted than the noun ‘commute’ for which I fought a battle last year when no one supported me, and surely is far more acceptable than the

²⁵ Docket #80-1350, Letter from Blackmun to Brennan (November 23, 1981).

²⁶ Docket #82-5466, Letter from Blackmun to Brennan (December 27, 1983).

²⁷ Docket #76-1662, Letter from Blackmun to Brennan (December 12, 1977).

²⁸ 456 U.S. 728, 730 (1982).

²⁹ Docket #80-1437, Letter from Burger to Blackmun (May 19, 1982).

³⁰ *Id.*

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Court's constant misuse of the word 'viable.' So I shall leave it as is and show you as concurring in the judgment."³¹

The "battle" over use of the word "commute" as a noun referenced in the *Sheehan* exchange offered Blackmun another salvo at "parameter" and lends further insight into his linguistic prowess. The dispute occurred during the Court's deliberation over *Allstate Insurance Co. v. Hague*,³² where Justice Brennan, the opinion's author, employed "commute" as a noun several times. Blackmun complained to Brennan that he "could not find that word listed as a noun in any dictionary I have," and asked whether "a better word [could] be found."³³ Brennan responded by citing *Webster's New Collegiate Dictionary* (1974) in support for his usage, adding that he "would be quite willing to substitute a synonym" but could not find one.³⁴ This did not satisfy Blackmun, who dismissed Brennan's dictionary choice as an "'authority' [that] would confer respectability on all kinds of words and phrases," including "right on," "groovy," and "parameterize."³⁵ Blackmun further complained: "[n]one of the large Webster's Dictionaries I have found around the building contains the word 'commute' as a noun," nor was "it contained in the well-regarded Oxford English Dictionary, in either Fowler's, or for that matter, in Samuel Johnson's (7th ed., 1785)."³⁶ Blackmun closed by noting his "fear that the few genuine English teachers that are left across the Country will make fun of us," suggesting five alternative word choices, and lamenting, presumably half-jokingly, that he perhaps "should withdraw my joinder and 'write separately.'"³⁷ Notwithstanding his pledge to substitute a synonym if

³¹ Docket #80-1437, Letter from Blackmun to Burger (May 20, 1982). The final opinion notes "The Chief Justice concurs in the judgment" without further explanation. *Sheehan*, 456 U.S. at 741. Incidentally, this dispute cost Assistant to the Solicitor General, and future Associate Justice, Samuel Alito a unanimous opinion in his first orally argued case before the Supreme Court.

³² 449 U.S. 302 (1981).

³³ Docket #79-938, Letter from Blackmun to Brennan (November 18, 1980).

³⁴ Docket #79-938, Letter from Brennan to Blackmun (November 19, 1980).

³⁵ Docket #79-938, Letter from Blackmun to Brennan (November 20, 1980).

³⁶ *Id.*

³⁷ *Id.*

one could be provided, Brennan continued with his usage of “commute” as a noun and Blackmun abided by his previous joinder.

Blackmun continued the fight over “viable” and “parameter” throughout his career, although he devoted the bulk of his attention to “parameter.” In 1983, Blackmun wrote to Justice O’Connor: “Before you arrived here, I advised the then ‘Brethren’ that I would never join an opinion in which the misused word ‘parameter’ appeared. See page 9 line 8 of your circulation of March 8. I adhere to that posture. [Reporter of Decisions] Henry Lind and I are fighting an all out war on this field of battle and, thus far, it has been successful though the carnage at times is great.”³⁸ A few years before retiring, Blackmun appeared to have essentially given up on “viable” but remained vigilant against the misuse of “parameter,” writing to Justice Scalia: “I might as well take this opportunity to make my annual tirade against the abuse of the kindly word ‘parameter.’ I have stated before that I shall join no opinion in which that mathematical term is employed. I feel much the same about ‘viable,’ but I have lost that battle here. The medical profession must suffer silently. But I shall fight the good fight of the mathematician about parameter.”³⁹

Blackmun’s colleagues were not the only ones who faced reproach for their improper usage of “viable” and “parameter.” The legislative and executive branches received scolding as well. However, unlike Blackmun’s colleagues, who were typically gently reminded in private letters, these reprimands were delivered publicly. In *Costle v. Pacific*

³⁸ Docket #81-1273, Letter from Blackmun to O’Connor (March 11, 1983). Blackmun added that the note was “meant to be a humorous addendum to my other letter of today concerning these cases,” but of course his language and persistence suggests that it was likely only half-humorous. Henry Lind followed Henry Putzel to become the second Reporter of Decisions enlisted in Blackmun’s battle. Blackmun’s clerks apparently joked that he would become Reporter of Decisions after retiring. Karlan, *supra* note 16, at 1. Blackmun regularly engaged Reporters on a range of issues concerning linguistics and editing. See, e.g., Richard J. Lazarus, *The Non(Finality) of Supreme Court Opinions*, 128 HARV. L. REV. 540, 558 (2014) (highlighting a letter from Blackmun to Lind lamenting the lack of pre-publication editing).

³⁹ BERNARD SCHWARTZ, DECISION: HOW THE SUPREME COURT DECIDES CASES 59 (1996) (quoting Justice Blackmun).

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Legal Foundation, Blackmun chastised the Environmental Protection Agency: “The agency by its regulations describes ‘secondary treatment’ as the treatment which will attain ‘the minimum level of effluent quality . . . in terms of . . . parameters (sic).’ These so-called ‘parameters’ (but compare any dictionary’s definition of this term) are specified levels of biochemical oxygen demand, suspended solids, and pH values.”⁴⁰ And unable to avoid using “viable” in its non-mathematical sense in *Huffman v. Western Nuclear Inc.*, Blackmun made sure the public record directed the blame toward Congress: “A purist might regard the word ‘viable’ as misused in this context. It nevertheless appears in the statute and therefore, inescapably, it and its variants are used throughout this opinion. See H. Fowler, *Modern English Usage* 679 (2d ed. 1965); W. Follett, *Modern American Usage* 344-345 (1966).”⁴¹



Blackmun’s colleagues generally appeased his efforts to eradicate improper usage of “viable” and “parameter,” along with their variants. Perhaps indicating that Blackmun’s persistence even amused his colleagues occasionally, Justice White once sent a joint note to Justice Rehnquist with copies to the Conference that read: “I can accept the new and viable parameters (as they say in the trade) you have established.”⁴² Blackmun even secured a commitment from Justice Scalia to continue his legacy at least in part. After inviting Blackmun into his “Chancellor’s English Society,” Scalia assured him that he had “not ‘lost the battle’ [over viability],” adding that “those with taste never use it, except in its literal medical context” and resolving that he “would sooner be caught watching a rock video than referring to a ‘viable option.’”⁴³ During OT 2012 and OT 2013, the words “parameter” or “parameterize” were not used at all in opin-

⁴⁰ 445 U.S. 198, 201 n.2 (1980).

⁴¹ 486 U.S. 663, 664 n.1 (1988).

⁴² Docket #77-841, Letter from White to Rehnquist (December 7, 1978).

⁴³ GREENHOUSE, *supra* note 4, at 238 (quoting Justice Scalia).

ions. As Blackmun would have predicted, however, the state of affairs with respect to contemporary usage of “viable” and “viability” is more bleak; justices employed them outside of the medical context nine times across seven opinions during this period.⁴⁴ Although further linguistic drift may eventually prove too much to justify sustained effort in behalf of the blood oath, Blackmun’s legacy as a wordsmith is secure.



⁴⁴ The offenders were Justices Kagan (four times across three opinions), Alito (three times across two opinions), Ginsburg (once) and Sotomayor (once). Scalia’s distaste for rock music remains vigorous. *See* *Elmbrook School District v. John Doe*, No. 12-755, slip op., at 1 (2014) (Scalia, J., dissenting from denial of certiorari) (suggesting that the “attitude” of those “who are offended by public displays of religion . . . parallels my own toward the playing in public of rock music”). However, Scalia joined two opinions during OT 2012 and OT 2013 using the word “viable” outside of its medical context. *Burwell v. Hobby Lobby Stores, Inc.*, No. 13-354, slip op., at 41 & 48 (2014) (joining Justice Alito’s majority opinion referencing a “viable alternative” and “the viability of ACA’s comprehensive scheme”); *Clapper v. Amnesty International USA*, 133 S. Ct. 1138 (2013) (joining Justice Alito’s majority opinion referencing “a viable Fourth Amendment claim”). Scalia has even joined two opinions with the phrase “viable option” since lamenting it in his note to Blackmun. *Pollard v. E. I. du Pont de Nemours & Co.*, 532 U.S. 843, 850 (2001) (“Courts recognized that reinstatement was not always a viable option . . .”); *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 214 (1999) (Rehnquist, C.J., dissenting) (“Removal was the only viable option . . .”).