Justice Blackmun's Capital Punishment Jurisprudence

by MALCOLM L. STEWART*

Introduction

In *Callins v. Collins*, issued during the final Term of Justice Blackmun's tenure on the Supreme Court, the Justice filed a dissenting opinion stating that he felt "morally . . . obligated simply to concede that the death penalty experiment has failed."[1] The *Callins* dissent made clear that the Justice would thenceforth vote to vacate the sentence of death in any capital case coming before the Court. In that respect, the position taken by Justice Blackmun during his final Term resembled those of Justices Brennan and Marshall from 1976 until their retirements from the bench.

Unlike Justices Brennan and Marshall, however, Justice Blackmun did not assert that the punishment of death is *per se* cruel or excessive. That is, he did not deny that the death penalty is an appropriate punishment for some criminals. Rather, the thrust of his dissent was that the American criminal justice system, at least as it currently operates, is incapable of reliably identifying those individuals.[2] On that basis Justice Blackmun concluded that "the death penalty . . . as currently administered, is unconstitutional."[3]

Justice Blackmun based that conclusion in part on what he perceived to be the irrevocable conflict between two lines of Supreme Court precedent. The first, having its genesis in *Furman v. Georgia*,[4] held that the decision whether to impose a capital sentence in a particular case cannot be entrusted to the unfettered discretion of the sentencing jury or judge.[5] Rather, to ensure that different capital

* Assistant to the Solicitor General, United States Department of Justice. The opinions expressed in this article are those of the author alone and do not represent the views of the Solicitor General, the Department of Justice, or the United States.

1. 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting).
2. *See id.* (Blackmun, J., dissenting).
3. *Id.* at 1159 (Blackmun, J., dissenting).
4. 408 U.S. 238 (1972) (per curiam).
5. *See id.*

defendants (at least within a given state) are treated in an evenhanded and consistent manner, the legislature must provide standards to guide and narrow the scope of the sentencer's discretion.[6] The second line of authority is most commonly associated with the Court's decisions in *Woodson v. North Carolina*[7] and *Lockett v. Ohio*.[8] Those decisions recognize a constitutional right to "individualized" sentencing in capital cases and a right, in particular, to present any and all evidence that the sentencer might regard as mitigating. In *Callins*, Justice Blackmun concluded that these cases could not be reconciled, explaining that "[e]xperience has taught us that the constitutional goal of eliminating arbitrariness and discrimination from the administration of death . . . can never be achieved without compromising an equally essential component of fundamental fairness—individualized sentencing."[9] He further concluded that neither principle could permissibly be sacrificed for the other, and that no acceptable balance between the two could be struck.[10]

Justice Blackmun also advanced a second justification for his determination that the death penalty, as currently administered, is unconstitutional. He explained that his previous willingness to enforce the capital punishment statutes was premised on his belief that adequate procedural safeguards—including, in particular, the availability of federal habeas corpus review—ensured that errors in the administration of the death penalty would be discovered and corrected.[11] Justice Blackmun stated, however, that in light of recent Supreme Court decisions sharply limiting the scope of federal habeas review of state convictions and sentences, he could no longer feel confident "that the Federal Judiciary will provide meaningful oversight to the state courts as they exercise their authority to inflict the penalty of death . . . ."[12]

Until his dissenting opinion in *Callins*, Justice Blackmun had consistently adhered to the view that the Constitution permitted the imposition of capital punishment, and on numerous occasions he had voted to uphold capital sentences.[13] Indeed, Justice Blackmun had

6. *See id.*

7. 428 U.S. 280 (1976).

8. 438 U.S. 586 (1978).

9. Callins v. Collins, 510 U.S. 1141, 1144 (1994) (Blackmun, J., dissenting) (citation omitted).

10. *See id.* (Blackmun, J., dissenting).

11. *See id.* at 1157 (Blackmun, J., dissenting).

12. *Id.* at 1158-59 (Blackmun, J., dissenting).

13. During each of the two Terms prior to his dissent in *Callins*, however, Justice Blackmun had indicated that his continued willingness to acknowledge the constitutionality of capital punishment was open to question. *See, e.g.*, Sawyer v. Whitley, 505 U.S. 333,

dissented in both *Furman* and *Woodson*, concluding in each case that he could see no principled basis for rejecting the state legislature's decision regarding the manner in which the death penalty should be administered. Even before his appointment to the Court, however, the Justice had expressed skepticism as to the wisdom and utility of capital punishment. Close examination of Justice Blackmun's capital punishment opinions reveals his difficult, even agonized, efforts to reconcile opposing values that he ultimately found irreconcilable.

This analysis of Justice Blackmun's capital punishment jurisprudence examines three distinct stages of his tenure on the Supreme Court. Part I discusses a series of cases decided during the 1970s in which the Court considered broad constitutional challenges to a variety of state capital sentencing regimes. Despite his personal opposition to capital punishment, during that period Justice Blackmun displayed great deference to state legislative judgments regarding the proper administration of the death penalty. Part II analyzes a series of dissenting opinions written by the Justice during the mid-1980s. Those dissents reflect his growing concern that state prosecutors, state trial judges, and a majority of the Supreme Court itself were unwilling to devote the care and attention necessary to ensure that individual capital cases were litigated in a fair and professional manner. Part III discusses a series of dissenting opinions written by Justice Blackmun during his final years on the Court. In these highly emotional opinions the Justice argued that the Court's limitations on federal habeas corpus jurisdiction had undermined the legitimacy of capital punishment itself.

One of the central hallmarks of Justice Blackmun's tenure on the Supreme Court was his commitment to deciding individual cases in a fair and careful manner. Justice Blackmun was willing to accept the constitutionality of capital punishment, and to accord broad deference to state legislative judgments regarding the manner in which the death penalty should be administered, so long as all participants in the process would perform their roles in a spirit of diligence and professionalism. Over the course of his tenure on the Court, however, Justice Blackmun appears to have become convinced that the incidence of error and serious misconduct in the litigation of capital cases was unacceptably high. Moreover, the Supreme Court's restrictions on federal habeas review—during the Justice's final years on the bench—

359-60 (1992) (Blackmun, J., concurring in the judgment); Herrera v. Collins, 506 U.S. 390, 446 (1993) (Blackmun, J., dissenting).

led him to conclude that no reliable mechanism existed for ensuring that such errors were detected in a timely fashion.

I. Early Challenges to State Captial Sentencing Regimes

The Court heard argument in *McGautha v. California*,[14] exactly five months after Justice Blackmun took the oath of office. McGautha was sentenced to death under California law, which provided for a separate sentencing proceeding before the same jury that had decided the question of guilt or innocence. Whether the defendant should be sentenced to death or life imprisonment was at the jury's absolute discretion.[15] McGautha argued that the state's failure to provide standards to guide the jury's sentencing determination violated the Due Process Clause of the Fourteenth Amendment.[16]

The Court rejected McGautha's contention by a vote of 6-3, with Justice Blackmun joining the majority opinion filed by Justice Harlan. The majority began by observing that "[o]ur function is not to impose on the States, *ex cathedra*, what might seem to us a better system for dealing with capital cases."[17] The Court could have rested its constitutional analysis on the principle of judicial restraint: suggesting that the adoption of determinate capital sentencing standards by the States would be desirable, while disclaiming the authority to require such standards as a matter of constitutional law. The Court did not, however, adopt that approach. Rather, it stated that "history reveals continual efforts, uniformly unsuccessful, to identify before the fact those homicides for which the slayer should die."[18] It suggested that any future efforts to devise such standards would be doomed to failure and stated that "[t]o identify before the fact those characteristics of criminal homicides and their perpetrators which call for the death penalty, and to express these characteristics in language which can be fairly understood and applied by the sentencing authority, appear to be tasks which are beyond present human ability."[19] The Court devoted particular attention to the aggravating and mitigating circumstances listed in the Model Penal Code, asserting that "such criteria do not purport to provide more than the most minimal control over the

14. 402 U.S. 183 (1971).
15. *See id.* at 189-90.
16. *See id.* at 196.
17. *Id.* at 195.
18. *Id.* at 197.
19. *Id.* at 204.

sentencing authority's exercise of discretion."[20] It concluded its discussion of the issue by stating:

> [i]n light of history, experience, and the present limitations of human knowledge, we find it quite impossible to say that committing to the untrammeled discretion of the jury the power to pronounce life or death in capital cases is offensive to anything in the Constitution. The States are entitled to assume that jurors confronted with the truly awesome responsibility of decreeing death for a fellow human will act with due regard for the consequences of their decision and will consider a variety of factors, many of which will have been suggested by the evidence or by the arguments of defense counsel. For a court to attempt to catalog the appropriate factors in this elusive area could inhibit rather than expand the scope of consideration, for no list of circumstances would ever be really complete. The infinite variety of cases and facets to each case would make general standards either meaningless "boiler-plate" or a statement of the obvious that no jury would need.[21]

Thus, while the *holding* of *McGautha* was simply that the Constitution did not prohibit the States from vesting capital sentencing juries with standardless discretion, the Court's analysis suggested that any attempt to promulgate such standards would be futile at best, and counterproductive at worst.

The petitioner in *McGautha* did not contend that the death penalty was *per se* violative of the Constitution, and the Court did not squarely address the issue.[22] The Court's analysis plainly presumed, however, that the insusceptibility of the capital sentencing decision to legal constraints did not render capital punishment unconstitutional. The Court stated that "[i]n light of history, experience, and the present limitations of human knowledge, we find it quite impossible to say that committing to the untrammeled discretion of the jury the power to pronounce life or death in capital cases is offensive to anything in the Constitution."[23] Taken literally, this language would compel rejection of any constitutional challenge to the propriety of the death penalty itself.

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20. *Id.* at 207.

21. *Id.* at 207-08.

22. Justice Black directly addressed the question in his opinion concurring in the judgment, stating: "[t]he Eighth Amendment forbids 'cruel and unusual punishments.' In my view, those words cannot be read to outlaw capital punishment because that penalty was in common use and authorized by law here and in the countries from which our ancestors came at the time the Amendment was adopted." *Id.* (Black, J., concurring).

23. *Id.* at 207.

Just over a year later, however, the Court abruptly shifted course. In *Furman v. Georgia*,[24] the Court considered three consolidated capital cases, two involving rape and one involving murder.[25] The Georgia and Florida statutes under review in *Furman* left to the jury's unfettered discretion the decision whether a capital defendant should be sentenced to death or to a term of imprisonment.[26] The Court's decision in *Furman* effectively invalidated all state and federal death penalty provisions then in existence.

Furman was highly fractured; each of the nine Justices filed a separate opinion, and no Justice in the majority joined in the opinion of any other.[27] Justices Brennan and Marshall argued that the death penalty was unconstitutional *per se*.[28] While Justices Douglas, Stewart, and White held that the Georgia and Texas statutes directly at issue in the case violated the Eighth Amendment, their opinions left open the possibility that the States could amend their capital punishment laws in a way that would satisfy the Constitution.[29] Their opinions also stressed the lack of standards governing the jury's sentencing determination, as well as the apparent arbitrariness of the process by which a small subset of persons convicted of capital crimes were sentenced to death, while other similarly situated defendants were spared.

Justice Blackmun dissented in *Furman*.[30] His constitutional analysis rested upon three basic arguments. First, the Justice asserted that the Court had not adequately justified its departure from existing precedent. Canvassing prior Supreme Court decisions, he observed that "until today capital punishment was accepted and assumed as not unconstitutional *per se* under the Eighth Amendment or the Fourteenth Amendment."[31] That the Constitution permits the imposition of the

24. 408 U.S. 238 (1972) (per curiam).

25. *See id.* at 239.

26. *See id.* at 308-09 & nn.8-9 (Stewart, J., concurring).

27. As one commentator stated "[*Furman*] is not so much a case as a badly orchestrated opera, with nine characters taking turns to offer their own arias." Robert Weisberg, *Deregulating Death*, 1983 SUP. CT. REV. 305, 315. Justice Blackmun's complaint in *Callins* that "the Court has chosen to deregulate the entire [death penalty] enterprise," 510 U.S. at 1145, may be drawn (consciously or unconsciously) from the title of Professor Weisberg's article.

28. *See Furman*, 408 U.S. at 257 (Brennan, J., concurring); *id.* at 314 (Marshall, J., concurring).

29. *See id.* at 240 (Douglas, J., concurring); *id.* at 306 (Stewart, J., concurring); *id.* at 310 (White, J., concurring).

30. *See id.* at 405 (Blackmun, J., dissenting). Justice Blackmun also joined the dissenting opinions filed by Chief Justice Burger and Justices Powell and Rehnquist. *See id.*

31. *Id.* at 407 (Blackmun, J., dissenting) (emphasis added).

death penalty was, he observed, "either the flat or the implicit holding" of a number of the Court's decisions, culminating in Justice Black's separate opinion in *McGautha* only the previous year.[32] The Justice acknowledged that precedent alone was not dispositive, stating that he "certainly subscribe[d] to the proposition[ ] that the Cruel and Unusual Punishments Clause 'may acquire meaning as public opinion becomes enlightened by a humane justice.'"[33] He expressed skepticism, however, that public attitudes had substantially changed during the brief interval between the Court's prior decisions upholding the death penalty and its contrary ruling in *Furman*.[34]

Second, Justice Blackmun argued that the decision of the majority was inconsistent with the limited role of the federal courts in our constitutional scheme. He stated that

> [o]ur task here, as must so frequently be emphasized and reemphasized, is to pass upon the constitutionality of legislation that has been enacted and that is challenged. That is the sole task for judges. We should not allow our personal preferences as to the wisdom of legislative and congressional action, or our distaste for such action, to guide our judicial decision in cases such as these.[35]

He emphasized the breadth of the Court's disruption of legislative policy choices, observing that "[n]ot only are the capital punishment laws of 39 States and the District of Columbia struck down, but also all those provisions of the federal statutory structure that permit the death penalty apparently are voided."[36] Justice Blackmun noted that the enactment of recent federal capital punishment provisions revealed essentially unanimous legislative support for the death penalty, at least in certain circumstances.[37] He found it "impossible . . . to believe" that the members of Congress who voted to enact those measures "were callously unaware and insensitive of constitutional overtones in legislation of this type," and concluded that elected legislators were "far more conscious of the temper of the times, of the maturing of society, and of the contemporary demands for man's dignity, than are we who sit cloistered on this Court."[38]

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32. *Id.* at 407-08 (Blackmun, J., dissenting).

33. *Id.* at 409 (Blackmun, J., dissenting) (quoting Weems v. United States, 217 U.S. 349, 378 (1910)).

34. *See id.* at 410 (Blackmun, J., dissenting) ("My problem . . . is the suddenness of the Court's perception of progress in the human attitude since decisions of only a short while ago.").

35. *Id.* at 411 (Blackmun, J., dissenting).

36. *Id.* (Blackmun, J., dissenting).

37. *See id.* at 412-13 (Blackmun, J., dissenting).

38. *Id.* at 413 (Blackmun, J., dissenting).

Finally, Justice Blackmun warned that the Court's decision might have unintended and untoward consequences. He construed the opinions of Justices Stewart and White to suggest that capital sentencing statutes making imposition of the death penalty mandatory for specified offenses might survive constitutional review.[39] Justice Blackmun stated that he feared the result

> will be that statutes struck down today will be re-enacted by state legislatures to prescribe the death penalty for specified crimes without any alternative for the imposition of a lesser punishment in the discretion of the judge or jury, as the case may be. This approach, it seems to me, encourages legislation that is regressive and of an antique mold, for it eliminates the element of mercy in the imposition of punishment. I thought we had passed beyond that point in our criminology long ago.[40]

In his concluding paragraph, Justice Blackmun once again distinguished between his own policy preferences and his conception of the judicial role. He observed that he found the Court's holding "difficult to accept or to justify as a matter of history, of law, or of constitutional pronouncement," even though he "personally . . . rejoice[d] at the Court's result."[41]

Insofar as its constitutional argument, nothing in Justice Blackmun's *Furman* dissent was in any way remarkable. Each aspect of the analysis—the recitation of precedent, the invocation of judicial restraint, and the warning of unintended consequences—is a familiar staple of judicial rhetoric and argumentation. Rather, its striking feature is its opening passage:

> 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 exper-

39. *See id.* (Blackmun, J., dissenting).

40. *Id.* (Blackmun, J., dissenting). In a similar vein, Chief Justice Burger's dissent stated:

> [I]t has been widely accepted that mandatory sentences for crimes do not best serve the ends of the criminal justice system. Now, after the long process of drawing away from the blind imposition of uniform sentences for every person convicted of a particular offense, we are confronted with an argument perhaps implying that only the legislatures may determine that a sentence of death is appropriate, without the intervening evaluation of jurors or judges. This approach threatens to turn back the progress of penal reform, which has moved until recently at too slow a rate to absorb significant setbacks.

Id. at 402-03 (Burger, C.J., dissenting).

41. *Id.* at 414 (Blackmun, J., dissenting).

> iences, and is not compatible with the philosophical convictions I have been able to develop. It is antagonistic to any sense of "reverence for life." Were I a legislator, I would vote against the death penalty for the policy reasons argued by counsel for the respective petitioners and expressed and adopted in the several opinions filed by the Justices who vote to reverse these convictions.[42]

This passage seems to me altogether extraordinary. It is, of course, quite common for a judge or Justice to vote to sustain a legislative judgment against constitutional challenge, while acknowledging that he might reach a different judgment were he, himself, the legislator. But it is highly unusual for a judge to express "distaste, antipathy, and indeed, abhorrence" for the legislative judgment being upheld. Perhaps even more arresting, is the introductory statement that "[c]ases such as these provide for me an excruciating agony of the spirit."[43] That statement is an unusually stark and forthright acknowledgment that the subordination of individual policy preferences implicit in the judicial role can be a source not only of intellectual difficulty, but of personal anguish as well.

Within four years of the Supreme Court's decision in *Furman*, thirty five States enacted new death penalty laws. Those statutes fell largely into one of two categories. Many States enacted "guided discretion" statutes providing for a separate penalty trial after a conviction for a capital crime. Those laws typically required the sentencer—usually the jury, but occasionally the judge—to consider a variety of statutory aggravating and mitigating factors similar to those listed in the Model Penal Code. Other States responded to *Furman* by enacting laws requiring courts to impose a capital sentence upon any defendant convicted of specified crimes.

In 1976, the Court addressed constitutional challenges to both types of capital sentencing regimes. The Court upheld the guided discretion statutes, with only Justices Brennan and Marshall dissenting.[44] The lead opinion, co-authored by Justices Stewart, Powell, and Stevens, construed *Furman* to "mandate[ ] that where discretion is afforded . . . on a matter so grave as the determination of whether a

42. *Id.* at 405-06 (Blackmun, J., dissenting). As his *Furman* dissent pointed out, Justice Blackmun had expressed personal reservations regarding the propriety of capital punishment while still on the court of appeals. *See id.* at 407 & n.4 (Blackmun, J., dissenting); Maxwell v. Bishop, 398 F.2d 138, 153-54 (8th Cir. 1968), *vacated and remanded on other grounds*, 398 U.S. 262 (1970).

43. *Furman,* 408 U.S. at 405 (Blackmun, J., dissenting).

44. *See* Gregg v. Georgia, 428 U.S. 153 (1976); *see also* Proffitt v. Florida, 428 U.S. 242 (1976).

human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action."[45] The plurality concluded that both the Georgia and Florida statutes satisfied that constitutional requirement.[46]

By a 5-4 majority, however, the Court struck down North Carolina and Louisiana statutes that mandated a sentence of death upon conviction for first-degree murder.[47] The plurality opinion acknowledged that the Constitution does not generally prohibit state legislatures from determining that all persons convicted of specified crimes should be subject to the same mandatory penalties.[48] It concluded, however, that

> in capital cases the fundamental respect for humanity underlying the Eighth Amendment requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death. This conclusion rests squarely on the predicate that the penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.[49]

Because the North Carolina statute precluded a sufficiently individualized determination of the appropriate penalty in a particular capital case, the plurality concluded, that the statute was unconstitutional.[50] The plurality found that the Louisiana statute suffered from a similar constitutional defect, and it was invalidated as well.[51]

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45. *Gregg*, 428 U.S. at 189.

46. *See id.* at 196-207 (opinion of Stewart, Powell, and Stevens, JJ.); *Proffitt*, 428 U.S. at 247-60 (opinion of Stewart, Powell, and Stevens, JJ.).

47. *See* Woodson v. North Carolina, 428 U.S. 280 (1976); Roberts v. Louisiana, 428 U.S. 325 (1976). The Court acknowledged that the Louisiana statute defined the crime of first-degree murder in somewhat narrower terms than did the North Carolina law, but it concluded that the difference was without constitutional significance. *See Roberts*, 428 U.S. at 331-36.

48. *See Woodson*, 428 U.S. at 304 (opinion of Stewart, Powell, and Stevens, JJ.).

49. *Id.* at 304-05 (opinion of Stewart, Powell, and Stevens, JJ.).

50. *See id.* at 305 (opinion of Stewart, Powell, and Stevens, JJ.).

51. *See id.* at 335-36 (opinion of Stewart, Powell, and Stevens, JJ.). On the same day that it decided *Gregg*, *Proffitt*, *Woodson*, and *Roberts*, the Court also issued its decision in *Jurek v. Texas*, 428 U.S. 262 (1976), upholding the Texas death penalty statute against constitutional challenge. The Texas capital punishment law was not easily analogized to either the Georgia and Florida laws that the Court upheld, or the North Carolina and Louisiana statutes that the Court struck down. The Texas law provided that defendants convicted of

Justice Blackmun voted to uphold the death sentence in each of the five capital cases decided by the Court in 1976. In none of those cases did he offer an explanation of his views. Rather, in each case he filed a one-sentence opinion concurring in or dissenting from the Court's judgment, supported only by citation to his own *Furman* dissent and to the other dissenting opinions issued in *Furman*.[52]

In light of his dissenting opinion in *Furman*, Justice Blackmun's willingness to uphold the Georgia and Florida statutes was not surprising. His position in *Woodson* and *Roberts*—in particular, his suggestion that his vote to affirm followed necessarily from the views that he and the other *Furman* dissenters had expressed—was, however, less predictable. The Justice's dissent in *Furman* had expressed particular disapproval of mandatory capital sentencing schemes, characterizing them as "legislation that is regressive and of an antique mold."[53] Certainly that opinion did not commit Justice Blackmun to the view that a mandatory capital sentencing statute is unconstitutional. But it was odd to suggest that the *Furman* dissent provided an adequate refutation of the constitutional challenge to the North Carolina and Louisiana laws.

When the Court issued its decisions in the 1976 death penalty cases, a reasonable observer might well have thought Justice Blackmun believed that the federal Constitution imposes no meaningful constraints on state legislatures' freedom to fashion procedural regimes for the administration of the death penalty. Justice Blackmun had not simply rejected the proposition that capital punishment is *per se* unconstitutional. He had voted both to uphold state laws that

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specified categories of murder would be sentenced to death if, but only if, the jury concluded that: (1) the crime "was committed deliberately and with the reasonable expectation that the death of the deceased or another would result"; (2) that the defendant was likely to "commit criminal acts of violence that would constitute a continuing threat to society"; and (3) that the conduct of the defendant was not a reasonable response to provocation by the deceased. *Id.* at 269 (opinion of Stewart, Powell, and Stevens, JJ.).

The Court's decision to uphold some of the challenged statutes while striking down others was attributable to Justices Stewart, Powell, and Stevens, who voted as a bloc (and wrote the lead opinion) in each of the five cases. Justices Brennan and Marshall voted to invalidate each of the five death penalty statutes, while Chief Justice Burger and Justices White, Blackmun, and Rehnquist voted to uphold them all.

52. *See Gregg*, 428 U.S. at 227; *Proffitt*, 428 U.S. at 261; *Woodson*, 428 U.S. at 307-08; *Roberts*, 428 U.S. at 363.

53. *Furman*, 408 U.S. at 413 (Blackmun, J., dissenting). Indeed, in the Florida legislative debates held in the fall of 1972, supporters of a guided discretion death penalty statute invoked the dissenting opinion of Chief Justice Burger in *Furman*, and in particular its condemnation of mandatory sentencing laws,s as evidence that the Court would invalidate a mandatory death penalty statute. *See* Malcolm Stewart, *Enactment of the Florida Death Penalty Statute, 1972: History and Analysis,* 16 NOVA L. REV. 1299, 1320, 1322-23 (1992).

vested the capital sentencing jury with unfettered discretion, and to uphold state laws that gave the sentencing jury no discretion at all. Moreover, he indicated that the various dissenting opinions issued in *Furman* provided a sufficient constitutional defense of *all* types of capital sentencing laws.

Two years later, the Court issued its decision in *Lockett v. Ohio*.[54] Lockett was a 21-year-old woman convicted as an aider and abettor in the murder of a pawnshop operator killed during the course of a robbery. She had waited in the getaway car while the robbery took place. The State's key witness testified that none of the conspirators had intended for a killing to occur, but that a gun held by one of the robbers had gone off when the pawnbroker attempted to grab it.[55]

Under Ohio law, murder committed in the course of an aggravated robbery carried a mandatory death sentence unless the defendant could establish one of the three statutory mitigating factors: (1) that the victim had induced or facilitated the offense; (2)that the defendant had acted under duress or coercion; or (3)that the offense was primarily the result of psychosis or mental deficiency.[56] The trial judge, apparently concluding that none of the statutory mitigating circumstances were present, found that he had "'no alternative, whether [he] like[d] the law or not,'" but to sentence Lockett to death.[57]

In arguments before the Supreme Court, Lockett contended "that her death sentence [wa]s invalid because the statute under which it was imposed did not permit the sentencing judge to consider, as mitigating factors, her character, prior record, age, lack of specific intent to cause death, and her relatively minor part in the crime."[58] The Supreme Court reversed Lockett's death sentence. In an opinion written by Chief Justice Burger, a four-Justice plurality relied on the lead opinion in *Woodson* in holding that the "qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed."[59] The plurality concluded on that basis that "the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than

54. 438 U.S. 586 (1978).
55. *See id.* at 589-90.
56. *See id.* at 589, 593-94.
57. *Id.* at 594.
58. *Id.* at 597.
59. *Id.* at 604.

death."[60] Justices White and Rehnquist strongly objected to that aspect of the plurality's analysis, arguing that it reintroduced the very arbitrariness that *Furman* had condemned.[61]

Justice Blackmun articulated a middle ground, concurring in the judgment "for a reason more limited than that which the plurality espouse[d] . . . ."[62] He explained that "the Ohio judgment in this case improperly provided the death sentence for a defendant who only aided and abetted a murder, without permitting any consideration by the sentencing authority of the extent of her involvement, or the degree of her *mens rea*, in the commission of the homicide."[63] Justice Blackmun would have required "that the sentencing authority have discretion to consider the degree of the defendant's participation in the acts leading to the homicide and the character of the defendant's *mens rea*."[64] He also observed:

> [t]his approach is not too far off the mark already used by many States in assessing the death penalty. Of 34 States that now have capital statutes, 18 specify that a minor degree of participation in a homicide may be considered by the sentencing authority, and, of the remaining 16 States, 9 allow consideration of any mitigating factor.[65]

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60. *Id.* (footnote omitted). The Court explained its reference to "the rarest kind of capital case" by noting that it "express[ed] no opinion as to whether the need to deter certain kinds of homicide would justify a mandatory death sentence as, for example, when a prisoner—or escapee—under a life sentence is found guilty of murder." *Id.* n.11.

61. *See id.* at 623 (White, J., concurring in part, dissenting in part, and concurring in the judgments) ("I greatly fear that the effect of the Court's decision today will be to compel constitutionally a restoration of the state of affairs at the time *Furman* was decided . . ."); *id.* at 631 (Rehnquist, J., concurring in part and dissenting in part) ("the new constitutional doctrine will not eliminate arbitrariness or freakishness in the imposition of sentences, but will codify and institutionalize it.").

62. *Id.* at 613 (Blackmun, J., concurring in the judgment).

63. *Id.* (Blackmun, J., concurring in the judgment).

64. *Id.* at 615-16 (Blackmun, J., concurring in the judgment).

65. *Id.* at 616-17 (Blackmun, J., concurring in the judgment). Justice Blackmun acknowledged that his opinion in *Lockett* marked a departure from his prior deference to state legislatures regarding the procedures to be employed in capital cases. He explained that

> [t]hough heretofore I have been unwilling to interfere with the legislative judgment of the States in regard to capital-sentencing procedures, this Court's judgment as to disproportionality in [*Coker v. Georgia*, 433 U.S. 584 (1977)], in which I joined, and the unusual degree to which Ohio requires capital punishment of a mere aider and abettor in an armed felony resulting in a fatality even where *no* participant specifically intended the fatal use of a weapon, provides a significant occasion for setting some limit to the method by which the States assess punishment for actions less immediately connected to the deliberate taking of human life.

Id. at 616 (Blackmun, J., concurring in the judgment) (citations omitted).

Though both Justice Blackmun and the *Lockett* plurality concluded that Lockett's death sentence had been unconstitutionally imposed, their modes of analysis differed significantly. Justice Blackmun did not endorse the plurality's categorical holding that the capital sentencer must be permitted to consider "any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death."[66] Rather, Justice Blackmun attached particular significance to evidence "concerning the defendant's degree of participation in the homicide and the nature of his *mens rea* in regard to the commission of the homicidal act."[67] Justice Blackmun did not explain why that form of mitigating evidence was entitled to special consideration, beyond noting that the large majority of States with death penalty statutes permitted it to be taken into account in determining the appropriate sentence. His opinion suggests the possibility, however, of an alternative approach to mitigating evidence in capital cases.

Under that approach, the constitutional right to present mitigating evidence would be limited to those factors that have traditionally been deemed central to an assessment of an individual's criminal culpability. Whether a particular mitigating circumstance falls into that category would be ascertained by reference both to historical practice and to contemporary state enactments. State statutes (like Ohio's) that precluded consideration of such factors by the sentencing judge or jury would be held unconstitutional. With respect to mitigating circumstances as to which no historical or contemporary consensus existed, however, individual States could determine whether a particular factor was sufficiently relevant to the capital sentencing decision so as to justify its consideration by the sentencer.[68]

Such a regime might have imposed significant burdens upon the Supreme Court, which would have had ultimate responsibility for determining which mitigating circumstances are and are not so fundamental as to give them constitutional status. That approach would, however, have enabled the Court to recognize some constitutional

66. *Id.* at 604 (Blackmun, J., concurring in the judgment).

67. *Id.* at 616 (Blackmun, J., concurring in the judgment).

68. Two commentators have advocated a very similar approach, arguing that "the individualization requirement of the Eighth Amendment is most sensibly understood to mandate consideration of evidence of reduced culpability in capital cases." Carol S. Steiker & Jordan M. Steiker, *Let God Sort Them Out? Refining the Individualization Requirement in Capital Sentencing*, 102 YALE L.J. 835, 858 (1992). They explain that "[t]he focus on culpability is apparent in current state statutory schemes and consonant with historical efforts, both common law and statutory, to separate capital murder from murders warranting a sentence less than death." *Id.*

right for a capital defendant to introduce mitigating evidence, while remaining faithful to the *Furman* principle that the decision whether an individual will be sentenced to death may not ultimately be entrusted to the sentencer's unfettered discretion. Indeed, alone among the eight Justices who participated in *Lockett*, Justice Blackmun recognized the possibility of a middle ground between a rule that a capital defendant must be permitted to introduce whatever potentially mitigating evidence he wishes, and a rule that the State's authority to determine what circumstances will be regarded as mitigating is subject to no constitutional constraints.

Close examination of Justice Blackmun's early capital punishment opinions may thus make his *Callins* dissent seem particularly surprising. In concluding that "the death penalty, as currently administered, is unconstitutional,"[69] the Justice relied heavily upon his perception that the rule announced in *Furman* was irrevocably in tension with the *Woodson/Lockett* line of cases, and that both lines of authority set forth fundamental constitutional principles. Justice Blackmun dissented in *Furman* and *Woodson*, however, and in *Lockett* he concurred on grounds substantially more limited than those articulated by the plurality.

One feature common to all of the cases discussed above is that each involved a direct constitutional challenge to the governing state death penalty statute. In *McGautha*, *Furman*, and *Woodson*, the defendants' constitutional claims did not depend in any meaningful way on the facts of their individual cases. Rather, they raised what were in essence facial challenges to the governing state death penalty laws; and Justice Blackmun voted to reject each claim. In *Lockett*, Justice Blackmun declined to adopt the broad rule articulated by the plurality, and he took pains to emphasize that the rule he endorsed was consistent with the death penalty statutes of a large majority of the States whose laws provided for capital punishment. Justice Blackmun's jurisprudence during this period may, therefore, be best understood as reflecting not an uncritical acceptance of all aspects of the States' administration of the death penalty, but a particular deference to state *legislative* judgments concerning the manner in which capital punishment should be implemented.

69. Callins v. Collins, 510 U.S. 1141, 1159 (1994) (Blackmun, J., dissenting).

II. Growing Concerns: Dissenting Opinions in the Mid-1980s

During his first 13 years on the Court, Justice Blackmun occasionally joined in decisions overturning capital sentences.[70] He did not, however, dissent from a single decision upholding a sentence of death until the final day of the 1982 Term, when he filed dissenting opinions in three such cases.[71]

During the 1980s, however, the Supreme Court confronted an increasing number of capital cases that involved challenges to the manner in which individual trials had been conducted, rather than challenges to the terms of the governing statutes. In that context Justice Blackmun, with increasing frequency, voted to sustain the constitutional claims raised by capital defendants. Perhaps more significantly, Justice Blackmun began to write separately, frequently expressing the view that other actors involved in the administration of the death penalty had devoted insufficient care to their tasks.

The most substantial of his 1980s' dissents came in *Barefoot v. Estelle.*[72] The defendant in *Barefoot* was convicted of killing a Texas police officer and was sentenced to death by a jury.[73] Under Texas law, a jury may impose a capital sentence only if it determines, *inter alia*, that "there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society."[74] At the penalty phase of Barefoot's trial, the State introduced the testimony of two psychiatrists who stated that Barefoot was likely to commit further criminal acts.[75] The jury sentenced Barefoot to death.

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70. In addition to *Lockett*, *see* Gardner v. Florida, 430 U.S. 349, 364 (1977) (Blackmun, J., concurring in the judgment); Coker v. Georgia, 433 U.S. 584 (1977); Presnell v. Georgia, 439 U.S. 14 (1978) (per curiam); Green v. Georgia, 442 U.S. 95 (1979) (per curiam); Godfrey v. Georgia, 446 U.S. 420 (1980); Beck v. Alabama, 447 U.S. 625 (1980); Adams v. Texas, 448 U.S. 38 (1980); Estelle v. Smith, 451 U.S. 454 (1981); Enmund v. Florida, 458 U.S. 782 (1982). *Gardner* is the only one of those cases in which Justice Blackmun filed an opinion, and his concurrence simply indicated that he considered himself bound by the Court's judgments in *Woodson* and *Roberts*. *See Gardner*, 430 U.S. at 364.

71. One commentator has stated that Justice Blackmun, having "remained virtually silent in capital cases" until the end of the 1982 Term, "seemed almost to explode in rhetorical force" in his three dissenting opinions. Robert A. Burt, *Disorder in the Court: The Death Penalty and the Constitution*, 85 MICH. L. REV. 1741, 1817 (1987).

72. 463 U.S. 880 (1983).

73. *See id.* at 883.

74. *Id.* at 884.

75. *See id.* The majority opinion in *Barefoot* blandly asserted that "[t]he State also called two psychiatrists, John Holbrook and James Grigson, who, in response to hypothetical questions, testified that petitioner would probably commit further acts of violence and represent a continuing threat to society." *Id.* at 884. As Justice Blackmun's dissent ex-

In the Supreme Court, Barefoot contended that the introduction of the psychiatric testimony bearing on future dangerousness violated his rights under the Constitution.[76] He was supported by an amicus brief filed by the American Psychiatric Association (APA), which estimated that "two out of three predictions of long-term future violence made by psychiatrists are wrong."[77] The Court rejected Barefoot's constitutional claim. Observing that "[n]either petitioner nor the Association suggests that psychiatrists are always wrong with respect to future dangerousness, only most of the time," the Court was "unconvinced . . . that the adversary process cannot be trusted to sort out the reliable from the unreliable evidence and opinion about future dangerousness."[78] The majority recognized that scientific and other expert testimony is frequently excluded from federal trials on the ground of unreliability. It found those cases inapposite, however, because they were "not constitutional decisions, but decisions of federal evidence law."[79]

In his dissent, Justice Blackmun found it "impossible to square admission of this purportedly scientific but actually baseless testimony with the Constitution's paramount concern for reliability in capital sentencing."[80] He observed that "unreliable scientific evidence is widely acknowledged to be prejudicial,"[81] because a lay jury may tend to accept uncritically opinions offered by those who purport to be experts.[82] He pointed out that even in non-capital cases, scientific evi-

plains, the medical testimony was a good deal more emphatic than the majority's description suggests. Both doctors testified that their psychiatric training gave them specialized expertise in predicting violent behavior. *See id.* at 918-19 (Blackmun, J., dissenting). Dr. Holbrook testified that "within reasonable psychiatric certainty," Barefoot was likely to commit future crimes of violence. *Id.* at 919 (Blackmun, J., dissenting). Dr. Grigson testified that Barefoot was "above ten" on a one-to-ten scale rating sociopathic tendencies, and that there was a "one hundred percent and absolute" likelihood that Barefoot would commit future violent crimes, whether he was incarcerated or released into society. *Id.* (Blackmun, J., dissenting). Neither of the expert witnesses had examined Barefoot or requested the opportunity to examine him. *See id.* at 917 (Blackmun, J., dissenting).

76. *See id.* at 896.

77. *Id.* at 920 (Blackmun, J., dissenting) (emphasis omitted).

78. *Id.* at 901.

79. *Id.* at 899 n.6.

80. *Id.* at 923 (Blackmun, J., dissenting). In that regard, Justice Blackmun invoked the statement of the *Woodson* plurality that because the penalty of death is qualitatively different from any other punishment, "there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." *Id.* at 924 (Blackmun, J., dissenting) (quoting Woodson v. North Carolina, 428 U.S. 280, 305 (1976)).

81. *Id.* at 926 (Blackmun, J., dissenting).

82. *See id.* at 926-28 (Blackmun, J., dissenting).

dence is routinely excluded if the state of knowledge within the pertinent discipline is considered insufficient.[83]

Justice Blackmun acknowledged that the exclusion of such evidence typically rests on rules of evidence rather than constitutional doctrine.[84] He observed, however, that "the principle requiring that capital sentencing procedures ensure reliable verdicts" was an established constitutional rule.[85] The apparent thrust of his analysis was that the greater need for reliability in the capital sentencing context provided a doctrinal basis for "constitutionalizing" what would otherwise be unconstitutional rules of federal evidence law. Justice Blackmun also rejected the majority's view that cross-examination and rebuttal evidence should enable the jury to separate reliable from unreliable psychiatric testimony, asserting that the resulting "battle of experts" would distract the jury "from an assessment of the propriety of sentencing to death the defendant before it to resolving a scientific dispute about the capabilities of psychiatrists to predict future violence."[86]

The most striking feature of Justice Blackmun's *Barefoot* dissent, however, is its rhetorical tone. The opinion is laced with open contempt for the psychiatrists who had testified at Barefoot's trial and for the state officials who had introduced their testimony. Justice Blackmun stated that "while Doctors Grigson and Holbrook were presented by the State and by self-proclamation as experts at predicting future dangerousness, the scientific literature makes crystal clear that they had no expertise whatever."[87] Citing APA standards of conduct forbidding a psychiatrist from offering an opinion about an individual he has not examined, the Justice asserted that "[t]he Court today sanctions admission in a capital sentencing hearing of 'expert' medical testimony so unreliable and unprofessional that it violates the canons of medical ethics."[88] He noted that "[t]he APA particularly condemns the use of the diagnosis employed by Doctors Grigson and Holbrook in this case, that of sociopathy."[89] Finally, he concluded that "Texas' choice of substantive factors"—*i.e.*, the legislature's determination that a finding of future dangerousness should be a prerequisite to a sentence of death—"does not justify loading the factfinding

83. *See id.* at 930 (Blackmun, J., dissenting).
84. *See id.* at 931 n.9 (Blackmun, J., dissenting).
85. *Id.* (Blackmun, J., dissenting).
86. *Id.* at 934-35 (Blackmun, J., dissenting).
87. *Id.* at 922 (Blackmun, J., dissenting).
88. *Id.* at 924 n.6 (Blackmun, J., dissenting).
89. *Id.* at 932 (Blackmun, J., dissenting).

process against the defendant through the presentation of what is, at bottom, false testimony."[90]

Justice Blackmun's *Barefoot* dissent is wholly unlike anything that the Justice had previously written on the subject of capital punishment. Justice Blackmun had occasionally voted to invalidate sentences of death, and he had voiced his personal opposition to the death penalty. He had, however, neither dissented from a decision upholding a capital sentence, nor previously expressed outrage or indignation at the manner in which a State administered its system of capital punishment. Clearly, Justice Blackmun's capital punishment jurisprudence shifted dramatically in the years after *Barefoot*: he more frequently voted in favor of capital defendants, expressed his views in writing, and criticized what he perceived as abuses in the administration of the death penalty.

It is impossible to know whether *Barefoot* caused a significant change in Justice Blackmun's approach to the legal issues surrounding the administration of the death penalty, or whether the case fortuitously came before the Court at a time when the Justice's views were changing for other reasons. Nevertheless, it seems to me entirely plausible that *Barefoot* would elicit such an emotional reaction from Justice Blackmun. The Justice quite evidently believed that the doctors who testified at Barefoot's trial had betrayed the profession by willfully misstating their ability to offer reliable expert opinion on the subject of future dangerousness. Moreover, his high regard for the medical profession would have caused him to view such a betrayal as an extraordinarily serious breach. Justice Blackmun was also clearly of the view that the state officials who prosecuted Barefoot had knowingly presented false and misleading evidence—evidence that was especially pernicious because it was offered by witnesses whom the jury was particularly likely to believe—in their effort to obtain a capital sentence. Thus, it is not unimaginable to assume that Justice Blackmun's exposure to the case would substantially affect his willingness to

90. *Id.* at 938 (Blackmun, J., dissenting). The dissenting opinion also expresses frustration at the majority's willingness to tolerate what Justice Blackmun clearly regarded as a manifest injustice. *See id.* at 935 (Blackmun, J., dissenting). "One searches the Court's opinion in vain for a plausible justification for tolerating the State's creation of this risk of an erroneous death verdict." *Id.* at 935-36 (Blackmun, J., dissenting). "Ultimately, when the Court knows full well that psychiatrists' predictions of dangerousness are specious, there can be no excuse for imposing on the defendant, on pain of his life, the heavy burden of convincing a jury of laymen of the fraud." *Id.* (Blackmun, J., dissenting).

believe that the death penalty was being administered fairly in individual cases.[91]

Two other dissenting opinions filed by Justice Blackmun during the middle part of the 1980s reflect his shifting perspective on the death penalty. The first is *Cabana v. Bullock*.[92] *Cabana* involved the application of *Enmund v. Florida*[93] (which held that a defendant may be sentenced to death only if he is found to have killed, attempted to kill, or intended that a killing take place or that lethal force be used).[94] In *Cabana*, a Mississippi jury convicted and sentenced Bullock to death for a killing that occurred during the course of a robbery which he and another man perpetrated.[95] His conviction and sentence were upheld by the Mississippi courts.[96] Bullock sought federal habeas review, contending that the jury instructions given at his trial permitted the jury to sentence him to death based solely upon his participation in the underlying robbery, without making the findings required by *Enmund*.[97] The Fifth Circuit agreed. It vacated Bullock's death sentence and directed the State either to impose a sentence of life imprisonment, or to conduct a new sentencing hearing at which a jury could determine whether a sentence of death was appropriate.[98]

The Supreme Court modified the appellate court's judgment. The Court agreed that the instructions given to Bullock's sentencing jury failed to satisfy the standard announced in *Enmund*.[99] It disagreed, however, with the Fifth Circuit's conclusion that proper *Enmund* findings could be made only by a jury at a new sentencing

91. The other two dissents filed by Justice Blackmun on the same day were quite short—less than a page apiece—but emotionally charged. *See* Barclay v. Florida, 463 U.S. 939, 991 (1983) (Blackmun, J., dissenting); California v. Ramos, 463 U.S. 992, 1028-1029 (1983) (Blackmun, J., dissenting). The *Barclay* dissent stated that "when a State chooses to impose capital punishment, as this Court has held a State presently has the right to do, it must be imposed by the rule of law . . . . The errors and missteps [in Barclay's case]—intentional or otherwise—come close to making a mockery of the Florida statute and are too much for me to condone." 463 U.S. at 991 (Blackmun, J., dissenting). Justice Blackmun's dissent in *Ramos* accused the majority of "substituting an intellectual sleight of hand for legal analysis," and asserted that "[t]his kind of appellate review compounds the original unfairness of the [challenged] instruction itself, and thereby does the rule of law disservice." *Id.* at 1029 (Blackmun, J., dissenting).

92. 474 U.S. 376 (1986).

93. 458 U.S. 782 (1982).

94. *See id.* at 798.

95. *See Cabana*, 474 U.S. at 379-81.

96. *See id.*

97. *See id.* at 381-82.

98. *See id.* at 382.

99. *See id.* at 392.

hearing.[100] It held that "the sentence currently in force may stand provided only that the requisite findings are made in an adequate proceeding before some appropriate tribunal—be it an appellate court, a trial judge, or a jury."[101]

Justice Blackmun's dissent took issue with the majority's pronouncement that constitutionally sufficient *Enmund* findings could be made by an appellate court. He contended that the Court "ignores both the proper institutional roles of trial and appellate courts and the pragmatic and constitutional concerns with reliability that underlie those roles."[102] He asserted that the majority's willingness to permit essential findings of fact to be made by state appellate courts "turns on its head the heightened concern with reliability that has informed our review of the death penalty over the past decade."[103] Justice Blackmun emphasized "the special competence of trial courts," noting that in a variety of contexts the Court had recognized the superior factfinding capabilities of trial judges, who have seen the witnesses and are consequently well-positioned to make credibility determinations.[104] He asserted that "a capital-sentencing scheme that permits an appellate court to make *Enmund* findings sacrifices reliability needlessly to no discernible end, and cannot satisfy the Eighth Amendment."[105] Finally, he stressed that the case before the Court raised the precise concerns that made trial-level sentencing indispensable:

> *I have read the trial transcript.* Although I think the evidence is consistent with Bullock's claim that the killing of Mark Dickson resulted from a drunken brawl between [a third party] and Dickson that tragically got out of hand, I must concede that a jury or judge who saw Bullock testify might well think he lied. I fail, however, to see how an appellate court confidently could conclude, without any indication from anyone who actually saw him testify, that Bullock's account was so unworthy of belief that he was properly condemned to death.[106]

100. *See id.*

101. *Id.* at 392.

102. *Id.* at 397 (Blackmun, J., dissenting).

103. *Id.* at 399 (Blackmun, J., dissenting).

104. *Id.* at 400-01 (Blackmun, J., dissenting).

105. *Id.* at 402-03 (Blackmun, J., dissenting).

106. *Id.* at 406 (Blackmun, J., dissenting) (emphasis added) (citation omitted). The underscored language is vintage Blackmun, reflecting his commitment to the principle that the task of any judge, on any court, is to decide the case before him correctly — not simply to announce broad legal principles for other courts to follow. The sentence might loosely be paraphrased as, "I am a Supreme Court Justice, but I am not afraid to get my hands dirty."

Justice Blackmun concluded that Bullock was entitled to a new sentencing hearing before a jury, and he dissented form the majority's determination that the requisite *Enmund* findings could be made by an appellate court that had not observed the witnesses.[107]

Later the same Term, Justice Blackmun dissented in *Darden v. Wainwright*.[108] Willie Darden was a black man sentenced to death in Florida for the murder of a white store owner during the course of a robbery.[109] The store owner's 16-year-old son was shot and wounded, and his wife was sexually assaulted.[110] In the Supreme Court, Darden contended, *inter alia*, that one member of the venire had been erroneously dismissed for cause by the trial judge, and that prosecutorial misconduct at closing argument had rendered the trial fundamentally unfair.[111]

Darden's case sparked an unusual public dispute within the Court even before his case was heard on the merits. Under the Court's procedures, four votes are sufficient to grant certiorari, but five votes are necessary to issue a stay of execution. The Court, by a vote of 5-4, initially denied Darden's application for a stay.[112] Later the same day, however, Darden's attorney requested that the prior stay application be treated as a petition for certiorari.[113] Justices Brennan, Marshall, Blackmun, and Stevens voted to grant the petition.

Justice Powell provided the fifth vote to grant a stay of execution, filing a separate opinion stating that "[m]y vote is to grant the application for a stay, although I find no merit whatever in any of the claims advanced in the petition for certiorari."[114] He explained that "in view of the unusual situation in which four Justices have voted to grant certiorari . . . and in view of the fact that this is a capital case with petitioner's life at stake, and further in view of the fact that the Justices are scattered geographically and unable to meet for a Confer-

107. *See id.* at 407 (Blackmun, J., dissenting).

108. 477 U.S. 168, 188 (1986) (Blackmun, J., dissenting).

109. *See id.* at 170-72.

110. *See id.* at 172-73.

111. *See id.* at 175.

112. *See* Darden v. Wainwright, 473 U.S. 927 (1985) (denying stay of execution). Justices Brennan and Marshall voted to grant Darden's stay application on the basis of their view that the death penalty is in all circumstances violative of the Eighth Amendment. *See id.* at 928 (granting stay of execution). Justices Blackmun and Stevens also voted to grant the stay, explaining that "[b]ecause this Court has not yet had an opportunity to review the denial of [Darden's] first petition for a federal writ of habeas corpus, we would grant the application for a stay of execution to enable this Court to consider whether to grant certiorari in the normal course of business." *Id.* (granting stay of execution).

113. *See id.*

114. *Id.* (Powell, J., concurring in the granting of the application for a stay).

ence, I feel obligated to join in granting the application for a stay."[115] Chief Justice Burger dissented. He observed, *inter alia*, that Darden's claims "ha[d] been passed upon no fewer than 95 times by federal and state court judges."[116] He concluded that "[b]ecause we abuse our discretion when we accept meritless petitions presenting claims that we rejected only hours ago, I dissent."[117]

After briefing and argument on the merits, the Court rejected each of Darden's claims by a 5-4 vote. Darden's challenge to the venire member's dismissal centered on the application of the Court's prior decisions in *Witherspoon v. Illinois*[118] and *Wainwright v. Witt*,[119] which held that a prospective member of a capital jury may be dismissed for cause based on his personal opposition to the death penalty only if that opposition would substantially impair his ability to apply the law of the State in accordance with the instructions given by the trial judge.[120] The Court held that the governing standard had been properly applied at Darden's trial.[121] It acknowledged that "[t]he precise wording of the question asked of [the venire member], and the answer he gave, do not by themselves compel the conclusion that he could not under any circumstances recommend the death penalty."[122] The Court observed, however, that the venire member had been present throughout the questioning of other jurors, when the correct legal standard was repeatedly articulated.[123] Based on "the record of *voir dire* in its entirety," the Court concluded that the prospective juror had been properly dismissed.[124]

The Court also concluded that Darden had not been deprived of a fundamentally fair trial by prosecutorial excesses at closing argument. It accepted Darden's claim that the argument was improper, stating that the State's closing argument "deserves the condemnation it has received from every court to review it."[125] For a variety of reasons, however, the Court concluded that the prosecutors' remarks did

115. *Id.* at 928-29 (Powell, J., concurring in the granting of the application for a stay).
116. *Id.* at 929 (Powell, J., concurring in the granting of the application for a stay).
117. *Id.* (Powell, J., concurring in the granting of the application for a stay).
118. 391 U.S. 510 (1968).
119. 469 U.S. 412 (1985).
120. *See id.* at 423-24.
121. *See* Darden v. Wainwright, 477 U.S. 168, 178 (1976).
122. *Id.*
123. *See id.* at 177.
124. *Id.* at 178 (emphasis added).
125. *Id.* at 179.

not effect a constitutional violation because they did not render the trial fundamentally unfair.[126]

Justice Blackmun began his dissent by noting the principle, frequently reiterated in the Court's death penalty opinions during the previous ten years, that "the Eighth Amendment requires a heightened degree of reliability in any case where a State seeks to take the defendant's life."[127] He accused the majority of infidelity to that principle, stating that "[t]oday's opinion . . . reveals a Court willing to tolerate not only imperfection but a level of fairness and reliability so low it should make conscientious prosecutors cringe."[128] He detailed the respects in which the prosecutors' closing argument had violated applicable canons of ethics,[129] and he characterized one prosecutor's summation as "a relentless and single-minded attempt to inflame the jury."[130]

Justice Blackmun also dissented with respect to Darden's *Witherspoon* claim. Reviewing the transcript of the voir dire, he concluded that the trial judge had failed to conduct an adequate inquiry into Murphy's ability to follow the law and the court's instructions. He then offered the following assessment:

> [a] close reading of the lengthy *voir dire* transcript leads me to conclude that the trial court's behavior is more easily explained by Murphy's appearance in the jury box at the end of a long day of questioning and the desire to finish jury selection expeditiously than by any definite impression on the part of the trial judge that Murphy was unqualified. But neither the trial court's eagerness to get the trial started, nor this Court's impatience with the progress of Darden's constitutional challenges to his conviction and death sentence, see, *e.g.*, 473 U.S. 928, 929 (1985) (BURGER, C.J., dissenting from the grant of certiorari because 12 years had elapsed since Darden's conviction and no fewer than "95" judges had reviewed the case), renders Murphy's exclusion justifiable or harmless.[131]

126. *See id.* at 182-83. In explaining its determination that the prosecutorial misconduct had not rendered the trial fundamentally unfair, the Court stated that many of the objectionable features of the prosecutors' remarks were invited by the defense; that the trial judge had instructed the jury to decide the case based on the evidence alone; that the evidence of guilt was very strong; and that defense counsel had effectively used his rebuttal argument to draw the jury's attention to the prosecutors' excesses. *See id.* at 182.

127. *Id.* at 188-189 (Blackmun, J., dissenting).

128. *Id.* at 189 (Blackmun, J., dissenting).

129. *See id.* at 191-92 (Blackmun, J., dissenting).

130. *Id.* at 192 (Blackmun, J., dissenting).

131. *Id.* at 204-05 (Blackmun, J., dissenting) (emphasis added) (footnote omitted). In a footnote, Justice Blackmun criticized Chief Justice Burger both for his initial dissent from the grant of certiorari and for reprinting that dissent as part of his concurrence on the

Justice Blackmun concluded that "this Court must do more than wring its hands when a State uses improper legal standards to select juries in capital cases and permits prosecutors to pervert the adversary process. I therefore dissent."[132]

Justice Blackmun's dissenting opinions in *Barefoot*, *Bullock*, and *Darden* share three crucial features. First, none of the cases involved a constitutional challenge to a state legislative decision regarding appropriate capital sentencing procedures. Nor did the capital defendants in those cases raise broad, systemic challenges that would have had obvious implications for large numbers of capital trials. Rather, each of the dissents focused on alleged improprieties in the conduct of individual prosecutions. Indeed, during the period from 1983 to 1986, when those dissents were written, Justice Blackmun continued to display his prior reluctance to second-guess state legislative pronouncements regarding the proper administration of the death penalty.[133]

Second, in each of the three dissents, Justice Blackmun relied on a line of the Court's decisions holding that the Eighth Amendment requires a heightened degree of reliability in the determination that death is the appropriate punishment in a particular case.[134] In *Bare-*

merits. *See id.* at 205 n.9 (Blackmun, J., dissenting). Justice Blackmun stated that he "kn[e]w of no other recent case in which a Justice has dissented on the ground that the claims raised by the petitioner—which at least four Justices must have found worthy of full consideration—were meritless." *Id.* (Blackmun, J., dissenting). He warned that "a public dissent from a grant of certiorari poses dangers both to the actual workings of the adjudicatory process and to public respect for that process." *Id.* (Blackmun, J., dissenting). And he asserted that "[b]y reprinting his dissent in its entirety and emphasizing once again the number of times this Court has been asked to review Darden's claims, THE CHIEF JUSTICE suggests that he irrevocably had committed himself to rejecting those claims before he had received the benefit of the full briefing, oral argument, access to the record, and discussion of the issues by other Members of the Court that followed our grant of certiorari." *Id.* (Blackmun, J., dissenting).

132. *Id.* at 206 (Blackmun, J., dissenting).

133. *See, e.g.*, Spaziano v. Florida, 468 U.S. 447, 464 (1984) (Eighth Amendment not violated if state reaches conclusion different from majority of states over how to best administrate laws); Zant v. Stephens, 462 U.S. 862, 879 (1983); Pulley v. Harris, 465 U.S. 37, 54 (1984); Baldwin v. Alabama, 472 U.S. 372, 389 (1985). Even in cases that did not raise constitutional challenges to state legislative judgments, Justice Blackmun often voted to reject the claims of capital defendants. *See, e.g.*, Wainwright v. Goode, 464 U.S. 78, 87 (1983) (per curiam); Sullivan v. Wainwright, 464 U.S. 109, 111-12 (1983) (per curiam); Woodard v. Hutchins, 464 U.S. 377, 378-80 (1984); Antone v. Dugger, 465 U.S. 200, 205-06 (1984) (per curiam); Wainwright v. Witt, 469 U.S. 412, 430 (1985); Lockhart v. McCree, 476 U.S. 162, 184 (1986).

134. *See* Barefoot v. Estelle, 463 U.S. 880, 924 (1980) (Blackmun, J., dissenting); Cabana v. Bullock, 474 U.S. 376, 399-400 (1976) (Blackmun, J., dissenting); Darden v. Wainwright, 477 U.S. 168, 188-89 & n.1 (1976) (Blackmun, J., dissenting). The Court in *Woodson* had invoked that principle as a basis for invalidating the North Carolina legislature's determination that death should be the mandatory penalty for specified categories of

foot, *Bullock*, and *Darden*, however, he invoked the *Woodson* principle, not as a ground for overturning a legislature's systemic decisions regarding the appropriate administration of the death penalty, but as a doctrinal basis for giving particularly close scrutiny to case-specific claims of legal error whenever such claims are raised within the context of a capital case.[135]

Finally, perhaps the most striking feature of the three dissents is their bitter rhetorical tone. The dissents in *Barefoot* and *Darden* asserted that state prosecutorial officials had acted dishonorably in their zeal to obtain convictions and capital sentences. Moreover the dissents essentially accused the Supreme Court majority of failing to approach its task with the appropriate seriousness and commitment. The thrust of the dissents was not simply that the Court had announced incorrect principles of law. Rather, the dissents suggested that a majority of the Court, either through impatience at the slow pace of the appellate process in capital cases, or through a lack of commitment to resolving individual cases correctly, had simply abandoned any effort at careful consideration of the defendants' claims.

III. Restrictions on Federal Habeas Review

During his final years on the Court, Justice Blackmun consistently voted to overturn capital sentence cases.[136] The capital cases

crimes. *See* Woodson v. North Carolina, 428 U.S. 280, 305 (1976). Justice Blackmun had of course dissented from that decision.

135. Justice Blackmun's use of the *Woodson* principle in his *Darden* dissent is particularly striking. That dissent's invocation of the need for a "heightened degree of reliability in any case where a State seeks to take the defendant's life" appears to apply both to Darden's claim of *Witherspoon* error and to his claim of prosecutorial misconduct at closing argument. *Darden*, 477 U.S. at 188-89 (Blackmun, J., dissenting). The misconduct at issue in *Darden*, however, occurred at the guilt phase of the trial, and Justice Blackmun voted to reverse Darden's conviction. *See id.* at 200 (Blackmun, J., dissenting). The apparent premise of Justice Blackmun's *Darden* dissent is that the need for heightened reliability in capital cases should influence not only an appellate court's review of the capital sentencing proceeding itself, but also its review of all aspects of the trial in a capital case. *See id.* at 196-97 n.3 (Blackmun, J., dissenting).

136. I have found only three cases decided after 1987—none of them after 1989—in which Justice Blackmun voted to reject, on the merits, a capital defendant's constitutional challenge to his conviction or sentence of death. *See* Lowenfield v. Phelps, 484 U.S. 231 (1988); Franklin v. Lynaugh, 487 U.S. 164, 183 (1988) (O'Connor, J., concurring); Hildwin v. Florida, 490 U.S. 638 (1989) (per curiam). Justice Blackmun also joined the majority opinion in *Whitmore v. Arkansas*, 495 U.S. 149 (1990) (holding that a fellow death row inmate lacked standing to challenge the capital sentence of an inmate who had declined to litigate on his own behalf). In *Sawyer v. Whitley*, 505 U.S. 333 (1992), Justice Blackmun agreed with the majority's decision not to reach the merits of the defendant's claims, though the Justice harshly criticized the standard announced by the majority in reaching

that most sharply divided the Justices, however, did not involve disputes as to the merits of capital defendants' claims. Rather, the most hotly contested questions involved the authority of federal courts (exercising habeas corpus jurisdiction) to review state-court criminal convictions and sentences.

The defendant in *Dugger v. Adams*[137] was convicted by a Florida jury of the first-degree murder of an 8-year-old child.[138] The jury recommended that the defendant be sentenced to death, and the trial judge imposed a capital sentence.[139] The jury was instructed in a manner that appeared to minimize the jurors' responsibility for the sentence ultimately imposed—an instructional error that was held by the Court in *Caldwell v. Mississippi*[140] to violate the Eighth Amend-

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that result. *See id.* at 350-60 (Blackmun, J., concurring in the judgment); *see also id.* at 360, 373-75 (Stevens, J., concurring in the judgment).

Two cases in particular demonstrate the extent to which Justice Blackmun's views regarding the constitutional issues surrounding the death penalty had changed during his time on the Court. The first is *Sumner v. Shuman*, 483 U.S. 66 (1987). The second is *Stanford v. Kentucky*, 492 U.S. 361 (1989).

In *Roberts (Harry) v. Louisiana*, 431 U.S. 633, 637 (1977) (per curiam), the Court had held that a Louisiana law mandating a sentence of death for the first degree murder of a police officer violated the Eighth Amendment requirement of individualized sentencing in capital cases. Justice Blackmun dissented from the opinion. *See id.* at 638 (Blackmun, J., dissenting). In the course of that dissent, he stated that "it is evident, despite the per curiam's general statement to the contrary, that mitigating factors need not be considered in every case; even the per curiam continues to reserve the issue of a mandatory death sentence for murder by a prisoner already serving a life sentence." *Id.* at 641 (Blackmun, J., dissenting). In *Sumner*, however, Justice Blackmun wrote the opinion for the Court striking down a Nevada statute that imposed a mandatory sentence of death for a prison inmate who is convicted of murder while serving a sentence of life imprisonment without possibility of parole. *See* 483 U.S. at 70-85.

In *Eddings v. Oklahoma*, 455 U.S. 104, 176 (1982), the Court had struck down the defendant's death sentences on the ground that the trial judge had considered himself to be precluded from considering the defendant's youth as a mitigating circumstance. Chief Justice Burger's dissent, in which Justice Blackmun joined, argued that the Court had granted certiorari solely on the question "whether the Eight and Fourteenth Amendments prohibit the imposition of a death sentence on an offender because he was 16 years old in 1977 at the time he committed the offense." *Id.* at 120 (Burger, C.J., dissenting). The dissent concluded, "I would decide the sole issue on which we granted certiorari, and affirm the judgment," *id.* at 128 (Burger, C.J., dissenting),—language that unequivocally expressed the dissenters' view that the Constitution did not preclude the imposition of capital punishment upon an individual who was sixteen years old at the time he committed the crime. In *Stanford*, however, Justice Blackmun joined Justice Brennan's dissenting opinion, which argued that "to take the life of a person as punishment for a crime committed when below the age of 18 is cruel and unusual and hence is prohibited by the Eighth Amendment." 492 U.S. at 382 (Brennan, J., dissenting).

137. 489 U.S. 401 (1989).

138. *See id.* at 402.

139. *See id.* at 404.

140. 472 U.S. 320 (1985).

ment.[141] Adams, however, was tried several years before the decision in *Caldwell*, and he did not challenge the instruction either at trial or on direct appeal. After *Caldwell* was decided, Adams attempted to raise the claim in a state habeas proceeding. The Florida Supreme Court, however, refused to address it on the merits because Adams had failed to raise the argument on direct appeal.[142]

Adams then sought relief in federal court. The Court had previously held in *Wainwright v. Sykes*[143] that a procedurally defaulted claim is cognizable on federal habeas review only if the petitioner can show, *inter alia*, that there was "cause" for the default. The Court had also indicated that one way for a habeas petitioner to establish "cause" was to show that the claim was "so novel that its legal basis [was] not reasonably available to counsel" at the time of the default.[144] The Eleventh Circuit held that Adams' claim of instructional error was so novel as to be unavailable to him at the time of his trial and direct appeal, and that Adams had therefore established "cause" for his default.[145] The court then held that the challenged instruction violated the rule announced in *Caldwell*, and it therefore vacated Adams' sentence of death.[146]

The Supreme Court reversed. The Court held that Adams' *Caldwell* claim was reasonably available to him at the time of trial, and that he had consequently failed to show "cause" for his procedural default.[147] Adams also defended the court of appeals' judgment on the

141. Thus, the trial judge instructed Adams's jury that "[t]he court is not bound by your [sentencing] recommendation. The ultimate responsibility for what this man gets is not on your shoulders. It's on my shoulders. You are merely an advisory group to me. . . ." *Dugger*, 489 U.S. at 403. Because under Florida law a judge may reject the jury's capital sentencing recommendation only "if the facts were 'so clear and convincing that virtually no reasonable person could differ,'" Adams contended that the judge's instructions had misled the jury regarding the scope of its sentencing responsibility. *Id.* at 405 (quoting Tedder v. State, 322 So. 2d 908, 910 (1975)).

142. *See id.* at 405.

143. 433 U.S. 72, 87 (1977).

144. Reed v. Ross, 468 U.S. 1, 16 (1984).

145. *See Adams*, 489 U.S. at 406.

146. *See id.*

147. In one sense *Adams* is a historical artifact. The Court's opinion plainly proceeds on the assumption that a habeas petitioner may obtain federal review of a defaulted claim by showing that the claim was so novel at the time of trial that he could not have been expected to raise it. Less than a week before its ruling in *Adams*, however, the Court had issued its decision in *Teague v. Lane*, 489 U.S. 288 (1989), in which a plurality of four Justices concluded that claims which, if accepted, would establish "new rules" of constitutional law are not cognizable in federal habeas proceedings. *See id.* at 310. The Court's subsequent explication of the *Teague* principle states that a rule of law will be regarded as a "new rule" unless (at the time the defendant's conviction became final) the rule was so clearly dictated by precedent that reasonable minds could not differ. *See* Butler v. McKel-

alternative grounds that the Florida Supreme Court had not enforced its procedural bar rule in a consistent fashion, and that dismissal of his habeas petition would result in a "fundamental miscarriage of justice."[148] In a lengthy footnote at the end of its opinion, the Court rejected both of those contentions.[149]

Justice Blackmun dissented. He did not take issue with the majority's conclusion that Adams had failed to establish "cause" for his procedural default.[150] He argued, however, that the court of appeals' judgment should be affirmed because the Florida Supreme Court had applied its procedural bar rule in an erratic manner,[151] and because the *Caldwell* error had so undermined the reliability of the sentencing proceeding as to render imposition of the death penalty a "fundamental miscarriage of justice."[152]

Justice Blackmun's dissent in *Adams* captured two important aspects of his capital case jurisprudence in his later years on the Court. The dissent expressed some disquiet at the very notion that rules of procedural default could lead to the execution of a person whose trial or sentencing was tainted by constitutional error.[153] That disquiet was muted, however, because Justice Blackmun appeared to accept the notion that procedural bar rules should generally be enforced, so long as they are evenhandedly applied, unless there is some particularly good reason to believe that the alleged error affected the outcome.

The Justice's greater concern in *Adams* was his belief that the majority, having granted certiorari in order to reverse the court of appeals on the issue of "cause," had simply refused to grapple with Adams' alternative arguments.[154] By rejecting those arguments in cursory fashion, Justice Blackmun asserted, "the Court both leaves the law in a shambles and reinstates respondent's death sentence without

lar, 494 U.S. 407, 412-15 (1990). Had *Adams* been decided only a year later, Adams' contention that his claim had been "novel" at the time of his trial and direct appeal would itself have been a sufficient basis for dismissing his habeas petition.

148. *Adams,* 489 U.S. at 410-12 n.6.

149. *See id.*

150. *See id.* at 421 (Blackmun, J., dissenting).

151. *See id.* at 406, 416-421.

152. *Id.* at 421-24 (Blackmun, J., dissenting).

153. *See id.* at 413 (Blackmun, J., dissenting) ("[T]his Court is sending a man to a presumptively unlawful execution because he or his lawyers did not raise his objection at what is felt to be the appropriate time for doing so.").

154. *See id.* at 421 (Blackmun, J., dissenting) ("[T]he majority treats the adequacy issue as an afterthought, although it is an analytically antecedent issue.").

ever bothering to determine what legal principle actually governs his case."[155] Justice Blackmun concluded that:

> the conclusory treatment [the alternative theories] receive does not suffice to discharge the Court's responsibilities to respondent, for whom these issues are a matter of life or death. Indeed, I would have expected that when this Court reinstates a death sentence vacated by the judgment below (and does so purely for procedural reasons), it would be particularly careful to consider fully all issues necessary to its disposition of the case. To judge by footnote 6 of the Court's opinion, this expectation was naive.[156]

Justice Blackmun did not suggest that the majority had announced incorrect legal principles that could be expected to affect a broad range of future cases. Rather his anger was prompted by his belief that the Court had made an inadequate effort to do justice to an individual defendant.[157]

Similarly in *Coleman v. Thompson*,[158] Justice Blackmun reacted with extraordinary anger to what he perceived to be a case-specific injustice. The defendant, in *Coleman*, was convicted and sentenced to death in a Virginia court. His conviction and sentence were affirmed on direct appeal. His petition for habeas corpus, which included several federal constitutional claims that had not been raised on direct review, was denied by a state trial court. Coleman sought to appeal that ruling to the state supreme court, but his notice of appeal was filed three days late, and the appeal was ultimately dismissed.[159]

Coleman then filed a petition for a writ of habeas corpus in federal court. His petition included seven claims that had been raised for the first time in his state habeas petition. The district court and court of appeals held that the claims were procedurally barred by Coleman's failure to file a timely appeal in the state habeas proceedings.[160] The Supreme Court affirmed. The Court held that "the important interest in finality served by state procedural rules, and the significant harm to the States that results from the failure of federal courts to respect them" should generally preclude a convicted inmate from obtaining federal habeas corpus review of claims that had been defaulted

155. *Id.* at 425 n.15 (Blackmun, J., dissenting).

156. *Id.* at 425 (Blackmun, J., dissenting).

157. Justice Blackmun's reference to "the Court's responsibilities to respondent," is particularly striking, reflecting the view that even a convicted child murderer has an entitlement to individualized consideration of his claims, at least in cases where the Supreme Court chooses to grant review. *Id.* (Blackmun, J., dissenting).

158. 501 U.S. 722 (1991).

159. *See id.* at 726-28.

160. *See id.* at 728-29.

in the state courts.[161] The Court also held that "[b]ecause Coleman had no right to counsel to pursue his appeal in state habeas, any attorney error that led to the default of Coleman's claims in state court cannot constitute cause to excuse the default in federal habeas."[162]

Justice Blackmun filed one of his angriest dissents.[163] He began by stating that "[o]ne searches the majority's opinion in vain . . . for any mention of petitioner Coleman's right to a criminal proceeding free from constitutional defect or his interest in finding a forum for his constitutional challenge to his conviction and sentence of death."[164] He accused the majority of "continu[ing] its crusade to erect petty procedural barriers in the path of any state prisoner seeking review of his federal constitutional claims," and he asserted that "the Court is creating a Byzantine morass of arbitrary, unnecessary, and unjustifiable impediments to the vindication of federal rights."[165] Justice Blackmun stated that "[i]n its attempt to justify a blind abdication of responsibility by the federal courts, the majority's opinion marks the nadir of the Court's recent habeas jurisprudence, where the discourse of rights is routinely replaced with the functional dialect of interests."[166] And he concluded that the Court's disposition of the case represented "the quintessence of inequity."[167]

This is strong language, even by the standard of Supreme Court dissents. At one level the case might seem to be an improbable source of discord. The facts were so unusual that the precedential effect of the Court's decision was likely to be small. But from another perspective, the Justice's reaction was unsurprising. Justice Blackmun was always uncomfortable with the notion that the long-term stability of the law required an acceptance of unjust results in individual cases. To deprive a capital defendant of access to a federal forum based on his attorney's blunder ran counter to the Justice's most deeply held beliefs. If the attorney's failure to conform to state procedural rules had reflected a deliberate effort to gain a tactical advantage, Justice Blackmun might have accepted the majority's decision. Where the error resulted from simple inadvertence, however, Justice Blackmun re-

161. *Id.* at 750.
162. *Id.* at 757.
163. *See id.* at 758 (Blackmun, J., dissenting).
164. *Id.* (Blackmun, J., dissenting).
165. *Id.* at 758-59 (Blackmun, J., dissenting).
166. *Id.* at 764 (Blackmun, J., dissenting).
167. *Id.* at 774 (Blackmun, J., dissenting).

garded the majority's decision as sacrificing the desire for fairness in individual cases to no substantial end.[168]

Finally, Justice Blackmun's concurring opinion in *Sawyer v. Whitley*[169] sharply criticized the Court's restrictions on habeas corpus review and suggested the course that he would ultimately take in *Callins*. The case involved a brutal torture-murder committed by Sawyer and an accomplice.[170] Sawyer's conviction and sentence were affirmed on direct appeal, and both the state and federal courts denied habeas relief.[171] Sawyer subsequently filed a second federal habeas petition, which was denied by the district court and court of appeals, chiefly on the grounds that the claims had either already been raised and rejected, or had not been raised in a timely fashion.[172]

The Court in *Sawyer* sought to define the circumstances in which a federal habeas court could reach the merits of a successive, abusive, or procedurally defaulted challenge to the manner in which a capital sentence had been imposed.[173] Prior decisions of the Court had held that successive, abusive, or procedurally defaulted claims could be considered on federal habeas if the petitioner could demonstrate his "actual innocence" of the crime for which he had been convicted.[174] The question in *Sawyer* was how that standard should be applied to a defendant who challenged the imposition of a sentence of death but did not deny having committed the crime for which that sentence had been imposed.[175] The Court held that a defendant should be regarded as "actually innocent" of the death penalty only if it could be said that, in the absence of any constitutional error, no reasonable juror would have concluded that the petitioner was eligible for the death penalty under applicable state law.[176]

Justice Blackmun's opinion concurring in the judgment did not attempt to define a precise alternative standard for determining when

168. *See id.* (Blackmun, J., dissenting).

169. 505 U.S. 333 (1992).

170. *See id.* at 336.

171. *See id.* at 337.

172. *See id.* at 338.

173. *See id.* at 335. As the Court explained, a "successive" claim is one that was "heard and decided on the merits in a previous petition"; an "abusive" claim is one that the defendant failed without justification to raise in a prior petition; and a "procedurally defaulted" claim is one that the defendant failed to preserve during the state proceedings. *See id.* at 338.

174. *See id.* at 339 (citing Kuhlman v. Wilson, 477 U.S. 436, 448 (1986); Murray v. Carrier, 477 U.S. 478, 496 (1986); Smith v. Murray, 477 U.S. 527, 537 (1986)).

175. *Id.* at 338.

176. *See id.* at 350.

a federal habeas court could entertain abusive, successive, or defaulted challenges to capital sentencing proceedings.[177] His opinion was instead a *cri de coeur*, an emotional attack both on the majority opinion in *Sawyer* itself and on prior decisions restricting the scope of federal habeas review. Justice Blackmun identified Warren McCleskey and Roger Keith Coleman as "two victims of the 'new habeas,'"[178] and he asserted that the Court's disposition of McCleskey's claims "starkly reveals the Court's skewed value system, in which finality of judgments, conservation of state resources, and expediency of executions seem to receive greater solicitude than justice and human life."[179]

Most significantly, Justice Blackmun's concurring opinion in *Sawyer* foreshadowed his ultimate conclusion in *Callins* that the death penalty as currently administered is unconstitutional. Justice Blackmun expressed his "ever-growing skepticism that, with each new decision from this Court constricting the ability of the federal courts to remedy constitutional errors, the death penalty really can be imposed fairly and in accordance with the requirements of the Eighth Amendment."[180] He stated that his willingness to enforce the death penalty despite his "own deep moral reservations" had been premised "on an understanding that certain procedural safeguards, chief among them the Federal Judiciary's power to reach and correct claims of constitutional error on federal habeas review, would ensure that death sentences are fairly imposed."[181] And he concluded that "[t]he more

177. Justice Blackmun asserted that "[b]y the traditional understanding of habeas corpus, a "fundamental miscarriage of justice" occurs whenever a conviction or sentence is secured in violation of a federal constitutional right." *Id.* at 352 (Blackmun, J., concurring in the judgment). Read broadly, that language would suggest that even abusive, successive, or defaulted constitutional claims should *always* be entertained, regardless of whether the constitutional violation undermines the reviewing court's confidence in the correctness of the conviction or sentence. *See id.* at 356 (Blackmun, J., concurring in the judgment) ("The accusatorial system of justice adopted by the Founders affords a defendant certain process-based protections that do not have accuracy of truth finding as their primary goal."). Justice Blackmun stated, however, that he had endeavored to apply the "actual innocence" standard in accordance with the Court's precedents. *See id.* at 357 n.2 (Blackmun, J., concurring in the judgment). He also joined Justice Stevens' opinion concurring in the judgment, which stated that a defendant should be regarded as "actually innocent" of the death sentence only if he can "demonstrate that it is more likely than not that his death sentence was clearly erroneous." *Id.* at 373 (Stevens, J., concurring in the judgment). Justice Stevens (joined by Justice Blackmun) concluded that Sawyer did not satisfy that standard. *See id.* at 373-75 (Stevens, J., concurring in the judgment).

178. *Id.* at 358 (Blackmun, J., concurring in the judgment).

179. *Id.* at 359 (Blackmun, J., concurring in the judgment).

180. *Id.* at 351 (Blackmun, J., concurring in the judgment).

181. *Id.* at 358 (Blackmun, J., concurring in the judgment).

the Court constrains the federal courts' power to reach the constitutional claims of those sentenced to death, the more the Court undermines the very legitimacy of capital punishment itself."[182]

Conclusion

In order to properly understand Justice Blackmun's dissenting opinion in *Callins*, and the personal struggle of which that dissent was the culmination, two possible misconceptions should be avoided. First, the Justice's *Callins* dissent cannot plausibly be regarded as the product of a shift from conservatism to liberalism that is sometimes thought to characterize Justice Blackmun's tenure on the Court. The Justice's dissent in *Furman*, written a scant two years after his elevation to the Supreme Court, expressed "distaste, antipathy, and indeed, abhorrence, for the death penalty."[183] The shift in Justice Blackmun's views regarding the constitutionality of the death penalty therefore cannot be attributed to a change of heart concerning the wisdom or morality of capital punishment. Second, it is important to avoid the misconception that Justice Blackmun ultimately adopted the "Brennan/Marshall position" regarding the constitutionality of the death penalty. Justice Blackmun always had great respect for Justices Brennan and Marshall, both as Justices and as men. His approach to the art of judging, however, was very different. Justice Blackmun was less apt to ground his decisions in broad, categorical pronouncements about the law, and more inclined to rely on case-specific analysis of the facts of a particular dispute. Characteristically, his ultimate conclusion regarding the constitutionality of capital punishment was based not on the view that the death penalty is cruel or unusual in the abstract, but on the conclusion—grounded in decades of experience on the federal bench—that it is unfairly or capriciously imposed in an intolerably large number of individual cases.

Both in his *Callins* dissent and in his earlier concurring opinion in *Sawyer*, Justice Blackmun stated that his willingness to enforce the death penalty had always been premised on his understanding that federal habeas review would be available to detect and remedy constitutional violations, and thus to ensure that capital punishment would be administered in a fair and consistent manner. When I first read those opinions, I was somewhat skeptical. After all, I thought, if Justice Blackmun's views had prevailed in *Furman* and *Woodson*, there

182. *Id.* at 360 (Blackmun, J., concurring in the judgment).

183. Furman v. Georgia, 408 U.S. 238, 405 (1976).

would have been no meaningful constitutional constraints on the death penalty. Absent an extensive body of federal constitutional law regarding the States' administration of capital punishment, it seemed to me, the availability of federal habeas review would have been of scant utility.

More thorough analysis of the Justice's death penalty opinions persuades me that my initial assessment was erroneous. My mistake lay in the implicit assumption that the only important federal constitutional claims in state death penalty cases are broad, systemic challenges to state capital sentencing statutes. That assumption is at odds with Justice Blackmun's consistent emphasis on the need for fairness to individual litigants. It was wholly in keeping with his overall approach to the art of judging that Justice Blackmun showed substantial deference to state legislative judgments regarding the proper administration of the death penalty, while attaching great importance to the continued availability of effective federal review of case-specific claims of constitutional error.

Despite his personal opposition, Justice Blackmun was willing to acknowledge the constitutional legitimacy of capital punishment, so long as he believed that all actors in the process would strive conscientiously to ensure that individual capital trials were conducted and reviewed in a fair and impartial manner. During the course of his tenure on the Court, however, he appears to have concluded both that the incidence of error and caprice in state capital prosecutions was unacceptably high, and that limitations on federal habeas review created a substantial risk that constitutional errors would go uncorrected. His concerns regarding the case-by-case administration of the death penalty, rather than his moral opposition to capital punishment as such, ultimately led to his dissent in *Callins*.