

A SOBER SECOND THOUGHT

Andrew H. Schapiro*

I. INTRODUCTION

By the year 1994—his twenty-fourth on the Supreme Court—Justice Harry Blackmun was a liberal icon, not only for his authorship and defense of *Roe v. Wade*,¹ but also because of his forceful dissents from many of the Rehnquist Court's right-leaning decisions in other areas. So his renunciation that year of the death penalty in *Callins v. Collins*,² while newsworthy and notable, would not have struck the casual observer as out of character or inconsistent with his jurisprudence. But from the vantage point of 1972—when Justice Blackmun was among the dissenters in *Furman v. Georgia*³—*Callins* could hardly be more surprising. Justice Blackmun's journey from *Furman* to *Callins* is the remarkable and instructive story of a Justice reluctantly concluding that the Court's quest for a constitutionally acceptable and administratively manageable death penalty, a quest in which he had been a principal participant, could not succeed.

The evolution of Justice Blackmun's capital jurisprudence proceeded in three stages. From 1972 until 1986, he was, to use his famous phrase from *Callins*, "tinker[ing] with the machinery of death,"⁴ seemingly convinced that if only the right set of rules could be developed the Constitution would be satisfied—despite his personal opposition to capital punishment. The period from

*Partner, Quinn, Emanuel, Urquhart & Sullivan. A former law clerk to Supreme Court Justice Harry Blackmun and to Seventh Circuit Judge Richard A. Posner, Mr. Schapiro is a graduate of Harvard Law School and Yale College. He wishes to thank Elizabeth Rosenshine, a third-year student at Fordham Law School, for her valuable assistance.

1. 410 U.S. 113 (1973).

2. 510 U.S. 1141 (1994).

3. 408 U.S. 238 (1972).

4. *Id.* at 1145 (Blackmun, J., dissenting from denial of certiorari).

1987 through 1991 can be described as one of disillusionment. Justice Blackmun became more receptive to petitioners' arguments in capital cases and increasingly voiced skepticism about the constitutional adequacy of purported safeguards against arbitrariness, racism, and factual error. The final phase, from 1991 until his opinion in *Callins* in 1994, was one of dismay. Justice Blackmun dissented in every significant capital case, and spoke out more sharply against the direction that the Court was taking.

Justice Blackmun identified three fundamental concerns in *Callins* that led him to give up on the death penalty. The primary one was the impossibility of reconciling the constitutional requirements that capital sentencing be both individualized and non-arbitrary. The insidious influence of race added to the problem. And the evisceration of the safeguard of habeas corpus pushed him across the line. In retrospect the development of each theme is visible in his decisions on capital cases from the 1970s to the 1990s.

II. BACKGROUND: THE *FURMAN* DISSENT

Justice Blackmun's personal feelings about the death penalty were never any secret. In *Furman* he wrote a separate dissent to offer a set of "somewhat personal comments":

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 experiences, 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 judgments.⁵

5. *Furman*, 408 U.S. at 406 (Blackmun, J., dissenting).

But when considering the legal arguments in *Furman*, Justice Blackmun was acutely conscious of his role as a judge:

I do not sit on these cases, however, as a legislator, responsive, at least in part, to the will of constituents. Our task here, as must so frequently be emphasized and re-emphasized, is to pass upon the constitutionality of legislation that has been enacted and that is challenged. This 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. The temptations to cross that policy line are very great. In fact, as today's decision reveals, they are almost irresistible.⁶

He concluded by reiterating the distinction between personal preference and constitutional command:

Although personally I may rejoice at the Court's result, I find it difficult to accept or to justify as a matter of history, of law, or of constitutional pronouncement. I fear the Court has overstepped. It has sought and has achieved an end.⁷

In the decade and a half that followed, Justice Blackmun would try to apply the Constitution to uphold capital sentencing schemes, and would often return to the mantra that the Court ought not second-guess legislative decisions.

III. 1976 – 1986: TINKERING WITH THE MACHINERY OF DEATH

When the Court reinstated the death penalty in *Gregg v. Georgia*,⁸ Justice Blackmun wrote simply “I concur in the judgment.”⁹ That same Term, he dissented from a decision that would ultimately become not only a pillar of the Court's death-penalty jurisprudence but also, two decades later, an important part of his own analysis in *Callins: Woodson v. North Carolina*.¹⁰ In *Woodson* the Court held the mandatory imposition of the death penalty unconstitutional because

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

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

8. 428 U.S. 153 (1976).

9. *Id.* at 227 (Blackmun, J., concurring) (citing *Furman*, 408 U.S. at 405–414 (Blackmun J., dissenting), 375 (Burger, C.J., dissenting), 414 (Powell, J., dissenting), 465 (Rehnquist, J., dissenting)).

10. 428 U.S. 280 (1976).

removing the jury's sentencing discretion was not a proper response to the problem identified in *Furman*: arbitrary imposition of the death penalty. The Court held that death cannot be constitutionally imposed without "consideration of relevant facets of the character and record of the individual offender" and "the circumstances of the particular offense."¹¹ Failure to do so, the majority wrote, "treats all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death."¹² But Justice Blackmun dissented, citing to his own opinion in *Furman* as well as the other dissenting opinions written by Justices Burger, Powell, and Rehnquist.¹³

Nor did Justice Blackmun join the plurality's decision in *Lockett v. Ohio*.¹⁴ There the plurality took the position that the mitigating factors the Ohio statute permitted to be considered were too limited; the statute was unconstitutional because it did not sufficiently permit individualized considerations. The plurality concluded 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 death.¹⁵

In other words, "an individualized decision is essential in capital cases."¹⁶

Justice Blackmun, however, was unwilling to go as far as did the plurality, and would have held Ohio's death-penalty statute unconstitutional for reasons that he described as "more limited."¹⁷ First, he allowed that imposition of the death penalty for aiding-and-abetting-type crimes could be unconstitutional as applied, where the statute forbids the sentencer to consider the

11. *Id.* at 304.

12. *Id.*

13. *Id.* at 307-08.

14. 438 U.S. 586 (1978).

15. *Id.* at 604 (footnotes omitted; emphasis in original).

16. *Id.* at 605.

17. *Id.* at 613 (Blackmun, J., concurring in part & concurring in the judgment).

defendant's "extent of . . . involvement, or the degree of . . . mens rea."¹⁸

He also expressed concern that the Ohio statute permitted a trial court judge to dismiss aggravating factors and impose a life sentence "in the interests of justice" where the defendant pleaded guilty or no contest, but not where a defendant insisted on a jury trial.¹⁹ The practical result was that a defendant who pleaded not guilty "endure[d] a semimandatory . . . capital-sentencing provision," whereas the defendant who pleaded guilty or no contest faced "a purely discretionary" sentencing provision.²⁰

But what is striking about *Lockett* is the extent to which Justice Blackmun seemed conflicted—even apologetic—about impinging on Ohio's prerogatives in any way:

Though heretofore I have been unwilling to interfere with the legislative judgment of the States in regard to capital-sentencing procedures . . . adhered to in the 1976 cases, . . . this Court's judgment as to disproportionality in *Coker*, *supra*, 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.²¹

Justice Blackmun was still reluctant to second-guess a state's statutory regime when the Court decided *Eddings v. Oklahoma*,²² in which the Court held that because capital punishment must be "imposed fairly and with reasonable consistency" to satisfy *Lockett*, a sentencer may not be precluded from considering any aspect of the defendant's character, the record, or any circumstances around the offense that the defendant identifies a mitigating factor that might

18. *Id.* (Blackmun, J., concurring in part & concurring in the judgment).

19. *Id.* at 618 (Blackmun, J., concurring in part & concurring in the judgment). This argument had been raised by the petitioner, but not reached by the plurality. *Id.* at 617 (Blackmun, J., concurring in part & concurring in the judgment).

20. *Id.* at 619 (Blackmun, J., concurring in part & concurring in the judgment).

21. *Id.* at 616 (Blackmun, J., concurring in part & concurring in the judgment).

22. 455 U.S. 104 (1982).

provide a basis for imposing a lesser sentence.²³ But Justice Blackmun joined the dissenters in asserting that the statute in question complied with *Lockett*, and argued that it was for the state to decide what weight is to be given to any evidence of mitigation.²⁴

Spaziano v. Florida,²⁵ for which Justice Blackmun delivered the opinion of the Court, evidenced his continuing willingness to uphold state sentencing schemes during this period. *Spaziano* approved a regime in which the trial judge had the discretion to override a jury's recommendation of a life sentence and impose death. Justice Blackmun ruled that the fact that statutes give this determination to juries in a majority of jurisdictions where capital punishment is available did not necessitate the conclusion that "contemporary standards of fairness and decency are offended by the jury override."²⁶ Moreover, because there was no indication that the jury override resulted in discriminatory or arbitrary application of the death sentence, it did not violate the reliability requirement.²⁷

Similar questions produced a similar result the following year, when Justice Blackmun delivered the Court's opinion in *Baldwin v. Alabama*.²⁸ Alabama's death-penalty statute, which required a jury to "fix the punishment at death" if it convicted of certain aggravated crimes, was not unconstitutional, he explained, because the statute provided for the trial judge to weigh mitigating and aggravating circumstances when determining whether to accept the jury's recommendation, and the Alabama appellate courts had interpreted the statute to require judges to impose punishment "without regard to the jury's mandatory 'sentence.'"²⁹ This interpretation persuaded Justice Blackmun that "while the specter of a mandatory death sentence may have made juries more prone to acquit, thereby benefiting the two defendants acquitted, it did not render Alabama's scheme unconstitutionally arbitrary."³⁰

23. *Id.* at 113-14.

24. *Id.* at 120 (Burger, C.J., White, Blackmun & Rehnquist, JJ., dissenting).

25. 468 U.S. 447 (1984).

26. *Id.* at 464.

27. *Id.* at 466-67.

28. 472 U.S. 372 (1985).

29. *Id.* at 383.

30. *Id.* at 388-89.

As of the mid-1980s, therefore, Justice Blackmun was still finding ways to uphold state sentencing schemes with regularity. Whatever qualms he may have had about capital punishment did not translate into concern about its constitutionality. That began to change, however, in the second half of that decade.

IV. 1987 – 1991: DISILLUSIONMENT

The Court underwent substantial changes in personnel and politicization in the late 1980s and early 1990s. William Rehnquist was elevated to Chief Justice when Warren Burger retired. Justice Scalia filled the open seat. Anthony Kennedy replaced Justice Powell; Justice Brennan was replaced by Justice Souter; and Clarence Thomas replaced Justice Marshall. During these years Justice Blackmun's reluctance to find fault with capital sentencing schemes and his tendency to defer to the states declined markedly.

Justice Blackmun dissented, for example, in *California v. Brown*,³¹ in which the Court rejected a challenge to an instruction to the jury that it “must not be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling” when deciding upon a sentence.³² Considering the “special role of mercy in capital sentencing and the stark finality of the death sentence,” Justice Blackmun was unwilling to accept the possibility that “when . . . a jury member is moved to be merciful to the defendant, an instruction telling the juror that he or she cannot be ‘swayed’ by sympathy may well arrest or restrain this human response, with truly fatal consequences for the defendant.”³³

Writing in broad and philosophical terms, he observed that “[w]hile the sentencer’s decision to accord life to a defendant at times might be a rational or moral one, it also may arise from the defendant’s appeal to the sentencer’s sympathy or mercy, human qualities that are undeniably emotional in nature.”³⁴ And he continued in a similar vein:

31. 479 U.S. 538 (1987).

32. *Id.* at 539.

33. *Id.* at 563 (Blackmun & Marshall, JJ., dissenting).

34. *Id.* at 561–62 (Blackmun & Marshall, JJ., dissenting).

In my view, we adhere so strongly to our belief that sentencers should have the opportunity to spare a capital defendant's life on account of compassion for the individual because, recognizing that the capital sentencing decision must be made in the context of "contemporary values," we see in the sentencer's expression of mercy a distinctive feature of our society that we deeply value.³⁵

Later that same Term, the Court decided a case that arguably marks the turning point in Justice Blackmun's approach to capital cases. In *McCleskey v. Kemp*³⁶ the Court held that a study demonstrating racial discrepancies in Georgia's application of the death penalty did not prove that the Georgia system was "arbitrary or capricious in application."³⁷ The racial variance, the Court held, did "not constitute a major systemic defect," for "[t]he Constitution does not require that a State eliminate any demonstrable disparity that correlates with a potentially irrelevant factor in order to operate a criminal justice system that includes capital punishment."³⁸

Justice Blackmun was appalled. His dissent featured sharp rhetoric and a tone of disillusionment that came to characterize his subsequent death-penalty writings. A conviction should be set aside, he wrote, when "discrimination in the administration of the criminal justice system is established."³⁹ He rejected the suggestion that relief ought not be granted because it "could lead to further constitutional challenges," calling that argument "the most disturbing aspect of [the majority's] opinion."⁴⁰ He questioned the factual basis for the concern, and asserted that in any event "narrowing the class of death-eligible defendants is not too high a price to pay for a death penalty system that does not discriminate on the basis of race."⁴¹

Yet Justice Blackmun was not ready to reject the death penalty itself. He continued to look for guidance and rules likely to resolve the problems identified in *McCleskey*, stating that "the establishment of guidelines for Assistant District Attorneys as to

35. *Id.* at 562–63 (Blackmun & Marshall, JJ., dissenting).

36. 481 U.S. 279 (1987).

37. *Id.* at 308 (emphasis in original).

38. *Id.* at 319.

39. *Id.* at 348 (Blackmun, Marshall, Stevens & Brennan, JJ. dissenting).

40. *Id.* at 365 (Blackmun, Marshall, Stevens & Brennan, JJ. dissenting).

41. *Id.* (Blackmun, Marshall & Stevens, JJ. dissenting).

the appropriate basis for exercising their discretion at the various steps in the prosecution of a case would provide at least a measure of consistency.”⁴² Even so, however, he expressed discouragement and concern:

The Court today sanctions the execution of a man despite his presentation of evidence that establishes a constitutionally intolerable level of racially based discrimination leading to the imposition of his death sentence. I am disappointed with the Court’s action not only because of its denial of constitutional guarantees to petitioner McCleskey individually, but also because of its departure from what seems to me to be well-developed constitutional jurisprudence.⁴³

In the years that followed *McCleskey*, Justice Blackmun became more comfortable joining colleagues’ harsh dissents in capital cases. In *Payne v. Tennessee*,⁴⁴ for example, the Court overruled two prior decisions to hold that “if the State chooses to permit the admission of victim impact evidence and prosecutorial argument on that subject, the Eighth Amendment erects no *per se* bar.”⁴⁵

Justice Marshall wrote a scathing dissent, which Justice Blackmun did not hesitate to join. The dissent opined that there had been no factual or legal changes to support overruling the prior decisions—only changes to court personnel—and lamented the creation of a “radical new exception to the doctrine of stare decisis” with “staggering” implications.⁴⁶ Justice Blackmun also joined Justice Stevens’s dissent, which argued that the Court’s substantive decision sharply departed from existing death-penalty jurisprudence, which previously had “required that any decision to impose the death penalty be based solely on the evidence that tends to inform the jury about the character of the offense and the character of the defendant.”⁴⁷

In cases such as *Brown*, *McCleskey*, and *Payne*, Justice Blackmun demonstrated a new willingness to find fault with capital sentences and greater openness to the use of sharp

42. *Id.* (Blackmun, Marshall & Stevens, JJ. dissenting).

43. *Id.* at 345 (Blackmun, Marshall, Stevens & Brennan, JJ. dissenting).

44. 501 U.S. 808 (1991).

45. *Id.* at 827.

46. *Id.* at 845 (Marshall & Blackmun, JJ., dissenting).

47. *Id.* at 856 (Stevens & Blackmun, JJ., dissenting).

language in dissent. His qualms about encroaching on state prerogatives took a back seat to his concern about the Court's readiness to uphold sentencing schemes against challenges that he found meritorious. Most of all he appeared to lose faith in his colleagues' good faith and commitment to enforce the Constitution in death-row prisoners' cases.

V. 1991-94: DISMAY

Justice Blackmun's death-penalty writings crossed from discouragement to dismay during the period from 1991 through 1994. He worried about the erosion of safeguards such as habeas review. Indeed, in *Sawyer v. Whitley*,⁴⁸ Justice Blackmun suggested that restrictions on habeas review were causing him to re-think the constitutionality of the death penalty altogether:

I also write separately to express my 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.⁴⁹

Justice Blackmun sounded a similar note in *Coleman v. Thompson*,⁵⁰ in which the Court held that claims presented for the first time in a state habeas proceeding are not subject to review in federal habeas proceedings. His language was severe:

[T]he Court today continues its crusade to erect petty procedural barriers in the path of any state prisoner seeking review of his federal constitutional claims. Because I believe that the Court is creating a Byzantine morass of

48. 505 U.S. 333 (1992).

49. *Id.* at 351 (Blackmun, J., concurring). In *Sawyer* the Court considered the circumstances under which, for habeas purposes, a petitioner can establish "actual innocence." The Court held that the merits of a "successive, abusive, or defaulted federal habeas claim" could be heard only if the petitioner showed "that, but for a constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty under the applicable state law"—an exception that applies when a petitioner has shown that he is "actually innocent." *Id.* at 335. In his concurrence, Justice Blackmun wrote that "the Court today adopts an unduly cramped view of 'actual innocence'" that could preclude the review of some meritorious claims. *Id.* at 351 (Blackmun, J. concurring).

50. 501 U.S. 722 (1991).

arbitrary, unnecessary, and unjustifiable impediments to the vindication of federal rights, I dissent.⁵¹

Two other dissents from this period warrant note. In *Arave v. Creech*,⁵² Justice Blackmun took the majority to task for approving an Idaho sentencing scheme that permitted the jury to impose the death penalty upon finding that a defendant had displayed “utter disregard for human life.”⁵³ The majority found that the utter-disregard test provided meaningful guidance because it could be read to mean cold-blooded.⁵⁴ With a tone of exasperation and even sarcasm, Justice Blackmun’s dissent walked through examples in which murders of every type imaginable had been described as cold-blooded—crimes of passion and premeditated crimes; crimes in which the defendant had shown emotion and crimes in which he had not; crimes motivated by hate and those born of indifference—explaining that the metaphor cold-blooded failed “to provide meaningful guidance to the sentencer as required by the Constitution.”⁵⁵

And in *Herrera v. Collins*,⁵⁶ in which the Court held that a claim of actual innocence does not entitle a petitioner to seek federal habeas relief, Justice Blackmun penned an impassioned dissent. “Nothing,” he said, “could be more contrary to contemporary standards of decency, . . . or more shocking to the conscience, . . . than to execute a person who is actually innocent.”⁵⁷ Indeed, “even a prisoner who appears to have had a *constitutionally perfect* trial ‘retains a powerful and legitimate interest in obtaining his release from custody if he is innocent of the charge for which he was incarcerated.’”⁵⁸ Justice Blackmun pulled no punches in calling out what he perceived to be the Court’s hostility to habeas review:

[H]aving held that a prisoner who is incarcerated in

51. *Id.* at 758–59 (Blackmun, Marshall & Stevens, JJ., dissenting).

52. 507 U.S. 463 (1993).

53. *Id.* at 465.

54. *Id.* at 475–76.

55. *Id.* at 479 (Blackmun & Stevens, JJ., dissenting); see also *id.* at 483–84 (Blackmun & Stevens, JJ., dissenting) (reviewing press accounts of so-called “cold-blooded” murders).

56. 506 U.S. 390 (1993).

57. *Id.* at 430 (Blackmun, J., dissenting) (citing *Ford v. Wainwright*, 477 U.S. 399, 406 (1986), and *Rochin v. Cal.*, 342 U.S. 165, 172 (1952)).

58. *Id.* at 438–39 (Blackmun, Stevens & Souter, JJ., dissenting) (quoting *Kuhlmann v. Wilson*, 477 U.S. 436, 452 (1986)) (emphasis in original).

violation of the Constitution must show he is actually innocent to obtain relief, the majority would now hold that a prisoner who is actually innocent must show a constitutional violation to obtain relief. The only principle that would appear to reconcile these two positions is the principle that habeas relief should be denied whenever possible.⁵⁹

Then he concluded with a stark statement: “The execution of a person who can show that he is innocent comes perilously close to simple murder.”⁶⁰

VI. DISAPPOINTMENT AND RESIGNATION

By the end of the Court’s 1992–93 Term, Justice Blackmun had given up hope that the Court could reconcile the need for both individualized sentencing determinations and non-arbitrary application of capital punishment. At the same time, he had concluded that the Court was steadily dismantling the protections that habeas review provided for death-row prisoners. He might still have felt constrained to defer to the states and to treat the federal courts’ role as limited, as he had in his early years on the Court, but he had lost any illusion that simply letting the states do as they saw fit would produce a constitutionally permissible sentencing regime. He also seemed to have concluded that some of his colleagues were taking something other than a neutral approach to deciding capital cases, and that their rulings were result-oriented.

Against this backdrop, as has been documented elsewhere,⁶¹ Justice Blackmun informed his clerks at the beginning of the 1993–94 Term that he was ready to renounce the death penalty. He asked them to watch for a suitable vehicle, and on February 22, 1994, he issued his dissent from the denial of certiorari in *Callins*:

Twenty years have passed since this Court declared that the death penalty must be imposed fairly, and with reasonable consistency, or not at all, . . . and, despite the effort of the

59. *Id.* at 439 (Blackmun, Stevens & Souter, JJ., dissenting).

60. *Id.* at 446 (Blackmun, J., dissenting).

61. Linda Greenhouse, *Becoming Justice Blackmun: Harry Blackmun’s Supreme Court Journey* 176–79 (Times Books 2005).

States and courts to devise legal formulas and procedural rules to meet this daunting challenge, the death penalty remains fraught with arbitrariness, discrimination, caprice, and mistake. This is not to say that the problems with the death penalty today are identical to those that were present 20 years ago. Rather, the problems that were pursued down one hole with procedural rules and verbal formulas have come to the surface somewhere else, just as virulent and pernicious as they were in their original form. Experience 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.⁶²

As a result, Justice Blackmun declared, “[f]rom this day forward, I no longer shall tinker with the machinery of death.”⁶³ He explained:

For more than 20 years I have endeavored—indeed, I have struggled—along with a majority of this Court, to develop procedural and substantive rules that would lend more than the mere appearance of fairness to the death penalty endeavor. Rather than continue to coddle the Court’s delusion that the desired level of fairness has been achieved and the need for regulation eviscerated, I feel morally and intellectually obligated simply to concede that the death penalty experiment has failed. It is virtually self evident to me now that no combination of procedural rules or substantive regulations ever can save the death penalty from its inherent constitutional deficiencies. The basic question—does the system accurately and consistently determine which defendants “deserve” to die?—cannot be answered in the affirmative. It is not simply that this Court has allowed vague aggravating circumstances to be employed, . . . relevant mitigating evidence to be disregarded, . . . and vital judicial review to be blocked The problem is that the inevitability of factual, legal, and moral error gives us a system that we know must wrongly kill some defendants, a system that fails to deliver the fair,

62. *Callins*, 510 U.S. at 1143–44 (Blackmun, J., dissenting from denial of certiorari) (internal citations omitted).

63. *Id.* at 1145 (Blackmun, J., dissenting from denial of certiorari).

consistent, and reliable sentences of death required by the Constitution.⁶⁴

The difficulty of accommodating both the need for individualized sentencing and the requirement of avoiding arbitrariness was at the heart of Justice Blackmun's decision in *Callins*, for "the consistency promised in *Furman* and the fairness to the individual demanded in *Lockett* are not only inversely related, but irreconcilable in the context of capital punishment."⁶⁵ He pointed out that "[a]ll efforts to strike an appropriate balance between these conflicting constitutional commands are futile because there is a heightened need for both in the administration of death."⁶⁶ He described this conflict in some detail, pointing out that removing arbitrariness from the process "would also restrict the sentencer's discretion to such an extent that the sentencer would be unable to give full consideration to the unique characteristics of each defendant and the circumstances of the offense," but that leaving "the sentencer with sufficient discretion to consider fully and act upon the unique circumstances of each defendant would 'thro[w] open the back door to arbitrary and irrational sentencing."⁶⁷

Justice Blackmun had, in short, concluded that he could not accommodate either of these core constitutional values without compromising the other. And, as he put it,

the proper course when faced with irreconcilable constitutional commands is not to ignore one or the other, nor to pretend that the dilemma does not exist, but to admit the futility of the effort to harmonize them. This means accepting the fact that the death penalty cannot be administered in accord with our Constitution.⁶⁸

But Justice Blackmun's concerns were not just with legal theory. His loss of faith in the Court itself was unmistakable. He wrote that

the Court has chosen to deregulate the entire enterprise, replacing, it would seem, substantive constitutional

64. *Id.* at 1145–46 (Blackmun, J., dissenting from denial of certiorari) (footnotes and internal citations omitted).

65. *Id.* at 1155 (Blackmun, J., dissenting from denial of certiorari).

66. *Id.*

67. *Id.* (Blackmun, J., dissenting from denial of certiorari) (quoting *Graham v. Collins*, 506 U.S. 461, 494 (1993) (Thomas, J., concurring)).

68. *Id.* at 1157 (Blackmun, J., dissenting from denial of certiorari).

requirements with mere esthetics, and abdicating its statutorily and constitutionally imposed duty to provide meaningful judicial oversight to the administration of death by the States.⁶⁹

Continuing, he noted in particular his “belief that this Court would not enforce the death penalty (even if it could) in accordance with the Constitution,” and characterized that belief as “buttressed by the Court’s ‘obvious eagerness to do away with any restriction on the States’ power to execute whomever and however they please.’”⁷⁰ He reminded his colleagues that he had been willing for years to uphold the death penalty because he had always understood 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.”⁷¹ But, he pointed out, he had in the end

grown increasingly skeptical that “the death penalty really can be imposed fairly and in accordance with the requirements of the Eighth Amendment,” given the now limited ability of the federal courts to remedy constitutional errors.⁷²

And then there was the issue of race. Justice Blackmun recognized that “[e]ven under the most sophisticated death penalty statutes, race continues to play a major role in determining who shall live and who shall die.”⁷³ He was deeply troubled by the knowledge “that the biases and prejudices that infect society generally would influence the determination of who is sentenced to death . . . so long as the sentencer is free to exercise unbridled discretion . . . and thereby to discriminate.”⁷⁴

69. *Id.* at 1145 (Blackmun, J., dissenting from denial of certiorari).

70. *Id.* at 1157 (Blackmun, J., dissenting from denial of certiorari) (quoting *Herrera*, 506 U. S. at 446 (Blackmun, J., dissenting)).

71. *Id.* (Blackmun, J., dissenting from denial of certiorari) (quoting *Sawyer v. Whitley*, 505 U. S. 333, 351, 358 (1992) (Blackmun, J., concurring in judgment)).

72. *Id.* (Blackmun, J., dissenting from denial of certiorari) (quoting *Sawyer*, 505 U.S. at 351).

73. *Id.* at 1153 (Blackmun, J., dissenting from denial of certiorari).

74. *Id.* (Blackmun, J., dissenting from denial of certiorari) (citations omitted).

VII. CONCLUSION

Justice Blackmun spent two decades wrestling with not only the workability of the death penalty, but also the propriety of close federal judicial review of state sentencing regimes. In *Callins* he addressed the latter question by quoting approvingly from Justice Brennan's dissent in *McCleskey*:

Those whom we would banish from society or from the human community itself often speak in too faint a voice to be heard above society's demand for punishment. It is the particular role of courts to hear these voices, for the Constitution declares that the majoritarian chorus may not alone dictate the conditions of social life. The Court thus fulfills, rather than disrupts, the scheme of separation of powers by closely scrutinizing the imposition of the death penalty, for no decision of a society is more deserving of "sober second thought."⁷⁵

Upon subjecting his views on the constitutionality of capital punishment to a "sober second thought," Justice Blackmun ultimately concluded that there could be no constitutional death penalty. Justices Brennan and Marshall, who had maintained even after *Gregg* that the death penalty is unconstitutional in all cases, had left the Court by the time of *Callins*, and so Justice Blackmun—who had dissented in *Furman*, who had spent years preaching the gospel of deference to the states, and who had struggled mightily to find appropriate limiting principles for a constitutional death penalty—found himself at last the sole Justice on the Court holding the abolitionist position.



75. *Id.* at 1155 (Blackmun, J., dissenting) (quoting *McCleskey*, 481 U.S. at 343 (Brennan, J., dissenting) (quoting Harlan F. Stone, *The Common Law in the United States*, 50 Harv. L. Rev. 4, 25 (1936))).