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# Justice Blackmun's Eighth Amendment Pilgrimage

*D. Grier Stephenson, Jr.\**

## I. INTRODUCTION

If one takes *Witherspoon v. Illinois*<sup>1</sup> as a starting point, capital punishment has been a fixture on the docket of the United States Supreme Court for barely a quarter century. Two years after *Witherspoon*, Harry Andrew Blackmun became the Court's ninety-eighth justice.<sup>2</sup> "For capital punishment lawyers," Michael Meltsner of the Legal Defense Fund observed in 1973, "he was a disaster."<sup>3</sup> For those engaged in the courtroom campaign against the death penalty, neither Blackmun's record as a federal appeals judge nor his position

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\* Copyright 1994 by D. Grier Stephenson, Jr., Charles A. Dana Professor of Government, Franklin and Marshall College; A.B. Davidson College, 1964; M.A. 1966, Ph.D. 1967, Princeton University. Co-author of *AMERICAN CONSTITUTIONAL LAW: INTRODUCTORY ESSAYS AND SELECTED CASES* (10th ed. 1993); editor of and contributor to *AN ESSENTIAL SAFEGUARD: ESSAYS ON THE UNITED STATES SUPREME COURT AND ITS JUSTICES* (1991).

1 391 U.S. 510 (1968). In an opinion by Justice Stewart, over three dissents, the Court held that a jury from which persons with scruples against the death penalty are excluded may not impose the death penalty.

2 No uniform practice of numbering justices exists. The method used here counts the two repeaters (John Rutledge and Charles Evans Hughes) and the three associate justices who became Chief Justice (Edward D. White, Harlan F. Stone, and William H. Rehnquist) only once. This is the method President Clinton presumably used when he introduced Judge Ruth Bader Ginsburg on June 14, 1993 as the soon-to-be "107th justice." *Transcript of President's Announcement and Judge Ginsburg's Remarks*, N.Y. TIMES, June 15, 1993, at A24.

On April 6, 1994, Justice Blackmun publicly announced his intention to retire at the end of the 1993-94 Term. Aaron Epstein & Robert A. Rankin, *Now, Search Begins to Replace Blackmun*, PHILA. INQUIRER, April 7, 1994, at A1; Ruth Marcus, *Justice Blackmun Announces Retirement*, WASH. POST, Apr. 7, 1994, at A1. At the time of his announcement, Blackmun, age 85, had served as long or longer than all but 21 of the Court's 107 justices. Only two were older at retirement or death: Chief Justice Taney, who died at age 87 while on the bench, and Justice Holmes, who retired at age 90.

3 MICHAEL MELTSNER, *CRUEL AND UNUSUAL: THE SUPREME COURT AND CAPITAL PUNISHMENT* 197 (1973).

in several Supreme Court decisions culminating in *Furman v. Georgia*<sup>4</sup> in 1972 was good news. Yet in the Supreme Court Term concluding in June 1993, Blackmun voted to uphold the claim of the individual petitioner against the government on all seven occasions in which the Court issued full opinions involving the death penalty.

The contrast between Meltsner's assessment and Blackmun's recent voting record invites investigation. What was Blackmun's position on the constitutionality of the death penalty at the time of his appointment to the Supreme Court and during his first years as a justice? What has been his position during recent Terms? In what respects has there been a transformation? Answers to these questions should be important to anyone contemplating the possibilities for change that judicial service brings, especially in situations where a constitutional question like capital punishment increasingly occupies the Court's agenda.

## II. BLACKMUN'S DECISIONS ON THE EIGHTH CIRCUIT COURT OF APPEALS

Joining the Eighth Circuit Court of Appeals in November 1959, Blackmun was among President Dwight Eisenhower's last judicial appointees. Indeed, without this nomination by Eisenhower it is highly unlikely that Blackmun, a Republican, ever would have served on the Supreme Court of the United States.<sup>5</sup>

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4 408 U.S. 238 (1972). See *infra* notes 46-57 and accompanying text for an overview of *Furman*.

5 Eisenhower's two successors in the White House, Kennedy and Johnson, followed the practice of most of their predecessors by overwhelmingly appointing members of their political party to the federal courts. The Democratic percentages for Kennedy and Johnson were 91% and 95%, respectively. D. GRIER STEPHENSON, JR. ET AL., *AMERICAN GOVERNMENT* 542 (2d ed., 1992) (See Table 15.1 for data for all presidents from Cleveland (Term I) through Bush).

Moreover, Minnesota's United States senators during the Kennedy and Johnson administrations (Hubert Humphrey, Eugene McCarthy, and Walter Mondale) were all Democrats. Had Blackmun not been picked by Eisenhower, the combination of two successive Democratic presidents and Democratic senators from Blackmun's home state would have been deadly to any aspirations Blackmun might have had for a federal judgeship during the 1960s.

At the outset of his administration, President Richard Nixon preferred Supreme Court nominees with judicial experience. Since he was 60 years old when Nixon became president, Blackmun would probably not even have been considered for a vacancy on either the district or appeals courts. Thus he would not have had the chance to acquire even a small amount of judicial experience by the time the

During his ten and a half years of service on the appeals bench, Blackmun participated in approximately 700 cases.<sup>6</sup> Of these, only nine (barely more than one percent) involved the death penalty: seven habeas corpus actions reviewing capital sentences imposed by Arkansas state courts, and two appeals from capital sentences imposed by federal district courts in Iowa and Nebraska.<sup>7</sup>

Blackmun's exposure as a federal circuit judge to cases involving capital crimes is small by contemporary standards for at least four reasons. First, the death penalty was disproportionately imposed by state courts in the South.<sup>8</sup> Of the states within the Eighth Circuit, which stretches from the Canadian border to the Louisiana line, only Arkansas had been part of the Confederacy. Second, by the mid-1960s two states within Blackmun's circuit had abolished capital punishment

Supreme Court nominations of southern appeals judges Haynsworth and Carswell had failed in the Senate. Once that happened, Nixon looked about for a Republican judge outside the South—publicly, at least, Nixon had given up on prospective southern nominees. With the backing of Chief Justice Warren Burger, a long-time acquaintance, Blackmun was thus one of a relatively small number of federal appeals judges in a position for active consideration. According to John P. Frank, "The Blackmun appointment was completely apolitical in the sense that, by [John] Mitchell's recollection, no senators were involved. Haynsworth's had been to a degree a senatorial appointment inspired by Senator Hollings of South Carolina, and Carswell's appointment had been promoted by Senator Gurney of Florida. But insofar as there was an outside source for the Blackmun appointment, it came from [Hershel] Friday, [Pat] Mahafey, and Burger." JOHN P. FRANK, CLEMENT HAYNSWORTH, THE SENATE, AND THE SUPREME COURT 118 (1991).

This was not the first time a judicial friendship had benefitted Blackmun. The occasion for his appointment to the Court of Appeals in 1959 was the retirement of Judge John B. Sanborn, for whom Blackmun had clerked in 1932-1933 and who enthusiastically supported Blackmun's candidacy for the bench 26 years later. *Hearings on the Nomination of Harry A. Blackmun, of Minnesota, to Be Associate Justice of the Supreme Court of the United States*, 91st Cong., 2d Sess. 27 (1970) [hereinafter *Hearings*].

6 *Hearings*, *supra* note 5, at 77-134.

7 *Pope v. United States*, 372 F.2d 710 (8th Cir. 1967) and *Feguer v. United States*, 302 F.2d 214 (8th Cir. 1962) were the two cases involving federal sentences. Blackmun wrote the opinion in both.

In addition to the nine death penalty cases, two cases raised other Eighth Amendment questions. An opinion written by Blackmun, *Jackson v. Bishop*, 404 F.2d 571 (8th Cir. 1968), enjoined use of the strap in Arkansas prisons. With Blackmun joining a per curiam opinion, *Harris v. Settle*, 322 F.2d 908 (8th Cir. 1963), denied a challenge to living conditions in a federal prison. The death penalty cases considered here include only those resolved by full opinion and do not include summary action by the judges of the Eighth Circuit on stays of execution.

8 MELTSNER, *supra* note 3, at 52.

entirely: Minnesota in 1911 and Iowa in 1965.<sup>9</sup> Third, in the 1960s, rules of federal habeas corpus were only beginning to develop to a point that would facilitate routine collateral attack on state convictions in federal courts.<sup>10</sup> Fourth, the "due process revolution" which accelerated the expansion of federal procedural rights to the states did not get underway until after 1961.<sup>11</sup>

Furthermore, when the Court applied more provisions of the Bill of Rights to the states, the justices frequently gave the rulings only limited retroactivity. Thus, such decisions were often of little help in situations where convictions had become final.<sup>12</sup> It is, therefore, not surprising to find that of the seven state cases Blackmun considered on habeas corpus, the resolution in three turned on racial discrimination in selection of jurors.<sup>13</sup> The civil rights revolution was at least a decade older than the due process revolution and was therefore a more prominent basis for decision. The jury issue had been before the Supreme Court on several occasions<sup>14</sup> and was one of the most common grounds employed to attack death sentences, at least where the condemned person was black.<sup>15</sup>

A pair of cases presented a more novel claim, however; a statistical pattern pointing to the role of race in the imposition of the death penalty itself.<sup>16</sup> Both cases involved William L.

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9 THE DEATH PENALTY IN AMERICA 12 (Hugo A. Bedau ed., rev. ed. 1967).

10 See, e.g., *Fay v. Noia*, 372 U.S. 391 (1963).

11 *Mapp v. Ohio*, 367 U.S. 643 (1961). *Mapp* and the appointment of Arthur Goldberg in 1962 to replace Justice Felix Frankfurter mark the start of the second half of the Warren Court and the "due process revolution."

12 E.g., *Johnson v. N.J.*, 384 U.S. 719 (1966) (limiting application of interrogation standards from *Miranda v. Arizona*, 384 U.S. 436 (1966), to defendants starting trial after the day *Miranda* was decided); *Linkletter v. Walker*, 381 U.S. 618 (1965) (denying application of the exclusionary rule to convictions that had become final before *Mapp*).

13 *Stewart v. Bishop*, 403 F.2d 674 (8th Cir. 1968); *Henslee v. Stewart*, 311 F.2d 691 (8th Cir. 1963); *Bailey v. Henslee*, 287 F.2d 936 (8th Cir. 1961) [hereinafter *Bailey I*]. Blackmun wrote the court's opinion in *Bailey I*; the second case was a per curiam opinion relying on *Bailey I*; and in the first case Blackmun was part of a two-judge majority. In another case, the court remanded for a hearing to decide whether determination of the voluntary nature of a confession is to be made by the trial judge and not the jury. *Mitchell v. Stephens*, 353 F.2d 129 (8th Cir. 1965).

14 E.g., *Avery v. Georgia*, 345 U.S. 559 (1953).

15 Indeed, the courtroom assault on the death penalty was more an offshoot of the civil rights movement than the due process revolution.

16 *Maxwell v. Stephens*, 348 F.2d 325 (8th Cir.) [hereinafter *Maxwell I*], cert. denied, 382 U.S. 944 (1965) (Douglas, J., dissenting); *Maxwell v. Bishop*, 398 F.2d 138 (8th Cir. 1968) [hereinafter *Maxwell II*], vacated, 398 U.S. 262 (1970). The

Maxwell, a black man who had been sentenced to death in 1962 in Garland County, Arkansas, for the rape of a white woman in 1961.<sup>17</sup> The question Maxwell raised would engage Blackmun again as a justice on the Supreme Court.<sup>18</sup> The data in *Maxwell I*<sup>19</sup> were suggestive but not conclusive: since 1913, all but two persons executed for rape in Arkansas had been black, but within the most recent 14 years, two blacks and two whites had been executed for the offense. Speaking for himself and the other judge in the majority, Blackmun observed:

These facts do not seem to us to establish a pattern or something specific or useful here, or to provide anything other than a weak basis for suspicion on the part of the defense. The figures certainly do not prove current discrimination in Arkansas. . . .

The defense argument goes too far and would, if taken literally, make prosecution of a Negro impossible in Arkansas today because of the existence [of] . . . standards which are now questionable. This would effect discrimination in reverse.<sup>20</sup>

In response to Justice Goldberg's dissent to the denial of certiorari in *Rudolph v. Alabama*<sup>21</sup> suggesting that the Eighth Amendment bars the death penalty for rape, where life has not been taken or endangered, Blackmun stated:

Despite whatever personal attitudes lower federal court judges as individuals might have toward capital punishment for rape, any judicial determination that a state's long existing death-for-rape statute . . . imposes punishment which is cruel and unusual . . . must be for the Supreme Court in the first instance and not for us.<sup>22</sup>

Where life is concerned[,] a conclusion of this kind may

seventh of the state death sentence cases Blackmun reviewed was *Bailey v. Henslee*, 309 F.2d 840 (8th Cir. 1962) [hereinafter *Bailey II*] which unsuccessfully challenged a second trial date in an Arkansas court in a rape case.

17 In capital cases, according to Arkansas practice at the time, unless the jury rendered a verdict of life imprisonment in the state penitentiary at hard labor, the death sentence was to be imposed. *Kelley v. State*, 202 S.W. 49 (Ark. 1918).

18 *McCleskey v. Kemp*, 481 U.S. 279 (1987). See *infra* notes 104-117 and accompanying text for further case discussion.

19 *Maxwell I*, 348 F.2d at 328.

20 *Id.* at 331.

21 375 U.S. 889 (1963).

22 *Maxwell I*, 348 F.2d at 332 (parenthetical statements omitted).

involve a personal reluctance for judges. We deal, however, with statutory provisions which are not our province, at least not yet . . . to change. Maxwell's life therefore must depend upon different views entertained by the Supreme Court of the United States or upon the exercise of executive clemency.<sup>23</sup>

Additional data with more sophisticated analysis by Professor Marvin Wolfgang of the University of Pennsylvania were available for the Court of Appeals when Blackmun's panel decided *Maxwell II* three years later.<sup>24</sup> The pertinent part of the Wolfgang study included statistics on fifty-five rape convictions in nineteen Arkansas counties between 1945 and 1960. Analysis revealed that the critical variables were the offender's race, the victim's race, and the sentence. Compared to others, black men convicted of raping white women were disproportionately sentenced to death. Furthermore, "no variable of which analysis was possible could account for the observed disproportionate frequency."<sup>25</sup>

Writing for the court, Blackmun was unpersuaded because the record was deficient on two counts. First, the study included no data from Garland County, the site of the crime and Maxwell's trial. Second, and related to the first, no evidence showed "that the petit jury which tried and convicted Maxwell acted *in his case* with racial discrimination."<sup>26</sup> Judge Blackmun continued:

We are not yet ready, to condemn and upset the result reached in every case of a negro rape defendant in the State of Arkansas on the basis of broad theories of social and statistical injustice. . . .

[W]e feel that the statistical argument does nothing to destroy the integrity of Maxwell's trial.<sup>27</sup>

Short of confessions by jurors of a racially-based intent to discriminate, Blackmun's opinion offered little encouragement

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23 *Id.* at 338. Blackmun also noted that "the record before us reveals that the rapist of the victim here was evidently not one who failed to endanger human life." *Id.* at 332.

24 *Maxwell v. Bishop*, 398 F.2d 138 (8th Cir. 1968) (*Maxwell II*). Following the adverse ruling by the Court of Appeals on Maxwell's first habeas corpus petition, the Supreme Court denied review. 382 U.S. 944 (1965) (Douglas, J., dissenting).

25 *Maxwell II*, 398 F.2d at 143 (citing Dr. Wolfgang's testimony).

26 *Id.* at 147 (emphasis added).

27 *Id.*

to those trying to prove discrimination in a particular case. The opinion also rejected two additional grounds offered for reversal: the absence of a two-stage trial which would determine guilt first and the penalty later,<sup>28</sup> and the presence of unbridled juror discretion to impose the death penalty.

Yet Blackmun expressed personal doubts about the sentence his court left undisturbed:

This fact makes the decisional process . . . particularly excruciating for the author of this opinion who is not personally convinced of the rightness of capital punishment and who questions it as an effective deterrent. But the advisability of capital punishment is a policy matter ordinarily to be resolved by the legislature or through executive clemency and not by the judiciary.<sup>29</sup>

Blackmun's circuit court record on the death penalty suggests several conclusions. First, even though he heard a small number of cases involving capital punishment, Blackmun confronted every major argument that took shape during the 1960s against the death penalty. Second, in *Maxwell II*, he confessed serious reservations about the morality and wisdom of capital punishment. Third, he was prepared to assure that trials resulting in the death penalty should be procedurally correct according to constitutional standards laid down by the Supreme Court. Fourth, he was unpersuaded that racial discrimination was a significant factor in the application of the death penalty. Fifth, reform or elimination of the death penalty, including establishment of sentencing standards, was the province of the legislature, not the judiciary.

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28 This procedure was a key recommendation of the American Law Institute's MODEL PENAL CODE § 201.6 cmt. 5 (Tent. Draft No. 9, 1959). Also part of the recommendation was the stipulation that a death sentence could be imposed only in the absence of certain mitigating circumstances and in the presence of one or more enumerated aggravating circumstances.

29 *Maxwell II*, 398 F.2d at 153-54 n.11 (stating that Blackmun was speaking only for himself and not the two judges who joined his opinion). On June 1, 1970, only days before Blackmun joined the Supreme Court, the Court, six to one, reversed the Eighth Circuit in *Maxwell II* but avoided the questions Blackmun had confronted. Instead, the majority remanded the case for reconsideration on *Witherspoon* grounds. *Maxwell v. Bishop*, 398 U.S. 262 (1970). Justice Stewart's opinion in *Witherspoon* had made the ruling completely retroactive. *Maxwell II*, 398 U.S. at 266 (citing *Witherspoon v. Illinois*, 391 U.S. 510 (1968)).

## III. BLACKMUN'S SUPREME COURT CONFIRMATION HEARINGS

Widespread opposition against the Supreme Court nominations of Judges Robert Bork in 1987 and Clarence Thomas in 1991 may tend to obscure the fact that Blackmun's nomination and confirmation as a justice came at the end of a two-year battle. When Blackmun appeared before the Senate Judiciary Committee on April 29, 1970, the nation had recently witnessed a series of remarkable judicial events. The Court was a major campaign issue in the presidential election of 1968; President Johnson's nomination of Justice Abe Fortas as Chief Justice failed to gain the Senate's approval in October 1968; Fortas resigned from the bench in May 1969 under a cloud of impropriety; Judge Warren Burger, President Nixon's choice for the center chair, succeeded Chief Justice Earl Warren in June; in November, relying on ideological and ethical reasons, the Senate rejected the nomination of Judge Clement Haynsworth to fill the Fortas seat by a vote of 55-45;<sup>30</sup> in April 1970, the Senate rejected Nixon's second choice, Judge Harrold Carswell, by a vote of 51-45 on grounds of ideology and competence.<sup>31</sup> Blackmun's selection on the heels of the Carswell debacle was perhaps a relief to the Senate which confirmed him 94-0 on May 12.<sup>32</sup>

One examining the Blackmun hearings more than two decades later finds them noteworthy in at least two respects. First, ethical concerns were paramount. Senators wanted to reassure themselves that Blackmun had not made the conflict-of-interest mistakes that had given some of them a reason to vote against Haynsworth.<sup>33</sup> Second, in contrast to later

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30 Ironically, among the letters of empathy Haynsworth received after the vote in the Senate was one from Blackmun. "He wrote to say that he shared Haynsworth's anguish and disappointment and urged him not to be discouraged, for the federal courts needed him very badly." FRANK, *supra* note 5, at 99 (from a letter from Blackmun to Haynsworth dated November 25, 1969, in the Haynsworth Papers at Furman University).

31 Not since the second presidency of Grover Cleveland in 1893 and 1894 had the Senate rejected two nominees for the same Supreme Court vacancy. HENRY J. ABRAHAM, *JUSTICES AND PRESIDENTS* 27-28 (3d ed. 1992).

32 There is a parallel between the relative ease of Blackmun's confirmation in 1970 and of Anthony Kennedy's in February 1988 (by a vote of 97-0). The latter's nomination followed the Senate's rejection of Bork in October 1987 and the aborted nomination of Judge Douglas Ginsburg in November.

33 The thesis of John Frank's book on the Haynsworth nomination is that the conflict-of-interest charges leveled against Haynsworth were overblown and were a smokescreen for ideological objections. He believes Haynsworth had done nothing more questionable than Blackmun: "one can only conclude that the fuss

hearings by the Judiciary Committee, senators queried the nominee via a colloquy between Blackmun and Senator Fong about only a single substantive issue of constitutional law,<sup>34</sup> capital punishment.

Early in the afternoon of April 29, Fong asked about a statement the nominee recently made to a reporter: "I believe you stated that it might well be that the Supreme Court might say that the imposition of capital punishment would be . . . cruel and unusual punishment, under the Constitution. Did you make that statement?"<sup>35</sup> In reply, Blackmun referred to *Pope* and the two Maxwell cases. "In all of those cases, the Eighth Amendment argument was made. In each and all of those cases we upheld the penalty against the Eighth Amendment argument."<sup>36</sup> Referring specifically to *Maxwell II*, he added:

I made the gratuitous observation which has caused so much furor, that it was particularly excruciating for one who is not convinced of the rightness of capital punishment as a deterrent in crime . . . . It is a part of personal philosophy. I think the other question of the rightness of legislation, be it by a State legislature, or by Congress in dealing with Federal crimes, to impose the death penalty is an entirely different question . . . . [O]rdinarily the imposition of the death penalty is a matter for the discretion of the legislature. I firmly believe this. One of course can imagine if a Legislature were to impose the death penalty on a pedestrian for crossing the street against a red light this might be something else

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over Haynsworth on this score was pure makeweight." FRANK, *supra* note 5, at 121.

34 Several senators tried to draw from Blackmun some statements about his judicial philosophy, without reference to particular issues. For example, Senator Ervin asked Blackmun to comment on Chief Justice Marshall's observation that "the patriots who framed the Constitution and the people who ratified it must be understood to have intended what they have said." Senator Hart asked, "Do you agree that the work of a member of the Supreme Court by its very nature requires some interpretation beyond the words of the Constitution and this interpretation requires an understanding of the contemporary society which gives rise to the concrete problem that is presented?" *Hearings, supra* note 5, at 33, 35. The nominee agreed with both senators. Senator Kennedy read to Blackmun parts of a speech the senator had given regarding threats to civil liberties but there were no references to Supreme Court decisions. *Id.* at 36-37. Blackmun explained that he was "sensitive" to such matters but declined to elaborate "because I think some of those things are certain to come before the Court before too long." *Id.* at 37.

35 *Hearings, supra* note 5, at 59.

36 *Id.*

again.<sup>37</sup>

Senator Fong pressed further. "So you feel that at the present time there really is not [sic] definitive attitude as far as you are concerned, no very definite attitude that capital punishment should be abolished?"<sup>38</sup> Blackmun responded:

This is my personal philosophy. If I were a legislator and it came up, probably this is the way I would initially feel depending in part on any overwhelming attitude on the part of my constituents. But otherwise, apart from that, I start with the premise that this is basically a legislative discretionary matter.<sup>39</sup>

"And," queried Fong, "if the Legislature says that capital punishment should be imposed, you would follow that?" "Certainly," Blackmun replied, "with an exception perhaps in my pedestrian illustration."<sup>40</sup>

Blackmun's statements in the exchange with Fong reflected the nominee's record as a circuit judge: he would adhere to established constitutional principles and would probably accept the dictates of the legislature in imposing the terms by which capital punishment would be administered. Reform in this area of the law was not the judiciary's task. In these respects, Blackmun seemed little different from some of those who were about to be his colleagues on the Court.

#### IV. COURT NOMENCLATURE AND FIGURES 1 AND 2

Most of the remaining sections of this article relate to Figures 1 and 2 which depict Blackmun's position in death penalty cases decided by the Supreme Court as well as the relative positions of Justice Thurgood Marshall and Justice (and later Chief Justice) William Rehnquist. A case was included on the list involving the death penalty if one party in the litigation was under a death sentence. So defined, the cases encompassed not only those which challenged capital punishment itself or a particular sentencing procedure, but also those in which the principal issue was access to the courts (as with habeas corpus or standing) or a procedural issue outside

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37 *Id.* at 59-60.

38 *Id.* at 60.

39 *Id.*

40 *Id.*

the Eighth Amendment. The latter categories were included because the Court's decision in each case had an obvious bearing on whether the convicted person lived or died.<sup>41</sup>

The percentages in Figures 1 and 2 represent the fraction of instances in which Justices Blackmun, Marshall, and Rehnquist, and the Court majority (usually at least five justices) supported the claim(s) made by the condemned person. Among justices, Marshall served the longest with Blackmun, through the 1991-1992 Term. He voted most consistently in favor of the claim presented by the condemned person, while Rehnquist voted most consistently against the claim.<sup>42</sup> The lines for Marshall and Rehnquist represent therefore, the Court's voting extremes on death penalty issues at any particular time.

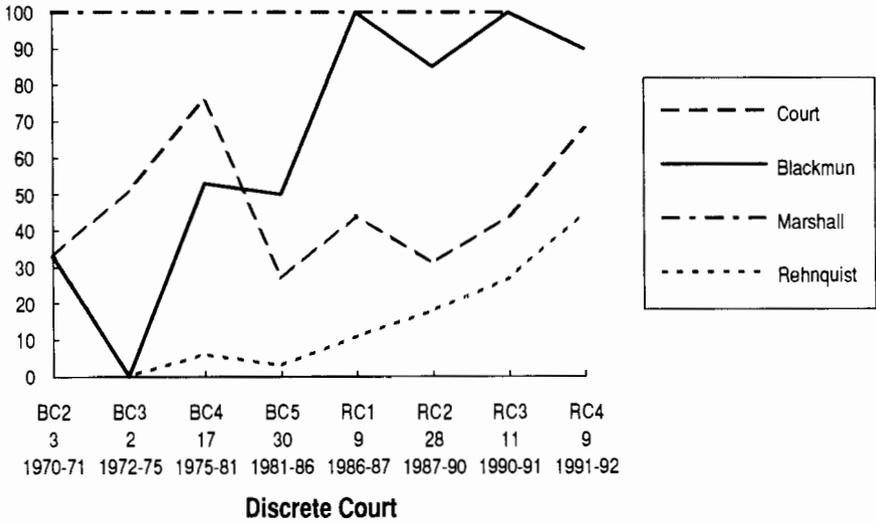
The period covered by Figure 1 begins with Blackmun's first complete Term (1970-1971) and concludes with the 1991-1992 Term. These Terms are grouped by "discrete court," as designated by a number. A discrete (or "natural") court is merely a period of stable membership. For example, the first Burger Court is 1969-1970, the Term during which the Court functioned with only eight justices until Blackmun was sworn in near its end. Figure 1 begins with the second Burger Court (labeled BC2) when Blackmun was fully on board. The third Burger Court (BC3) came about because of the appointments of Justices Powell and Rehnquist in place of Black and Harlan and lasted until Justice Douglas retired in 1975. No separate number was assigned when the Court was only briefly absent one or two justices, as happened in the fall of 1971 before Powell and Rehnquist came on the bench in January 1972. The nomenclature used here departs from the standard usage which refers simply to *the* Burger Court or *the* Rehnquist Court.

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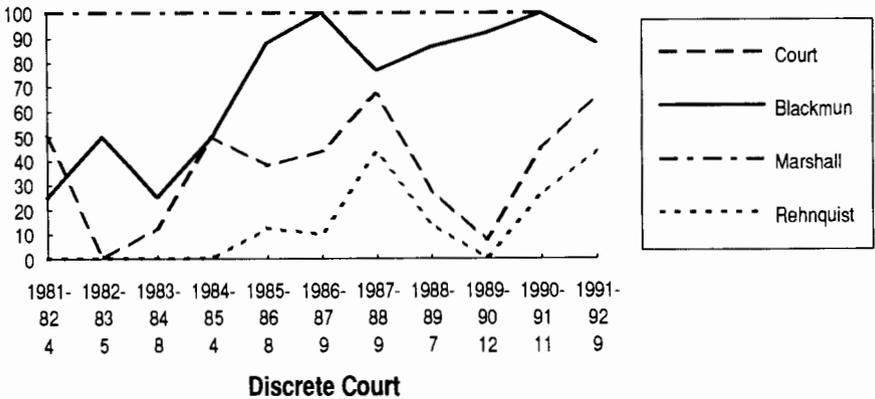
41 For over half a century in capital cases, the Court has looked closely at procedural safeguards outside the Eighth Amendment, especially when they bear on the accuracy of trial proceedings. *See, e.g., Powell v. Alabama*, 287 U.S. 45 (1932) (overturning a capital conviction for inadequacy of counsel at the state court trial level). Also, since petitioners in capital cases routinely raise multiple questions, the fact that the Court decides a case on one question does not preclude the possibility that a justice's vote is influenced by one or more other questions.

42 In death penalty cases, Justice Brennan's voting record was virtually identical to Marshall's. However, the graphs report Marshall's voting because he served a Term later than Brennan.

**Figure 1**  
**Support for Death Penalty Claimant, 1970-1992,**  
**in Percent, by "Discrete Court"**



**Figure 2**  
**Support for Death Penalty Claimant, 1981-1992,**  
**in Percent, by Term**



The further division into discrete courts in this article (*e.g.*, the second Rehnquist Court or RC2) highlights the differences that may appear in the Court's response to a category of cases during the tenure of the same Chief Justice as one justice departs and another arrives.

Except in the case of a single Term, reporting positions by discrete courts in Figure 1 rather than by Terms, means that the variation in the outcome of a single case is less likely to mislead the reader, especially in those Terms where only a few opinions were published. Even with this precaution, problems occur. With only two published principal opinions during the third Burger Court, for example, the possible percentages include only "0," "50," or "100." For this reason, the percentages must be considered in light of the number of cases from which they are derived. For this reason as well, Figure 2, which reports similar data by Term, does not begin until 1981-1982 when there were at least four capital cases annually.

The number of principal opinions appears below the name of the Court or Term and includes: all signed majority opinions, plurality opinions containing the judgment of the Court, and lengthy *per curiam* opinions published in cases involving the death penalty.<sup>43</sup> The number of such published principal opinions may be slightly different from the number of cases the Court decided on the subject, since the justices sometimes resolve more than one case with a single opinion. Using opinions instead of cases as a base reflects more accurately the number of opportunities presented for the justices to take a position on capital punishment.

## V. BLACKMUN'S FIRST DECADE ON THE SUPREME COURT

### A. *Furman v. Georgia*<sup>44</sup> and the *Early Burger Courts*

As Table 1 shows, the percentage of death penalty opinions issued by the Court each Term did not routinely approach or exceed five percent of the total number of principal opinions until after 1982.<sup>45</sup> Decisions in earlier cases, however, largely

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43 Cases were located by both computer-assisted and manual searches.

44 408 U.S. 238 (1972).

45 Given the variety of constitutional and statutory issues the Court confronts annually and the nearly complete control over the cases it decides, a subject that consumes at least five percent of the total number of principal opinions must be extraordinarily important to at least four members of the bench. Indeed, after 1982, relative to all other categories, capital cases stood an excellent chance of

defined the nature of disputes later cases would present.

*Furman v. Georgia* remains noteworthy because the Court effectively invalidated virtually every death penalty statute then in force in the United States. *Furman* is almost equally noteworthy in two other respects. First, of the five-justice majority only Brennan and Marshall found the death penalty itself fundamentally at odds with the Eighth Amendment. The remaining three justices (Douglas, White, and Stewart) found capital punishment, *as then administered*, a violation of the Eighth Amendment: too much discretion in the hands of juries and too few standards for judges made the death sentence capricious and unpredictable. Additionally, Stewart disallowed retribution alone as a constitutionally acceptable objective of punishment.<sup>46</sup> For Douglas, the extreme selectivity of the death penalty created an inequality because those executed "were poor, young, and ignorant."<sup>47</sup> For White, the death penalty was pointless as well: "the threat of execution is too attenuated to be of substantial service to criminal justice."<sup>48</sup> The positions of White and Stewart were probably unexpected because previously they were part of a six-justice majority in *McGautha v. California* upholding a death sentence for first-degree murder against similar arguments based on due process and equal protection grounds.<sup>49</sup>

Second, the four dissenting justices (Burger, Blackmun, Powell, and Rehnquist) not only saw no fundamental conflict between capital punishment and the Eighth Amendment, but were unpersuaded by the arguments Douglas, Stewart, and White found so compelling. Instead, the dissenters were willing to allow the states ample freedom in administration of capital punishment, subject to pre-*Furman* limitations such as those

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commanding the Court's attention. As will be noted, Justices Brennan and Marshall invariably voted to vacate death sentences for all petitioners and frequently dissented when the Court denied certiorari. Many death penalty cases thus arrived at the Court already with two of the four votes needed for plenary consideration. Rather than competing for four of nine potential votes for review, they needed only two of seven. Nonetheless, because of the very large number of capital cases competing for plenary review, the probability of a grant of certiorari in any single case was very low.

46 *Furman*, 408 U.S. at 308 (Stewart, J., concurring).

47 *Id.* at 250 (Douglas, J., concurring).

48 *Id.* at 313 (White, J., concurring).

49 402 U.S. 183 (1971). In *Crampton v. Ohio*, decided with *McGautha*, six justices expressly rejected the requirement of a bifurcated proceeding—one to establish the guilt of the accused and the other to set the penalty—to meet due process requirements.

enumerated in *Witherspoon*. For instance, during the previous Term, Burger and Blackmun were part of the *McGautha* majority, but had also joined in vacating a death sentence for rape after the Tennessee Supreme Court refused to consider the application of *Witherspoon* because of timing.<sup>50</sup>

TABLE 1

NUMBER OF PRINCIPAL OPINIONS PUBLISHED  
IN DEATH PENALTY CASES, 1975-1992

<i>Term</i>	<i>Principal Opinions*</i> (All Categories)	<i>Principal Opinions</i> (Death Penalty)
1975-76	159	5 (3.1%)
1976-77	142	4 (2.8%)
1977-78	135	2 (1.5%)
1978-79	138	2 (1.4%)
1979-80	149	2 (1.3%)
1980-81	138	2 (1.4%)
1981-82	167	4 (2.4%)
1982-83	162	6 (3.7%)
1983-84	163	8 (4.9%)
1984-85	151	4 (2.6%)
1985-86	159	8 (5.0%)
1986-87	152	9 (5.9%)
1987-88	142	9 (6.3%)
1988-89	143	7 (4.9%)
1989-90	132	12 (9.1%)
1990-91	116	11 (9.5%)
1991-92	110	9 (8.2%)

\* Principal opinions include opinions of the Court, plurality opinions, and significant per curiam opinions.

Blackmun's dissent in *Furman* was not only his first official statement on capital punishment as a Supreme Court justice but also was his longest opinion in a capital case until 1983.<sup>51</sup> Moreover, his *Furman* opinion was arguably the most anguished expression of the tension between personal values

50 *Hunter v. Tennessee*, 403 U.S. 711 (1971).

51 *Barefoot v. Estelle*, 463 U.S. 880, 916-38 (1983) (Blackmun, J., dissenting).

and professional role since Justice Frankfurter's dissent in the second flag salute case nearly three decades earlier.<sup>52</sup>

Noting that capital cases "provide for me an excruciating agony of the spirit," Blackmun no longer hesitated, as he had as a circuit judge and in the Senate hearings, to express his true feelings over the "rightness" of the death penalty.

I yield to no one in the depth of my distaste, antipathy, and, indeed, abhorrence, for the death penalty . . . . 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 . . . the Justices who vote to reverse these convictions.<sup>53</sup>

As a judge and not a legislator, Blackmun felt obliged to rest any vote against the death penalty on constitutional grounds. Acknowledging that the Cruel and Unusual Punishments Clause "may acquire meaning as public opinion becomes enlightened by a humane justice,"<sup>54</sup> Blackmun puzzled over "the Court's perception of progress in the human attitude since decisions of only a short while ago," for measuring progress in human attitudes was the business of the legislative and executive branches.

The authority should not be taken over by the judiciary in the modern guise of an Eighth Amendment issue.

. . . 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.<sup>55</sup>

52 *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 647 (1943) ("It can never be emphasized too much that one's own opinion about the wisdom or evil of a law should be excluded altogether when one is doing one's duty on the bench.")

53 *Furman*, 408 U.S. at 405-06. It is not apparent from the opinion why the phrase "reverence for life" appears in quotations marks.

54 *Id.* at 409 (quoting *Weems v. United States*, 217 U.S. 349, 378 (1910)). The view of the Eighth Amendment as embodying evolving standards of treatment is more prominently stated in Chief Justice Warren's opinion in *Trop v. Dulles*, 356 U.S. 86, 93-104 (1958).

55 *Id.* at 410-11.

Elected representatives of the people are "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 . . . ." <sup>56</sup>

Was Blackmun contradicting himself? How could the Eighth Amendment "acquire meaning" through changing public opinion if judges deferred to legislators as constitutionally correct barometers of the public's sense of "humane justice"? Blackmun may have implicitly accepted a "consensus" reading of the Eighth Amendment: that the Court might properly employ the Eighth Amendment against recalcitrant states of the union once most states had abolished capital punishment. The Court would follow, not lead. As a circuit judge, Blackmun had "no difficulty" concluding that the use of the strap as a disciplinary tool in the prisons of Arkansas "in this last third of the 20th century, runs afoul of" the Cruel and Unusual Punishments Clause. <sup>57</sup>

Not only had the majority in *Furman* "sought" and "achieved an end" not justified by "history," "law," or "constitutional pronouncement," <sup>58</sup> but the "end" reached might have an unintended consequence. To eliminate the dangers flowing from discretion allowed to judge or jury under the laws challenged in *Furman*, Blackmun explained:

[S]tatutes struck down today will be re-enacted . . . 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 . . . . This approach . . . encourages legislation that is regressive . . . , for it eliminates the element of mercy in the imposition of punishment. <sup>59</sup>

Statutes without discretion would be regrettable but presumably not unconstitutional.

Blackmun's opinion in *Furman* is revealing as a statement of his own views for several reasons. First, no justice is required to write a separate opinion, whether concurring or dissenting. Even where, as in this instance, other members of the Court wrote separately, Blackmun was under no obligation to write as much as he did, especially since he expressly joined

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56 *Id.* at 413.

57 *Jackson v. Bishop*, 404 F.2d 571, 579 (8th Cir. 1968).

58 *Furman*, 408 U.S. at 414.

59 *Id.* at 413.

the opinions written by Chief Justice Burger and Justices Powell and Rehnquist.<sup>60</sup> So one may fairly conclude that he wrote separately in order to leave no doubt about his position.

Second, his belief in the value of judicial restraint, at least in the context of the Eighth Amendment, was so deeply felt that it apparently overrode his disdain for capital punishment. This would account for his discourse on the province of the legislature to adopt a policy he found morally repulsive and lacking in utility. Yet, his advocacy of judicial restraint was not all-embracing. Recall that only seven months separated publication of his opinion in *Furman* and his majority opinion in *Roe v. Wade*.<sup>61</sup> Rather, his advocacy of restraint in *Furman* probably followed from his reading of the Court's previous policy of intervention in capital punishment issues only at the procedural margins.

Had Blackmun's perception of a modest Eighth Amendment judicial role not been so dominant, *Furman* would have offered a relatively painless opportunity for him to infuse his own values into the Cruel and Unusual Punishments Clause. Had he taken this step, however, he would have compromised the position he took in *Maxwell II* and in his exchange with Senator Fong. Given his acceptance of the evolutionary character of the Eighth Amendment, no prior statement on the subject would necessarily have seemed to be binding. After all, his vote had nothing to do with the outcome in *Furman*: there were already five votes against the death penalty, at least as then administered.

His *Furman* opinion allowed a counter explanation as well, although less convincing. Torn between restrained deference to the legislature and adherence to personal values, Blackmun knew that the outcome in *Furman* already supported the latter. It is surely easier to preach the virtues of judicial restraint when the immediate result is not the execution of the several hundred persons on "death row" at that time. This is the judicial equivalent of having one's cake while eating it too. The more plausible explanation, however, is that in 1972 Blackmun firmly believed that the Court's role under the Eighth Amendment was highly circumscribed.<sup>62</sup>

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60 Similarly, each justice had written separately the previous Term in *New York Times Co. v. United States*, 403 U.S. 713 (1971). Blackmun's opinion in that case was the briefest of the nine; he also joined Harlan's dissent.

61 410 U.S. 113 (1973).

62 Blackmun's votes in two non-capital Eighth Amendment cases decided

Third, even had the statutes challenged in *Furman* survived, there is nothing in his opinion to suggest that Blackmun would become intensely interested in *how* states administered the death penalty. He not only refused to align himself with the per se views of Brennan and Marshall, but declined to join the more fact-based and procedurally focused opinions of Douglas, Stewart, and White. The latter two justices, in particular, left the impression that the death penalty *could* be constitutionally applied.

Immediate assessments of *Furman's* significance varied from columnist Tom Wicker's prediction of "a flurry of state laws" to Legal Defense Fund head Jack Greenberg's flat declaration, "[t]here will no longer be any more capital punishment in the United States."<sup>63</sup> Prompt passage of new death penalty statutes in most states and the Court's next round of capital punishment decisions proved Wicker right.

#### B. *Gregg v. Georgia*<sup>64</sup> and the Fourth Burger Court

Whereas there had been only four votes in *Furman* to sustain the death penalty statutes, seven justices voted in 1976 to uphold in principle the revised capital sentencing schemes for murder in cases from Georgia, Florida, and Texas.<sup>65</sup> In *Gregg v. Georgia*, for instance, in place of the unbridled discretion particularly troubling to Stewart and White were the following requirements: (1) bifurcation of guilt and penalty phases of trial, (2) finding at least one of ten aggravating circumstances before death could be imposed, and (3) automatic review by the state supreme court to ensure proper application of the statute. Justice Stevens had by this time taken Douglas's place on the bench. Only Brennan and Marshall dissented, asserting again their categorical Eighth Amendment objection to capital punishment.

Aside from his vote to uphold the Georgia statute in *Gregg*, Blackmun had nothing new to say; he merely referred to his dissenting opinion in *Furman*. If his thinking about Eighth Amendment limitations had changed since 1972, he supplied no

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after *Furman* are consistent with this explanation. See *Hutto v. Davis*, 454 U.S. 370 (1982); *Rummel v. Estelle*, 445 U.S. 263 (1980).

63 MELTSNER, *supra* note 3, at 291.

64 *Gregg v. Georgia*, 428 U.S. 153 (1976).

65 *Id.*, 428 U.S. 153 (1976); *Proffitt v. Florida*, 428 U.S. 242 (1976); *Jurek v. Texas*, 428 U.S. 262 (1976).

clue in *Gregg*. He did not even comment on the constitutional merits of the new sentencing procedures.

Just as discretion had been the temporary downfall of capital punishment in *Furman*, its absence could be fatal as well. On the same day the Court upheld the sentencing schemes of Georgia, Florida, and Texas, a narrower majority (five instead of seven) struck down provisions for mandatory death sentences in first-degree murder cases coming from North Carolina and Louisiana.<sup>66</sup> Blackmun predicted passage of such legislation in 1972.<sup>67</sup> Nonetheless, he now voted to uphold their constitutionality, signaling that the legislature had chosen legitimately, if unwisely.

*Furman* when combined with the five death penalty cases the Court decided late in the 1975-1976 Term guaranteed continued judicial entanglement with capital punishment. There was the Scylla of too much discretion (as condemned in *Furman*) and the Charybdis of none or too little (as condemned in the mandatory-sentence cases). As further litigation drew the dimensions of the middle ground that remained, the Court would determine the future of the death penalty in the United States.

Of the eleven death penalty cases<sup>68</sup> the Supreme Court decided during the rest of the fourth Burger Court, five are useful in understanding the evolution of Blackmun's Eighth Amendment thinking. In *Roberts v. Louisiana*,<sup>69</sup> he tenaciously defended the authority of legislatures to fix mandatory sentences in some circumscribed instances. *Roberts* also marks the first opinion as a Supreme Court justice in which Blackmun delved into the facts of a capital case.

Louisiana's first-degree murder statute invalidated in the previous Term provided for a mandatory death sentence if the killer had a specific intent to kill or to inflict great bodily harm and was engaged in the perpetration or attempted perpetration

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66 *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Roberts v. Louisiana*, 428 U.S. 325 (1976).

67 *Furman*, 408 U.S. at 413 (predicting the reenactment of "regressive" legislation that eliminates "mercy").

68 *Estelle v. Smith*, 451 U.S. 454 (1981); *Bullington v. Missouri*, 451 U.S. 430 (1981); *Godfrey v. Georgia*, 446 U.S. 420 (1980); *Green v. Georgia*, 442 U.S. 95 (1979); *Presnell v. Georgia*, 439 U.S. 14 (1978); *Bell v. Ohio*, 438 U.S. 637 (1978); *Lockett v. Ohio*, 438 U.S. 586 (1978); *Roberts v. Louisiana*, 431 U.S. 633 (1977) (petitioner Harry Roberts); *Coker v. Georgia*, 433 U.S. 584 (1977); *Dobbert v. Florida*, 432 U.S. 282 (1977); *Davis v. Georgia*, 429 U.S. 122 (1976).

69 431 U.S. 633 (1977).

of aggravated kidnapping, aggravated rape, or armed robbery.<sup>70</sup> Now the Court confronted section two of the same statute, which mandated death when the victim was a fire fighter or peace officer engaged in official duties. The Court divided, as it had on section one, with Burger, Blackmun, Powell, and Rehnquist voting to affirm the sentence. Blackmun refused to accept the majority's decision that the earlier holding on section one controlled section two. Nor did he regard the Court's summary action, favorable to the claimant in *Washington v. Louisiana*,<sup>71</sup> as dispositive even though it involved the same statutory section. "I would simply inquire, as to Washington, whether its holding should not be overruled, now that the Court has had the benefit of more careful and complete consideration of the issue."<sup>72</sup> According to Blackmun section two:

[F]alls within that narrow category of homicide for which a mandatory death sentence is constitutional.

. . . [I]t is evident . . . 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.<sup>73</sup>

Blackmun did not explain why consideration of mitigation is not required in every case, but one may surmise from his *Furman* dissent that mitigation was simply not addressed by the Eighth Amendment.

Blackmun did not write an opinion in *Coker v. Georgia*,<sup>74</sup> the second of the five cases. However, his position in *Coker* was probably indicative of the significant step he would take in the following two cases. *Coker* remains well-known not only because the majority of seven justices, including Blackmun, invalidated Georgia's death-for-rape statute but also because it was the first death penalty law the Court struck down on grounds of Eighth Amendment proportionality.<sup>75</sup>

In *Furman*, Blackmun acknowledged the evolutionary character of the Eighth Amendment, though he may have held a consensus notion<sup>76</sup> of the amendment's limitations. In 1963,

70 *Roberts*, 428 U.S. at 327.

71 428 U.S. 906 (1976).

72 *Roberts*, 431 U.S. at 640-41.

73 *Id.* at 641.

74 433 U.S. 584 (1977).

75 *Id.* at 592.

76 See *supra* notes 54, 56, 57, and accompanying text.

thirty-three states no longer allowed death as a punishment for rape.<sup>77</sup> By 1977, only Georgia still allowed death for rape, even though it was imposed in only about ten percent of the rape convictions. Georgia exceeded the deference Blackmun accorded the legislature in a situation well short of the jay-walking example he had tendered to the Senate in 1970.<sup>78</sup>

Near the end of the 1977-78 Term, Blackmun again sided with the majority in overturning the death penalty in *Lockett v. Ohio*<sup>79</sup> and *Bell v. Ohio*.<sup>80</sup> The cases involved felony murder convictions and presented similar questions. The plurality ruled that the Ohio statute was infirm because it limited the range of mitigating circumstances that the sentencer could consider. Blackmun justified his concurrence in each case because, where one "only aided and abetted a murder," the sentencer could not consider "the extent of her involvement, or the degree of her *mens rea*, in the commission of the homicide."<sup>81</sup>

He realized that his position in *Coker* and the Ohio cases placed him at odds with the hands-off approach he articulated in *Furman*:

Though 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*, 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

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While the meaning of "cruel and unusual" would change over time, legislatures—not courts—would first reflect that change. Instead, courts would follow the movement of opinion reflected by the policies allowed in most states. Corrective action by the Supreme Court would be left for those few states out of step from the rest.

77 *Rudolph v. Alabama*, 375 U.S. 889, 889 n.1 (1963) (Goldberg, J., dissenting to denial of certiorari).

78 See *supra* notes 36, 37 and accompanying text for Blackmun's reply to Senator Fong at his confirmation hearings. Burger and Rehnquist dissented in *Coker*; Powell concurred only in the judgment, believing that there might be some situations where death would be a constitutionally permissible punishment for rape.

79 438 U.S. 586 (1978).

80 438 U.S. 637 (1978).

81 *Lockett*, 438 U.S. at 613. In his opinion in *Lockett*, Blackmun noted a second statutory flaw not reached by the plurality: under Ohio's rules of criminal procedure, a defendant pleading guilty or no contest was more likely to avoid the death penalty than one standing trial. Blackmun concluded that this discrimination was barred by *United States v. Jackson*, 390 U.S. 570 (1968).

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.<sup>82</sup>

If Blackmun was now willing to curb legislative discretion when there had been no "deliberate taking of human life," would he nonetheless continue to distinguish judicial intervention in other life-taking situations?

Within two years, he silently answered in the negative. The occasion was *Godfrey v. Georgia*,<sup>83</sup> when the Court revisited the statute facially upheld in *Gregg*. Georgia allowed a death sentence upon a finding beyond a reasonable doubt that the murder was "outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim."<sup>84</sup> Godfrey's argument was that the statutory provision lacked essential standards, and thus left too much discretion with the sentencer. A plurality, including Blackmun, agreed.<sup>85</sup>

In some cases, the state supreme court had required that "torture" be construed as an element of "aggravated battery," meaning that there had to be evidence of serious physical abuse of the victim before death. At Godfrey's trial, however, the statute had not been so limited. Moreover, there was nothing in the record to indicate that Godfrey's crimes (he had shot and instantly killed his wife and mother-in-law) reflected a consciousness more "depraved" than that of anyone else who committed murder.<sup>86</sup> The result was arbitrary; there was no principled basis upon which to separate murderers who deserved death for those who did not.<sup>87</sup>

Blackmun's position in *Godfrey*, however, was not typical of

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82 *Id.* at 616 (emphasis in the original; citations omitted).

83 446 U.S. 420 (1980).

84 *Id.* at 422.

85 The division in the case was six to three, with Burger, White, and Rehnquist dissenting. Because Brennan and Marshall held to their view that the death penalty was unconstitutional in all circumstances, there was only a plurality opinion, representing the views of the remaining four justices in the majority. Plurality opinions in capital cases were therefore common where the question was the death penalty itself and where the majority favoring the claimant included no more than six justices.

86 *Id.* at 425-26.

87 *Id.* at 427-28.

his voting behavior in death penalty cases during the six Terms of the fourth Burger Court. In the four capital cases where the principal issue lay outside the Eighth Amendment, Blackmun sided with the claimant in each one. Where the principal issue involved the Eighth Amendment, by contrast, he voted for the claimant in only five of 13 opportunities. Overall, he remained significantly less disposed than the majority of the bench to reverse capital cases.

## VI. BLACKMUN'S SECOND DECADE

### A. *The Last Burger Court*

Challenges to capital sentences increasingly occupied the Court's agenda after Justice Stewart's retirement and Justice O'Connor's arrival in 1981. Whereas there were barely three death penalty cases on average per Term during fourth Burger Court, the average number in the last Burger Court doubled to six per year, for a total of thirty. For the first time, Blackmun voted for the claimant in death penalty cases more frequently than did a majority of the bench. Indeed, he did so nearly twice as often. This pattern persisted: in every Term after 1985-86, Blackmun's support for the capital claimant surpassed the majority's.

Among the subset of capital cases decided mainly on Eighth Amendment grounds, his support for claimants during 1981 to 1986 remained thirty-nine percent. Nonetheless, the majority's support in this subset declined sharply, from sixty-two percent during 1975 to 1981 down to twenty-eight percent during 1982 to 1986. Among the thirteen "definitional" Eighth Amendment cases—those not excessively fact-bound and those likely to be influential in shaping the Eighth Amendment—Blackmun supported the claimant on seven occasions for fifty-four percent support. These numbers and Blackmun's published opinions suggest Blackmun's continued tolerance of variations in state sentencing schemes but a growing intolerance of departures from safeguards that were part of the Eighth Amendment's core. It was also during the last Burger Court that Blackmun, while not denying states the authority to impose the death penalty, began to display skepticism over the fairness of its administration.<sup>88</sup> These themes emerge from four opinions

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88 Until the 1985-86 Term, Blackmun could alternately appear strict and lenient in capital cases. For example, in *Barclay v. Florida*, 463 U.S. 939 (1983), he

he filed: two for the Court and two in dissent.

In *Spaziano v. Florida*<sup>89</sup> and *Baldwin v. Alabama*,<sup>90</sup> condemned persons challenged sentencing procedures at variance with those practiced in most states. Blackmun wrote for the majority upholding the procedures in both cases, over the dissenting votes of Brennan, Marshall, and Stevens.

In *Spaziano*, Florida law regarded the jury's sentence in a capital case as advisory only. The trial judge made an independent balancing of the aggravating and mitigating circumstances to determine the proper punishment.<sup>91</sup> If the judge chose death, the law also required explanation in writing. At Spaziano's trial, the jury recommended life imprisonment, but the judge imposed death. Spaziano argued that only the jury could impose the ultimate penalty. "The Sixth Amendment never has been thought to guarantee a right to a jury determination of that issue [jury determination of the death sentence]," Blackmun replied.<sup>92</sup>

Acknowledging that only two other states, Alabama and Indiana, allowed a judge to override a jury's recommendation of life imprisonment, Blackmun was "unwilling to say that there is any one right way for a State to set up its capital sentencing scheme."<sup>93</sup> The identity of the sentencer was not essential. What was essential was a system "that can rationally distinguish between those individuals for whom death is an appropriate sanction and those for whom it is not . . . . [The system] must also allow the sentencer to consider the individual circumstances of the defendant, his background, and his crime."<sup>94</sup> With proper safeguards these determinations could be made by a judge as well as by a jury. "We see nothing that suggests that the application of the jury-override procedure has

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dissented when the majority excused as harmless error the trial judge's consideration of the defendant's criminal record as an aggravating circumstance even though that was improper under state law. "The end does not justify the means even in what may be deemed to be a 'deserving' capital punishment situation," he wrote. *Id.* at 991. Yet in the following term he joined a seven-justice per curiam opinion which upheld a death sentence even though the judge relied on a factor (future dangerousness) unavailable to the sentencer under state law. *Wainwright v. Goode*, 464 U.S. 78 (1983).

89 468 U.S. 447 (1984).

90 472 U.S. 372 (1985).

91 *Spaziano*, 468 U.S. at 451-52.

92 *Id.* at 459.

93 *Id.* at 464.

94 *Id.* at 460.

resulted in arbitrary or discriminatory application of the death penalty, either in general or in this particular case."<sup>95</sup> Indeed, Blackmun was "satisfied" that the Florida Supreme Court took its reviewing responsibility "seriously and has not hesitated to reverse a trial court if it derogates the jury's role."<sup>96</sup>

In the *Baldwin* case, an Alabama court had condemned Brian Baldwin to death under a 1975 statute (repealed in 1981), which arguably muddled the responsibilities of a judge and jury. Once a jury found a defendant guilty of one of certain offenses "with aggravation," the statute directed the jury to "fix the punishment at death." That "fixing," however, was not dispositive. The trial judge then heard evidence of aggravating and mitigating factors and sentenced the defendant to death or to life imprisonment without parole.<sup>97</sup>

Were the jury's sentence the actual sentence, the scheme admittedly would violate the Eighth Amendment because of the absence of discretion. But what was the status of the jury's sentence? Was it a recommendation? What was the trial judge's role? Was the judge to sit in review of the jury decision? Was the judge to consider the jury's conclusion in arriving at the "final" sentence? Although Alabama's scheme was "peculiar and unusual," even unique among states with death penalties, and although its "wisdom and phraseology [were] surely open to question," these deficiencies proved inconsequential to the Court.<sup>98</sup>

The majority rejected the dissenting view that Alabama had unduly complicated the sentencing judge's task with confusing signals and irrelevant pressures. It was as if the jury was handing the judge merely one group's opinion. The judge was the actual sentencer. The statute was silent as to the weight the judge was to give the jury decision, and the Court was apparently impressed by the controlling interpretation; the Alabama appellate courts directed the sentencing judge "to impose a sentence without regard to the jury's mandatory 'sentence.'"<sup>99</sup> Moreover, the judge in this case did not cite the jury's view as one of the factors leading him to condemn

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95 *Id.* at 466.

96 *Id.* at 465.

97 *Baldwin v. Alabama*, 472 U.S. 372, 373-74 (1985).

98 *Id.* at 389.

99 *Id.* at 383-84. The Court declined to consider the validity of a scheme in which the judge did consider the jury's sentence as a factor in deciding to impose the death penalty. *Id.* at 386 n.8.

Baldwin to death. Blackmun noted in this majority opinion that:

The judge, of course, knew the Alabama system and all that it signified, knew that the jury's "sentence" was mandatory, and knew that it did not reflect consideration of any mitigating circumstance. The judge, logically, therefore, would not have thought that he owed any deference to the jury's "sentence" on the issue whether the death penalty was appropriate for petitioner.<sup>100</sup>

Both *Baldwin* and *Spaziano* allowed Blackmun to express his traditional deference to legislatures in Eighth Amendment matters. While the Alabama and Florida schemes fell outside the "consensus," neither struck Blackmun as being patently unfair. Even the arguably mandatory tilt of the Alabama statute was far less obvious than the North Carolina and Louisiana laws that he found constitutionally acceptable in the wake of *Gregg*.<sup>101</sup> Yet, when he perceived unfairness or a clear violation of Eighth Amendment precedent, deference vanished.

In the 1985-86 Term, Blackmun filed dissents in *Cabana v. Bullock*<sup>102</sup> and *Darden v. Wainwright*.<sup>103</sup> The decision in *Cabana* turned on an application of *Enmund v. Florida*,<sup>104</sup> which devised a "bright-line" rule for felony murder cases. In *Enmund*, five justices, including Blackmun, declared that the Eighth Amendment barred the death penalty for a participant in a felony murder who did not kill, attempt to kill, or intend to kill,<sup>105</sup> thus clarifying a point that had been obscured in *Lockett*.

In *Bullock*, a Mississippi court sentenced the petitioner to death for aiding and abetting a murder but did not make the required *Enmund* findings. The state supreme court's review of

100 *Id.* at 385-386.

101 By the time *Baldwin* was decided, O'Connor had replaced Stewart, and in *Baldwin* she took a position at odds with his vote in *Woodson v. North Carolina*, 428 U.S. 280 (1976). Otherwise, the justices in *Baldwin* were consistent with their positions in *Woodson*, except for Powell who was part of the majority in both.

102 474 U.S. 376, 394 (1985) (Blackmun, J., dissenting).

103 477 U.S. 168, 188 (1986) (Blackmun, J., dissenting).

104 458 U.S. 782 (1982).

105 Justice White, who wrote the majority opinion in *Enmund*, had already suggested this rule in a separate opinion in *Lockett v. Ohio*, 438 U.S. 586, 613 (1978). Blackmun's opinion in *Lockett* took issue with White, finding it unnecessary in every instance to require the presence of "actual intent" to kill. *Id.* at 614 n.2. By the time *Enmund* came down, Blackmun had apparently dropped the objections he had expressed in *Lockett*.

the conviction was likewise deficient. On these points, the Court agreed, but the justices parted company on how the constitutional violation might be cured. For the majority, "any court that has the power to find the facts and vacate the sentence" was in a position to satisfy *Enmund*.<sup>106</sup> For Blackmun in dissent, this was not enough: "only a new sentencing proceeding before a jury can guarantee the reliability which the Constitution demands."<sup>107</sup> Anything less, according to Blackmun, would weaken the protection *Enmund* imposed:

*Enmund* established a clear constitutional imperative that a death sentence not be imposed by a sentencer who fails to make one of the *Enmund* findings. The Court confuses this imperative with the guarantee it purports to make today that a death sentence will not be carried out before someone makes an *Enmund* finding.<sup>108</sup>

The majority was prepared to accept an appellate court's finding of intent to kill in place of such a finding by the trial court. Blackmun thought the former was not the equivalent of the latter: a jury's first hand view of witness credibility was fundamentally different from an appellate court's reading and interpretation of a trial transcript. Only a trial court could make the initial assessment of Bullock's "personal responsibility and moral guilt before deciding to send him to die."<sup>109</sup> Of course, *Spaziano* could be read as judicial unwillingness to dictate sentencing procedures to the states, but Blackmun countered that the majority had gone too far. "That we have refused 'to say that there is any one right way for a State to set up its capital sentencing scheme,' does not mean that there are no wrong ways."<sup>110</sup> Rather, "it is far better . . . to establish a bright-line rule requiring the findings to be made by the trial court, especially since the Court has failed to identify a single reason why a State legitimately could prefer to vest the fact-finding function in an appellate court."<sup>111</sup> There is no deference here: the burden rested on the state to justify a procedure, rather than on the claimant to overcome a presumption of constitutionality.

Later in the same Term, Blackmun's dissent in *Darden v.*

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106 *Bullock*, 474 U.S. at 386.

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

108 *Id.* at 397-98 (emphasis in the original).

109 *Id.* at 407.

110 *Id.* at 402 (citation omitted).

111 *Id.* at 406-07 n.4.

*Wainwright* accused the five-justice majority of departing from the Eighth Amendment principle that there must be "a heightened degree of reliability in any case where a State seeks to take the defendant's life."<sup>112</sup> For Blackmun, the record contained two flaws that demanded that the death penalty be vacated: prosecutorial misconduct and exclusion of a member of the venire in violation of *Witherspoon*. On the first point, the Court was "willing to tolerate not only imperfection but a level of fairness and reliability so low it should make conscientious prosecutors cringe."<sup>113</sup>

On the second point, the Court had disregarded its holding in *Davis v. Georgia*<sup>114</sup> in which the "improper exclusion of one juror renders a death sentence constitutionally infirm per se."<sup>115</sup> In *Darden*, "the potential prejudice is palpable. Even though it was stripped of members expressing reservations about the death penalty, this jury could not agree unanimously that a death sentence was appropriate."<sup>116</sup>

Blackmun's dissents in *Darden* and *Bullock* suggest heightened awareness and little hesitation when reviewing capital sentencing. His position in *Darden* 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"<sup>117</sup> was far from his deference in *Furman* and his defensiveness in *Lockett*. By the end of the Burger Court, Blackmun seemed both surprised and frustrated over indifference he perceived when lives were at stake.

### B. *The Memorandum Cases*

Blackmun's shift during the last Burger Court is also evidenced by his behavior in some memorandum cases in which the Court denied certiorari. In recent years, the Court has coped with the increasing number of petitions for certiorari in all categories through the use of a "discuss list" to determine which petitions would be discussed at conference. From among

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112 *Darden*, 477 U.S. at 188-89 (Blackmun, J., dissenting).

113 *Id.* at 189.

114 429 U.S. 122 (1976). Ironically, Blackmun had joined the dissent. *Id.* at 123-24 (Rehnquist, J., dissenting).

115 *Darden*, 477 U.S. at 200-01 (Blackmun, J., dissenting) (citing *Davis*).

116 *Id.* at 201.

117 *Id.* at 206.

eligible cases, the Chief Justice circulates a list in advance of the conference containing those cases he wishes to be considered. Any associate justice is free to add cases to the list for discussion. If a case does not appear on the list, review is automatically denied.<sup>118</sup>

As claimants challenged their death sentences after *Gregg*, Justices Brennan and Marshall routinely appended a brief dissent when the Court denied certiorari: "Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, we would vacate the death sentence in this case."<sup>119</sup> Sometimes they would publish an extended dissent, often several pages long, highlighting aspects of the case that merited a grant of certiorari.

It is reasonable to suppose that the capital cases the Court refused to review were on the discuss list. The points made in the extended dissent were probably the "talking points" at the conference.<sup>120</sup> Indeed, interviews of some justices and clerks conducted by H. W. Perry, Jr., revealed that, at least for the years 1976-1980, every capital case was on the discuss list.<sup>121</sup> In other words, Court policy deemed no capital case "frivolous," even though the Court denied review to most of them. The cases with extended dissents were probably those discussed at greatest length during the 1980s and into the 1990s.

As Table 2 shows, Brennan and Marshall dissented alone in most of these extended memorandum opinions. Nevertheless, Blackmun or another justice, most frequently Stevens, would sometimes join in that part of the dissent which explored questions other than the per se Eighth Amendment objection.<sup>122</sup>

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118 Use of the discuss list has been widely known for some time. See, e.g., ALPHEUS T. MASON ET AL., *AMERICAN CONSTITUTIONAL LAW* 22 (7th ed. 1983).

119 E.g., *Woodkins v. Texas*, 431 U.S. 960 (1977) (Brennan, J. and Marshall, J., dissenting) (citations omitted).

120 It would have made little sense to explain in dissent one or more reasons why the Court should have granted certiorari if those reasons had not already been mentioned in conference.

121 A pink sticker was affixed to all certiorari petitions in capital cases. H. W. PERRY, JR., *DECIDING TO DECIDE* 92-94 (1991).

122 On denials of a stay of execution, which were also the subject of some memorandum cases, both Blackmun and Stevens could join Brennan and Marshall with no effect on the case since the four would be a minority of the bench. Most of the memorandum cases containing the extended dissents, however, involved an unsuccessful petition for certiorari by a condemned claimant; a vote by Blackmun and Stevens to join Brennan and Marshall in such a situation would of course have produced a successful petition for certiorari.

Of course the fact that Blackmun joined such a dissent to the denial of certiorari does not mean that, had the Court granted review, he necessarily would have voted for the claimant. It does strongly suggest, however, that Blackmun was not only aware of the nature of the petitioner's claim but thought that the issue was important enough to warrant plenary consideration. That he joined Brennan and Marshall at least twenty-three percent of the time after the 1984-85 Term also suggests that Blackmun had begun to follow questions arising in capital cases more closely and that he would allocate an ever greater amount of the Court's calendar to death penalty issues.<sup>123</sup>

Table 2  
MEMORANDUM CASES INVOLVING THE DEATH  
PENALTY CONTAINING AN EXTENDED DISSSENT BY  
BRENNAN AND MARSHALL

Term	Brennan & Marshall Only*	Including Blackmun
1976-1981	09	1 (11%)
1981-19825	05	1 (20%)
1982-1983	13	0 (0%)
1983-1984	22	2 (9%)
1984-1985	36	6 (17%)
1985-1986	29	9 (31%)
1986-1987	22	6 (27%)
1987-1988	22	5 (23%)
1988-1989	25	6 (24%)
1989-1990	19	6 (32%)
1990-1991	15	6 (40%)
1991-1992	05	4 (80%)

\* Brennan retired at the end of the 1989-90 Term. The data for 1990-91 reflect a dissent by Marshall only. Since Marshall retired in the summer of 1991, data in the middle column for 1991-92 include an extended dissent by neither Brennan nor Marshall but by a member of the Court other than Blackmun.

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<sup>123</sup> Table 2 also includes data from the 1990-91 Term, after Brennan's retirement, and from the 1991-92 Term, after Marshall's retirement. As a measure of their influence, note the decline in number of extended dissents in memorandum death penalty cases in 1991-92.

### C. *The First Rehnquist Court*

Bounded by Chief Justice Burger's retirement, Justice Rehnquist's move to the center chair, and Judge Antonin Scalia's arrival, all in mid-1986, and Justice Powell's retirement in mid-1987, the first Rehnquist Court lasted only a single Term. In this Term nine of the principal opinions announced by the Court involved the death penalty, with seven based primarily on Eighth Amendment grounds. Blackmun voted for the claimant in each one of the nine decisions. Furthermore, on three occasions, Blackmun articulated positions which represented significant shifts in his views.<sup>124</sup>

In *McCleskey v. Kemp*,<sup>125</sup> the Court engaged the issue Blackmun had faced squarely almost two decades before as a circuit court judge in the Maxwell cases: racially discriminatory application of the death penalty. On that previous occasion, he voted to leave the death penalty in place. In *McCleskey*, he cast one of the four dissenting votes to set it aside.<sup>126</sup> Why were arguments, unpersuasive in 1968, now so convincing? Blackmun offered one explanation in his opinion, a second basis implicitly emerged from the reasoning in *McCleskey*, and experience suggested a third possibility.

Recall the difficulty Blackmun had with *Maxwell II*.<sup>127</sup> Consider the novelty of the issue: had his panel accepted Maxwell's statistical claim, the case would have achieved landmark status almost instantly.<sup>128</sup> Moreover, the Wolfgang data

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124 There was possibly a fourth occasion as well. Blackmun was among the five justices, in *Booth v. Maryland*, 482 U.S. 496 (1987), who held the introduction of victim impact statements was not admissible in a capital trial. *Booth's* per se bar to such statements was later overruled in *Payne v. Tennessee*, 111 S. Ct. 2597 (1991), in which Blackmun was one of three dissenters. Yet his dissent in *Furman* in 1972 included a long paragraph on the widespread harm done by murderers, in which he decried "the misery the petitioners' crimes occasioned to the victims, to the families of the victims, and to the communities where the offenses took place. . . ." 408 U.S. at 413-14. Introduction of victim impact statements was not at issue in *Furman*. Nevertheless, by discussing the subject, Blackmun may have thought that such considerations could legitimately matter.

125 481 U.S. 279 (1987).

126 It is unclear what would have remained of the death penalty in Georgia, had *McCleskey* secured a fifth vote. See *id.* at 365-66 (Blackmun, J., dissenting); *id.* at 367 (Stevens, J., dissenting).

127 *Maxwell v. Bishop*, 398 F.2d 138 (8th Cir. 1968). Of the two Maxwell cases, the statistical argument was stronger in the second.

128 Such a ruling would not have been called the handiwork of a "strict constructionist" and would probably have kept Blackmun off Nixon's list of acceptable nominees for the Supreme Court two years later. However, this is a comment on

were limited in scope and included no entries from the county where Maxwell was tried. Blackmun saw nothing to convince him that unconstitutional discrimination occurred in Maxwell's trial, disregarding the role racial discrimination may have played elsewhere in the Arkansas criminal justice system. He was not willing to infer discriminatory action in a single instance occurring at one locale from a racially discriminatory pattern in other locales within the same state.

In contrast, Blackmun found the Baldus study,<sup>129</sup> which lay at the heart of McCleskey's case, both impressive and compelling.<sup>130</sup> First, more than the Wolfgang data, the Baldus study looked at the race not only of the condemned person but also of the victim. White-victim cases were far more likely than black-victim cases to yield a death penalty, and within the former group, black defendants were far more likely to be sentenced to death than white defendants. Second, the data were recent (1973-78) and included ample cases from Fulton County where the crime and McCleskey's trial occurred. Third, according to Blackmun, the Baldus study showed a high level of sophistication and detail and considered more than 400 variables.<sup>131</sup> He was correct: the level of statistical analysis, especially in the use of multiple regression, far exceeded anything he had seen in the second Maxwell case.

The Baldus study also impressed Blackmun because of the Court's very recent decision in *Batson v. Kentucky*.<sup>132</sup> The majority's vote in *Batson* made it much easier to prove that a prosecutor had used racially-based, and hence unconstitutional, peremptory challenges in criminal trials. Since *Batson* focused on the effects of racially discriminatory prosecutor behavior before a jury was ever impaneled, it was not a big leap to consider prosecutorial discretion at points in a murder trial before

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the political reality of the situation when viewed after the fact. It does not suggest that Blackmun's action in the Maxwell cases was calculating. In fact, Blackmun seemed to resent being characterized as a Nixon conservative. ABRAHAM, *supra* note 31, at 309.

As it was, Blackmun was the only member of the Court in 1987 who had published an opinion grappling with a racial discrimination challenge to the death penalty.

129 DAVID C. BALDUS ET AL., *Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience*, 74 J. CRIM. L. & CRIMINOLOGY 661 (1983).

130 *McCleskey*, 481 U.S. at 354 n.7.

131 *Id.*

132 476 U.S. 79 (1986). Blackmun voted with the majority to allow prima facie proof of racial motivation in peremptory challenges in jury selection.

a case moved to the penalty phase, or before it even moved to trial. The prosecutor would have to bring charges of first-degree murder and would have to ask for the death penalty before a jury could even deliberate the question. As Blackmun explained:

I concentrate on the decisions within the prosecutor's office through which the State decided to seek the death penalty and, in particular, the point at which the State proceeded to the penalty phase after conviction. This is a step at which the evidence of the effect of the racial factors was especially strong . . . .<sup>133</sup>

The discriminating effects of prosecutorial discretion that *Batson* had highlighted thus made the evidence of racial discrimination in *McCleskey* all the more believable. Reflection on prosecutorial discretion in the earlier case had apparently made Blackmun more aware of other stages in the criminal justice process that could also be corrupted by racial prejudice.

*Batson* was important in a second way as well; Powell's majority opinion had said that "a defendant may make a prima facie showing of purposeful racial discrimination in selection of the venire by relying solely on the facts concerning its selection in his case."<sup>134</sup> There did not have to be a consistent pattern of official racial discrimination to find a violation of the equal protection clause. *Batson* thus overruled *Swain v. Alabama*,<sup>135</sup> in which the Court refused to probe prosecutorial motivation in an isolated case—a constitutional violation required a pattern of race-based challenges in "case after case . . . ."<sup>136</sup> While acknowledging that *Batson* was different, Blackmun also found it pertinent. "The irony is that *McCleskey* presented proof in this case that would have satisfied the more burdensome standard of *Swain* . . . , a standard that was described in *Batson* as having placed on defendants a 'crippling burden of proof.'<sup>137</sup> Since *Batson* did not exclude reliance on a pattern of discriminatory challenges, saying only that such a pattern was not a necessary condition, Blackmun seized on the pattern of discrimination apparent in the Baldus data as a

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133 *McCleskey*, 481 U.S. at 351.

134 *Batson*, 476 U.S. at 95 (emphasis in the original).

135 380 U.S. 202 (1965).

136 *Id.* at 223.

137 *McCleskey*, 481 U.S. at 364.

substitute for the absence of proof of purposeful discrimination in *McCleskey's* case alone.

*Batson* was different not merely because it involved peremptory challenges but because the majority deemed the data from the venire selection in the defendant's own case sufficient for a prima facie showing of purposeful discrimination. In other words, the series of peremptory challenges in a single case could make a pattern. This possibility was precisely what was lacking in *McCleskey's* argument—in the nature of prosecutorial discretion, no single case could constitute a pattern. There are perhaps two or three critical decisions the prosecutor makes that could result in the jury's reaching the death penalty. To find discrimination, one would have to infer it from other cases.

The difference was now decisive: for Powell's majority opinion in *McCleskey*, the petitioner had not shown racial discrimination *in his isolated case*. This was dispositive for Blackmun in 1968. It was not in 1987. For Blackmun, an individualized showing was now unnecessary; it placed the burden of proof too high. "Judicial scrutiny is particularly appropriate in *McCleskey's* case because '[m]ore subtle, less consciously held racial attitudes could also influence' the decisions in the Georgia capital sentencing system."<sup>138</sup>

A third factor might also account for Blackmun's vote in *McCleskey*: he was now an associate justice on the Supreme Court. It is one thing to stake out new ground as a circuit court judge; it is another thing to do so as a member of the highest court in the land, especially given the presence of Brennan, Marshall, and Stevens who were also convinced that the Baldus data pointed to equal protection and Eighth Amendment violations.

In contrast to *McCleskey*, Blackmun provided a fifth vote and the majority opinion in *Gray v. Mississippi*<sup>139</sup> to overturn a death sentence. *Gray* offered a chance for the Court to reconsider *Davis v. Georgia*.<sup>140</sup> In *Davis*, Blackmun, along with Burger, joined Rehnquist's dissent asking for plenary consideration, while not fully embracing harmless error analysis for

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138 *Id.* (quoting *Turner v. Murray*, 476 U.S. 28, 35 (1986)).

139 481 U.S. 648 (1987).

140 429 U.S. 122 (1976) (vacating a death sentence by summarily holding a trial court misapplied *Witherspoon* by excluding from a capital jury a prospective juror who under *Witherspoon* would be qualified to serve).

*Witherspoon* mistakes. Should there be a per se rule requiring vacation of the death sentence as *Davis* had held? Of the seven justices sitting in 1987 who had also taken part in *Davis*, only Blackmun's vote changed. As it had in *McCleskey*, prosecutorial discretion weighed heavily in Blackmun's opinion, probably accounting for the resolution of doubt that the shift in his vote reflected. In declining now to depart from the *Davis* majority holding, he noted one of the "real-world factors that render inappropriate" application of harmless-error analysis to violations of *Witherspoon*:

[T]he State exercised its peremptory challenges to remove all venire members who expressed any degree of hesitation against the death penalty. Because courts do not generally review the prosecution's reasons for exercising peremptory challenges, and because it appears that prosecutors often use peremptory challenges in this manner, a court cannot say with confidence that an erroneous exclusion for cause of a scrupled, yet eligible, venire member is an isolated incident in that particular case. Therefore, we cannot say that courts may treat such an error as an isolated incident having no prejudicial effect.<sup>141</sup>

Thus, it was not the absence of the single improperly excluded venire member alone that threatened jury integrity. Rather, it was the probability that such an instance suggested other erroneous, but undetected, exclusions.

In the same Term, the Court also revisited mandatory capital sentencing. In 1975, a Nevada court condemned Raymond Shuman to death under a statute which specified the death penalty for murder committed by a prisoner serving a life sentence without possibility of parole.<sup>142</sup> After the Court's pair of five to four mandatory sentence rulings in *Woodson* and *Roberts* in 1976, the legislature repealed the statute. The question now facing the Court was not whether the 1976 rulings should stand but whether Nevada's narrow exception to guided-discretion sentencing could survive. Recall that Blackmun had dissented in both of the 1976 mandatory sentence decisions, and in the following Term he filed a dissent to the Court's decision to strike down a mandatory capital sentence in the killing of a peace officer.<sup>143</sup> Now, however, he wrote for a majority of

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141 *Gray*, 481 U.S. at 667-68 (footnotes omitted).

142 *Shuman v. State*, 578 P.2d 1183 (Nev. 1978).

143 *Roberts v. Louisiana*, 431 U.S. 633, 641 (1977) (defendant Harry Roberts,

six that Nevada's exception and hence Shuman's sentence were invalid.<sup>144</sup> "The Nevada mandatory capital-sentencing statute under which Shuman was sentenced to death precluded a determination whether any relevant mitigating circumstances justified imposing on him a sentence less than death."<sup>145</sup> Knowing only that Shuman was convicted of murder, committed while in prison serving a life sentence without possibility of parole for an earlier offense, does "not provide an adequate basis on which to determine whether the death sentence is the appropriate sanction in any particular case."<sup>146</sup> There could have been other circumstances that mitigated his responsibility for his acts but that did not reach the level of a legal defense to the murder charge.<sup>147</sup>

His opinion in *Sumner* thus represents a departure from his past beliefs. Not only had the Nevada statute been less inclusive than the North Carolina and Louisiana statutes previously considered, but Blackmun was now persuaded that mitigation was an essential element in capital sentencing for any offense. "The simple fact that a particular inmate is serving a sentence of life imprisonment without possibility of parole does not contribute significantly to the profile of that person for purposes of determining whether he should be sentenced to death."<sup>148</sup> The same point would apply to one convicted of killing a peace officer or anyone else. He would not accept the legislative conclusion inherent in any mandatory sentencing statute that some offenses by their nature always outweigh any conceivable mitigating circumstance.

#### D. *The Second Rehnquist Court*

When the October 1987 Term opened, Justice Powell's seat remained vacant. The Court operated with eight justices until Anthony Kennedy was sworn in at the beginning of 1988. Between the fall of 1987 and the summer of 1990 when Justice Brennan retired, the Court issued twenty-eight principal opinions in death penalty cases; sixteen were grounded mainly in the Eighth Amendment. The average number per Term was

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distinct from the 1976 *Roberts* decision with petitioner Stanislaus Roberts).

144 *Sumner v. Shuman*, 483 U.S. 66 (1987).

145 *Id.* at 78.

146 *Id.*

147 *Id.* at 78-79.

148 *Id.* at 80.

almost identical to the number decided in 1986-87. Of the twenty-eight, Blackmun voted with the claimant in all but four. In none of those four did Blackmun's vote determine the outcome.<sup>149</sup> Moreover, Blackmun dissented on each of the seven occasions when the majority refused to consider the condemned petitioner's claim because of judicially-imposed limits on federal habeas corpus review of state court convictions.<sup>150</sup>

There were also at least four significant capital decisions during the second Rehnquist Court in which Blackmun did not publish an opinion. In two,<sup>151</sup> he provided a necessary fifth vote for the claimant, and was one of four dissenting justices in the remaining pair.<sup>152</sup> Opinions he wrote in another three cases<sup>153</sup> presented the opportunity to apply or to reconsider prior positions.

Most of the Court's Eighth Amendment opinions since *Furman* examined sentencing standards and their application. In contrast, *Thompson v. Oklahoma*<sup>154</sup> dealt with the class of persons who could constitutionally be subjected to the death

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149 See *Whitmore v. Arkansas*, 495 U.S. 149 (1990) (denying standing to a death row inmate's "next friend"); *Hildwin v. Florida*, 490 U.S. 638 (1989) (existence of a Sixth Amendment right to jury sentencing, a question already confronted in *Spaziano*); *Franklin v. Lynnaugh*, 487 U.S. 163 (1988) (adequacy of charges to the jury); *Lowenfield v. Phelps*, 484 U.S. 231 (1988) (adequacy of charges to the jury).

150 See, e.g., *Butler v. McKellar*, 494 U.S. 407 (1990), which held that the rule of *Arizona v. Roberson*, 486 U.S. 675 (1988), dealing with police interrogations, was not retroactively available to support a federal habeas corpus petition. Because *Roberson* qualified as a "new rule," the result was that the state could carry out an execution (or any other kind of sentence) if it was valid at the time it was imposed, even if it could not be imposed now because of intervening decisions by the Court. Blackmun had already expressed frustration at the manner in which the majority refused to consider the merits of claims on habeas corpus. In *Dugger v. Adams*, 489 U.S. 401 (1989), his dissenting opinion observed that "the Court today itself arbitrarily imposes procedural obstacles to thwart the vindication of what apparently is a meritorious Eighth Amendment claim." *Id.* at 412-13. Adams presented a claim under *Caldwell v. Mississippi*, 472 U.S. 320 (1985), which had disallowed a death sentence imposed by a jury led to believe by the prosecutor that the appellate court was responsible for determining the appropriateness of a death sentence, not the jury. *Caldwell* was one of the very few cases in which Marshall wrote an opinion of the Court in a capital case.

151 *Thompson v. Oklahoma*, 487 U.S. 815 (1988); *South Carolina v. Gathers*, 490 U.S. 805 (1989).

152 *Stanford v. Kentucky*, 492 U.S. 361 (1989); *Blystone v. Pennsylvania*, 494 U.S. 299 (1990).

153 *Walton v. Arizona*, 497 U.S. 639 (1990); *McKoy v. North Carolina*, 494 U.S. 433 (1990); *Mills v. Maryland*, 486 U.S. 367 (1988).

154 487 U.S. 815 (1988). Justice Kennedy did not participate in this five to three vote.

penalty. In *Thompson* Blackmun and four others concluded that the Eighth Amendment barred the execution of one who was fifteen years old at the time the homicide was committed. Yet, when the Court decided otherwise in the following Term regarding those who were sixteen or seventeen, Blackmun found himself in a minority of four.<sup>155</sup>

*South Carolina v. Gathers*<sup>156</sup> tested the limits of the Court's holding in *Booth v. Maryland*,<sup>157</sup> by disallowing the use of victim impact statements during the sentencing phase of a capital trial. At issue were comments by the prosecutor on religious tracts and a voter registration card carried by the victim. Adhering strictly to *Booth*, Blackmun joined four justices in setting aside the death sentence. In a separate concurring opinion, White, who had dissented in *Booth*, noted that the sentence had to be vacated unless *Booth* itself was to be overruled.<sup>158</sup>

*Blystone v. Pennsylvania*<sup>159</sup> illustrated how firmly Blackmun accepted the logical implication of his opinion in *Sumner* regarding mandatory sentencing and how far he had moved on this question since *Woodson*. Five justices found no constitutional defect in a Pennsylvania statute that requires the death penalty when the jury found at least one aggravating circumstance and no mitigating circumstances. Blackmun aligned himself with the dissenting view: the statute essentially removed the jury's discretion once no mitigating circumstances were present and effectively dictated a mandatory sentence.<sup>160</sup>

When Blackmun published a death penalty opinion during this period, one saw the degree of scrutiny he now routinely applied in reviewing capital sentencing. *Mills v. Maryland*<sup>161</sup> challenged a death sentence primarily on the possibility that the jury relied on an unconstitutional interpretation of state law: that the statute required the death sentence if the jury

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155 *Stanford v. Kentucky*, 492 U.S. 361 (1989). The critical vote was O'Connor's; she was part of the majority in both *Thompson* and *Stanford*.

156 490 U.S. 805 (1989).

157 482 U.S. 496 (1987).

158 *Gathers*, 490 U.S. at 812 (White, J., concurring). *But see* *Payne v. Tennessee*, 111 S. Ct. 2597 (1991) (overruling *Booth* as a per se bar after Brennan retired).

159 494 U.S. 299 (1990).

160 *Id.* at 309 (Brennan, J., dissenting).

161 486 U.S. 367 (1988).

unanimously found an aggravating circumstance but could not agree unanimously on the existence of any particular mitigating circumstance. As Blackmun explained in the opinion of the Court, "[a]ccording to petitioner's view, even if some or all of the jurors were to believe *some* mitigating circumstance or circumstances were present, unless they could unanimously agree on the existence of the *same* mitigating factor, the sentence necessarily would be death."<sup>162</sup>

Also, the interpretation of the statute relied upon by *Mills* could produce no mitigating circumstances in two ways: (1) either eleven, but not twelve, jurors could agree on the presence of a single mitigating circumstance, or (2) all twelve could agree that mitigating circumstances existed but fail to agree unanimously on any single one of them. Either variation could work absolutely to cut off consideration of mitigating factors. The Maryland Court of Appeals offered a different construction which barred the death penalty as long as one juror believed that a mitigating factor was not outweighed by an aggravating factor.<sup>163</sup> Believing, however, that the interpretation favorable to the petitioner was one that jurors reasonably could have drawn from the instructions given to them, and since there was no way to know that the jurors did not rely on the unacceptable interpretation, Blackmun and the five-justice majority felt compelled to require re-sentencing.<sup>164</sup>

The implicit assumption in *Mills* was that states could not impose a rule of unanimity on jurors for consideration of particular mitigating factors. A test of this assumption returned to the Court two Terms later in *McKoy v. North Carolina*,<sup>165</sup> in which six justices removed whatever doubt might have remained. Capital sentencing instructions which prevent the sentencing jury from considering any mitigating factor on which the jury does not unanimously agree violate the Eighth Amendment. As Blackmun elaborated in a concurring opinion, the gravamen was not the requirement that the jury unanimously find mitigating circumstances, but the *way* the unanimity rule operated—injecting arbitrariness into the process.<sup>166</sup> "The extreme control given to one juror in the North Carolina

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162 *Id.* at 371 (emphasis in the original).

163 *Id.* at 372.

164 *Id.* at 384.

165 494 U.S. 433 (1990).

166 *Id.* at 445 (Blackmun, J., concurring).

scheme in effect can allow that juror alone to impose a capital sentence. It is that fact . . . that is dispositive."<sup>167</sup>

Blackmun was similarly troubled by Arizona's sentencing scheme which also made it more difficult for mitigation to enter into the jury's decision. In *Walton v. Arizona*,<sup>168</sup> five justices upheld requirements that allowed the sentencer to consider only those mitigating circumstances "proved by a preponderance of the evidence" and that placed on the defendant the burden of establishing mitigation "sufficiently substantial to call for leniency."<sup>169</sup> Blackmun's dissent, joined by Brennan, Marshall, and Stevens, pointed to what he found to be the Court's previous insistence that the defendant be given "an unrestricted opportunity to present relevant mitigating evidence."<sup>170</sup> If this opportunity was foreclosed, as Blackmun believed to be true here, the sentencing scheme was constitutionally deficient.

But Blackmun's *Walton* dissent is perhaps more significant for its bitter conclusion.

Today this majority serves notice that capital defendants no longer should expect from this Court . . . a considered examination of their constitutional claims . . . . [T]he majority makes only the most perfunctory effort to reconcile its holding with this Court's prior Eighth Amendment jurisprudence. . . .

Perhaps the current majority has grown weary of explicating what some Members no doubt choose to regard as hypertechnical rules . . . . Today's decision is either an abdication of the Court's constitutional role, or it is a silent repudiation of previously settled legal principles.<sup>171</sup>

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167 *Id.* at 456.

168 497 U.S. 639 (1990).

169 *Id.* at 677 (Blackmun, J., dissenting).

170 *Id.* at 678. Blackmun's dissent also objected to the majority's acceptance of Arizona's "heinous, cruel or depraved" aggravating circumstance despite its vagueness which, he believed, had not been suitably corrected by the state appellate courts. The Court had confronted a similar question in *Godfrey v. Georgia*, 446 U.S. 420 (1980).

171 *Id.* at 708. *Lewis v. Jeffers*, 497 U.S. 764 (1990), decided on the same day as *Walton*, dealt with the ambiguity of the statutory aggravating circumstance mentioned in the preceding note. Blackmun again wrote the dissent for Brennan, Marshall, and Stevens. His conclusion was equally bitter: "My dissenting opinion in *Walton* notes the Court's increasing tendency to review the constitutional claims of capital defendants in a perfunctory manner, but the Court's action in this case goes far beyond anything that is there observed." *Lewis*, 497 U.S. at 804 (Blackmun, J., dissenting). *Walton* came up on direct review, while *Jeffers* came up on federal habeas corpus petition.

## VII. BLACKMUN IN HIS THIRD DECADE

A. *Recent Rehnquist Courts*

The Supreme Court's two stalwart Eighth Amendment opponents of the death penalty, Justices Brennan and Marshall, retired in 1990 and 1991 respectively. The third Rehnquist Court therefore lasted only a single Term (1990-91), with David Souter in Brennan's place. The fourth Rehnquist Court lasted two Terms until Justice White's departure in 1993, with Clarence Thomas in Marshall's place. Only data from 1991-92, however, are included in Figures one and two.

Death penalty cases continued to occupy a prominent place on the docket: eleven principal opinions were issued in 1990-91, and nine in 1991-92. Brennan and Marshall's absence did not alter Blackmun's voting pattern in capital cases. In the third Rehnquist Court, Blackmun voted for the claimant on every occasion; in the first Term of the fourth Rehnquist Court, he voted against the claimant only once;<sup>172</sup> in the second year of the fourth Rehnquist Court, he voted in favor of the capital claimant every time.

By the turn of the new decade, Blackmun had developed three principles to guide his approach in this area. First, "[i]n light of the stark finality of the death sentence, the importance of procedural safeguards in capital-sentencing proceedings cannot be overstated."<sup>173</sup> Because death was so different from all other punishments both in its severity and its irrevocability, the Court was obliged to pay particularly close attention to any claim of procedural unfairness. Accordingly, he provided an essential fifth vote when the Court set aside a death sentence because at the time of the penalty hearing, the petitioner had been given inadequate notice that he might be condemned to death.<sup>174</sup> He cast one of two dissenting votes when the majority held that a state may constitutionally establish a rebuttable presumption of competence and may allocate to the defendant

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172 See *Sawyer v. Whitley*, 112 S. Ct. 2514 (1992), in which the Court unanimously rejected a prisoner's petition on habeas corpus. Blackmun, however, concurred only in the judgment, taking issue with the scope of the Court's "actual innocence" exception. Blackmun found its definition "unduly cramped." *Id.* at 2525. (Blackmun, J., concurring).

173 *Robertson v. California*, 498 U.S. 1004, 1005 (1990) (Blackmun, J., dissenting to denial of certiorari).

174 *Lankford v. Idaho*, 111 S. Ct. 1723 (1991).

the burden of establishing, by preponderance of the evidence, one's incompetency to stand trial.<sup>175</sup> He declared "I do not believe a Constitution that forbids the trial and conviction of an incompetent person tolerates the trial and conviction of a person about whom the evidence of competency is so equivocal and unclear."<sup>176</sup> Instead, the burden of proof should rest on the state.

Blackmun's second principle was that "the Eighth Amendment safeguards the capital defendant against the *mere risk* that the death sentence will be imposed arbitrarily and capriciously."<sup>177</sup> The probable presence of such risk permeated the opinions by Stewart, White, and Douglas in *Furman* from which Blackmun dissented; its probable absence had assuaged the main opinion by Stewart in *Gregg* which Blackmun did not join. Blackmun had now adopted the principle as a command and was one of its most ardent defenders. States had to adhere to rules designed to assure a rational division between convicted murderers who would live and those who would die. Accordingly, in *Parker v. Dugger*<sup>178</sup> Blackmun cast a fifth vote in vacating a death sentence when it was unclear that the Florida Supreme Court had conducted an independent review of aggravating and mitigating factors, thus denying the prisoner the individualized treatment to which he was constitutionally entitled. The risk, which Blackmun was presumably prepared to accept, was that continuous and conscientious application of this principle would transform the Court into a high court of errors. This was White's point in dissent that the degree of scrutiny of the record in *Parker* was "inconsistent with our precedents and with the Court's role as the final arbiter of federal constitutional issues of great importance."<sup>179</sup>

These two principles led to a third: the courts of the United States should remain open to, and be solicitous of, state prisoners seeking review of federal constitutional claims on habeas corpus. In the late 1980s, when the Supreme Court cut back on opportunities for collateral review in federal courts, Blackmun protested vigorously. He dissented in *Coleman v. Thomp-*

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175 *Medina v. California*, 112 S. Ct. 2572 (1992).

176 *Id.* at 2583 (Blackmun, J., dissenting).

177 *Robertson*, 498 U.S. at 1007 (emphasis added).

178 498 U.S. 308 (1991).

179 *Id.* at 323 (White, J., dissenting).

son,<sup>180</sup> for instance, when the majority refused to examine a state court decision resting on a state procedural defect that was independent of any federal question. For Blackmun, the Court was engaged in a "crusade to erect petty procedural barriers in the path"<sup>181</sup> of those pressing important constitutional claims.

In 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 . . . [that] now routinely, and without evident reflection, subordinates fundamental constitutional rights to mere utilitarian interests.<sup>182</sup>

Blackmun's voting record matched his rhetoric. In cases decided since 1986 based on access to a federal forum, Blackmun almost always voted with the capital claimant.<sup>183</sup> The reality of a less hospitable federal forum in habeas actions was all the more troubling since he felt that the majority had become insufficiently attentive to the interests of defendants on direct review. Because the Court traditionally preferred to grant certiorari in capital cases on collateral, as opposed to direct review,<sup>184</sup> he wondered whether the Court would continue to oversee the administration of capital punishment in any meaningful way.

The intensity of his adherence to these principles pushed him to reconsider the Court's role in applying the Eighth Amendment. Near the end of the 1991-92 Term in *Sawyer v. Whitley*, he 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."<sup>185</sup> Clarifying his early articulation of judicial restraint in Eighth Amendment matters, Blackmun explained why he had accepted constitutionality of

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180 111 S. Ct. 2546 (1991).

181 *Id.* at 2569 (Blackmun, J., dissenting).

182 *Id.* at 2572-73.

183 In a different context, Blackmun had urged an open federal forum at least as early as 1976: "There must be federal relief available against persistent deprivation of federal constitutional rights even by (or, perhaps I should say, particularly by) constituted authority on the state side." *Rizzo v. Goode*, 423 U.S. 362, 382 (1976) (Blackmun, J., dissenting).

184 *Schiro v. Indiana*, 493 U.S. 910 (1989) (opinion of Stevens, J., respecting the denial of the petition for writ of certiorari).

185 112 S. Ct. 2514, 2525 (1992) (Blackmun, J., concurring).

capital punishment despite his personal distaste and doubts that it served as an effective deterrent:

My ability in *Maxwell*, *Furman* and the many other capital cases I have reviewed during my tenure on the federal bench to enforce, notwithstanding my own deep moral reservations, a legislature's considered judgment that capital punishment is an appropriate sanction, has always rested 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. Today, more than 20 years later, I wonder what is left of that premise underlying my acceptance of the death penalty.<sup>186</sup>

Recent decisions revealed "this 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."<sup>187</sup>

The continued constitutionality of capital punishment in the United States was thus dependent on the Court's serious and careful scrutiny of the claims of those persons condemned to die. A decline in the availability of effective review mechanisms undermined "the very legitimacy of capital punishment itself."<sup>188</sup> Presumably, Blackmun did not believe in 1992 any more than he believed in 1968, or 1972, or 1976, that capital punishment was inherently at odds with the Eighth Amendment. If capital punishment violated the Constitution, it would be because of the absence of sufficient safeguards to assure that sentencing proceeded according to law. In his eyes, the Eighth Amendment's verdict on capital punishment would rest on diligence and efficacy: the Court's careful application of constitutional principles and the adequacy of those principles to prevent a miscarriage of justice.

### B. 1994: *The Journey's End*

What was implicit in Blackmun's thinking in 1992 became explicit in 1994. In a dissent from the Court's unsigned order in *Callins v. Collins*<sup>189</sup> on February 22, denying review in a cap-

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186 *Id.* at 2529.

187 *Id.*

188 *Id.* at 2530.

189 114 S. Ct. 1127 (1994).

ital case from Texas, Blackmun forthrightly declared, "[T]he death penalty remains fraught with arbitrariness, discrimination, caprice and mistake . . . . From this day forward, I no longer shall tinker with the machinery of death."<sup>190</sup> He was now convinced that the *Furman* criteria, which he rejected in 1972 but later embraced, were unattainable in practice. The Eighth Amendment required that capital sentencing be both individualized and predictable. One could be achieved only with the sacrifice of the other. "Experience has shown that the consistency and rationality promised in *Furman* are inversely related to the fairness owed the individual when considering a sentence of death. A step toward consistency is a step away from fairness."<sup>191</sup>

This conclusion was unavoidable if the Court was to take its oversight responsibility seriously. "[F]air, consistent and reliable sentences of death required by the Constitution" were beyond the power of the Court to assure. "[T]he death penalty experiment had failed . . ." <sup>192</sup> While conceding the possibility that the Court could draw "procedural rules or verbal formulas that actually will provide consistency, fairness, and reliability . . . I am not optimistic that such a day will come."<sup>193</sup> To pretend that the Court had actually succeeded in applying constitutional standards "lessens us all."<sup>194</sup>

## VIII. CONCLUSION

Although Blackmun—even in his 1994 *Callins* declaration—never adopted the per se approach of Brennan and Marshall toward capital punishment, his voting in death penalty cases after the mid-1980s nearly matched theirs.<sup>195</sup> His early

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190 *Id.* at 1129-30 (Blackmun, J., dissenting).

191 *Id.* at 1132.

192 *Id.* at 1130-31.

193 *Id.* at 1138.

194 *Id.* Blackmun's opinion did not go unanswered. In a reply, Justice Scalia accepted Blackmun's characterization of the tension but rejected his solution. *Id.* at 3546 (Scalia, J., concurring). Scalia reasserted a position he had announced in the 1990 *Walton* decision—the Eighth Amendment did not require individualization in capital sentencing through wide-ranging consideration by the sentencer of mitigating circumstances. *Walton v. Arizona*, 497 U.S. 639, 673 (1990).

195 To the Court's disposition of capital cases after *Callins* in which the justices declined to intervene, Blackmun even appended a paragraph reminiscent of the ones which Brennan and Marshall had appended to hundreds in the years after *Gregg*. See *supra* note 119 and accompanying text. "Adhering to my view that the death penalty cannot be imposed fairly within the constraints of our Consti-

propensity to vote for the state in capital cases vanished. A comparison of his later years with his first seven years on the Court reveals a shift of 180 degrees in capital cases. On legislative judgments, skepticism supplanted deference; on sentencing procedures, concern replaced indifference; on the fairness of capital trials, doubt superseded confidence; on the strictures of the Eighth Amendment, toughness displaced permissiveness.<sup>196</sup> He became an advocate for those on whom the arm of authority weighed most heavily.

While this jurisprudential change was real and dramatic, albeit gradual, one can only infer an explanation from the record. Both as a federal appellate judge and a Supreme Court justice, he has eschewed grand theories of constitutional law. Asked by Senator Hart in 1970 what President Nixon meant "when he says he is looking for a strict constructionist," Blackmun deflected the query by replying, "I suppose the President would be the best man to answer that."<sup>197</sup> His answer may have been as personally revealing as it was politically deft. If Blackmun was not attracted to the Brennan-Marshall

tution, see my dissent in *Callins v. Collins* . . . I would grant the application for stay of execution and the petition for certiorari and would vacate the death sentence in this case." *Callins v. Texas*, 114 S. Ct. 1339, 1340 (1994) (Blackmun, J., dissenting to denial of certiorari).

196 Blackmun's understanding of the Eighth Amendment changed with respect to non-capital sentencing too. He was part of the majority in *Rummel v. Estelle*, 445 U.S. 263 (1980), and in *Hutto v. Davis*, 454 U.S. 370 (1982), which upheld, against claims of disproportionality, a life sentence for a repeat offender who had defrauded people of about \$230 and a 40-year sentence for possession of nine ounces of marijuana, respectively. Nevertheless, Blackmun joined the majority in *Solem v. Helm*, 463 U.S. 277 (1983), which invalidated a life sentence without parole for a repeat offender whose most recent crime had been passing a bad check for \$100. Blackmun dissented in *Harmelin v. Michigan*, 111 S. Ct. 2680 (1991), when the majority upheld a statute mandating a life sentence without parole on possession of more than 650 grams of a substance containing cocaine.

197 *Hearings, supra* note 5, at 34. An editorial assessment of Blackmun published in his hometown newspaper, the *Rochester* (Minn.) *Post-Bulletin*, on April 15, 1970, takes on added meaning a quarter-century later. The editorial was placed on the Senate Judiciary Committee Record during Blackmun's nomination hearings by Senator Walter Mondale, who testified on Blackmun's behalf:

There is, of course, much speculation about what kind of justice Blackmun will be. The White House press secretary said President Nixon considers him to be a strict constructionist. Judge Blackmun himself commented to reporters: 'I've been called a liberal and a conservative. Labels are deceiving. I call them [judicial decisions] as I see them.' Only history will tell what kind of label fits him. But, as he said, labels are deceiving."

position on the Eighth Amendment, neither did he remain long persuaded by his own espousal of self-restraint in *Furman*.

In place of reliance on doctrine is a pragmatic and highly individualized approach to deciding cases that probably eased his movement from one "wing" of the Court to the other in Eighth Amendment cases.<sup>198</sup> Even at the time he took his seat on the Court, Blackmun had already acquired a reputation as a fact-oriented jurist<sup>199</sup> who viewed judging as a serious and painstaking craft. As a justice, he has been moved by the recognition that, at least in criminal matters, an individual stood behind every petition for review, no matter how complex the issues.<sup>200</sup>

Exposure may also be a factor. From the fall of 1970 through June of 1992, the Court issued principal opinions in 109 capital cases and denied review in hundreds more. Blackmun typically confronted more death penalty cases in a single year on the Supreme Court than he did during his entire eleven years on the Eighth Circuit. Although exposure may dull some people's sensitivity to issues, it appears to have sharpened Blackmun's. Recall that as early as 1972, he confessed that capital cases "provide for me an excruciating agony of the spirit."<sup>201</sup> He not only decided that his initial stance of restraint was unworkable but became more aware of the many ways in which sentencing procedures and the appellate process could operate unfairly. *McCleskey v. Kemp*<sup>202</sup> in particular highlighted the role of prosecutorial discretion, which would remain even when race was not involved. Blackmun thus faced the irony of the Court's Eighth Amendment jurisprudence: rules sufficiently intricate to channel discretion and to identify rationally those murderers who deserve death also create countless opportunities for their violation and, accordingly, an expanded need for appellate oversight.

Finally, no justice decides cases in isolation. The Supreme Court is a collegial institution in which all nine members not

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198 ABRAHAM, *supra* note 31, at 309-10.

199 *Hearings*, *supra* note 5, at 9-10 (reporting the assessment of the American Bar Association's Committee on the Federal Judiciary).

200 THIS HONORABLE COURT PART 2 (PBS television broadcast, May 9, 1988). See Al Kamen, *Off the Bench: The High Court as 9 Human Beings*, WASH. POST, May 2, 1988, at B1, for a discussion of the uniqueness of the conversations among justices featured in this program.

201 *Furman v. Georgia*, 408 U.S. 238, 406 (1972).

202 481 U.S. 279 (1987).

only vote on almost all cases but interact intellectually and socially with each other as well.<sup>203</sup> Brennan and Marshall, with their fervent and fundamental opposition to the death penalty, may have inspired Blackmun to become an Eighth Amendment skeptic. Moreover, cases exist in isolation no more than justices do. A single Term presents an array of constitutional issues. Blackmun's tenure on the Court reveals a shift not merely on Eighth Amendment matters but others as well.<sup>204</sup> Furthermore, in less than three years after his appointment in 1970, he became the Court's most ardent defender of a constitutional right to privacy.<sup>205</sup> It is not unthinkable to suppose that re-thinking or developing one's position in one area of the law may encourage or "cross-pollinate" reconsideration in another. In Blackmun's case, that re-evaluation without a doubt encompassed the Eighth Amendment.<sup>206</sup> He became less hesitant to deploy federal judicial power all the while he became more confident of certain constitutional values and more at ease with the concept of a judiciary that existed to

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203 WALTER F. MURPHY, *ELEMENTS OF JUDICIAL STRATEGY* 31-90 (1964); Robert G. Seddig, *John Marshall and the Origins of Supreme Court Leadership*, 36 U. PITT. L. REV. 785 (1975).

204 For example, contrast Blackmun's positions in some early and later free speech and equal protection cases: *Cohen v. California*, 403 U.S. 14 (1971), with *Texas v. Johnson*, 491 U.S. 397 (1989); *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973), with *Phyllis v. Doe*, 457 U.S. 292 (1982). Nevertheless, Henry Abraham's characterization of Blackmun's "readily demonstrable . . . odyssey" in "race, gender, and religion cases" may claim too much. The statement might better be read as an invitation to further research—as a suggestion, not a conclusion. ABRAHAM, *supra* note 31, at 310. Abraham also credits part of Blackmun's shift in constitutional cases to "anger with the media's constant taunting of his erstwhile alliance with Burger" [e.g., early references to the "Minnesota Twins"]. *Id.*

205 *Roe v. Wade*, 410 U.S. 113 (1973).

206 Blackmun's pro-government to pro-claimant shift on death penalty issues has not carried over to all dimensions. On search and seizure matters, for example, compare his dissenting opinion in *Arkansas v. Sanders*, 442 U.S. 753 (1979), with his opinion for the Court in *California v. Acevedo*, 111 S. Ct. 1982 (1991). In *Acevedo*, the majority adopted his pro-prosecution position that the majority in *Sanders* had rejected.

Ironically, it was partly the Supreme Court's stance on criminal justice issues that made the Court an issue in the presidential campaign of 1968. Republican nominee Richard Nixon in his standard stump speech decried court decisions that had "gone too far in weakening the peace forces as against the criminal forces in this country." A. Large, *Law and Order—Into the Fuzzy Swirl*, WALL ST. J., Oct. 22, 1968, at 20. Nixon promised to correct the imbalance in making judicial appointments. If Blackmun left the "law and order" reservation on Eighth Amendment issues, he has generally remained there with respect to the Fourth Amendment.

guard individual rights. The arrival of colleagues in the 1980s less disposed than an earlier majority to defend civil liberties may have bolstered both his confidence and a sense of the Court's role.

Whatever the reasons, few justices in modern Supreme Court history have evinced a more remarkable transformation in constitutional jurisprudence. Blackmun's votes and opinions in dozens of cases spanning more than three decades on the federal bench tell the story of one person's Eighth Amendment pilgrimage.