Marking the Progress of a Humane Justice: Harry Blackmun's Death Penalty Epiphany

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I. INTRODUCTION

Nothing could be more ordinary in the law than the refusal of the United States Supreme Court to hear an appeal from a decision of a lower state court. Every day, the Supreme Court receives a flood of requests asking that certain lower court decisions be reviewed and overturned. The overwhelming majority of these requests are routinely and summarily denied. A minute fraction of these cases actually receives the Court’s scrutiny.¹

On February 22, 1994, the United States Supreme Court refused to hear the appeal of Bruce Edwin Callins, a death row inmate in Texas.² Given the slender prospect that the Court would agree to review any case, the decision not to review Callins’ case was predictable—and quite ordinary.³ What makes Callins’ case extraordinary is Justice *
Harry A. Blackmun’s use of the case as a vehicle for announcing that, after some thirty-five years of deciding capital appeals, he had come to believe that the death penalty was in all cases unconstitutional.4 Dissenting from the Court’s denial of certiorari, Justice Blackmun declared, “[f]rom this day forward, I no longer shall tinker with the machinery of death.”5

This Article surveys Harry Blackmun’s struggle with the death penalty as a jurist, first on the federal court of appeals and most recently as a Justice of the United States Supreme Court. As a private citizen, Harry Blackmun has long been opposed to the death penalty, in part because he believes that it fails to deter would-be murderers.6 Nonetheless, during eleven years as a judge on the court of appeals and for most of his twenty-four years as a Justice on the Supreme Court, Blackmun consistently voted to uphold the death penalty. In recent years, however, Justice Blackmun has grown increasingly critical of the Court’s creation of “unprecedented and unwarranted barriers” to federal court review of constitutional claims pressed by capital defendants.7 On February 22, 1994, Justice Blackmun announced that his burgeoning doubts had ripened into a firm conviction that “the death penalty, as currently administered, is unconstitutional.”8

Before one concludes prematurely that Justice Blackmun is yet another bleeding-heart liberal who—like former colleagues William Brennan and Thurgood Marshall—categorically opposes the death penalty under all circumstances, his ascent to the Court and voting history in capital cases should be considered.

Harry Andrew Blackmun was born on November 12, 1908 in Nash-ville, Illinois.9 He grew up in St. Paul, Minnesota, where his father owned a small store.10 According to his own account, Blackmun “grew

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5. Id. at 1130 (Blackmun, J., dissenting).
6. Nightline (ABC television broadcast, Nov. 18, 1993). During this rare television appearance, Justice Blackmun said:
   Every time there is a striking, vicious killing of some kind there is always a move for the death penalty. I can understand this, but I think we should accept it as pure, sheer retribution, and that there is no deterrent effect to it at all. If people want to be retributive in their approach, they have that privilege.
   Id.
8. Callins, 114 S. Ct. at 1138 (Blackmun, J., dissenting).
9. OXFORD COMPANION, supra note 1, at 75.
10. Id.
up in poor surroundings" and worked part-time for spending money and expenses. During the waning years of the Roaring Twenties, Blackmun attended Harvard University on a tuition scholarship. To defray expenses at Harvard, Blackmun took a variety of jobs including milkman, janitor, painter and boat driver to the Harvard crew coach.

In 1929, Harry Blackmun graduated summa cum laude with a bachelor of arts degree in mathematics. He briefly considered medical school, but chose the law instead. Blackmun earned his law degree from Harvard in 1932.

Soon after graduating from law school, Harry Blackmun acquired a position as a judicial clerk in the chambers of Judge John B. Sanborn of the United States Court of Appeals for the Eighth Circuit. In 1933, Blackmun left the clerkship and began teaching at the Mitchell College of Law in St. Paul, Minnesota. Blackmun left teaching after just one year and joined a Minneapolis law firm where he eventually became partner.

In 1950, after sixteen years in private practice, Blackmun accepted a position as general counsel to the Mayo Clinic in Rochester, Minnesota.

II. COURT OF APPEALS DECISIONS

Justice Blackmun was appointed to the United States Court of Appeals for the Eighth Circuit in 1959 by Republican President Dwight D. Eisenhower. As a member of the court of appeals, Judge Black-

13. Id.
14. Id.
15. CONGRESSIONAL QUARTERLY’S GUIDE TO THE U.S. SUPREME COURT 876 (Elder Witt ed., 1989) [hereinafter CONGRESSIONAL QUARTERLY].
16. Id.
17. Id.
18. Id.
19. Id. Coincidentally, this law school was the alma mater of Chief Justice Warren E. Burger. Id. at 864. For more information on the connection between Justice Blackmun and Chief Justice Warren Burger, see infra notes 64-65 and accompanying text.
20. CONGRESSIONAL QUARTERLY, supra note 15, at 864.
22. CONGRESSIONAL QUARTERLY, supra note 15, at 876. Blackmun replaced his former boss, Judge John B. Sanborn, who had hired Blackmun to be his law clerk 26 years earlier. Id.
mun consistently voted to enforce the death penalty, even though he publicly stated that he doubted its moral, social and constitutional legitimacy.23

Early in his career as a court of appeals judge, Blackmun wrote the unanimous opinion in *Feguer v. United States.*24 Victor Harry Feguer was convicted of kidnapping and murdering Dr. Edward Roy Bartels in violation of the federal Kidnapping Act.25 The jury recommended death and Feguer was sentenced to hang.26

Feguer appealed his conviction and sentence to the Eighth Circuit. In his appeal, Feguer raised issues concerning his competency to stand trial, his defense of insanity and the fairness of the trial itself.27 Ultimately, after a searching analysis, Blackmun held that the trial court’s determination that Feguer was mentally competent to stand trial was not arbitrary or unwarranted28 and that the instructions given on insanity were proper.29

Blackmun likewise rejected Feguer’s contention that his trial had been unfair because of restraints placed upon defense counsel’s closing argument30 and because the government’s closing argument was inflammatory and prejudicial.31 The Eighth Circuit, per Judge Blackmun, affirmed Feguer’s conviction and death sentence.32 He was executed by hanging on March 15, 1963 and became the last person in this country to be executed under authority of the federal government.33

Nowhere in his exhaustive opinion does Blackmun advert to his personal views regarding the death penalty. But the sense of grave responsibility he felt in capital cases emerged nonetheless. Judge Blackmun wrote:

> It is perhaps unnecessary to say that when a criminal case involving the ultimate penalty which the law can impose comes before an appellate court for review, that court has an obligation, serious and profound, to examine with care every point of substance raised by the defense and to acquaint itself

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23. *See, e.g.,* Feguer v. United States, 302 F.2d 214 (8th Cir. 1962); Pope v. United States, 372 F.2d 710 (8th Cir. 1967); Maxwell v. Bishop, 398 F.2d 138 (8th Cir. 1968).
24. 302 F.2d 214.
25. *Id.* at 216. The Kidnapping Act was codified at 18 U.S.C. § 1201(a) (1956). That statute provided for the death penalty “if the kidnap victim has not been liberated unharmed and if the verdict of the jury shall so recommend.” *Feguer,* 302 F.2d at 253.
26. *Id.* at 216.
27. *Id.* at 216-17.
28. *Id.* at 238.
29. *Id.* at 245.
30. During closing argument, the judge twice admonished defense counsel to refrain from comment relating to opposition to and abolition of the death penalty. *Id.* at 252.
31. *Id.* at 253-54.
32. *Id.* at 255.
intimately with the details of the record. This is especially so where, as here, the case concerns both an emotionally offensive act and many facets of the criminal law which today are particularly sensitive. We have had this obligation in mind as we worked on this record and the briefs.\textsuperscript{34}

That Judge Blackmun was not simply paying lip service to his responsibility is apparent from the depth of his analysis and the length of his opinion. Judge Blackmun's \textit{Feguer v. United States} opinion occupies forty-two pages of the Federal Second Reporter,\textsuperscript{35} a remarkable statistic given that there was no real dispute that Feguer was both the kidnapper and killer.\textsuperscript{36} Blackmun's painstaking attention to the facts of the case (which consume twenty-three pages of his opinion\textsuperscript{37}) reflects the seriousness with which he undertook his role as appellate judge.\textsuperscript{38}

In \textit{Pope v. United States},\textsuperscript{39} Judge Blackmun again wrote a unanimous decision upholding a capital defendant's conviction and death sentence. Duane Earl Pope, a twenty-two-year-old college student who had led an otherwise model life, was convicted of shooting and killing three bank employees and seriously wounding a fourth during the course of a

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\item \textsuperscript{34} \textit{Feguer}, 302 F.2d at 217.
\item \textsuperscript{35} \textit{id.} at 214-55.
\item \textsuperscript{36} \textit{id.} at 217.
\item \textsuperscript{37} \textit{id.} at 214-36. Judge Blackmun acknowledged that his emphasis on the facts of the case may have provided "too much detail." \textit{id.} at 217. It may be that Judge Blackmun's dogged recitation of the facts in capital cases reflects the seriousness with which he views the constitutional preference that in capital cases a defendant is entitled to an individualized determination of sentence. See \textit{Woodson v. North Carolina}, 428 U.S. 280 (1976); \textit{Roberts v. Louisiana}, 428 U.S. 325, 333 (1976).
\item \textsuperscript{38} Justice Blackmun's insistence on scrupulous examination of the facts of each capital case has led to divergent results. Until his dramatic pronouncement in \textit{Callins}, Justice Blackmun eschewed the notion that the death penalty always violates the Eighth Amendment. Lynn E. Blais, \textit{Simple Justice/Simple Murder: Reflections on Judicial Modesty, Federal Habeas and Justice Blackmun's Capital Punishment Jurisprudence}, 97 DICL. L. REV. 513, 520 (1993). Conversely, Justice Blackmun refused to hold that states are largely unconstrained by the Constitution in the administration of their systems of capital punishment. \textit{id}.
\item \textsuperscript{39} Blackmun's opinion in \textit{Feguer} concludes on a curious note. He appears to recognize the difficulties that confront attorneys who are called upon to represent clients charged with capital crimes. Judge Blackmun expressed the court's appreciation to Feguer's defense counsel for their assistance, under court appointments, to the trial court and to us in their most capable representation of the defendant. We are conscious of the vast amount of time which they spent upon the substantial and difficult issues of this case. The public should be grateful for this positive recognition of professional responsibility in an unpopular cause.
\item \textit{Feguer}, 302 F.2d at 254-55. For a similar expression of appreciation, see \textit{Pope v. United States}, 372 F.2d 710, 737 (8th Cir. 1967) (Blackmun, J.) (expressing gratitude to defense attorneys and counsel for the government in a capital case). For a discussion of the \textit{Pope} case, see infra notes 39-44 and accompanying text.
\item \textsuperscript{39} 372 F.2d 710 (8th Cir. 1967) (Blackmun, J.), \textit{vacated}, 392 U.S. 651 (1968).
\end{itemize}
robbery which netted $1,598.\textsuperscript{40} Pope raised numerous issues on direct appeal.\textsuperscript{41} With meticulous care, Judge Blackmun considered—and rejected—each one.\textsuperscript{42}

As he had in \textit{Feguer}, Judge Blackmun presented a detailed factual account of the defendant’s background.\textsuperscript{43} Blackmun’s extensive recounting of Pope’s blemish-free life prior to the multiple murders may have prompted concurring Judge Lay to urge the President to exercise clemency on Pope’s behalf and commute his three death sentences to life sentences.\textsuperscript{44} Nonetheless, Blackmun’s opinion does not indicate that he believed that Pope was a strong candidate for executive clemency. More generally, whatever misgivings Judge Blackmun may have harbored about the death penalty, he kept to himself.

Judge Blackmun was less circumspect about his personal views on the death penalty in his majority opinion in \textit{Maxwell v. Bishop}.\textsuperscript{45} William L. Maxwell, a twenty-one-year-old black man, had been sentenced to die for the rape of a white woman in Arkansas.\textsuperscript{46} This time the case came before Judge Blackmun not on direct appeal but on appeal from the denial by the district court of a second habeas corpus petition.\textsuperscript{47} Maxwell’s primary argument on appeal was that the state of

\textsuperscript{40} Id. at 712.
\textsuperscript{41} Id. at 714. Of particular importance to Pope’s appeal was the effect of raising the insanity defense on the government’s right to have the defendant examined by experts and to have the government’s experts’ opinions placed in evidence. The court held that by raising the insanity defense, Pope had raised the issue for all purposes and the government was entitled to have its experts examine him. \textit{Id.} at 721. Another of Pope’s arguments involved the tension between the defendant’s right to allocution and a unitary trial. \textit{Id.} at 727-30. This argument foreshadowed the Supreme Court decision in McGautha v. California, 402 U.S. 183 (1971).
\textsuperscript{42} \textit{Pope}, 372 F.2d at 737.
\textsuperscript{43} According to Blackmun’s majority opinion, Pope was an average farm boy who was very active in both the athletic and extracurricular programs of his high school. Pope played football, basketball and baseball and was a member of the track team. He participated in band, glee club, chorus and dramatics. He was president of his senior class and spent two years as a member of the student council. During his senior year, Pope was captain of the basketball team and cocaptain of the football team. At the time of the crime, Pope was 22-years-old and a recent graduate of McPherson College. \textit{Id.} at 712-13.
\textsuperscript{44} \textit{Id.} at 739, 741 (Lay, J., concurring).
\textsuperscript{45} 398 F.2d 138 (8th Cir.), \textit{vacated}, 398 U.S. 997 (1968).
\textsuperscript{46} \textit{Id.} at 139. The evidence at trial showed that Stella Spoon, a 35-year-old white woman, awakened early one morning when she heard an unusual noise in her living room. Clad only in her pajamas, she saw someone attempting to force open a screened window. Ms. Spoon ran to telephone the police when the intruder seized her, dragged her outside and raped her within two blocks of her home. William L. Maxwell was arrested within hours of the rape. Maxwell v. State, 370 S.W.2d 113, 114-15 (Ark. 1963).
\textsuperscript{47} Maxwell, 398 F.2d at 139. Perhaps due to the procedural posture of this case, Judge Blackmun spent relatively little time addressing the facts surrounding the crime and the defendant’s background. He tersely observed, “Maxwell’s guilt or innocence is not in issue before us.” \textit{Id.} at 140-41.
Arkansas discriminated against blacks in the application of the death penalty for the crime of rape, violating both the Equal Protection Clause of the Fourteenth Amendment and the federal civil rights statute.\(^48\)

In support of his race claim, Maxwell introduced expert testimony and statistical evidence which purported to reveal disparities in the imposition of the death penalty on black and white defendants in selected counties throughout several southern states, including Arkansas.\(^49\) Judge Blackmun found Maxwell’s statistical evidence unpersuasive, in part because it did not relate to the county where the offense was committed and where Maxwell was tried and convicted.\(^50\) Perhaps it is more accurate to suggest that Judge Blackmun rejected Maxwell’s claim because his supporting evidence proved both too little and too much.\(^51\) The evidence proved too little because it failed to demonstrate that the petit jury that tried and convicted Maxwell acted in his case with discriminatory intent.\(^52\) At the same time, Maxwell’s evidence purported to prove too much. Judge Blackmun explained:

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. This is particularly so on a record so specific as this one. And we are not yet ready to nullify this petitioner’s Garland County trial on the basis of results generally, but elsewhere, throughout the South.

We therefore reject the statistical argument in its attempted application to Maxwell’s case. Whatever value that argument may have as an instrument of social concern, whatever suspicion it may arouse with respect to southern interracial rape trials as a group over a long period of time, and whatever it


\(^49\) Maxwell, 398 F.2d at 141-44. A study proffered by Maxwell examined, inter alia, 55 rape convictions in 19 selected Arkansas counties. The study disclosed that 34 defendants were black and 21 were white; 33 had a previous record; 26 were known to have been in prison; 39 victims were white and 15 were black; 14 defendants were sentenced to death while 41 received life; and counsel was appointed in 35 cases and was retained in 9. Based in part on this data, Maxwell’s expert testified that (1) the critical variables in sentencing were the race of the offender and race of the victim; (2) compared to other rape defendants, blacks convicted of raping white victims were disproportionately sentenced to death; and (3) “no variable of which analysis was possible could account for the observed disproportionate frequency.” Id. at 142-43.

\(^50\) Id. at 146. Rather, the statistics were gathered from 19 other Arkansas counties and from counties in 11 other states. Id.

\(^51\) This argument, that Maxwell’s evidence proved both too much and too little, was co-opted by the United States Supreme Court to deny relief in 1987 to Warren McCleskey, a black death row inmate in Georgia who raised an equal protection challenge to Georgia’s death penalty scheme. See McCleskey v. Kemp, 481 U.S. 279, 292 (1987). By this time, however, Justice Blackmun was more receptive to the claim of racial discrimination in the application of the death penalty, and he dissented. For a more complete discussion of McCleskey, see infra part IV.C.

\(^52\) Maxwell, 398 F.2d at 147.
may disclose with respect to other localities, we feel that the statistical argument does nothing to destroy the integrity of Maxwell's trial. 53

Judge Blackmun also carefully considered what he called Maxwell's "single verdict argument." 54 Maxwell had urged that the Arkansas statute that permitted the jury to choose between death and life imprisonment provided no standards by which the jury was to exercise its choice and that, as a result, the statute was unconstitutional. 55 In addition, Maxwell had argued that the Arkansas "practice of submitting simultaneously to the jury the two issues of guilt and punishment in a capital case 'compounds the vice of lawless jury discretion * * * by making it virtually impossible for the jurors to exercise their discretion in any rational fashion.'" 56 Blackmun rejected both arguments and upheld Maxwell's death sentence. 57

By way of peroration, Judge Blackmun offered a glimpse into his personal views on capital punishment:

It is obvious, we think, that the efforts on behalf of Maxwell would not thus be continuing, and his case reappearing in this court were it not for the fact that it is the death penalty, rather than life imprisonment, which he received on his rape conviction. This fact makes the decisional process in a case of this kind 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. We note, for what that notice may be worth, that the death penalty for rape remains available under federal statutes. 58

III. UNITED STATES SUPREME COURT DECISIONS

While Judge Blackmun struggled with his personal convictions about capital punishment, others wrestled for control of the White House. During the 1968 presidential campaign, Republican candidate Richard

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53. Id. at 147.
54. Id. at 148.
55. Id.
56. Id. at 148-49. Both of these arguments were ultimately rejected by the United States Supreme Court in McGautha v. California, 402 U.S. 183 (1971). See infra notes 80-88 and accompanying text.
57. Id. at 149-51.
58. Id. at 153-54 (footnote omitted). In a footnote, Judge Blackmun observed that his fellow panel members, Judges Vogel and Matthes, did not share his views on the efficacy of capital punishment. Id. at 154 n.11. Within a decade of upholding Maxwell's death sentence for rape, Justice Blackmun voted with a majority of the Supreme Court in holding that a sentence of death is grossly disproportionate and excessive punishment for the crime of rape and thus violates the Eighth Amendment. Coker v. Georgia, 433 U.S. 584 (1977).
Nixon vigorously criticized the liberal decisions of the Warren Court and "emphasized the need for new justices who favored 'peace forces' rather than criminals." As President, Nixon hoped to implement his campaign pledge through the careful selection of tough-minded judges. On April 14, 1970, after two previous nominations had failed to win Senate confirmation, President Nixon selected Harry Blackmun to replace Abe Fortas, who had resigned from the nation's highest court. Within a month of Blackmun's nomination, he was unanimously confirmed by the Senate. At age sixty-one, Harry Blackmun assumed

59. OXFORD COMPANION, supra note 1, at 592.

60. In his autobiography, President Nixon explained that he was impressed by Warren Burger, his eventual choice for Chief Justice, in part because he had read excerpts from one of Burger's speeches on the role of law and order in society that had been printed in a 1967 issue of U.S. News and World Report. The impression was so strong that Nixon incorporated several ideas from Burger's speech into his own 1968 presidential campaign speeches. RICHARD NIXON, RN: THE MEMOIRS OF RICHARD NIXON 419-20 (1978).

61. President Nixon's first choice, Fourth Circuit Judge Clement F. Haynesworth of South Carolina, was rejected by the Senate in November 1969 by a vote of 55 to 45. OXFORD COMPANION, supra note 1, at 592. This marked the first occasion since 1930 that the United States Senate had refused to confirm a presidential nominee to the Supreme Court. Id. Angered that Republican senators had broken ranks and voted with the Democrats, "Nixon promptly nominated another southern conservative, Fifth Circuit Judge G. Harold Carswell of Florida." Id. In April 1970, Carswell's nomination was also rejected by the Senate, this time by a vote of 51 to 45. Id. With characteristic self-derision, Justice Blackmun frequently refers to himself as "Old Number 3." Karlan, supra note 12, at 529 n.13. According to a former law clerk, when Justice Anthony Kennedy was confirmed following the failed nominations of Robert Bork and Douglas Ginsburg, Justice Blackmun welcomed Kennedy with a humorous note that referenced their shared distinction as third choices. Id.

62. Blackmun was nominated only after President Nixon bitterly concluded that the United States Senate "would not confirm a southern nominee who was also a judicial conservative." CONGRESSIONAL QUARTERLY, supra note 15, at 864. President Nixon had relatively little difficulty with his first appointment to the Supreme Court. Shortly before the fiasco developed regarding the replacement of Associate Justice Abe Fortas, President Nixon selected Warren Burger to succeed Chief Justice Earl Warren, who had resigned. In his autobiography, Nixon claimed to have developed five criteria for his selection of Chief Justice:

The next Chief Justice must have a top-flight legal mind; he must be young enough to serve at least ten years; he should, if possible, have experience both as a practicing lawyer and as an appeals court judge; he must generally share my view that the Court should interpret the Constitution rather than amend it by judicial fiat; and he must have a special quality of leadership that would enable him to resolve differences among his colleagues so that, as often as possible, the Court would speak decisively on major cases with one voice or at least with a strong voice for the majority opinion.

NIXON, supra note 61, at 419. Presumably, Nixon applied at least some of the same criteria to his Associate Justice nominees.

63. Harry Blackmun was confirmed without opposition on May 12, 1970. CONGRESSIONAL QUARTERLY, supra note 15, at 864. Nonetheless, because of the difficulty Nixon encountered in seeking confirmation for the two previous appointees, Fortas' seat on the Court remained vacant for more than a year.
a seat on the Court formerly occupied by Justices Story, Holmes, Cardozo and Frankfurter.

Blackmun had attended grade school in the Minneapolis-St. Paul area with conservative Chief Justice Warren Burger. The men were lifelong friends. Indeed, early in Blackmun’s Supreme Court career, he voted with Burger so often that critics dubbed the two men the “Minnesota Twins.”

Blackmun’s appointment as Justice arguably solidified a conservative shift on the Court in capital cases. During the 1968 term, the Justices had granted certiorari to review Maxwell v. Bishop, a decision of the Eighth Circuit Court of Appeals. During conference, the Justices tentatively agreed to strike down an Arkansas death penalty statute and, in the process, to reverse the decision of Eighth Circuit Judge Harry Blackmun. As discussed above, Maxwell had been sentenced to die after his 1962 conviction for rape. Writing for the court of appeals, then Eighth Circuit Judge Harry Blackmun had upheld the district court’s denial of habeas corpus relief.

Six Justices (Earl Warren, William Douglas, John Harlan, William Brennan, Abe Fortas and Thurgood Marshall) stood ready to reverse Maxwell v. Bishop and secretly voted that the Arkansas law was unconstitutional because it did not require a separate sentencing hearing, to be conducted only after a finding of guilt. These Justices

64. WOODWARD & ARMSTRONG, supra note 21, at 86. The men were so close, in fact, that Harry Blackmun served as best man at Warren Burger’s wedding in 1933. Id. at 82. In fact, Blackmun had grown up within six blocks of Burger’s home in St. Paul. KIM I. EISLER, A JUSTICE FOR ALL: WILLIAM J. BRENNAN, JR., AND THE DECISIONS THAT TRANSFORMED AMERICA 219-20 (1993).

65. CONGRESSIONAL QUARTERLY, supra note 15, at 864. According to Bob Woodward and Scott Armstrong, Blackmun, an avid baseball fan, had warned Burger soon after Blackmun arrived at the Court that they would be tagged the “Minnesota Twins” after the baseball team based in their home towns. WOODWARD & ARMSTRONG, supra note 21, at 121-22. Blackmun’s prediction came true within his first six months on the Court. Id. at 122. Blackmun’s pattern of voting with Burger on most cases earned him a less charitable sobriquet from the Court’s law clerks: “Hip pocket Harry.” Id. This derisive moniker was most apt early during Blackmun’s tenure on the Court. In Blackmun’s initial 119 votes, he voted with Chief Justice Burger 113 times. EISLER, supra note 64, at 220. Harvard Law Review tabulated Blackmun’s voting patterns somewhat differently. According to the Review, during Blackmun’s first year on the Court he sided with Chief Justice Burger in 96 percent of his votes. Reuben, supra note 11, at 47. Over Blackmun’s first five years on the Court, his pattern of voting with Burger declined to 84 percent. Id.

66. 398 F.2d 138 (8th Cir. 1968).

67. WOODWARD & ARMSTRONG, supra note 21, at 205.

68. See supra notes 45-58 and accompanying text.

69. Maxwell, 398 F.2d at 139.

70. Id.

71. The Supreme Court has expressed a strong preference in capital cases for bifurcated proceedings. See, e.g., Gregg v. Georgia, 428 U.S. 153, 195 (1976). During the first stage of a capital trial, the sentencer resolves the issue of the defendant’s guilt. Only evidence relevant to
agreed that bifurcating capital trials in this way would allow the defendant to testify during the sentencing phase and present mitigating evidence, without compromising the defendant's right not to testify during the guilt portion of his trial. 73

Chief Justice Warren assigned the task of writing the majority opinion to Justice Douglas, who wrote such a broad opinion that he lost Justice Harlan's vote. 74 As a result of Justice Harlan's defection, a firm six-to-three majority was whittled down to five-to-four. 75 Before the decision could be announced, Justice Fortas resigned, leaving the Court deadlocked, four-to-four. 76 The following year, Warren E. Burger replaced Earl Warren as Chief Justice and the vote tipped five-to-three to uphold the law. 77 Justice Harlan insisted that the case be held over until the appointment of Fortas' successor. 78

President Nixon's choice of Harry Blackmun to succeed Fortas, however, ensured that Maxwell v. Bishop would not be the vehicle for this particular decision. Because Blackmun had participated in the case as an appellate judge—indeed, he had authored the unanimous decision of the three-judge appellate panel 79—he was prohibited as a Supreme Court Justice from voting in the case. To circumvent this problem, the Court simply selected two cases from other jurisdictions which raised the same issues. Consequently, the six-to-three majority to strike down the Arkansas statute in Maxwell v. Bishop became a six-to-three majority to uphold the


72. WOODWARD & ARMSTRONG, supra note 21, at 206.
73. Id. at 205-06. According to one scholar, Maxwell was certain to get relief from the U.S. Supreme Court in the form of a new trial because jurors who said they were opposed to the death penalty had been excluded from serving on Maxwell's jury in violation of Witherspoon v. Illinois, 391 U.S. 510 (1968). EISLER, supra note 64, at 240-41. Under Witherspoon, decided six years after Maxwell's conviction, states may not cull from jury service those jurors who oppose capital punishment unless their personal beliefs prevent them from imposing death in an appropriate case. Id.; see also MARK TUSHNET, CONSTITUTIONAL ISSUES: THE DEATH PENALTY 37-40 (1994). Because Witherspoon was not decided until after Maxwell filed his second federal habeas petition, the Witherspoon claim did not appear in either the habeas petition or the petition for certiorari. Id. at 37. Nonetheless, the attorney for the state of Arkansas candidly conceded that the trial record, which had not been furnished to the Supreme Court, showed a clear Witherspoon violation. Id.
74. WOODWARD & ARMSTRONG, supra note 21, at 206.
75. Id.
76. Id.
77. Id.
78. Id.
California and Ohio statutes in *McGautha v. California* and *Crampton v. Ohio*, respectively. Thus, soon after joining the Court, Justice Blackmun voted to uphold the death penalty in *McGautha v. California* by applying the same principles and logic he had used to deny relief to Maxwell.

Dennis Councle McGautha was sentenced to death for killing Benjamin Smetana while robbing Smetana's store. In *McGautha*, the Court considered a challenge to the death penalty grounded on the Fourteenth Amendment. McGautha argued (as had Maxwell) that the standardless discretion exercised by capital juries violated due process. The Court held that juries did not have to be given definite standards to guide their sentencing decisions. Writing for the majority, Justice Harlan observed, "[t]o identify before the fact those characteristics of criminal homicides and their perpetrators which call for the death penalty, and to express these characteristics in language which can be fairly understood and applied by the sentencing authority, appear to be tasks which are beyond present human ability." Justice Harlan continued, "[f]or a court to attempt to catalog the appropriate factors in this elusive area could inhibit rather than expand the scope of consideration, for no list of circumstances would ever be really complete.

Justice Harlan likewise disposed of the argument that in capital cases the Fourteenth Amendment required bifurcated trials, in which the penalty is decided during a separate sentencing proceeding. Justice Harlan wrote that although bifurcated trials might be a "superior means of dealing with capital cases if the death penalty is to be retained at

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80. *McGautha v. California*, 402 U.S. 183 (1971); see WOODWARD & ARMSTRONG, supra note 21, at 205-06. Because the *McGautha* case did not present both parts of the "single verdict argument" which had been presented in *Maxwell v. Bishop*, see supra notes 54-57 and accompanying text, the Court selected another case, *Crampton v. Ohio*, and consolidated it with *McGautha*. Ultimately, Maxwell escaped execution when the Court agreed to remand the case to the lower courts to consider the Witherspoon issue. See supra note 73 and accompanying text. In late 1970, just before leaving office, Arkansas Governor Laurence Rockefeller commuted William Maxwell's death sentence, as well as those of all other Arkansas death row inmates. TUSHNET, supra note 73, at 136.

82. See supra note 55 and accompanying text.
84. Id. at 208. Justice Harlan thus admonished the Court that it should not require legislatures to provide standards to guide jury discretion "because the visceral decision of whether to kill a defendant could not be reduced to legal rules." JOHN KAPLAN & ROBERT WEISBERG, CRIMINAL LAW: CASES AND MATERIALS 391 (1991). The Court based its decision entirely on the Fourteenth Amendment and completely ignored the Eighth Amendment aspect of the issue. See *McGautha*, 402 U.S. 183. Justice Blackmun joined the majority opinion and did not write separately. See id. at 184. Justices Douglas, Brennan and Marshall dissented. See id. at 226, 248.
all," the Constitution "does not guarantee trial procedures that are the best of all worlds." Rather, "[t]he Constitution requires no more than that trials be fairly conducted and that guaranteed rights of defendants be scrupulously respected." More specifically, Justice Harlan wrote that the policies of the privilege against self-incrimination, embodied within the Fifth Amendment, are not offended when a capital defendant yields to the pressure to testify on the issue of punishment at the risk of damaging his case on guilt.

Within a year, in Furman v. Georgia, the constitutionality of the death penalty was again challenged, but this time on Eighth Amendment grounds. William Henry Furman, a black man, attempted to break into William Micke's home late one evening. When Micke, alerted by the noise, came downstairs to investigate, Furman attempted to flee. Furman ran to the back porch where he tripped over an electrical cord. The gun Furman was carrying discharged, sending the bullet through a closed door and killing Micke.

A majority of the Supreme Court in 1972 used the Furman case to strike down death penalty laws throughout the United States. Six hundred and thirteen prisoners awaiting execution throughout the country were spared when Furman resulted in the commutation of their sentences to life.

Three members of the Furman majority, Justices William Douglas, Potter Stewart and Byron White, concluded that imposing and carrying out the death penalty in the cases before the Court constituted cruel and unusual punishment in violation of the Eighth and Fourteenth Ampl-
ments. The two other members of the majority, Justices William Brennan and Thurgood Marshall, ruled that the death penalty was unconstitutional in all cases. All members of the majority agreed that the fatal flaw was the lack of standards to guide jurors in deciding whether a defendant should live or die. Justice Stewart observed, "These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual. . . . [I]f any basis can be discerned for the selection of these few to be sentenced to die, it is the constitutionally impermissible basis of race." Justice Blackmun explained years later:

The concurring Justices argued that the glaring inequities in the administration of death, the standardless discretion wielded by judges and juries, and the pervasive racial and economic discrimination, rendered the death penalty, at least as administered, "cruel and unusual" within the meaning of the Eighth Amendment. Justice White explained that, out of the hundreds of people convicted of murder every year, only a handful were sent to their deaths, and that there was "no meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not." Justice Blackmun and three colleagues dissented from the Furman majority. Although Blackmun announced that he personally rejoiced at the Court’s result, he declared himself unable to accept it "as a
matter of history, of law, or of constitutional pronouncement." 101 His words are worth reading:

Cases such as these provide for me an excruciating agony of the spirit. I yield to no one in the depth of my distaste, antipathy, and, indeed, abhorrence, for the death penalty, with all its aspects of physical distress and fear and of moral judgment exercised by finite minds. That distaste is buttressed by a belief that capital punishment serves no useful purpose that can be demonstrated. . . .

... [W]ere I a legislator, I would do all I could to sponsor and to vote for legislation abolishing the death penalty. And were I the chief executive of a sovereign State, I would be sorely tempted to exercise executive clemency.

... I do not sit on these cases, however, as a legislator, responsive, at least in part, to the will of constituents. Our task here, as must so frequently be emphasized and re-emphasized, is to pass upon the constitutionality of legislation that has been enacted and that is challenged. This is the sole task for judges. We should not allow our personal preferences as to the wisdom of legislative and congressional action, or our distaste for such action, to guide our judicial decision in cases such as these. The temptations to cross that policy line are very great. In fact, as today’s decision reveals, they are almost irresistible. 103

Years later, Justice Blackmun explained his dissent in *Furman*:

Despite my intellectual, moral, and personal objections to the death penalty, I refrained from joining the majority because I found objectionable the Court’s abrupt change of position in the single year that had passed since *McGautha*. While I agreed that the Eighth Amendment’s prohibition against cruel and unusual punishments “may acquire meaning as public opinion becomes enlightened by a humane justice,” I objected to the “suddenness of the Court’s perception of progress in the human attitude since decisions of only a short while ago.” 104

Within four years of the *Furman* decision, the Court again confronted the constitutionality of the death penalty in *Gregg v. Georgia* 105 and four companion cases decided the same day. 106 Immediately after the Court announced the result in *Furman*, state legislatures set about busily

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101. Id. at 414 (Blackmun, J., dissenting).
102. Id. at 405 (Blackmun, J., dissenting).
103. Id. at 410-11 (Blackmun, J., dissenting).
105. 428 U.S. 153 (1976). Troy Leon Gregg was convicted of two counts of armed robbery and two counts of murder and was sentenced to death. COYNE, supra note 88, at 25-26.
repairing their death penalty statutes. New death penalty laws emerged which ostensibly provided sensible and objective guidelines to assist judges and juries in determining who deserved to live and who deserved to die. States employed several different strategies to bring their laws into compliance with Furman’s mandate. Some sought to identify those deserving of death by embellishing their capital punishment statutes with carefully selected adjectives. Thus, Florida resolved that those whose crimes were “especially heinous, atrocious, or cruel” could be executed. Georgia rendered death-eligible those whose crimes were “wantonly vile, horrible or inhuman.” Other states, including Ohio, specifically identified aggravating and mitigating circumstances which would be weighed against one another to determine whether death was the appropriate penalty. A third group of states, including North Carolina and Louisiana, reacted to Furman by enacting mandatory death penalty statutes which eliminated sentencer discretion altogether.

The Gregg cases required the Court to determine the constitutionality of the revised death penalty statutes in Georgia, Texas, Florida, North Carolina and Louisiana. Ultimately, the Court upheld the statutes of Georgia, Texas and Florida and struck down those of North Carolina and Louisiana.

In Gregg and the four companion cases, a three-member plurality consisting of Justices Stewart, Powell and Stevens joined in an opinion and announced the judgment of the Court. The Gregg plurality embraced Furman’s holding that the death penalty “could not be imposed under sentencing procedures that created a substantial risk that it would be inflicted in an arbitrary and capricious manner.” Chief Justice Burger and Justices White, Blackmun and Rehnquist concurred.

107. See Flanders, supra note 33, at 11.
108. See id.
111. See Lockett v. Ohio, 438 U.S. 586, 604-06 (1978) (concluding that the sentencer in a capital case may “not be precluded from considering, as a mitigating factor, any aspect of a defendant’s character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.”).
114. See supra notes 105-13 and accompanying text.
115. See supra note 106. For a brief discussion of the companion cases, see infra notes 138-85 and accompanying text.
117. Id. at 188.
in the judgment. Nonetheless, this coalition of Justices concluded that the Eighth Amendment erected no per se barrier to the punishment of death. These seven Justices agreed that the Georgia death penalty statute at issue in Gregg remedied the constitutional defects which the Furman Court found fatal to capital sentencing procedures. For example, Justice Stewart, joined by Justices Powell and Stevens, concluded that

the concerns expressed in Furman that the penalty of death not be imposed in an arbitrary or capricious manner can be met by a carefully drafted statute that ensures that the sentencing authority is given adequate information and guidance. As a general proposition these concerns are best met by a system [like Georgia’s] that provides for a bifurcated proceeding at which the sentencing authority is apprised of the information relevant to the imposition of sentence and provided with standards to guide its use of the information.

Although the Gregg Court failed to produce a majority opinion, several key themes emerge with clarity. First, the Eighth Amendment must draw its meaning from the “evolving standards of decency that mark the progress of a maturing society.” Thus, the Eighth Amendment historically has not been viewed as a “static concept.” Proof that the death penalty comported with evolving standards of decency could be found in the legislative response to Furman and the decisions of capital juries empaneled under revised death penalty statutes. At the time of Gregg, the legislatures of at least thirty-five states had enacted new statutes that provided for the death penalty for at least some crimes that result in the death of another person. Moreover, by the end of March 1976, more than 460 persons had been sentenced to death under post-Furman death penalty statutes.

The second theme which emerges from Gregg is that public perceptions of standards of decency with respect to criminal punish-

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118. Id. at 207, 227.
119. See, e.g., id. at 177-78. Only Justices Brennan and Marshall accepted the view that evolving standards of decency require that the Eighth Amendment be construed finally as prohibiting capital punishment for any crime, regardless of its depravity and impact on society. In their dissents, Justices Brennan and Marshall tenaciously insisted that the death penalty was in all circumstances cruel and unusual punishment. Id. at 230-31 (Brennan, J., dissenting); id. at 231, 241 (Marshall, J., dissenting).
120. Id. at 195. Note that although bifurcated proceedings—which resolve guilt issues during one phase and then, if necessary, sentencing issues at a separate phase, usually before the same jury—may be constitutionally preferred, they are not constitutionally required. Id.
121. Id. at 173 (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958)).
122. Id. at 172-73.
123. Id. at 179-82.
124. Id. at 179-80.
125. Id. at 182.
ment, although relevant, are not dispositive.\textsuperscript{126} Punishments must also "accord with 'the dignity of man,' which is the 'basic concept underlying the Eighth Amendment.'"\textsuperscript{127} That the death penalty comported with the dignity of man was established, according to the \textit{Gregg} majority, once it was determined that the penalty was not "excessive."\textsuperscript{128} The inquiry into "excessiveness" has two components:\textsuperscript{129} "First, the punishment must not involve the unnecessary and wanton infliction of pain. Second, the punishment must not be grossly out of proportion to the severity of the crime."\textsuperscript{130} Because capital punishment serves valid penological goals of retribution and, perhaps, deterrence,\textsuperscript{131} the suffering it causes is not gratuitous. Moreover, the imposition of capital punishment for the crime of murder, when the victim's life has been taken deliberately by the offender, is not invariably disproportionate.\textsuperscript{132}

Justice Blackmun concurred in the judgment in \textit{Gregg}\textsuperscript{133} and in two companion cases which upheld death sentences rendered under post-
\textit{Furman} statutes.\textsuperscript{134} In the two companion cases which struck down death sentences rendered under post-
\textit{Furman} statutes, Justice Blackmun dissented.\textsuperscript{135} In each case, however, Justice Blackmun did not write an opinion.\textsuperscript{136} Those interested in his reasons were simply directed to the various dissenting opinions in \textit{Furman}.\textsuperscript{137} Nonetheless, brief examina-

\begin{footnotesize}
\begin{enumerate}
\item 126. \textit{Id.} at 173.
\item 127. \textit{Id.} (quoting \textit{Trop v. Dulles}, 356 U.S. 86, 100 (1958)).
\item 128. \textit{Id.}
\item 129. \textit{Id.}
\item 130. \textit{Id.} (citations omitted).
\item 131. The Court acknowledged that the empirical evidence on whether the death penalty has a deterrent effect was dubious. \textit{Id.} at 184-85. Nonetheless, retribution—the "expression of society's moral outrage at particularly offensive conduct"—is a valid penological goal, "essential in an ordered society that asks its citizens to rely on legal processes rather than self-help to vindicate their wrongs." \textit{Id.} at 183.
\item 132. \textit{Id.} at 187. Troy Leon Gregg eluded execution but not death. In 1980, along with three fellow death row inmates, Gregg escaped from the Georgia State Prison in Reidsville. \textit{COYNE, supra} note 88, at 29. The day after the escape, Gregg's body was discovered by swimmers in Mountain Island Lake in rural North Carolina. \textit{Id.} He had died of blows to the head and neck. \textit{Id.} Prosecutors surmised that Gregg had been stomped to death by a coescapee. \textit{Id.}
\item 133. \textit{Gregg}, 428 U.S. at 227 (Blackmun, J., concurring).
\item 136. \textit{E.g., Gregg}, 428 U.S. at 227 (Blackmun, J., concurring).
\item 137. \textit{E.g., id.} (Blackmun, J., concurring). The points raised by the various \textit{Furman} dissents may be summarized as follows: Chief Justice Burger stated that the death penalty was neither "unnecessary" nor "excessive." See \textit{Furman v. Georgia}, 408 U.S. 238, 393 (1972) (Burger, C.J., dissenting). Retribution was an appropriate goal of criminal punishment and the Eighth Amendment did not proscribe "all punishments the States are unable to prove necessary to deter
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tion of the holdings of the four companion cases may add to an appreciation of Justice Blackmun's death penalty jurisprudence.

A. The Gregg Companion Cases

1. Proffitt v. Florida

Writing for the three-member plurality in Proffitt v. Florida, Justice Powell described the mechanics of the Florida death penalty statute:

Under the new statute, if a defendant is found guilty of a capital offense, a separate evidentiary hearing is held before the trial judge and jury to determine his sentence. Evidence may be presented on any matter the judge deems relevant to sentencing and must include matters relating to certain legislatively specified aggravating and mitigating circumstances. Both the prosecution and the defense may present argument on whether the death penalty shall be imposed.

At the conclusion of the hearing the jury is directed to consider "whether sufficient mitigating circumstances exist... which outweigh the aggravating circumstances found to exist; and... based on these considerations, whether the defendant should be sentenced to life [imprisonment] or death." The jury's verdict is determined by majority vote. It is only advisory; the actual sentence is determined by the trial judge. The Florida Supreme Court has stated, however, that "in order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ."

The trial judge is also directed to weigh the statutory aggravating and mitigating circumstances when he determines the sentence to be imposed on or control crime." Id. at 397 (Burger, C.J., dissenting). Chief Justice Burger's opinion invited state legislatures to bring their laws into compliance with Furman's requirements, while acknowledging that "McGautha convincingly demonstrates that all past efforts 'to identify before the fact' the cases in which the penalty is to be imposed have been 'uniformly unsuccessful."' Id. at 400-01 (Burger, C.J., dissenting) (quoting McGautha v. California, 402 U.S. 183, 197 (1971)).

Justice Powell preached judicial self-restraint, echoed Justice Blackmun's dissent and characterized the majority's ruling as "the very sort of judgment that the legislative branch is competent to make and for which the judiciary is ill-equipped." Id. at 418 (Powell, J., dissenting).

Justice Powell concluded that "the indicators most likely to reflect the public's view—legislative bodies, state referenda and the juries which have the actual responsibility—do not support the contention that evolving standards of decency require total abolition of capital punishment." Id. at 442 (Powell, J., dissenting). In Justice Powell's view, "the assessment of popular opinion is essentially a legislative, not a judicial, function" which "lies at the periphery—not the core—of the judicial process in constitutional cases." Id. at 443 (Powell, J., dissenting).

Justice Rehnquist's dissent focused on the grave consequence of human error, but not, as one might expect, the quintessential human error of executing an innocent person. Instead, Rehnquist warned of the seriousness of judicial "error resulting from a mistaken upholding of an individual's constitutional claim against the validity of a legislative enactment." Id. at 468 (Rehnquist, J., dissenting). This, per Justice Rehnquist, was "a good deal more serious" than upholding the constitutionality of a particular law and thereby wrongfully depriving an individual of a right secured to him by the Constitution. Id. (Rehnquist, J., dissenting).

a defendant. The statute requires that if the trial court imposes a sentence of death, "it shall set forth in writing its findings upon which the sentence of death is based as to the facts: (a) [t]hat sufficient [statutory] aggravating circumstances exist . . . and (b) [t]hat there are insufficient [statutory] mitigating circumstances . . . to outweigh the aggravating circumstances."\(^{139}\)

According to the plurality, the key difference between the statutory schemes in Florida and Georgia was that in Florida, the trial judge imposed the death penalty; in Georgia, the jury assessed punishment.\(^{140}\) Finding this distinction to be constitutionally insignificant, the plurality opinion focused on similarities between the two statutory schemes. In this regard, the Florida statute was similar to Georgia's statute in that the Florida statute "require[d] the trial judge to focus [his determination of death] on the circumstances of the crime and the character of the individual defendant."\(^{41}\)

Both Georgia and Florida provided for automatic review by the highest state court of all cases in which death is imposed.\(^{142}\) Unlike the Georgia scheme, however, the Florida statute did not proscribe a specific form for appellate review.\(^{143}\) Nonetheless, the plurality concluded that the Florida procedure "has in effect adopted the type of proportionality review mandated by the Georgia statute."\(^{144}\)

The plurality rejected attacks on the Florida death penalty statute on the grounds that aggravating and mitigating circumstances were vague, overbroad and imprecise. Justice Powell wrote:

> While the various factors to be considered by the sentencing authorities do not have numerical weights assigned to them, the requirements of Furman are satisfied when the sentencing authority's discretion is guided and channeled by requiring examination of specific factors that argue in favor of or against imposition of the death penalty, thus eliminating total arbitrariness and capriciousness in its imposition.\(^{145}\)

2. Jurek v. Texas

In Jurek v. Texas,\(^{146}\) the Court upheld the death penalty statutory scheme in Texas. After Furman, the Texas legislature revised its death penalty statute and identified five offenses punishable by death:

\(^{139}\) Id. at 248-50 (alterations in original) (citations omitted).
\(^{140}\) Id. at 252.
\(^{141}\) Id. at 251.
\(^{142}\) Id. at 250-51.
\(^{143}\) Id.
\(^{144}\) Id. at 259.
\(^{145}\) Id. at 258.
\(^{146}\) 428 U.S. 262 (1976).
[1] murder of a peace officer or fireman; [2] murder committed in the course of kidnaping, burglary, robbery, forcible rape, or arson; [3] murder committed for remuneration; [4] murder committed while escaping or attempting to escape from a penal institution; and [5] murder committed by a prison inmate when the victim is a prison employee.\textsuperscript{147}

During the guilt and innocence stage of the capital trial, the jury is required to determine whether the state proved beyond a reasonable doubt that the defendant committed one of the enumerated capital offenses.\textsuperscript{148} If the jury finds the defendant guilty of a capital offense, the Texas statute, like those upheld in \textit{Gregg} and \textit{Proffitt}, provides for a separate sentencing proceeding during which both the prosecution and defense are permitted to introduce relevant evidence and present arguments for or against the punishment of death.\textsuperscript{149} Unlike Florida and Georgia, however, the Texas death penalty statute did not adopt a list of aggravating and mitigating factors and circumstances for the jury to consider during sentencing. Rather, Texas procedure required the jury to answer three questions to determine whether a defendant would be allowed to live in prison or be put to death:

(1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;
(2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and
(3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.\textsuperscript{150}

Although the Texas statute did not set out a list of aggravating circumstances, Justices Stewart, Powell and Stevens concluded that “each of the five classes of murders made capital by the Texas statute is encompassed in Georgia and Florida by one or more of their statutory aggravating circumstances.”\textsuperscript{151} The plurality reasoned that “in essence, the Texas statute requires that the jury find the existence of a statutory aggravating circumstance before the death penalty may be imposed.”\textsuperscript{152} According to the plurality opinion, notwithstanding the absence of a defined group of statutory aggravators, the system in Texas, like those

\textsuperscript{147} \textit{Id.} at 268.
\textsuperscript{148} \textit{Id.} at 269.
\textsuperscript{149} \textit{Id.}
\textsuperscript{150} \textit{Id.}
\textsuperscript{151} \textit{Id.} at 270.
\textsuperscript{152} \textit{Id.}
in Georgia and Florida, "requires the sentencing authority to focus on the particularized nature of the crime."\textsuperscript{153}

In upholding the constitutionality of the Texas statute, the plurality cautioned that consideration of only aggravating circumstances would fall short of the individualized sentencing required by the Eighth and Fourteenth Amendments.\textsuperscript{154} Such a statutory scheme, the plurality reasoned, would amount to a mandatory death sentence. "A jury must be allowed to consider on the basis of all relevant evidence not only why a death sentence should be imposed, but also why it should not be imposed."\textsuperscript{155} Because the three questions posed to the jurors sufficiently focused on mitigating circumstances, the system in Texas was constitutional.\textsuperscript{156}

Not all legislative attempts to cure the constitutional defects identified in \textit{Furman} were as successful as those in Georgia, Florida and Texas. In \textit{Woodson v. North Carolina}\textsuperscript{157} and \textit{Roberts v. Louisiana},\textsuperscript{158} a different coalition of Justices combined to invalidate the post-\textit{Furman} death penalty statutes of North Carolina and Louisiana. This time, the three-member plurality of Justices Stewart, Powell and Stevens was joined by Justices Brennan and Marshall in striking down mandatory death penalty schemes in North Carolina and Louisiana.\textsuperscript{159} In both cases, the Justices who had cast concurring votes in \textit{Gregg}, \textit{Proffitt} and \textit{Jurek} (Chief Justice Burger, and Justices White, Blackmun and Rehnquist) assumed the role of dissenters.\textsuperscript{160}


In response to \textit{Furman}, the North Carolina legislature enacted a "new" death penalty statute in 1974. This statute was virtually identical to North Carolina's pre-\textit{Furman} statute except that it made the death penalty mandatory for everyone convicted of first-degree murder or felony-murder. According to Justice Stewart's plurality opinion, mandatory death sentences had long been viewed with disfavor because such mandatory sentencing practices were perceived as "unduly harsh and unworkably rigid."\textsuperscript{161}

\textsuperscript{153.} \textit{Id.} at 271.
\textsuperscript{154.} \textit{Id.}
\textsuperscript{155.} \textit{Id.}
\textsuperscript{156.} \textit{Id.} at 272.
\textsuperscript{157.} 428 U.S. 280 (1976).
\textsuperscript{158.} 428 U.S. 325 (1976).
\textsuperscript{159.} \textit{Id.} at 327; \textit{Woodson}, 428 U.S. at 307, 308.
\textsuperscript{160.} \textit{See Roberts}, 428 U.S. at 326; \textit{Woodson}, 428 U.S. at 281-82.
\textsuperscript{161.} \textit{Woodson}, 428 U.S. at 293.
[O]ne of the most significant developments in our society's treatment of capital punishment has been the rejection of the common-law practice of inexorably imposing a death sentence upon every person convicted of a specified offense. North Carolina's mandatory death penalty statute for first-degree murder departs markedly from contemporary standards respecting the imposition of the punishment of death and thus cannot be applied consistently with the Eighth and Fourteenth Amendments' requirement that the State's power to punish "be exercised within the limits of civilized standards."\(^\text{162}\)

Justice Stewart identified two other reasons to strike down the North Carolina statute. First, the mandatory sentencing procedure did not address "Furman's rejection of unbridled jury discretion in the imposition of capital sentences."\(^\text{163}\) "North Carolina's mandatory death penalty statute provides no standards to guide the jury in its inevitable exercise of the power to determine which first-degree murderers shall live and which shall die."\(^\text{164}\) Moreover, studies showed that jurors faced with mandatory death sentences were reluctant to return guilty verdicts because of the "enormity of the sentence automatically imposed."\(^\text{165}\)

The second reason Justice Stewart gave for invalidating the North Carolina statute is that the mandatory sentencing procedure did not allow for "particularized consideration of relevant aspects of the character and record of each convicted defendant before the imposition upon him of a sentence of death."\(^\text{166}\) "[W]e believe that in capital cases the fundamental respect for humanity underlying the Eighth Amendment requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death."\(^\text{167}\) Thus, *Woodson* imposed a requirement of "individualized sentencing" in capital cases.\(^\text{168}\)

The guiding principle is recognition that death is "different." According to *Woodson*,

> [T]he penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.\(^\text{169}\)

\(^{162}\) *Id.* at 301 (quoting Trop v. Dulles, 356 U.S. 86, 100 (1958)).  
\(^{163}\) *Id.* at 302.  
\(^{164}\) *Id.* at 303.  
\(^{165}\) *Id.* at 302.  
\(^{166}\) *Id.* at 303.  
\(^{167}\) *Id.* at 304 (citation omitted).  
\(^{168}\) *Id.*  
\(^{169}\) *Id.* at 305.
4. Roberts v. Louisiana

Louisiana, like North Carolina, responded to Furman by replacing discretionary jury sentencing in capital cases with mandatory death sentences. Consequently, the Louisiana statute met the same fate as North Carolina's statute. After Furman, Louisiana adopted a different and somewhat narrower definition of first-degree murder than North Carolina. Although North Carolina had decreed that all persons guilty of either "willful, deliberate and premeditated homicide" or felony-murder would automatically receive a death sentence, Louisiana took a more conservative approach.

The Louisiana statute also imposed an automatic death sentence on all first-degree murderers, but defined first-degree murder to include only five categories of homicide: (1) killing in connection with certain felonies; (2) killing a fireman or police officer engaged in the performance of his duties; (3) killing for remuneration; (4) killing with the intent to inflict harm on more than one person; and (5) killing by a person with a prior murder conviction or under a current life sentence.

Under the Louisiana scheme, when the state charged an individual with the offense of first-degree murder the jury was provided with, and instructed on, four potential verdicts: (1) guilty of first-degree murder; (2) guilty of second-degree murder; (3) guilty of manslaughter; and (4) not guilty. Second-degree murder was punished by life in prison. If a jury found the defendant guilty of first-degree murder, death was mandatory and appeals for mercy by the jury had no effect.

Writing for the three-member plurality, Justice Stevens concluded that limiting the range of offenses for which the death penalty could be imposed did not adequately respond to the harshness and inflexibility of a mandatory death sentence. According to Justice Stevens, even narrowly tailored mandatory death penalty statutes had historically been rejected in favor of discretionary death penalty statutes. This historical trend revealed "our society's rejection of the belief that 'every offense in a like legal category calls for an identical punishment without

171. Woodson, 428 U.S. at 286.
172. Roberts, 428 U.S. at 329 n.3.
173. See id. at 329-30.
174. See id. at 331.
175. See id.
176. Id. at 332.
177. See id. at 333.
regard to the past life and habits of a particular offender."[178] "The Eighth Amendment, which draws much of its meaning from 'the evolving standards of decency that mark the progress of a maturing society,' simply cannot tolerate the reintroduction of a practice so thoroughly discredited."[179] Moreover, the system of offering four verdicts to the jury

not only lacks standards to guide the jury in selecting among first-degree murderers, but it plainly invites the jurors to disregard their oaths and choose a verdict for a lesser offense whenever they feel the death penalty is inappropriate. There is an element of capriciousness in making the jurors' power to avoid the death penalty dependent on their willingness to accept this invitation to disregard the trial judge's instructions.[180]

Justice White, along with Chief Justice Burger and Justices Blackmun and Rehnquist, dissented in *Woodson* and *Roberts*. [181] Justice White rejected the plurality's view that historically mandatory death sentences were so disfavored that they should be deemed unconstitutional under the Eighth Amendment.[182] Further, Justice White concluded that the mandatory provisions in the death penalty statute were designed to remove the unfettered jury discretion which rendered the death penalty in *Furman* unconstitutional.[183] In *Roberts*, Justice White wrote: "As I see it, we are now in no position to rule that the State's present law, having eliminated the overt discretionary power of juries, suffers from the same constitutional infirmities which led this Court to invalidate the Georgia death penalty statute in *Furman v. Georgia*."

Justice White criticized the distinctions drawn by the plurality between the mandatory death penalty statute of Louisiana and the statutory scheme of Texas. Justice White stated:

Furthermore, Justices Stewart, Powell, and Stevens uphold the capital punishment statute of Texas, under which capital punishment is required if the defendant is found guilty of the crime charged and the jury answers two additional questions in the affirmative. Once that occurs, no discretion is left to the jury; death is mandatory. Although Louisiana juries are not required to answer these precise questions, the Texas law is not constitutionally distinguishable from the Louisiana system under which the jury, to convict.

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178. *Id.* (quoting *Williams v. New York*, 337 U.S. 241, 247 (1949)).
179. *Id.* at 336 (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958)).
180. *Id.* at 335.
must find the elements of the crime, including the essential element of intent to kill or inflict great bodily harm, which, according to the instructions given in this case, must be felonious, "that is, it must be wrong or without any just cause or excuse." 185

185. Id. at 359. In his Woodson dissent, Justice Rehnquist embraced Justice White’s view that the Texas statutory scheme required a mandatory death penalty. 428 U.S. at 315 (Rehnquist, J., dissenting). Justice Rehnquist similarly attacked the Woodson plurality’s decision to uphold the Texas scheme while striking down North Carolina’s statute.

The Texas system much more closely approximates the mandatory North Carolina system which is struck down today. The jury is required to answer three statutory questions. If the questions are unanimously answered in the affirmative, the death penalty must be imposed. It is extremely difficult to see how this system can be any less subject to the infirmities caused by juror nullification which the plurality concludes are fatal to North Carolina’s statute. Justices Stewart, Powell, and Stevens apparently think they can sidestep this inconsistency because of their belief that one of the three questions will permit consideration of mitigating factors justifying imposition of a life sentence. It is, however, as those Justices recognize far from clear that the statute is to be read in such a fashion. In any event, while the imposition of such unlimited consideration of mitigating factors may conform to the plurality’s novel constitutional doctrine that “[a] jury must be allowed to consider on the basis of all relevant evidence not only why a death sentence should be imposed, but also why it should not be imposed,” the resulting system seems as likely as any to produce the unbridled discretion which was condemned by the separate opinions in Furman.

Id. at 315-16 (Rehnquist, J., dissenting) (citations omitted).

The plurality’s insistence on individualized consideration of the sentencing . . . does not depend upon any traditional application of the prohibition against cruel and unusual punishment contained in the Eighth Amendment. The punishment here is concededly not cruel and unusual, and that determination has traditionally ended judicial inquiry in our cases construing the Cruel and Unusual Punishments Clause. What the plurality opinion has actually done is to import into the Due Process Clause of the Fourteenth Amendment what it conceives to be desirable procedural guarantees where the punishment of death, concededly not cruel and unusual for the crime of which the defendant was convicted, is to be imposed. This is squarely contrary to McGautha, and unsupported by any other decision of this Court.

Id. at 323-24 (Rehnquist, J., dissenting) (citations omitted).
B. Parsing the Lexicon of Death

A former law clerk to Justice Blackmun recently characterized the Justice's decisionmaking as imbued with "carefulness and thoroughness, and . . . sensitivity to the real-life situation of the litigants." Nowhere are these traits more apparent than in Justice Blackmun's personal and professional struggle with capital cases.

186. In Arave v. Creech, the Court held that Idaho's aggravating circumstance that the defendant exhibited "utter disregard for human life," as construed by the Idaho Supreme Court, was not facially invalid. 113 S. Ct. 1534, 1541 (1993). Justice Blackmun barely disguised his disgust in his dissent:

Confronted with an insupportable limiting construction of an unconstitutionally vague statute, the majority in turn concocts its own limiting construction of the state court's formulation. Like "nonsense upon stilts," however, the majority's reconstruction only highlights the deficient character of the nebulous formulation that it seeks to advance. Because the metaphor "cold-blooded" by which Idaho defines its "utter disregard" circumstance is both vague and unenlightening, and because the majority's recasting of that metaphor is not dictated by common usage, legal usage, or the usage of the Idaho courts, the statute fails to provide meaningful guidance to the sentencer as required by the Constitution. Accordingly, I dissent. Id. at 1545 (Blackmun, J., dissenting) (footnote omitted).

To further emphasize the macabre banality of making life or death decisions turn on questions of semantics, Justice Blackmun wrote: "There is, of course, something distasteful and absurd in the very project of parsing this lexicon of death. But as long as we are in the death business, we shall be in the parsing business as well." Id. at 1550. (Blackmun, J., dissenting).


188. Perhaps Justice Blackmun himself put it best in his Furman dissent: "Cases such as these provide for me an excruciating agony of the spirit." Furman v. Georgia, 408 U.S. 238, 405 (1972) (Blackmun, J., dissenting). Recently, in an interview with National Public Radio reporter Nina Totenberg, Justice Blackmun described a typical execution eve at the Supreme Court.

[N]The justices have scattered and gone home, probably, but we know in advance about scheduled executions, and there is at least one clerk from each chamber who is here, perhaps all night if necessary, and my clerk is on the phone probably several times, as papers are being filed and we talk about them. And nearly always the vote is by telephone. On occasion we have a conference call, where we all get on the line, and—but it's kind of like a death march, I suppose. I can't speak for the clerks, but sometimes they look pretty exhausted the next morning, and I am, too. And of course, it occasions a little bit of sleeplessness for me, but then, maybe I'm not tough enough. I'm not as tough as some of the justices are about the death penalty.

Nightline, (ABC television broadcast, Nov. 18, 1993).

When Totenberg asked whether Justice Blackmun had ever cried over capital cases, his first response was "No." He clarified: "Figuratively, yes, but not actually." Id. After confirming that he believed it possible that "genuinely innocent people were executed," Justice Blackmun revealed a sense of powerlessness: "Well, you stay awake, there's no doubt about it, but there's just not much you can do except make a noise about it . . . ." Nonetheless, as the interview made clear, Justice Blackmun's empathy was not confined to those facing imminent execution:
Several of Justice Blackmun's post-Gregg opinions chart his growing disaffection with the Court's capital jurisprudence. For some time after Gregg, however, Justice Blackmun appeared committed to a conservative construction of the Eighth Amendment. For example, in *Spaziano v. Florida*—one of relatively few majority opinions he authored in capital cases—Justice Blackmun had little difficulty affirming the death sentence of Joseph Robert Spaziano. At Spaziano's trial for first-degree murder, the court informed him that it would instruct the jury on lesser included, noncapital offenses, if Spaziano would agree to waive the statute of limitations, which had expired as to those offenses. Spaziano refused and the court instructed the jury solely on capital murder. The jury convicted Spaziano of first-degree murder, but a majority of jurors recommended that he be sentenced to life imprisonment. Spaziano's trial judge overrode the jury's recommendation and sentenced Spaziano to die in Florida's electric chair.

In the Supreme Court, Spaziano argued that the trial court committed constitutional error in refusing to instruct the jury on lesser included offenses. Indeed, four years earlier, in *Beck v. Alabama*, the Court recognized that a risk of an unwarranted conviction is created when a jury is deprived of a "third option" of convicting the defendant of a

On the other hand, I can understand and sympathize completely with the victims, if they have survived, or with the victim's family and the anguish that they have gone through, and I can understand why our legislators at the state level and in the Congress, on occasion, have imposed the death penalty.

Mere more generally, former law clerk Harold Koh has commented that Justice Blackmun's willingness to show his agony showed that he worried about cases, both because they were intellectually and doctrinally difficult, but also because they were personally painful. Other judges recognized this as well and tried to put personal pain away or be less candid about what they were doing. Justice Blackmun absolutely refused to do that and was much more honest.


Not all observers have taken such a charitable view of Justice Blackmun's compassionate decisionmaking. See, e.g., Jeffrey Rosen, *Sentimental Journey: The Emotional Jurisprudence of Harry Blackmun*, THE NEW REPUBLIC, May 2, 1994, at 13 (arguing that "the qualities that made Blackmun an admirable man ultimately condemned him to be an ineffective justice").

190. *Id.* at 450.
191. *Id.*
192. Under Florida's death penalty statute, a jury's recommendation as to sentence is merely advisory. The trial court is required to conduct its own weighing of the aggravating and mitigating circumstances. Notwithstanding the recommendation of the jury, the trial court is empowered to enter a sentence of life imprisonment or death. If the court imposes death, its decision must be accompanied by specific written findings. *Id.* at 451.

193. *Id.* at 451-52.
194. *Id.* at 449.
lesser included offense. Nonetheless, Justice Blackmun devoted a scant seven paragraphs to rejecting this challenge.

If the jury is not to be tricked into thinking that there is a range of offenses for which the defendant may be held accountable, then the question is whether Beck requires that a lesser included offense instruction be given, with the defendant being forced to waive the expired statute of limitations on those offenses, or whether the defendant should be given a choice between having the benefit of the lesser included offense instruction or asserting the statute of limitations on the lesser included offenses. We think the better option is that the defendant be given the choice.

Justice Blackmun deftly distinguished Beck because Spaziano was not seeking to put before the jury a “third option.” Had Spaziano’s argument prevailed, the jury would have been permitted to find him guilty of first-degree murder (and punishable accordingly), guilty of lesser included offenses (for which he could not be punished at all due to the statutes of limitations) or not guilty (and, of course, therefore unpunishable). Justice Blackmun noted: “Where no lesser included offense exists, a lesser included offense instruction detracts from, rather than enhances, the rationality of the process. Beck does not require that result.”

Spaziano also challenged the constitutionality of Florida’s override provision which empowered the judge to sentence him to death, even though a majority of jurors had recommended that he serve a life sentence. Justice Blackmun was again unmoved. He rejected the notion that juries, not judges, are better equipped to make reliable capital sentencing decisions. Justice Blackmun saw no reason why a jury’s recommendation of life should be inviolate. Although Justice Blackmun agreed that the fundamental issue in a capital sentencing proceeding is the determination of the appropriate punishment, he found nothing in the Constitution which guaranteed the right to jury determination of that issue. Finally, even though a majority of jurisdictions with capital sentencing statutes vest the life-or-death decision in the jury, Spaziano failed to establish that contemporary standards of fairness and decency are offended by the jury override.

196. Id. at 637.
197. Spaziano, 468 U.S. at 456.
198. Id. at 455.
199. Id. at 449.
200. Id. at 461-62.
201. Id. at 465.
202. Spaziano had argued that 30 out of 37 jurisdictions with a capital sentencing statute let the jury decide. Id. at 463. Of the others, only three allowed a judge to override a jury recommendation. Id.
203. Id. at 464.
Within three years of writing to affirm Spaziano's death sentence, Justice Blackmun authored the majority opinion in *Sumner v. Shuman*,\(^{204}\) which granted relief to a death-sentenced inmate. In 1975, while serving life without parole for an unrelated first-degree murder, Raymond Wallace Shuman killed a fellow inmate at Nevada State Prison.\(^{203}\) A Nevada statute then in effect mandated an automatic death sentence for anyone convicted of murder while serving a sentence of life without parole.\(^{206}\) Accordingly, Shuman was sentenced to death.\(^{207}\)

The following year, over Justice Blackmun's dissent,\(^{208}\) the United States Supreme Court struck down mandatory death penalty provisions in North Carolina\(^{209}\) and Louisiana.\(^{210}\) Relying in large part on these precedents, Shuman urged the Supreme Court to hold that Nevada's automatic death penalty statute was likewise unconstitutional.\(^{211}\)

Writing for a six-member majority, Justice Blackmun held that Nevada's mandatory death penalty statute violated the Eighth and Fourteenth Amendments.\(^{212}\) Clearly, Nevada's scheme ran afoul of the Court's requirement of individualized sentencing in capital cases. Under the individualized-sentencing doctrine, the sentencer is constitutionally required to consider, as a mitigating factor, any aspect of a capital defendant's character or record, and any circumstances of the particular offense.\(^{213}\) Nonetheless, the state argued that an exception to the individualized-sentencing doctrine was necessary in cases involving

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\(^{206}\) 483 U.S. at 67 n.1.

\(^{207}\) *Sumner*, 578 P.2d at 1184.


\(^{209}\) *Woodson*, 428 U.S. 280 (holding unconstitutional a North Carolina statute which imposed a mandatory death sentence).

\(^{210}\) *Roberts*, 428 U.S. 325 (holding unconstitutional a Louisiana statute which required a mandatory death sentence). Indeed, in 1977, the year after *Roberts* and *Woodson* were decided, the Nevada legislature repealed its mandatory death penalty provisions. *Shuman*, 483 U.S. at 67 n.1. In any event, neither *Roberts* nor *Woodson* resolved the constitutionality of a mandatory statute applied to inmates serving life without parole. For a discussion of *Roberts* and *Woodson*, see supra notes 161-85 and accompanying text.

\(^{211}\) *Shuman*, 483 U.S. at 69-70. The Nevada statute under which Shuman was sentenced to death was enacted shortly after the *Furman* decision and was repealed soon after the decisions in *Gregg* and *Woodson*. Thus, Nevada's mandatory statute was in force for four years. *Id.* at 70.

\(^{212}\) *Id.* at 85.

\(^{213}\) *Id.* at 75-76.
murder by inmates serving life without parole.\textsuperscript{214} This exception, the state urged, was required for two reasons. First, without a mandatory death statute for inmates serving life without parole, there would be nothing to deter this group from committing additional murders.\textsuperscript{215} Second, the state’s legitimate interests in retribution would be undermined by applying a guided-discretion statute to inmates who murder while serving life without parole.\textsuperscript{216}

In his majority opinion, Justice Blackmun explained why neither reason justified a departure from the individualized-sentencing doctrine:

A mandatory capital-sentencing procedure for life-term inmates is not necessary as a deterrent. An inmate who is serving a life sentence is not immune from Nevada’s death penalty if he is convicted of murder. The fact that a State provides a guided-discretion sentencing procedure does not undermine any deterrent effect that the threat of the death penalty may have. Those who deserve to die according to the judgment of the sentencing authority will be condemned to death under such a statute.

The force of the deterrent argument for this mandatory statute is weakened significantly by the fact that every prison system in the country is currently operating without the threat of a mandatory death penalty for life-term inmates. . . .

We also reject the proposition that a mandatory death penalty for life-term inmates convicted of murder is justified because of the State’s retribution interests. The argument is that the death penalty must be mandatory for life-term inmates because there is no other available punishment for one already serving a sentence of life imprisonment without possibility of parole. . . . [T]here are other sanctions less severe than execution that can be imposed even on a life-term inmate. An inmate’s terms of confinement can be limited further, such as through a transfer to a more restrictive custody or correctional facility or deprivation of privileges of work or socialization. In any event, even the retribution interests of the State cannot be characterized according to a category of offense because “[s]ociety’s legitimate desire for retribution is less strong with respect to a defendant who played a minor role in the murder for which he was convicted.”\textsuperscript{217}

Moreover, Justice Blackmun wrote, “any legitimate state interests can be satisfied fully through the use of a guided-discretion statute that ensures adherence to the constitutional mandate of heightened reliability in death-penalty determinations through individualized-sentencing procedures.”\textsuperscript{218}

Shuman marks an important, if not somewhat mysterious, point in Justice Blackmun’s capital jurisprudence. Without one word of explanation, Justice Blackmun abandoned his dissents in Woodson and

\begin{itemize}
  \item[214.] Id. at 82-83.
  \item[215.] See id. at 83.
  \item[216.] See id.
  \item[217.] Id. at 82-85 (quoting Skipper v. South Carolina, 476 U.S. 1, 13 (1986)).
  \item[218.] Id. at 85.
\end{itemize}
Roberts, and embraced the majority opinions in those cases to support the result he reached in Shuman.219

Justice Blackmun's professional embrace of a punishment he found personally repugnant was undermined further in Coleman v. Thompson.220 In Coleman, six members of the Court agreed that Roger Keith Coleman could be executed without federal review of his constitutional claims because Coleman's lawyers had missed a filing deadline within which to submit a notice of appeal from a state court decision denying him relief.221 According to Justice O'Connor's majority opinion, "This Court will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment."222

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219. In Shuman, Justice Blackmun also departed from his usual practice of focusing painstaking attention on the facts of each case. Even though the issue in Shuman presented a pure question of law, Justice Blackmun's complete omission of the facts can perhaps best be understood when one considers the cruel nature of the killing for which Shuman was automatically sentenced to die:

On August 27, 1973, Ruben Bejarno, an inmate at the Nevada State Prison, was set afire and burned with a flammable fluid. He was given emergency treatment at Carson-Tahoe Hospital in Carson City and transferred to Valley Medical Center in Santa Clara, California. He died three days later.

When he was transferred from the prison to the hospital, he said several times in the presence of an officer, "[a]ll over a window." Bejarno stated at the hospital that it was Shuman who had set him afire. He reiterated this statement, upon questioning, at the medical center.

Shuman and Bejarno occupied adjoining cells. Two cans containing flammable fluid, both with Shuman's fingerprints, were found in Bejarno's cell. When Bejarno ran from his cell in flames, Shuman was seen near Bejarno's cell making throwing motions. The State's contention was that Shuman threw the empty cans into Bejarno's cell after he had set him afire. Shuman's hair was singed; he suffered a severe burn on his left hand. It was also learned that the two had been fighting, just prior to the incident, over opening a window located near their cells.

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220. See id. at 755-57. Virginia state law provided that "no appeal shall be allowed unless a notice of appeal is filed with the trial court within 30 days of final judgment." Id. at 727. Coleman's lawyers' fatal mistake was in calculating the 30-day period as beginning when the clerk of the court entered the order of final judgment. See id. Unbeknownst to counsel, the 30-day clock started running four days earlier when the judge actually signed the order of final judgment. See id. Ironically, the error, although deadly, did not amount to ineffective assistance of counsel. By the time Coleman's lawyers missed the filing deadline, Coleman's case was in state postconviction, a stage during which no one is constitutionally entitled to the assistance of counsel. Id. at 756.

221. See id. at 729.
Coleman argued that, under *Harris v. Reed*, he was nonetheless entitled to federal review of his constitutional claims. In *Harris*, the Court announced that "a procedural default [such as missing a filing deadline] does not bar consideration of a federal claim on either direct or habeas review unless the last state court rendering a judgment in the case 'clearly and expressly' states that its judgment rests on a state procedural bar." Restated, if the last state court to which a petitioner presented his federal claims fails to plainly state that it is relying on independent and adequate state grounds, *Harris* creates a presumption that there is no adequate and independent state ground for the state court decision. In those circumstances, federal court review is permitted, notwithstanding the procedural default.

The majority avoided bestowing on Coleman the benefit of the "*Harris* presumption" by holding that the presumption did not apply to summary orders, such as the "three-sentence dismissal order" the Virginia Supreme Court used to deny relief to Coleman.

Justice Blackmun's pique was palpable. Joined by Justices Marshall and Stevens, he dissented:

Federalism; comity; state sovereignty; preservation of state resources; certainty: The majority methodically inventories these multifarious state interests before concluding that the plain-statement rule . . . does not apply to a summary order. One searches the majority's opinion in vain, however, for any mention of petitioner Coleman's right to a criminal proceeding free from constitutional defect or his interest in finding a forum for his constitutional challenge to his conviction and sentence of death. . . . [D]isplaying obvious exasperation with the breadth of substantive federal habeas doctrine and the expansive protection afforded by the Fourteenth Amendment's guarantee of fundamental fairness in state criminal proceedings, the Court today continues its crusade to erect petty procedural barriers in the path of any state prisoner seeking review of his federal constitutional claims. Because I believe that the Court is creating a Byzantine morass of arbitrary, unnecessary, and unjustifiable impediments to the vindication of federal rights, I dissent.

Justice Blackmun's opinion suggests a growing displeasure with the Court's treatment of federal habeas review:

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, where the discourse of rights is routinely replaced with the functional dialect of interests. The Court's habeas jurisprudence now routinely, and without evident reflection, subordinates fundamental constitu-

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225. *Harris*, 489 U.S. at 263 (citation omitted).
227. Id.
228. Id. at 758-59 (Blackmun, J., dissenting).
tional rights to mere utilitarian interests. Such unreflective cost-benefit analysis is inconsistent with the very idea of rights. The Bill of Rights is not, after all, a collection of technical interests, and "surely it is an abuse to deal too casually and too lightly with rights guaranteed" therein.229

The fertile seeds of discontent found in Justice Blackmun's Coleman dissent fully flowered in Sawyer v. Whitley.230 A Louisiana jury sentenced Robert Wayne Sawyer to die for a brutal murder in which the victim was beaten, scalded with hot water and set afire.231 After Sawyer's first petition for a writ of habeas corpus failed, he filed a second federal petition.232 Because this petition contained successive and abusive claims,233 the lower federal courts denied relief and refused to consider Sawyer's claims on the merits.234 Sawyer argued that, notwithstanding the successive and abusive nature of his claims, he was entitled to federal court review of those claims under the "miscarriage of justice" exception.235 This exception applied, according to Sawyer, because he was "actually innocent" of the death penalty.236

The Court denied relief, but only after setting an extraordinarily harsh threshold for petitioners seeking to demonstrate "actual innocence." Sawyer would be entitled to federal review of his successive and abusive claims only if he could "show by clear and convincing evidence that but for a constitutional error, no reasonable juror would have found

229. Id. at 764-65 (citations omitted) (quoting Brown v. Allen, 344 U.S. 443, 498 (1953)).
231. Id. at 2517-18.
232. Id. at 2518.
233. Successive claims include claims which were raised and rejected in an earlier petition. Abusive claims include claims which should have been raised, but were not in fact raised, in an earlier petition.
234. 112 S. Ct. at 2518. The Court of Appeals for the Fifth Circuit held that Sawyer had not shown cause for failure to raise the claims in his first petition, and that he had not shown that he was "actually innocent" of the crime of which he was convicted or the penalty imposed. Id. The general rule is that, unless a habeas petitioner demonstrates cause and prejudice, a court may not reach the merits of: (a) successive claims which raise grounds identical to grounds heard and decided on the merits in a previous petition; (b) new claims, not previously raised which constitute an abuse of the writ; or (c) procedurally defaulted claims in which the petitioner failed to follow applicable state procedural rules in raising the claims. Id. (citation omitted). An exception to the requirement of showing cause and prejudice is if the failure to hear the claims would constitute a "miscarriage of justice." Id. According to the Court, justice miscarries when federal courts refuse to review the claims of someone who can make out a claim of "actual innocence." Id. Sawyer forced the Court to define what constitutes actual innocence for purposes of excusing a petitioner from the cause and prejudice requirement. Id. at 2518-19.
235. Id.
236. Id. at 2517-18.
him eligible for the death penalty" under Louisiana law.237 Moreover, in determining eligibility for death, courts should consider only evidence concerning aggravating factors.238

Justice Blackmun joined Justice Stevens' concurring opinion.239 According to Justice Stevens' opinion, the majority's "narrow definition of 'innocence of the death sentence' fails to recognize that, in rare cases, even though a defendant is eligible for the death penalty, such a sentence may nonetheless constitute a fundamental miscarriage of justice."240

Although Justice Blackmun concurred in the judgment that Sawyer was not entitled to relief, he bitterly castigated the Court's "unduly cramped view of 'actual innocence.'" He wrote separately "to reemphasize [his] opposition to an implicit premise underlying the Court's decision: that the only 'fundamental miscarriage of justice' in a capital proceeding that warrants redress is one where the petitioner can make out a claim of 'actual innocence.'"241 In Justice Blackmun's view, the majority's "exaltation of accuracy as the only characteristic of 'fundamental fairness' is deeply flawed."242

A more personal reason prompted Justice Blackmun's separate opinion: burgeoning doubt about the continuing constitutionality of capital punishment. Justice Blackmun's agonizing struggle with the constitutionality of the death penalty was laid bare when he confessed

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237. Id. at 2517. Sawyer did not claim that he was actually innocent of the murder for which he received the death sentence. Rather, he argued that he was actually innocent of the death penalty. In other words, constitutional error caused a "fair probability" that the admission of false evidence or the preclusion of mitigating evidence resulted in his death sentence. Id. at 2521.

238. Id. at 2522-23.

239. Justice O'Connor also joined Justice Stevens' opinion. Id. at 2530.

240. Id. at 2533 (Stevens, J., concurring).

241. Id. at 2525 (Blackmun, J., concurring).

242. Id. (Blackmun, J., concurring).

243. Id. at 2527 (Blackmun, J., concurring) (quoting Smith v. Murray, 477 U.S. 527, 545 (1986) (Stevens, J., dissenting)). Justice Blackmun cited the case of Warren McCleskey as "the archetypal 'fundamental miscarriage of justice' that the federal courts are charged with remedying." Id. at 2529.

McCleskey demonstrated that state officials deliberately had elicited inculpatory admissions from him in violation of his Sixth Amendment rights and had withheld information he needed to present his claim for relief. In addition, McCleskey argued convincingly in his final hours that he could not even obtain an impartial clemency hearing because of threats by state officials against the pardons and parole board. That the Court permitted McCleskey to be executed without ever hearing the merits of his claims starkly reveals the Court's skewed value system, in which finality of judgments, conservation of state resources, and expediency of executions seem to receive greater solicitude than justice and human life.

Id. (Blackmun, J., concurring). Warren McCleskey's case came before the Court twice before he was executed. See infra notes 277-94 and accompanying text.
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.’  

He elaborated:

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.

After surveying recent decisions denying relief to death-sentenced prisoners, Justice Blackmun remarked, “As I review the state of this Court’s capital jurisprudence, I thus am left to wonder how the ever-shrinking authority of the federal courts to reach and redress constitutional errors affects the legitimacy of the death penalty itself.” His opinion ends with a warning to his colleagues: “The more the Court constrains the federal courts’ power to reach the constitutional claims of those sentenced to death, the more the Court undermines the very legitimacy of capital punishment itself.”

IV. JUSTICE BLACKMUN’S EVOLUTION

What, then, ultimately led Justice Blackmun to conclude in 1994—as five concurring Justices had in Furman twenty-two years earlier—that the death penalty “as currently administered” is contrary to the
Constitution of the United States? Part of the answer lies in what Justice Blackmun describes as “the paradox underlying the Court's post-
Furman jurisprudence.” According to Justice Blackmun, Furman's promise is “that the death penalty must be imposed fairly, and with reasonable consistency, or not at all.” In the years since Furman, the Court has imposed in capital cases two inherently incompatible sets of commands: (1) the sentencer’s discretion to impose the death penalty must be meticulously guided; and (2) the sentencer’s discretion to exercise mercy must be unlimited. At bottom, the conflict is one between consistency and rationality in the administration of the death penalty and fairness to the individual defendant.

A. Furman's Promise of Consistency and Rationality in the Imposition of the Death Penalty

Given that Furman generated nine separate opinions, it is not surprising that state legislatures, seeking to comply with its mandate, reacted in markedly different ways. However, by the time the Court decided Gregg in 1976, as least part of Furman’s mandate was clear: when a sentencing body exercises discretion on a matter so grave as whether a human life should be taken or spared, that discretion must be carefully channelled and limited so as to minimize the risk of wholly arbitrary and capricious action. To avoid the “wanton” and “random” infliction of death, the sentencer’s discretion should be fettered by procedural rules and objective standards. Otherwise, as the Court noted in Gregg, “the system cannot function in a consistent and a rational manner.”

It is significant that on the same day the Court upheld the constitutionality of death penalty schemes that guided sentencing discretion, it struck down mandatory death penalty statutes that completely eliminat-
ed sentencing discretion.259 When it held that mandatory death penalty schemes were unconstitutional, the Court took an important step toward embracing an individualized-sentencing requirement in capital cases.

B. The Lockett-Eddings Requirement of Individualized-Sentencing Determinations

In Lockett v. Ohio,260 the Court reversed a death sentence imposed under a capital sentencing scheme which precluded consideration of mitigating circumstances proffered by the defendant as the basis for a sentence less than death.261 Sandra Lockett and several others planned to rob a pawnshop. Because Lockett knew the owner of the pawnshop, she stayed in the car while the others went in the store.262 During the course of the robbery, one of the robbers shot and killed the owner.263 Lockett was sentenced to death under an Ohio statute which did not permit the sentencing authority to consider as mitigating evidence Lockett’s character, prior record, age, lack of specific intent to cause death or her relatively minor role in the crime.264

According to the plurality opinion, individualized sentencing is essential in capital cases.265 Under the individualized-sentencing doctrine, selection of an appropriate sentence depends upon the judge’s “possession of the fullest information possible concerning the defendant’s life and characteristics.”266 As the Court explained in an earlier case:

A process that accords no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind. It treats all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death.267

261. Id. at 606-08.
262. Id. at 590.
263. Id.
264. Id. at 593-94.
265. Id. at 605.
The Court in *Lockett* reaffirmed that fundamental fairness during capital sentencing proceedings could only be assured by treating each person convicted of a capital crime "with that degree of respect due the uniqueness of the individual."\(^{268}\) However, because individualized sentencing vests the sentencer with discretion to exercise mercy, arbitrary decisionmaking (prohibited by *Furman*) may to some degree be inevitable.\(^{269}\)

One year before *Lockett* was decided, Monte Lee Eddings, a sixteen-year-old, was convicted of the first-degree murder of an Oklahoma highway patrolman and was sentenced to death.\(^{270}\) In imposing death, the trial judge considered Eddings' youth in mitigation but interpreted Oklahoma state law to prevent him from considering as mitigating evidence Eddings' unhappy upbringing, violent family history and emotional disturbance.\(^{271}\)

The Supreme Court reversed and remanded because Eddings' sentence had been imposed without "the type of individualized consideration of mitigating factors . . . required by the Eighth and Fourteenth Amendments in capital cases."\(^{272}\) The Court appeared to marry *Lockett*'s requirement of individualized sentencing to *Furman*'s requirement of rational, consistent imposition of death sentences when it recognized in *Eddings* that the death penalty must "be imposed fairly, and with reasonable consistency, or not at all."\(^{273}\) For Justice Blackmun, this union was one of "competing constitutional commands."\(^{274}\) That these commands are hopelessly incompatible is apparent, according to Justice Blackmun, from the Court's unsuccessful attempts to balance the two during the twenty-two years since *Furman*.\(^{275}\) Nor does he believe a proper balance possible: "Experience has shown that the consistency and rationality promised in *Furman* are

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269. Justice Stewart offered an answer to this argument by suggesting that *Furman* does not mandate the extirpation of all risk of arbitrary and capricious action. It only requires that the risk of wholly arbitrary and capricious action be minimized. *Gregg v. Georgia*, 428 U.S. 153, 189 (1976).


271. *Id.* at 107-09.

272. *Id.* at 105 (quoting *Lockett*, 438 U.S. at 606).


inversely related to the fairness owed the individual when considering a sentence of death. A step toward consistency is a step away from fairness.” The decisional path that led Justice Blackmun to this remarkable conclusion is examined below.

C. McCleskey v. Kemp

In 1987, Justice Blackmun revisited the issue of racial discrimination in the imposition of the death penalty in McCleskey v. Kemp. Warren McCleskey, a black man, was sentenced to die for killing a white police officer during the course of an armed robbery of a Georgia furniture store. McCleskey argued that Georgia administered its capital sentencing schemes in a racially discriminatory manner, in violation of the Eighth and Fourteenth Amendments. To support his claim, McCleskey proffered a comprehensive statistical study that concluded that, “after taking into account some 230 nonracial factors that might legitimately influence a sentencer, the jury more likely than not would have spared McCleskey’s life had his victim been black.” Blacks
who kill whites were found to be sentenced to death "at nearly 22 times
the rate of blacks who kill blacks, and more than 7 times the rate of
whites who kill blacks."281

A bare majority of the Court282 rejected McCleskey's claims and
eventually he was executed.283 Justice Blackmun, although he had
denied relief in 1968 as a circuit judge to William Maxwell, an
Arkansas death row inmate who had raised similar claims,284 dis-
sented.285 He joined most of Justice Brennan's dissent that explained
how the Georgia sentencing system violated the Eighth Amendment.
Justice Blackmun wrote separately to explain that McCleskey had also

been black, while, among defendants with aggravating and mitigating factors
comparable to McCleskey's, 20 of every 34 would not have been sentenced to die if
their victims had been black. Finally, the assessment would not be complete without
the information that cases involving black defendants and white victims are more likely
to result in a death sentence than cases featuring any other racial combination of
defendant and victim. The story could be told in a variety of ways, but McCleskey
could not fail to grasp its essential narrative line: there was a significant chance that
race would play a prominent role in determining if he lived or died.

Id. at 321 (citations omitted).

281. Id. at 327 (Brennan, J., dissenting).

282. Justice Powell's opinion for the majority was joined by Chief Justice Rehnquist and
Justices White, O'Connor and Scalia.

283. Warren McCleskey died in Georgia's electric chair on September 25, 1991. Legal
Defense Fund, Death Row, U.S.A. 6 (Fall 1994).

284. While a judge on the United States Court of Appeals, Blackmun rejected a challenge to
the constitutionality of an Arkansas capital sentencing scheme based on allegations of racial
discrimination supported by statistical evidence. Maxwell v. Bishop, 398 F.2d 138, 148 (8th Cir.
1968). Justice Blackmun explained why McCleskey's evidence compelled a different result than
that reached by the Eighth Circuit in Maxwell.

The Court of Appeals found the evidence presented by Maxwell incomplete, not
directly relevant to his individual claim, and statistically insufficient. McCleskey's
evidence, however, is of such a different level of sophistication and detail that it simply
cannot be rejected on those grounds. Unlike the evidence presented by Maxwell, which
did not contain data from the jurisdiction in which he was tried and sentenced,
McCleskey's evidence includes data from the relevant jurisdiction. Whereas the
analyses presented by Maxwell did not take into account a significant number of
variables and were based on a universe of 55 cases, the analyses presented by
McCleskey's evidence take into account more than 400 variables and are based on data
concerning all offenders arrested for homicide in Georgia from 1973 through 1978, a
total of 2,484 cases. Moreover, the sophistication of McCleskey's evidence permits
consideration of the existence of racial discrimination at various decision points in the
process, not merely at the jury decision. It is this experience, in part, that convinces
me of the significance of the Baldus study.

McCleskey, 481 U.S. at 354 n.7 (Blackmun, J., dissenting).

285. McCleskey, 481 U.S. at 345 (Blackmun, J., dissenting). Justice Brennan wrote a separate
dissent, id. at 320, as did Justice Stevens, id. at 366. Justice Marshall did not write separately, but
joined the dissents of Justice Brennan and Justice Blackmun. Id. at 320, 366.
been denied equal protection of the law as guaranteed by the Fourteenth Amendment.

According to Justice Blackmun, "the problem of race" exacerbates the arbitrariness which is inherent in the sentencer's discretion to bestow mercy. More significant, however, is Justice Blackmun's assertion that the McCleskey majority "virtually conceded that both fairness and rationality cannot be achieved in the administration of the death penalty." This concession, according to Justice Blackmun, may be found in Justice Powell's majority opinion. Justice Powell wrote: "Prosecutorial decisions necessarily involve both judgmental and factual decisions that vary from case to case. Thus, it is difficult to imagine guidelines that would produce the predictability sought . . . without sacrificing the discretion essential to a humane and fair system of criminal justice."

Justice Blackmun grimly acknowledged that the biases and prejudices that infect society generally influence the determination of which defendants shall live and which shall die. Race, he concluded, inevitably affects sentencing decisions, even under the most sophisticated death penalty statutes.

The fragile distinction between life and death decisionmaking in McCleskey's case became apparent years later. Justice Lewis Powell, the author of the five-four majority opinion which sealed McCleskey's fate, retired months of the decision. Four years later, in the summer of 1991, Powell was asked whether he would change his vote in any case. According to Powell's biographer, the retired Justice responded, "Yes, McCleskey v. Kemp." Powell had come to believe that capital punishment should be abolished. Doubtless, this would have provided cold comfort to Warren McCleskey, who died in Georgia's electric chair on September 25, 1991.

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286. Id. at 346 (Blackmun, J., dissenting).
288. Id. at 1129 (Blackmun, J., dissenting). Justice Blackmun suggests that the majority turned its back on McCleskey's "staggering evidence of racial prejudice infecting Georgia's capital-sentencing scheme" because it was troubled by the fact that Georgia had imposed more procedural and substantive safeguards than most other states after Furman. Id. at 1135 (Blackmun, J., dissenting). Notwithstanding Georgia's efforts, it "was still unable to stamp out the virus of racism." Id. (Blackmun, J., dissenting).
289. McCleskey, 481 U.S. at 314 n.37 (citation omitted).
290. Callins, 114 S. Ct. at 1135 (Blackmun, J., dissenting).
292. Id.
293. Id.
294. Although Justice Powell confessed his belief that the death penalty should be abolished in 1991, his change of heart on the issue of capital punishment was not widely known until the 1994 publication of John Jeffries' book, JUSTICE LEWIS F. POWELL, JR.
D. Penry v. Lynaugh

Two years after McCleskey, a capital case from Texas shook Justice Blackmun’s confidence that an appropriate balance between Furman’s requirement of consistency and Lockett’s requirement of individualized sentencing was possible. Penry v. Lynaugh involved a challenge to Texas’ death penalty statute.

While on parole from a rape conviction, Johnny Paul Penry was charged with the brutal rape and murder of Pamela Carpenter. At trial, Penry raised an insanity defense and presented the testimony of a psychiatrist, Dr. Jose Garcia. Dr. Garcia testified that Penry suffered from organic brain damage and moderate retardation. As a result, Penry had poor control over his impulses and was unable to learn from experience. According to Dr. Garcia, Penry’s brain damage was probably caused at birth but may have been caused by beatings and multiple injuries to the brain at an early age. “In Dr. Garcia’s judgment, Penry was suffering from an organic brain disorder at the time of the offense which made it impossible for him to appreciate the wrongfulness of his conduct or to conform his conduct to the law.”

Penry argued that under Texas law, the sentencing jury was prevented from giving full mitigating effect to his evidence of child abuse and mental retardation. The Texas sentencing statute then in effect required the jury, during a separate sentencing phase, to answer three questions. The answers to these questions would determine whether the defendant would be sentenced to death. Only one of the three questions—whether the defendant posed a “continuing threat to society”—was related to Penry’s mitigating evidence. But Penry’s evidence of child abuse and mental retardation was double-edged; it diminished his blameworthiness for his crime even as it indicated that there was a probability that he would be dangerous in the future. Because a reasonable juror could have believed that the Texas statute

296. Id. at 307.
297. Id. at 308.
298. Id.
299. Id.
300. Id. at 308-09.
301. Id. at 309.
302. Id. at 318.
303. Id. at 310.
304. Id.
305. Id. at 323.
306. Id. at 324.
prohibited a sentence less than death based upon Penry's mitigating evidence, the Court reversed Penry's death sentence.\textsuperscript{307}

To Justice Blackmun, Penry exemplifies the "paradox underlying the Court's post-Furman jurisprudence."\textsuperscript{308} As Justice Blackmun noted, the Court earlier had held that Texas had complied with Furman by carefully channeling the sentencer's discretion.\textsuperscript{309} Indeed, Texas had channelled discretion by requiring that a jury unanimously answer three questions affirmatively before a defendant would be sentenced to death.\textsuperscript{310} Those same limitations placed upon the sentencer's discretion, however, rendered Penry's death sentence unconstitutional.\textsuperscript{311}

\textbf{E. Herrera v. Collins}

The specter of executing an innocent person haunts death penalty proponents and galvanizes death penalty opponents.\textsuperscript{312} As the Court has

\begin{itemize}
\item \textsuperscript{307} Id. at 326.
\item \textsuperscript{308} Callins v. Collins, 114 S. Ct. 1127, 1134 (1994) (Blackmun, J., dissenting).
\item \textsuperscript{309} See Jurek v. Texas, 428 U.S. 262 (1976).
\item \textsuperscript{310} Id. at 269.
\item \textsuperscript{311} Callins, 114 S. Ct. at 1134. Justice Blackmun did not write separately in Penry. See Penry, 492 U.S. 302. Instead, he joined portions of Justice O'Connor's opinion of the Court. Specifically, Justice Blackmun joined with Justices O'Connor, Brennan, Marshall and Stevens to hold that Penry's argument—that his jury was unable to fully consider and give effect to mitigating evidence of his mental retardation and abused background in answering Texas' three special issues—sought a result dictated by Jurek v. Texas, 428 U.S. 262 (1976) (upholding Texas' death penalty statute in the face of a constitutional challenge). Consequently, Penry was not seeking a "new rule" which, under Teague v. Lane, 489 U.S. 288 (1989), "would not be cognizable in federal habeas corpus. Under Teague, "new rules" may not generally be applied or announced in cases on collateral review. 489 U.S. 288. Justice Blackmun also joined the entirety of Justice Stevens' opinion concurring in part and dissenting in part. Penry, 492 U.S. at 349. These two Justices agreed that the Court should not apply Teague's nonretroactivity principles to capital cases without the benefit of briefing and oral argument. Id. Moreover, even if Teague were held to apply to capital cases, Justices Stevens and Blackmun agreed that an exception to the retroactivity doctrine applied. Id. In their view, rules prohibiting a certain category of punishment for a class of defendants because of their status or offense are excepted from Teague's draconian doctrine. Id. Justice Brennan's opinion, joined by Justice Marshall, suggested that the execution of mentally retarded offenders was always unconstitutional. Id. at 341. Thus, Justice Blackmun and three others (Justices Brennan, Marshall and Stevens) concluded that executing mentally retarded persons is unconstitutional. A bare majority (Justices O'Connor, Rehnquist, Scalia, White and Kennedy) held otherwise.


\item \textsuperscript{312} COYNE & ENTZEROTH, supra note 71, at 80. Justice Blackmun has observed, "Nothing could be more contrary to contemporary standards of decency, or more shocking to the conscience, than to execute a person who is actually innocent." Herrera v. Collins, 113 S. Ct. 853, 876 (1993)
\end{itemize}
recognized, "death is a different kind of punishment from any other which may be imposed." What makes death different, of course, is its finality and irrevocability. Consequently, the Court has insisted upon searching appellate review of death sentences and their underlying convictions as indispensable components of a constitutional death penalty scheme.

*Herrera v. Collins* involved a death row inmate’s constitutional claim for relief based upon newly discovered evidence of innocence. In 1982, Leonel Herrera was convicted of murdering two Texas police officers and was sentenced to death. Texas law at the time required a defendant seeking a hearing based on newly discovered evidence to file a motion within thirty days after imposition of sentence. Ten years later, Herrera sought a federal hearing based upon sworn affidavits which stated that his brother Raul, by then deceased, had committed the murders.

Before the United States Supreme Court, Herrera argued that the Eighth and Fourteenth Amendments to the United States Constitution prohibit the execution of a person who is innocent of the crime for which he was convicted. Ultimately, Herrera’s argument that executing an innocent man was cruel and unusual punishment persuaded a bare majority of the Court, but failed to forestall his execution. Over Justice Blackmun’s strident dissent, the Court ruled six-to-three that Herrera could be executed without a hearing on his claim.
of innocence.\textsuperscript{324} Herrera was put to death by lethal injection on May 12, 1993.\textsuperscript{325}

Perhaps Justice Blackmun viewed Herrera as simply the latest episode in the Court's "crusade to erect petty procedural barriers in the path of any state prisoner seeking review of his federal constitutional claims."\textsuperscript{326} After all, the majority's ruling had upheld a Texas rule of criminal procedure which required new trial motions based upon newly discovered evidence to be made within thirty days of the imposition of sentence.\textsuperscript{327} However, Justice Blackmun's words burned much more deeply:

\begin{quote}
I have voiced disappointment over this Court's obvious eagerness to do away with any restriction on the States' power to execute whomever and however they please. I have also expressed doubts about whether, in the absence of such restrictions, capital punishment remains constitutional at all. Of one thing, however, I am certain. Just as an execution without adequate safeguards is unacceptable, so too is an execution when the condemned prisoner can prove that he is innocent. The execution of a person who can show that he is innocent comes perilously close to simple murder.\textsuperscript{328}
\end{quote}

\textsuperscript{324} Herrera, 113 S. Ct. at 870. Several principles led the majority to conclude that Herrera's claim of actual innocence did not entitle him to federal habeas relief. First, a claim of actual innocence based on newly discovered evidence is not a ground for federal habeas relief. \textit{Id.} at 860. Federal habeas courts sit to ensure that individuals are not imprisoned in violation of the Constitution, not to correct errors of fact. \textit{Id.} Second, actual innocence is not itself a constitutional claim justifying habeas relief. \textit{Id.} at 862. Rather, it is a gateway through which habeas petitioners must pass to have otherwise procedurally barred constitutional claims considered on the merits. \textit{Id.} Finally, even if actual innocence were a ground for federal habeas relief, Herrera's evidence was insufficient to warrant relief. \textit{Id.} at 869. His newly discovered evidence consisted primarily of hearsay, produced eight years after his trial and only after the death of his brother Raul, the alleged perpetrator. \textit{Id.} at 869-70.

\textsuperscript{325} Even as Herrera was strapped to the death chamber gurney he maintained his innocence. In his last statement, Herrera said: I am innocent, innocent, innocent. Make no mistake about this. I owe society nothing. I am an innocent man and something very wrong is taking place tonight. \textit{Man in Case on Curbing New Evidence is Executed}, N.Y. TIMES, May 13, 1993, at A14.


\textsuperscript{327} Herrera, 113 S. Ct. at 866. The majority reasoned that if Herrera were actually innocent, the traditional remedy, when the new evidence is discovered too late to file a new trial motion, would not be federal habeas relief, but rather executive clemency under state law. \textit{Id.} at 869.

\textsuperscript{328} Herrera, 113 S. Ct. at 884 (Blackmun, J., dissenting) (citations omitted). In an interview with Nina Totenberg of National Public Radio broadcast shortly after his \textit{Collins} dissent was published, Justice Blackmun addressed the inevitability of human error and the imperfections in the criminal justice system. He acknowledged that he believed it possible that, during his tenure as Justice, "genuinely innocent people" whose cases came before the Court have been executed. \textit{All Things Considered: Blackmun Dissents in Death Penalty Case} (National Public Radio broadcast, Feb. 22, 1994).
F. Callins v. Collins

Justice Blackmun selected a rather unremarkable Texas case to announce his bleak assessment that "the death penalty remains fraught with arbitrariness, discrimination, caprice, and mistake." Bruce Edwins Callins, a twenty-year-old, black, unemployed high school dropout, was sentenced to death in May 1982 for shooting Allen Huckleberry to death, during the course of a robbery. Callins petitioned the Supreme Court to review his case, raising two constitutional issues. Callins argued that he was not permitted to introduce certain mitigating evidence which might have persuaded the jury to return a sentence other than death. He also claimed that his conviction and sentence, rendered by an all-white jury, were tainted by racism.

Justice Blackmun's dissent in Callins weaves together the various arguments he had articulated so forcefully in McCleskey and Herrera. Justice Blackmun conceded that "most of the public seems to desire, and the Constitution appears to permit, the penalty of death." Nevertheless, he concluded that the Court had broken the promise of Furman, because "if the death penalty cannot be administered consistently and rationally, it may not be administered at all."

In Justice Blackmun's dissent, three themes emerge with clarity: (1) racism plays an unacceptable role in determining who will be condemned to die; (2) the inevitability of error continues to insure that innocent people will be executed; and (3) federal courts no longer provide meaningful review of the constitutional claims pressed by death row inmates. He explained, "the problems that were pursued down one hole with procedural rules and verbal formulas have come to the surface somewhere else, just as virulent and pernicious as they were in their original form."

330. Several witnesses testified that Callins shot Huckleberry without provocation after Huckleberry failed to hand over his wallet. According to law enforcement agencies in Dallas and Tarrant Counties, at the time of Huckleberry's murder, Callins was engaged in a crime spree involving robberies, kidnappings, beatings and shootings. Steve McGonigle, Death Penalty is a Failure, Justice Declares: Appeal by Dallas Killer Spurs Blackmun's Remarks, DALLAS MORNING NEWS, Feb. 23, 1994, at 1A. Huckleberry bled to death from a single gunshot wound to the neck.
331. Id.
332. Id.
333. Id.
335. Id. (Blackmun, J., dissenting) (citing Eddings v. Oklahoma, 455 U.S. 104, 112 (1982)).
336. Id. (Blackmun, J., dissenting).
337. Id. at 1129 (Blackmun, J., dissenting).
With respect to race, Justice Blackmun wrote:

Even under the most sophisticated death penalty statutes, race continues to play a major role in determining who shall live and who shall die. Perhaps it should not be surprising that the biases and prejudices that infect society generally would influence the determination of who is sentenced to death, even within the narrower pool of death-eligible defendants selected according to objective standards. No matter how narrowly the pool of death-eligible defendants is drawn according to objective standards, *Furman*’s promise still will go unfulfilled so long as the sentencer is free to exercise unbridled discretion within the smaller group and thereby to discriminate.  

Justice Blackmun’s assessment of the risk of executing innocent people was equally blunt: “The problem is that the inevitability of factual, legal, and moral error gives us a system that we know must wrongly kill some defendants, a system that fails to deliver the fair, consistent, and reliable sentences of death required by the Constitution.” He continued:

Certainly there will be individuals who are actually innocent who will be unable to make a better showing than what was made by Herrera without the benefit of an evidentiary hearing. The Court is unmoved by this dilemma, however; it prefers “finality” in death sentences to reliable determinations of a capital defendant’s guilt.

Further, Justice Blackmun noted ominously, “Innocent persons have been executed, perhaps recently, and will continue to be executed under our death penalty scheme.”

Justice Blackmun reasoned that the very existence of human error which renders the criminal justice system imperfect demands “searching appellate review of death sentences and their underlying convictions.” Because Justice Blackmun concluded that no death sentence may constitutionally be imposed under current death penalty laws, he did not address the merits of Callins’ arguments. Nonetheless, Justice Blackmun lamented that the Court had stripped “state prisoners of virtually any meaningful federal review of the constitutionality of their incarceration.” He wryly observed:

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338. *Id.* at 1135 (Blackmun, J., dissenting). Justice Blackmun observed, “the power to be lenient [also] is the power to discriminate.” *Id.* (alteration in original) (citing McCleskey v. Kemp, 481 U.S. 279, 312 (1986)).

339. *Id.* at 1130 (Blackmun, J., dissenting).

340. *Id.* at 1138 (Blackmun, J., dissenting) (footnote omitted).

341. *Id.* at 1138 n.8 (Blackmun, J., dissenting) (citations omitted).

342. *Id.* at 1129 (Blackmun, J., dissenting).

343. *Id.* at 1130 n.2 (Blackmun, J., dissenting).

344. *Id.* (Blackmun, J., dissenting) (quoting Butler v. McKellar, 494 U.S. 407, 417 (1990) (Brennan, J., dissenting)).
Even if Callins had a legitimate claim of constitutional error, this Court would be deaf to it on federal habeas unless "the state court's rejection of the constitutional challenge was so clearly invalid under then-prevailing legal standards that the decision could not be defended by any reasonable jurist." That a capital defendant facing imminent execution is required to meet such a standard before the Court will remedy constitutional violations is indefensible.  

... Because I no longer can state with any confidence ... that the federal judiciary will provide meaningful oversight to the state courts as they exercise their authority to inflict the penalty of death, I believe that the death penalty, as currently administered, is unconstitutional.  

... For more than 20 years I have endeavored—indeed, I have struggled—along with a majority of this Court, to develop procedural and substantive rules that would lend more than the mere appearance of fairness to the death penalty endeavor. Rather than continue to coddle the Court’s delusion that the desired level of fairness has been achieved and the need for regulation eviscerated, I feel morally and intellectually obligated simply to concede that the death penalty experiment has failed.

Justice Blackmun declared that the constitutional defects he identified were irremediable: "It is virtually self-evident to me now that no combination of procedural rules or substantive regulations ever can save the death penalty from its inherent constitutional deficiencies. The basic question—does the system accurately and consistently determine which defendants ‘deserve’ to die?—cannot be answered in the affirmative."

Justice Blackmun expressed optimism that one day a majority of the Court would embrace his position.

This Court eventually will conclude that the effort to eliminate arbitrariness while preserving fairness "in the infliction of [death] is so plainly doomed to failure that it—and the death penalty—must be abandoned altogether." I may not live to see that day, but I have faith that eventually it will arrive.

345. Id. (Blackmun, J., dissenting) (quoting Butler, 494 U.S. at 417-18 (Brennan, J., dissenting)).
346. Id. at 1138 (Blackmun, J., dissenting).
347. Id. at 1130 (Blackmun, J., dissenting) (footnote omitted).
348. Id. (Blackmun, J., dissenting). Nor was Justice Blackmun optimistic that consistency, fairness and reliability could ever be achieved in adequate measure in capital cases. He wrote, "Perhaps one day this Court will develop procedural rules or verbal formulas that actually will provide consistency, fairness, and reliability in a capital-sentencing scheme. I am not optimistic that such a day will come." Id. at 1138.
V. CONCLUSION

Since 1791, the ability of the government to impose the death penalty has been tempered by the Eighth Amendment’s prohibition against cruel and unusual punishment. The year before Harry Blackmun began his distinguished career as a jurist, the Supreme Court held that the Eighth Amendment “must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.” Although Justice Blackmun personally opposed capital punishment, he voted consistently throughout most of his judicial career to uphold the right of the state and federal government to execute its citizens. His recognition, after thirty-five years on the bench, that the death penalty may not be constitutionally administered bespeaks personal courage, abundant professional experience and a truly remarkable evolution.

350. The Bill of Rights—the first ten amendments to the United States Constitution—was ratified effective December 15, 1791.