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# Revelations from the Blackmun Papers on the Development of Death Penalty Law

Martha Dragich Pearson\*

Justice Blackmun's legacy is strongly linked to two issues – abortion and capital punishment.<sup>1</sup> Blackmun's opinions in these controversial areas account for much of the notion that his ideology changed while on the Court.<sup>2</sup> Participants in this Symposium have reflected on these and other areas where Justice Blackmun left his mark on American law. Professor Deason explores the arbitrability cases and shows that the Court struggled – and Justices changed their minds – even in connection with relatively technical legal issues arising in non-controversial commercial contexts.<sup>3</sup> One reason the Court struggles with some issues is that legal standards are (or become) inherently contradictory or confusing over time. As the law evolves, it moves in directions the Justices may not have anticipated and cannot continue to support. As a result, both the Court and individual Justices change direction. In the arbitrability cases, Justice Blackmun was one of several Justices whose approach changed as the law developed, largely through opinions authored by others.<sup>4</sup>

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1. See, e.g., Jeffrey B. King, Comment, *Now Turn to the Left: The Changing Ideology of Justice Harry A. Blackmun*, 33 HOUS. L. REV. 277, 291-92 (1996).

2. See Martha J. Dragich, *Justice Blackmun, Franz Kafka, and Capital Punishment*, 63 MO. L. REV. 853, 854 & n.3 (1998), and sources cited therein.

3. Ellen E. Deason, *Perspectives on Decisionmaking from the Blackmun Papers: The Cases on Arbitrability of Statutory Claims*, 70 MO. L. REV. 1133 (2005).

4. Deason sums up Justice Blackmun's record in the arbitrability cases as follows:

A number of factors influenced Justice Blackmun and, as the sequence of cases progressed, their level of significance to his decisionmaking varied. The importance with which he regarded international law and the functioning of the international order seems to have been crucial in his initial pro-arbitrability stance in the cases concerning transnational arbitrations. This conclusion is supported by his suggestion to Justice Stewart that the *Scherk* opinion should emphasize the New York Convention and its status as U.S. law, and is consistent with the importance he accorded to international perspectives more generally. In the domestic context, the importance of *stare decisis*, consistency in statutory interpretation, and his reading of Congressional policies protecting investors held sway, but by then the votes to halt the march of arbitration for statutory claims were lacking, even with his support.

*Id.* at 1180.

In the context of the politically-charged abortion cases, on the other hand, Justice Blackmun was the architect of the trimester framework<sup>5</sup> and, later, the most vocal defender of the abortion right.<sup>6</sup> Professor Kobylka notes that personal attachment to the issue, increasingly heated rhetorical style, and growing focus on egalitarianism were essential features in the development of Justice Blackmun's abortion jurisprudence.<sup>7</sup> Interestingly, the nature of the abortion right was not fully appreciated even by Blackmun at the time it was first articulated. Both its privacy dimension<sup>8</sup> and its role in assuring equality for women<sup>9</sup> were initially subordinate to the role of the physician-patient relationship on which Blackmun focused in *Roe v. Wade* and *Doe v. Bolton*.<sup>10</sup>

My comments focus on the death penalty cases, responding to some of Professor Sisk's conclusions about them. As I will show, both Professor Deason's and Professor Kobylka's observations are applicable to the death penalty cases. The availability of the Blackmun Papers aids immeasurably in scholars' attempts to understand how the law developed and what role particular Justices may have played in that development.

## I. UNCERTAINTY AND INSTABILITY IN THE LAW

Although many take umbrage<sup>11</sup> at Justice Blackmun's explanation that not he, but the Court, changed on capital punishment,<sup>12</sup> the truth is that both changed – in opposite directions. Within the first few years of Justice Blackmun's tenure on the Court, death penalty law had undergone a series of stunning reversals. In 1972, the death penalty statutes then on the books were outlawed in *Furman v. Georgia*, a case in which Justice Blackmun dissented.<sup>13</sup> *Furman* was denominated a per curiam decision but in fact included nine separate opinions and took up 232 pages.<sup>14</sup> It is little wonder that this "variety of opinions . . . engendered confusion as to what was required in

5. See *Roe v. Wade*, 410 U.S. 113, 164-65 (1973) (plurality opinion).

6. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 833-34 (1992) (plurality opinion).

7. Joseph F. Kobylka, *Tales From the Blackmun Papers: A Fuller Appreciation of Harry Blackmun's Judicial Legacy*, 70 MO. L. REV. 1075, 1105 (2005).

8. *Id.* at 1077.

9. Linda Greenhouse, *The Evolution of a Justice*, N.Y. TIMES MAGAZINE, Apr. 10, 2005 (Magazine), at 628.

10. See *Roe*, 410 U.S. at 163; *Doe v. Bolton*, 410 U.S. 179, 192 (1973) (plurality opinion).

11. Gregory C. Sisk, *The Willful Judging of Harry Blackmun*, 70 MO. L. REV. 1049, 1066-68 (2005).

12. See *Callins v. Collins*, 510 U.S. 1141, 1143-45 (1994) (Blackmun, J., dissenting from denial of certiorari) (castigating the Court for "deregulat[ing] the entire enterprise" of capital punishment).

13. *Furman v. Georgia*, 408 U.S. 238, 239-40 (1972) (5-4 decision) (per curiam).

14. See generally *id.*

order to impose the death penalty in accord with the Eighth Amendment."<sup>15</sup> Four years after *Furman*, the Court approved three new death penalty statutes designed to overcome the objections laid down in *Furman*.<sup>16</sup> At the same time, the Court invalidated two other new statutes, which imposed mandatory death penalties for specified offenses.<sup>17</sup> In 1978 the Court decided *Lockett v. Ohio*,<sup>18</sup> a case now thought by many to be "irreconcilable with *Furman*."<sup>19</sup> The Blackmun Papers reveal that the Court was aware of the problem it was creating.

Chief Justice Burger wrote to the conference one week after *Lockett* was argued, noting the serious difficulties already inherent in the Court's death penalty jurisprudence:

I reserved my vote in [*Lockett*] to analyze more closely the possibility of a remand. But . . . at the moment, given our holdings to date, at best in plurality opinions, I do not think that the statute can be saved by remanding it for further construction by the Ohio Supreme Court. I am also reconsidering my "affirm" vote in [the companion case of *Bell v. Ohio*], in light of the discussion on *Lockett*.

Although I did not agree with the views of the plurality in our preceding cases, I am now prepared to yield with the hope that there can be a majority opinion here. With deference, I feel that our plurality opinions on the death penalty have created uncertainty and instability in an area which deserves the greatest certainty and stability that can be provided, and this calls for a Court opinion. . . .<sup>20</sup>

The Chief Justice's desire for a majority opinion was to remain unfulfilled as the Court struggled to apply *Furman*'s mandate.

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15. *Lockett v. Ohio*, 438 U.S. 586, 599 (1978).

16. See *Jurek v. Texas*, 428 U.S. 262 (1976) (plurality opinion), *order vacated by* 429 U.S. 875 (1976); *Proffitt v. Florida*, 428 U.S. 242 (1976) (plurality opinion), *order vacated by* 429 U.S. 875 (1976); *Gregg v. Georgia*, 428 U.S. 153 (1976) (plurality opinion), *order vacated by* 429 U.S. 875 (1976).

17. *Roberts v. Louisiana*, 428 U.S. 325 (1976) (5-4 decision); *Woodson v. North Carolina*, 428 U.S. 280 (1976) (5-4 decision).

18. 438 U.S. 586.

19. Mary Sigler, *Contradiction, Coherence, and Guided Discretion in the Supreme Court's Capital Sentencing Jurisprudence*, 40 AM. CRIM. L. REV. 1151, 1164, 1194 (2003) (citation omitted).

20. Memorandum from Chief Justice Burger to the conference, dated January 24, 1978, Blackmun Papers, Box 270, Folder 14. The Chief Justice eventually did change his vote in *Bell v. Ohio*, writing the Court's opinion reversing the Ohio court's ruling. 438 U.S. 637 (1978).

### A. Inconsistent Commands

At the time *Lockett* was decided, Justice White described the decision as an “about face” from *Furman*.<sup>21</sup> The Blackmun Papers reveal that the nascent inconsistency between *Furman* and *Lockett* was discussed among the Justices even as draft opinions in *Lockett* were being circulated.<sup>22</sup> Justice Blackmun wrote to Chief Justice Burger:

I agree with others that your memorandum of April 10 [1978] is helpful and that it promises to take the Court down the road to a Court opinion in the Ohio capital punishment cases. The memorandum is particularly helpful, I feel, because it outlines rather dramatically the difficulties that have beset the Court in its death penalty decisions of recent years and focuses upon the pendulum swings that have taken place. It discloses the corner into which the Court painted the States and reveals the causes for the mandatory statutes (which some of us predicted) and now the swing back to the discretionary with all its ramifications.

I suspect that . . . I shall not be able to join the opinion that evolves. [M]y position at conference was that a sentencing authority must be permitted to consider the degree of a non-triggerman’s involvement. It would follow that the Ohio statute was unconstitutional as applied to Sandra Lockett on that fairly narrow ground. When I first read your opinion, I thought that this would be its thrust. . . . At the end of your opinion, however, I sense a shift to the plurality position in *Woodson*, namely, that to be constitutional a capital sentencing statute must permit consideration of age, prior record, prospects for rehabilitation, and character. . . . For me the point of taking a non-triggerman case was that there might be some

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21. *Lockett*, 438 U.S. at 622 (White, J., concurring in part, dissenting in part, and concurring in the judgments). Justice White had dissented from the 1976 holdings invalidating mandatory death sentences for particular types of crimes. See *Roberts*, 428 U.S. 325; *Woodson*, 428 U.S. 280. In *Lockett*, he restated his belief “that it does not violate the Eighth Amendment for a State to impose the death penalty on a mandatory basis when the defendant has been found guilty beyond a reasonable doubt of committing a deliberate, unjustified killing.” *Lockett*, 438 U.S. at 623 (White, J., concurring in part, dissenting in part, and concurring in the judgments). Justice White concurred in the judgment vacating Lockett’s sentence because there was no finding that Lockett (the getaway driver) intended that death be inflicted in connection with the robbery in which she participated, and thus the penalty was unconstitutionally disproportionate to the offense. See *id.* at 624.

22. See Memorandum from Byron R. White to the Chief Justice (with copies to the conference), dated June 20, 1978, Blackmun Papers, Box 270, Folder 14 (explaining Justice White’s inability to join Part III of the Court’s opinion in *Lockett*).

broader agreement on the necessity of considering some factor distinctive to non-triggermen, namely, the degree of involvement. Those in the *Woodson* plurality might well wish to write beyond an opinion so confined, but I would have thought that they at least could join such an opinion as a basic proposition.<sup>23</sup>

At the time, Justice Blackmun was still in the minority of the Court on the death penalty. Despite his disagreement with *Furman* and the 1976 cases, however, Blackmun tried to apply their rules in *Lockett*.<sup>24</sup> His memorandum clearly foreshadows the incompatibility of *Furman* with the rule developing in *Lockett*.<sup>25</sup> Blackmun tried to ameliorate this incompatibility by urging a decision on *Lockett* on narrower grounds, but failed to persuade the Court.<sup>26</sup>

A later memorandum from Justice Powell confirms Blackmun's sense that Chief Justice Burger's opinion finds support in the plurality opinion in *Woodson v. North Carolina*, where "the history and growth of individualized sentencing was traced in detail."<sup>27</sup> In contrast to Justice Blackmun's desire for a narrower rule than that found in *Woodson*, Justice Powell advised: "In order not to leave the mistaken impression that the Court is now taking a fundamentally different tack from that of the plurality in *Woodson* and the other 1976 cases," it would be "desirable to draw primarily on the *Woodson* opinion."<sup>28</sup> Powell was also concerned "that the Court not leave any question as to the continued validity of the statutes upheld in *Proffitt* and *Jurek*" (two of the other 1976 cases).<sup>29</sup> Powell's memorandum notes that the statutes approved by the Court in those two cases were not nearly as broad as the statement in *Lockett* that the sentencer must be permitted to consider "any aspect of the defendant's character and record or any circumstances of his offense as an independently mitigating factor."<sup>30</sup> In fact, the Florida and Texas statutes approved in 1976 were facially not very different from the Ohio statute, at issue in *Lockett*.<sup>31</sup> The real difference was that the Florida and Texas state courts had construed the statutes broadly "to allow consideration of any miti-

23. Memorandum of April 17, 1978, from Blackmun to the Chief Justice (with copies to the conference), Blackmun Papers, Box 270, Folder 14.

24. See *Lockett*, 438 U.S. at 616 (Blackmun, J., concurring).

25. Memorandum of April 17, 1978, *supra* note 23.

26. *Id.*

27. Memorandum of June 13, 1978 from Lewis F. Powell, Jr. to the Chief Justice (with copies to the conference), at 1, Blackmun Papers, Box 270, Folder 14.

28. *Id.* at 2. According to Powell, Burger's draft drew instead on a 1949 decision, *Williams v. New York*. *Id.*

29. *Id.*

30. *Lockett v. Ohio*, 438 U.S. 586, 607 (1978).

31. See *id.*; *Proffitt v. Florida*, 428 U.S. 242 (1976) (plurality), *order vacated by* 429 U.S. 875 (1976); *Gregg v. Georgia*, 428 U.S. 153 (1976) (plurality), *order vacated by* 429 U.S. 875 (1976).

gating factor.”<sup>32</sup> Powell continued: “[I]n view of the . . . similarities between the statutes at issue in *Proffitt* and *Jurek* and the Ohio statute at issue here, I think it would be prudent for the Court to make clear the distinctions between those cases and this one.”<sup>33</sup>

A few days later, Justice White wrote:

[V]esting in the jury unlimited authority to consider mitigating circumstances is to enhance its power to dispense at will its own brand of justice in an essentially standardless manner. In the long run, imposing the death penalty under such a mandate would revert to that which in my view was an unacceptably erratic system that could not be relied upon to contribute to any of the ends of criminal punishment. *Furman v. Georgia*, 408 U.S. 238 (White, J., concurring).<sup>34</sup>

Ultimately, as Justice Blackmun describes, and Justice Scalia restates, the situation, the Court “attached to the imposition of the death penalty two quite incompatible sets of commands: the sentencer’s discretion to impose death must be closely confined, . . . but the sentencer’s discretion *not* to impose death (to extend mercy) must be unlimited.”<sup>35</sup>

### B. Evolving Standards

Professors Kobyłka and Sisk have both argued that *Roe* fails to provide a satisfactory legal and constitutional basis for abortion.<sup>36</sup> Indeed, Justice O’Connor suggested early on that *Roe*’s trimester framework was “on a collision course with itself.”<sup>37</sup> The trimester framework of *Roe* eventually fell apart in view of scientific developments that affected viability.<sup>38</sup> Similarly, the legal standard in death penalty cases depends on “evolving standards of decency that mark the progress of a maturing society” as a measurement of whether a punishment is “cruel and unusual” and therefore violates the Eighth Amendment.<sup>39</sup> The death penalty standard is thus tied to an external phenomenon – public opinion – that is open to interpretation and subject to change.

32. Memorandum of June 13, 1978, *supra* note 27, at 3 (emphasis added).

33. *Id.*

34. See Memorandum of June 20, 1978, *supra* note 22.

35. *Callins v. Collins*, 510 U.S. 1141, 1141-42 (1994) (Scalia, J., concurring) (citations omitted).

36. Kobyłka, *supra* note 7, at 1091-94; Sisk, *supra* note 11, at 1053-60.

37. *City of Akron v. Akron Ctr. for Reprod. Health*, 462 U.S. 416, 458 (1983) (O’Connor, J., dissenting), *overruled by* *Planned Parenthood of Se. Pa.*, 505 U.S. 833 (1992).

38. Kobyłka, *supra* note 7, at 1101-04.

39. *Trop v. Dulles*, 356 U.S. 86, 99-101 (1958) (5-4 decision).

Noting the “elasticity” of this constitutional standard, Justice Marshall rested his analysis in *Furman* heavily on the proposition that capital punishment “is morally unacceptable to the people of the United States at this time in their history.”<sup>40</sup> Justice Marshall was forced to acknowledge that in a span of only four years after *Furman*, “the legislatures of 35 States have enacted new statutes authorizing the imposition of the death sentence for certain crimes.”<sup>41</sup> This fact seriously undermined the reasoning of Marshall’s *Furman* opinion.<sup>42</sup> To make the case that the shift in public opinion did not justify a change in the law, Marshall was forced to argue that the people were not sufficiently informed about the death penalty when they reenacted it.<sup>43</sup> The Court’s recent decisions on capital punishment of juveniles and the mentally retarded, overruling precedents less than twenty years old, illustrate the degree to which this standard still fails to provide enduring guidance.<sup>44</sup> The evidence of a change in the national sentiment with regard to juveniles was, according to Justice Scalia, “flims[y],” reflecting that “a national consensus which could not be perceived in our people’s laws barely 15 years ago now solidly exists.”<sup>45</sup> Scalia continues:

If the Eighth Amendment set forth an ordinary rule of law, it would indeed be the role of this Court to say what the law is. But the Court having pronounced that the Eighth Amendment is an ever-changing reflection of “the evolving standards of decency” of our society, it makes no sense for the Justices then to *prescribe* those standards rather than discern them from the practices of our people. On the evolving-standards hypothesis, the only legitimate function of this Court is to identify a moral consensus of the American people. By what conceivable warrant can nine lawyers presume to be the authoritative conscience of the Nation?<sup>46</sup>

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40. *Furman v. Georgia*, 408 U.S. 238, 315, 360 (1972) (5-4 decision) (per curiam) (Marshall, J., concurring).

41. *Gregg v. Georgia*, 428 U.S. 153, 232 (1976) (plurality opinion) (Marshall, J., dissenting), *order vacated by* 429 U.S. 875 (1976).

42. *See Furman*, 408 U.S. at 314-17 (Marshall, J., concurring).

43. *Gregg*, 428 U.S. at 232 (Marshall, J., concurring).

44. *See Atkins v. Virginia*, 536 U.S. 304 (2002) (holding that the execution of mentally retarded people convicted of capital offenses is prohibited by the Eighth Amendment), *abrogating* *Penry v. Lynaugh*, 492 U.S. 302 (1989) (plurality); *Roper v. Simmons*, 125 S. Ct. 1183 (2005) (holding that the imposition of capital punishment for a crime committed by a juvenile violates both the Eighth and Fourteenth Amendments), *abrogating* *Stanford v. Kentucky*, 492 U.S. 361 (1989) (5-4 decision).

45. *Roper*, 125 S. Ct. at 1217 (Scalia, J. dissenting).

46. *Id.* at 1222 (emphasis in original).



This shifting standard, along with weak and inconsistent precedents, ensured that the Court collectively, and the Justices individually, would continue to struggle with capital cases.

## II. JUSTICE BLACKMUN'S REACTION

In death penalty cases after *Lockett*, Justice Blackmun followed a pattern of focusing in great detail on the facts of each case, trying to apply the conflicting precedents, and ignoring the inherent difficulties of the legal standard. In the abortion cases, by comparison, Justice Blackmun's trimester framework invited the Court to focus almost entirely on the specific burdens imposed by states' regulations on abortion rather than on issues of privacy rights or gender equality. Justice Blackmun was left to complain about the resulting erosion of the right itself.<sup>47</sup> In the death penalty cases, on the other hand, Justice Blackmun used the tension between *Furman* and *Lockett* as an invitation to focus on the facts of each case. This approach, in turn, probably allowed Justice Blackmun's personal antipathy toward capital punishment to shape his decisions, in the sense that it may be easier to approve the punishment in the abstract than as applied to an individual defendant, particularly in the absence of a clear, controlling legal standard.

Professor Sisk identified an important ramification of this approach when he noted, in connection with the religious liberty cases, that Blackmun's "preference for case by case balancing . . . often leaves ample room for exercise of ad hoc discretion and arbitrary results."<sup>48</sup> In the death penalty cases, I would suggest that the lack of a firmer legal standard, and the long-time lack of a clear majority position on the Court, invited case-by-case evaluation, allowing Justice Blackmun (and others) to ignore the larger fractures in the legal framework.

In connection with the abortion cases, Professor Kobylka noted that as Justice Blackmun and the Court diverged, Justice Blackmun's opinions were marked by a growing sense of personal attachment, increasingly heated rhetoric, and a concern about egalitarianism.<sup>49</sup> Much the same can be said of Justice Blackmun's later death penalty opinions.

### A. Personal Attachment

Readers of the death penalty opinions have noted Justice Blackmun's unusually personal remarks.<sup>50</sup> The articulation of personal views is unusual –

47. Kobylka, *supra* note 7, at 1091-94.

48. Sisk, *supra* note 11, at 1066 (citation omitted).

49. Kobylka, *supra* note 7.

50. See, e.g., Richard A. Posner, *Judges' Writing Styles (And Do They Matter?)*, 62 U. CHI. L. REV. 1421, 1434 (1995); Stuart Taylor, Jr., *Justice Blackmun's Jurisprudence of Compassion*, LEGAL TIMES, April 11, 1994, at 26.

though not unknown – in judicial opinions.<sup>51</sup> A statement of the judge’s personal views invites, at the very least, inquiry into the real basis for his or her vote, and may lessen confidence that decisions are based on the law.<sup>52</sup> Interestingly, Justice Blackmun was not the first Justice to express such views in a death penalty case.<sup>53</sup> A note in Justice Blackmun’s files quotes the following passage:

A lifetime’s preoccupation with criminal justice, as a prosecutor, defender of civil liberties, and scientific student, naturally leaves one with views. Thus, I disbelieve in capital punishment. But as a judge I could not impose the views of the very few States who through bitter experience have abolished capital punishment upon all the other States, by finding that ‘due process’ proscribes it. . . . I do not believe that even capital offenses by boys of fifteen should be dealt with according to the conventional criminal procedure. It would, however, be a bald judicial usurpation to hold that States violate the Constitution in subjecting minors . . . to such a procedure.<sup>54</sup>

This statement comes from the concurring opinion of Justice Frankfurter in a 1948 case.<sup>55</sup> Justice Frankfurter made this statement in the context of acknowledging that “subtle and . . . elusive” constitutional standards – such as Due Process – open the way for judges’ personal views to influence their decisions.<sup>56</sup> The way for judges to avoid that trap “is to explore the influences that have shaped one’s unanalyzed views.”<sup>57</sup> Justice Blackmun’s note quoting this passage is dated April 16, 1971.<sup>58</sup> This date indicates that Justice Blackmun was aware of Frankfurter’s admonition during the Court’s consideration of *McGautha v. California*, a May 3, 1971 decision holding the death penalty constitutional as applied.<sup>59</sup> The final placement of the note in Justice Black-

51. See, e.g., Dragich, *supra* note 2, at 904-06 (citations omitted).

52. *Id.*

53. See, e.g., *Haley v. Ohio*, 332 U.S. 596, 602-03 (1948) (5-4 decision) (Frankfurter, J., concurring).

54. *Re: Capital Punishment*, Note of Apr. 16, 1971, Blackmun Papers, Box 648, Folder 9. At the end of the quoted passage appears this attribution: “Mr. Justice Frankfurter, concurring in *Haley v. Ohio*, 332 U.S. 596, 602-03 (1948).” *Id.* At the bottom, the note bears the initials “H.A.B.” and the date “4/16/71,” indicating that Blackmun dictated the note on April 16, 1971. *Id.*

55. *Haley*, 332 U.S. at 602-03 (Frankfurter, J., concurring).

56. *Id.* at 602.

57. *Id.*

58. Note of Apr. 16, 1971, *supra* note 54.

59. *McGautha v. California*, 402 U.S. 183, 183, 185-86 (1971), *superseded by statute* FED. R. EVID. 609(a) (1975). The Court did not consider the Eighth Amend-

mun's papers suggests that Blackmun continued to consult Frankfurter's statement throughout his tenure on the Court, particularly in *Furman* and *Callins*.<sup>60</sup>

When Justice Blackmun voiced his doubts about the death penalty in *Furman* and other cases, he may have been trying to follow Frankfurter's instruction to "explore the influences that . . . shaped [his] . . . views" on the issue.<sup>61</sup> Justice Blackmun said in *Furman*:

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. Were I a legislator, I would vote against the death penalty . . . . I do not sit on these cases, however, as a legislator . . . . Our task here . . . is to pass upon the constitutionality of legislation . . . .<sup>62</sup>

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ment claim in *McGautha*. See *Furman v. Georgia*, 408 U.S. 238, 381 (1972) (5-4 decision) (per curiam) (Burger, C.J., dissenting).

60. The Frankfurter quote now appears in the files of the 1994 *Callins* case. Blackmun Papers, Box 648, Folder 9. A separate note in the same file refers to the Frankfurter passage, and bears a handwritten note indicating that the quoted Frankfurter passage itself was to be found in the "Oct. 1971 cases file" (the *Furman* case file). Apparently, Justice Blackmun retrieved the note from the 1971 cases file at some point during the drafting of what became the *Callins* dissent.

61. *Haley*, 332 U.S. at 602 (Frankfurter, J., concurring).

62. *Furman*, 408 U.S. at 405-06, 410-11 (Blackmun, J., dissenting). Justice Blackmun had, however, also explored his personal views on the death penalty earlier, while sitting as an appellate judge, perhaps before he came across Justice Frankfurter's comment. See *Maxwell v. Bishop*, 398 F.2d 138, 153-54 (8th Cir. 1968), cert. granted, 393 U.S. 997 (U.S. Dec. 16, 1968) (No. 622), judgment vacated by 398 U.S. 262 (1970). The Blackmun papers reveal that Blackmun had drafted a personal statement in *Pope v. United States*, 372 F.2d 710 (8th Cir. 1967), vacated by 392 U.S. 651 (1968), an en banc decision in which Blackmun wrote the opinion. Blackmun Papers, Box 38, Folder 15. On January 4, 1967 Blackmun wrote to the court, enclosing a draft opinion. Letter from HAB to the court dated Jan. 4, 1967, Blackmun Papers, Box 38, Folder 15. His letter reads, in part, "You may perhaps feel that my closing comments about capital punishment . . . should be omitted. . . . heretofore I have been rather neutral about capital punishment, but *Feguier* and this case have convinced me that its efficacy is questionable. I personally feel that the statutes need revision. . . ." *Id.* at 3. As it turned out, most of the other judges were opposed to Blackmun's "closing comments," and the matter caused some friction among the judges. See correspondence in Blackmun Papers, Box 38, Folder 15. Blackmun eventually deleted the personal comments from the opinion. See Letter from Blackmun to the court dated January 23, 1967, at p. 2, Blackmun Papers, Box 38, Folder 15. The file contains only the final version of the opinion; thus, the text of Blackmun's first attempt to state his personal views in an opinion is lost.

Justice Frankfurter saw the exposition of personal views as necessary to help judges cabin the influence of those views on their decisions.<sup>63</sup> Justice Blackmun's repeated and anguished personal comments in the death penalty cases,<sup>64</sup> on the other hand, have given rise to suspicion that he ignored the law. The tone of Frankfurter's comments is detached; his remarks emphasize separation of powers issues with only a mention of his "disbelie[f]" in capital punishment.<sup>65</sup> Blackmun's comments strike a different balance, emphasizing his personal "abhorrence" of the penalty.<sup>66</sup> The disparity between Blackmun's personal views and his votes is extreme, and maybe that alone suggests that the separation of the two could not hold up in the end. Viewed across the span of his judicial tenure, these repeated explorations of Blackmun's personal views suggest that the law is not a sufficient basis for decision. And of course, hindsight shows that Justice Blackmun's votes in death penalty cases eventually came into harmony with his personal views.<sup>67</sup> It is not surprising, then, that Professor Sisk sees Blackmun's career as an extended search for the way to bring the Court's decisions into harmony with his personal views – in short, as an exercise of will.<sup>68</sup> Professor Sisk states that there is "little evidence that Harry Blackmun regularly felt or finally accepted a conflict between his preferences and his judicial opinions."<sup>69</sup> It seems to me that Blackmun's personal comments in the death penalty opinions show the opposite. Blackmun's dissent in *Furman* exposes his keen awareness of precisely this conflict – and accompanied his vote to *uphold* the death penalty across the board.<sup>70</sup>

### B. Heated Rhetoric

The open expression of this conflict, particularly as Justice Blackmun's rhetorical style heated up over the years, is unsettling and unsatisfying. Blackmun's comments in *Furman* and elsewhere are often taken as an example of his judicial humility – subordinating strongly held personal convictions to the demands of the law.<sup>71</sup> Professor Sisk implies, however, that the very inclusion of such a statement of personal views instead subordinates the law

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63. See *Haley*, 332 U.S. at 602-03 (Frankfurter, J., concurring).

64. Dragich, *supra* note 2, at 855-57.

65. *Haley v. Ohio*, 332 U.S. 596, 602-03 (1948) (Frankfurter, J., concurring); see *supra* text accompanying note 54.

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

67. Dragich, *supra* note 2, at 875-76.

68. See Sisk, *supra* note 11, at 1051-68.

69. *Id.* at 1050.

70. *Furman*, 408 U.S. at 405 (Blackmun, J. dissenting). The majority held that imposition of the death penalty constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. See *id.* (majority opinion).

71. See *id.* at 405-06 (Blackmun, J., dissenting).

to the judge.<sup>72</sup> Such statements invite the speculation that the judge's personal views did influence the decision, and they do little to promote the general notion of the rule of law.

But there is more to the story of Justice Blackmun's death penalty jurisprudence than imposition of his own will. The law itself was in disarray, as noted above – not so different from the situation Professor Deason described in the arbitration cases.<sup>73</sup> When the existing law fails to dictate the decision, judges sometimes react by criticizing the law.<sup>74</sup> In such situations, judges also employ mechanisms such as distinguishing cases to the point of absurdity, changing their votes, or choosing one line of cases over another.<sup>75</sup> The *Lockett* correspondence clearly shows that Justice Blackmun tried, at an early juncture in the Court's post-*Furman* jurisprudence, to convince the Court to adopt a narrower version of the individualized sentencing mandate in order to head off the contradictions already developing in the case law.<sup>76</sup> He simply was not successful in this endeavor – and this inability to persuade the Court may be one marker of his relative ineffectiveness as a Justice according to Professor Wrightsman's analysis.<sup>77</sup>

### C. Egalitarianism and Individuality

Professor Kobylka identified “egalitarianism” as another important aspect of the abortion cases.<sup>78</sup> The death penalty cases exhibit this same concern. In the abortion cases, the concern about egalitarianism related to poverty.<sup>79</sup> Blackmun reacted angrily to decisions denying public abortion funding and cases imposing waiting periods and other burdens that fell more harshly on poor women.<sup>80</sup> In the death penalty cases, Blackmun's egalitarianism related primarily to racial disparities in imposition of the penalty, and also to

72. Sisk, *supra* note 11, at 1051-68.

73. See generally Deason, *supra* note 3.

74. See generally Robert W. Sweet, *The Judge's Dilemma: Duty or Conscience?*, 19 CARDOZO L. REV. 1041, 1045 (1997).

75. In *Walton v. Arizona*, Justice Scalia resolved this conflict by declaring that he would no longer follow *Lockett*. 497 U.S. 639, 672-73 (1990) (plurality opinion) (Scalia, J., concurring in part and concurring in the judgment), *overruled by* Ring v. Arizona, 536 U.S. 584 (2002) (plurality).

76. See *Lockett v. Ohio*, 438 U.S. 586, 613, 615-16 (1978) (Blackmun, J., concurring in part and concurring in the judgment).

77. Larry S. Wrightsman & Justin R. La Mort, *Why Do Supreme Court Justices Succeed or Fail? Harry Blackmun as an Example*, 70 MO. L. REV. 1261, 1263-65 (2005).

78. Kobylka, *supra* note 7.

79. *Id.* at 1113.

80. Sisk, *supra* note 11, at 1056, 1059.

issues of poverty, poor education, and minimal assistance of counsel.<sup>81</sup> Blackmun's opinion in *McCleskey v. Kemp* condemns the Court's unwillingness to consider statistical evidence of racial bias in capital sentencing.<sup>82</sup> *McCleskey* is clearly one of the key cases in Justice Blackmun's change of views on the death penalty.

At about this same time, Justice Blackmun's opinions show a decided shift toward personalization of and sympathy for the defendant. This focus appears to be dictated by the broad formulation of the *Lockett* rule, which Blackmun initially resisted and which was solidified in the Court's 1982 decision in *Eddings v. Oklahoma*.<sup>83</sup> By 1986, Justice Blackmun's "transformation" to staunch opponent of the death penalty was essentially complete, though it would be another eight years before his *Callins* dissent appeared.<sup>84</sup>

#### D. *The Path to Callins*

The Blackmun Papers shed some new light on the road by which Justice Blackmun arrived at his dissent in *Callins*. The case of one condemned defendant, Warren McCleskey, seems to have played a critical role. After twice having his case heard by the Supreme Court,<sup>85</sup> McCleskey was executed in the fall of 1991.<sup>86</sup> According to memoranda from his clerks, Blackmun was deeply affected by McCleskey's execution.<sup>87</sup> At breakfast the day after that execution, Blackmun dictated some remarks that would eventually form the basis of his *Callins* opinion.<sup>88</sup> From that point, it is clear that Blackmun and

81. See generally Deborah C. Malamud, *Intuition and Science in the Race Jurisprudence of Justice Blackmun*, 26 HASTINGS CONST. L.Q. 73, 97-99 (1998) (race); Michael D. Moore, *Tinkering with the Machinery of Death: An Examination and Analysis of State Indigent Defense Systems and their Application to Death-Eligible Defendants*, 37 WM. & MARY L. REV. 1617, 1617 (1996) (ineffective assistance).

82. 481 U.S. 279, 345 (1987) (5-4 decision) (Blackmun, J., dissenting).

83. 455 U.S. 104, 105 (1982) (5-4 decision).

84. Dragich, *supra* note 2, at 876.

85. See *McCleskey*, 481 U.S. 279; *McCleskey v. Zant*, 499 U.S. 467 (1991), *superseded by statute*, Anti-terrorism and Effective Death Penalty Act, 28 U.S.C. §§ 2244, 2255 (1996).

86. See "McCleskey is Executed for '78 Killing," *Atlanta Journal and Constitution*, Sept. 25, 1991, sec. A p. 1.

87. See Memorandum to Blackmun from Steff [Stephanie Dangel], dated May 15, 1992 (p. 3) (referring to "the notes you dictated to me the morning after Warren McCleskey was executed last fall"); Memorandum from Andrea [Ward], dated June 16, 1992 (referring to "comments you made at breakfast shortly after the McCleskey execution last fall"), both in case file for *Sawyer v. Whitley*, Blackmun Papers, Box 604, Folder 6. The pre-argument memorandum on *Sawyer*, prepared by Steff [Stephanie Dangel] and dated February 23, 1992, also refers to "the discussion we had earlier in the year after Warren McCleskey's execution" (p. 31). Blackmun Papers Box 604, Folder 6.

88. See sources cited *supra* note 87.

his clerks searched for a case that would serve as a vehicle for his abandonment of capital punishment. Notes in the case file for *Sawyer v. Whitley*, a 1992 decision under consideration at the time of McCleskey's execution, discuss use of this case as the "perfect opportunity to explain how your views on the death penalty have evolved [because] of the [Court's] dismantling of the writ of habeas corpus."<sup>89</sup> The clerk who prepared a draft of Blackmun's concurrence in *Sawyer* states that "Part II is intended as a . . . personal statement from you on the state of habeas and the death penalty."<sup>90</sup>

Even in 1992, however, the clerk describes Justice Blackmun as "still believ[ing] that the death penalty can be const[itution]al [but that the] Court has gone 'too far' in ensuring its imposition."<sup>91</sup> In fact, Justice Blackmun voted in this case to uphold the death sentence.<sup>92</sup> Though he believed the Court's standard was wrong,<sup>93</sup> he joined Justice Stevens in finding that "*Sawyer* ha[d] failed to demonstrate that it is more likely than not that his death sentence was clearly erroneous."<sup>94</sup> Blackmun wrote an opinion concurring in the judgment, which said:

I . . . write separately to express my ever-growing skepticism that, with each new decision from this Court constricting the ability of the federal courts to remedy constitutional errors, the death penalty really can be imposed fairly and in accordance with the requirements of the Eighth Amendment.

...

Since [the 1976 cases], the Court has upheld the constitutionality of the death penalty where sufficient procedural safeguards exist to ensure that the State's administration of the penalty is neither arbitrary nor capricious. At the time those decisions issued, federal courts possessed much broader authority than they do today to address claims of constitutional error on habeas review and, therefore, to examine the adequacy of a State's capital scheme and the fairness and reliability of its decision to impose the death

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89. Memorandum to Blackmun from Steff [Stephanie Dangel], dated May 15, 1992 (p. 3), Blackmun Papers, Box 604, Folder 6.

90. Memorandum from Andrea [Ward], dated June 16, 1992, Blackmun Papers, Box 604, Folder 6. A thorough reading of the files makes clear that the basis for – and often the wording of – opinions came from Blackmun himself, often communicated to his clerks orally at breakfast. For a contrary view, see David J. Garrow, *The Brains Behind Blackmun*, LEGAL AFFAIRS, June 2005, at 27, 34.

91. Memorandum to Blackmun from Steff [Stephanie Dangel], dated February 23, 1992 (p. 31), Blackmun Papers Box 604, Folder 6.

92. *Sawyer v. Whitley*, 505 U.S. 333, 350 (1992) (Blackmun, J., concurring).

93. *Id.* at 350-51 (Blackmun, J., concurring in the judgment).

94. *Id.* at 375 (Stevens, J., concurring).

penalty in a particular case. 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.<sup>95</sup>

In August of 1993, a clerk wrote in a memo to Justice Blackmun that "the time has come to abandon the effort to craft a constitutional death penalty."<sup>96</sup> The discussion centers on the conflict between the demands of *Furman* for consistency in sentencing (reducing discretion of the sentencer) and *Lockett* (requiring particularized consideration of each individual defendant).<sup>97</sup> As the term progressed, draft opinions were prepared for several cases in which executions were scheduled.<sup>98</sup> These drafts contain blank spaces where the name of the defendant and the name of the State would be filled in.<sup>99</sup> The graphic images in the *Callins* dissent of the defendant strapped to the gurney, intravenous tubes in his arms – images I had assumed were particular to Bruce Callins – had been written with others – or with no one in particular – in mind. Each time an execution was delayed, the search began for another case.<sup>100</sup> Eventually, Blackmun's clerk concluded that "[i]nstead of searching for the ideal vehicle for the dissent, the dissent should be tailored for any death case."<sup>101</sup> In the end, the case of Bruce Callins was selected.

The process of selecting a case that presents an issue in a particularly useful way from among certiorari petitions in many similar cases is, of course, familiar to the Court. But here the search for a case in which to announce his views seems only to highlight Justice Blackmun's personal frustration with the Court. Even so, I do not share Professor Sisk's view that Jus-

95. *Id.* at 351, 360 (citations omitted) (Blackmun, J., concurring in the judgment).

96. Memorandum from Andy [Schapiro] to Blackmun, dated August 6, 1993, and captioned "The Death Penalty," Box 648, Folder 7.

97. *Id.* at 1-2.

98. See Memorandum to Blackmun from Michelle [Alexander], dated October 27, 1993, Blackmun Papers, Box 648, Folder 7 (discussing dissenting opinion that was "written for Gary Graham"); Memorandum to Blackmun from Michelle [Alexander], at 5, dated November 16, 1993, Blackmun Papers, Box 648, Folder 7 (discussing Blackmun's desire "to release the death penalty dissent by the end of the calendar year," discussing various cases pending at the time, and recommending use of Schlup v. Delo as the "best vehicle").

99. See Draft [opinion] dated February 2, 1994, Blackmun Papers, Box 648, Folder 5 (caption, docket number, name, and State of Bruce Callins filled in by hand).

100. See Memorandum to Justice Blackmun from Michelle [Alexander], dated January 27, 1994 and captioned "Capital Cases," (discussing fact the "the two cases I picked out as great vehicles may well not reach this Court for months" (referring to cases of Jeffrey Walton and Malcolm Rent Johnson)).

101. Memorandum to Blackmun from Michelle [Alexander], dated January 27, 1994 at 1, Blackmun Papers, Box 648, Folder 6 at 2 (requesting approval "to modify the dissent (slightly) to accommodate any death case").



tice Blackmun “failed to fully appreciate that there is [any] difference between [his attitudes and the law.]”<sup>102</sup> Blackmun’s later death penalty opinions make clear that he knew the law but believed it to be inherently unworkable (a view shared by other members of the Court).<sup>103</sup>

It is, I suppose, an act of “will” to denounce the existing law in a judicial opinion. Justice Blackmun wrote in *Callins*: “I no longer shall tinker with the machinery of death.”<sup>104</sup> But he made this statement in dissent from the denial of certiorari<sup>105</sup> – a posture in which the opportunity to take any action, or to make any law, is conspicuously absent. Thus in *Callins*, at least, we cannot say that Blackmun “interpos[ed] his own will into the substance of the law.”<sup>106</sup>

What I find objectionable is the juxtaposition of Justice Blackmun’s angry rhetoric with the throwing up of his hands.<sup>107</sup> Justice Blackmun retired from the Court a few weeks later, making *Callins* his last word on the death penalty. I am personally disappointed that Justice Blackmun gave up on the law of capital punishment,<sup>108</sup> but I appreciate his frankness in admitting that the legal standard was deeply flawed. He did not have the votes to fix it. To my mind, his solution, though unsatisfying, is no more “willful” than Justice Scalia’s announcement that he would follow one of the Court’s decisions but not the other.

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102. Sisk, *supra* note 11, at 1050.

103. Dragich, *supra* note 2, at 910 & nn.443-448, and cases cited therein.

104. 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting from denial of certiorari).

105. *See id.*

106. Sisk, *supra* note 11, at 1073.

107. Dragich, *supra* note 2, at 922.

108. *Id.* at 876, 922-23.