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On January 25 the United States Supreme Court decided the fate of Leonel Herrera.[1] Herrera had been convicted in Texas of the capital murder of Los Fresnos Police Officer Enrique Carrisalez, and had been sentenced to death. Ten years after his conviction was final, Herrera filed a second federal habeas petition claiming that he was actually innocent of the murder for which he was sentenced to death. His petition was supported by several affidavits in which the affiants claimed that Herrara's deceased brother, Raul Herrara, Sr., had killed the police officer.[2] Herrera presented his claim to the federal court because it was not cognizable in state court. In Texas, to obtain a hearing based on newly discovered evidence, a defendant must file a motion within thirty days after the imposition of sentence.[3] Herrera's legal claim was straightforward: the Eighth and Fourteenth Amendments to the United States Constitution, he argued, prohibit the execution of an innocent person.

Writing for five members of the Court, Chief Justice Rehnquist rejected Herrera's claim. Acknowledging that no state forum existed in which Herrera could demonstrate his innocence, the Court none-

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1. Herrera v. Collins, 113 S. Ct. 853 (1993).

2. One affidavit was sworn by Hector Villareal, a former state judge. Mr. Villareal asserted in his affidavit that while representing Raul Sr. on a charge of attempted murder, Raul Sr. had told him that he — and not Herrera — had killed Officer Carrisalez. In addition, Herrera submitted the affidavit of Raul Herrera, Jr., who stated that as a nine year old he witnessed his father murder Officer Carrisalez. Raul Jr. claimed that he had not come forward with this information sooner because he had been threatened by various persons involved in a drug trafficking scheme, which allegedly included members of the local sheriff's department. Finally, Herrera's petition was supported by the affidavits of two individuals — a friend and a former cellmate of Raul Sr. — who swore that Raul, Sr., had confessed to the murder of Officer Carrisalez. *See* 113 S. Ct. at 857-58.

3. *Id.* at 860. *See also*, TEX. R. APP. PROC. 31(a)(1) (1992). Texas courts have construed this 30-day time limit as jurisdictional. *See* Beathard v. State, 767 S.W.2d 423, 433 (Tex. Crim. App. 1989).

theless concluded that federal habeas would not lie: "[c]laims of innocence based on newly discovered evidence have never been held to state a ground for federal habeas relief absent an independent constitutional violation occurring in the underlying state criminal proceeding."[4] Moreover, even indulging the assumption (made an explicit basis of their agreement with the majority opinion by Justices O'Connor and Kennedy[5]), that "in a capital case a truly persuasive demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional, and warrant federal habeas relief if there were no state avenue open to process such a claim,"[6] the Court felt certain that Herrera had not made the requisite demonstration of innocence in this case.

Joined by Justices Stevens and Souter, Justice Blackmun wrote in dissent. Justice Blackmun first made clear his view that the Eighth Amendment, interpreted to reflect evolving standards of decency, must certainly proscribe the execution of an innocent person. He also reminded the majority that the protection of the Eighth Amendment does not end once a defendant has been validly convicted and sentenced,[7] nor does it permit of facile distinctions between claims concerning guilt and those involving punishment.[8] Moreover, Justice Blackmun found room for Herrera's claim in the Court's conception of substantive due process, an avenue unexplored by the majority opinion. Ultimately, chastising the majority for failing to do so itself, Justice Blackmun set forth the standard by which a petitioner's attempt to demonstrate actual innocence should be evaluated.

Implicit in Justice Blackmun's discussion of Herrera's constitutional claim was his continuing frustration with the Court's contemporary federal habeas jurisprudence.[9] And, in an eloquent plea that the Court consider the impact on individual death-sentenced defendants of its zealous reconstruction of federal habeas, Justice Blackmun wrote:

> I have voiced disappointment over this Court's obvious eagerness to do away with any restriction on the States' power to execute

4. Leonel v. Herrera, (quoting and citing Townsend v. Sain, 372 U.S. 293, 317 (1963)).
5. *See* Herrera v. Collins, 113 S. Ct. at 870 (O'Connor, J., concurring).
6. *Id.* at 871.
7. *Id.* at 877 (Blackmun, J., dissenting) (referring to Johnson v. Mississippi, 486 U.S. 578 (1988) and Ford v. Wainwright, 477 U.S. 399 (1986)).
8. *Id.* at 877-78 (discussing Beck v. Alabama, 447 U.S. 625 (1980)).
9. Herrera v. Collins, 113 S. Ct. 853 (1993) (Blackmun, J., dissenting) ("The majority's discussion of petitioner's constitutional claims is even more perverse when viewed in the light of the Court's recent habeas jurisprudence.").

> 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.[10]

The *Herrera* dissent marks the second time in two Terms in which Justice Blackmun has called into question the legitimacy of the death penalty. Each involved an interpretation of the scope of federal habeas. Last Term, in *Sawyer v. Whitley*,[11] the Court finally defined the "fundamental miscarriage of justice" exception to the rule barring federal habeas review of defaulted, successive or abusive federal habeas claims in the context of a challenge to a capital sentencing proceeding. Prior to the decision in *Sawyer*, the Court had made clear that a state prisoner could obtain federal review of such a claim only if he could show cause and prejudice, or if the failure of the federal court to consider the claim would constitute a miscarriage of justice.[12] The miscarriage of justice exception is a narrow one, which requires the petitioner to demonstrate that "under the probative evidence he has a colorable claim of actual innocence."[13] While that standard is readily understood when a petitioner claims that the state has convicted the wrong person of the crime, until *Sawyer* the federal courts wrestled with the capital punishment analog: When a petitioner claims that he was unconstitutionally sentenced to die, what does it mean to be "actually innocent" of the death penalty?

The Court in *Sawyer* concluded that to obtain federal review of a defaulted, successive or abusive challenge to his death sentence under the miscarriage of justice exception, a petitioner must show by "clear and convincing evidence that but for the constitutional error no reasonable juror would have found petitioner eligible for the

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10. *Id.* at 884 (Blackmun, J., dissenting).

11. 112 S. Ct. 2514 (1992).

12. A procedurally defaulted claim is one in which the petitioner failed to follow applicable state procedural rules in raising the claim. *See* Murray v. Carrier, 477 U.S. 478 (1986). A successive claim is one which raises grounds identical to grounds heard and decided on the merits in a previous federal habeas petition, *see* Kuhlmann v. Wilson, 477 U.S. 436 (1986), while an abusive claim is one that was available but not raised in a previous federal habeas petition. *See* McCleskey v. Zant, 111 S. Ct. 1454 (1991).

13. *Kuhlmann*, 477 U.S. at 454. *See also* Murray v. Carrier, 477 U.S. 478 (1986); Smith v. Murray, 477 U.S. 527 (1986).

death penalty."[14] Eligibility in this formulation is defined by the manner in which the state narrows the class of offenders upon which the sentencer is authorized to impose the death penalty. Because that class is narrowed, in most states, before the jury may consider mitigating evidence, death sentenced defendants are generally unable to obtain federal habeas review of defaulted, successive or abusive claims related to the consideration of mitigating evidence.

Justice Blackmun joined Justice Stevens' concurrence in *Sawyer*,[15] and wrote separately "to express [his] ever-growing skepticism that, with each new decision from this Court constricting the ability of the federal courts to remedy constitutional errors, the death penalty really can be imposed fairly and in accordance with the requirements of the Eighth Amendment."[16] In particular, Justice Blackmun wrote, "[a]s 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." [17]

Justice Blackmun's skepticism about the constitutional legitimacy of the death penalty is new-found. Twenty years ago, he was adamant in his assertion that the appropriateness of the penalty of death was not a constitutional issue for decision by federal courts, but, rather, a matter of policy to be left to the reasoned judgment of state legislatures. Dissenting in *Furman v. Georgia*,[18] the watershed case in which five separate opinions combined to render unconstitutional the death penalty as it was then administered, Justice Blackmun wrote:

> To reverse the judgments in these cases is, of course, the easy choice. It is easier to strike the balance in favor of life and against death. It is comforting to relax in the thoughts — perhaps the rationalizations — that this is the compassionate decision for a maturing society; that this is the "moral" and right thing to do . . . . This, for me, is good argument, and it makes

14. Sawyer v. Whitley, 112 S. Ct. 2514 (1992).

15. Justices Stevens, Blackmun, and O'Connor felt that the Court's standard was "flawed in both its failure to consider constitutional errors implicating mitigating factors, and in its unduly harsh requirement that a defendant's eligibility for the death penalty be disproved." Sawyer v. Whitley, 112 S. Ct. 2514, 2535 (1992) (Stevens, J., concurring). Nonetheless, even under the more lenient standard articulated in the concurrence, these Justices concluded that Sawyer had not established that failure to consider his claim would constitute a fundamental miscarriage of justice. *See id.* at 2530 (Stevens, J., concurring); *Id.* at 2528, n.2 (Blackmun, J., concurring).

16. *Id.* at 2525 (Blackmun, J., concurring).

17. *Id.* at 2529.

18. 408 U.S. 238 (1972).

> some sense. But it is good argument and it makes sense only in the legislative and executive way and not as a judicial expedient . . . . 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 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.[19]

In the series of cases through which the Court "constitutionalized" the death penalty four years later, Justice Blackmun's concurrences and dissents referred only to the several dissents in *Furman* and the reasoning contained in his own dissent in that case.[20] Moreover, since 1976, Justice Blackmun has with some regularity joined the Court in upholding challenged death sentences,[21] authored opinions for the Court upholding death sentences,[22] and dissented in cases in which death sentences were reversed.[23]

Nor has Justice Blackmun consistently resisted the Court's imposition of restrictions on the exercise of federal habeas jurisdiction in noncapital cases. For example, he joined the majority in *Stone v. Powell*,[24] in which the Court limited federal habeas review of Fourth Amendment claims to those cases in which the petitioner was denied an opportunity for full and fair litigation of that claim in state court. The next Term Justice Blackmun was again with the majority when it first applied the "cause and prejudice" standard to federal habeas review of claims defaulted in state court.[25]

How, then, does a Justice who does not believe that the death penalty is inherently unconstitutional or that restrictions on the exercise of federal habeas jurisdiction are always unwise, arrive at the conclusion that such restrictions condemn the death penalty? In my view, the answer is revealed through reflections on Justice Blackmun's personal and jurisprudential modesty.

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19. 408 U.S. at 410.

20. *See* Gregg v. Georgia, 428 U.S. 153, 227 (1976) (Blackmun, J., concurring); Jurek v. Texas, 428 U.S. 262, 279 (1976) (Blackmun, J. concurring); Woodson v. North Carolina, 428 U.S. 280, 307 (1976) (Blackmun, J., dissenting).

21. *See, e.g.*, Zant v. Stephens, 462 U.S. 862 (1983).

22. *See, e.g.*, Spaziano v. Florida, 468 U.S. 447 (1984); Baldwin v. Alabama, 472 U.S. 372 (1985).

23. *See, e.g.*, Roberts (Harry) v. Louisiana, 431 U.S. 633, 638 (1977) (Blackmun, J., dissenting); Eddings v. Oklahoma, 455 U.S. 104, 120 (1982) (Burger, C.J., dissenting).

24. 428 U.S. 465 (1976).

25. Wainwright v. Sykes, 433 U.S. 72 (1977).

On a personal level, no one who knows Justice Blackmun can fail to be impressed by his sincere humility. During the Term that I clerked for him, this trait surfaced often in the course of our breakfast conversations, generally in response to the myriad invitations he would receive to speak at or attend important academic or charitable events. Upon receiving yet another of the seemingly endless entreaties, Justice Blackmun would peruse the guest list (or list of other potential speakers), shake his head incredulously, and express his disbelief that he, too, would be invited to join such notables. Often this disbelief took the form of a simple question: "I wonder what possessed them to ask me?" Other times, simple bemusement: "I can't for the life of me imagine why they would want me there." Occasionally, his reaction seemed to reveal an obviously inaccurate sense of self-limitation: "Well, I guess I'll go, if they want me, but I don't imagine I'll have anything useful to say." As his law clerks, impressed with his keen intellect, the breadth and depth of his knowledge, and his indefatigable attention to details, we found these responses amusing. To a one, however, we were certain that Justice Blackmun was sincere in uttering them.

Our impression of his sincerity was confirmed whenever Justice Blackmun found himself in the position of being the object of commentary. Just as, I am told, he did this symposium, Justice Blackmun approached such occasions with some degree of trepidation. While I was clerking for him, he generally expressed this concern by hoping that "they" would "go easy" on him, or by speculating on the shape in which we would find him the next morning at breakfast. Upon leaving for the event in question, he would say, "Well, I'm, off. I guess I'll see you at breakfast tomorrow, if they don't beat up on me too badly."

In Justice Blackmun's case, the modesty of the man is mirrored in the modesty of his jurisprudence. It is not, of course, a novel proposition that the power of the law is at its zenith when exercised with humility. In fact, the virtues of judicial modesty are embodied in many of the doctrines of our common and constitutional law. The very mechanism by which the common law distills general principles by resolving concrete disputes as they arise, eschewing the abstract exposition of grand precepts, reflects such modesty. So too does our insistence that dicta is just that. The common law tradition narrows the issues and focuses the judge's attention on those issues: not as they might be imagined, but as they actually occur. As the late Professor Freund described it, the common law tradition is one

"whereby principles are worked pure by rubbing against the hard face of experience."[26] Similarly, the process of reasoning by analogy permits (or requires) the development of intermediary qualifying principles which, in turn, lend stability and legitimacy to the evolving law.[27]

Constitutional jurisprudence is also replete with examples of judicial modesty, many of which have common law analogs.[28] For example, the case and controversy requirement embodied in Article III serves an important narrowing and focusing function, and the Court has added to the derivative concept of standing prudential limitations that extend beyond the dictates of Article III.[29] As Professor Bickel wrote:

> [O]ne of the chief faculties of the judiciary, . . . which fits the courts for the function of evolving and applying constitutional principles, is that the judgment of courts can come later, after the hopes and prophecies expressed in legislation have been tested in the actual workings of our society . . . . The concepts of "standing" and "case and controversy" tend to ensure [that the Court is able to prove its principles as it evolves them] and there are sound reasons . . . for believing that the hard, confining, and yet enlarging context of a real controversy leads to sounder and more enduring judgments.[30]

Similarly, concerns with ripeness and justiciability, as well as the political question doctrine, embody a modest appraisal of the judiciary's role in our constitutional structure. Indeed, the Court's common practice of declining to exercise certiorari jurisdiction to permit certain issues to "percolate" in the lower courts reveals an unadorned willingness to defer decision in the hope of avoiding it.

Justice Blackmun's capital punishment jurisprudence, perhaps more than that of any other Justice, has epitomized the virtues of jurisprudential humility. In the true tradition of the common law,

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26. Paul A. Freund, *Justice Brandeis: A Law Clerk's Remembrance*, 68 AM. JEWISH HISTORY 7, 17 (1978) (quoted and cited in Anthony Lewis, *In Memoriam, Paul A. Freund*, 106 HARV. L. REV. 16, 18 (1992)).

27. *See* Archibald Cox, *In Memoriam, Paul Freund*, 106 HARV. L. REV. 7, 8 (1992) (discussing Professor Freund's insistence that constitutional interpretation adopt these commendable attributes of the common-law tradition).

28. *See, e.g.*, ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH 111-198 (1962) (detailing the "passive virtues" of constitutional jurisprudence).

29. *See Lujan v. Defenders of Wildlife*, ___ S. Ct. ___ (1992) (slip op. at 4) (Although some of its elements express merely prudential considerations that are part of judicial self government, the core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III.).

30. *Id.* at 115.

Justice Blackmun has wrestled with the compelling facts of each capital case, consistently concluding neither that the death penalty always violates the Eighth Amendment,[31] nor that states are largely unconstrained by the constitution in the manner in which they administer their system of capital punishment.[32] By way of example, I will discuss three of the general principles by which Justice Blackmun brings to bear his judicial modesty on his capital punishment jurisprudence.

The first is, as noted above, Justice Blackmun's conviction that the contours of the Eighth Amendment must be revealed incrementally and exposed at the interstices of the law and facts. By means of careful attention to the legal issues crystallized by the real-life application of state capital punishment schemes to actual crimes and defendants, Justice Blackmun's "common law" of capital punishment has emerged over the past twenty years. This incremental, common-law approach is readily illustrated by his evaluation of the circumstances under which the Eighth Amendment requirement of heightened reliability in capital cases compels a state court to instruct a jury on lesser included offenses of the capital crime.

In *Beck v. Alabama*,[33] Gilbert Beck challenged his death sentence based on the Eighth Amendment's requirement that states employ in capital cases procedures that ensure a heightened reliability in the determination that death is the appropriate sentence. Beck was accused of participating in a robbery that resulted in the death of the victim, and charged with the capital crime of robbery-intentional killing. In Alabama, felony murder (without the intent to kill required to impose the death sentence), is a lesser included offense of that capital crime. Although Beck admitted his participation in the robbery, he consistently denied that he killed or intended to kill the victim. Nonetheless, he was charged with robbery-intentional killing, and the State sought the death sentence. Under state law, the judge was prohibited from instructing the jury on noncapital felony murder. Accordingly, the jury was given the option of convicting Beck of capital murder or acquitting him entirely. In reviewing Beck's challenge, the Court recognized that a jury, faced with such an option, may inappropriately convict the defendant to avoid setting him free. In light of the Eighth Amendment's requirement of heightened relia-

31. This, of course, was the position advanced by Justices Brennan and Marshall.

32. This position is perhaps most consistently advanced by Chief Justice Rehnquist and Justices Scalia and Thomas.

33. 447 U.S. 625 (1980).

bility, the Court concluded that "if the unavailability of a lesser included offense instruction enhances the risk of an unwarranted conviction, [a State] is constitutionally prohibited from withdrawing the option from the jury in a capital case."[34] Justice Blackmun joined in the majority opinion.

Four years later, Joseph Spaziano challenged his death sentence, invoking *Beck* and arguing that the state court had unconstitutionally refused to instruct the jury on the lesser included offense of noncapital murder.[35] In this case, the statute of limitations had run on the lesser included offense, and the trial court had offered Spaziano the option of waiving the statute of limitations or proceeding to trial without the lesser included offense instruction. Spaziano argued that he was entitled to the instruction as well as the expired statute of limitations: that he should not be required to waive a substantive right in order to receive a constitutionally fair trial.

Writing for the Court, Justice Blackmun rejected Spaziano's argument. "The element the Court found essential to a fair trial in *Beck* was not," he made clear, "simply a lesser included offense instruction in the abstract, but the enhanced rationality and reliability the instruction introduced into the jury's deliberations."[36] Requiring the jury to be instructed on a lesser included offense that did not exist would simply add a different type of distortion to the deliberation, not serve the *Beck* goal of eliminating the distortion introduced by the all or nothing choice between capital murder and innocence. Justice Blackmun's analysis of Spaziano's claim well reflects the inherently modest qualities of the common law: approach concrete cases incrementally to distill general principles, and apply those principles by analogy to the concrete facts of future cases.

Second, in reviewing challenges to individual sentences of death Justice Blackmun has been exceedingly unwilling to intrude into matters of policy or legislative judgment. He initially articulated this unease eloquently in *Furman*, and has reiterated it in subsequent cases, including, for example, *Lockett v. Ohio*,[37] and *Bell v. Ohio*.[38] In their separate appeals, Lockett and Bell argued that the Ohio capital sentencing scheme violated the Eighth and Fourteenth Amendments because it limited the factors that the sentencer could

34. Beck v. Alabama, 447 U.S. 625, 637-38 (1980).
35. Spaziano v. Florida, 468 U.S. 447 (1984).
36. *Id.* at 455.
37. 438 U.S. 586 (1978).
38. 438 U.S. 637 (1978).

consider in mitigation.[39] In particular, the defendants wanted to present to the sentencer evidence of their youth, their lack of specific intent to commit murder, their relatively minor participation in the crime that resulted in the murder, their good character and their lack of a prior record. A plurality of the Court upheld the challenges, stating broadly that "the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers."[40]

Justice Blackmun, however, concurred on narrower grounds. Ever mindful of the appropriate roles of the legislature and judiciary in determining the wisdom and the constitutionality of the death penalty, Justice Blackmun wrote:

> Though heretofore I have been unwilling to interfere with the legislative judgment of the States in regard to capital-sentencing procedures, . . . this Court's judgment as to disproportionality . . . and the unusual degree to which Ohio requires capital punishment of a mere aider and abettor in an armed felony resulting in a fatality . . . provides a significant occasion for setting some limit to the method by which the States assess punishment for actions less immediately connected to the deliberate taking of human life.[41]

Justice Blackmun's commitment to a limited role for the judiciary in the death penalty debate is reflected again in *Spaziano v. Florida*,[42] in which the Court rejected the defendant's challenge to the Florida capital sentencing scheme. In Florida, the jury verdict as to penalty is advisory to the presiding judge, who may override the jury recommendation if warranted. Writing for the Court, Justice Blackmun explained,

> [a]s the Court several times has made clear, we are unwilling to say that there is any one right way for a State to set up its capital sentencing scheme . . . . We are not persuaded that placing the responsibility on a trial judge to impose the sentence

39. Once a verdict of aggravated murder with specifications was returned, the statute required the sentencer to impose the death penalty unless it found that (1) the victim had induced or facilitated the offense, (2) it was unlikely that the defendant would have committed the offense but for the fact that she was under duress, coercion, or strong provocation, or (3) the offense was primarily the product of the defendant's psychosis or mental deficiency. *See* Lockett v. Ohio, 438 U.S. 586, 594-95; OHIO REV. CODE §§ 2929.03-2929.04 (B) (1975).

40. *Lockett*, U.S. at 604.

41. *Id.* at 616 (Blackmun, J., concurring).

42. 468 U.S. 447 (1984).

> in a capital case is so fundamentally at odds with contemporary standards of fairness and decency that Florida must be required to alter its scheme and give final authority to the jury to make the life-or-death decision.[43]

Finally, Justice Blackmun has consistently insisted that when decision-making authority is appropriately located in the judicial branch, that power must be allocated to the legal actor that can exercise it most reliably and legitimately. In *Enmund v. Florida*,[44] the Court established a constitutionally required factual predicate for the valid imposition of the death penalty on a defendant who is convicted of felony-murder: that the defendant killed, attempted to kill, or intended to kill the deceased.[45] Four years later in *Cabana v. Bullock*, Crawford Bullock, Jr., challenged his death sentence on the ground that no *Enmund* finding had been made.[46] The Supreme Court agreed that Bullock's sentence must be vacated, but opined that the Supreme Court of Mississippi had the choice on remand of either imposing a sentence of life imprisonment or obtaining the relevant finding by "any court that has the power to find the facts and vacate the sentence." Such courts, in Mississippi, include appellate courts.[47]

Justice Blackmun's dissent in *Cabana* was premised on his understanding of the "proper institutional roles of trial and appellate courts and the pragmatic and constitutional concerns with reliability that underline those roles."[48] The *Enmund* finding, being quintessentially a finding of fact, could not, according to Justice Blackmun, be made reliably by any actor other than the original fact finder at the sentencing phase. Moreover, Justice Blackmun pointed out, the Eighth Amendment requires not only that the fact finder consider the constitutionally relevant information, but also that those findings of fact be subject to meaningful appellate review. "To permit States to collapse factfinding and review into one proceeding is to abandon one of the most critical protections afforded by every capital-sentenc-

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43. Spaziano v. Florida, 468 U.S. 447, 464-65 (1984).

44. 458 U.S. 782 (1982).

45. In most states that employ the penalty of death, a defendant can be convicted of capital murder for his participation in a felony that resulted in the loss of life, regardless whether the defendant himself caused the death. The Court subsequently "explained" that the *Enmund* culpability requirement could be satisfied by a showing that the defendant was a major participant in a felony that resulted in a death, and acted with reckless indifference to human life. *See* Tison v. Arizona, 481 U.S. 137 (1987).

46. Cabana v. Bullock, 474 U.S. 376 (1986).

47. *Id.* at 386.

48. *Id.* at 394, 397 (Blackmun, J., dissenting).

ing scheme to which the Court previously has given approval."[49]

Similarly, Justice Blackmun dissented in *Clemons v. Mississippi*,[50] in which the Court held that Mississippi's "especially heinous, atrocious or cruel" aggravating circumstance provided insufficient guidance to the sentencing jury, but suggested that, on remand, the Supreme Court of Mississippi could simply reweigh the remaining (valid) aggravating circumstances and mitigating factors and thereby salvage the defendant's death sentence. Again Justice Blackmun emphasized the institutional limitations of appellate courts:

> An appellate court is ill-suited to undertake the task of capital sentencing, not simply because of its general deficiencies as a factfinder, or because the costs of erroneous factfinding are so high, but also because the capital sentencing decision by its very nature is peculiarly likely to turn on considerations that cannot adequately be conveyed through the medium of a written record.[51]

In addition, Justice Blackmun chastised the Court for its bold overreaching: both because its advice to the Mississippi Supreme Court was a "pure and simple advisory opinion" and because the effect of such an opinion was to shift the locus of the decision-making from the state courts to the Supreme Court. Consistent with the passive virtues of constitutional jurisprudence, Justice Blackmun argued, the appropriate course for the Court to take, upon determining that Clemons' death sentence was invalid, was to vacate the judgment of the court below and remand for further proceedings. The state courts on remand, not the Supreme Court, were the legitimate forum for making the initial determination whether Clemons should be resentenced and according to what procedures. However, "[r]ather than awaiting, and then reviewing, the decisions of other tribunals, the Court today assumes that its role is to offer helpful suggestions to state courts seeking to expedite the capital sentencing process."[52]

It is clear, then, that Justice Blackmun has approached the difficult issues raised by the imposition of capital punishment with a heightened awareness of the limitations of judicial authority and competence. How though, does this jurisprudential modesty guide a Justice to question the legitimacy of the death penalty itself? As noted earlier, the strength of the common law tradition has been at-

49. *Id.* at 404.
50. 110 S. Ct. 1441 (1990).
51. *Id.* at 1460.
52. *Id.* at 1455.

tributed, in part, to its incremental, analogical structure: a structure by which the principles of the law can work themselves clean without resulting in dramatic instability or judicial aggrandizement. Such a structure, to be successful, requires consistent engagement. Federal habeas jurisdiction, in Justice Blackmun's view it seems, provides the consistent access to concrete cases needed to "work clean" the principles guiding the imposition of capital punishment, and provides that access in a manner respectful of the strengths and limitations inherent in state and federal courts.

The structural dialectic of federal habeas was first discussed in a ground-breaking article by the late Robert Cover and Alexander Aleinikoff.[53] In that piece, Cover and Aleinikoff identify several facets of federal habeas jurisdiction that replicate the passive virtues of the common law. For example, federal habeas review "encourages successful vindication of federal rights by isolating them from other elements in the criminal process and making them the special concern of a special forum,"[54] much like the common-law traditions of analogical reasoning and incremental advancement isolate issues and focus the court's attention. In addition, federal habeas jurisdiction is a patient and limited jurisdiction: federal habeas courts do not intrude into the state criminal proceedings and direct that they employ specific constitutional safeguards. Rather, "[t]he relief afforded by habeas corpus is almost always extended to only a single petitioner and the form of relief is limited to release from confinement."[55]

Each of those aspects of federal habeas jurisdiction commend its expansive interpretation in all cases, not just in capital cases. The sentence of death, however, is unique in its finality, and that uniqueness impels the conclusion that the Eighth Amendment requires that procedures employed in making the determination whether to impose the death penalty ensure heightened reliability. The inherent redundancy of federal habeas jurisdiction "fosters greater certainty that constitutional rights will not be erroneously denied."[56] Moreover, while states are presumed to act within the constraints of the constitution in establishing their criminal justice systems, it is has been, without doubt, the existence and exercise of federal habeas jurisdiction that has prompted the states to develop and implement procedures in capital cases that comply with the mandate of heightened

53. Robert M. Cover and T. Alexander Aleinikoff, *Dialectic Federalism: Habeas Corpus and the Court*, 86 YALE L.J. 1035 (1977).
54. *Id.* at 1045.
55. *Id.* at 1043 (citations omitted).
56. *Id.* at 1945.

reliability. Accordingly, it may be only in the context of capital punishment that the judicial modesty made possible by a robust federal habeas jurisdiction serves a constitutionally compelled role. Justice Blackmun, in his recent capital opinions, appears poised to embrace such a view.