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Recommended Citation
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JUSTICE BLACKMUN AND CRIMINAL JUSTICE:
A MODEST OVERVIEW

by

STEPHEN L. WASBY

INTRODUCTION

Justice Harry A. Blackmun was nominated for a position on the Supreme Court in 1970 by President Richard M. Nixon after the Senate rejected Nixon's nominations of Judges Clement Haynsworth and G. Harrold Carswell. Blackmun, as a judge of the U.S. Court of Appeals for the Eighth Circuit for eleven years, had written opinions that reflected "judicial restraint, an appreciation for the limits of judicial authority and deference to state and legislative prerogatives" as well as conservatism on defendants' rights and civil liberties issues. These strains of thought made him attractive to a president looking for someone supporting the "war on crime." That his nomination may have been suggested by his childhood friend Chief Justice Burger, whose record on "defendant's rights" had long been established, would have reinforced his attractiveness in this regard.

At least as far as criminal justice was concerned, the president was not to be disappointed by Justice Blackmun, who stayed relatively close to his original, conservative starting point on criminal justice issues for a longer time than he did on other civil liberties issues. Criminal justice, broadly defined, is the area in which Justice Blackmun, not exhibiting the independence and shift he showed more promptly elsewhere, voted most frequently with the other Nixon appointees. Although Blackmun was not irredeemably conservative and there were some issues, such as exclusion of minorities from juries, on which he was consistently liberal throughout his Court tenure, he remained pretty much a law-and-order justice.

Then his criminal justice position did change, although at times haltingly and with exceptions. Even into the mid-1980s and beyond, Justice Blackmun

* The author wishes to acknowledge the helpful observations of his criminal justice colleague Jim Acker, who is, of course, not responsible for remaining errors.

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1. Michael Pollet, Harry A. Blackmun, 5 Justices Of The United States Supreme Court 3,8 (Leon Friedman ed., 1978).

could adopt a tone highly consonant with the Crime Control model.\textsuperscript{3} For example, when the Court ruled in 1990 that restitution obligations imposed as a condition of probation in a state criminal proceeding were dischargeable in bankruptcy, Blackmun complained of this use of the Bankruptcy Code "as a shield to protect a criminal from punishment for his crime."\textsuperscript{4} However, in roughly the last decade of his service on the Court, he moved away from Chief Justice Burger, the other Nixon appointees, and other conservatives who joined the Court later, to change his tone — he was called a "voice of reason" in criminal matters\textsuperscript{5} — and to vote more frequently with Justices Brennan and Marshall, making what one critic called "the most wayward Republican appointee since Earl Warren."\textsuperscript{6}

When Justice Blackmun left the Court at the end of his lengthy tenure, although one would not label "liberal" his overall record on criminal justice, his position in that area was no longer an exception to the proposition that he had engaged in a significant jurisprudential shift away from conservatism during his Supreme Court tenure. While some talked of his "liberal" vote, his position may only have appeared liberal because of the arrival of more conservative colleagues and the departure of consistently liberal justices Brennan and Marshall. We must remember, however, that arranging members of the Court in a left-to-right ideological array indicates only their relative, not absolute, positions. In his last few terms on the Court, Blackmun was close to, or part of, a liberal bloc of justices. After voting in a liberal direction but not sufficiently with Justices Brennan and Marshall to be part of their bloc in the 1988 and 1989 Terms, he became a member of the liberal bloc for the first time in the 1990 Term, and in the 1991-1993 terms continued to form such a bloc with Justice Stevens.\textsuperscript{7} Yet in 1994, Blackmun may have been only one of the two most liberal members of a Court that, with appointments by Presidents Reagan and Bush, had moved steadily toward the conservative end of the political spectrum.

In any event, rather than impose ideological labels, we should discuss the justice's opinions so that the reader can determine which ones, if any, are appropriate. This article provides such a discussion. It is an examination of Justice Blackmun's criminal justice opinions during his entire Court tenure (1970-1994), with somewhat greater attention paid to his more recent opin-
ions, particularly those from roughly his last decade on the Court. Although comprehensive, it is a modest overview because it does not provide detailed examination of particular cases for their jurisprudential rules. Moreover, it is not the Court's jurisprudence that is reviewed here, but Justice Blackmun's contribution to, or response to, it; where he wrote separately, the majority's view will be stated only briefly to provide a basis for Blackmun's response, which will be the focus.

Examination of the opinions appearing under one individual's signature, including solo concurring and dissenting opinions, allows us to be reasonably sure we are looking at that person's views. However, we must keep in mind that a justice's written statements, particularly opinions of the Court, are likely to be influenced by colleagues' views. There is considerable evidence that the justice signing an opinion incorporates segments of other justices' views and excludes other material at their suggestion. Thus, as Justice Blackmun joined the liberals, their input into his opinions would be likely to push his opinions in a more liberal direction, perhaps providing a somewhat exaggerated view of any changes in his position.

Criminal procedure as usually defined covers the provisions of the Fourth, Fifth, and Sixth Amendments, due process generally, and relevant statutory enactments, with a primary focus on the constitutional provisions. In addition to Justice Blackmun's pronouncements on issues within the scope of those provisions, this article encompasses more — his interpretation of statutes, part of an examination of his deference to officials in the criminal justice community, and the Eighth Amendment, because of Justice Blackmun's centrality in the controversy over capital punishment, where substance (what is "cruel and unusual") and procedure are inextricably intertwined. Justice Blackmun's deference to criminal justice officials and state courts is looked at first, followed by his view of the reach of substantive criminal statutes. The article then proceeds to Blackmun's views on search and seizure issues and the Fifth Amendment, on both of which his conservatism was most evident and certainly more so than with respect to Sixth Amendment issues, particularly public trial, discussion of which follows. The article concludes with an examination of Justice Blackmun's views on capital punishment and related habeas corpus issues. Included is his attention-getting statement in *Callins v. Collins,* only several weeks before announcement of his retirement and several months from the end of his tenure, in which he asserted that the death penalty could not be applied constitutionally and that he would no longer vote to sustain a capital sentence.

Justice Blackmun often exhibited deference to officials in the criminal justice system. He did so in several ways. He gave substantive criminal statutes, particularly those on gun possession by felons, a broad reading. Although his position on prosecutorial vindictiveness was mixed, he supported prosecutors by rejecting defendants’ demands for material and by limiting defendants’ ability to appeal before trial.\textsuperscript{10} His use of a flexible approach, in which case-by-case development of the law based on “totality of the circumstances” was emphasized, gave criminal justice officials more freedom than \textit{per se} rules; he was critical of \textit{per se} rules even adopted in support of law enforcement interests. Yet, while he was often willing to allow those in the criminal justice system leeway in which to operate, he could also impose constraints on them. He did this most obviously by limiting the discretion of police conducting inventory searches,\textsuperscript{11} but this imposition of constraint can be seen in other areas as well. An example is Blackmun’s holding that, when there had been a Speedy Trial Act violation, it was an abuse of discretion for a U.S. district court to dismiss a case with prejudice.\textsuperscript{12} Certainly dismissal was required under the statute, he said, but it was also clear that no particular type of remedy was presumed and that “courts are not free simply to exercise their equitable powers in fashioning an appropriate remedy,” but must, as the Act specifies, consider particular factors in determining the remedy.\textsuperscript{13}

Perhaps Justice Blackmun’s most significant criminal justice opinion came in \textit{Mistretta v. United States}\textsuperscript{14} upholding, against nondelegation and separation of powers challenges, the constitutionality of the sentencing guidelines created by the United States Sentencing Commission. He stressed that, “in our increasingly complex society, replete with ever changing and more technical problems,”\textsuperscript{15} Congress had to be able to delegate authority, and had passed constitutional muster here by using with sufficient detail and specificity — prescribing the guidelines system, providing particulars, and directing the commission to consider particular factors. Congress, he said, although giving “substantial discretion” to the commission, “in actuality . . . legislated a full hierarchy of punishment . . . and stipulated the most important offense and offender characteristics to place defendants within these categories.”\textsuperscript{16}

\begin{itemize}
\item \textsuperscript{10} See United States v. MacDonald, 435 U.S. 850, 861 (1978)(no pretrial appeal of speedy trial claim).
\item \textsuperscript{11} See \textit{infra} notes 114-80 and accompanying text.
\item \textsuperscript{12} United States v. Taylor, 487 U.S. 326 (1988).
\item \textsuperscript{13} \textit{Id.} at 332-34.
\item \textsuperscript{14} 488 U.S. 361 (1989).
\item \textsuperscript{15} \textit{Id.} at 372.
\item \textsuperscript{16} \textit{Id.} at 377.
\end{itemize}
As to separation of powers, Blackmun found the Commission, placed in the judicial branch but an "independent" body, was not performing other branches' functions nor was it undermining the judicial branch's integrity.\footnote{Id. at 385.} As it had done in other situations, Congress had here given rulemaking authority to the judicial branch; moreover, sentencing was a quintessentially judicial function, performed by judges long before the Sentencing Reform Act was passed. Although there was a larger "degree of political judgment" in developing the guidelines than in formulating other rules for which the judiciary had the responsibility,\footnote{Id. at 392.} the difference did not make unconstitutional the commission's placement, particularly as its work was not combined with the judiciary's powers, although there were some judges on the commission — an aspect Blackmun also found constitutionally proper.\footnote{For a discussion of this portion of the opinion, see Stephen L. Wasby, Mistretta: Federal Judges' Extrajudicial Activities, 14 JUST. SYS. J. 110 (1990).}

**Deference to Prosecutors.** Blackmun's deference to prosecutors is evident in two opinions he wrote for the Court on the question of disclosure of material, in both of which he read the requirements of *Brady v. Maryland*\footnote{373 U.S. 83 (1963).} narrowly. In the "Slick" Moore murder case, finding the exculpatory information sought not "material" under *Brady*, Blackmun argued that there was "no constitutional requirement that the prosecution make a complete and detailed accounting to the defense of all police investigatory work on a case."\footnote{Moore v. Illinois, 408 U.S. 786, 795 (1972). This is the case of which Woodward and Armstrong made much because Justice Brennan allegedly joined Blackmun to curry favor with him. \textit{BOB WOODWARD & SCOTT ARMSTRONG, THE BRETHREN} 224-225 (1979).} More recently, Blackmun, minimizing the extent of the prosecutor's failure to disclose, rejected automatic reversal for nondisclosure of information that would have been used to impeach prosecution witnesses.\footnote{United States v. Bagley, 473 U.S. 667 (1985).} Using a not-easily-violated standard typical of the Burger Court, he would have required reversal only where there was a reasonable probability that the non-disclosure would have affected the case's outcome.\footnote{Id.}

Later, however, in a closely-related case, Blackmun joined Brennan and Marshall in showing displeasure with the police's failure to preserve potentially useful evidence and with the majority's position that such action was not a denial of due process unless the defendant could show police bad faith.\footnote{Arizona v. Youngblood, 488 U.S. 51 (1988).} Drawing on cases involving prosecutors' actions, he wrote that the evidence's
materiality, not the officers’ state of mind, was determinative.\textsuperscript{25} That police were negligent rather than malicious did not change the negative effect on defendant’s ability to present an effective\textsuperscript{26} case and on “the possibility of complete exoneration.”\textsuperscript{27} Blackmun did say, however, that burdens on the police in maintaining evidence should be taken into account and that it might be acceptable if they tested physical evidence and discarded the evidence while retaining the tests.\textsuperscript{28}

Also of assistance to prosecutors was Blackmun’s ruling for a 5-4 Court allowing federal prosecutors to appeal a convicted dangerous special offender’s sentence under the Organized Crime Act. Indeed, he went so far as to say that the Double Jeopardy Clause “does not provide the defendant with the right to know at any specific moment in time what the exact limit of his punishment will turn out to be.”\textsuperscript{29} He also wrote for the Court, in a case with an overlay of federalism, to allow a state prosecutor trying a defendant federal official in federal court (upon defendant’s removal of case) to appeal a judge’s acquittal order entered after the jury’s finding of guilt, although a federal prosecutor would not have been able to do so.\textsuperscript{30} Showing his concern for states’ position in our federal system, he noted that had the case been in the Arizona courts, the state’s right to appeal would have been certain; no federal interest would be violated by allowing the state to obtain the review it would have had in its own courts.

However, on questions of prosecutorial vindictiveness, Justice Blackmun was not fully deferential to prosecutors. For one thing, when judges denied motions to dismiss a prosecution because of alleged prosecutorial vindictiveness, he would allow defendants to appeal in order to provide a meaningful opportunity to protect the “right not to be tried.”\textsuperscript{31} He also argued in dissent that a prosecutor, threatening higher charges if a defendant did not plead guilty, should have to justify such threats “on some basis other than discouraging [defendant] from the exercise of his right to a trial”; moreover, the prosecutor should present charges at the beginning of the bargaining process instead of engaging in “deliberate overcharging.”\textsuperscript{32} He felt that the Court, as part of its continuing support for plea-bargaining, “was departing from, or

\begin{footnotes}
\item[25] Id. at 64.
\item[26] Id. at 66.
\item[27] Id. at 68.
\item[28] Id. at 71.
\end{footnotes}
at least restricting, the principles established” in its earlier vindictiveness cases; however, at the same time, he noted that courts “necessarily have deferred to the prosecutor’s exercise of discretion in the initial charging decisions” because they could not know what the prosecutor was doing.\(^{33}\) And a few years later, he agreed that a prosecutor’s addition of a felony indictment after the defendant failed to plead guilty to a misdemeanor was not vindictive; however, his agreement rested only on the relatively narrow ground that the prosecutor should have the “flexibility” to add charges “based on ‘objective information’” and had satisfactorily explained his action.\(^{34}\)

Blackmun’s lack of consistency on deference to prosecutors can be seen in a later case in which a prosecutor had been accused of a closing argument which even the majority conceded contained improper statements. There Blackmun wrote for four dissenters, complaining that the majority had been “willing to tolerate not only imperfection but a level of fairness and reliability so low it should make conscientious prosecutors cringe.”\(^{35}\) The justice’s heightened standard for evaluating the prosecutor’s statements may be explained by the fact that this was a death penalty case which came after the justice’s uneasiness over application of the penalty had begun to be evident.

**Deference to Prison Administrators?** On the one hand, Justice Blackmun deferred to prison administrators, and, on the other, exhibited significant concern over prison and jail conditions. As to the former, he deferred to officials’ decisions to place prisoners in administrative segregation\(^ {36}\) and also sustained between-prison transfers of prisoners without a hearing even when the transfers were between Hawaii and the mainland.\(^ {37}\) As to the latter, in arguing for protection of the disadvantaged, he called for attention to “real world” problems, saying that escapees should not be made to “return forthwith to the hell that obviously exceeds the normal deprivations of prison life” in order to assert duress and necessity defenses to the crime of escape.\(^ {38}\)

One basis for distinguishing among Justice Blackmun’s rulings on prison matters is to separate cases involving prison rules from cases in which prisoners sought remedies for alleged violations of their rights. With respect to the former, Blackmun wrote for the Court to sustain regulations creating categories of individuals who might be excluded from visiting prisoners; regulations allowing visitation did not, he said, create a liberty interest to

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33. *Id.* at 368 n.2.
which due process would attach. 39 Similarly, he found regulations concern-
ing federal prisoners' receipt of subscription publications facially valid as
reasonably related to legitimate penological interests, even if serious First
Amendment questions would arise if the same restrictions were imposed in a
non-prison context. 40 However, when a state statute reduced good time credit,
his belief "good time" had to be earned led him to join the Court only grudg-
ingly in finding the law an ex post facto violation, as he recognized that the
precedents were against him. 41

Blackmun was less deferential when it came to prisoners' remedies. In
a 1985 case, for example, he held that members of a prison's Institution
Discipline Committee, whom a prisoner charged had violated his constitu-
tional rights, were not entitled to absolute immunity from suit for damages but
could avail themselves only of qualified immunity. 42 Although the commit-
tee members were "perform[ing] an adjudicatory function" and were in a
difficult situation such that they might want not to serve if they could be sued,
the importance of protecting against constitutional violations overrode the
request for absolute immunity. 43

Blackmun's concern for prisoners' well-being became particularly evident in
the remedy context in a case when a prisoner sued under 42 U.S.C. §1983 over
administrators' failure to protect him from another prisoner's attack. When
the Court ruled that prisoners could not bring a case for prison officials' neg-
ligence, Blackmun, along with Marshall, dissented, arguing that in the prison
situation, officials prevent inmates from protecting themselves and thus make
them dependent on the officials for protection from danger. 44 Blackmun then
agreed when the Court's majority held that excessive physical force against
prisoners may constitute cruel and unusual punishment although the prisoner
did not suffer serious injury. However, concurring separately, he went on to
argue against the government's position that, because of the increase in
prisoner petitions, a different standard for judging such situations was neces-
sary. 45 Calling the right to seek judicial redress as valuable for prisoners as for
other citizens, and indeed more valuable for the prisoner, he labeled the

43. Id. at 203-04.
327 (1986)(concurring in judgement) (citing his Davidson opinion).
judgment).
government's stance an "audacious approach to the Eighth Amendment" which "assumes that the interpretation of an explicit constitutional protection is to be guided by pure policy preferences for the paring down of prisoner petitions." 46

Blackmun's support for inmates injured while in prison was made clearest in a concurring opinion he filed in his last term. In Farmer v. Brennan, 47 the Court held that prison officials would not be liable to prisoners under the Eighth Amendment unless the officials knew that the inmates faced substantial risk of serious harm and the officials then failed to act reasonably to abate the harm. Justice Blackmun concurred in Justice Souter's majority opinion primarily "because it creates no new obstacles for prison inmates to overcome, and it sends a clear message to prison officials that their affirmative duty under the Constitution to provide for the safety of inmates is not to be taken lightly." 48 Nonetheless, writing emotionally about young inmates who had committed nonviolent crimes yet were subjected to "horrors" like prison rape which "border on the unimaginable," 49 Blackmun turned his concurrence into a belated dissent in the three-year-old case of Wilson v. Seiter, 50 where the Court had held that prison officials' culpable state of mine (deliberate indifference) would have to be shown for an inmate to prove a constitutional violation. Calling for overruling Wilson v. Seiter, Blackmun argued that prisoners "experience[d] punishment... regardless of whether a state actor intended the cruel treatment to chastise or deter"; because prison overcrowding, with its contribution to violence, might result from inadequate funding by the legislature, he said that attention should be given to more than prison officials. The point of the Eighth Amendment, he continued, was to guarantee that "reasonable measures will be taken to ensure" each prisoner's safety, not "to protect prison officials... from lawsuits." 51

Showing consistency in facilitating prisoners' efforts to obtain remedies, Blackmun also wrote for a unanimous Court to rule that a federal prisoner seeking only money damages for violations of constitutional provisions need not exhaust administrative remedies under Bureau of Prisons grievance procedures before bringing a Bivens action. 52 Despite the importance of exhaustion of administrative remedies, about which he wrote at length, he found that

46. Id.
48. Id. at 1986; see also id. at 1989.
49. Id. at 1987.
petitioning inmates were “heavily burden[ed]” by the grievance procedure, which, in any event, did not provide the monetary remedy the prisoner sought.\textsuperscript{53}

Blackmun came down on the prisoners’ side when they sought to be brought to trial on out-of-state charges lodged against them. The Court’s majority determined that, under the Interstate Agreement on Detainers, the 180-day period for bringing a prisoner to trial on such charges did not begin until the prisoner’s request for a disposition of the detainer was actually delivered to court and to the prosecutor of the jurisdiction that had lodged the detainer.\textsuperscript{54} Dissenting, Blackmun argued instead that the time should run from the prisoner’s transmission of the request to the warden, the last point at which the prisoner could be said to have had control over the matter. The Agreement’s “180-day clock,” he said, was “intended to give the prisoner a lever with which to move forward a process that will enable him to know his fate and perhaps eliminate burdensome conditions.”\textsuperscript{55} The Agreement had been enacted for prisoners, “not to protect prosecutors’ calendars, or even to protect prosecutions.”\textsuperscript{56}

In another case involving time limits under the Agreement, in one of his last opinions, Justice Blackmun, again in dissent, sided with the prisoner.\textsuperscript{57} When the majority found state court failure to observe the 120-day speedy trial rule under the Agreement not cognizable under federal habeas corpus, at least when the defendant made no objection to the setting of a trial date and suffered no prejudice,\textsuperscript{58} Blackmun focused on “Congress’ unambiguous judgment about the severity of, and the necessary remedy for, a violation of the IAD time limits,” saying that such a violation was not, as the majority had said, merely “technical.”\textsuperscript{59}

\textit{Deference to State Courts?} Whether the Supreme Court would defer to state courts on matters of criminal procedure was particularly important in the Burger Court, which state officials frequently asked to overturn state court rulings favoring defendants. Of greatest significance among Justice Blackmun’s criminal justice statements on this subject was his opinion for the Court in \textit{Oregon v. Hass}, where he declared that whatever states did “as a matter of [their] own law,”\textsuperscript{60} they could not interpret the federal Constitution

\begin{footnotes}
\item[53] Id. at 1090.
\item[55] Id. at 1094-95.
\item[56] Id. at 1092.
\item[57] Reed v. Farley, 114 S. Ct. 2291, 2303 (1994)(Blackmun, J., dissenting).
\item[58] Id. at 2294.
\item[59] Id. at 2307.
\item[60] 420 U.S. 714, 719 (1975).
\end{footnotes}
to give protections the U.S. Supreme Court had refused to provide. Later, however, Blackmun’s stance was to be quite different: when the majority insisted that state courts make a clear statement of their reliance on state law, he refused to join the Court’s “presumption of jurisdiction over cases coming here from state courts.”

Early in his tenure on the Court, Blackmun joined *Younger v. Harris* and its companion cases ordering federal court non-involvement in pending state criminal proceedings, and he also joined *Younger’s* extension to civil situations, particular where the state could have proceeded against certain behavior like welfare fraud either criminally or civilly. However, when people had been threatened with criminal charges but not yet prosecuted, he felt they could proceed with their federal court suit because “considerations of equity, comity, and federalism have less vitality” in that situation.

**Harmless Error.** An important aspect of Justice Blackmun’s approach to state courts was his strong commitment to the use of the “harmless error” doctrine in evaluating lower court mistakes. Yet this commitment cut differently in later years than it did initially. While at first it was the basis for deferring to state courts, later, as he saw his colleagues become more willing to tolerate constitutional errors in criminal trials, Blackmun used “harmless error” to protect defendants.

Perhaps reflecting his long experience as a lower appellate judge accustomed to reviewing trial court records for error, Blackmun’s first concurring opinion, supporting the introduction of contested evidence, was based on the “harmless error” rule of *Chapman v. California*. Later, he criticized his colleagues for abandoning previous harmless error analysis and adopting a per se rule that would prevent trial courts from “weighing all the circumstances.”

In a 1986 case in which the majority allowed a double-jeopardy violation to be remedied by reducing the barred conviction to one not barred by double jeopardy, with the burden on defendant to show he would not have been convicted of the lesser included offense, Blackmun turned “harmless error” into a tool for the defendant. He concurred in the judgment to criticize his

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64. Ellis v. Dyson, 421 U.S. 426, 432 (1975).
colleagues for not considering the case under the "harmless error" rule and for using an approach that was more lenient, and thus more deferential to the state. For him, once a constitutional violation was established, "the proceedings lose whatever presumption of regularity they formerly enjoyed, and the State properly bears a heavy burden in arguing that the result should nonetheless be treated as valid." 69

Later in the same term, dissenting with Brennan and Marshall, he also argued that despite the importance of the harmless error rule, some errors—in this case, an erroneous malice instruction in a homicide case—were so fundamental that "harmless error" was inapplicable. 70 Blackmun also took the equivalent of that position again with respect to a prosecutor's statement, during closing argument, that the defendant could have taken the stand, although "harmless error" was not directly discussed. The Court's majority ruled that there was no Fifth Amendment violation on the grounds the statement followed from, and was a fair response to, comments in defense counsel's closing argument. 71 Blackmun instead thought the Court should have decided whether the prosecutor's comment was "plain error" requiring reversal even without contemporaneous objection. 72 Likewise, Blackmun wrote for a plurality to say that when a juror who was not irrevocably committed against the death penalty was excluded regardless of circumstances, there was reversible constitutional error that was not subject to harmless error analysis. Mistaken exclusion of a single juror might be considered to be harmless error, but not the prosecution's systematic use of its peremptory challenges to remove all those hesitant to impose the death penalty. 73

Justice Blackmun also exhibited a pro-defendant use of "harmless error" analysis in two death penalty cases when he was showing increased uneasiness with application of the penalty. In one case involving exclusion of jurors for their views on capital punishment (a case which also involved a prosecutor's improper closing argument), Blackmun argued not only that the state rather than the defense should have the burden of proving an excluded juror's bias, but also that the exclusion was not harmless. 74 Shortly before, he

69. Id. at 255.
72. Id. at 34 (Blackmun, J., concurring in part and dissenting in part).
74. Darden v. Wainwright, 477 U.S. 168, 203 (1986)(Blackmun, J., dissenting). See supra text accompanying note 35. When this defendant's case returned to the Court, certiorari was denied, but Blackmun, along with Brennan and Marshall, dissented, saying that he "was not persuaded then, and I am not persuaded now, that . . . Darden received a fair trial in the Florida courts. A person should not be condemned to die and be executed under any system of justice in this country without a fair trial." Darden v. Dugger, 485 U.S. 943, 943
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had joined Justices Brennan and Marshall in dissenting from the Court’s denial of review in a capital case. There, said Blackmun, the state court, while recognizing the applicability of the “harmless error” doctrine, had “failed to show the requisite attentiveness to the possibility of prejudice” to defendant from error at the trial. The harmless error rule of Chapman, Blackmun asserted, “was meant to be more than merely a formula to incant before affirming the results of constitutionally infirm prosecutions.”

However, even as he came to object strongly to the Court’s treatment of death penalty cases, Blackmun at times could be more willing to agree with the Court’s allowing of harmless error analysis in considering lower court errors in such cases.

Federal Habeas: Deference to State Courts? Ultimately, Justice Blackmun adopted a strong position favoring prisoners’ access to federal courts so that they could obtain review of constitutional claims concerning their convictions. He took this stance particularly in the context of capital punishment during the majority’s successful effort to restrict such access by death-sentenced defendants. At first, he had agreed with his Burger Court colleagues’ efforts to limit state prisoners’ use of federal courts to challenge their state convictions. He made clear that the Warren Court majority had taken habeas corpus far beyond “traditional notions” of the writ and had engaged in its “extraordinary expansion.” Yet his concerns about racial equality led him to insist that federal habeas corpus remain available to state prisoners raising claims of racial discrimination in the criminal justice system. Writing for the Court, although he rejected the particular claim of discrimination, he refused to extend to the grand jury situation the limitation Stone v. Powell had imposed on review of Fourth Amendment issues. He also tried to make federal habeas corpus available for parents trying to challenge state laws for termination of parental rights under which the state obtained custody of their children, although in so doing he would have left federal district courts with broad discretion to refuse the writ.

He put further distance between himself and his colleagues as to habeas

77. See infra notes 325-38 and accompanying text (for discussion of Justice Blackmun’s habeas jurisprudence in that context).
corpus by criticizing as too rigid their mandating dismissal of a state prisoner's habeas petition containing a mixture of exhausted claims and claims for which state remedies were unexhausted. He turned against his colleagues the very values they claimed to advance, saying they had been "more destructive than solicitous" of federal-state court comity. Under their ruling, state courts would now be forced to examine "patently frivolous" claims before federal courts could examine "serious, exhausted ground[s] for relief"; moreover, federal courts would have to engage in extra work to determine whether petitions would have to be dismissed nor would the Court's action limit the number of habeas petitions with which they would have to deal.

Questions of deference to the states, and particularly to state courts, were among the issues posed by federal habeas. One issue was whether, and how, state courts could insulate their rulings from federal court review. In its 1983 decision in Michigan v. Long, the Court had imposed a "plain statement" rule on the state courts, under which, for an "adequate and independent" state ground to exist, the state court must explicitly declare reliance on state grounds for decision. In 1989 and 1991, the Court imported the "clear statement" rule to federal habeas. In one case, a murder case without a death sentence, Justice Blackmun wrote for the Court to apply the rule to federal habeas proceedings, with the result that a defendant's procedural default in state court did not bar consideration of the defendant's federal claim unless the last state court issuing a judgment clearly and expressly stated that the judgment rested on a state procedural bar. As he remarked, "Requiring a state court to be explicit in its reliance on a procedural default does not interfere unduly with state judicial decision-making."

Two years later, however, Blackmun joined Justices Marshall and Stevens in objecting to the majority's damage to his 1989 ruling when it refused to apply to a state court's summary dismissal of an appeal the presumption that a state court decision was based on federal grounds unless the state court asserted otherwise. Here the result was that federal habeas was not available — and a death sentence was upheld. Blackmun particularly objected to the majority's use of concerns related to federalism, including "comity; state sovereignty; [and] preservation of state resources," to justify

83. Id. at 525.
84. Id.
87. Id. at 264.
its decision. He felt that federalism, without “inherent normative value,” did not “blindly protect the interest of States from any incursion by the federal courts” but should instead provide citizens “the liberties that derive from the diffusion of sovereign power.” 89 The Court, he said, was “creating a Byzantine morass of arbitrary, unnecessary, and unjustifiable impediments to the vindication of federal rights” 90 and had “managed to transform the duty to protect federal rights into a self-fashioned abdication.” 91 That the death-sentenced defendant had to suffer for errors made by his attorney, with the defendant being executed without having his federal claims heard by a federal court, particularly bothered the dissenters. 92 This case shows clearly that, whatever independent value Blackmun placed on state prisoners’ access to federal habeas, he was particularly concerned that this access be available when the death sentence had been imposed.

Reach of Criminal Statutes. A judge reading a substantive criminal statute broadly, in addition to evincing a position on the societal interests embodied in the statute and granting leeway to the legislators who enacted the laws, also shows deference to the prosecutor who has brought the charges being challenged. Justice Blackmun tended to engage in such broad readings, in a number of instances relying, he said, on legislative intent, also the basis for his occasional narrow reading of criminal statutes.

His first opinion reflecting a broad reading of substantive criminal laws was a dissent declaring that, on the basis of congressional intent, he would have allowed conviction for possession of a counterfeit alien registration receipt card as an “immigrant or non-immigrant visa, permit, or other document required for entry into the United States.” 93 Other examples of broad readings were his interpretation, for a unanimous Court, of the RICO statute that held insurance proceeds from arson to be a forfeitable “interest,” 94 and his opinion for a 5-4 Court that the mail fraud statute’s mailing requirement was satisfied when title-application forms were mailed to the state by retail dealers who had purchased cars from the accused distributor and then sold the cars to consumers; he opined that “the use of the mails need not be an essential element of the scheme.” 95

89. Id. at 759. For an examination of Justice Blackmun’s treatment of federalism in other contexts, see Stephen L. Wasby, Justice Harry Blackmun in the Burger Court, 11 Hamline L. Rev. 183, 209-217 (1988).
90. Coleman, 501 U.S. at 760.
91. Id. at 761.
92. Id. at 770-72.
Blackmun’s readings of scienter requirements also provided prosecutors flexibility to bring charges. For example, for the Court, he allowed a conviction for an assault on a federal officer in the performance of official duties when the assailant did not know his victim was a federal officer, because “the integrity of federal functions and the safety of federal officers” would be “frustrated by the imposition of a strict scienter requirement.” That his thinking on this element of criminal statutes did not change during his Court tenure could be seen early in his last term. A five-justice majority had held that for someone to have “willfully violated” the statutory provision on structuring of currency transactions in connection with reporting requirements, the government must prove defendant’s knowledge that his conduct was unlawful. Writing in dissent for Chief Justice Rehnquist and Justices O’Connor and Thomas, and thus showing that he could still be found among the Court’s conservatives on some criminal justice matters, Blackmun complained that the Court was “imposing an artificially heightened scienter requirement” which was not required by either the statutory language or legislative intent.

Then, on scienter questions associated with the Mail Order Drug Paraphernalia Control Act, after writing for a unanimous Court to adopt the government’s position that the phrase “primarily intended” established objective standards for determining drug paraphernalia, he ruled that there need not be proof that a defendant knew a particular customer would actually use such items with illegal drugs. All that was required was proof of defendant’s awareness that customers generally were likely to use the items, not “specific knowledge that the items are ‘drug paraphernalia’ within the meaning of the statute.” While he said that the absence of an explicit scienter requirement did not mean Congress intended not to have one, his position posed only a moderate burden for the government.

Several times Justice Blackmun broadly interpreted statutes penalizing a felon’s possession of a gun. At one point he called the rules an “essentially civil disability” although enforced by criminal sanctions. Opining that penal laws were to be construed strictly but not so as to defeat Congress’ intent, he held that retrieving a gun from a pawnshop was “acquisition” from a regi-

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97. Id. at 678.
99. Id. at 665.
101. Id. at 1753-54.
102. Id. at 1752.
tered dealer. He also would not have required that a connection between a gun and interstate commerce be shown before a conviction of someone “who receives, possesses, or transports in commerce any firearm,” because “Congress was attempting to reach and prohibit every possession of a firearm by a felon.” He again stressed this point in holding that, under the statute, when someone acquired a gun in an intrastate transaction, previous movement of a gun in commerce was sufficient; he found no statutory ambiguity to trigger (hah!) the Rule of Lenity. He also ruled that Gun Control Act disabilities applied even when a conviction had been expunged after completion of probation, and that a felon could not possess a firearm until the predicate felony conviction was actually overturned — or other specified executive action was taken; that the predicate conviction was subject to collateral attack was insufficient.

Despite these generally broad readings of criminal statutes, in some instances Blackmun was willing to read them narrowly. Thus, he agreed that Congress had failed to extend the Hobbs Act to reach the use of violence to achieve legitimate union objectives, despite his “visceral reaction to immaturity conceived acts of violence of the kind charged, . . . that such acts deserve to be dignified as federal crimes.” His readings of the sentencing provisions of the Comprehensive Drug Abuse Prevention and Control Act were also narrow, benefiting defendants. He also ruled that Congress had “acted with exceeding caution when attaching criminal penalties to copyright infringement” and thus “bootleg” records (unauthorized copies of commercial unreleased performances) were not “stolen, converted or taken by fraud” under the National Stolen Property Act.

Blackmun could also rule on the scope of criminal statutes in a way that did not cut clearly for either prosecutor or defendant. In one, his 1990 opinion for a unanimous Court in Taylor v. United States, in which “burglary” in a federal statute was defined for sentencing enhancement purposes, defendants were unable to avoid enhanced punishment but states were simultaneously constrained in seeking such enhancement. Blackmun found that

Congress had intended a "generic" view of burglary so that, on the one hand, defendants could not use "arcane technicalities of the common-law definition," from which present meanings had significantly diverged, and, on the other, that anything states chose to call "burglary" would not by that fact be a predicate offense. He adopted a definition with the basic elements of unlawful entry into and remaining in a building with intent to commit a crime, and, in requisite crime-control language, pointed out "that Congress singled out burglary ... for inclusion for a predicate offense ... because of its inherent potential harm to persons."  

FOURTH AMENDMENT

For the most part, Justice Blackmun supported law enforcement officers' search efforts. He strongly advocated significant leeway for car searches without warrants, while he increased weight to civil liberties concerns when searches of and related to the home were at issue. In other search situations, he came to adopt a moderate posture, positioning himself between the Court's conservative majority and the remaining liberals. For example, when the Court held that the Fourth Amendment did not apply to American authorities' search of a Mexican residence of a Mexican citizen with no attachment to the United States, Justice Blackmun joined neither the Court nor Justice Brennan's position that the Fourth Amendment applied fully in such situations. Instead, while agreeing with the majority that the Warrant Clause did not apply extraterritorially, he dissented because "[t]he Fourth Amendment nevertheless requires that the search be 'reasonable.'"  

Justice Blackmun's Fourth Amendment concerns led him to allow some judicial oversight of extradition proceedings. When the majority ruled that once the governor of the asylum state had acted, that state's courts could not inquire into the demanding state's judicial determination of probable cause, Blackmun argued that "extended restraint of liberty following arrest" under rendition made necessary greater consideration of Fourth Amendment concerns, so that a qualified magistrate had to make an appropriate determination of probable cause before extradition could proceed. However, he resolved the tensions between the Rendition Clause and Fourth Amendment by limiting the asylum state court's authority to that of discovering a facial showing of a neutral magistrate's probable cause finding.  

112. Id. at 593.
113. Id. at 588.
The justice's moderate, non-doctrinaire position on Fourth Amendment questions can also be seen in a 1988 case. A defendant who saw a police car began to run; the officers accelerated to catch up with defendant, and, driving alongside him, seized pills he had discarded. In announcing the unanimous Court's not surprising outcome that seizure of the pills was not a Fourth Amendment violation, Blackmun was careful to reject both the defendant's and the state's "attempts to fashion a bright-line rule." They had, he pointed out, "failed to heed this Court's clear direction that any assessment as to whether police conduct amounts to a seizure implicating the Fourth Amendment must take into account 'all the circumstances surrounding the incident' in each individual case," and that a "contextual approach" must be used.116

In later years, the same moderation led Justice Blackmun to criticize the Court for deciding more than was necessary — in the government's favor. For example, when the Court held that claims of excessive force by law enforcement officers while carrying out an arrest, investigatory stop, or "seizure" were properly analyzed under an "objective reasonableness" standard, Blackmun, in addition to keeping open the possibility that an individual could use such Fourth Amendment doctrine, would not have foreclosed use of substantive due process arguments, which he felt the majority had done.117

The following year provided a further example in a case with a liberal result. The Court held that an inventory search on the opening of a locked suitcase, in the absence of a policy on opening closed containers during such a search, violated the Fourth Amendment.118 Blackmun, who had only a few years earlier asserted "the importance of having such inventories conducted only pursuant to standardized police procedures,"119 agreed in the result. However, he said that the Court had gone beyond properly suppressing the evidence in this case to discuss situations when a police officer could be given discretion to conduct an inventory search. But his concern was not merely the abstract one that the Court had gone further than necessary to decide the case; it was the direction in which the Court had gone too far." The exercise of discretion by an individual officer, especially when it cannot be measured against objective, standard criteria, creates the potential for abuse of Fourth Amendment rights,"120 said Justice Blackmun, certainly not showing the deference to law enforcement officers a more junior Justice Blackmun would have shown.

120. Florida, 495 U.S. at 11.
Exclusionary Rule. Justice Blackmun did not support extension of the exclusionary rule developed in *Mapp v. Ohio,*\(^{121}\) but he did not share Chief Justice Burger's strong opposition and did not join the Chief Justice's extended attack on it in the *Bivens* case.\(^{122}\) However, adopting a theme like the Gilbert and Sullivan refrain that "the policeman's lot is not a happy one," Blackmun asserted that the majority's finding in that case of a direct Fourth Amendment cause of action would "tend to stultify proper law enforcement and to make the day's labor for the honest and conscientious officer even more onerous and more critical"; moreover, "otherwise quite adequate remedies have always been available" for Fourth Amendment violations.\(^{123}\)

He appeared to change his mind on this point, however, when he later said that various alternatives to the exclusionary rule, such as perjury prosecutions, administrative discipline, contempt and civil suits, were "not likely to fill the gap," and their adequacy had been "implicitly rejected" in *Mapp.*\(^{124}\) Blackmun did, however, strongly support the rule's use "where a Fourth Amendment violation has been substantial and deliberate."\(^{125}\) This position led him to allow challenges to false statements knowingly or intentionally included in search warrant affidavits, but, indicating the "limited scope" of the holding, he would not require a hearing on such a challenge without a strong preliminary showing, and would suppress evidence only if defendant then made his case by a preponderance of the evidence.\(^{126}\)

Justice Blackmun's major statement about the exclusionary rule came in his opinion for the Court in *United States v. Janis,*\(^{127}\) refusing to extend the rule to a federal civil tax proceeding, particularly to exclude evidence seized by state officials. Blackmun adopted his conservative colleagues' basic positions that the exclusionary rule was a "comparatively late judicial creation" rather than a basic part of the Fourth Amendment, that its purpose was deterrence, and that existing deterrence was sufficient so that the high costs of excluding evidence would not justify any deterrence from extending the rule.\(^{128}\) The values dictating his decision became clear when he said that there came "a point at which courts, consistent with their duty to administer the law,

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123. Id. at 430.
125. Id. at 171 (1978). See also Brown v. Illinois, 422 U.S. 590 (1975); see infra notes 185-86 and accompanying text.
128. Id. at 443.
cannot continue to create barriers to law enforcement in the pursuit of a supervisory role that is properly the duty of the Executive and Legislative Branches."\textsuperscript{129}

Although in \textit{Janis}, he noted that the Court had to rely on "common sense" in judging the exclusionary rule's deterrent effect because empirical studies provided no clear picture or appeared,\textsuperscript{130} "each . . . in its own way, . . . to be flawed,"\textsuperscript{131} eight years later, concurring in \textit{United States v. Leon}, he gave greater weight to such studies. That the Court's decision to adopt the partial "good-faith exception" to the exclusionary rule was, he said, "avoidably provisional" because it was based on "an empirical judgment" about the rule's effect.\textsuperscript{132} The time would come for rethinking were evidence to appear that the Court's exception to the exclusionary rule was weakening police compliance with the rule.

Justice Blackmun's acceptance of the "good-faith exception" premise and his continued resistance to extending the exclusionary rule could be seen in his 1987 opinion for a 5-4 Court that the rule did not apply to evidence obtained when police acted with objectively reasonable reliance on a statute allowing warrantless administrative searches that were subsequently found to violate the Fourth Amendment.\textsuperscript{133} Application of the exclusionary rule, he said, "properly has been restricted to those situations in which its remedial purpose is effectively advanced,"\textsuperscript{134} which would not be the case here because the problem was with the statute, passed by legislators, not with the police officers who properly relied on it.

\textbf{Home Searches and Retroactivity. Home Searches.} Justice Blackmun's first home search case was his first opinion for the Court, \textit{Wyman v. James}.\textsuperscript{135} There his negative views of welfare programs and welfare recipients led to his submerging home dwellers' privacy interests. The "home visit" at an AFDC recipient's home did not entail "any search . . . in the Fourth Amendment meaning of that term,"\textsuperscript{136} he declared, nor was it unreasonable. In language typical of the early, traditionalist Blackmun, he said the benevolent case-

\begin{enumerate}
  \item \textsuperscript{129} \textit{Id.} at 459.
  \item \textsuperscript{130} \textit{Id.} at 457-58.
  \item \textsuperscript{131} \textit{Id.} at 449-50.
  \item \textsuperscript{134} \textit{Id.} at 347.
  \item \textsuperscript{135} 400 U.S. 309 (1971).
  \item \textsuperscript{136} \textit{Id.} at 317-18.
\end{enumerate}
worker "is not a sleuth but rather, we trust, is a friend to one in need."\(^{137}\)

When Blackmun again wrote for the Court in a home search case, in *Payton v. New York*, he was able to give fuller scope to privacy interests, perhaps because welfare’s blurring effect was absent, perhaps because almost ten years had past and he had begun to move away from the sway of Chief Justice Burger. He declared that a “suspect’s interest in the sanctity of his home . . . outweighs the governmental interests” so as to require a warrant.\(^{138}\)

As he later said in ruling on *Payton*’s retroactivity, the Court had earlier labelled comparable police conduct “of doubtful constitutionality,” so that *Payton* had not announced “an entirely new and unanticipated principle of law”; furthermore, the “constitutional protection traditionally accorded to the privacy of the home” should have led police to “resolve any doubts regarding the validity of a home arrest in favor of obtaining a warrant.”\(^{139}\)

**Retroactivity.** *Payton* led Justice Blackmun to a serious reassessment of the Court’s retroactivity doctrine, to which we turn before continuing our discussion of his Fourth Amendment rulings. In his post-*Payton* retroactivity rulings, Blackmun gave particular attention to Justice Harlan’s concerns. Earlier, he had objected that the Court had run into the ground the “acceptable principle” of *Gideon*\(^{140}\) retroactivity when it ruled that uncounseled pre-*Gideon* convictions could not be used to impeach credibility,\(^{141}\) and, in holding *O’Callahan v. Parker*\(^{142}\) nonretroactive, he had deferred to the military’s reliance on the old rule and stressed the highly negative effects of favoring retroactivity.\(^{143}\)

Faced with the question of *Payton*’s retroactivity, Blackmun found the *Payton* rule applicable to all convictions not yet final when it was decided. In so doing, he adopted Justice Harlan’s position to provide “a principle . . . capable of general application” and to “further the goal of treating similarly situated defendants similarly.”\(^{144}\) Later, for the same 5-4 Court, he found that Justice Harlan’s concerns applied “with equal force” to the retroactivity of Fifth Amendment rules.\(^{145}\) More important, in dealing with the question of the

\(^{137}\) *Id.* at 322-23.

\(^{138}\) 445 U.S. 573, 603 (1980).


retroactivity of *Batson v. Kentucky*, he drew on his prior retroactivity opinions to rule broadly for a 6-3 majority that new criminal procedure rules were to be applied to all state and federal cases pending on direct review or not yet final.

*The Home, Again.* In post-*Payton* cases involving home searches, Justice Blackmun adhered to strong protection for the resident, writing in dissent in two cases involving searches within a home. In the first case, he objected when the Court’s majority upheld a search warrant that was broader than appropriate because it was based on the mistaken belief there was only one apartment on the floor of a building, and thus also upheld the resultant search of defendant’s apartment by mistake was valid. A Fourth Amendment violation had occurred, he said; the officers’ error was not reasonable under the circumstances, particularly where “‘objective facts’ should have made the officers aware that there were two different apartments on the third floor well before they discovered the incriminating evidence” and there was no independent probable cause to arrest the defendant.

Later in the same term, Blackmun also objected strongly when the Court found no Fourth Amendment violation in a probation officer’s search of a probationer’s home on “reasonable grounds.” The warrant requirement could not be dispensed with simply because someone was a probationer, he said. The need to supervise a probationer might create “exceptional circumstances” allowing a reduced level of suspicion as a basis for obtaining a warrant, but the need was not of sufficient weight to dispense with a warrant. Yet, reducing the force of his objection and revealing continued adherence to a law-and-order perspective, he took a position parallel to his much earlier social worker “home visit” ruling in saying that no warrant would be necessary for a probation officer’s ordinary home visit and that the “exigent circumstances” exception to the warrant requirement would suffice in emergencies without lowering the warrant requirement generally as applied to probationers.

Justice Blackmun’s heightened concerns for home-related privacy interests did not diminish when a police search, instead of being inside the house, was in the area nearby. In one of the Court’s search cases resulting from the war on drugs, the majority had held a search warrant was not required when a helicopter (at a height of 400 feet) had been used to observe the interior.

149. *Id.* at 90.
150. *Id.* at 99.
of a partially-covered greenhouse in a residential backyard.\textsuperscript{152} Blackmun dissented on the basis that the defendant's expectation of privacy depended on the frequency of such flights. Saying that "we need not abandon our judicial intuition entirely," he thought such helicopter flights rare and he would therefore force the prosecution to show that there was not such a reasonable expectation of privacy, although he did claim to disagree with fellow-dissenter Brennan on the extent to which the justices could themselves make the determination of whether the expectation of privacy was reasonable.\textsuperscript{153}

\textit{Beyond the Home}. Justice Blackmun supported searches outside the context of arrest in the home in situations where he viewed privacy as not improperly invaded. Thus he found that installation and use of pen registers to record dialed telephone numbers did not constitute a Fourth Amendment "search" because people did not have a legitimate expectation of privacy in such information, of which the telephone company would be aware.\textsuperscript{154} Likewise, individuals lost any expectation of privacy through their own actions when their obscene films were missent to a company whose employees opened the packages and gave the contents to the FBI.\textsuperscript{155} Blackmun's concern about the drug situation in schools led him to agree to a warrantless search of a student's purse, based on reasonable suspicion.\textsuperscript{156} He found it sufficient that the school situation fell within those "in which special needs, beyond the normal need for law enforcement, make the warrant and probable cause requirement impracticable,"\textsuperscript{157} because "an immediate response frequently is required not just to maintain an environment conducive to learning, but to protect the very safety of students and school personnel."\textsuperscript{158} A "teacher's focus," he added, is, and should be, on teaching and helping students, rather than on developing evidence against a particular troublemaker.\textsuperscript{159}

Whatever his view of students' rights with respect to searches, Blackmun stood up strongly for requiring a warrant and probable cause when the focus shifted several years later to an adult employee's work area. He dissented from the Court's approval of a standard of "reasonableness under all the circumstances" for judging public employers' intrusion on public employees' work-related privacy interests,\textsuperscript{160} as he found no reason to do

\begin{footnotesize}
\textsuperscript{153} Id. at 467-68.
\textsuperscript{154} Smith v. Maryland, 442 U.S. 735, 742-44 (1979).
\textsuperscript{155} Walter v. United States, 447 U.S. 649 (1980).
\textsuperscript{157} Id. at 351.
\textsuperscript{158} Id. at 353.
\textsuperscript{159} Id.
\end{footnotesize}
away with the warrant and probable cause requirements generally and "no special practical need" to abandon them in the particular case. However, when a different sort of workplace — a heavily-regulated one — was at issue, he was willing to allow warrantless searches. Writing for the court, he upheld a New York law that authorized warrantless inspections of vehicle dismantling businesses — automobile junkyards, to be less polite — because of their connection with "chop-shops." The law was within the exception to the warrant requirement for administrative inspections of closely-regulated businesses, where the owner's reduced expectation of privacy resulting from the extensive regulation led to "lessened application" of requirements of a warrant and probable cause. "Lessened application" did not, however, mean absence of a several-pronged test of reasonableness for the warrantless inspection, which Blackmun found satisfied by the state's interest in the problem of motor vehicle theft and the relation between the inspections and the overall regulatory scheme. That police officers, not administrative inspectors, performed the inspections was, he thought, of no constitutional matter.

When a person was at an airport instead of a workplace, Blackmun's concerns were evoked. In particular, as part of his criticism of less-than-narrow rulings whether by liberals or conservatives, he expressed concern that his colleagues were going too far in supporting law enforcement authorities' searches of travelers at airports. He approvingly noted "society's interest in overcoming the extraordinary obstacles to the detection of drug traffickers" and agreed that only "reasonable suspicion" was required for temporary detentions of certain travelers. However, he believed that the extent of intrusiveness should control whether a limited seizure was within the Terry exception and expressed fear that the Court's ready approval of such detentions went too far toward eliminating the probable cause requirement. Indeed, in another airport-stop case, in which a trained dog sniffed a traveler's luggage (a point [hah!] he thought unnecessary to the resolution of the case), Blackmun spoke of "an emerging tendency . . . to convert the Terry decision into a general statement that the Fourth Amendment requires only that any seizure be reasonable."

161. Id. at 742.
Cars. Justice Blackmun gave lip service to the privacy interests of those who drove cars, but was willing to set aside those interests to give broad scope to car searches. Even when agreeing with the Court in outlawing “random stops” of cars, he wrote to note that “other less intrusive spot checks” were still available, and he upheld a warrantless external search of a car.

Blackmun also found no Fourth Amendment violation in a seizure of cars in a public place to satisfy tax obligations, in part because of his support for enforcement of the tax laws; however, he was quick in the same case to strike down the seizure, after a warrantless entry, of materials in a private corporation’s office.

The justice’s principal pronouncements about car searches came in the Chadwick to Ross line of cases concerning warrantless seizure of items in cars. Joining Justice Rehnquist and taking a more conservative position than Chief Justice Burger, Blackmun advocated a rule that warrants were “not required to seize and search any movable property in the possession of a person properly arrested in a public place.” He then declared that “a warrant should not be required to seize and search any personal property found in an automobile that may in turn be seized and searched without a warrant” under prior cases. He thought the alternative of impounding an item and obtaining a warrant would be “less intrusive” than immediate warrantless search of footlockers and like items found in cars, but found the alternative unnecessary. As a custodial arrest was a major intrusion on privacy, corollary lesser invasions were “incidental,” and because a warrant would be issued in almost all such cases, making police “go through the formality of obtaining” a warrant seemed unlikely to assist Fourth Amendment concerns.

Throughout these cases, Blackmun argued for a “clear-cut” rule to aid prosecutors and law enforcement officers and complained that the Court allowed “fortuitous circumstances” — for example, the location of items

166. See, e.g., Cardwell v. Lewis, 417 U.S. 583, 591 (1974)(“[I]nsofar as Fourth Amendment protection extends to a motor vehicle, it is the right to privacy that is the touchstone of our inquiry.”).
172. Chadwick, 433 U.S. at 19.
when the car was stopped—to control outcomes.\textsuperscript{175} When the Court protected closed pieces of luggage and closed opaque containers from warrantless searches even when the items were obtained during a lawful car search, Blackmun conceded that the ruling “at least has the merit of a ‘bright line’ rule that should serve to eliminate the opaqueness and to dissipate some of the confusion” the Court had created for itself but dissented nonetheless.\textsuperscript{176} When, in the \textit{Ross} case, the Court moved significantly toward his position, Blackmun did not retreat from his prior dissents but joined the Court’s opinion only grudgingly so that there could be “an authoritative ruling” and so that “applicable legal rules can be clearly established”—important not only for the Court as an institution, but also for law enforcement officials and defendants.\textsuperscript{177}

Almost ten years later, Blackmun wrote for the Court when it dealt with a question not answered in \textit{Ross} and upheld a warrantless search of a sack in a movable vehicle in the absence of probable cause to search the entire car: the police could search if probable cause supported the search, because “a container found after a general search of the automobile and a container found in a car after a limited search for the container are equally easy for the police to store and for the suspect to hide or destroy.”\textsuperscript{178} He reached this conclusion in part to clarify confusion resulting from the “rule” of the \textit{Chadwick-Sanders} cases, but he also found that the earlier rule only minimally protected privacy and that containers could be searched incident to a lawful arrest.

One other aspect of searches related to automobiles is important in a study of Harry Blackmun’s criminal justice positions: drinking-and-driving. When the Court held that a checkpoint for drunk driving did not violate the Fourth Amendment, Blackmun concurred only in the judgment not to take a different view of the law but to “remind the Court that it has been almost 20 years” since he had noted that the “slaughter on the highways of this Nation exceeds the death toll of all our wars.”\textsuperscript{179} When he joined the Court in invalidating the nighttime arrest of a drunken driver in his home for a nonjailable offense, he also wrote a concurring opinion limited to his “profound personal concern” about drinking-and-driving. Here he criticized the state for not doing more to criminalize the offense, calling it an “indulgent parent” who “hesitates to discipline the spoiled child very much,” and he complained “about the unwillingness of our national consciousness to face up to—and to do some-

\textsuperscript{175} See Sanders, 442 U.S. at 772 (advocating adoption of a “clear-cut” rule).
\textsuperscript{176} Robbins, 453 U.S. at 436.
\textsuperscript{177} United States v. Ross, 456 U.S. 798, 825 (1982).
\textsuperscript{179} Michigan Department of State Police v. Sitz, 496 U.S. 444, 456 (1990) (quoting Blackmun’s opinion in Perez v. Campbell, 402 U.S. 637, 657 (1971)). He had also spoken out
thing about — the continuing slaughter upon our Nation’s highways.”

FIFTH AMENDMENT

Fifth Amendment and Counsel. Justice Blackmun’s Fifth Amendment opinions dealt primarily with Miranda and related issues, although he also spoke to double jeopardy concerns. His unhappiness with Miranda was evident in his unwillingness to extend its scope and in his comments that excluding voluntary statements was costly. Thus he reaffirmed the rule that statements obtained in violation of Miranda could be used to impeach a witness’ testimony. He also ruled that, because of the “burdens” it would place on “the juvenile justice system and the police,” Miranda’s “rigid rule,” which he felt at least had the virtue of specificity, should not be extended to allow a juvenile to invoke his Miranda rights by calling not for a lawyer but for a probation officer, who could not give the protection a lawyer was to provide. As to whether the juvenile had waived his rights, the totality-of-circumstances test was to be used.

Justice Blackmun also spoke to non-Miranda aspects of the Fifth Amendment. Where Miranda focused on an individual’s not having to engage in self-incrimination, Blackmun spoke for the Court when it dealt with an aspect of an individual’s wishing to testify. Writing for a 5-4 Court which invalidated a per se rule excluding all hypnotically-refreshed testimony as violating a defendant’s right to testify on her own behalf, he strongly emphasized the importance to a criminal defense of an individual’s being able to give a personal version of events and said that questions about defendant’s veracity as well as inaccuracies possibly introduced by hypnosis (which he conceded) “can be tested adequately by cross-examination.” His attention was attracted by the per se nature of the state’s rule, which made it arbitrary, because it prevented a trial court from considering the admissibility of post-hypnosis testimony in a particular case, regardless of why the defendant underwent hypnosis.

184. If the ability to testify fully was to be protected, Justice Blackmun also believed that the individual’s presence at a trial was important. In a case related to such a due process question decided under the Federal Rules, Blackmun spoke for a unanimous Court to say that when a defendant was not present at beginning of a trial — as distinct from absconding during it — the trial could not begin. Crosby v. United States, 113 S. Ct. 748 (1993).
Fifth Amendment questions are often intertwined with questions arising under either the Fourth or Sixth Amendments. Blackmun was more supportive of defendants' positions when such additional concerns entered a case than when the Fifth Amendment alone was present. Thus, in *Brown v. Illinois*, a case "at the crossroad of the Fourth and the Fifth Amendments," Blackmun, in order to avoid having the exclusionary rule "substantially diluted," ruled that although *Miranda* warnings would be one factor in a totality-of-circumstances approach under the "fruits of the poisonous tree" doctrine to determine the voluntariness of a post-arrest confession, the warnings alone were insufficient to eliminate the taint of an improper arrest.

Then Justice Blackmun dealt with another very important combined Fourth/Fifth Amendment question: whether someone's Fifth Amendment rights were violated by use of that person's business records obtained during a valid office search. Over the dissenters' objection that *Boyd v. United States* was being overturned, Blackmun, ruling for the Court that there was no Fifth Amendment violation, said the person whose records were sought was not compelled to help find, produce, or authenticate them. Later, he wrote for a nearly unanimous Court that the Fifth Amendment had also not been violated when a court order compelled a grand jury target to authorize foreign banks to disclose records of his accounts without forcing him to identify documents or acknowledge their existence. Execution of the authorization by the target would not be a "testimonial communication," as the compulsion of signing the document under a court's order would "shed no light on [Doe's] intent or state of mind," and the most the government would have from the bank records would be "the bank's implicit declaration, by its act of production in response to the subpoena, that it believes the accounts to be petitioner's"; neither would be self-incrimination by the target. Consonant with the "totality of circumstances" position he had used elsewhere, Justice Blackmun said "whether a compelled communication or testimonial for purposes of applying the Fifth Amendment often depends on the facts and circumstances of the particular case."

The Fifth Amendment's intersection with the Sixth Amendment right to counsel also resulted in several Blackmun opinions. The first came when the

185. 422 U.S. 590, 591 (1975).
186. Id. at 602-03.
190. Id. at 216.
191. Id. at 218.
192. Id. at 214-15.
majority in *Brewer v. Williams*, the famous “Christian burial speech” case,\(^{193}\) converted a challenge to *Miranda* into a Sixth Amendment issue under the *Massiah* rule of no interference with right to counsel after indictment\(^ {194}\) and found a *Massiah* violation. Blackmun, objecting to an unnecessary extension of *Massiah* and giving the facts of Williams’ contact with Officer Leaming a different reading from the majority’s, emphasized the “brutal, tragic, and heinous crime inflicted upon a young girl on the afternoon of the day before Christmas.”\(^ {195}\) Again reading the facts differently, and quoting the Chief Justice as to the “high price society pays” for the “drastic remedy” of excluding voluntary statements, he was even clearer that the majority had broken away from *Massiah* when it ruled inadmissible a jailed defendant’s incriminating statements to a paid informant told to be alert to federal prisoners’ statements but not to question or initiate conversations.\(^ {196}\) His position was to restrict the obviously disliked *Massiah* rule to situations in which agents deliberately sought information from defendants in the absence of counsel after formal judicial proceedings were initiated.

However, Blackmun was later faced with a question under the *Edwards*\(^ {197}\) line of cases on the question of resumption of questioning after a defendant had been given *Miranda* warnings and had invoked the right to counsel. There he took a different stance, objecting when the Court held that police were not barred from interrogating a defendant after an indictment if defendant waived the right to counsel, with *Miranda* warnings sufficient to make defendant aware of the counsel right. He said in dissent that it was sufficient to rule that the defendant could not be further interrogated until counsel had been made available, unless defendant initiated communication. As he put it, “the Sixth Amendment does not allow the prosecution to take undue advantage of any gap between the commencement of the adversary process and the time at which counsel is appointed for a defendant.”\(^ {198}\)

**Double Jeopardy.** Justice Blackmun’s rulings on various aspects of double jeopardy, a subject to which the Court gave considerable attention, show a clear difference between his earlier and later years on the Court. In the earlier period, he sided with the government by ruling against defendant’s double

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195. *Brewer*, 430 U.S. at 441. He also noted the costs of the exclusionary rule in likely preventing a new trial in the case. However, he was wrong, and the subsequent conviction was upheld on other grounds. *See Nix v. Williams*, 467 U.S. 431 (1984) (validating conviction on other grounds).
jeopardy claims, while in his last few years on the Court he adopted a stance strongly supportive of such claims. In an early ruling, when the Court was deciding on many double jeopardy cases, Blackmun, speaking for a plurality, adopted the position that there was no constitutional violation in trying someone for both conspiracy to distribute and for continuing criminal enterprise, where the two matters could have been tried together but the defendant was responsible for having separate trials for each offense, and Congress had not intended cumulative punishments for the two matters. On the same day, he also favored the government’s position by dissenting when the majority held that a violation did result where conviction for a lesser included offense was followed by conviction for a greater offense. Here he objected to the majority’s overturning a state high court’s determination that two acts “were sufficiently distinct to justify a second prosecution” and criticized the majority for using the case to announce new double jeopardy law.

When the Court, in a case from the District of Columbia, found that Congress intended that rape be considered a lesser included offense for killing in the course of rape, thus precluding application of consecutive sentences for the two sentences, Blackmun agreed with the result but wrote separately to state his understanding that the Double Jeopardy Clause did not “prevent the imposition of cumulative punishments in situations in which the Legislative Branch clearly intended that multiple penalties be imposed for a single criminal transaction,” and that “the question of what punishments are constitutionally permissible is not different from the question of what punishments the Legislative Branch intended to be imposed.” For him, “[t]he only function the Double Jeopardy Clause serves in cases challenging multiple punishments is to prevent the prosecutor from bringing more charges, and the sentencing court from imposing greater punishments, than the Legislative Branch intended”; there was no separate basis for the Court limiting cumulative punishments.

He further aided the government by allowing it to appeal certain sentences, such as the sentence of a dangerous special offender. Noting situations in which second prosecutions had been allowed, for example, after certain mistrials, from principles surrounding the Double Jeopardy Clause, he derived the propositions that it was “not a complete barrier to an appeal by the prosecution in a criminal case” and that not the appeal, but the relief requested,

201. Id. at 171-72.
203. Id. at 698.
204. Id. at 697.
should be a court's focus. Review of a sentence, which he found not constitutionally invalid, was quite different from reprosecution after acquittal, acquittals were "accorded special weight." The government’s appeal would delay when the defendant would learn his ultimate sentence, but, Blackmun noted, "[t]he Double Jeopardy Clause does not provide the defendant with the right to know at any specific moment in time what the exact limit of his punishment will turn out to be." When a federal officer charged with a state crime removed his case to federal court and was acquitted by the court after the jury found him guilty, Blackmun also allowed the government to appeal the acquittal judgment. For a 7-2 Court, he said the relevant federal statute allowed the party with a final judgment to appeal, so the state could appeal, subject only to constitutional limits. The state would not violate constitutional double jeopardy limits in this case, as it was only attempting to reimpose the jury's guilty verdict, not subject the officer to a second trial.

If these double jeopardy cases from 1977-1981 show Justice Blackmun adopting a generally pro-government stance, his rulings starting in 1989 present a quite different picture. One case, for example, showed him both questioning the conclusive effects of guilty pleas and asserting that the Double Jeopardy Clause had been violated. When a defendant pleaded guilty in a single proceeding to two charges of conspiracy on the explicit premise of two agreements starting at different times and with separate objectives, the Court upheld the plea conceding guilt to two separate offenses, but Blackmun was not in the majority. In dissent with Justices Brennan and Marshall, he charged that there was a clear constitutional violation and argued that challenging it was not foreclosed by a plea of guilty, which, "for all its practical importance in the day-to-day administration of justice, does not bestow on the Government any power to prosecute that it otherwise lacks." Perhaps the defendant could have realized the problem and refused to plead to the second of the two indictments, said Blackmun, but, by parity of reasoning, it was "no less true that the Government should have been aware that it could be charging duplicitous conspiracies, and, if so, not brought the second indictment."

Justice Blackmun also entered into the debate on the increasingly complicated subject of when the relationship between proof of one crime and proof of another crime created double jeopardy. Objecting that the majority

206. Id. at 129-30.
207. Id. at 137.
210. Id. at 581.
211. Id. at 586.
had “cavalierly” overturned Grady v. Corbin,212 a major double jeopardy ruling that was only three years old and “has proved neither unworkable nor unsound,” he argued that “the Double Jeopardy Clause prohibits a subsequent criminal prosecution where the proof required to convict on the later offense would require proving conduct that constitutes an offense for which a defendant already has been prosecuted.”213

Blackmun’s changing position on the death penalty could not but affect his view of the double jeopardy issue.214 This could be seen in 1981 in Bullington v. Missouri.215 There, for the Court, Blackmun found a double jeopardy violation when the jury, in the defendant’s first trial, had sentenced him to life in prison rather than death, and, after a reversal of the conviction, the death penalty was then considered at retrial. In his last term, speaking in a related case, he said that Bullington’s “essential holding . . . was that capital sentencing proceedings uniquely can constitute a ‘jeopardy’ under the Double Jeopardy Clause.”216 Thus it governed the situation in which a jury had not returned a verdict on a count of intentional killing and had later recommended against the death penalty but the judge had imposed that sentence for intentional killing. The Court majority found that the sentencing phase of a capital case was not a “successive prosecution” in violation of the Double Jeopardy Clause so as to bar the judge’s action, but Blackmun dissented. He found the sentencing portion of a capital case very much like a trial, as it certainly subjected the defendant to the “trauma” of defending himself (again) against a death sentence.217

Justice Blackmun’s opinion for a unanimous Court that assessing an additional civil sanction on a defendant punished in a criminal case constituted double jeopardy,218 because of the increased use of civil penalties, including forfeiture, was one of his most important double jeopardy rulings, apart from Bullington. Not all civil penalties are “punishment,” he said, and “the Government is entitled to rough remedial justice” in obtaining civil penalties,219 but a civil sanction with deterrent or retributive purposes was punitive, as was a civil penalty that bore no relation to compensating government for its loss. In the latter situation, the person against whom the penalty was

214. For other instances of his opinions on other criminal procedure issues in the capital punishment context, see infra text accompanying notes 301-390.
217. Id.
219. Id. at 446.
assessed could have an accounting of government damages so the trial court could determine if it was in fact double jeopardy. In the particular case, where the criminal penalty had been assessed before the civil one, government expenses were $16,000, and defendant's potential False Claims Act liability were $130,000, the civil penalty was punitive in nature. However, Blackmun decreased the force of his opinion by saying at the end that the government could avoid double jeopardy problems by seeking both criminal and civil penalties in the same proceeding, and could obtain the full civil sanction — even if punitive — by seeking it prior to criminal proceedings. 220

SIXTH AMENDMENT

Right to Counsel. Justice Blackmun strongly and consistently supported the right to counsel. He did complain that the right of self-representation upheld by the Court “frequently will cause procedural confusion without advancing any significant strategic interest of the defendant,” 221 and, indeed, tartly observed that, given the “old proverb that 'one who is his own lawyer has a fool for a client,'” the court was “bestow[ing] a constitutional right on one to make a fool of oneself.” 222 However, he regularly supported indigent defendants’ right to counsel at trial and in trial-like proceedings. Indeed, he went further than the majority by arguing in dissent that counsel should be provided for indigents at trial when there was a prosecution for an offense punishable by more than six months imprisonment, not merely when imprisonment actually resulted. 223 That position led him to join the majority in holding that a misdemeanor conviction obtained when a defendant was not represented by counsel could not be used to enhance a subsequent misdemeanor into a felony. 224 The enhancement issue arose again in the justice's last term when the Court, directly overruling Baldasar v. Illinois, allowed an uncounseled misdemeanor conviction (valid because no prison time had been imposed) to be used to enhance a sentence upon a subsequent conviction. 225 Justice Blackmun, dissenting, pointed out that the Court had not previously allowed imprisonment to be “imposed on the basis of an uncounseled conviction,” called attention to his dissent in Scott, and stressed the reliability that counsel provided in a trial. 226

220. Id. at 450.
222. Id. at 852.
226. Id. at 1931-32. See id. at 1932 n.1 (stressing need for counsel at trial).
Blackmun's strongest statements supporting the right to counsel came, first, in the context of a proceeding to terminate parental rights, and then in two opinions in the late 1980s on adequacy of representation and on forfeiture of funds from which counsel could be paid. He argued for a straightforward rule for counsel for indigent parents at all proceedings dealing with termination of parental rights, because of the punitive nature of such proceedings and the very serious imbalance between the state and a parent often "lacking in education and easily intimidated by figures of authority." Although Blackmun usually espoused a totality-of-circumstances, case-by-case approach, here he said that was "likely to be both cumbersome and costly" and would place a heavy burden on trial judges to determine, in advance of the proceedings, whether counsel was necessary.

On the forfeiture issue, Blackmun, speaking for (now) fellow-liberals Brennan, Marshall, and Stevens, dissented strongly when the five-justice conservative majority refused to exempt from forfeiture under federal forfeiture statutes funds defendants had sought to use to pay attorneys for representing them nor to protect those funds from a pre-trial freeze of assets subject to forfeiture. He agreed with critics of the provisions "that it is unseemly and unjust for the Government to beggar those it prosecutes in order to disable their defense at trial" and with district judges who "understand, perhaps far better than we, the devastating consequences of attorney's fee forfeiture for the integrity of our adversarial system of justice." It was not sufficient that court-appointed counsel — necessary in the absence of funds for retained counsel — would be available to defendants, he argued. "The right to retain private counsel serves to foster the trust between attorney and client that is necessary for the attorney to be a truly effective advocate," and also "serves to assure some modicum of equality between the Government and those it chooses to prosecute"; moreover, appointed "counsel is too readily perceived as the Government's agent rather than [defendant's] own." Blackmun criticized not only his colleagues for upholding the forfeiture statutes but also Congress itself, saying, "[h]ad it been Congress' express aim to undermine the adversary system as we know it, it could hardly have found a better engine of


228. Lassiter, 452 U.S. at 50-51.

229. Caplin & Drysdale, Chartered v. United States, 491 U.S. 617 (1989); United States v. Monsanto, 491 U.S. 600 (1989) (holding that funds intended to be used for attorney fees are not exempt from forfeiture).

230. Caplin & Drysdale, 491 U.S. at 635.

231. Id. at 645-46.
destruction than attorney's-fee forfeiture," because government restraint of
defendants' assets before trial would make private counsel unwilling to rep-
resent the defendant. Thus the statutes put the government where it could
"exercise an intolerable degree of power over any private attorney who takes
on the task of representing a defendant in a forfeiture case." When private
counsel did undertake such defense, they would, in their own interest, wish to
"remain ignorant of the source of the assets from which he is paid." Such
"interest in knowing nothing is directly adverse to his client's interest in full
disclosure," he added, and would result in a less-than-fully vigorous investi-
gation and defense.

Blackmun's strong statement about the adequacy of representation came
in a case where a defendant's lawyer was in partnership with the lawyer
representing a co-indictee and assisted in the defense of the co-indictee. The
Court refused to rule that the defendant's lawyer was engaged in active
representation of a competing interest in violation of the Sixth Amendment;
the majority likewise found no violation when the attorney did not develop
and present evidence of defendant's troubled family background. Dissent-
ating and speaking for Justices Brennan and Marshall (and for Justice Powell,
in part) with respect to both issues, Justice Blackmun found violations of the
Court's Strickland v. Washington standard on effective assistance of coun-
sel with respect to both issues. Focusing on the conflict of interest issue
because "the duty of loyalty to a client is 'perhaps the most basic' responsi-
bility of counsel," he found it "difficult to imagine a more direct conflict
than existed here." The lawyers' credibility and effectiveness would be
damaged where the community "was aware that the same law partners to-
gether were representing two defendants in capital cases and that they were
arguing inconsistent theories that placed the blame on that defendant who did
not happen to be on trial at the moment." He also believed the attorney's
failure to request a psychological examination of a defendant with "signifi-
cant psychological problems and diminished mental capabilities," with the
death penalty in the balance, was "contrary to professional norms of compe-
tent assistance," and that, not having defendant's mother testify in the trial's

232. Id. at 648.
233. Id. at 650.
234. Id. at 649.
235. Id. at 650.
238. Burger, 483 U.S. at 800 (quoting Strickland, 466 U.S. at 692).
239. Burger, 483 U.S. at 806.
240. Id. at 809-10.
sentencing phase was “not supported by informed professional judgment.”

At the end of his tenure, in a statement made on the last day he served on the Court, Blackmun again returned to the inadequacy of representation in capital cases generally. He stated that lawyers assigned to death penalty cases “at times are less qualified than those appointed in ordinary criminal cases” and recited horror stories of inadequate defense, where the “consequences of such poor trial representation for the capital defendant . . . can be lethal.” He pointed specifically to the inadequacy of funding for counsel in such particularly complex cases and to the lack of standards by which the adequacy of the performance of appointed counsel could be judged, particularly “given the low standard for acceptable attorney conduct and the high showing of prejudice required under Strickland.”

Blackmun also wrote on other aspects of attorney-client interaction. In one case driving from the government’s efforts to penetrate lawyer-client relations, Blackmun wrote for a unanimous Court to hold that courts may use in camera review to determine whether communications alleged to be within the attorney-client privilege are within the crime-fraud exception to the privilege for attorney-client communications, with the party opposing use of the privilege having to present evidence of the applicability of the crime-fraud exception. Earlier he had also sided with defense attorneys, this time against their clients, when he had agreed with the majority that the right to counsel was not violated by an attorney’s refusal to cooperate in a defendant client’s perjury. However, he wrote a separate concurrence for the liberal justices (Brennan, Marshall, and Stevens) in which he agreed that the defendant “had no legitimate interest that conflicted with [the lawyer’s] obligations not to suborn perjury and to adhere to the Iowa Code of Professional Responsibility” and that the lawyer served the client’s best interests by not presenting perjured testimony, but in which he also complained that the Court had gone beyond the Sixth Amendment issue to an “implicit adoption of a set of standards of professional responsibility for attorneys in state criminal proceedings.” In this case, he exhibited once more his “totality of circumstances” approach to issues when he stated that whether a defendant’s Sixth Amendment rights were violated by counsel’s response to defendant-client’s plan to commit perjury “may depend on many factors.”

241. Id. at 813-14.
245. Id. at 189.
246. Id. at 188.
Identification and Cross-Examination. For all his support of the right to counsel in trial-type proceedings, Blackmun was reluctant to expand the right to the period prior to trial, such as a witness’ examination of a photo array. In an early decision, in a tone quite different from that he was to use much later in talking of the need for access to counsel prior to formal habeas proceedings, he said this was not a situation in which “the accused required aid in coping with legal problems or assistance in meeting his adversary.” Nor did he find a due process violation when counsel was not provided when an individual photograph was used to assist in identifying a defendant, although he conceded that the use of the individual photo “was both suggestive and unnecessary.” Here he used his totality-of-circumstances test in doing so because a per se rule would exclude “consideration of alleviating factors” in keeping “reliable and relevant” evidence from the jury and would increase the risk of erroneous determinations by the trial judge.

Such opinions suggest that Blackmun was not sympathetic to defendants in identification matters; he would admit evidence shown to be reliable if certain factors, taken as a whole, were satisfied. However, he could take the victim’s position. He did so in a case in which a rape victim identified her rapist on the basis of an observation the Court characterized as lasting “only 10 to 15 seconds,” Blackmun criticized “the Court’s degradation... of so vital an observation,” saying that under the circumstances of a sexual attack, such a period could definitely “leave an accurate and indelible impression on the victim.”

Blackmun also appeared not to show heightened concern for defendants’ confrontation rights, ruling in a number of situations against claims that such rights had been violated. Outside the context of co-defendant’s/co-conspirator’s confessions, where his position was mixed, his less-than-charitable reception of defendant’s confrontation claims was first evident when the government did not produce a witness at trial but instead used the transcript of the witness’s preliminary hearing testimony. Blackmun was unwilling to require inquiries into the “effectiveness” of the government’s efforts to locate witnesses, as measured by a not-particularly-stringent standard. Having rejected such claims, he then allowed trial use of the preliminary hearing transcript of testimony because defense counsel had had the

250. Id. at 112.
252. See infra notes 260-67 and accompanying text.
Blackmun's opposition to Confrontation Clause claims also was evident in two opinions on the sensitive issue of accommodations to protect child witnesses from trauma. He first spoke for the Court in holding that neither confrontation nor due process rights were violated when a defendant was excluded from a hearing on the competency of a child witness. Conceding that the competency hearing was essentially a stage of the trial rather than a "pre-trial" proceeding, he argued that excluding defendant did not interfere with subsequent cross-examination, particularly as types of questions asked in the earlier proceeding could be repeated at the trial. When the Court then held that a defendant had the right to confront even child witnesses face-to-face at trial, so that placing a screen between child sexual assault victims and the defendant violated his rights, Blackmun, joined only by Chief Justice Rehnquist, dissented to call the infringement "minimal" and to assert the validity of the means used to protect the child witnesses. He complained that the Court had made too much out of defendants' need to see witnesses and had thus interfered with states' innovative efforts to make it easier for child sexual assault victims to testify, which he considered an important state interest, and perhaps in the process had risked "sacrifice [of] other, more central, confrontation interests, such as the right of cross-examination or to have the trier of fact observe the testifying witness," although he did not specify how this would occur. Shortly afterwards, Blackmun's view essentially prevailed in the Court's decision in *Maryland v. Craig*.

**Co-Defendants' Confessions.** Blackmun's first statement on the admissibility of confessions by co-defendants came when the plurality had found no Confrontation Clause violation in admission defendants' interlocking confessions at their joint trial. Blackmun, once again drawing on harmless error analysis, agreed that admitting the confessions was permissible but objected to the Court's apparent abandonment of harmless-error analysis and its adoption instead of "a *per se* rule to the effect that "Bruton is inapplicable in an interlocking confession situation." It was Blackmun's analysis the Court
adopted in 1987 in ruling, 5-4, that, when a nontestifying codefendant’s confession is not directly admissible against a defendant, it is not admissible even with an instruction to the jury to disregard it and even when defendant’s own statement was admitted.261

A year earlier, Justice Blackmun had argued again, as he had in *Parker v. Randolph*, that to say that interlocking confessions were not automatically admissible did not mean they were “irrelevant to a determination whether a codefendant’s out-of-court statements are sufficiently reliable to be admissible against the defendant.”262 In this case, where he joined Chief Justice Burger and Justices Powell and Rehnquist in dissent, the co-defendant had confessed only after having been told defendant had implicated him. The majority, ruling that improper and unconstitutional reliance had been placed on a codefendant’s confession, thought such a confession was presumptively unreliable and found insufficient evidence of reliability to allow its admission as evidence.263 Blackmun, pointing out that defendants were not blaming each other but had made “corroborated and mutually reinforcing statements,” stated his strong support for the “lofty precepts” of the Confrontation Clause of the Sixth Amendment” but chided the majority for being “overly concerned with theory” and “disregard[ing] the significant realities that so often characterize a criminal case.”264

In a case based on the Federal Rules of Evidence but implicating constitutional concerns, Blackmun dissented with Justices Brennan and Marshall when the Court ruled that the preponderance of the evidence test was appropriate for decisions to admit a co-conspirator’s statements (as to the existence of the conspiracy and defendant’s participation in it); that hearsay statements were properly used in making the admissibility decision; and that the court was not required to make an inquiry into independent indicia of reliability of the statement.265 Objecting to the Court’s interpretation of the Federal Rules of Evidence, Blackmun stated his belief that admissibility of a nontestifying co-conspirator’s statement was still to be judged by evidence apart from the statement itself. This was to be done so as not to interfere with determining...
the statement's reliability, which considering the co-conspirator's statement would do. There must be a judicial determination as to "indicia of reliability" of the co-conspirator's statement, he said, as the Confrontation Clause "surely demand[ed]" such a determination.266 Referring to the same perspective that he had used to skewer a liberal majority in Lee v. Illinois the previous year, in this case Blackmun, while recognizing prosecutors' need for the statement, used the "realistic view" "to remain with the traditional exemption that has been shaped by years of 'real world' experience with the use of co-conspirators' statements in trials and by a frank recognition of the possible unreliability of these statements," as those statements would control interpretations of other evidence and be used when prosecutors' other evidence was inadequate.267

Juries. Blackmun rejected reducing the jury's size below six and was sympathetic to claims of racial discrimination in jury composition. However, he was disinclined to extend the jury's presence beyond core criminal trial functions. Thus, stating broadly that "in our legal system" the jury was not "a necessary component of accurate factfinding," he wrote for the plurality in McKeiver v. Pennsylvania to reject, under a basic Due Process Clause "fundamental fairness" test, the claim that juries were required in juvenile proceedings.268 Although he recognized some "disappointments of grave dimensions" in the juvenile system's operation, he was far less pessimistic than Justice Fortas had been in Gault269 and retained hope for the system's informal and rehabilitative model and unique way of functioning.270 Also early in his Court tenure, he thought the jury unnecessary when extended punishments were given for contempts, as sufficient protection was provided by having sentence imposed by a judge other than the one who presided at the trial.271 Later, however, attempting to distinguish between civil and criminal contempts, he wrote for the Court to hold that large fines imposed against labor unions were criminal in nature and thus could be imposed only after a jury trial.272

In the adult system, Blackmun also demonstrated lack of support for defendants' access to jury trial when he wrote for the Court to uphold Massachusetts' two-tier trial system, which had no juries in first-instance court;

266. Id. at 186.
267. Id. at 197-98.
268. 403 U.S. 528, 543 (1971).
270. McKeiver, 403 U.S. at 547.
sufficient protection was provided, he thought, by the jury’s availability at a de novo trial at the next level. However, Justice Blackmun helped to draw the line when efforts were made to reduce the jury’s size, rejecting the use of juries as small as five persons. However, his opinion was only for a plurality of himself and Justice Stevens, as he drew heavily on post-Williams v. Florida social science research on the effect of jury size on jury deliberations. His use of that research, which he thought raised “significant questions” about accuracy of results, inconsistency, and detriment to the defense from use of juries smaller than six, brought an attack from Justice Powell for the “numerology” of the opinion.

Blackmun also said that reduced jury size posed a potentially negative effect on representation of minorities on juries. That concern, consistent throughout his tenure on the Court and part of his larger concern about racial discrimination, was fully evident in three of his opinions for the Court on systematic exclusion of minorities from juries. In Castaneda v. Partida for a badly divided Court, Blackmun, examining differences between population and grand jury composition and showing his interest in statistics with an extended footnote about statistical theory, upheld a prima facie case that Mexican-Americans, “a clearly identifiable class protected from exclusion,” had been systematically excluded from state grand juries. Nor, he said, was plaintiff’s case dispelled simply because the county’s “governing majority” was also Mexican-American, but he did avoid an exchange between Justices Powell and Marshall as to whether individuals of a previously discriminated-against minority now in power would discriminate against others of their group.

277. Id. at 246. During oral argument in Burch v. Louisiana, 441 U.S. 130 (1979) (nonunanimous six-person criminal jury invalid), in which Blackmun joined the majority. He interrupted counsel to call attention to that criticism: “Blackmun made this announcement almost apologetically,” wrote an observer, “as though fully conceding that he alone favored this approach.” Louise Korns (Assistant District Attorney, New Orleans) to Bernard Grofman, February 26, 1979.
278. See Wasby, supra note 89, at 227-29.
280. Id. at 496 n.17.
281. Id. at 495
282. Id. at 495.
283. Id. at 503 (Marshall, J., concurring). Id. at 514-15, 514 n.6 (Powell, J., dissenting). Marshall cited "social science theory and research" to buttress his assertion that such discrimination occurred. Id. at 503.
The second opinion, *Rose v. Mitchell*,284 involved allegations of discrimination in selecting grand jury foremen. In reiterating that convictions could be set aside where there was racial discrimination in selection of the grand jury and holding that such claims could be raised in federal habeas (although a prime facie claim had not been made out here), Justice Blackmun wrote passionately about the “pernicious” quality of racial discrimination in the administration of justice and expressed considerable concern that some members of the Court had retreated from the firm position that discrimination in grand jury selection required setting aside a conviction regardless of the lack of taint in the petit jury.285 (Because of his concern that juries be unbiased, he also wished to allow lower courts leeway to consider claims that jurors’ contacts or family history had tainted their consideration of a case.286)

In 1992, Blackmun was able to embed his concern further in the fabric of the law. In one of the successor cases to *Batson v. Kentucky*,287 he ruled for the Court that defendants could not use race as the basis for excluding potential jurors through peremptory challenges because such use was state action under the Fourteenth Amendment.288 It was state action because juries fulfilled a “governmental function” and the state provided the means for selecting them; even if a defendant, a private actor, initiated removal of a potential juror, observers would perceive that the *court* had excused the juror and thus would attribute the removal to the state. The Court had long held, said Blackmun, that denying a person the right to serve on a jury inflicted injury by discriminating against that individual; that injury occurred whether prosecutor or defendant inflicted it. Moreover, to exclude African-Americans purposefully, and particularly when a trial involved a race-related crime, was to undermine public confidence in the legal system.289

In his last term, in a paternity and child-support civil case clearly was applicable to the criminal setting, Blackmun was able to extend his concern about excluding people from juries because of their ascriptive characteristics when he wrote for a 6-3 Court to hold that when state actors engaged in gender discrimination in their use of peremptory strikes, equal protection had

285. Id. at 554-56.
286. Rushen v. Spain, 464 U.S. 114, 151 (1983)(Blackmun, J., dissenting). See also McDonough Power Equipment v. Greenwood, 464 U.S. 548 (1984). This was a civil case in which the Court refused to overturn a judgment on the basis of a juror’s mistaken, but honest, answer to a voir dire question. Blackmun concurred to emphasize his concern that those wishing to assert the absence of an impartial jury have adequate remedies. Id. at 556-57.
289. Id. at 2353-54.
been violated.\footnote{J.E.B. v. Alabama \textit{ex rel.} T.B., 114 S. Ct. 1419 (1994).} Noting that “prejudicial attitudes toward women in this country have not been identical to those held toward racial minorities,” he nonetheless found strong similarities, with use of peremptory challenges to remove those of one sex based on the same sort of stereotypical thinking that had led to use of peremptories to strike African Americans from juries; moreover, the exclusion of women from juries had ended long after exclusion based on race.\footnote{Id. at 1425.} He could find little support provided for the position that gender predicted attitudes, the claim made by lawyers selecting juries.

When exclusion was based not on characteristics like race or gender but on attitudes — about the death penalty — Blackmun’s position was less clear. We have seen that he found exclusion from juries those opposed to the death penalty should not be judged a species of “harmless error.”\footnote{Darden v. Wainwright, 477 U.S. 168 (1986). \textit{See supra} notes 74-76 and accompanying text.} However, for purposes of having a jury that was a “fair cross-section” of the community from which improper exclusions had not been made, he did not find those opposed to the death penalty (“Witherspoon-excludables”) to constitute the same type of “distinctive group” as were those of a particular race or sex.\footnote{Buchanan v. Kentucky, 483 U.S. 402, 415 (1987).} Thus it was not improper to use a jury from which those opposed to capital punishment were excluded (a “death-qualified” jury) for a joint trial of two defendants even though the prosecution sought the death penalty only as to petitioner’s co-defendant.\footnote{477 U.S. at 402.} Clearly showing deference to prosecutors as he had more consistently done earlier, Blackmun found important the state’s interest “to proceed in a joint trial when the conduct of more than one criminal defendant arises out of the same events” so that it was not “required to undergo the burden of presenting the same evidence to different juries.”\footnote{Id. at 418-19.}

\textit{Public Trial.} When the Court allowed closing of courtroom proceedings in \textit{Gannett v. DePasquale}, Justice Blackmun declared that, with respect to pretrial suppression hearings, “often . . . the only judicial proceeding of substantial importance that takes place during a criminal prosecution,”\footnote{443 U.S. 368, 434 (1979).} decisions by prosecutor, defendant, and judge were not sufficient to protect “public trial” interests.\footnote{However, in another case, involving keeping voir dire open, he thought the defendant and prosecution would adequately protect a juror’s privacy interests. \textit{Press-Enterprise Co. v. Superior Court of California, Riverside County, 464 U.S. 501, 515 (1984)} (Blackmun, J., concurring).} Engaging in an extended historical analysis, he stressed

the virtues of such open judicial proceedings in protecting not only the defendant but also the public's need to know about police and prosecutorial performance. He also strongly criticized the Court's "inflexible per se rule" and "wooden approach" and recognized exceptions to open trials if certain criteria were satisfied on a case-by-case basis. When, in the Richmond Newspapers case, the Court turned from the Sixth Amendment to the First Amendment as a basis for open trials, Blackmun openly noted how "gratifying" it was that the Court would both turn to history as a primary basis for its ruling and "wash away some of the graffiti that marred" the Gannett opinions, particularly the talk of "trials" instead of "pretrial hearings." On the related issue of judges' "gag orders" barring reporting about judicial proceedings, as circuit justice he relied on the heavy presumption under the First Amendment against prior restraints in staying such orders. He stressed that "each passing day [of a direct prior restraint] may constitute a separate and cognizable infringement of the First Amendment," an infringement that would be "irreparable."

EIGHTH AMENDMENT

Non-Capital Issues. The principal element in Eighth Amendment jurisprudence, and the one most relevant to a discussion of Justice Blackmun, is, of course, the death penalty. There were, however, other Eighth Amendment issues about which Blackmun wrote. One, not directly on a criminal matter but related to criminal procedure, was the question of whether the Eighth Amendment excessive fines provision applied to punitive damages in cases brought by private parties. Speaking for a 7-2 Court, Blackmun held that this situation was "too far afield from the concerns that animate the Eighth Amendment" even if the Excessive Fines Clause applied outside the criminal context. Moreover, there was no common law standard for excessiveness by which to review punitive damages awards. Part of the rationale for this ruling was that only private parties, not the government, were involved in the suit. When the government brought an in rem civil forfeiture proceeding, Blackmun wrote for a unanimous Court to hold the Excessive Fines Clause applicable to such a proceeding, because forfeiture was a punishment.

In an earlier ruling in which a party sought to apply the Eighth Amendment in a noncriminal context, Justice Blackmun had also found the provision

not applicable. There a person had been wounded by a police officer and was taken to a hospital for treatment; when the hospital sought reimbursement from the city, Justice Blackmun held that the city’s obligation toward the wounded person was fulfilled by taking that person to the hospital; the Constitution did not “dictate how the cost of that care should be allocated as between [the city] and the provider of the care,” which was a state law question. If the Eighth Amendment required that the wounded person receive medical treatment, it did not require a certain financial means of providing it.

**Death Penalty.** Judge Blackmun of the Eighth Circuit, and then Justice Blackmun of the Supreme Court, upheld states’ adoption of the death penalty. His Supreme Court writing on the subject extended from an anguished dissent in *Furman v. Georgia* through another anguished statement in *Callins v. Collins* in 1994, shortly before his departure from the Court, that it was not possible for the death penalty to be applied constitutionally and that he would no longer “tinker with the machinery of death.”

In *Furman*, exhibiting considerable personal conflict, Justice Blackmun had distinguished between his role as judge, on the one hand, and, on the other, his personal views and what he might do in other roles. He stated his “distaste, antipathy, and ... abhorrence” for capital punishment, saying “it violates childhood’s training and life’s experiences, and is not compatible with the philosophical convictions I have been able to develop;” moreover, he viewed it as “serv[ing] no useful purpose that can be demonstrated.” As a result, he said, he would have voted against it as a legislator and exercised clemency as an executive. But that he was a judge in a democracy overrode his personal concerns. Later, he was to say that he had “refrained from joining the majority [in *Furman*] because I found objectionable the Court’s abrupt change of position in the single year that had passed since *McGautha*.”

During the more than two decades from *Furman* to *Callins*, Blackmun at first generally upheld state procedures for imposing the penalty and gave the states considerable leeway in determining the relative roles of jury and judge. However, he then increasingly adopted a different tone about capital punishment and expressed greater concern about the manner of the penalty’s imposition. That concern was to force him into dissent against application of

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303. City of Revere v. Massachusetts General Hospital, 463 U.S. 239, 244-45 (1983).
305. 408 U.S. 238, 405-06 (1972).
307. Furman, 408 U.S. at 405.
the death penalty in particular cases in his last decade on the Court, even while he adhered to the constitutionality of capital punishment. His increased uneasiness with the Court majority’s course in dealing with a multiplicity of death penalty variations adopted by the states and a variety of factual situations posed by different defendants in death penalty cases also led him to speak out more frequently even before he arrived at the position he announced in Callins.

After examining his 1983 rulings, and before discussing further the conclusion he reached in 1994, how he dealt with the death penalty over the course of his tenure on the Court until then will be examined. Then two topics — due process questions that arose in a capital punishment context, and the Court’s treatment of federal habeas corpus in death penalty cases — are discussed to see the extent to which resolution of other criminal procedure issues was affected by the presence of capital punishment. Blackmun’s views on some basic elements of the validity of the death penalty are discussed next, followed by the role of juries in the death penalty process — both selection (or exclusion) of jurors and jury consideration of mitigating evidence. The Court’s treatment of aggravating circumstances follows. A return to Callins v. Collins ends this section.

1983. That the Callins v. Collins statement could not have been a complete surprise should have been clear roughly a decade before it was made, because 1983 saw Blackmun dissent in several death penalty rulings. As Burt has suggested, in 1983, the justice “seemed almost to explode in rhetorical force” after earlier being “virtually silent,” with the new phase of rulings magnifying rather than silencing his doubts.\(^{309}\) And in 1984, he is reported to have said at Dartmouth College that he thought that, with so many defendants close to execution, the resulting bloodbath would make the population rethink capital punishment.

Justice Blackmun’s heightened concerns were apparent, for example, in a brief dissent on the last day of the 1982 term, when the Court approved a required jury instruction calling attention to the governor’s ability to commute a life sentence but not including a similar statement about commutation of the death sentence, and Blackmun attacked the majority’s use of “intellectual sleight of hand” instead of “legal analysis” as a “disservice” to “the rule of law.”\(^{310}\) He used the “rule of law” theme in another brief dissent the same day in objecting to the Court’s failure to find a federal constitutional violation in state court consideration of an aggravating circumstance improper under state law. In a tone quite different from that of his earlier years on the Court, he


argued that despite the seriousness of defendant’s offense, “The end does not justify the means even in what may be deemed to be a ‘deserving’ capital punishment situation.” 311

His changing views were also evident in the concern he expressed about the haste with which people were being executed. That concern was made manifest in statements directed both at state courts and his colleagues. When a majority of his own colleagues vacated a lower court stay that had been granted pending resolution of a certiorari petition in a case posing an issue before the Court in an already-argued death penalty case, he spoke unhappily of “what appears to be an untoward rush to judgment.” 312 He was to repeat that theme in later years, particularly when the Court limited access to the federal courts for habeas corpus petitioners. 313 One could also see that Blackmun’s earlier deference to state courts would evaporate when those courts dealt summarily with capital punishment cases. When Missouri courts refused to issue a stay of execution pending the Supreme Court’s final action on a certiorari petition, as a circuit justice Blackmun issued stays. In the first instance, he noted that the defendant “must have at least one opportunity to present to the full Court his claims that his death sentence has been imposed unconstitutionally”; when he had to do the same thing with respect to the same court only shortly thereafter, he expressed obvious irritation. 314

The year 1983 also saw him make a strong statement opposing capital punishment sentencing procedures. It came in the “killer shrink” case, Barefoot v. Estelle, 315 involving testimony from psychiatrist witnesses who routinely predicted that defendants would commit future crimes. The majority’s ruling that such testimony was not inherently unreliable both engaged Blackmun’s interest in medical matters and provoked his ire. Use of such testimony “despite the fact that [it] is wrong two times out of three” could not be squared with the requirement that capital sentencing had to be reliable, he wrote. 316 Drawing on the scientific literature, he blasted the alleged “experts” for their lack of expertise, calling their testimony “so unreliable and unprofessional that it violates the canons of medical ethics”; he found use of the “experts” testimony “particularly indefensible” when it was based on hypotheticals because they had not even examined the defendant. 317

313. See infra notes 325-38 and accompanying text.
316. Id. at 917.
317. Id. at 924 n.6. Blackmun was, however, to write for the Court in allowing use, to
Due Process. Two cases from late in Justice Blackmun’s tenure, in both of which he wrote for himself and Justice Stevens in dissent, illustrate his stance on important procedural protections for a defendant when those protections were at issue in a death penalty case. Both cases concerned defendant’s competence. In the first, the Court upheld a statute requiring that the party asserting that a defendant was incompetent to stand trial had the burden of proving the incompetence, and ruled that a presumption of competency was valid.\footnote{Medina v. California, 112 S. Ct. 2572 (1992).} For Blackmun, where evidence of competence was “equivocal and unclear,” a person could not be tried and convicted; the Due Process Clause, which was “not the Some Process Clause,”\footnote{Id. at 2586.} demanded, he said, adequate \textit{anticipatory, protective procedures} to minimize the risk that an incompetent person will be convicted.\footnote{Id. at 2584 (Blackmun, J., dissenting) (emphasis in original).} Not only was it not \textit{adequate} to place the burden on someone whose competence was in doubt, but placing the burden on the government was appropriate, not least because the government had better access to defendant during the pretrial period and the costs of the burden were “not at all prohibitive.”\footnote{Id. at 2589.}

Blackmun again objected a term later when the same majority ruled that the standard of competence for pleading guilty or waiving the right to counsel was the same as the standard as competence to stand trial. The effect of the capital punishment context was clear in Blackmun’s statement that through its ruling, “the majority upholds the death sentence for a person whose decision to discharge counsel, plead guilty, and present no defense well may have been the product of medication or mental illness.”\footnote{Godinez v. Moran, 113 S. Ct. 2680, 2691-92 (1993)(Blackmun, J., dissenting).} He thought the premise for the standard for competence to stand trial, which was “specifically designed to measure a defendant’s ability to ‘consult with counsel’ and to ‘assist in preparing his defense,’” vanished when a defendant lacked representation, and that the standard became insufficiently demanding with respect to the more serious matter of pleading guilty, a situation to which a court’s competency determination had to be tailored.\footnote{Id. at 2693-94.} (Faced with instructions defining “reasonable doubt,” Blackmun, joined in part by Justice Souter, took issue with the majority’s holding that the instructions at issue did not violate due process.\footnote{Victor v. Nebraska/Sandoval v. California, 114 S. Ct. 1239, 1254-59 (1994) (Blackmun, J., dissenting).})

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\bibitem{318} Medina v. California, 112 S. Ct. 2572 (1992).
\bibitem{319} Id. at 2586.
\bibitem{320} Id. at 2584 (Blackmun, J., dissenting) (emphasis in original).
\bibitem{321} Id. at 2589.
\bibitem{323} Id. at 2693-94.
\end{thebibliography}
Habeas Corpus. It is clear that Justice Blackmun’s views on capital punishment affected — indeed, dictated — positions on habeas corpus. His uneasiness with the Court’s treatment of cases in which a defendant had been sentenced to death became quite visible in his reaction to the majority’s treatment of death-sentenced defendants’ attempts to bring constitutional claims to federal court through habeas corpus. Here he became particularly concerned that use of the federal courts to vindicate federal constitutional claims was being eliminated, and that concern became evident in cases applying the Court’s rules that those seeking habeas review must justify their procedural defaults. In one such case,325 a defendant’s lawyer had not initially objected to an instruction on the jury’s role in imposing the death penalty, but had later tried to challenge the instruction in a federal habeas corpus proceeding, after a Supreme Court ruling had invalidated similar commentary.326 The five-justice majority said that its own ruling did not provide “cause” for defense counsel’s failure to make his objection at trial or to challenge it on appeal.327 An angry Justice Blackmun, claiming that “the Court... arbitrarily imposes procedural obstacles to thwart the vindication of what apparently is a meritorious Eighth Amendment claim,”328 found that “the incorrect instructions may well have caused the jury to vote for a death sentence that it would not have returned had it been accurately instructed,”329 and objected to the Court “sending a man to a presumptively unlawful execution because he or his lawyers did not raise his objection at what is felt to be the appropriate time for doing so.”330 Again, one could see the effect of the fact that this was a capital case: “[the] incoherence in the Court’s decisionmaking,” wrote Blackmun, “would be disturbing in any case, but is especially shocking in a capital case.”331

Justice Blackmun’s displeasure with the majority’s treatment of federal habeas petitions by death-sentenced defendants was, if anything, even more evident in two 1992 and 1993 cases, where the defendants wished to present in federal court claims that they were actually innocent of the crimes for which they had been convicted. In the first, Sawyer v. Whitley,332 the majority ruled that, to be able to present an actual innocence claim in a successive petition

327. Dugger, 489 U.S. at 401.
328. Id. at 413-14.
329. Id. at 422.
330. Id. at 413.
331. Id. at 424 n.15.
(that is, other than the first), a habeas petitioner had, by "clear and convincing" evidence, to show that no reasonable juror would have found him eligible for death penalty but for the constitutional error claimed. Blackmun, although not dissenting, wrote separately to state his view that "the Court's focus on factual innocence is inconsistent with Congress' grant of habeas corpus jurisdiction," as there were "certain process-based protections" to which defendant was entitled apart from accurate truth-finding. He also repeated his objection to the "unprecedented and unwarranted barriers to the federal judiciary's review of the merits of claims" by those convicted in state courts and "the continued narrowing of the avenues of relief to federal habeas petitioners."

When the Court went further to say that a claim of factual innocence based on newly-discovered evidence was not a basis for a federal habeas claim, Blackmun said that the Court had first required (in Sawyer v. Whitley) that "actual innocence" be shown but now was demanding "that a prisoner who is actually innocent must show a constitutional violation to obtain relief." In view of the Court's recent habeas decisions, he found its requirements "perverse," and thought that its rulings could be reconciled only under "the principle that habeas relief should be denied whenever possible," although he did say he would apply a higher standard before granting relief on the merits of an actual innocence claim than he would to reach any claims where there had been procedural default or the claims had not been raised in prior petitions. Blackmun looked to the substantive standards of the Eighth Amendment, which he said was "not static but rather reflects evolving standards of decency" in viewing the status of claims of actual innocence. "Nothing could be more contrary to contemporary standards of decency," or more shocking to the conscience," he said, "than to execute a person who is actually innocent," adding, at the end of his opinion, "The execution of a person who can show that he is innocent comes perilously close to simple murder."

In his last opinion for the Court, a statutory interpretation case, Justice Blackmun wrote to facilitate capital defendants' effective access to federal habeas corpus. He read recently-enacted federal statutory provisions to provide for the appointment of counsel in federal habeas cases prior to defendant's filing of a formal, legally sufficient habeas petition. To require the capital defendant to proceed with the filing of a habeas petition without

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333. Id. at 2527-28.
334. Id. at 2525.
335. Id. at 2525, 2529.
337. Id. at 876, 884. The Due Process Clause would also be violated: "Execution of the innocent is equally offensive to the Due Process Clause of the Fourteenth Amendment." Id. at 878.
counsel, he said, might prevent receiving any hearing on the merits if petitioner did not successfully negotiate the shoals created by the Court’s own limitations on federal habeas. He reinforced that decision in another part of the same case by interpreting a related statute to mean that federal district courts had jurisdiction to enter stays of execution to give aid to defendants’ right to counsel, that is, they could do so prior to the filing of a formal habeas petition where they had appointed counsel to assist in preparation of such a petition.338

Mandatory Statutes. When the Furman Court struck down the death penalty as then applied, Blackmun, in addition to his statement about the conflict between his personal views and his judicial role, expressed concern that a result of the decision might be statutes, “regressive and of an antique mold,” making the death penalty mandatory for certain offenses “without any alternative for the imposition of a lesser punishment in the discretion of the judge or jury.”339 Yet, only citing that dissent, he disagreed when the Court did invalidate mandatory death penalty statutes.340 Ten years, later, however, he was to write for the Court in overturning a mandatory death penalty statute, enacted after Furman but repealed after the Court’s 1976 rulings on mandatory and discretionary death penalty statutes that required death for murder by a person under a sentence of life without parole.341 A “departure from the individualized capital-sentencing doctrine is not justified,”342 he wrote, finding that the statute did not comply with the notion “that the level of criminal responsibility of a person convicted of murder may vary according to the extent of that individual’s participation in the law,” nor did the fact that defendant was under a sentence of life without parole “contribute significantly to the profile of that person for purposes of determining whether he should be sentenced to death.”343

Justice Blackmun’s commitment to individualized consideration of capital defendants could be clearly seen when the Court ruled that a state court could make a necessary determination of a defendant’s culpability.344 Dis-
sentencing, he said that was insufficient and that, as “the death penalty cannot constitutionally be imposed without an intensely individual appraisal of the personal responsibility and moral guilt of the defendant,” only a jury could make the requisite determination.\textsuperscript{345}

\textit{Mitigating Circumstances.} Justice Blackmun initially did not strongly support strongly jury consideration of mitigating circumstances before a death sentence was imposed and also was willing to see the role of the jury diminished. For example, he wrote that “mitigating factors need not be considered in every case.”\textsuperscript{346} Speaking for the Court, he also found it permissible for judges to impose the death sentence over jury recommendations of life imprisonment because “there certainly is nothing \ldots that requires that the sentence by imposed by a jury” and it was not determinative that jury findings were final in most states.\textsuperscript{347} Going further, and again speaking for the Court, he also brushed aside suggestions that a jury’s mandated “sentence” of death would improperly influence the judge hearing evidence on aggravation and mitigation and imposing the actual sentence.\textsuperscript{348}

Blackmun joined the Court’s first major ruling on individualized consideration of mitigating circumstances only on the alternative ground that capital punishment could not be imposed on one who had only aided and abetted a murder “without permitting any consideration \ldots of the extent of \ldots involvement, or the degree of mens rea.”\textsuperscript{349} However, he came to support such individualized consideration wholeheartedly. His position on the consideration of mitigating evidence was most apparent in four opinions from 1988 through 1994. In the first, he spoke for a bare majority in holding that a defendant must be resentenced where there was a substantial probability the jurors thought instructions precluded them from considering mitigating evidence unless they unanimously agreed on the applicability of a particular mitigating circumstance.\textsuperscript{350} Two years later, when the Court came to Blackmun’s conclusion — that jurors’ consideration of mitigating evidence is improperly limited by a sentencing procedure that allowed the jury to consider only unanimously-found mitigating circumstances — Blackmun agreed but wrote to underscore his view that his approach of two years earlier was the proper one.\textsuperscript{351} However, in 1993, he found himself in dissent in a related

\textsuperscript{345} Id. at 395-96.
habeas corpus case (involving a murder conviction but not a death sentence) where the majority found that a lower court rule prohibiting a murder conviction if the jury had found a mitigating mental state was a "new rule" and thus, under *Teague v. Lane*, 352 could not be applied to defendant's case on federal habeas corpus. 353 Finding that the procedure used, which prevented jury consideration of a lesser offense, "severely diminished the likelihood of an accurate conviction," he would have allowed the lower court's rule to be applied retroactively as a "watershed rule of criminal procedure." 354

That same concern for accuracy — or, put differently, that the jury not make its decision based on distorted information — was apparent in one of Justice Blackmun's last prevailing opinions. For a plurality, he said that when the state raised the issue of a defendant's future dangerousness, the defendant was entitled to an instruction that a life sentence meant life without the possibility of parole. 355 Basing his ruling on the Due Process Clause, not the Eighth Amendment, he said the jury could not be allowed to operate on the basis of misunderstandings and false choices. "The State may not," he said, "create a false dilemma by advancing generalized arguments regarding the defendant's future dangerousness while, at the same time, preventing the jury from learning that the defendant never will be released on parole." 356 In addition, he dissented when the Court found that admission into evidence of a defendant's prior death sentence did not undermine the jury's sense of responsibility for determining the appropriateness of the same penalty in the case before it. 357

Justice Blackmun's interest in accuracy also motivated a statement, in dissent from a denial of review, showing his concern that defendants be aware of evidence that might have been taken into account in sentencing. He spoke out when the Court denied review in a case in which a defense attorney had learned that the judge who presided over sentencing of defendant had once represented defendant's mother in a divorce proceeding and the lower courts had refused to grant post-conviction relief. Blackmun said that it was uncon-

354. Id. at 2127.
356. Id. at 2198.
stitutional to allow "consideration during the sentencing phase of evidence that the defendant has not had an opportunity to rebut."\textsuperscript{358}

*Aggravating Circumstances.* At the same time he was attempting to prevent erosion of jury consideration of mitigating evidence, Justice Blackmun was engaged in a parallel, and unsuccessful, battle to constrain use of statutory aggravating circumstances. This could be seen in his dissents in three 1990 cases and another three years later. The first, *Clemons v. Mississippi*\textsuperscript{359} involved a state appellate court’s reweighing evidence or engaging in harmless error review based in part on an invalid, improperly defined aggravating circumstance and, as a result, upholding death sentences. When the majority allowed what Justice Blackmun called such “salvaging” of a death sentence, he objected strongly to allowing an appellate court to perform the function that the jury should perform. He declared that “appellate courts are institutionally incapable of fulfilling the distinct functions performed by trial judges and juries,”\textsuperscript{360} in particular, imposing the death sentence “involves an assessment of the defendant himself,” and the sentence should be “pronounced by a decisionmaker who will look upon the face of the defendant as he renders judgment.”\textsuperscript{361}

He repeated that view later in the same term, when the Court, by a 5-4 vote, held that it was not necessary to have a jury determine the existence of aggravating circumstances (a judge could do it) and accepted state laws providing that the sentencer in a capital case could consider only mitigating evidence proved by a preponderance of the evidence.\textsuperscript{362} As this case came to the Court on direct review, Blackmun did not hesitate to note that the same justices who were limiting the availability of federal habeas corpus were now "serv[ing] notice that capital defendants no longer should expect from this Court on direct review a considered examination of their constitutional claims."\textsuperscript{363} Reiterating his view that appellate courts were not constitutionally competent to determine aggravating circumstances, Blackmun criticized the plurality’s “hardline approach” and again insisted on “the capital defendant’s right to unrestricted presentation of mitigating evidence,” which might be sufficiently reliable to have a place in the sentencing decision even when not proved by a preponderance of the evidence.\textsuperscript{364} However, he also

\footnotesize{\textsuperscript{358} Robertson v. California, 498 U.S. 1004, 1005 (1990)(Blackmun, J., dissenting from denial of certiorari).}  
\footnotesize{359. 494 U.S. 738 (1990).}  
\footnotesize{360. Id. at 765 (Blackmun, J., dissenting).}  
\footnotesize{361. Id. at 771-72.}  
\footnotesize{362. Walton v. Arizona, 497 U.S. 639 (1990).}  
\footnotesize{363. Id. at 708.}  
\footnotesize{364. Id. at 685 (1990)(Blackmun, J., dissenting).}
objected to the Court's holding on several other grounds. For one thing, he was disturbed that the fifth vote to uphold the death penalty was cast by a justice (Scalia) who openly disavowed the Court's position that capital defendants were entitled to individualized determinations of their sentence.

Blackmun also objected to Arizona's formulation of aggravating circumstances, which was at issue in the companion case of Lewis v. Jeffers. There Blackmun made clear in dissent that, by not providing the jury with sufficient guidance, the state's aggravating circumstances formulation did not properly limit the cases in which the death penalty could be imposed; if all cases fell within the scope of the definition, the definition was constitutionally defective.

Blackmun carried forward his concern about the Court's treatment of improperly-written aggravating circumstances provision two years later when he criticized the Court, faced with a provision that was unconstitutionally vague, for writing its own limiting construction to save the provision. The state, not the high court, said Blackmun, had to "provide a construction that, on its face, reasonably can be expected to be applied in a consistent and meaningful way so as to provide the sentencer with adequate guidance." And, in one of his last cases, when the Court found in a facial challenge to several of California's "special circumstances" that the provisions were not unconstitutionally vague, Blackmun also dissented. He said that jurors "are given no guidance in how to consider" the statutorily-enumerated factors; that some of the special circumstances, not having been given a limiting construction by the state courts, could cover a wide range of situations; and that, absent proper limitations, improper statements made in the courtroom might be given weight by jurors. Moreover, if jurors' discretion was "largely unguided," there was an increased likelihood that the jurors would use constitutionally invalid considerations, particularly race, in making their decisions.

Race and Death. Racial discrimination in the application of the death penalty reinforced Justice Blackmun's other concerns. When the Court had an opportunity to confront the question in a case which presented a major social science study (by David Baldus and others) of discrimination in the entire

366. Id. at 794-95.
367. Id. at 799 (Blackmun, J., dissenting).
370. Id. at 2645.
process leading to imposition of the death penalty, the majority, failing to come to grips with the data, ruled that the study had not established a discriminatory purpose in the particular case and did not show a constitutionally significant risk of racial bias in capital sentencing in Georgia. Given Justice Blackmun's interest in social science and its methodology, most evident earlier in opinions concerning jury size and composition, it is not surprising that, in addition to criticizing the majority for using an unexacting level of equal protection scrutiny in this case, he dealt directly with the study. Finding it "of such a different level of sophistication and detail" from that presented in the Maxwell case when he had sat on the Eighth Circuit, he said the data could not be dismissed as inadequate. He thought that, without contrary evidence, the study presented a "showing of sufficient magnitude that . . . one must conclude that racial factors entered into the decisionmaking process that yielded McCleskey's death sentence." (In his Callins statement, he was to remind his audience that "there has been no serious effort to impeach the Baldus study," which was not likely "unique to Georgia." ) To grant McCleskey's claim would be particularly important, said Blackmun, for the benefits it would provide were it "to lead to a closer examination of the effects of racial considerations through the criminal-justice system"; if such considerations were significant, they could be eradicated "to ensure an evenhanded application of criminal sanctions," and if they were not present, "the integrity of the system is enhanced."

The Change Comes to Pass. In one of the first death penalty habeas corpus cases in which he registered a dissent, Justice Blackmun had spoken of the majority's "unseemly haste" in dealing with important issues and in 1993 he spoke of his colleagues' "obvious eagerness to do away with any restriction on the States' power to execute whomever and however they please." In Sawyer v. Whitley, he finally went beyond such complaints about giving short shrift to federal habeas to indicate that the majority's actions raised

373. McCleskey, 481 U.S. at 354 n.7.
374. Id. at 359.
376. McCleskey, 481 U.S. at 365.
fundamental questions about his continued adherence to the constitutionality of the application of the death penalty. He stated directly 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.” 379 Or, as he put it in concluding, as he called attention to the Court’s refusal to address claims by named individuals, each of whom had been executed, “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.” 380 Reminding us of his “own deep moral reservations” about capital punishment, Blackmun said that he had been able to enforce it because federal courts had had broader authority to review constitutional claims associated with its imposition. His position had “always rested on an understanding that certain procedural safeguards, chief among them the federal judiciary’s power to reach and correct claims on constitutional error on federal habeas review,” would assure fair imposition of the death sentence.381 Yet, “more than 20 years later,” he said, “I wonder what is left of that premise underlying my acceptance of the death penalty.”382 Here the Callins v. Collins statement is clearly foreshadowed.

Justice Blackmun began that extended statement, the core of which was that capital punishment could not be constitutionally applied and therefore he would no longer vote to uphold a death sentence, by stating his hope that subsequent individuals against whom that penalty was sought would have competent and vigorous counsel and would appear before “a judge who is still committed to the protection of defendant’s rights.” Yet he found that even if those conditions were met, “our collective conscience will remain uneasy” because “the death penalty remains fraught with arbitrariness, discrimination, caprice, and mistake.”383 His principal theme was that the goals set up in the Court’s death penalty jurisprudence — “individual fairness, reasonable consistency, and absence of error” — and particularly the first two, could not be balanced; moreover, the Court had made matters worse by “abdicating its statutorily and constitutionally imposed duty to provide meaningful judicial oversight to the administration of death by the States.”384

380. Id. at 2530.
381. Id. at 2529.
382. Id.
384. Id.
 Returning to the Furman case, in which he had dissented, Blackmun found “little doubt now that Furman’s essential holding was correct... if the death penalty cannot be administered consistently and rationally, it may not be administered at all.”385 Yet the Court could not overcome the dilemma of meeting the objective of consistent application while simultaneously granting discretion to sentencers, who must have discretion “that is at once generously expanded and severely restricted.” Restricting the number of people to whom the death penalty could be applied, he now believed, was unacceptable, because those still subject to the penalty would be subject to arbitrariness that could not be eliminated: “It seems that the decision whether a human being should live or die is so inherently subjective — rife with all of life’s understandings, experiences, prejudices, and passions — that it inevitably defies the rationality and consistently required by the Constitution.”386

Having declared that, as a result of his misgivings, “I no longer shall tinker with the machinery of death,”387 Justice Blackmun made good on that promise for the remainder of that last term on the Court, consistently voting to overturn the death sentence in every capital case that came to the Court. He did so in several series of certiorari denials, numbering almost thirty cases, as well as several rehearings and a number of actions related to stays of execution; in all, he dissented. In one, he supported a death row inmate’s claim that hanging — used only by Washington and Montana, and, Blackmun noted, South Africa — was cruel and unusual punishment, both because of “overwhelming” public condemnation of the practice and because the practice was “crude and imprecise”; hanging, he argued, either inflicted pain wantonly or violated human dignity, depending on whether it led to asphyxiation or strangulation, on the one hand, or decapitation, on the other.388 In another, he responded to Justice Scalia’s separate statement in Callins in which Scalia had questioned why this case rather than Callins had not been the vehicle for Blackmun’s statement, because, to Scalia, the facts of the brutal murder made punishment seem so necessary.389 Blackmun pointed out that, although the crime was brutal, North Carolina had never before recommended death for a mentally retarded defendant, under age twenty, with evidence of mental and emotional disturbance, and concluded that the singling out of this one defendant for the death penalty “only confirms my conclusion that the death

385. Id. at 1131.
386. Id. at 1134-35.
387. Id. at 1130.
penalty experiment has failed" because it "simply does not accurately and consistently determine which defendants most 'deserve' to die." Given the extent of entrenchment of the majority's position, Blackmun's votes against imposition of capital punishment during the remainder of the 1993 Term could have made little practical difference — but his statement was extremely important as a moral position, perhaps its basic purpose.

The *Callins v. Collins* statement can be said to have been foreshadowed by his *Furman* statement about his personal beliefs, but one must remember that Justice Blackmun, espousing the same judicial self-restraint which exhibited itself in his pronounced tendency to support the government in criminal justice matters, had voted in *Furman* to sustain the death penalty. *Callins* had brought Blackmun full circle — to adoption of the position from which he dissented in *Furman*. What happened to cause that? Put differently, why did his hesitations about his colleagues' actions in capital punishment cases — concerns he had stated before but not to the extent of refusing to apply the death penalty— finally reach the point where he could no longer accede to its further imposition?

Justice Blackmun issued his *Callins v. Collins* statement on February 22, 1994. From what we now know, it appears that he had already indicated to President Clinton that he intended to retire at term's end. Perhaps that decision provided the release that allowed the justice to have his personal views, stated openly more than two decades earlier, trump his views of his role as a judge. Another, longer-range explanation is based on the relationship between concerns over capital punishment, on the one hand, and other, broader criminal justice concerns. When Justice Blackmun had to confront issues such as due process in sentencing or double jeopardy in the capital punishment context, his hesitations about the validity of the death penalty may have sensitized him to the effects of the procedural issues presented and that greater sensitivity may have carried back into his consideration of those procedural questions when they were not linked to capital punishment. Conversely, however, it is possible that growing concern about defendants' rights generally — that is, outside the death penalty context — carried over to the death penalty context, where they fell on ground fertilized by the justice's personal uneasiness about the death penalty. Perhaps both explanations apply, with increasing liberalism in criminal procedure reinforcing an increasingly pro-government stance with respect to capital punishment.

CONCLUSION

This examination of Justice Harry Blackmun's opinions in the field of criminal justice shows a jurist who often deferred to law enforcement officials, particularly prosecutors, in a number of ways. These included broad reading of criminal statutes and reviewing criminal convictions using a "harmless error" approach and reliance on "totality of the circumstances" tests. There was, however, less deference to prison administrators, particularly as to prisoners' remedies. While showing concern that habeas corpus had been overextended, he wished to retain federal habeas for claims of racial discrimination in the criminal justice system and in the capital punishment context.

With respect to issues at the heart of recent criminal procedure controversy, Blackmun clearly rejected extension of either the exclusionary rule or the Miranda doctrine, although he was more supportive of Fifth Amendment rights when they were intertwined with rights under the Fourth and Sixth Amendments. He was generally quite supportive of law enforcement officers' search activities outside the home, particularly warrantless searches of cars and their contents, but was protective of the home and closely-related areas. His position of double jeopardy shifted from an early pro-government stance to a pro-defendant posture in later years, particularly as to civil forfeiture or when the death penalty was implicated. He strongly supported the right to counsel at trial and in comparable proceedings, here too protecting against forfeiture, and was highly critical of the Court's stance on counsel rights in the capital punishment context. While not favorably disposed to defendants' identification and confrontation claims, he was strongly supportive of open pretrial hearings and trials and to not excluding minorities and women from juries.

His personal views in opposition to capital punishment did not initially prevent him as a judge from supporting the states' decisions to adopt various versions of the death penalty. However, his growing concern about the Court's eliminating effective review and its haste in allowing capital punishment to go forward blossomed ultimately into skepticism it could ever be applied fairly and then to refusal to apply it.

The overall picture is of someone who remained more conservative in this area of the law than in others for a long time but whose criminal justice jurisprudence demonstrated not only a variety of dimensions but also significant shifts in approach and tone and thus results — most notably about the death penalty but in other areas of the criminal justice domain as well. Specifying what Justice Blackmun said in his opinions related to capital punishment, as in other areas of criminal procedure, is relatively easy to do.
Specifying causes of the shift, by contrast, leaves us largely in the realm of conjecture. Perhaps the liberalism of his more recent criminal procedure and death penalty rulings was latent and he continued the movement toward a more liberal position that was visible earlier in other areas of the law, but simply took longer for his changed views to affect his criminal procedure jurisprudence. That, however, only begs the question, Why longer there than in other areas of the law? Perhaps the concern Blackmun had long shown for individuals was extended to criminal defendants although they had not earlier been the beneficiary of that concern. Another possibility is that, just as the justice had adopted a self-consciously centrist position to offset his colleagues' increasing conservatism so their increasing conservatism on criminal procedure matters — including, but not limited to, the death penalty and related habeas corpus matters — drove him to attempt to counter them by attempting to apply the law fairly, or to provide a voice of reason to counter what he saw as increasing ideological rigidity. Someone whose criminal justice jurisprudence had such multiple facets and who has exhibited such growth during a tenure on the Court is not likely to be with us again soon, and thus we have much to learn from Justice Harry A. Blackmun.

391. I borrow this phrase from the title of a book: HE SHALL NOT PASS THIS WAY AGAIN: THE LEGACY OF JUSTICE WILLIAM O. DOUGLAS (Stephen L. Wasby 1990), which I took from a phrase Justice Blackmun himself spoke at a luncheon in honor of the 50th anniversary of Justice Douglas's joining the Supreme Court.