THE ARGUMENT FROM CONTINGENT REALITIES AND THE CONSTITUTIONAL CASE AGAINST THE DEATH PENALTY

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I. Justice Blackmun and the Death Penalty

> Perhaps one day this Court will develop procedural rules or verbal formulas that actually will provide consistency, fairness, and reliability in a capital-sentencing scheme. I am not optimistic that such a day will come. I am more optimistic, though, that this Court will eventually conclude that the effort to eliminate arbitrariness while preserving fairness "in the infliction of [death] is so plainly doomed to failure that it -- and the death penalty -- must be abandoned altogether." . . . I may not live to see that day, but I have faith that eventually it will arrive. The path the Court has chosen lessens us all. [Justice Blackmun, dissenting, *Callins v. Collins*, 1994].

Shortly before his retirement, Justice Blackmun, published a dissent from the Supreme Court's denial of a writ of *certiorari* in a Texas death penalty case. This dissent is perhaps doomed to be a mere footnote in capital punishment jurisprudence. I believe, however, the argument prosecuted in this relatively short opinion is profound, and very useful for future death penalty opponents. It deserves further discussion.

Some historical background is relevant. Justice Blackmun's has consistently held that capital punishment is not *per se* unconstitutional. In *Callins v. Collins* he concedes that, "most of the public seems to desire, *and the Constitution appears to permit*, the penalty of death" [my emphasis]. Indeed, one of Blackmun's early opinions was a dissent in the pivotal case of *Furman v. Georgia*. He assures us that he has always held "intellectual, moral, and personal objections to the death penalty." Nevertheless, on the question of constitutionality he felt that a ruling of unconstitutionality was more of an exercise in judicial will than a reasoned interpretation of the Eighth Amendment.

> Our task here, as must so frequently be emphasized and re-emphasized, is to pass upon the constitutionality of legislation that has been enacted and that is challenged. This is the sole task for judges. We should not allow our personal preferences as to the wisdom of legislative or congressional action, or our distaste for such action, to guide our judicial decision in cases such as these. The temptations to cross that policy line are very great. In fact, as today's decision reveals, they are almost irresistible. [Justice Blackmun, dissenting, *Furman v. Georgia*, 1972].

Justice Blackmun's position has the appearance of contradiction. On the one hand he argues that "the Constitution appears to permit, the penalty of death," and that the Court's task "is to pass upon the constitutionality of legislation that has been enacted and that is challenged." On the other, he defends strong moral objections to the death penalty, and by 1994 he concludes: "I feel morally and intellectually obligated simply to concede that the death penalty experiment has failed." Thus, Justice Blackmun has stated for the record that the capital punishment is constitutional, but that it is carried out in such a way that will always make it unconstitutional.

I want to reject two attractive candidates for squaring the apparent contradiction in Justice Blackmun's position, not so much because the are false, as that they are irrelevant for understanding the argument. It is, of course, perfectly consistent to draw a rigid line between a moral stand and a constitutional one. I suspect many judges reconcile a moral revulsion for the death penalty with a firm belief that democratic majorities have a political and legal right to impose this form of punishment, and that the federal Constitution permits it. Justice Blackmun is clearly arguing for a constitutionally stronger position than this. *Callins* asserts not only that capital punishment is morally flawed, but that it "fails to deliver the fair, consistent, and reliable sentences required by the Constitution." The bottom line is that capital punishment is unconstitutional.

Perhaps even more tempting is the sociological approach to constitutional jurisprudence. It is well-known that Justice Blackmun joined the Court as a relative conservative, both from a political and judicial point of view. By the time of his retirement, he was the Court's most liberal justice. Perhaps the change of view on capital punishment is as simple as a change in political and legal philosophy. Justice Blackmun tells us that this is partly true in his reflection on his vote in *Furman*. Although he dissented from the Court's opinion, he now concedes that:

> [t]here is little doubt that *Furman*'s essential holding was correct. Although most of the public seems to desire, and the Constitution appears to permit, the penalty of death, it is surely beyond dispute that if the death penalty cannot be administered consistently and rationally, it cannot be administered at all. [Justice Blackmun, dissenting, *Callins v. Collins*, 1994].

Part of Justice Blackmun's mature position on capital punishment is undoubtedly due to a change of judicial philosophy. He is very candid about his earlier reservations about the Court's failure to respect *stare decisis* in *Furman*. After all, the Court had explicitly rejected the argument that capital punishment was fatally arbitrary and capricious when the constitutional challenge was phrased in terms of the Fourteenth Amendment's Due Process Clause just the year before in *McGautha v. California*. Changing the focus to the Eighth Amendment hardly changes the crucial constitutional issues. I would argue, however, that the key to Blackmun's change of heart in not a political or constitutional reevaluation, but more of an empirical reconsideration. Twenty years experience convince him that:

> despite the efforts of the States and the courts to devise legal formulas and procedural rules . . . the death penalty remains fraught with arbitrariness, discrimination, caprice, and mistake. This is not to say that the problems with the death penalty today are identical to those that were present twenty years ago. Rather, the problems that were pursued down one hole with procedural rules and verbal

> formulas have come to surface somewhere else, just as virulent and pernicious as they were in their original form. Experience has taught us that the constitutional goal of eliminating arbitrariness and discrimination from the administration of death . . . can never be achieved without compromising an equally essential component of fundamental fairness -- individualized sentencing. [Justice Blackmun, dissenting, *Callins v. Collins,* 1994].

The argumentative strategy that Justice Blackmun utilizes in *Callins* is implicit in most of the Court's death penalty jurisprudence. I call it the argument from contingent realities. It concedes that some policy, law, or course of action is normatively acceptable in certain abstract circumstances. It immediately counters, however, with the charge that empirical realities -- human nature, social reality, the state of the law, and the like -- are such that this otherwise permissible option becomes normatively forbidden. The argument from contingent realities has both moral and legal applications.

Our Supreme Court has always held that the death penalty is not *per se* unconstitutional. They have ruled, however, that it is unconstitutional in certain circumstances. Most famously, they determined that all of the then current death penalty statutes were unconstitutional because they failed to protect condemned prisoners from arbitrary and capricious death sentences. They implicitly argued that the Constitution permitted capital punishment in circumstances that were non-arbitrary and free from caprice. They pointed out, however, that then current laws, coupled with social and racial attitudes, guaranteed that there would always be an unacceptable level of arbitrariness and caprice. Thus, contingent realities -- human nature, cultural attitudes, fact about the criminal justice system, and the wording of the death penalty statutes then on the books -- insured that there would always procedural unfairness in trial courts' decisions about who was to live and die. Justice Blackmun simply recycled the original *Furman* argument, though with additional worries about racial and economic discrimination, and the dangers of executing the innocent. The Constitution may allow capital punishment in a much more just, fair, careful world. Our world, sadly, is not just, fair, or careful enough to permit it.

II. Arguments from Basic Principle

> The guarantees of the Fourteenth Amendment extend to all persons. The language is explicit: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." It is settled beyond question that the "rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights are personal rights." The guarantee of equal protection cannot mean one thing when applied one individual and something else when applied to a person of another color. If both are not accorded the same protection, then it is not equal. [Justice Powell, *Regents of the University of California v. Bakke*]

Above is a classic appeal to basic principles. Justice Powell quotes the "explicit" language of the Equal Protection Clause. He reminds us of a basic principle of justice that demands equal treatment regardless of skin color. On the basis of the very abstract moral and constitutional principles he determines that a highly specific and technical means of choosing an entering medical school class at a public university is unconstitutional. As it turned out, of course, four of his colleagues on the Court felt that the decision did not go far enough and that the Affirmative Action program at U. C. Davis also violated Title VI of the Civil Rights Act, while four other colleagues with equal conviction felt that neither the Civil Rights, nor the Equal Protection Clause, prohibited the Affirmative Action Plan utilized by U. C. Davis.

This sort of reaction to what I am calling an argument of basic principle is not that uncommon. The basic principles, moral and constitutional, make for great rhetoric. And in fairness, they undoubtedly reflect genuine

conviction in their authors. The problem is that they often completely fail to change anyone's mind. The liberal dissenters in *Bakke* were well aware of both the language of the Fourteenth Amendment and the moral requirement to treat like cases like. They knew than many conservatives felt that Affirmative Action was both wrong and unconstitutional. They simply disagreed with their more conservative colleagues about the specifics of the U. C. Davis plan. And, indeed, were quite willing to present their own arguments from basic principles for a very different judgment.

Arguments from basic principle seem to fall into two equally unpromising categories. Often, as in the Affirmative Action example, they result in a complete breakdown in normative consensus; they almost seem exercises in preaching to the converted, guaranteed to be unconvincing to opponents. Or, the normative recommendation they endorse turns out to be one over which there is clear social consensus, in which case they are largely unnecessary. Neither of these simple assessments is completely fair. There is value in the careful articulation of moral arguments for important actions and policies, even if they are not particularly controversial. If nothing else, they are educational. Perhaps of more relevance to the capital punishment debate, arguments from basic principle do occasionally succeed in winning converts. Any teacher of introductory ethics can tell you that students in these courses do often change their moral stands on the basis of reading and appreciating moral and constitutional arguments. Though such a change of position on the basis of an argument from basic principle is much rarer once students have become aware of the basic outlines of the debate.

We shall see directly that there are well-known arguments from basic principle against the constitutionality of the death penalty. This author happens to believe that some of these arguments are sound. But, since it is highly unlikely that these arguments will win many converts, I propose to examine a very different constitutional strategy.

III. Arguments from Contingent Realities

> It is virtually self-evident to me now that no combination of procedural rules or substantive regulations can ever save the death penalty from its inherent constitutional deficiencies. The basic question -- does the system accurately and consistently determine which defendants "deserve to die? -- cannot be answered in the affirmative. . . . The problem is that the inevitability of factual, legal and moral error gives us a system that fails to deliver the fair, consistent, and reliable sentences required by the Constitution. [Justice Blackmun, dissenting, *Callins v. Collins*, 1994].

Consider an example of the strategy of arguing from contingent realities in a context that is thankfully far removed from constitutional jurisprudence. The debate concerns the old academic question of romantic and sexual relationships between faculty and students in their courses. There are well-known arguments from basic principle for both sides of this on-going controversy. Those who believe that such relationships are always wrong make points about inherent conflicts of interest, and exploitative power relations. Those who are more tolerant of there being some circumstances where intimate relationships are permitted counter with arguments about consenting adults and personal privacy. As is typical in these cases neither argumentative strategy promises to win many converts. Suppose it were your job, perhaps because of administrative responsibilities, to advocate restraint.

You might begin with a concession. Depending on you assessment of the strength of the above arguments from basic principles this concession may or may not be "merely for the sake of argument." In a more perfect world there would be nothing intrinsically wrong with faculty sleeping with their students. In such a world people would be able to clearly separate their personal lives from their professional lives. They would be objective about the necessary assessment of academic quality within higher education, and they would not allow the grades they give, or the grades they receive, to affect their personal relationship. Related to this, they would

carefully prevent the professor-student power relationship from spilling over to the relationship between lovers. Finally, other students in the class would realize that all of the above compartmentalization had occurred. They would respect both the professor and the student as intelligent adults, professional and objective in their academic roles, and consequently, they would remain confident that the relationship had no bearing on the their own performance in the course.

Merely to state how things would be in such an ideal world, of course, is to draw the obvious contrast to the way things are in the much less than perfect interpersonal, and academic, worlds in which we all find ourselves. The argument from contingent realities against professor-student affairs is concerned, not with how things might be if only we were stronger, wiser, completely objective and professional, but how things are in the world of all to familiar and human colleagues and students. There may be no *inherent* conflict of interest in such relationships, but we are clearly aware that such conflicts will often occur. We may strive for bias free objective grading, but we sadly recognize that affection and lust will color our perceptions. We can acknowledge that the status and power differentials in the academy are artificial and need not transfer to other areas of our lives, but we concede they do nonetheless. And since we recognize these very natural traits in ourselves, our colleagues, and our students, we can easily understand why other students in our classes are suspicious when they learn of the relationships. Their worries about justice in grades, as well as very practical concerns about their own performance, has a kind of legitimacy, even in those rare cases where the professor and student are much more successful in separating their personal and professional lives than is the norm.

Professor-student sexual relationships are not intrinsically wrong -- this is conceded, remember, at least for the sake of argument. But, they are wrong all the same. Contingent realities -- what we know of people, their emotions and attitudes, the nature of academic life -- guarantee that the risk of a conflict of interest, and the completely understandable appearance of a conflict of interest, require academics to forego them as a matter of personal morality, and professional obligation.

I am under no illusion that such an argument will be convincing to everyone. What I am insisting, however, is that these sorts of considerations have a chance of changing someone's mind about an issue in our profession, and perhaps even influencing someone's behavior, even if they believe -- in the abstract -- that one's personal, emotional, and sexual life is no one else's business, and that consenting adults should be allowed to do most anything they damn well please.

IV. Basic Principles and the Unconstitutionality of the Death Penalty

> Principles invariably defend values and often do so without expressly mentioning the values being defined. What is true of principles in general is true of the Eight Amendment and the value of human dignity. The laws and practices forbidden as "cruel and unusual punishments" are punishments that violate certain values. Indeed, such punishments are forbidden *because* they are an affront to these values. . . . The values in question are inseparably connected with human dignity. [Bedau, p. 148]

The constitutional case against capital punishment begins, of course, with the Eighth Amendment. With the consistent, and really quite remarkable exception of Justices Marshall and Brennan, our Supreme Court has always ruled that the death penalty was not, *per se*, cruel and unusual. There is a surprisingly strong argument from basic principle, however, to this stronger conclusion. I begin with this argument, though I have already conceded that it is unlikely to win many converts, both because of its intrinsic interest, and because the argument from contingent realities starts from a different, but compatible, interpretation of the Eighth Amendment.

According to Chief Justice Warren, in a non-capital punishment case, "[t]he basic concept underlying the Eighth Amendment is nothing less than the dignity of man" [*Trop v. Dulles*]. In *Furman v. Georgia*, Justice

Brennan borrowed the important phrasiology -- "Even the vilest criminal remains a being possessed of common human dignity." The Kantian concept of human dignity or worth becomes central in this interpretation of the Eighth Amendment. On such a view all human beings, even the moral "monsters" who often receive death sentences, have an intrinsic moral and legal status simply by their species membership. Basically, this special status endows them with "a non-waivable, nonforfeitable, nonrelinquishable right -- the right to one's status as a moral being, a right that is implied in one's being a possessor of any rights at all" [Morris quoted in Bedau (1992) p. 171].

According to Hugo Bedau, who has done the most thorough job of tracing such an interpretation out, what makes the death penalty inherently cruel and unusual, is not its brutality, not the severity of death, but an unacceptable kind of power relation that violates the principle of human dignity.

> "[T]he heart of cruelty" is "total activity smashing total passivity." Cruelty on this view consists in "subordination, subjection to a superior power whose will becomes the victim's law." Where cruelty reigns -- whether in the hands of a Marquis de Sade or in the galvanic charges used by a modern torturer -- there is a "power-relationship between two parties," one of whom is "active, comparitively powerful," and the other of whom, the victim, is "passive, comparatively powerless." [Bedau, p. 168.]

Such a definition of constitutional cruelty, though insightful, does not by itself show that capital punishment is unacceptable. Without even addressing the interpretive criticisms that death penalty proponents are sure to raise, there remain two serious problems for defenders of the human dignity approach. The first focuses on the concept of unusualness in the Eighth Amendment. In any plausible colloquial sense of the term, capital punishment, thought relatively infrequent, is not at all unusual. Bedau, expanding on Justice Brennan's original strategy, suggests that we see punishment as unusual when two conditions are satisfied.

- The punishment is no more effective in satisfying society's needs than other less sever forms of punishment.
- The punishment is applied is only rarely applied, and when it is there is no clear correlation with the seriousness of the crime.

Condition (i), of course, gets us into the heart of several empirical controversies. Constitutional opponents claim that long prison sentences are equally effective in meeting society's two biggest concerns with criminal punishment -- the deterrence of future murders, and the incapacitation and segregation of current murderers. In addition, though extremely counter-intuitive to the general public, imprisonment is much less expensive.

Condition (ii) implicates the Court's concern with arbitrary and capricious death sentences that was the focus of the *Furman* decision. We shall return to this concern below. But notice that even if there were some much more exact method of ensuring that only the most serious murders received capital punishment, there would still be many more of these murders than any jurisdiction has shown an interest in dealing with through capital trials and execution. This means that death will always be unusual in the sense that many equally serious murders will be punished through much less serious means.

The argument to this point is as follows. Human dignity -- the right to be a bearer of rights -- requires that certain kinds of complete power relationships between individuals and their government are forbidden. What is cruel in capital punishment is that this power relationship is exhibited in its most extreme form. The punishment is unusual because it is both socially unnecessary, and inevitably the exception not the rule.

Proponents of capital punishment may be tempted to counter by pointing out that the empirical realities of life imprisonment exhibit equally unacceptable power relationships between citizens and government. Bedau is willing to concede that from certain perspectives life in prison may be a more sever punishment than death.

This does not undercut his argument, however, for two reasons. First, as horrible as prison is, the state is not completely extinguishing the entity capable of bearing rights. Depriving a person personal privacy, liberty, and autonomy, to say nothing of placing them in a grossly unsafe and unattractive environment, is extremely serious punishment. But that would be what both social safety and justice demand. Convicts would still be allowed certain aspects of human dignity -- the opportunity to grow morally or intellectually, for example. Thus, though very serious, imprisonment is not necessarily as cruel as execution. Furthermore, the Eighth Amendment forbids cruel *and unusual* punishments. Life imprisonment is not unusual in the sense developed here. We do not have a less sever, but equally effective means of achieving deterrence and incapacitation.

There is one final counter to this argument from basic principle that strikes at its heart. Even if this argument is successful at the level of moral and political theory, to have application in a constitutional context, a whole interpretive methodology must be accepted. Proponents of capital punishment can appeal to arguments from original intent with distressing plausibility. The strategy here is not simply an appeal to what the founders may never have considered, abortion on demand, for example. Capital punishment appears to be something they did think about, and explicitly to accommodate in both the Fifth and Fourteenth Amendments. Remember that citizens may "be held to answer for a *capital*, or otherwise infamous crime," when specific procedural safeguards are respected, and that both the State and the federal government may *deprive* a person "of *life*, liberty, or property with[. . .] due process of law."

I do not take this latter argument to be decisive. I am very suspicious of the naive appeal to original intent. I also think that the gambit may be addressed in its own terms. If the earlier human dignity argument is at all plausible, the capital punishment opponent might argue that doing away with capital punishment actually respect the founders' intent. What has changed, according to this strategy, is empirical reality. Society now has a cheaper, equally effective method for deterring future murderers, and incapacitating the current murders, something that was not the case at the beginnings of our nation, or even in the 1860s. What I do concede -- and this is hardly surprising since we are debating at the level of basic priciple -- is that reflective experts on the Constitution of plausible arguments for a very different assessment of the *per se* constitutionality of the death penalty. Consequently, I will move to a constitutional case against capital punishment with an appeal to contingent realities.

V. The Arbitrary and Capricious Nature of Capital Punishment

> Because of the uniqueness of the death penalty, *Furman* held that it could not be imposed under sentencing procedures that created a substantial risk that it would be inflicted in an arbitrary and capricious manner. . . . "[T]he death penalty is exacted with great infrequency even for the most atrocious crimes and . . . there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not." . . . Indeed, the death sentences examined by the Court in *Furman* were "cruel and unusual in the same way that being struck by lightening is cruel and unusual. For, of all the people convicted of [capital crimes], many just as reprehensible as these, the petitioners [in *Furman* were] among a capriciously selected random handful upon which the sentence of death has in fact been imposed. . . . [T]he Eighth and Fourteenth Amendments cannot tolerate the infliction of death under legal systems that permit this unique penalty to be so wantonly and freakishly imposed." [*Gregg v. Georgia,* Justice Stewart (quoting Justices White and Stewart in *Furman*)]

In *Furman v. Georgia* the Court spoke through a *per curiam* opinion, and then five concurring opinions and four dissenting. The five had constitutional worries about capital punishment that ranged from fundamental violations of human dignity, to a moral rejection by the people if they only knew the true facts, to racial discrimination. There was a shared concern, however, focusing on the capricious nature of the punishment.

Our legal culture has some remarkable expectations. We look to experienced trial judges to handout fair punishments of fines or imprisonments, while we require completely inexperienced juries to decide if capital punishment is appropriate. The clear message of *Furman* and *Gregg* was that completely wide open jury discretion led to the arbitrariness and caprice in the imposition of capital punishment. Accordingly, a narrowing of jury discretion was now constitutionally required. There is, however, a conflicting constitutional principle.

The Court worried in 1978 that although guided jury discretion was required in order to eliminate caprice, it could not be so guided that it precluded a jury's consideration of mitigating circumstances. The case before the Court was perfect for this kind of claim. Lockett was only twenty-one, was only an accomplice, and was not at the scene of the murder but outside in the getaway car. Yet, she was sentenced to die under Ohio's post-*Furman* murder statute. Chief Justice Burger recalled the plurality's thoughts in *Woodson v. North Carolina*.

> [I]n capital cases the fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting death. [*Woodson*, quoted in *Lockett v. Ohio*, Chief Justice Burger]

This issue in *Woodson* was a mandatory death penalty, but the Chief Justice reasoned that the same kind of considerations required that juries be allowed to consider a much wider range of facts before exercising their guided discretion.

> [T]he Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death. . . . Given that the imposition of death by public authority is so profoundly different from all other penalties, we cannot avoid the conclusion that an individualized decision is essential in capital cases. [*Lockett*, Chief Justice Burger]

Consider the two constitutional directives.

> (1) [T]he Eighth and Fourteenth Amendments cannot tolerate the infliction of death under legal systems that permit this unique penalty to be so wantonly and freakishly imposed.
>
> (2) [T]he Eighth and Fourteenth Amendments require that the sentencer . . . not be precluded from considering . . . any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.

Principle (1) tells juries that they may not capriciously exercise their discretion in inflict death as they see fit. Principle (2), however, may well force them to do precisely this. How can they possibly consider "any aspect of a defendant's character or record" without exercising unlimited discretion to administer death on a case by case basis? Radin calls this the "dilemma of discretion," and concludes the tension is unavoidable.

> Thus, the dilemma of discretion reflects the strength of both equal treatment and individual desert as moral aspects of the respect for persons that must delineate the bounds of acceptable punishment. We must be sure we treat like cases alike; we must be sure we consider each case as that of a unique individual. We cannot

> simultaneously maximize the extent to which we satisfy both of these moral requirements. [Radin, p. 141]

It would appear that there are three distinct responses to the dilemma of discretion. One is candidly urged by Justice Scalia.

> Though Justice Blackmun joins those of us who have acknowledged the incompatibility of the Court's Furman and Lockett-Eddings lines of jurisprudence . . . he unfortunately draws the wrong conclusion from the acknowledgment. . . . Surely a different conclusion commands itself to wit, that at least one of these judicially announced irreconcilable commands which cause the Constitution to prohibit what its text explicitly permits must be wrong. [*Callins*, Justice Scalia, concurring]

Scalia's argument assumes that the prohibition on jury discretion, and the requirement for juries to consider any mitigating factor, are both to some degree artificial constructions of the Court, without clear textural support. He does not suggest which principle would need to be sacrificed, though I suspect he would like to do away with the *Lockett-Eddings* horn of the dilemma.

Arguments from contingent realities give rise to bo the the *Furman* and *Lockett-Eddings* lines of jurisprudence. They are responses to the problem of administering justice in the real world where imperfect, overworked, biased, and all too finite human beings must make decisions about who is to life and who is to die.

Justice Blackmun concludes that neither of the above principles can be sacrificed. This leaves two responses. One can admit a certain tension between abstract principles, or between principles and practical concerns, and try to resolve these tensions wisely on a case by case basis. The Court would clearly like to believe that a "balancing" of the principles of limited jury discretion and unlimited jury consideration of mitigating circumstances is, both in principle and in practice, possible. Justice Blackmun argues that it is not possible. He finds an articulate ally in a most unexpected place. Then Justice Rehnquist in his dissent in *Lockett* accurately predicted the dilemma of discretion.

> The theme of [*Lockett*] far from supporting those views expressed in *Furman* . . . tends to undercut those views. If a defendant as a matter of constitutional law is permitted to offer as evidence in the sentencing hearing any fact . . . the new constitutional doctrine will not eliminate arbitrariness or freakishness in the imposition of sentences, but will codify and institutionalize it. . . . [I]t will not guide sentencing discretion but will totally unleash it. [*Lockett*, Justice Rehnquist, dissenting]

The tension at the heart of the dilemma of discretion is itself a practical tension. There is no logical contradiction between guiding juries to exercise limited and wise discretion, and allowing them to consider mitigating circumstances. Justice Blackmun presents a kind of empirical argument that the prohibited capriciousness of the death penalty still remains. He tells us of twenty years of personal and professional struggle "to develop procedural and substantive rules that would lend more than the appearance of fairness to the death penalty." He now concludes that "the death penalty experiment has failed."

Since, as a practical matter, unlimited jury discretion leads to arbitrariness and caprice, jury discretion must be limited. Since, again as a practical matter, non-omniscient juries need to hear about mitigating circumstances in order to issue just capital sentences, jury discretion must be reintroduced to allow for the consideration of mitigating circumstances. And finally, since the dilemma of discretion does not admit to procedural or

appellate resolution, Justice Blackmun draws the obvious conclusion.

> [T]he proper course when faced with irreconcilable constitutional commands is not to ignore one or the other, nor to pretend that the dilemma does not exist, but to admit the futility of the effort to harmonize them. This means accepting the fact that the death penalty cannot be administered in accord with our Constitution. [*Callins*, Justice Blackmun, dissenting]

The dilemma of discretion, coupled with the most of the same facts about the criminal justice system and human nature that led to the issues in *Furman* in the first place, virtually guarantee that the first of the problems in our argument from contingent realities still exists. The death penalty is still administered in an arbitrary and capricious manner.

VI. A Different Source of Caprice

> While the death penalty is the subject of a vociferous national debate, it really boils down to a series of decisions made by local elected officials. Once the death penalty is law, "the D.A. control everything" . . . Prosecutorial discretion insures that the lives of identical murderers committing identical crimes can be valued completely differently on the opposite sides of a county line. [Rosenberg, p. 321]

The line of jurisprudence from *McGautha* to *Callins* makes the problem appear to be one of reigning in arbitrary and capricious jury sentences. This was a problem, continues to be a problem, and the dilemma of discretion may well insure that it will always be a problem. In fairness to the post-*Furman* capital statutes, as well as judicially mandated procedural changes, the problem of jury caprice has appreciably lessened. In fact, however, actions of juries and trial judges are only one source of arbitrary administration of the death penalty, and I would argue, far from the most serious. The real problem both before and after *Furman* is the decisions of other legal officials, particularly District Attorneys, about who and is not to be tried in capital cases.

Hugo Bedau's masterful new edition of *The Death Penalty in America* contains a non-scholarly piece of reporting that implicitly prosecutes a devastating jurisprudential argument. Tina Rosenberg's, "The Deadliest D.A.," chronicles the actions of the Philadelphia District Attorney's office. A very aggressive chief prosecutor who goes for the death penalty in most cases that meet the post-*Furman* guidelines of Pennsylvania's capital murder statute is the focus of the article. Her office pursues this strategy for at least three different reasons. The first reflects both the personal morality, and the law enforcement philosophy of Lynne Abraham.

> When it comes to the death penalty, I'm passionate. I truly believe it is manifestly correct. . . . I don't care how many millions it costs, given the billions wasted every year in large cities. Please don't tell me about cost when talking about the rights of the victim. It's of no interest to me. It's not even a consideration. Whatever it costs is worth it. . . . I've looked at all those sentenced to be executed. No one will ever shed a tear. Prison is too good for them. They don't deserve to live. I represent the victim and the families. I don't care about killers. [Rosenberg, p. 320-1]

In addition, pursuing as a capital case has strategic advantages. The high stakes make it much more likely that the state can plea bargain, secure a conviction and a long prison sentence, without the time or expense of a lengthy trial. If the case does go to trial, the state has some distinct advantages, primarily jury selection. The state receives twenty peremptory challenges, not the standard seven. Finally, to be so adamantly pro-capital punishment is plain and simple good politics in Philadelphia.

Contrast Lynne Abraham with Pittsburgh District Attorney, Robert Colville. The two are charged with administering the exact same capital statutes in the state's two largest metropolitan areas. As legally and demographically similar as they Philadelphia and Pittsburgh are, the attitudes of their District Attorneys could hardly be more different.

> I could live with [the death penalty] or without it. . . . I never had a lot of thought that the ultimate revenge was necessary. The death penalty can't cure everything. . . . A lot of times Philadelphia does it to get a plea to life and a death-qualified jury . . . That's never happened here. When I say I'm going to take your life, I must deeply believe that you should be executed. I'm not going to bargain with you. We will not use it for prosecutorial advantage. [Rosenberg, p. 327-8]

I take it that both Ms. Abraham and Mr. Colville are both dedicated public servants, and decent, thoughtful, and ethical individuals. The issues is not whether is not whether the District Attorney's office in one of the jurisdictions is handling capital cases in the "right" way, while the other has got it "wrong." The point is that when such different personal perspectives, as well as departmental philosophies, are the key ingredients in decisions about who lives, and who dies, the problem of arbitrary and capricious administration is right back at the heart of the death penalty debate. And, the problem here, though undoubtedly mitigated by the post-*Furman* changes, clearly survives in the contemporary capital punishment statutes and procedures.

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