

The Death Penalty—Justice Blackmun's Declaration

On February 22, 1994, U.S. Supreme Court Justice Harry A. Blackmun used the Court's denial of an appeal by Bruce Edwin Callins, a Texas death row inmate, to explain why he would forever be opposed to the death penalty. Reproduced below are excerpts from his dissenting opinion in that case (*Callins v. Collins*, 114 S.Ct. 1127, 1128-38 [1994]). Shortly after the *Callins* case was decided, Justice Blackmun retired from the court, having served for 24 years. Three years later, on May 21, 1997, Edwin Callins was put to death by lethal injection at the Texas state prison at Huntsville. The following article contains a contrasting opinion provided by Justice Antonin Scalia, writing for the Court's majority.

From this day forward, I no longer shall tinker with the machinery of death. For more than 20 years I have endeavored—indeed, I have struggled—along with a majority of this Court, to develop procedural and substantive rules that would lend more than the mere appearance of fairness to the death penalty endeavor. Rather than continue to coddle the Court's delusion that the desired level of fairness has been achieved and the need for regulation eviscerated, I feel morally and intellectually obligated simply to concede that the death penalty experiment has failed. It is virtually self-evident to me now that no combination of procedural rules or substantive regulations ever can save the death penalty from its inherent constitutional deficiencies. The basic question—does the system accurately and consistently determine which defendants "deserve" to die?—cannot be answered in the affirmative. It is not simply that this Court has allowed vague aggravating circumstances to be employed, see, for example, *Arave v. Creech*, (1993), relevant mitigating evidence to be disregarded, see, for example, *Johnson v. Texas*, (1993), and vital judicial review to be blocked, see, for example, *Coleman v. Thompson*, (1991). The problem is that the inevitability of factual, legal, and moral error gives us a system that we know must wrongly kill some defendants, a system that fails to deliver the fair, consistent, and reliable sentences of death required by the Constitution.

It is the decision to sentence a defendant to death—not merely the decision to make a defendant eligible for death—that may not be arbitrary. While one might hope that providing the sentencer with as much relevant mitigating evidence as possible will lead to more rational and consistent sentences, experience has taught otherwise. 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 passion—that it inevitably defies the rationality and consistency required by the Constitution.

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 eventually will conclude that the effort to eliminate arbitrariness while preserving fairness "in the infliction of [death] is so plainly doomed to failure that it—and the death penalty—must be abandoned altogether." *Godfrey v. Georgia*, 446 U.S. 420, 442 (1980) (Marshall, J., concurring in the judgment). 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. I dissent.

The Death Penalty—Justice Scalia's Rebuttal

Justice Blackmun dissented from the denial of *certiorari* in this case [*Callins v. Collins*], with a statement explaining why the death penalty "as currently administered," is contrary to the Constitution of the United States. That explanation often refers to "intellectual, moral, and personal" perceptions, but never to the text and tradition of the Constitution. It is the latter rather than the former that ought to control. The Fifth Amendment provides that "[n]o person shall be held to answer for a capital...crime, unless on a presentment or indictment of a Grand Jury,...nor be deprived of life...without due process of law." This clearly permits the death penalty to be imposed, and establishes beyond doubt that the death penalty is not one of the "cruel and unusual punishments" prohibited by the Eighth Amendment.

Convictions in opposition to the death penalty are often passionate and deeply held. That would be no excuse for reading them into a Constitution that does not contain them, even if they represented the convictions of a majority of Americans. Much less is there any excuse for using that course to thrust a minority's views upon the people. He chooses, as the case in which to make that statement, one of the less brutal of the murders that regularly come before us—the murder of a man ripped by a bullet suddenly and unexpectedly, with no opportunity to prepare himself and his affairs, and left to bleed to death on the floor of a tavern. The death-by-injection which Justice Blackmun describes looks pretty desirable next to that. It looks even better next to some of the other cases currently before us which Justice Blackmun did not select as the vehicle for his announcement that the death penalty is always unconstitutional—for example, the case of the 11-year-old girl raped by four men and then killed by stuffing her panties down her throat. See *McCollum v. North Carolina*, No. 93-7200, cert. now pending before the Court. How enviable a quiet death by lethal injection compared with that! If the people conclude that such more brutal deaths may be deterred by capital punishment; indeed, if they merely conclude that justice requires such brutal deaths to be avenged by capital punishment; the creation of false, untextual, and unhistorical contradictions within "the Court's Eighth Amendment jurisprudence" should not prevent them.