Denver Law Review

Volume 82
Issue 4 *Symposium - Children and the Courts: Is Our System Truly Just?*

Article 6

January 2005

# Roper v. Simmons: Insights from the Perspective of Justice Blackmun's Former Law Clerk

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# *ROPER V. SIMMONS*: INSIGHTS FROM THE PERSPECTIVE OF JUSTICE BLACKMUN'S FORMER LAW CLERK

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Editor's Note: The following is a transcript of Mr. Lazarus's presentation at the University of Denver Sturm College of Law on March 4, 2005.

Good morning, and thanks so much for having me out here. Special thanks to Heather, who contacted me, I guess last fall, about coming out when I did a presentation at a Children's Rights conference, and to everyone here who has made this trip so easy. It's really been a pleasure. I'm going to have another opportunity a little later this morning to do Q&A with Mitchel Brim about the *Roper* case.[1] So I'm going to save some of my comments about the specifics of that case for a little bit later on in the morning. I thought what I would try and do first is talk more generally about how the Supreme Court thinks about capital cases; how it decides cases, what drives the Supreme Court's decision-making and putting *Roper v. Simmons* into a little bit broader context.

I wasn't in the courtroom the other day when the Justices handed down *Roper v. Simmons*, but I have talked to some people who were in the courtroom. As you may know, when the Court issues a decision, it just doesn't publish its decision and hand [it] out at the press office or put [it] up on the website. They actually sit up there on the bench and the presiding Justice, it's usually Chief Justice Rehnquist, but these days he's not around, so it's Justice Stevens, he calls the case number and says that they're going to announce the decision, and then he turns it over to the author of the decision, in this case, Kennedy. And the author of the decision gives a two or three minute synopsis of the decision and then they move onto the next case that they are announcing.

This week, that's not what happened. Justice Kennedy did give his two or three-minute synopsis, but then, Justice Scalia, who was in the dissent in this case—as those of you who follow it know, it was a 5-4 decision.[2] There were two dissents.[3] Justice Scalia wrote for himself, the Chief Justice and Justice Thomas.[4] And Justice Scalia read signifi-

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† Partner, Akin Gump Strauss Hauer & Feld LLP. The following is a transcript of remarks made on March 4, 2005 at the Denver University Law Review Symposium, "Children and the Courts: Is Our System Truly Just?"

1. 125 S. Ct. 1183 (2005).
2. *Id.*
3. *See id.* at 1206 and 1217.
4. *See id.* at 1217.

cant portions of his dissent from the bench. That happens about, oh, perhaps four or five times a term out of the eighty cases that they hand down. And it happens when one of the dissenting Justices is so deeply upset about the majority opinion—thinks that this case is so outrageous in the way it was decided—that he or she feels compelled to express personal outrage by sitting up there on the bench and basically railing against the majority opinion. And that's what Justice Scalia did this week.

What that's an indication of is, as much as Justice Scalia saw this as a bad decision—the dissenters always think that the majority opinion is a bad decision—he thinks it's bad in a really profound and broad way. It's not just about the juvenile death penalty. This case to him is about something much broader. And so, I thought I'd try and talk about why he thinks that and how you get around to framing the broader issues that were at stake in *Roper*.

But first I thought I'd start by talking a little bit about judicial decision-making at the Court. I don't know if you all are familiar with legal realism, but it's the philosophy that was developed at Yale Law School that takes a rather pragmatic view of how judges decide cases—one humorist once described legal realism as reducing how judges decide cases based on what they had for breakfast that day.[5] Now, I'm not willing to go that far, but I have my own sort of realist theory of how Justices decide cases, and I'm going to call it my theory of interior decoration.

My theory of interior decoration is that if you could just go into a Justice's office, you [could] discern by their choice in interior decoration pretty much what you need to know about that person's jurisprudence. And it really will allow you to predict an awful lot about how they would go about deciding cases and what results they would reach.

So, I thought I'd take you into Justice Blackmun's chambers, just for a few minutes, and describe some of his interior decoration and how you could really sense his jurisprudence and his method of deciding cases. Then I'll talk about a few of the other Justices, [and] then talk a little bit about a death penalty case—not a juvenile death penalty case, but another death penalty case—and then wrap it up by coming back to

5. This approach is often caricatured as the "what the judge ate for breakfast" approach. Charles Yablon, who has tried to trace the origins of the "what they ate for breakfast" proposition, argued that it may in fact have been erroneously derived from a statement by Roscoe Pound. Yablon showed that in 1905, Pound contrasted the western notion of a "rule of law" with law making by an "oriental cadi administering justice at the city gate by the light of nature tempered by the state of his digestion . . . ." Charles M. Yablon, *Justifying the Judge's Hunch: An Essay on Discretion*, 41 HASTINGS L.J. 231, 236 n.16 (1990) (quoting Roscoe Pound, *The Decadence of Equity*, 5 COLUM. L. REV. 20, 21 (1905)). In the 1930s, Jerome Frank referred to Pound's comment, arguing that "no more than in France, Germany, England or the United States, is the judge in Mohammedan countries supposed to decide cases according to his passing whim or the temporary state of his digestion." *Id.* (quoting Jerome Frank, *Are Judges Human?*, 80 U. PA. L. REV. 17, 18 (1931)).

this question of what are the big issues that these cases raise when you think about how the individual Justices, based on what they had on their walls, decide cases.

Now, when you walked into Justice Blackmun's chambers, the first thing you would notice is that on all the bookshelves there would be these orange Wheaties boxes. They were not the most important things in the room, but it did tip you off that he was a huge Minnesota Twins fan, because he had Wheaties boxes from all the Twins' championship seasons. Then, on one wall, he had a life-sized baseball bat hanging there. Underneath there was a small brass plaque that said, "I shall never forgive myself." I remember the first time I was in his office, I asked him about that plaque and the baseball bat, and he told me the story behind it. He wrote this opinion that never gets read in law school anymore, but it's called *Flood v. Kuhn*.[6] It was an anti-trust opinion involving baseball.

Curt Flood was an outfielder for the St. Louis Cardinals, a very well known player. Back then, this is before the age of free agency—I don't think any of you were born before the age of free agency—but it used to be that owners could control where players played. They didn't have the ability to move around teams the way they do today. And so, Curt Flood, who wanted to be able to move and make more money, challenged what was called the "baseball reserve system." He brought this lawsuit claiming that the reserve system was a violation of the Federal Antitrust laws; that teams were colluding with each other.[7] Justice Blackmun wrote the majority opinion in that case, *Flood v. Kuhn*, and if you look it up in the U.S. Reports, you'll see it's a very, very unusual opinion. The first section of the opinion has absolutely nothing to do with the law whatsoever.[8] It is a tribute to the game of baseball.[9] Justice Blackmun adored the game of baseball and he writes this flowery thing about America's pastime, and he puts in a list of his hundred favorite players of all time.[10] There are people on there—obviously Babe Ruth, that type of thing—but there are also really incredibly obscure players.[11] There was one athlete on the Court at that time, Byron "Whizzer" White. Whizzer White was one of the greatest football players who ever lived, before he got into law. And he was so disgusted by the fact that Justice Blackmun has written this absurd trivia to the game of baseball that he actually refused to sign the opinion for that reason.[12]

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6. 407 U.S. 258 (1972).
7. *See id.* at 259.
8. *See id.* at 261-64.
9. *See id.*
10. *See id.* at 262-63.
11. *See id.*
12. *See id.* at 285 ("Mr. Justice White joins in the judgment of the Court, and in all but Part I of the Court's opinion.").

But, in any event, there it was, and Blackmun publishes his opinion and the next day he gets a phone call from his best friend up in Minnesota. "Hello, Harry?" "Yeah. How you doing?" "Read your opinion in *Flood v. Kuhn*. Great job. I loved that whole thing about the tribute to the game of baseball. Only one problem—where's Mel Ott?" Mel Ott was right fielder for the New York Giants, he had five hundred and eleven home runs, and he's in the Hall of Fame.[13] "What do you mean? I love Mel Ott. He's right there on the list." Blackmun's friend said, "Harry, he's not there."

Blackmun goes to his copy of the opinion, flips through it and sure enough, he's left Mel Ott off. To which he said the famous words, "I shall never forgive myself." And the baseball bat on his wall is the last Louisville Slugger-Mel Ott model that was ever made, and his clerks gave it to him.

But what's at least arguably interesting or important about this Mel Ott story is, he was actually serious when he said he would never forgive himself. Justice Blackmun was the most compulsive, detail-oriented—some might say anal—human being I have ever run across. And being a lawyer, I've run across a lot of compulsive-anal people. And it had a deep, deep effect on his jurisprudence. I would even go so far as to say it had an especially deep effect on his death penalty jurisprudence.

Now, why is that? Well, Justice Blackmun read every petition that came in to the Supreme Court of the United States. These capital cases come in with tremendous frequency. He read all the papers in those cases. And he started out as a Justice in 1972 in the case of *Furman v. Georgia*.[14] He wrote a dissent in *Furman v. Georgia*—which is an anti-death penalty decision—saying, "I don't much care for capital punishment, but I can't find anything in the Constitution that suggests that it's unconstitutional."[15] That's where he started in 1972, his second year on the Court. Before he left the Court, he'd become a death penalty abolitionist. And one of the main things that drove him in the direction of abolition was reading the cases over and over and over again, and you're struck really—and I'll talk about a little more later—[by] two things in these cases. One is the horrible crimes that are involved. But the other is how frequently the system of justice seems to have broken down under the pressure of death penalty cases. And it's the meticulousness with which he went about his job that I think drove Justice Blackmun through the years, by experience, towards being an abolitionist.

Another thing that was in his office that was of particular note, he had behind his desk the swords of his grandfathers. Both of them had

13. *See* "Batting" spreadsheet, *at* http://www.baseball-reference.com/o/ottme01.shtml (last visited June 16, 2005).

14. 408 U.S. 238 (1972).

15. *See id.* at 405.

fought for the Union in the Civil War. And in another corner, he had a shrine to Abraham Lincoln—a silhouette, a bust, some framed quotations.

What did that all mean for Justice Blackmun? Justice Blackmun was someone for whom the struggle of Abraham Lincoln, the struggle to save the Union, the decision to emancipate the slaves was bred into his bones. He was a northern Lincoln Republican. A very different kind of Republican than we think of in the modern Republican Party. He was a Lincoln Republican from the North. And that had real consequences for his jurisprudence.

Did any of you ever read the novel, *Killer Angels*?[16] *Killer Angels* is an incredible Civil War novel about the Battle of Gettysburg, and one of the heroes of that book is a man named Joshua Chamberlain. He was a real-life figure who led the Twentieth Maine at Little Round Top, the area in which, basically, the most vicious fighting occurred. The Union position held and it turned the tide in the Civil War. When Blackmun talked about *Killer Angels*, as I remember doing with him one morning at breakfast, he literally got tears in his eyes. I mean, that's how much that was present history for him.

So what does that mean jurisprudentially? People often ask that question. How did Blackmun get nominated as this rock-solid conservative by Nixon in 1971, and turn out to be this flaming lib by the time he gets off the Court? And the answer in part, [in] a significant part I would say, are those swords behind his desk and that shrine to Lincoln. Because as this Court moved into the areas of states' rights, nothing could be more antithetical to everything that Justice Blackmun believed in than the notion of states' rights.

States' rights was the philosophical conception of the Constitution over which the Civil War was fought and against which the Union fought. Lincoln was for the Union and that's what Justice Blackmun was for. And so, on this Court, as issues of states rights, [and] issues of remedying the history of discrimination—questions like affirmative action or other kinds of anti-discrimination measures—came before the Court, Justice Blackmun was always going to be on the liberal side of those issues because of his—what I'll call his—Civil War heritage.

And if you want to know why Justice Souter, again nominated as a conservative, has emerged as a liberal, or probably the second-most liberal Justice on this current Court, the answer is exactly the same. Souter's great-great-grandfather nominated Abraham Lincoln in 1860; he had relatives who worked on the Underground Railroad. He is a New

16. MICHAEL SHAARA, THE KILLER ANGELS: A NOVEL OF THE CIVIL WAR (1993).

Hampshire Lincoln Republican. I've never been in Souter's chambers, but I'll bet you there's Civil War stuff up there in spades.

What else was in Blackmun's chambers? He had on one bookshelf a little Plexiglas cube, and inside that cube there was a swatch of fabric. And in the swatch of fabric, there was a hole in that piece of fabric and he had it framed there. Over the time I worked for him, I found out that that was a swatch of fabric from his favorite reading chair that he had in his apartment and one day somebody shot a bullet through his window and hit that chair. Nobody was in it, nobody was hurt in his apartment, but it's a kind of morbid souvenir. I'm not a mind reader and I actually never asked Blackmun why he had that thing there, but I'm pretty sure I know why. Which is, everywhere Blackmun went after January 22, 1973, when he wrote *Roe v. Wade*,[17] he was followed by controversy and protests. He used to get these letters every week. He read every one of them, too, from these people who would write in. Very strange letters. "Dear Justice Blackmun. You are worse than Hitler. Love, Bill."

But, this was a shadow that he carried around with himself. And I think for Justice Blackmun, whose reaction to all this was complicated, the swatch of fabric was a reminder of how Supreme Court decisions do affect people's lives in a very, very profound way. The lives of women who wanted the right to choose; and no less, the lives of those who believed sincerely that to do so was murder. And he was always humble in his approach to his job as a consequence of that sense of just how great the Court's power really is and was. And I think that that is something that deeply, deeply shaped Justice Blackmun's jurisprudence. He was the most empathetic Justice probably in the history of the Supreme Court. The guy who wrote famous weird line[s] in his opinion[s], like "Poor Joshua!" which is a famous line from a case involving the abuse of a child.[18] Not the usual fare for Supreme Court Justices or their opinions. But that's something you could tell if you sort of had a magnifying glass and went around his office and looked at all the stuff he had in there.

And it doesn't only hold true for Justice Blackmun. If you go into the offices of say, Tony Kennedy and Sandra Day O'Connor and you look at their offices and you ask yourself, well, what does their decor tell you? You'll see a very different type of motif in their offices than you'll see in Blackmun's office or Souter's office. You'll see a Western motif. O'Connor's office is filled with Navajo rugs and things like that, things that describe her Arizona heritage. In Kennedy's chambers he has a Remington statue—these are Westerners. They are not caught up in Civil War issues. They have an individualistic view of things. And just to take two positions of theirs that seemed politically or ideologically in

17. 410 U.S. 113 (1973).

18. DeShaney v. Winnebago County Dept. of Social Services, 489 U.S. 189, 213 (1989) (Blackmun, J., dissenting).

conflict, but really aren't, these are two Justices who have voted with deep skepticism toward affirmative action but with considerable sympathy towards gay rights.

What unites those two positions? Well, I think their Western approach unites those two positions. They don't believe in groupthink. They want individuals to be taken as individuals, albeit Justice Kennedy didn't exactly stay true to that in the juvenile death penalty cases, as I'm sure Mitchel [Brim] will say. But, when it comes to affirmative action, they don't like groupthink. When it comes to what they view basically as bigotry towards people based on their group identity, meaning gays, they don't like that either. And I think that's kind of a Western or frontier approach to jurisprudence that you can see very much from the decor in their office.

Why do I go through this riff on interior decoration? I do it because it's important to keep in mind that the Court is not a monolith. It's nine individuals who come to the Court with passions and prejudices and inclinations that are just their own. And at the end of the day, especially in a Court that divides as closely as this one, that matters, because one person's inclination can turn the tide between having the juvenile death penalty and not having the juvenile death penalty. Having a right to choose and not having a right to choose. Having affirmative action, not having affirmative action. A whole host of issues, and they are often driven by factors that you don't really learn in the law books.

So, I thought I'd talk now, specifically about the death penalty for a little bit. Not about the juvenile death penalty until the end. I'm going to talk about a case that came to the Court in the late 1980s called *Texas v. Tompkins*,[19] and it's a case you won't find—you won't find a published decision on the case. It you go look it up you'll see there's just a little squib. It says that the judgment of the, I guess it's the Court of Criminal Appeals of Texas is affirmed by an equally divided vote.[20] That's what happens when there's a tie at the Supreme Court. There's no opinion when you have a tie at the Supreme Court. They just issue an affirmance to the lower court with that one sentence. But a lot happened in *Texas v. Tompkins* before they got to their tie, and I thought I'd talk a little bit about that as a way of describing what was really at stake in *Roper v. Simmons* and why Justice Scalia got so really, really mad when it didn't come out his way.

Phillip Tompkins was a borderline mentally retarded man living in Texas, in Houston.[21] He was driving around late at night and he decided

19. 490 U.S. 754 (1989).

20. *See id.*

21. *See* Tompkins v. State, 774 S.W.2d 195, 213 (Tex. Crim. App., 1987) (psychologist's report stated that "Matthews . . . requested that she give him 'specific kinds of help' that related to his inability to sleep and eat, and his problems with depression.").

he wanted to buy his girlfriend dinner.[22] He didn't have any money so he came up with a scheme to get some money. He was going to rear-end a car driven by somebody, and when that person stopped, he was going to take out his knife and hold the person up at knifepoint and get money.

So, he executed his scheme. He rear-ends the car of a young woman named Mary Berry, and he takes out his knife, demands her money and she doesn't have it. She just has an ATM card. So, he forces her into the car and they drive around Houston for a while, while she tries to explain to Phillip Tompkins how to use her ATM card. This was the 1980s—it was not so common as it is now, and his mental faculties were diminished. But, he finally gets the drift of it and gets her password. He takes her out by the Astrodome and ties her to a tree. Then, he stuffs a bed sheet in her mouth. Off he goes to the bank and he takes money out of her account, and we know that because he's caught on tape by the ATM camera that's always there. He's also seen by a security guard at two in the morning while he's doing this. While he's doing this, Mary Berry very painfully choked to death on the gag that he had shoved in her mouth. He's caught and convicted of capital murder, which is intentional murder during the course of another felony, being robbery, and he's sentenced to death.[23]

For a lot of us at the Court, there was something chilling about this case. Not because it was one of the worst crimes we saw. Sad to say, it wasn't one of the worst capital cases we saw. Those cases often involve children, torture, and all kinds of other incredible behavior. But it was chilling because we all worked until midnight when, at the Court, they used to turn the computers off to force us to go home, and we would walk to our cars in the Supreme Court parking lot and drive home by ourselves. Especially the women clerks who worked on that case just had one of those "there but for the Grace of God go I" feelings about it [that] kept them up at night. The other thing that was almost typical of a capital case, just the way terrible crimes are, was that here was another case where something seemed to have gone very, very wrong in the administration of justice.

By the time the case got to the Supreme Court there were two issues involved. One of the issues arose out of a Supreme Court precedent called *Beck v. Alabama*.[24] In Alabama at one time there was a rule in capital cases—have you all had criminal law? Yes? Okay, so this will be familiar territory to all. In Alabama there was a rule in capital cases that no lesser-included offense instructions would be given.[25] The jury

22. For facts *see Tompkins*, 774 S.W.2d at 210-11; Brief for Petitioner at 2-4, Texas v. Tompkins, 490 U.S. 754 (1989); Respondents Brief at 3-6, Texas v. Tompkins, 490 U.S. 754 (1989).

23. *See Tompkins*, 774 S.W.2d at 198.

24. 447 U.S. 625 (1980).

25. Under the Alabama death penalty statute the trial judge was prohibited from giving the jury the option of convicting the defendant of a lesser-included offense; instead, the jury was to

would only be given a choice between conviction on capital murder or acquittal.[26] Nothing in between. And the Supreme Court had been asked to decide: Is that Constitutional? And the Supreme Court had decided that, no, that's not Constitutional.[27] The reason it decided that is, look, what if the jury thinks that the defendant is guilty of a really terrible crime, but not capital murder? Capital murder is reserved for an unusual set—a narrow set of cases. So what if they think—terrible crime, murder in the heat of passion or something, but not capital murder? And the choice is between convicting on capital murder or letting somebody who has done something really awful go completely free. Juries are going to have too much of a tendency to convict on capital murder, so you can't do that.[28] You must give at least one lesser-included offense instruction.[29]

So what was the question in the Phillip Tompkins case? Phil Tompkins' defense at trial was: I didn't mean to kill Mary Berry.[30] He copped to the incident, but he said he didn't mean to do it.[31] And his lawyer asked the judge to give two lesser-included offense instructions as a consequence of that.[32] To give an instruction on reckless murder and on negligent homicide, and the judge refused.[33] The judge said, "I'll give you a lesser included offense instruction, but not those two.[34] I'll give you the lesser included offense instruction of intentional murder, not in the course of a robbery."[35]

Now, that was not the aspect of the case that was in doubt. He'd been caught on videotape and seen by a security guard. So the question that came to the Supreme Court was: Is it okay under *Beck v. Alabama* to have any lesser included offense instruction, or does it have to be a lesser included offense instruction that actually meets the element of the case that is in question? And the Texas Appellate Court said—no problem.[36] The way we look at it is, he was too reckless to be negligent and too negligent to be reckless, and the trial court was right to not give these

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either convict the defendant of the capital crime, in which case it must impose the death penalty, or acquit him. ALA. CODE § 13-11-2(b)(1975).

26. *See id.*

27. *See generally* Beck v. Alabama, 447 U.S. 625 (1980).

28. *See Beck*, 447 U.S. at 637 ("The failure to give the jury the 'third option' of convicting on a lesser included offense would seem inevitably to enhance the risk of an unwarranted conviction.").

29. *See id.*

30. *See* Appellate Petition, Motion and Filing at 4, Texas v. Tompkins, 490 U.S. 754 (1989) ("Petitioner argued that instructions on the lesser offenses were warranted because the jury could infer from the evidence that the petitioner had not *intended* to kill the deceased when he left her bound, gagged, and tied to a tree.").

31. *See id.*

32. *See id.* ("Petitioner requested that the jury be instructed on the lesser included offenses of felony murder, involuntary manslaughter and criminally negligent homicide.").

33. *See id.*

34. *See Tompkins*, 774 S.W.2d at 198.

35. *See id.*

36. *See id.* at 213.

instructions.[37] I'm not sure I understand what that means, but that's how it came up to the United States Supreme Court.

The second issue in the case had to do with a case called *Batson v. Kentucky*.[38] It's probably a case that you all are familiar with in criminal law. That's the case which says that prosecutors cannot use their peremptory challenges to strike people from the jury on the basis of their race.[39] Now, of course, that's been expanded—it applies to civil cases and applies to both the prosecutor and defense, it applies to gender—it's a much broader rule. Back then, it was prosecutors can't use peremptory challenges, which are those challenges that you don't need to give a reason for, to eliminate people on the basis of race.

The way a *Batson* challenge works is that the defendant usually tries to make a statistical showing that there's a pattern of striking minority jurors, and then the prosecutor must come up with case-related, race-neutral explanations. Then the judge's job is to determine whether those explanations are real or whether they are a pretext for race discrimination.

So, in the Phillip Tompkins case, there were thirteen blacks and Phil Tompkins was black.[40] There were thirteen blacks on the jury panel.[41] The prosecutor used challenges for cause to eliminate eight, and then used her peremptory challenges to eliminate the other five.[42] So, Tompkins was tried in front of an all-white jury.[43] [Tompkins] brought the *Batson* challenge, [and] the prosecutor came up with explanations for what she had done.[44] But some of those explanations didn't ring true.[45] She said, for example, one juror had been eliminated because he was illiterate.[46] Well, it turned out he wasn't illiterate.[47] In another instance, she said that she'd eliminated someone because he was a postal worker.[48] Now, what that has to do with the price of eggs in China, who knows? But she said she had had bad luck with postal workers in previous cases.[49] But then it turned out on cross-examination that she'd had to

37. *See id.* at 211-13.
38. 476 U.S. 79 (1986).
39. *See Id.* at 95 ("Thus . . . a defendant may make a prima facie showing of purposeful racial discrimination in selection of the venire by relying solely on the facts concerning its selection *in his case*.").
40. *See Tompkins*, 774 S.W.2d at 198.
41. *See id.*
42. *See id.*
43. *See supra* note 30, at 5.
44. *See Tompkins*, 774 S.W.2d at 202.
45. *See id.* at 219-20.
46. *See id.*
47. *See id.*
48. *See id.* at 205.
49. *See id.*

admit that she'd actually had very good luck with postal workers in previous cases.[50]

The trial judge looked at these excuses and said, "I don't believe this.[51] I think these are not legitimate or true justifications for your challenges.[52] But I can think of some reasons why you wouldn't have wanted to have those jurors on this jury, so I'm going to say it's okay."[53] And that had gone up to the Texas Court of Criminal Appeals, which is the highest court in Texas, and they had looked at it and said, "Well, that can't be right.[54] The issue is not whether the trial judge could think of reasons for getting rid of these jurors. The issue is whether the prosecutor's explanations are pretextual or not."[55] But, then they said, "Well, we're not in the business of assessing credibility in this court, so we're just going to affirm."[56]

And that's how that came up to the Supreme Court. I think most of us who looked at this case thought to ourselves, "Well, Tompkins is probably right on the jury instruction issue; he's absolutely right on the *Batson* issue. This is going to be one of those easy cases and this guy's going to get a new trial."

Oral argument comes around—nothing very significant usually happens at Supreme Court oral arguments, but this was a particularly interesting and amusing oral argument. At that time, Thurgood Marshall was still on the bench, the first African-American Justice who had spent a large part of his career trying capital cases in the South in front of all-white juries. And the lawyer for the State of Texas got up and about three minutes into her presentation, Marshall just leaned into his microphone: "Postal worker." Just like that. The lawyer looks up like "where'd that come from?" The lawyer goes on another thirty seconds and Marshall moves in, "Postal worker." After about the fifth time, the Texas lawyer just practically lost it. But Marshall was having his fun. After argument, they go off and they have their vote. So, they go into their secret conference and go around the table, which they do, and each person states his or her views and they take a vote.

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50. *See id.*

51. *See id.* ("Perhaps, indeed, federal postal employees share a common view of the criminal justice system antithetical to the interests of law enforcement. But if so, we are not aware of it . . . .").

52. *See id.*

53. *See id.* ("Notwithstanding what we have stated, we find that the prosecuting attorney's reasons that she gave constitute a racially neutral explanation, and it is not the office of this Court to judge her credibility.").

54. *See id.* at 202 ("This Court and the courts of appeals are principally reviewing courts. We do not substitute our judgments of witnesses' credibility and evidentiary weight for those of the fact finder, but affirm those judgments whenever the record discloses sufficient evidence in their support.").

55. *See id.* at 205.

56. *See id.* at 205-06.

On the jury instruction issue, the vote was five [to three]—oh, I should tell you that Justice O'Connor didn't participate in this case, there were only eight Justices participating. Justice O'Connor's husband's law firm was doing Tompkins' case pro bono, so she stepped off the case. So you've got eight of them sitting around the table, and the vote is five to three on the jury instruction issue, that it was okay. It doesn't matter that the jury instruction conform with the aspect of the case that's in doubt, as long as the jury has another third option, that's enough.

Then, on the *Batson* issue, it was five to three for Tompkins. Five of the Justices voted that he needed a new trial, that this was clearly a violation of *Batson*. The other three disagreed. And the line-up was very predictable. The Justices have changed since then, but they are still very predictable and still divided just about as closely as they were then. At that time, Brennan and Marshall always voted in favor of the capital defendant. They believed the death penalty was unconstitutional in every circumstance, no matter what precedent said. No matter what, they believed morally it was wrong and, therefore, they were going to vote to reverse every capital case.

Blackmun had not moved that far at that time, but he was growing increasingly close to the abolitionist camp, although for reasons very different from Brennan's and Marshall's. And, so, he was the sure vote in that direction as well. Then, on the other side, you had the Chief, Rehnquist, you had Scalia, and you had Whizzer White. All of them were very conservative on capital cases and pretty much a sure bet the other way.

So, the swing votes in this case were Stevens and Kennedy, who was brand new to the Court. Justice Stevens and he were the ones who flipped each way, so they joined the three conservatives on the *Beck* issue, and joined the more liberal Justices on the *Batson* issue. And the way it works at the Court is that the senior member of the majority gets to assign the opinion. If the Chief Justice is in the majority, then he gets to assign it. But if he's not, as he wasn't in this case, the senior Justice in the majority does. So, between Kennedy and Stevens, Stevens is far senior to Kennedy, so he assigned it—he took it for himself. And he took it for himself because he was very, very interested in the *Batson* issue and he wanted to send a message to state courts which he felt were paying absolutely no attention to *Batson* whatsoever, and he wanted to send a message that they ought to cut it out. So, what happens at the Supreme Court is, the majority opinion is written, and it circulates. And what you are waiting for, after circulation, when you're the author of the majority, is what is called "join memos," which are these little notes that get sent around from the other chambers that just say things like, "Please join me to your opinion," and you need to get four of those to get a majority. Justice Brennan used to love waving his around—"You need five votes around here to do anything." You need five votes, so you need

four join memos. And then you're all set. Then you could ignore what anybody else thinks. So, Stevens is waiting for his join memos to come in and on the *Beck* issue, he gets his join memos right away. He gets Kennedy, and White and Scalia and Rehnquist, on up, so he's all set. But on the *Batson* side of things, he immediately gets the three liberals, Brennan and Marshall and Blackmun, but he gets silence out of Tony Kennedy. And nobody can really figure out what the heck's going on because, after oral argument, Tony Kennedy had gone in to see Thurgood Marshall.

By the way, [Thurgood Marshall] is another Justice [whose] interior decoration told a lot about him. He wrote the Kenyan Constitution, and his office was filled with African memorabilia, including a number of very sharp spears that he used to go over and fondle whenever a clerk was bugging him. He was quite ornery by that time in his life, and I think his decor reflected that. But, jokes aside, Kennedy had gone in to see Blackmun after oral argument. Kennedy's a very jolly fellow—the kind of guy you'd like to have a round of golf with—and he was trying to make friends. He was brand new to the Court. So he goes in to see Thurgood Marshall, "Thurgood, do you believe this case? I mean, that postal worker excuse. That's the most ridiculous thing I ever heard." And they yukked it up for a while and then Kennedy went to his own chambers.

Now, the opinion has come around, and you get dead silence out of the Kennedy chambers and in the Court, you know, if you're not hearing back from somebody over the course of a few weeks, something bad is going to happen. And, sure enough, after about three months, Tony Kennedy sends around a note. And it's a couple of paragraphs and it says, "I've changed my mind on the *Batson* issue. I have looked through the entire trial record and I can think of reasons why a prosecutor wouldn't have wanted those jurors on the jury." So he did exactly what the trial court had done, exactly what you're not supposed to do on *Batson*, changed his mind and changed his vote. That meant that Stevens lost that half of his opinion, because it was four to four now on the *Batson* issue, which would have meant that they would affirm the lower court's *Batson* ruling by an equally divided court.

So now, instead of having an opinion that was going to say new trial for Phillip Tompkins, he had an opinion that said, Phillip Tompkins' conviction and sentence are affirmed. Stevens got very upset about this, and I think it's the only time in Court history this ever happened. The author of the opinion himself, Justice Stevens, decided to change his own vote on the other side of the case, on the *Beck v. Alabama* side of the case, and pretend that he thought that that should come out the other way, so that that would also be four-four and the whole case would just disappear and he would throw his entire opinion draft into the trash can. And that's what he did.

It didn't help Phillip Tompkins any, because his conviction and sentence were now affirmed and he was on his way [to the death penalty]. I guess in Texas at that time it was lethal injection.

As an aside, I'll tell you what happened with Phillip Tompkins. His lawyers filed another habeas petition and they started looking into the sentencing phase of the case. There had been an expert who testified on the question of future dangerousness. In Texas, every jury in capital cases is asked three questions, one of which is: How much of a risk of future dangerousness is the defendant? And the state always brings in an expert who says this guy is the most vicious human being alive and has a hundred percent chance of future dangerousness.

And the defense always brings in an expert who says he was brutally treated as a child and with enough therapy he'll be an angel. In this case, the state had used an expert named Jean Matthews who claimed to have known Phillip Tompkins from a previous stint that he did in jail. She was a criminologist with a Masters Degree from the University of Florida or Florida State. So the defense lawyers called down to Florida State and said, tell us about Jean Matthews, does she really have a Masters Degree? And they say yeah, she does. She has a Masters Degree in music. She was a trombone expert. Texas was so embarrassed by having called an expert witness who turned out not to be an expert, that they actually commuted Phillip Tompkins' sentence.

But, nobody at the Court knew that that was going to happen. And everybody at the Court knew something else—which was that Phillip Tompkins had confessed to this crime. He's given the police a very, very lengthy confession and in that confession, he had described everything that happened about bumping into Mary Berry and holding her up at knifepoint and taking her out to the Astrodome and stuffing a gag in her mouth. And how, when he had come back from the bank, she was dead.

And, you know, I had prosecuted for several years, saw quite a few confessions, and re-read Phillip Tompkins' many times. And there's just some things that have a ring of truth about them. I don't think anybody really questioned whether Phillip Tompkins' confession was true. It had actually been suppressed at his trial for a variety of reasons. But it meant that everybody at the Court really knew that Phillip Tompkins had not intended to kill Mary Berry. And, under the capital jurisprudence in this country, it's unconstitutional to execute someone who didn't intend to kill. So, everybody at the Court knew that Phillip Tompkins didn't deserve, from a Constitutional standpoint, to be executed. And, yet, the Court split four-four and was perfectly willing to let Phillip Tompkins be executed, regardless of that fact. And, that raised, for me, really haunting questions about what was going on. I really didn't believe, although some of the liberals at the Court did, that it's just because the conservatives are a bunch of cold-hearted sons of—whatever. It's because there

was a war going on inside the Court. A war of ideas, but one that had really shunted to one side the questions of individualistic justice of any particular case, and had brought to the fore larger jurisprudential questions which dominated everything.

And, here's where we'll get back to the juvenile level of the death penalty. The conservatives on the Supreme Court, then and now, believed that the liberal Justices use some of the more amorphous phrases in the Constitution, such as the Due Process Clause. What does that mean? Or, cruel and unusual punishment. What does that mean? They use the inherent vagueness of those terms to foist their own views of what is right and wrong into the Constitution and onto the elected branches of the government. That's the center of *Roe v. Wade*. If you take the religious component out, the jurisprudential battle in *Roe v. Wade* is substantive due process. And what is substantive due process? If you are conservative, you believe it is this container into which the liberal Justices pour their own moral value system and read it into the Constitution. And, if you are a conservative Justice, you believe that the jurisprudence about what is a cruel and unusual punishment, which is defined by our "evolving standards of decency," is a container into which the liberal Justices pour their value system and foist it onto the Constitution and onto the law.

And so, why is it that Justice Scalia read his dissent in *Roper v. Simmons*? It can't be because it's about the juvenile death penalty. It's not a trivial issue by any means. But there are only seventy juvenile offenders on death row at the moment. This is not a matter of profound national significance in anything more than a symbolic sense. It is because in a jurisprudential sense, from Scalia's point of view, what is going on here [is] that the Court, despite all these conservative appointments, is still ultimately a Court where Justices pour their own moral sentiments into the Constitution at the expense of the elected branches of government. And what's really going on in *Roper v. Simmons* is that Justice Kennedy, joined by the four more liberal members of the Court—doesn't like the fact the United States is the only country in the world that actively proclaims its support for the juvenile death penalty prior to this case. He doesn't want to be on the wrong side of history. He thinks it's a morally bad idea. And so, he is using the vague phrase, "evolving standards of decency," to read his own morality or the majority's morality, into the Constitution.

And if you read Scalia's dissent, it is peppered with references to the abortion debate. And the reason is that he doesn't see this as being any different from that from a jurisprudential standpoint. This is the abortion debate all over again. It is the gay rights debate—do homosexuals have a right to consensual sodomy in their own homes under the right to privacy, which is an unenumerated right in the Constitution?

These cultural social issues are at stake in *Roper v. Simmons* from a jurisprudential standpoint. And that's why the Court is so deeply, deeply divided and why a case that's really of very narrow scope is a case with enormous importance. What it shows is that Tony Kennedy has become, in these issues, the moral compass for the Court. And the question then becomes: Is it a good thing or a bad thing for the country that he has that kind of authority? And we can take that up in the Q&A later on. Thank you so much for listening for an hour.