Winter 2013

The Marshall Hypothesis and the Rise of Anti-Death Penalty Judges

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INTRODUCTION

I am honored to offer an Introduction to Crystal Enekwa's Comment, which follows. Her work evidences her close examination of capital punishment as currently practiced in the United States, and invites consideration of the views of persons most familiar with the operation of the death penalty to assess the punishment's value.

The starting point for her examination of the death penalty is a proposition penned forty years ago. In his concurrence in *Furman v. Georgia*, Justice Thurgood Marshall stated that support for the death penalty should not be based on public opinion polls nor abstract sentiment, "but on whether people who were fully informed as to the purposes of the penalty and its liabilities would find the penalty shocking, unjust, and unacceptable."[1] Justice Marshall then discussed seven paradoxes of capital punishment that were "critical to an informed judgment on the morality of

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1. 408 U.S. 238, 361 (Marshall, J., concurring).

the death penalty."[2] He confidently predicted that "[a]ssuming knowledge of all the facts presently available regarding capital punishment, the average citizen would, in my opinion, find it shocking to his conscience and sense of justice. For this reason alone capital punishment cannot stand."[3] His proposal has been called the Marshall Hypothesis.

In her thought-provoking Comment, Ms. Enekwa proposes applying the Marshall Hypothesis to the real world. Taking Justice Marshall's jurisprudence seriously, she suggests that current criticisms of the administration of the death penalty, as articulated by those most familiar with its operation, serve as the basis for capital punishment reform. In lieu of abstract pronouncements on capital punishment, she has collected the views of prison employees, capital defense lawyers, former prosecutors, spiritual advisors to capital inmates, and family members of persons killed in capital crimes. She could have added to that a chorus of some state and federal court judges whose experience adjudicating capital cases influenced their views on the appropriateness of the punishment.[4]

All of these persons, for at least part of their lives, did not question the legitimacy of capital punishment (or, if they did, they suppressed those

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2. *Id.* at 362.

3. *Id.* at 369.

4. For example, Tennessee Supreme Court Justice Ray L. Brock, Jr., who served from 1974 through his retirement in 1987, began dissenting in capital cases in 1981, declaring that the punishment was cruel and unusual punishment under Article I, Section 16 of the Tennessee Constitution. *See* State v. Dicks, 615 S.W.2d 126 (Tenn. 1981) (Brock, J., dissenting) (declaring his opposition).

Washington Supreme Court Justice Robert F. Utter resigned in 1995 because he was convinced that the death penalty could not be applied fairly. *See* Jack Hopkins, *Death Penalty Inequities Prompt State High Court Justice to Retire*, SEATTLE POST-INTELLIGENCER, Mar. 30, 1995, at A1.

U.S. Supreme Court Justice John Paul Stevens wrote "that the imposition of the death penalty represents the pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes. A penalty with such negligible returns to the State is patently excessive and cruel and unusual punishment violative of the Eighth Amendment." Baze v. Rees, 553 U.S. 35, 86 (2008) (Stevens, J., concurring) (internal quotation marks omitted).

U.S. Supreme Court Justice Harry Blackmun declared, "Because I no longer can state with any confidence that this Court is able to reconcile the Eighth Amendment's competing constitutional commands, or that the Federal Judiciary will provide meaningful oversight to the state courts as they exercise their authority to inflict the penalty of death, I believe that the death penalty, as currently administered, is unconstitutional." Callins v. Collins, 510 U.S. 1141, 1158-59 (1994) (Blackmun, J., dissenting).

Former U.S. Supreme Court Justice Lewis Powell expressed a pragmatic opposition to the death penalty. He said that capital punishment should be abolished because it served no useful purpose, and it did not deter. To him, the death penalty was not fairly and expeditiously enforced. *See* JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR.: A BIOGRAPHY 451-53 (1994).

doubts) and worked toward ensuring it was implemented fairly. But after having "up-close and personal" experiences—some over many cases, and all over many years—with the modern capital punishment system, they came to oppose the death penalty.

In this Introduction, I review and reflect on the Marshall Hypothesis to place Ms. Enekwa's Comment in context. To that end, Part I provides a brief overview of Justice Marshall's appointment to the United States Supreme Court. Part II details Justice Marshall's *Furman* concurrence, in which he declared that the death penalty violated the Eighth Amendment, and his sentiments four years later in *Gregg v. Georgia*,[5] in which he stated that retribution had no role to play in capital punishment. Part III summarizes research testing the Marshall Hypothesis. Part IV briefly reviews the careers of three of Justice Marshall's Supreme Court colleagues, and statements late in their careers in which they each questioned the efficacy of the death penalty. Part V concludes.

I. JUSTICE MARSHALL, THE SUPREME COURT, AND THE DEATH PENALTY

In June 1967, when announcing his decision to nominate Thurgood Marshall to serve as the first African American on the United States Supreme Court, President Lyndon Johnson after noting, among other things, his success as an advocate before the Court, declared that it was "the right thing to do, the right time to do it, the right man and the right place."[6] President Johnson correctly perceived that Marshall would provide a reliable liberal vote.[7]

Justice Marshall's background and experience as a civil rights lawyer, including litigating race discrimination cases, and as a capital defense attorney might have led one to expect that he would bring special insights in reviewing claims brought by the traditionally marginalized and in capital cases. Justice Marshall unquestionably did this throughout his tenure; however, all of Justice Marshall's biographers indicate that prior to *Furman*, he had not expressed an interest in ending the death penalty.[8]

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5. 428 U.S. 153 (1976).

6. Lyndon B. Johnson, Remarks to the Press Announcing the Nomination of Thurgood Marshall as Associate Justice of the Supreme Court (June 13, 1967), *available at* http://www.presidency.ucsb.edu/ws/?pid=28298.

7. President Lyndon Johnson may not have had a firm grasp of Thurgood Marshall's judicial philosophy, but he did believe that Marshall "would just be in the liberals' pocket 100 percent of the time." JUAN WILLIAMS, THURGOOD MARSHALL: AMERICAN REVOLUTIONARY 7 (1998) (internal quotation marks omitted).

8. As a circuit judge, Justice Marshall expressed no reservations about the death penalty. The influences that drove him to become an abolitionist while on the High Court remain uncertain. One biographer suggests it was the product of Justice Brennan's influence. *See* WILLIAMS, *supra* note 7, at 351. Another biographer states that Justice Marshall's

II. *FURMAN* AND *GREGG*

In the first five years of Justice Marshall's appointment to the Supreme Court, that body had intermittently subjected parts of the death penalty process to constitutional scrutiny.[9] After a few years of addressing procedural issues, the Court, in 1972, directly addressed the constitutionality of capital punishment. In *Furman v. Georgia*, by a 5-4 vote, the Court ruled that all of the death penalty statutes in this country were unconstitutional under the Eighth Amendment.

Throughout his Supreme Court service, Justice Marshall's opinions in criminal law cases had special resonance.[10] He tended to focus on what happened to bring the case to the Court and the real life consequences of the Court's decisions; this was especially true in capital cases.[11] But *Furman*

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opposition was partially based on losing the capital case of a high school classmate. *See* MICHAEL D. DAVIS & HUNTER R. CLARK, THURGOOD MARSHALL: WARRIOR AT THE BAR, REBEL ON THE BENCH 320 (1992).

9. *See* Maxwell v. Bishop, 398 U.S. 262 (1970) (remanding capital case because prospective jurors were excluded on grounds ruled impermissible in *Witherspoon v. Illinois*); Boykin v. Alabama, 395 U.S. 238 (1969) (finding due process violated when trial judge did not inquire on the record whether defendant's plea was knowingly and voluntarily entered); Jackson v. United States, 390 U.S. 570 (1968) (holding that Federal Kidnapping Act violated the Fifth and Sixth Amendments because it authorized a jury to sentence a defendant to death if the victim had been harmed during the kidnapping but a lesser sentence was authorized for bench trials or guilty pleas); Witherspoon v. Illinois, 391 U.S. 510 (1967) (holding that automatic removal of prospective capital jurors who were opposed to or who expressed conscientious scruples against capital punishment violated the Sixth Amendment's fair cross-section provision). Justice Marshall recused himself from participating in *Jackson v. United States*, apparently because he participated in the case when he was Solicitor General. *See Jackson*, 390 U.S. at 591.

10. *See* David L. Bazelon, *Humanizing the Criminal Process: Some Decisions of Mr. Justice Marshall*, 6 NAT'L BLACK L.J. 3 (1980) (noting that Marshall's opinions in criminal cases sought to ensure that the rich and poor can participate equally in the adversary system); Bruce A. Green & Daniel Richman, *Of Laws and Men: An Essay on Justice Marshall's View of Criminal Procedure*, 26 ARIZ. ST. L.J. 369 (1994) (suggesting Marshall's criminal procedure decisions were based on his conception of the humanity of those who wielded state authority and of those who might be subjected to it); Charles J. Ogletree, *Justice Marshall's Criminal Justice Jurisprudence: "The Right Thing To Do, The Right Time To Do It, The Right Man and The Right Place,"* 6 HARV. BLACKLETTER J. 112 (1989) (noting that Justice Marshall's opinions reflect the need for procedural fairness and substantive justice).

11. *See* John D. Burrow, *The Most Unfortunate Decisions: Forging and Understanding of Justice Thurgood Marshall's Jurisprudence of Death*, 6 HOW. SCROLL: SOC. JUST. L. REV. 1 (2003) (describing Marshall's death penalty jurisprudence as socio-legal engineering in that it identified the constitutional defects in the capital punishment process and humanized capital defendants); Randall Coyne, *Taking the Death Penalty Personally: Justice Thurgood Marshall*, 47 OKLA. L. REV. 42 (1994) (suggesting that

was different. Instead of employing an empathetic approach, he focused less on the facts of the four cases before the Court, and more on the operation of the death penalty in this country. His opinion starts with a traditional legal analysis before concluding in a theoretical and prophetic tone. Justice Marshall's concurrence stands out in tone and substance from the opinions of his eight colleagues.[12] The death penalty having been the law in the United States, Justice Marshall wrote about the progress the United States had made in reforming the death penalty up to that day in 1972, and, most importantly, about the future of capital punishment in this country. His *Furman* concurrence may be his most important opinion, adding to his legacy as a Justice.

A. Justice Marshall's Furman *Concurrence*

Unlike the other Justices, Justice Marshall adopted an absolutist approach[13]—declaring the death penalty unconstitutional. Justice Marshall first described the historical and legal antecedents of the Eighth Amendment.[14] He then discussed the relevant Supreme Court cases interpreting the Amendment.[15] He concluded that these cases had interpreted the Eighth Amendment to "draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[16] The

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Marshall's continued objections to capital punishment were rooted in his experience as a capital defense attorney and the inequitable administration of capital punishment); Tracey B. Fitzpatrick, *Justice Thurgood Marshall and Capital Punishment: Social Justice and the Rule of Law*, 32 AM. CRIM. L. REV. 1065 (1995) (maintaining that Marshall's capital punishment jurisprudence adhered to his vision of equal justice for all and respect for the rule of law); Gerald F. Ulemen, *Justice Thurgood Marshall and the Death Penalty: A Former Criminal Defense Lawyer on the Supreme Court*, 26 ARIZ. ST. L.J. 403 (1994) (noting Marshall's continuing concern about the quality of capital defense attorneys).

12. One source described Marshall's concurrence this way: "The fifty-eight-page draft was an unusually scholarly and comprehensive treatise on the history of the death penalty in America and England. Marshall argued for an absolute ban and had assembled every conceivable argument that the death penalty was discriminatory." BOB WOODWARD & SCOTT ARMSTRONG, THE BRETHREN: INSIDE THE SUPREME COURT 250 (1979).

According to another source: "Marshall's sixty-page concurrence in the *Furman* result was a masterly product of exhaustive, painstaking research. He wrote most of it himself, trusting little of it to his clerks. Many court observers regard it as the finest opinion he produced during his years on the Court." DAVIS & CLARK, *supra* note 8, at 323.

13. Although it would later be clear that Justice Brennan had done the same, that was not so clear in his *Furman* concurrence. *See* Gerald T. McFadden, *Capital Sentencing—Effect of* McGautha *and* Furman, 45 TEMP. L. REV. 619, 622 (1972) (suggesting that Brennan might approve of mandatory capital punishment schemes).

14. *Furman*, 408 U.S. at 316-22 (Marshall, J., concurring).

15. *Id.* at 322-28.

16. *Id.* at 329.

concurrence discerned four additional principles.[17] First, punishments that involve too much physical pain and suffering are prohibited. Second, previously unknown punishments are permissible if they are no more cruel than the ones they superseded. Third, a penalty may be cruel and unusual because it is excessive and serves no valid legislative purpose. Fourth, even if a penalty is not excessive and serves a valid legislative purpose, it may be prohibited if popular sentiment is against it.

Justice Marshall next reviewed how the death penalty had been historically applied in the United States.[18] He noted that capital punishment was brought to this country but its use was tempered considerably, through the reduction in the number of capital crimes, replacement of mandatory death sentences with jury discretion as to the punishment, and the development of progressively more humane methods of execution.[19] In light of this, he wondered "whether American society has reached a point where abolition is not dependent on a successful grass roots movement in particular jurisdictions, but is demanded by the Eighth Amendment."[20] He noted, however, that "the Eighth Amendment is our insulation from our baser selves. The 'cruel and unusual' language limits the avenues through which vengeance can be channeled."[21] To determine whether the death penalty was excessive, Justice Marshall assessed each of the penological rationales and policies—retribution, deterrence, prevention of recidivism, encouragement of guilty pleas and confessions, eugenics, and economy—conceivably offered in support of capital punishment.[22] Finding little support for any proffered rationale, Justice Marshall concluded that the death penalty was excessive and unnecessary punishment in violation of the Eighth Amendment.[23]

The concurrence then turned predictive.[24] Even if the death penalty was not excessive, he opined, it violated the Eighth Amendment because "it is morally unacceptable to the people of the United States at this time in their history."[25] In his view, the question of capital punishment was not to be decided by public opinion polls indicating public acceptance or rejection

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17. *Id.* at 331-32.
18. *Id.* at 333-42.
19. *Id.* at 341.
20. *Id.* at 341-42.
21. *Id.* at 345.
22. *Id.* at 342-59.
23. *Id.* at 359.
24. *See* N. Douglas Wells, *Justice Thurgood Marshall: "Prophet With Honor,"* 22 CAP. U. L. REV. 561, 566, 569-70 (1993) (describing Marshall's judicial philosophy as one based on sociological jurisprudence, which included considering the impact a court decision had on the quality and fabric of society).
25. *Furman*, 428 U.S. at 360.

> because whether or not a punishment is cruel and unusual depends, not on whether its mere mention 'shocks the conscience and sense of justice of the people,' but on whether people who were fully informed as to the purposes of the penalty and its liabilities would find the penalty shocking, unjust, and unacceptable.[26]

He did not insist that the public had to act rationally. They could vote based on their "subjective, emotional reactions [as] informed citizens."[27] Justice Marshall reasoned that if the public knew more about the operation of capital punishment, the average citizen would conclude that it was an unwise policy and morally reprehensible.[28]

Viewing retribution as the main justification for the death penalty, he postulated, "I cannot believe that at this stage in our history, the American people would ever knowingly support purposeless vengeance. Thus, I believe that the great mass of citizens would conclude on the basis of the material already considered that the death penalty is immoral and therefore unconstitutional."[29] After again describing how the death penalty had been unequally imposed in this country, he concluded, "Assuming knowledge of all the facts presently available regarding capital punishment, the average citizen would, in my opinion, find it shocking to his conscience and sense of justice. For this reason alone capital punishment cannot stand."[30]

B. Justice Marshall's Gregg *Dissent*

Furman was hardly the end of the story. Thirty-five states and Congress redrafted their death penalty laws after *Furman*. Four years later in *Gregg v. Georgia*,[31] and in two other cases,[32] the Court, by 7-2 votes, ruled that the

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26. *Id.* at 361 (quoting United States v. Rosenberg, 195 F.2d 583, 608 (2d Cir. 1952)).
27. *Id.* at 362.
28. According to Justice Marshall, the public should be informed

> that the death penalty is no more effective deterrent than life imprisonment, that convicted murderers are rarely executed, but are usually sentenced to a term in prison; that convicted murderers usually are model prisoners, and that they almost always become law-abiding citizens upon their release from prison; that the costs of executing a capital offender exceed the costs of imprisoning him for life; that while in prison, a convict under sentence of death performs none of the useful functions that life prisoners perform; that no attempt is made in the sentencing process to ferret out likely recidivists for execution; and that the death penalty may actually stimulate criminal activity.

Id. at 362-63.
29. *Id.* at 363.
30. *Id.* at 369.
31. 428 U.S. 153 (1976).

death penalty did not invariably violate the Eighth Amendment, and concluded that the amended statutes had addressed the concerns identified in *Furman*.

Justice Marshall and Justice Brennan dissented. In his dissent, Justice Marshall assessed the cogency of his hypothesis in light of the rewritten capital punishment laws.[33] He interpreted a then-recent study as confirming his sentiment "that the American people know little about the death penalty, and that the opinions of an informed public would differ significantly from those of a public unaware of the consequences and effects of the death penalty."[34]

Justice Marshall then noted that in *Gregg* a majority of the Court had concluded that general deterrence and retribution were the two justifications that supported the death penalty. Notwithstanding the promulgation of a then-recent academic study intimating that the death penalty was a general deterrent to crime,[35] Justice Marshall remained unconvinced. As to retribution, Justice Marshall noted that it was a multifaceted concept, and he, therefore, divided the concept into different strands. The first strand encapsulated the idea that those who break the law deserve punishment. He then responded to the Court's reasoning, which endorsed the retributive value of capital punishment.

> The foregoing contentions—that society's expression of moral outrage through the imposition of the death penalty pre-empts the citizenry from taking the law into its own hands and reinforces moral values—are not retributive in the purest sense. They are essentially utilitarian in that they portray the death penalty as valuable because of its beneficial results. These justifications for the death penalty are inadequate because the penalty is, quite clearly I think, not necessary to the accomplishment of those results.[36]

Justice Marshall next addressed another strand of retribution—the contention that "the taking of the murderer's life is itself morally good."[37]

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32. *See* Proffitt v. Florida, 428 U.S. 242 (1976) (upholding Florida's capital punishment scheme); Jurek v. Texas, 428 U.S. 262 (1976) (upholding Texas's capital punishment scheme).

33. *Gregg*, 428 U.S. at 231-33 (Marshall, J., dissenting).

34. *Id.* at 232 (discussing Austin Sarat & Neil Vidmar, *Public Opinion, the Death Penalty, and The Eighth Amendment: Testing the Marshall Hypothesis*, 1976 WIS. L. REV. 171).

35. *Id.* at 234 (citing I. Ehrlich, *The Deterrent Effect of Capital Punishment: A Question of Life and Death*, 65 AM. ECON. REV. 397 (1975)).

36. *Id.* at 238-39.

37. *Id.* at 239. Commentators are thus wrong to claim that Justice Marshall did not fully appreciate the different variants of retribution. *Cf.* Carol S. Steiker, *The Marshall Hypothesis Revisited*, 52 HOW. L.J. 525, 526, 528-29 (2009); Jordan Steiker, *The Long Road*

He noted that the *Gregg* plurality opinion had declared that "the Eighth Amendment demands more than that a challenged punishment be acceptable to contemporary society."[38] According to the plurality, the punishment also had to conform "with the basic concept of human dignity," and the rationale for imposing punishment has to be consistent "with our respect for the dignity of [other] men."[39] Taking a person's life because he "deserves it" was, in his view, the denial of the wrongdoer's dignity and worth. Justice Marshall concluded that the death penalty was unnecessary to promote deterrence or "any legitimate notion of retribution" and was therefore an excessive penalty forbidden by the Eighth Amendment.[40] His *Gregg* dissent represented an unbowed and equally convinced approach to the issue.

C. The Faith of an Abolitionist

Justice Marshall's *Furman* concurrence evidences an unfailing belief in the "American public." He believed that public support of the death penalty rested on several false premises, and that once these false premises were exposed, a fully informed public would reject capital punishment. Furthermore, his understanding of the Eighth Amendment as a limitation against "our baser selves" ensured that authorized punishments must be humane, as defined by contemporary standards.[41]

Even after *Gregg*, Justice Marshall continued to hold onto his beliefs, though it was the worst of times for death penalty abolitionists. It is worth remembering that his *Gregg* concurrence was written as a coda to the just

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Up From Barbarism: Thurgood Marshall and the Death Penalty, 71 TEX. L. REV. 1131, 1144-45 (1993).

38. *Gregg*, 408 U.S. at 240 (Marshall, J., dissenting).

39. *Id.*

40. *Id.* at 240-41.

41. Years later, Justice Blackmun expressed a similar hope when he concluded that the death penalty could not be imposed within the parameters of 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 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 . . . .

Callins v. Collins, 510 U.S. 1141, 1159 (1994).

failed arduous and incremental litigation campaign to have the Supreme Court declare capital punishment unconstitutional.[42]

Justice Marshall had to note that a key player in the capital litigation campaign was the NAACP LDF, the organization that he served as Director-Counsel during its more successful efforts to desegregate schools.[43] A decade after *Gregg*, Jack Greenburg, Justice Marshall's successor at the NAACP LDF, which continues to litigate major capital cases, repeated Justice Marshall's observations on the public's misperceptions on the death penalty:

> Death penalty proponents have assumed a system of capital punishment that simply does not exist: a system in which the penalty is inflicted on the most reprehensible criminals and meted out frequently enough both to deter and to perform the moral and utilitarian functions ascribed to retribution. Explicitly or implicitly, they assume a system in which certainly the worst criminals . . . are executed in an even-handed manner. But this idealized system is *not* the American system of capital punishment . . . .
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> Indeed, the reality of American capital punishment is quite to the contrary. Since at least 1967, the death penalty has been inflicted only rarely, erratically, and often upon the least odious killers, while many of the most heinous criminals have escaped execution. Moreover, it has been employed almost exclusively in a few formerly slave holding states, and there it has been used almost exclusively against killers of whites, not

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42. *See generally* MICHAEL MELTSNER, CRUEL AND UNUSUAL: THE SUPREME COURT AND CAPITAL PUNISHMENT (1974) (chronicling the NAACP Legal Defense and Education Fund's (LDF) efforts from 1961 through 1972 to have the United States Supreme Court declare capital punishment unconstitutional); Eric L Muller, *The Legal Defense Fund's Capital Punishment Campaign: The Distorting Influence of Death*, 4 YALE L. & POL'Y REV. 158 (1985) (reviewing the NAACP LDF, its death penalty campaign, the problems the campaign faced and comparing the anti-death penalty effort with the earlier struggle to desegregate public education). *See also* BARRETT J. FOERSTER, RACE, RAPE, AND INJUSTICE: DOCUMENTING AND CHALLENGING DEATH PENALTY CASES IN THE CIVIL RIGHTS ERA (2012) (recollections of one of 28 law students who, in the summer of 1965, assisted in collecting data on southern rape cases, seeking to prove that the death penalty was applied in a racially discriminatory manner during the previous 20 years).

43. *See generally* MARK V. TUSHNET, MAKING CIVIL RIGHTS LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1936-1961 (1994) (chronicling Thurgood Marshall's involvement with and leadership of the NAACP LDF); MARK V. TUSHNET, THE NAACP LDF'S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION 1925-1950 (1987) (history of the NAACP LDF's legal campaign against segregated public schools which led up to the U.S. Supreme Court declaring the practice unconstitutional). *See also* RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY (1976) (recounting the history of racial segregation in the United States and the litigation efforts lead primarily by the NAACP LDF to challenge and overturn de jure segregation in public education).

> blacks. It is this system, not some idealized one, that must be defended in any national debate on the death penalty . . . .[44]

Justice Marshall's hypothesis and his persistent effort to ensure human dignity to those on the lowest rungs of our society's social ladder are reminiscent of the attitude of slavery abolitionists. For example, while this country wrestled with whether to continue the enslavement of African Americans and whether to stop the spread of slavery, Unitarian minister Theodore Parker sermonized:

> Look at the facts of the world. You see a continual and progressive triumph of the right. I do not pretend to understand the moral universe; the arc is a long one, my eye reaches but little ways; I cannot calculate the curve and complete the figure by the experience of sight; I can divine it by conscience. And from what I see I am sure it bends towards justice. Things refuse to be mismanaged long. Jefferson trembled when he thought of slavery and remembered that God is just. Ere long all America will tremble . . . .[45]

Stated simply, like his abolitionist predecessors, Justice Marshall in *Furman* and *Gregg* appeals to a higher law and an equitable order. Though representative democracy generally prevails in this country, Justice Marshall in *Furman* and *Gregg* refused to defer to the public's choice, if what the public wanted was either based on inaccuracies or resulted in the constitutionally impermissible treatment of others.

III. TESTS OF THE MARSHALL HYPOTHESIS

Social scientists have repeatedly tested some of the Supreme Court's assertions regarding the death penalty. For instance, in *Gregg*, the Court recognized the main social purposes for the death penalty as retribution and deterrence of prospective capital offenders.[46] Social science research suggests that public support for the death penalty is not so easily categorized. In response to social scientists' questions, death penalty supporters proffer both utilitarian and retributive rationales for the penalty, while opponents of the death penalty proffer largely utilitarian justifications for its elimination.[47] Furthermore, when asked to select between deterrence

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44. Jack Greenberg, *Against the American System of Capital Punishment*, 99 HARV. L. REV. 1670, 1670 (1986).

45. 2 THEODORE PARKER, *Of Justice and the Conscience*, *in* THE COLLECTED WORKS OF THEODORE PARKER: SERMONS–PRAYERS 37, 48 (Frances Powers Cobbe ed., 1879).

46. *Gregg*, 428 U.S. at 183.

47. Phoebe C. Ellsworth & Lee Ross, *Public Opinion and Capital Punishment: A Close Examination of the Views of Abolitionists and Retentionists*, 29 CRIME & DELINQ. 116, 149-57 (1983).

and retribution as the reason for the death penalty, about 63% of supporters select deterrence.[48] When informed that no reliable studies have established that the death penalty deters, support for the death penalty falls to 55%, and to 43% if life without parole is a sentencing option.[49] Nonetheless, a segment of the population embraces the death penalty as a retributive sanction.[50] In short, death penalty support appears to be broad—approaching a supermajority of public endorsement—and wide—that is, for a variety of reasons. Yet, on closer examination, the death penalty is strongly embraced by fewer persons than may initially appear and more for its symbolism as a punishment than for its effectiveness as a crime control tool.[51]

Social scientists have also tested Justice Marshall's hypothesis. More than twenty published articles describe experiments[52] and their results.[53]

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48. Tom R. Tyler & Renee Weber, *Support for the Death Penalty: Instrumental Response to Crime, or Symbolic Attitude?*, 17 LAW & SOC'Y REV. 21, 24 (1982).

49. Hans Ziezel & Alec M. Gallop, *Death Penalty Sentiment in the United States*, 5 J. QUANTITATIVE CRIMINOLOGY 285, 290 (1989); *see also* Neil Vidmar & Phoebe Ellsworth, *Public Opinion and the Death Penalty*, 26 STAN. L. REV. 1245, 1257 (1974) (reporting 54% support for the death penalty even if it were proven not to be a deterrent to crime).

50. It remains unclear what variant(s) of retribution these supporters endorse. *See* Robert M. Bohm, *Retribution and Capital Punishment: Toward a Better Understanding of Death Penalty Opinion*, 20 J. CRIM. JUST. 227, 234 (1992) (identifying eight different meanings of retribution and reporting that vindictive revenge and revenge-utilitarian are the most popular); James O. Finckenauer, *Public Support for Death Penalty: Retribution as Just Deserts or Retribution as Revenge*, 5 JUST. Q. 81 (1988) (exploring whether retributive-based support for capital punishment is based on just deserts or revenge).

51. Ellsworth & Ross, *supra* note 47, at 162-65.

52. *See, e.g.*, *Cedric Michel & John K. Cochran, The Effects of Information on Change in Death Penalty Support: Race- and Gender-Specific Extensions of the Marshall Hypotheses*, 9 J. ETHNICITY CRIM. JUST. 291 (2011); Deniese Kennedy-Kollar & Evan J. Mandery, *Testing the Marshall Hypothesis and its Antithesis: The Effect of Biased Information on Death-Penalty Opinion*, 23 CRIM. JUST. STUD. 65 (2010); Robert M. Bohm, *The Effects of Classroom Instruction and Discussion on Death Penalty Opinions: A Teaching Note*, 17 J. CRIM. JUST. 123 (1989); Robert Bohm, *Death Penalty Opinions: A Classroom Experience and Public Commitment*, 60 SOC. INQUIRY 285 (1990); Robert M. Bohm, Louise J. Clark, & Adrian F. Aveni, *The Influence of Knowledge on Reasons for Death Penalty Opinions: An Experimental Test*, 7 JUST. Q. 175 (1990); Robert M. Bohm & Ronald E. Vogel, *Educational Experiences and Death Penalty Opinions: Stimuli that Produce Changes*, 2 J. CRIM. JUST. EDUC. 69 (1991); Robert M. Bohm & Ronald E. Vogel, *A Comparison of Factors Associated with Uninformed and Informed Death Penalty Opinions*, 22 J. CRIM. JUST. 125 (1994); Robert M. Bohm & Brenda L. Vogel, *More Than Ten Years After: The Long-Term Stability of Informed Death Penalty Opinions*, 32 J. CRIM. JUST. 307 (2004); Robert M. Bohm, Louise J. Clark, & Adrian F. Aveni, *Knowledge and Death Penalty Opinion: A Test of the Marshall Hypotheses*, 28 CRIME AND DELINQ. 360 (1991); A.W. Clarke, E. Lambert, & L.A. Whitt, *Executing the Innocent: The Next Step in the Marshall Hypothesis*, 26 N.Y.U. REV. L. & SOC. CHANGE 309 (2000-01); John K.

These studies generally indicate that supporters of the death penalty have some knowledge about the way the penalty has been applied, but are uninformed on whether it is a deterrent.[54] Once informed that capital punishment is not a deterrent[55] and of its unequal administration, support for the sanction falls among those who moderately support the penalty.[56] The more knowledgeable a person is about the death penalty before the study, the less likely it is that information on the operation of capital punishment will change that person's views.[57]

Cochran, Beth Sanders & Mitchell B. Chamlin, *Profiles in Change: An Alternative Look at the Marshall Hypotheses*, 17 J. CRIM. JUST. EDUC. 205 (2006); John K. Cochran & Mitchell B. Chamlin, *Can Information Change Public Opinion? Another Test of the Marshall Hypothesis* 33 J. CRIM. JUST. 573 (2005); Ellsworth & Ross, *supra* note 47; Eric Lambert & Alan Clarke, *The Impact of Information on an Individual's Support of the Death Penalty: A Partial Test of the Marshall Hypothesis Among College Students*, 12 CRIM. JUST. POL'Y REV. 215 (2001); D. R. LONGMIRE, AMERICANS' ATTITUDES ABOUT THE ULTIMATE WEAPON, IN AMERICANS VIEW CRIME AND JUSTICE: A NATIONAL PUBLIC OPINION SURVEY 93 (T.J. Flanagan & D.R. Longmire eds., 1996); Charles G. Lord, Lee Ross & Mark R. Lepper, *Biased Assimilation and Attitude Polarization: The Effects of Prior Theories on Subsequently Considered Evidence*, 37 J. PERSONALITY & SOC. PSYCH. 2098 (1979); Allan L. Patenaude, *"May God Have Mercy on Your Soul!" Exploring and Teaching a Course on the Death Penalty*, 12 J. CRIM. JUST. EDUC. 405 (2001); M. Sandys, *Attitudinal Change Among Students in a Capital Punishment Class: It May be Possible*, 20 AM. J. CRIM. JUST. 37 (1995); Sarat & Vidmar, *supra* note 34; Neil Vidmar & Tony Dittenhoffer, *Informed Public Opinion and Death Penalty Attitudes*, 23 CANADIAN J. CRIMINOLOGY 43 (1981); D. Weinstock & G. Schwartz, *Executing the Innocent: Preventing the Ultimate Injustice* 34 CRIM. L. BULL. 328 (1998); Harold O. Wright, Jr., Robert Bohm, & Katherine M. Jamieson, *A Comparison of Uninformed and Informed Death Penalty Opinions: A Replication and Expansion* 20 AM. J. CRIM. JUST. 57 (1995); Hans Zeisel & A. Gallup *Death Penalty Sentiment in the United States*, 5 J. QUANTITATIVE CRIMINOLOGY 285 (1989).

53. The subjects of these studies have typically been college and university students in the United States. Canadian students also reflected a substantial decline in support for the death penalty after being exposed to deterrence, moral, and judicial administration issues. *See* Vidmar & Dittenhoffer, *supra* note 52, at 53.

54. Sarat & Vidmar, *supra* note 34, at 187.

55. At least since 1976, researchers have studied whether the death penalty is a deterrent to murder or other crimes. The overwhelming weight of the research is that the death penalty is not a deterrent. *See* John J. Donohue & Justin Wolfers, *Uses and Abuses of Empirical Evidence in Death Penalty Debate*, 58 STAN. L. REV. 791 (2005) (summarizing debate, considering most recent deterrence studies, and expressing profound uncertainty regarding any deterrent effect).

56. Sarat & Vidmar, *supra* note 34, at 188-91, 195-97.

57. Eric G. Lambert, Scott D. Camp, Alan Clarke, & Shanhe Jiang, *The Impact of Information on Death Penalty Support, Revisited*, 57 CRIME & DELINQ. 572, 590 (2011).

Robert Bohm has run several studies on the issue.[58] His most comprehensive study was in 1991, with other researchers.[59] It concluded that the public lacks general knowledge about the death penalty and its administration;[60] that upon being informed about the operation of the death penalty, there is a decline in support for the penalty; but the amount of decline was related to the amount of prior knowledge the person had about the death penalty.[61] Furthermore, some death penalty opinions will not change, regardless of the quantity and quality of information on its operation, because humans process new data, on a subject like the death penalty in accordance with their previously held views.[62] In fact, there is a greater likelihood of polarization and hardening of a person's opinions on capital punishment when presented with information beyond its operation.[63] Along the same line, research suggests that after being informed about the death penalty, once people declare their public support for the sanction, they tend not to revisit that decision, despite evidence of the unfairness and

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58. In 1989, he noted that compared with the beginning of the course, 26% of the students in his death penalty class expressed a reduction of support for capital punishment at the end of the class. Bohm, *supra* note 52, at 130.

In a 1991 study, Bohm observed a small decrease in support for the death penalty in students who took a death penalty class, but not among those who took a non-death penalty class. Robert M. Bohm, Louise J. Clark, & Adrian F. Aveni, *The Influence of Knowledge on Reasons for Death Penalty Opinions: An Experimental Test*, 7 JUST. Q. 175, 175 (1990); Robert M. Bohm & Ronald E. Vogel, *Educational Experiences and Death Penalty Opinions: Stimuli that Produce Changes*, 2 J. CRIM. JUST. EDUC. 69, 77-79 (1991) (confirming earlier research on information that tended to change students' death penalty opinions).

A few years later, an expanded study with other authors again noted a decline in death penalty support among students. *See* Harold O. Wright Jr., Robert M. Bohm, & Katherine M Jamieson, *A Comparison of Uninformed and Informed Death Penalty Opinions: A Replication and Expansion*, 20 AM. J. CRIM. JUST. 57 (1995).

59. Robert M. Bohm, Louise J. Clark & Adrian F. Aveni, *Knowledge and Death Penalty Opinion: A Test of the Marshall Hypothesis*, 28 CRIME & DELINQ. 360 (1991).

60. *Id.* at 369-73.

61. *Id.* at 377.

62. *See generally* Charles G. Lord, Lee Ross, & Mark R. Lepper, *Biased Assimilation and Attitude Polarization: The Effect of Prior Theories and Subsequently Considered Evidence*, 37 J. PERSONALITY & SOC. PSYCHOL. 2098, 2105-08 (1979).

Bohm and his co-authors attributed the lack of influence that information on the death penalty had on some to "biased assimilation," that is, processing new information so that it is in accordance with previously held views. *See* Robert M. Bohm, Louise J. Clark, & Adrian F. Aveni, *The Influence of Knowledge on Reasons for Death Penalty Opinions: An Experimental Test*, 7 JUST. Q. 175, 183-84 (1990). The biased assimilation concept has also been labeled as cognitive dissonance. *See* Robert M. Bohm & Ronald E. Vogel, *Educational Experiences and Death Penalty Opinions: Stimuli that Produce Changes*, 2 J. CRIM. JUST. EDUC. 69, 141 (1991).

63. *See* Lord, Ross, & Lepper, *supra* note 62, at 2105-08.

fallibility of the punishment.[64] Bohm's studies replicate the conclusions of other experiments and Bohm's work has been confirmed in subsequent studies.[65]

Empirical research indicates that members of different social groups are influenced differently by the same information on capital punishment. White and older respondents are more likely to support the death penalty than non-white and younger persons.[66] Women do not favor the death penalty as much as men, poorer people favor the death penalty less frequently than the more affluent, and Democrats and Independents are less in favor of the penalty in comparison to Republicans.[67] Notwithstanding the apparent change of views about the death penalty in some participants, at some level death penalty support is less about empirical proof on the utility of capital punishment and more about a person's worldview or the sentiment attached to using criminal law to address social problems.[68]

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64. Robert M. Bohm, *Death Penalty Opinions: A Classroom Experience and Public Commitment*, 60 SOC. INQUIRY 285, 295 (1990).

65. For example, a 1995 study concluded that support for the death penalty dropped from 56% to 22% after students took a course on the subject, while opposition rose from 35% to 65%. Sandys, *supra* note 52, at 45. A 2001 study found a statistically significant drop in support for the death penalty among students exposed to materials that showed the lack of deterrence and the possibility of executing innocent persons. Lambert & Clarke, *supra* note 52, at 228; *see also* Cochran, Sanders, & Chamlin, *supra* note 52 (reporting the results of informing students of death penalty data in ten different classes); Lambert, Camp, Clarke, & Jiang, *supra* note 57, at 589 (reporting decline in support for death penalty among people exposed to information on its lack of deterrence and the possibility of executing an innocent person). *But see* Kennedy-Kollar & Mandery, *supra* note 52, at 80-82 (reporting increase in support for death penalty among death penalty supporters after receiving data on its administration). *See also supra* note 52 and accompanying text.

66. Lambert, Camp, Clarke, & Jiang, *supra* note 57, at 589-90; Ziesel & Gallop, *supra* note 49, at 294.

Several studies have detected the chasm of death penalty support between races. *See, e.g.*, David N. Baker, Eric G. Lambert & Morris Jenkins, *Racial Differences in Death Penalty Support and Opposition: A Preliminary Study of White and Black College Students*, 35 J. BLACK STUD. 201 (2005); John K. Cochran & Mitchell B. Chamlin, *The Enduring Racial Divide in Death Penalty Support*, 34 J. CRIM. JUST. 85 (2006); Jon Hurwitz & Mark Peffley, *Explaining the Great Racial Divide: Perceptions of Fairness in the U.S. Criminal Justice System*, 67 J. POL. 762 (2005); Michel & Cochran, *supra* note 52; James D. Unnever & Francis T. Cullen, *The Racial Divide in Support for the Death Penalty: Does White Racism Matter?*, 85 SOC. FORCES 1281 (2007).

67. Ziesel & Gallop, *supra* note 49, at 294; Lambert, Camp, Clarke, & Jiang, *supra* note 57, at 589-90.

68. *See* Ziesel & Gallop, *supra* note 49, at 295. Bohm et al. labeled this biased assimilation. *See* Robert M. Bohm, Louise J. Clark, & Adrian F. Aveni, *The Influence of Knowledge on Reasons for Death Penalty Opinions: An Experimental Test*, 7 JUST. Q. 175, 183-84 (1990); Scott Vollum & Jacqueline Buffington-Vollum, *An Examination of Social-Psychological Factors and Support for the Death Penalty: Attribution, Moral*

Finally, the studies have explored the impact that the data has on death penalty views. Exposure to information on the death penalty does not have significant long-term influence on a person's views of capital punishment.[69] Accordingly, three years after first exposure to data on the death penalty, most people return to their pre-exposure views of capital punishment.[70]

IV. LIVING OUT THE MARSHALL HYPOTHESIS ON THE UNITED STATES SUPREME COURT

While social scientists were conducting these experiments, the Justices on the United States Supreme Court were deciding capital cases. Three of Justice Marshall's colleagues—Justice Lewis F. Powell Jr., Justice Harry A. Blackmun, and Justice John Paul Stevens—were living out what the social science experiments suggested.

A. The Content of Capital Punishment Jurisprudence

When the Court first started to subject the death penalty to federal constitutional regulation—usually under the Due Process Clause of the Fourteenth Amendment and the Eighth Amendment's Cruel and Unusual Punishment Clause—it endeavored to ensure that the criminological views of its members would not override legitimate legislative determinations. To do so, the Court intimated that it would rely on social and empirical data in constructing the parameters of the death penalty.[71]

By 1986, ten years into the process, the Court had resolved many important issues.[72] The Court, however, had generally ignored the logical implications of relevant empirical research, instead basing its decisions on the legal reasoning of its members—shorn of the influence of empiricism and social science.[73] This meant that the personal views of the Justices would play a role in the Court's determination of the law, perhaps more than in non-capital cases.

Disengagement, and the Value-Expressive Function of Attitudes, 35 AM. J. CRIM. JUST. 15, 30-32 (2010).

69. Robert M. Bohm & Brenda L. Vogel, *More than Ten Years After: The Long-Term Stability of Informed Death Penalty Opinions*, 32 J. CRIM. JUST. 307, 307, 325 (2004).

70. *Id.*; Sandys, *supra* note 52, at 47-48 (1995) (reporting continued attitude change one year after exposure to death penalty data).

71. James R. Acker, *Different Agenda: The Supreme Court, Empirical Research Evidence, and Capital Punishment Decisions, 1986-1989*, 27 L. & SOC. REV. 65, 66 (1993).

72. *Id.* at 67.

73. *Id.*

B. Justice Harry A. Blackmun

During the 1968 presidential campaign, Richard Nixon promised to appoint to the bench experienced judges who interpreted the Constitution and federal law narrowly and were judicially conservative.[74] Harry A. Blackmun, a Nixon appointee, who joined the Supreme Court in June 1970, fit that bill. Immediately before his appointment, Blackmun served eleven years as a federal appellate judge.[75] During that tenure he decided four capital cases. In one opinion, *Maxwell v. Bishop*,[76] Blackmun wrote that the decisional process was

> particularly excruciating for the author of this opinion who is not personally convinced of the rightness of capital punishment and who questions it as an effective deterrent. But the advisability of capital punishment is a policy matter ordinarily to be resolved by the legislature or through executive clemency and not by the judiciary.[77]

During his one-day confirmation hearing, Blackmun stated that he personally thought that the death penalty should be abolished and that as a legislator he would vote to repeal it. He promised, as a judge, to follow the legislature's directives, in all but the rarest of cases.[78]

Justice Blackmun proved true to his words. In his first years on the Supreme Court, Justice Blackmun was a reliably conservative justice.[79] Notably, in 1972, he was one of the dissenters in *Furman*, where he again wrote of his personal disapproval of capital punishment.[80] Justice Blackmun "personally . . . rejoice[d]" at the Court's result, but he faulted the Court for overstepping its institutional role.[81] Four years later, Justice Blackmun was in the majority in *Gregg*, which held that the death penalty did not invariably violate the Eighth Amendment. From the mid-1970s, Justice Blackmun adopted more moderate judicial positions, more frequently voting in favor of criminal defendants in non-capital cases; by the mid-1980s he voted even more often in favor of the criminal defendant in non-

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74. HENRY J. ABRAHAM, JUSTICES, PRESIDENTS, AND SENATORS: A HISTORY OF THE U.S. SUPREME COURT APPOINTMENTS FROM WASHINGTON TO CLINTON 9-10 (rev. ed. 1999).

75. *Id.* at 258.

76. 398 F.2d 138 (8th Cir. 1968), *rev'd on different grounds*, 398 U.S. 262 (1970).

77. *Maxwell*, 398 F.2d at 153-54 n.11.

78. *Hearing on the Nomination of Harry A. Blackmun, of Minnesota, to be Associate Justice of the Supreme Court of the United States*, 91st Cong., 2d Sess. 59-60 (1970).

79. ABRAHAM, *supra* note 74, at 260.

80. Furman v. Georgia, 408 U.S. 238, 405-07 (1972) (Blackmun, J., dissenting).

81. *Id.* at 414.

capital cases, and most frequently to limit the application of the death penalty.[82]

Justice Blackmun had a tendency to include personal professions in his judicial opinions.[83] Despite filing more dissents in capital cases later in his tenure, Justice Blackmun rarely criticized the path of the Court's jurisprudence.[84] Thus, his dissent from the denial of certiorari in *Callins v. Collins*,[85] on February 22, 1994, was surprising.[86] In *Callins*, Justice Blackmun declared:

> 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.[87]

Justice Blackmun explained that he accepted that capital punishment must be administered consistently and rationally.[88] He concluded that the discretion that was necessary and inherent in the capital punishment process proved to be its undoing,[89] and the issue of race only exacerbated how that discretion was exercised.[90] Justice Blackmun did not believe that the conflicting constitutional commands—of insisting on procedural rules and

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82. ABRAHAM, *supra* note 74, at 260-61.

83. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 943 (1992) (Blackmun, J., concurring and dissenting); DeShaney v. Winnebago Cnty. Dept. of Soc. Servs., 489 U.S. 189, 213 (1989) (Blackmun, J., dissenting); *Furman*, 408 U.S. at 405-07 (Blackmun, J., dissenting).

84. The closest examples were passing references in *Herrera v. Collins*, 506 U.S. 390, 446 (1993) (Blackmun, J., dissenting) and *Sawyer v. Whitley*, 505 U.S. 333, 358 (1992) (Blackmun, J., concurring in judgment). For summaries of Justice Blackmun's capital jurisprudence, *see* Randall Coyne, *Marking the Progress of a Humane Justice: Harry Blackmun's Death Penalty Epiphany*, 43 U. KAN. L. REV. 367 (1995); D. Grier Stephenson, Jr., *Justice Blackmun's Eighth Amendment Pilgrimage*, 8 BYU J. PUB. L. 271 (1994); Malcolm L. Stewart, *Justice Blackmun's Capital Punishment Jurisprudence*, 26 HAST. CONST. L.Q. 271 (1998).

85. 510 U.S. 1141 (1994).

86. Starting in 1992, Justice Blackmun and his law clerks searched for a case in which he could announce his changed views on capital punishment. Martha Dragich Pearson, *Revelations from the Blackmun Papers on the Development of Death Penalty Law*, 70 MO. L. REV. 1183, 1195-98 (2005).

87. *Callins*, 510 U.S. at 1145 (Blackmun, J., dissenting from denial of certiorari).

88. *Id.* at 1147.

89. *Id.* at 1147-53.

90. *Id.* at 1153-55.

objective standards that minimized the risk of arbitrary death sentences while maintaining individualized sentencing of defendants—could be reconciled.[91] Furthermore, the Court's jurisprudence had "retreated" from its earlier commitment to satisfying both commands.[92] Justice Blackmun also noted that the federal courts' power to address claims of constitutional error in capital cases had, since *Gregg*, been circumscribed by the Court.[93] Accordingly, he concluded that the death penalty as currently administered was unconstitutional.[94]

Justice Blackmun's legal legacy is as a judge concerned with the implications of his decisions.[95] His judicial philosophy changed along with the membership of the Court, resulting in Justice Blackmun's being perceived as more liberal over the years and his voting more frequently with his more liberal colleagues. Furthermore, during his tenure the Court's membership changed as more conservative Justices replaced moderate or liberal ones.[96] Justice Blackmun's view of his role as a member of the high court changed, too; at the end of his tenure, he was more comfortable relying on and disclosing his personal views and reconsidering his previously held views in light of new knowledge and experiences.

C. Justice Lewis F. Powell, Jr.

Justice Lewis F. Powell, Jr. was another Nixon appointee. He joined the Supreme Court in January 1972. Like Justice Blackmun, Justice Powell was selected because of his perceived conservative judicial philosophy. Unlike Justice Blackmun, Justice Powell did not have prior judicial experience. Powell was, however, a well-respected lawyer in private practice, who had served in several public service positions, including as president of the

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91. *Id.* at 1155-56.

92. *Id.* at 1156.

93. *Id.* at 1157-59.

94. *Id.* at 1159.

95. ABRAHAM, *supra* note 74, at 261; William J. Brennan, Jr., *A Tribute to Justice Harry A. Blackmun*, 108 HARV. L. REV. 1 (1994); Stephen Breyer, *In Memoriam: Harry A. Blackmun*, 113 HARV. L REV. 1 (1999); Harold Hongju Koh, *Justice Blackmun and the "World Out There,"* 104 YALE L.J. 23 (1994).

96. When Justice Blackmun became a Justice, he joined Chief Justice Warren Burger, Justices Hugo Black, William Douglas, John Marshall Harlan II, William Brennan, Potter Stewart, Byron White, and Thurgood Marshall. During Justice Blackmun's service, Justice Lewis F. Powell, Jr., succeeded Justice Black, Justice William Rehnquist succeeded Justice Harlan, Justice John Paul Stevens succeeded Justice Douglas, Justice Sandra Day O'Connor succeeded Justice Stewart, Justice Antonin Scalia succeeded Justice Rehnquist upon the latter's elevation to Chief Justice, Justice Anthony Kennedy succeeded Justice Powell, Justice David Souter succeeded Justice Brennan, Justice Clarence Thomas succeeded Justice Marshall and Justice Ruth Bader Ginsburg succeeded Justice White.

American Bar Association.[97] When he joined the Court Justice Powell did not have a firm view on capital punishment, and likely had done little serious thinking about the issue.[98]

Furman was one of the first cases Justice Powell heard.[99] He dissented from the Court's ruling in that case that the death penalty was unconstitutional. To him, capital punishment was authorized by the text of the Constitution, and had been practiced since the nation's founding, and the Court's precedents had presumed its constitutionality.[100] It was the role of the legislatures, not the courts, to remedy any defects in the death penalty.[101] Justice Powell also criticized his colleague's willingness to rely on "speculative assumptions" in ruling the death penalty unconstitutional.[102] He briefly responded to Justice Marshall's hypothesis that the fully informed public would reject the discriminatory application of the death penalty.[103] According to Justice Powell, capital punishment might be accepted because of its infrequent and uneven application or out of ignorance as to its implementation.[104]

Four years later, the Court again considered the constitutionality of capital punishment.[105] At that time, Justice Powell joined Justice Potter Stewart and Justice John Paul Stevens to co-author controlling plurality opinions in the five cases before the Court.[106] The approaches taken by Georgia, Florida, and Texas were deemed constitutional, while the laws of North Carolina and Louisiana were not.[107] The trio's approach announced

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97. ABRAHAM, *supra* note 74, at 263-64.

98. JEFFRIES, *supra* note 4, at 408.

99. Days before oral argument, Justice Marshall paid a courtesy call on his new colleague on his first day as a justice and jokingly asked Justice Powell, "Do you have your capital punishment opinion written yet?" After Powell responded no, Justice Marshall said, "Well, I wish you luck. My wife Cissy is after me, and thinks we should string them all up. But, you'll see what I've written." He left with a chuckle. WOODWARD & ARMSTRONG, *supra* note 12, at 241-42.

100. Furman v. Georgia, 408 U.S. 238, 417-28 (1972) (Powell, J., dissenting).

101. *Id.* at 431-33.

102. *Id.* at 444.

103. *Id.* at 446-47.

104. *Id.* at 446-47.

105. *See* Gregg v. Georgia, 428 U.S. 153, 158 (1976) ("The issue in this case is whether the imposition of the sentence of death for the crime of murder under the law of Georgia violates the Eighth and Fourteenth Amendments.").

106. *See id.* (plurality opinion of Justices Stewart, Powell and Stevens); Proffitt v. Florida, 428 U.S. 242, 244 (1976) (plurality opinion of Justices Stewart, Powell and Stevens); Jurek v. Texas, 428 U.S. 262, 264 (1976) (plurality opinion of Justices Stewart, Powell and Stevens); Woodson v. North Carolina, 428 U.S. 280, 282 (1976) (plurality opinion of Justices Stewart, Powell and Stevens); Roberts v. Louisiana, 428 U.S. 325, 327 (1976) (plurality opinion of Justices Stewart, Powell and Stevens).

107. *See Gregg*, 428 U.S. at 207 (concluding that Georgia's capital sentencing statutory

twin commands that they stated were required by the Constitution.[108] First, so long as a jurisdiction's death penalty laws and procedures provided guidance for the exercise of the choice of whether to seek or impose the death penalty, the laws were valid. Second, even after a defendant was found guilty, death penalty laws had to provide for an individualized assessment by the sentencer on whether to impose a death sentence on that defendant.

Justice Powell thereafter endeavored to apply the principles announced in the 1976 cases. Perceived as the Court's conscience, Justice Powell was in the majority more often than any of his colleagues in death penalty cases.[109] Notwithstanding the Court's 1976 decisions, executions did not become regular events. In 1983, noting that a number of state capital cases were nearing the end of federal habeas review, in *Barefoot v. Estelle*,[110] the Court outlined the procedures for the federal courts to use in deciding whether to stay an execution and for appeals from the denial of stays.[111] Notwithstanding *Barefoot*, the number of inmates on death row continued to rise because more defendants were being sentenced to death than were being executed or otherwise removed from death row.

According to Justice Powell, and other members of the Court, capital defense lawyers were part of the reason for the rising death row population because they exploited the legal process, including filing last minute appeals to the Supreme Court.[112] Under Supreme Court practice, four votes

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scheme did not violate the Constitution); *Proffitt*, 428 U.S. at 259-60 (concluding that Florida's capital sentencing system served to assure that death sentences would not be "wantonly" or "freakishly" imposed); *Jurek*, 428 U.S. at 276 (concluding that Texas's capital sentencing laws and procedures did not violate the Eighth and Fourteenth Amendments); *Woodson*, 428 U.S. at 305 (declaring North Carolina's mandatory death penalty law unconstitutional); *Roberts*, 428 U.S. at 336 (declaring Louisiana's mandatory death penalty law unconstitutional).

108. *See Gregg*, 428 U.S. at 189 ("whether a human life should be taken or spared, [the sentencer's] discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action"); *id.* at 195 (to ensure that the death penalty is not "imposed in an arbitrary or capricious manner can be met by a carefully drafted statute that ensures that the sentencing authority is given adequate information and guidance"); *id.* at 197 ("No longer can a [capital] jury . . . reach a finding of the defendant's guilt and then, without guidance or direction, decide whether he should live or die. Instead, the jury's attention is directed to the specific circumstances of the crime . . . . In addition, the jury's attention is focused on the characteristics of the person who committed the crime . . . .").

109. *See* JEFFRIES, *supra* note 4, at 435.

110. 463 U.S. 880 (1983).

111. *Id.* at 892-96.

112. JEFFRIES, *supra* note 4, at 443-45; *see* Sullivan v. Wainwright, 464 U.S. 109, 112 (1983) (Burger, C.J., concurring in denial of application for stay); Gray v. Lucas, 463 U.S. 1237, 1237 (1983) (Burger, C.J., concurring in denial of petition for certiorari and application for stay).

were required to grant certiorari, and three votes were required to hold a case if a pending Court decision was related to the issues raised in the petition seeking review.[113] In 1985, Justice Powell proposed that the Court change its rules to require five votes to grant certiorari in capital cases since that was the number required to grant a stay of execution.[114] Under his proposal, the Court would not continue to be put in the position of having four votes to grant certiorari to hear the case, but not enough votes to grant a stay of execution so that the defendant wasn't executed in the interim.[115] Ultimately, the Court did not then change its rules.

Justice Powell's best-known capital punishment decision is *McCleskey v. Kemp*,[116] where the Court addressed the issue of race discrimination and the death penalty.[117] In *McCleskey*, the Court ruled that a death sentence was constitutional, notwithstanding a complex statistical study that indicated a risk that racial considerations entered into the decision to seek and impose a death sentence.[118] According to Justice Powell, Warren McCleskey was unable to establish a violation of his right to equal protection of the law because he was unable to show that he was sentenced to death because of his race or that the state enacted or retained its system of capital punishment because of its anticipated discriminatory effects. McCleskey's Eighth Amendment claim was rejected because he was unable to show that there was a constitutionally unacceptable risk that racial considerations influenced the capital decision process.[119]

Just over two months later, in June 1987, Justice Powell retired from the Supreme Court. His judicial legacy is as a conservative, pragmatic judge, who took a non-ideological approach to deciding cases.[120] As a result, he often cast the deciding vote in cases decided by a 5-4 vote. Justice Powell considered each case on its own merits, focusing on the facts, without attempting to decide issues not before the Court. He often balanced the competing claims of the parties in his opinions. Justice Powell, too, was

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113. *See* JEFFRIES, *supra* note 4, at 445.

114. LINDA GREENHOUSE, BECOMING JUSTICE BLACKMUN: HARRY BLACKMUN'S SUPREME COURT JOURNEY 167-72 (2005); MARK V. TUSHNET, MAKING CONSTITUTIONAL LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1961-1991, at 163-73 (1997).

115. Despite believing that seeking a stay was part of an effort to delay executions, Justice Powell and Chief Justice Burger, out of concern for the institutional legitimacy of the Court, developed a policy of casting the fifth vote for a stay. TUSHNET, *supra* note 114, at 170.

116. 481 U.S. 279 (1987).

117. *Id.* at 282-83.

118. *Id.* at 291.

119. *Id.* at 298-99.

120. ABRAHAM, *supra* note 74, at 265-67. *See generally* William J. Brennan, Jr., *A Tribute to Justice Lewis F. Powell, Jr.*, 101 HARV. L. REV. 395 (1987); Stephen Breyer, *In Memoriam: Lewis F. Powell, Jr.*, 112 HARV. L. REV. 589 (1999).

heralded as being willing to reconsider some of his previously held judicial views. His kindness and courteousness were legendary and were attributed to his Southern aristocratic upbringing.

In 1988, he accepted Chief Justice Rehnquist's invitation to chair the Ad Hoc Committee on Federal Habeas Corpus in Capital Cases (known as the Powell Committee), which was to consider the problem of delay in capital cases. The following year, Justice Powell published a Commentary in the Harvard Law Review, in which he reaffirmed his view that the death penalty was constitutional.[121] The Commentary criticized the "excessively repetitious litigation and years of delay between sentencing and execution" in capital cases,[122] and suggested that Congress and the state legislatures should consider whether "a punishment that is being enforced only haphazardly is in the public interest."[123] The Powell Committee's Report, published around the same time, echoed these sentiments and included among its proposals providing capital defense attorneys in state court proceedings (at trial, on appeal, and in post-conviction proceedings) and barring more than one federal habeas petition to review the conviction and death sentence.[124] The Committee's recommendations were not enacted into law.[125]

Justice Powell continued to speak on capital punishment. In 1990, he shared with his biographer that if he were a state legislator he would vote against the death penalty because it was not being enforced.[126] The next year, he stated that capital punishment should be abolished because it was not being enforced expeditiously.[127] According to his biographer, Justice Powell's Supreme Court service taught him that the death penalty was a failed experiment in judicial lawmaking, which would never work.[128]

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121. Lewis F. Powell, Jr., Commentary, *Capital Punishment*, 102 HARV. L. REV. 1035 (1989).

122. *Id.* at 1035.

123. *Id.* at 1046.

124. *See* Ad Hoc Committee on Federal Habeas Corpus in Capital Cases Committee Report, Judicial Conference of the U.S., Committee Report and Proposal, *reprinted in* 135 CONG. REC. 24694 (1989).

125. The Supreme Court later interpreted the federal habeas corpus laws in line with the Powell Committee's recommendations. For example, in *McCleskey v. Zant*, 499 U.S. 467 (1991), the Court prohibited the filing of successive writs that asserted a previously raised claim. Most of the Committee's other suggestions were later codified by the Antiterrorism and Effective Death Penalty Act. *See* John H. Blume, *ADEPA: The "Hype" and the "Bite,"* 91 CORNELL L. REV. 259, 266-74 (2006).

126. JEFFRIES, *supra* note 4, at 453.

127. *Id.*

128. *Id.*

D. Justice John Paul Stevens

In November 1975, when Justice William Douglas resigned from the Supreme Court, President Gerald Ford instructed the Attorney General of the United States to "[f]ind me another Lewis Powell."[129] In making judicial appointments, President Ford focused more on a nominee's qualifications and tried to select persons with whom he was politically and ideologically compatible.[130] President Ford sought someone who would restrain the jurisdiction of the federal courts.[131] He also preferred appellate court nominees with judicial experience.[132]

John Paul Stevens, a federal appellate judge for five years and a perceived moderate conservative and centrist, was selected and confirmed to the Court sixteen days later in December 1975.[133] When Justice Stevens joined the Court he was a swing vote—equally likely to vote with his conservative or liberal colleagues—but over his tenure he voted more frequently with the more liberal members of the Court.[134] Throughout his service, he had a high pro-rights or pro-individual score.[135] Though he exhibited the trait as a court of appeals judge, more than most of his Supreme Court colleagues, Justice Stevens was apt to write a separate concurring or dissenting opinion.[136] He usually declined to compromise his views to obtain a Court majority.[137]

An early exception to Justice Stevens' go-it-alone approach was his joining with Justice Stewart and Justice Powell in 1976 to co-author the controlling plurality opinions that established the parameters of the modern system of capital punishment, as discussed above. In his last years on the Court, Justice Stevens voted to limit the reach of capital punishment. In doing so, he may have laid the foundation for judicial abolition of the

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129. *Id.* at 419.

130. ABRAHAM, *supra* note 74, at 274-75.

131. *Id.* at 276.

132. *Id.* at 274.

133. *Id.* at 276. Due to Justice Douglas' declining health and the close vote among its members, the Court delayed deciding capital punishment cases until his successor joined the Court. Thus, like Justice Powell, within weeks of his arrival Justice Stevens was hearing arguments on and having to decide the constitutionality of the death penalty.

134. *Id.*; BILL BARNHART AND GENE SCHLICKMAN, JOHN PAUL STEVENS: AN INDEPENDENT LIFE 205-06 (2010).

135. ABRAHAM, *supra* note 74, at 276.

136. BARNHART & SCHLICKMAN, *supra* note 134, at 200-02. Justice Stevens has explained that he believes that the public should know if there is disagreement within an appellate court on how a case should be resolved. John Paul Stevens, *Foreword* to KENNETH A. MANASTER, ILLINOIS JUSTICE: THE SCANDAL OF 1969 AND THE RISE OF JOHN PAUL STEVENS, at xii (2001).

137. BARNHART & SCHLICKMAN, *supra* note 134, at 200-09; MANASTER, *supra* note 136, at 273.

sanction. In 2002, he wrote *Atkins v. Virginia*,[138] which declared that it was not objective social factors, but the Justices' own judgment, that determined whether a capital punishment practice was constitutional.[139] Three years later, he was a member of the majority that decided *Roper v. Simmons*,[140] which used *Atkins'* methodology, and focused on the apparent rate of change in death penalty policies as reflecting the evolving standards of decency that mark the progress of a maturing society.[141]

In 2008, Justice Stevens filed a concurring opinion in a capital case, *Baze v. Rees*.[142] In *Baze*, the Court ruled that a three-drug protocol used in the lethal injection of capital prisoners did not violate the Constitution.[143] Though he joined in that conclusion, Justice Stevens used his opinion to announce that he had reconsidered the utility of capital punishment.

He first noted that *Gregg* proffered three justifications for capital punishment: deterrence, retribution, and incapacitation.[144] None of these aims was achieved under the modern capital punishment processes, he stated.[145] Accordingly, Justice Stevens examined whether it was "time to kill" the death penalty.[146] He noted that *Atkins* and other capital cases often relied on the judgment of the Justices and that that judgment could be based on data that fell short of absolute proof.[147]

The 1976 cases were premised on the development of adequate procedures to cure the deficiencies identified in *Furman*. Justice Stevens noted, however, that due to subsequent Supreme Court decisions, capital defendants received fewer protections than non-capital defendants. He identified the following significant concerns: capital defendants were more likely denied a trial by jurors representing a fair cross-section of the community; there was a risk of error in capital cases because of the structure of the capital sentencing phase;[148] there was a risk of discriminatory application of the death penalty; and a risk of executing the innocent. In light of these apprehensions, Justice Stevens stated that "any

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138. 536 U.S. 304 (2002).
139. *Id.* at 312.
140. 543 U.S. 551 (2005).
141. *Id.* at 567.
142. 553 U.S. 35 (2008).
143. *Id.* at 47, 63.
144. *Id.* at 78 (Stevens, J., concurring in judgment).
145. *Id.*
146. *Id.* at 81.
147. *Id.* at 84.
148. Justice Stevens noted some states had changed their sentencing proceedings to obviate the sentencer's reliance on residual doubt as to guilt and that some states allowed victim impact evidence in the sentencing phase.

penalty more severe than life imprisonment without the possibility of parole" is constitutionally excessive, and therefore unlawful.[149]

Notwithstanding his conclusion that the death penalty was unconstitutional, Justice Stevens pledged to respect the precedents that upheld the sanction.[150] Like Justices Marshall, Brennan, and Blackmun, who all declared the death penalty unconstitutional while members of the Court, Justice Stevens reached that same conclusion. Unlike that trio, Justice Stevens did not thereafter dissent from every capital case he reviewed. In subsequent cases in which plenary review was granted he continued to address the arguments made by the parties without mentioning his prior conclusion that the death penalty was unconstitutional.[151]

Justice Stevens retired from the Supreme Court in June 2010. His legacy is as a pragmatic judge, unafraid to consider new approaches to recurring problems or to reconsider previously adopted positions. Sometimes Justice Stevens was alone; on other occasions his colleagues joined him. Similar to Justice Blackmun, Justice Stevens saw the composition of the Court change during his tenure, with a steady addition of Justices who were more conservative than he. Accordingly, during the last decade of his service, Justice Stevens' once moderate-conservative position seemed liberal, and he was more apt to vote with the outcome that the more ideologically liberal justices favored.[152] Justice Stevens never lost the "maverick" label he was branded with early in his tenure, and upon his retirement, he seemed to revel in being classified both as a maverick and as an independent-minded judge.[153] Justice Stevens, as the senior associate Justice since 1994, had the authority to choose which of his colleagues would write the Court's opinion when the Chief Justice was not in the majority. Contrary to the stereotype as an intellectual loner, Justice Stevens used that assignment power felicitously.[154]

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149. *Baze*, 553 U.S. at 86 (Stevens, J., concurring in judgment).

150. *Id.*

151. *See, e.g.*, Holland v. Florida, 130 S. Ct. 2549 (2010); Beard v. Kindler, 558 U.S. 53 (2009); Cone v. Bell, 556 U.S. 449 (2009).

152. ABRAHAM, *supra* note 74, at 276.

153. *See generally* BARNHART & SCHLICKMAN, *supra* note 134. Jeffrey Rosen, *The Dissenter*, N.Y. TIMES, Sept. 23, 2007, at 50. ABRAHAM, *supra* note 74, at 276-79.

154. Charles F. Jacobs & Christopher E. Smith, *The Influence of Justice John Paul Stevens: Opinion Assignments by the Senior Associate Justice*, 51 SANTA CLARA L. REV. 743 (2011). Jacobs and Smith provide examples of the apparent strategic assignment of opinions by Justice Stevens in an array of substantive areas, including in capital cases such as *Ring v. Arizona*, 536 U.S. 584 (2002), *Atkins v. Virginia*, 536 U.S. 304 (2002), *Roper v. Simmons*, 543 U.S. 551 (2008), and *Kennedy v. Louisiana*, 554 U.S. 407 (2008). *Id.* at 753-72.

E. Saying Good-bye to Capital Punishment

Justices Blackmun, Powell, and Stevens each did not question the legitimacy of capital punishment early in their tenure. It is worth remembering that these three Justices are each properly viewed as philosophically moderate-conservative judges. They were not ideologues on criminal law, and if they didn't generally keep an open mind in that area, they were at least willing to reconsider their earlier thinking on the subject. Simply put, they were empathetic judges,[155] who let the facts guide them in applying the law.

Furthermore, when they turned away from the death penalty, none of the trio declared that the death penalty was per se unconstitutional. Instead, they condemned the operation of capital punishment, accepting that death can be a permissible punishment.

Justice Blackmun's and Justice Stevens' change of mind occurred while still members of the Supreme Court, and they placed their dénouement to the death penalty in the United States Reports. These were undoubtedly calculated decisions, announced as each was considering retiring and likely his judicial legacy. Now, future Justices, lawyers, and academics can study their reasoning. Equally important, though, is that the world, which can access decades of their opinions adjudicating capital punishment issues, can just as easily retrieve their statements recanting the death penalty.

One does not have to study their sayonaras to state executions for long to see that what Justice Blackmun condemned—the twin commands of guided discretion and individualized sentencing announced in the 1976 cases—is what Justice Stevens both invented and praised. Both Justices point to subsequent decisions of the Court—their colleagues (whom they sometimes aided and abetted)—as being at fault.

Justice Powell is different. Four years into retirement when asked by his biographer whether he would change his vote in any case, he responded: "I would vote the other way in any capital case . . . . Yes. I have come to think that capital punishment should be abolished."[156]

This is quite a turn of events. Justice Powell's biographer notes that Justice Powell's more conservative colleagues endeavored to reduce the delay between imposition of the death sentence and execution by circumscribing the avenues for judicial review. Justice Powell, too, proceeded in this direction. As a Justice, he consistently voted to restrict the

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155. Every judge uses empathy. The question becomes how much and when. As Senator and President Barack Obama stated, empathy was a criterion in confirming and selecting judicial nominees. For an exploration of empathy and judging, *see* Thomas B. Colby, *In Defense of Judicial Empathy*, 96 MINN. L. REV. 1944 (2012); Neal R. Feigenson, *Sympathy and Legal Judgment: A Psychological Analysis*, 65 TENN. L. REV. 1 (1997); Lynn N. Henderson, *Legality and Empathy*, 85 MICH. L. REV. 1574 (1987).

156. JEFFRIES, *supra* note 4, at 451.

reach of the writ of federal habeas corpus for state prisoners,[157] and gave speeches on the need to restrict habeas.[158] He also sought to change the Court's internal rules on granting stays of execution. In retirement, he chaired and endorsed the Powell Committee's habeas law restrictions, and proposed similar changes to federal law in his Harvard Law Review article.[159] Yet, according to his biographer, Justice Powell's turnaround was attributable to capital punishment cases themselves.

> From them Powell learned that the death penalty would never be routinely applied . . . . Powell knew firsthand their deadly hold on the judge's peace of mind. He knew how hard it was not to take a second, third, or fourth look at rejected claims, how easy it seemed to put the whole thing off for one more hearing, how much courage—or callousness—it took to treat death like any other penalty. Some judges could achieve that emotional distance, but Powell came to believe that the system as a whole would always be plagued by doubt and that doubting itself, it would inspire resentment and contempt.[160]

If these were Justice Powell's feelings, he kept them to himself as he didn't express any doubts in public, even after his retirement.

Missing from the biographer's account is an explanation—ideally, in Powell's own words or by his own hand (for example in a law review article or newspaper editorial)—explaining the reasons behind his change of mind.[161] As currently presented, Justice Powell's transformation on capital punishment seems too favorable a rendition by too sympathetic a source—his former law clerk.[162]

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157. Among the decisions of the Court that Justice Powell wrote addressing the availability of the writ of habeas corpus are: *Rose v. Clark*, 478 U.S. 570 (1986) (holding that harmless error standard applies to claim of improper jury instruction); *Kuhlmann v. Wilson*, 477 U.S. 436 (1986) (finding that a defendant must prove that state and its informant acted deliberately to elicit incriminating statements in order to show that his right to counsel was violated; and, for a plurality of the Court, finding that the ends of justice would not be served by addressing a claim in a successive habeas petition, which had been rejected in previous habeas petition); and *Stone v. Powell*, 428 U.S. 465 (1976) (holding that search and seizure claims cannot be raised in federal habeas if the state provided petitioner with a full and fair opportunity to litigate Fourth Amendment issues in state court).

158. *See* Bryan A. Stevenson, *The Politics of Fear and Death: Successive Problems in Capital Federal Habeas Corpus Cases*, 77 N.Y.U. L. REV. 699, 714 n.75 (2002) (citations omitted).

159. Powell, *supra* note 121.

160. JEFFRIES, *supra* note 4, at 452-53.

161. Justice Powell did such in 1990 when he publicly repudiated his vote in the 1986 case of *Bowers v. Hardwick*. *Id.* at 530.

162. The biographer, in contrast, is appropriately critical of Justice Powell's handling of *Bowers v. Hardwick*. *Id.* at 527-30.

Justice Powell's supposed capital punishment repudiation explanation reads like

Regretfully, none of the Justices fully documented their doubts about the death penalty as they arose. Understandably, a judge who hedges or equivocates on the important issue of the death penalty creates uncertainty within the capital punishment system. Yet, it may be that all we are entitled to is "a jurisprudence of doubt"[163] when it comes to capital punishment. Justice Marshall's hypothesis suggested as much in *Furman*.

V. CONCLUSION

This Introduction has highlighted Justice Marshall's perceptive insights on the death penalty. His hypothesis has been tested and written about for decades. Social scientists have confirmed parts of his thesis. Decades of constitutional regulation of the death penalty may have left us no better off than when the death penalty was condemned in *Furman*.

Three of Justice Marshall's colleagues—Justice Blackmun, Justice Powell, and Justice Stevens—all upper class Republican white men, eventually withdrew their support for capital punishment. Their actions lend support to Justice Marshall's hypothesis that individuals fully informed about the administration of the death penalty would conclude that it was an unwise policy. Additionally, if his fellow jurists are viewed as retaining an open mind on capital punishment, their actions further corroborate the related social science research, notwithstanding their social and political backgrounds.

Justice Blackmun's, Justice Powell's and Justice Stevens' considered conclusions reflect that though each was qualified when first fitted for his Supreme Court robe, they did not become hard-headed ideologues on the Court. Rather, after attempting to foster a national conversation on capital punishment with the state and national legislatures and executive branches in 1976, their shoulders expanded as they reconceived their role as judges. In the end, they each concluded that the Court had not held up its end of the dialogue, and that the death penalty as presently administered is unconstitutional.

Justice Marshall was correct that those who come to the subject with a relatively open mind cannot help but be in wonderment by this country's death penalty, especially its many contradictions. Perhaps the only thing

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an end-of-life confession or a will manumitting slaves. While eternal rest is not mine to give, I believe that a personal confession and genuine repentance are sufficient to absolve one of wrongdoing in this world. *See Luke* 23:39-43. The personal nature of Justice Powell's so-called confession is missing. Like Justice Marshall, I am put off by the "southernness" of the action—realizing it is wrong, but seeking only private absolution for actions that had widespread public impact. *See* HOWARD BALL, A DEFIANT LIFE: THURGOOD MARSHALL AND THE PERSISTENCE OF RACISM IN AMERICA 267 (1998).

163. The idea is from *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 844 (1992) (plurality).

slightly more astonishing is that so many who support the death penalty know relatively little about how it actually works. If a better death penalty is in the offing, then both death penalty abolitionists and capital punishment retentionists at least have to talk about their differences.

Ms. Enekwa's Comment has a formula for how that conversation can start.