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The Gross Injustices of Capital Punishment: A Torturous Practice and Justice Thurgood Marshall's Astute Appraisal of the Death Penalty's Cruelty, Discriminatory Use, and Unconstitutionality

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The Gross Injustices of Capital Punishment: A Torturous Practice and Justice Thurgood Marshall's Astute Appraisal of the Death Penalty's Cruelty, Discriminatory Use, and Unconstitutionality

John D. Bessler*

Abstract

Through the centuries, capital punishment and torture have been used by monarchs, authoritarian regimes, and judicial systems around the world. Although torture is now expressly outlawed by international law, capital punishment—questioned by Quakers in the seventeenth century and by the Italian philosopher Cesare Beccaria and many others in the following century—has been authorized over time by various legislative bodies, including in the United States. It was Beccaria's book, Dei delitti e delle pene *(1764), translated into French and then into English as* An Essay on Crimes and Punishments *(1767), that fueled the still-ongoing international movement to outlaw the death penalty. An edict of the Grand Duke of Tuscany, issued in 1786, made Tuscany the first jurisdiction in Western civilization to abolish capital punishment for all crimes. In 2021, decades after Justice Thurgood Marshall spoke out against "the gross injustices in the administration of capital punishment" and filed relentless dissents asserting that the death penalty is a* per se *violation of the U.S. Constitution's Eighth and Fourteenth Amendments, the Commonwealth of Virginia became one of the latest jurisdictions to abolish capital punishment.*

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In the more than 250 years since the publication of Beccaria's On Crimes and Punishments, much penal reform and social change has occurred, including with respect to interrogation, criminal justice, and punishment practices. Judicial torture, for example, was once explicitly authorized in civil law countries in continental Europe, but the U.N. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment now expressly prohibits both physical and mental forms of torture. In addition, Western penal systems have abandoned non-lethal corporal punishments—once a staple of centuries-old legal systems. The English common law and the Eighth Amendment, in fact, have long been understood to prohibit torture, though the concept of torture was understood much differently in the seventeenth and eighteenth centuries than it is in the twenty-first century. England's monarchs, acting outside the common-law prohibition, previously made use of devices of torture such as the rack and the thumbscrew, and the U.S. Supreme Court—in the nineteenth century—explicitly approved the use of public shooting and electrocution as methods of execution even as it simultaneously held that the Eighth Amendment bars torturous punishments. European countries, including England, now explicitly forbid executions altogether through two protocols to the European Convention on Human Rights. Significantly, although the English "Bloody Code" once authorized death sentences for scores of offenses along with various non-lethal corporal punishments such as ear cropping and the pillory, bodily punishments such as branding and the stocks are no longer part of Western penal codes.

This Article contextualizes the modern death penalty debate and recalls the cogent arguments that Justice Thurgood Marshall made against capital punishment in his judicial opinions. It then shows how Justice Marshall's vocal and pragmatic critique of capital punishment—one rooted in his own experience as a civil rights lawyer in capital cases and, later, as a justice—should be taken seriously and adopted by present-day U.S. Supreme Court justices. In laying out Justice Marshall's persuasive arguments against capital punishment, the Article points out that mock (or simulated) executions and other threats of death or bodily harm in other contexts (e.g., with respect to custodial interrogations) are already treated as impermissible acts of psychological torture. With

Justice Marshall regularly classifying the death penalty as a "cruel and unusual punishment" in his powerful, well-grounded dissents, this Article asserts that those dissents against capital punishment should become the law of the land in the twenty-first century. Not only is capital punishment cruel and unusual and a violation of equal protection of the laws as Justice Marshall contended, but it is clear that, in light of the modern definition of torture, state-sponsored death threats must be classified under the rubric of torture—what the law considers the extreme form of cruelty. The absolute prohibition of torture is already considered to be a jus cogens norm of international law and that legal prohibition admits of no exceptions, with the death penalty bearing all the tell-tale indicia and characteristics of torture. In fact, an immutable characteristic of capital punishment is that it makes use of credible threats of death.

In short, the death penalty's use—long known to intentionally inflict severe pain and suffering, and long administered in a highly arbitrary and discriminatory fashion in violation of fundamental human rights—must be outlawed and strictly forbidden to ensure that no one is subjected to the cruelty or torture of facing a capital prosecution, living under a sentence of death, or being put to death at the hands of the state. Justice Marshall—along with his colleague, Justice William Brennan—frequently wrote that the U.S. Constitution's Eighth and Fourteenth Amendments should be interpreted to bar the death penalty's use in all circumstances. In examining all of the evidence, much of which is irrefutable, this Article concludes that Justice Marshall was correct and that the death penalty's use must be declared to be unconstitutional and a per se violation of the U.S. Constitution. Death sentences and executions violate human dignity, fundamental human rights, and the equal protection of the laws—concepts at the very heart of American and international law, and ones that Justices Marshall and Brennan regularly cited in their judicial opinions. In the twenty-first century, death sentences and executions must be stigmatized for what they truly are: acts of extreme cruelty amounting to torture.

"I believe that the following facts would serve to convince even the most hesitant of citizens to condemn death as a sanction: capital punishment is imposed discriminatorily against certain identifiable classes of people; there is evidence that innocent people have been executed before their innocence can be proven; and the death penalty wreaks havoc with our entire criminal justice system."

—Justice Thurgood Marshall, concurring in *Furman v. Georgia* (1972)[1]

"I have spoken out often to decry the gross injustices in the administration of capital punishment in our country. I air my concerns once again today with the fervent hope that they reach receptive ears. When in Gregg v. Georgia the Supreme Court gave its seal of approval to capital punishment, this endorsement was premised on the promise that capital punishment would be administered with fairness and justice. Instead, the promise has become a cruel and empty mockery. If not remedied, the scandalous state of our present system of capital punishment will cast a pall of shame over our society for years to come. We cannot let it continue."

—Justice Thurgood Marshall, Remarks at the Annual Dinner in Honor of the Judiciary, American Bar Association (Aug. 6, 1990)[2]

1. Furman v. Georgia, 408 U.S. 238, 363–64 (1972) (Marshall, J., concurring).

2. THURGOOD MARSHALL: HIS SPEECHES, WRITINGS, ARGUMENTS, OPINIONS, AND REMINISCENCES 293, 295 (Mark V. Tushnet, ed. 2001).

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I. Introduction

The history of capital punishment is rife with discrimination and other violations of civil and human rights. In *Furman v. Georgia*, the *per curiam*, five-to-four U.S. Supreme Court decision declaring America's death penalty a "cruel and unusual punishment in violation of the Eighth and Fourteenth Amendment,"[3] Justice William O. Douglas—after examining English and American history[4]—voted with the majority, observing in his concurrence that "[t]hose who wrote the Eighth Amendment knew what price their forebears had paid for a system based not on equal justice, but on discrimination."[5] "The high

3. *Furman*, 408 U.S. at 240 (per curium).

4. I have previously written about the Eighth Amendment's history and the Eighth Amendment's roots in English law. *See generally* John D. Bessler, *A Century in the Making: The Glorious Revolution, the American Revolution, and the Origins of the U.S. Constitution's Eighth Amendment*, 27 WM. & MARY BILL RTS. J. 989 (2019) (providing a history of the 1689 English Bill of Rights and its prohibition of cruel and unusual punishment); JOHN D. BESSLER, CRUEL AND UNUSUAL: THE AMERICAN DEATH PENALTY AND THE FOUNDERS' EIGHTH AMENDMENT 216 (2012) (surveying the history of the Cruel and Unusual Punishment Clause of the U.S. Constitution's Eighth Amendment); *see also* Anthony F. Granucci, *"Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning*, 57 CAL. L. REV. 839 (1969) (reviewing the history of the "cruel and unusual punishments" prohibition from its basis in English common law); Joshua E. Kastenberg, *An Enlightened Addition to the Original Meaning: Voltaire and the Eighth Amendment's Prohibition Against Cruel and Unusual Punishments*, 5 TEMP. POL. & C.R. L. 49 (1996) (discussing the influence of enlightenment theorists on the framers' understanding of "cruel and unusual punishments"); John F. Stinneford, *The Original Meaning of "Cruel"*, 105 GEO. L.J. 441 (2017) (detailing the historic usage of the word "cruel" with reference to punishment standards and concluding that it is intended to mean "unjustly harsh" rather than "motivated by cruel intent"); John F. Stinneford, *The Original Meaning of "Unusual": The Eighth Amendment as a Bar to Cruel Innovation*, 102 NW. U. L. REV. 1739 (2008) (examining the historic usage of "unusual" in the context of punishment and concluding that it is a term of art referring to government practices that are contrary to "long usage" or "immemorial usage").

5. *Furman*, 408 U.S. at 255 (Douglas, J., concurring).

> In those days, the target was not the blacks or the poor, but the dissenters, those who struggled for a parliamentary regime, and who opposed governments' recurring efforts to foist a particular religion on the people. One cannot read this history without realizing that the desire for equality was reflected in the ban against "cruel and unusual punishments" contained in the Eighth Amendment.

service rendered by the 'cruel and unusual' punishment clause of the Eighth Amendment," Justice Douglas emphasized, "is to require legislatures to write penal laws that are evenhanded, nonselective, and nonarbitrary, and to require judges to see to it that general laws are not applied sparsely, selectively, and spottily to unpopular groups."[6] Justice Douglas concluded that statutes allowing for the death penalty's "discretionary" application[7] "are unconstitutional in their operation" as they are "pregnant with discrimination, and discrimination is an ingredient not compatible with the idea of equal protection of the laws that is implicit in the ban on 'cruel and unusual' punishments."[8]

The death penalty's arbitrary and discriminatory application drove the majority's decision in *Furman*. In his concurrence,

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6. *Id*. at 256.

7. *See id.* at 252–53. After discussing the cases of the three Black men—Lucious Jackson, Elmer Branch, and William Furman—who'd been sentenced to death (two for rape and one for murder), Justice Douglas emphasized:

> We cannot say from facts disclosed in these records that these defendants were sentenced to death because they were black. Yet our task is not restricted to an effort to divine what motives impelled these death penalties. Rather, we deal with a system of law and of justice that leaves to the uncontrolled discretion of judges or juries the determination whether defendants committing these crimes should die or be imprisoned. Under these laws, no standards govern the selection of the penalty. People live or die, dependent on the whim of one man or of 12.

8. *Id.* at 256–57; *see also id.* at 242 ("It would seem to be incontestable that the death penalty inflicted on one defendant is 'unusual' if it discriminates against him by reason of his race, religion, wealth, social position, or class, or if it is imposed under a procedure that gives room for the play of such prejudices."); *id.* at 256.

> A law that stated that anyone making more than $50,000 would be exempt from the death penalty would plainly fall, as would a law that in terms said that blacks, those who never went beyond the fifth grade in school, those who made less than $3,000 a year, or those who were unpopular or unstable should be the only people executed. A law which, in the overall view, reaches that result in practice has no more sanctity than a law which in terms provides the same.

Justice Potter Stewart wrote that the death sentences under review "are cruel and unusual in the same way that being struck by lightning is cruel and unusual," emphasizing that "the petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed."[9] "My concurring Brothers," he added, "have demonstrated that, if any basis can be discerned for the selection of these few to be sentenced to die, it is the constitutionally impermissible basis of race."[10] In his own concurrence, Justice Thurgood Marshall—also examining English and American history—concluded that America's founders "intended to outlaw torture and other cruel punishments."[11] "Regarding discrimination," Justice Marshall wrote, "it has been said that '[i]t is usually the poor, the illiterate, the underprivileged, the member of the minority group—the man who, because he is without means, and is defended by a court-appointed attorney—who becomes society's sacrificial lamb . . . .'"[12] "[A] look at the bare statistics regarding executions is enough to betray much of the discrimination," Marshall pointed out, citing data on those executed since 1930,[13] evidence of racial and gender

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9. *Id*. at 309–10 (Stewart, J., concurring).

10. *Id*. at 309–10; *see also id.* at 310:

> But racial discrimination has not been proved, and I put it to one side. I simply conclude that the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed.

11. *See id.* at 315–22 (Marshall, J., concurring); *see also id.* at 323–24 (discussing the 1892 decision in *O'Neil v. Vermont* where Justice Field and two of his colleagues opined that confining someone for approximately fifty-four years and subjecting an offender to hard labor for selling liquor in violation of Vermont law was a cruel and unusual punishment) (internal citations omitted).

12. *Id.* at 364 (internal quotations omitted).

13. *Id*.

> A total of 3,859 persons have been executed since 1930, of whom 1,751 were white and 2,066 were Negro. Of the executions, 3,334 were for murder; 1,664 of the executed murderers were white and 1,630 were Negro; 455 persons, including 48 whites and 405 Negroes, were executed for rape. It is immediately apparent that Negroes were executed far more often than whites in proportion to their percentage of the population.

discrimination,[14] and how the death penalty falls upon the most vulnerable.[15]

The U.S. Supreme Court's June 29, 1972 decision in *Furman*, in which Justices Thurgood Marshall and William Brennan and three of their colleagues wrote of the death penalty's unconstitutionality in separate concurring opinions,[16] came close

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14. *See id.* at 364–65.

> [T]here is evidence of racial discrimination. Racial or other discriminations should not be surprising. In *McGautha v. California* . . . this Court held 'that committing to the untrammeled discretion of the jury the power to pronounce life or death in capital cases is (not) offensive to anything in the Constitution.' This was an open invitation to discrimination. There is also overwhelming evidence that the death penalty is employed against men and not women. Only 32 women have been executed since 1930, while 3,827 men have met a similar fate. It is difficult to understand why women have received such favored treatment since the purposes allegedly served by capital punishment seemingly are equally applicable to both sexes.

15. *See id.* at 365–66.

> It also is evident that the burden of capital punishment falls upon the poor, the ignorant, and the under privileged members of society. It is the poor, and the members of minority groups who are least able to voice their complaints against capital punishment. Their impotence leaves them victims of a sanction that the wealthier, better-represented, just-as-guilty person can escape.

16. *See* Alan I. Bigel, *Justices William J. Brennan, Jr. and Thurgood Marshall on Capital Punishment: Its Constitutionality, Morality, Deterrent Effect, and Interpretation by the Court*, 8 NOTRE DAME J.L. ETHICS & PUB. POL'Y 11, 155 (1994).

> The jurisprudence of Brennan and Marshall on the applicability of the Eighth Amendment's prohibition of "cruel and unusual punishments" to the death penalty is virtually identical. Categorical opposition to capital punishment was first expressed by both Justices in the 1972 case of *Furman v. Georgia,* essentially for similar reasons: the death penalty, a barbaric form of punishment which inflicts a great deal of pain, is offensive to human dignity; it is arbitrarily imposed and racially biased regarding the class of offenders sentenced to

on the heels of the California Supreme Court's February 18, 1972 decision in *People v. Anderson*.[17] In the latter case, the California Supreme Court considered the case of Robert Anderson, convicted of first-degree murder, attempted murder, and first-degree robbery and sentenced to die by a jury.[18] Anderson argued that the death penalty constituted a cruel and unusual punishment and contravened both the U.S. Constitution's Eighth Amendment and article I, section 6 of California's constitution.[19] In that case, the California Supreme Court—applying state law—concluded that capital punishment "is both cruel and unusual as those terms are defined under article I, section 6, of the California Constitution, and that therefore death may not be exacted as punishment for crime in this state."[20] "The cruelty of capital punishment lies not only in the execution itself and the pain incident thereto, but also in the dehumanizing effects of the lengthy imprisonment prior to execution during which the judicial and administrative procedures essential to due process of law are carried out," the California Supreme Court ruled. "Penologists and medical experts agree," California's highest court added, "that the process of carrying out a verdict of death is often so degrading and brutalizing to the human spirit as to constitute psychological torture."[21]

While some predicted the American death penalty's demise in *Furman*'s wake,[22] thirty-five states soon reenacted death penalty

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> death; it is offensive to contemporary society; and it does not deter commission of homicide or serve any demonstrable purpose of punishment. Fundamentally, Brennan and Marshall fervently believed that the wording of the Eighth Amendment prohibited the death penalty, and both shared perceptions of judicial power which justified abolition notwithstanding widespread adoption of capital punishment at the state and federal levels.

17. People v. Anderson, 493 P.2d 880 (Cal. 1972).
18. *Id.* at 882.
19. *Id.* at 883.
20. *Id.* at 882.
21. *Id.* at 894.
22. *See, e.g.,* John D. Bessler, *Revisiting Beccaria's Vision: The Enlightenment, America's Death Penalty, and the Abolition Movement*, 4 NW. J.L. & SOC. POL'Y 195, 240 (2009).

laws and the nation's highest court felt compelled to revisit the subject just four years later.[23] In 1976, the U.S. Supreme Court—bowing to then-existing public sentiment as expressed by state legislatures seeking to reinstate capital punishment—reversed course and upheld the death penalty's constitutionality in *Gregg v. Georgia*[24] and two companion cases.[25] Justice Marshall—deeply affected[26] and now forced to become a dissenter—wrote in his dissent in *Gregg* that he continued to view the death penalty as "a cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments."[27] Marshall pointed out that "the American people know little about the death penalty," observing that "an informed public would differ significantly from those of a public unaware of the consequences and effects of the death

> The *Furman* decision, though closely divided, was widely seen as the death knell for America's death penalty. When the first English-language biography of Cesare Beccaria was published in Philadelphia in 1973, the well-known University of Chicago criminologist, Norval Morris, wrote the foreword, referring to America's death penalty in the past tense. "Beccaria was, of course, one of the leading early opponents of capital punishment," Morris wrote, confidently proclaiming, "[t]he final vindication by the Supreme Court of his view of the social inutility of this punishment, and of its unconstitutionality, confirmed the quality of Beccaria's perceptive vision." Even many of the Justices themselves privately predicted that America would never witness another execution.

23. *See* Sofia Perla, *The Two Percent: How Florida's Capital Punishment System Defies the Eighth Amendment*, 15 FIU L. REV. 515, 532 (2021) ("[F]ollowing *Furman*, thirty-five states, including Florida, revised their death penalty statutes.").

24. 428 U.S. 153 (1976).

25. *See* Jurek v. Texas, 428 U.S. 262, 276 (1976) (finding that "Texas' capital-sentencing procedures . . . do not violate the Eighth and Fourteenth Amendments"); see Proffitt v. Florida, 428 U.S. 242, 259 (1976) (upholding the constitutionality of Florida's death penalty laws).

26. *See* Randall Coyne, *The Life and Jurisprudence of Justice Thurgood Marshall*, 47 OKLA. L. REV. 35, 43 (1994) ("The *Gregg* decision took an enormous personal toll on Justice Marshall. Spectators said that when the majority decision was read from the bench, Justice Marshall appeared visibly shaken. He left the Court early and later that night suffered a mild heart attack at age sixty-seven.").

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

penalty."[28] "An excessive penalty is invalid under the Cruel and Unusual Punishments Clause 'even though popular sentiment may favor' it," Justice Marshall emphasized.[29] In his dissent, Justice Marshall noted: "To be sustained under the Eighth Amendment, the death penalty must 'compor(t) with the basic concept of human dignity at the core of the Amendment,' the objective in imposing it must be '(consistent) with our respect for the dignity of (other) men.'"[30] "Under these standards," he concluded, "the taking of life 'because the wrongdoer deserves it' surely must fall, for such a punishment has as its very basis the total denial of the wrong-doer's dignity and worth."[31] In *Gregg* and until his retirement in 1991, Justice Marshall—along with his colleague, Justice William Brennan—regularly expressed the view that the death penalty violates the dictates of the Eighth and Fourteenth Amendments.[32] For Marshall, it was a position

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28. *Id.* at 232. *See* Bharat Malkani, *Dignity and the Death Penalty in the United States Supreme Court*, 44 HASTINGS CONST. L.Q. 145, 155 n.53 (2017) ("The notion that an informed citizenry would reject the death penalty has come to be known as 'The Marshall Hypothesis.'").

29. *Gregg*, 428 U.S. at 233 (Marshall, J., dissenting).

30. *Id.* at 240 (quoting Trop v. Dulles, 356 U.S. 86, 100 (1958) (plurality opinion)).

31. *Id.* at 240–41 (citations omitted). *See also* Bigel, *supra* note 16, at 130:

> The central component of Brennan and Marshall's position on the death penalty was based on the Court's contention in *Trop v. Dulles* (1958) that the Eighth Amendment 'must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.' Both believed that perceptions of unacceptable cruelty have evolved to a point where the death penalty is considered offensive to human dignity.

32. *See* MICHAEL MELLO, AGAINST THE DEATH PENALTY: THE RELENTLESS DISSENTS OF JUSTICES BRENNAN AND MARSHALL 11–13, 143–44, 182–84, 187–89 (1996); Maynard v. Cartwright, 486 U.S. 356, 366 (1988) (Brennan, J., concurring) ("Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, I would direct that the re-sentencing proceedings be circumscribed such that the State may not reimpose the death sentence.") (internal citations omitted); Martha Minow, *A Tribute to Justice Thurgood Marshall*, 105 HARV. L. REV. 66, 75 (1991) ("In every death penalty case, Justice Marshall and his friend and colleague Justice Brennan included a restatement of their view that the death sentence violates the Eighth Amendment."); Jordan Steiker, *The Long Road Up*

informed by his extensive civil rights work and his prior representation of capital defendants.[33]

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from Barbarism: Thurgood Marshall and the Death Penalty, 71 TEX. L. REV. 1131, 1132 (1993):

> Justice Marshall voted to overturn every death sentence that came before the Court following the Court's approval of several capital punishment schemes in 1976. The U.S. Reports are filled with Justice Marshall's (and Justice Brennan's) familiar refrain: "Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, we would grant certiorari and vacate the death sentence in this case."

Howard Ball, *Thurgood Marshall's Forlorn Battle Against Racial Discrimination in the Administration of the Death Penalty: The* McCleskey *Cases, 1987, 1991*, 27 MISS. C.L. REV. 335, 335 (2008):

> In the entire history of the American Republic, from 1789 to 2008, only two of the 110 justices who have sat on the U.S. Supreme Court believed that state-mandated executions were both immoral and unconstitutional. These jurists were William J. Brennan, Jr. and Thurgood Marshall. They never hesitated to write dissents when the Court denied certiorari in death penalty cases; they always dissented when the Court majority validated the death penalty after hearing the lawyers and reading the briefs.

33. *See* Coyne, *supra* note 26, at 36–37:

> Marshall knew from bitter personal experience that America's criminal justice system and the military justice system were infested with hatred and prejudice against minorities. When Marshall was forty-three years old, litigating civil rights cases for the National Association for the Advancement of Colored People (NAACP), he successfully defended black soldiers unjustly sentenced to death in Korea and Japan. Those sentences were reduced or reversed after Marshall persuaded military officials and President Harry Truman that serious errors pervaded the soldiers' trials.

See also id. at 38:

> Marshall was not always so fortunate in his representation of the condemned. During his early years of private practice, Marshall represented a former high school classmate who was charged with robbery and murder. Marshall lost, and his client

Since *Gregg*, the U.S. Supreme Court has upheld the constitutionality of the death penalty in spite of the punishment's inherent characteristics—one of which is that it systematically makes use of threats of death—and the way in which it has been administered.[34] Despite all of the historical data about discrimination presented and relied upon in *Furman*, and in spite of a massive, highly sophisticated study—the "Baldus study"—showing the death penalty's discriminatory administration, including on the basis of the race of the victim,[35] the U.S. Supreme

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> died on the gallows at the Maryland penitentiary in Baltimore. The loss weighed heavily on Marshall's conscience. Marshall explained: 'When the time of execution came up, I felt so bad about it—that maybe I was responsible—that I decided I was going to go and see the execution.' At the last minute, a friend of Marshall's convinced him not to attend.

Id. ("Some years later, when asked if the hanging of his classmate had inspired his condemnation of the death penalty, Marshall replied: 'Well, I don't know whether that . . . well, it did. It did because I lost the death penalty case in private practice.'"). Throughout his U.S. Supreme Court tenure, Justice Marshall believed strongly in the importance of defense counsel to the reliability of the outcome of judicial proceedings. *See e.g.*, Strickland v. Washington, 466 U.S. 668, 715 (1984) (Marshall, J., dissenting) ("The performance of defense counsel is a crucial component of the system of protections designed to ensure that capital punishment is administered with some degree of rationality. 'Reliability' in the imposition of the death sentence can be approximated only if the sentencer is fully informed of 'all possible relevant information about the individual defendant whose fate it must determine.'") (internal citations omitted); *see also* Gerald F. Uelmen, *Justice Thurgood Marshall and the Death Penalty: A Former Criminal Defense Lawyer on the Supreme Court*, 26 ARIZ. ST. L.J. 403, 408 (1994) ("In many cases coming before the Supreme Court on petitions for certiorari in the wake of *Strickland*, Justice Marshall found significant evidence that defense counsel had performed inadequately in death penalty cases and dissented from the denial of certiorari.").

34. *See e.g.*, Bucklew v. Precythe, 139 S. Ct. 1112, 1122 (2019) ("The Constitution allows capital punishment, In fact, death was 'the standard penalty for all serious crimes' at the time of the founding."); Glossip v. Gross, 576 U.S. 863, 869 (2015) ("Holding that the Eighth Amendment demands the elimination of essentially all risk of pain would effectively outlaw the death penalty altogether."); Baze v. Rees, 553 U.S. 35, 47 (2008) ("[C]apital punishment is constitutional . . . the Constitution does not demand the avoidance of all risk of pain in carrying out executions.").

35. The Baldus study was performed by Professors David C. Baldus, Charles Pulaski, and George Woodworth. David C. Baldus et al., *Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience*, 74 J. CRIM. L. & CRIMINOLOGY 661 (1983); *see also* McCleskey v. Kemp, 481 U.S. 279, 286 (1987) (noting that the Baldus study consisted of "two sophisticated statistical studies"

Court in *McCleskey v. Kemp*[36] continued to turn a blind eye to what Justice Marshall called capital punishment's "gross injustices."[37] By a five-to-four vote, the Court in *McCleskey* held that Georgia's capital punishment law did not violate the U.S. Constitution's Equal Protection Clause or the Eighth Amendment's prohibition of cruel and unusual punishments.[38] The Baldus study, after taking account of 230 variables, concluded that defendants charged with killing white victims were 4.3 times as likely to receive a death sentence; that Black defendants were 1.1 times as likely to receive death sentences as others defendants; and that Black defendants

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examining "over 2,000 murder cases that occurred in Georgia during the 1970's" and observing of the results).

> The raw numbers collected by Professor Baldus indicate that defendants charged with killing white persons received the death penalty in 11% of the cases, but defendants charged with killing blacks received the death penalty in only 1% of the cases. The raw numbers also indicate a reverse racial disparity according to the race of the defendant: 4% of the black defendants received the death penalty, as opposed to 7% of the white defendants.

See id. at 286–87:

> Baldus also divided the cases according to the combination of the race of the defendant and the race of the victim. He found that the death penalty was assessed in 22% of the cases involving black defendants and white victims; 8% of the cases involving white defendants and white victims; 1% of the cases involving black defendants and black victims; and 3% of the cases involving white defendants and black victims. Similarly, Baldus found that prosecutors sought the death penalty in 70% of the cases involving black defendants and white victims; 32% of the cases involving white defendants and white victims; 15% of the cases involving black defendants and black victims; and 19% of the cases involving white defendants and black victims.

36. 481 U.S. 279 (1987).

37. TUSHNET, *supra* note 2, at 295.

38. *See McCleskey*, 481 U.S. at 292–93 (finding that the defendant "must prove the decisionmakers in *his* case acted with a discriminatory purpose", and that he offered none).

who killed white victims have the greatest likelihood of being sentenced to death.[39]

Justice Lewis Powell cast the deciding vote in *McCleskey* and wrote the Court's decision. "At most," Justice Powell wrote for the majority, "the Baldus study indicates a discrepancy that appears to correlate with race."[40] "Apparent disparities in sentencing," he stressed in the opinion he very much came to regret after his retirement,[41] "are an inevitable part of our criminal justice system."[42] The Supreme Court's majority opinion in *McCleskey* specifically determined that the capital offender had to prove that "the decisionmakers in *his* case acted with discriminatory purpose" and that statistical evidence was insufficient as proof of such discrimination.[43] "[W]e hold that the Baldus study is clearly insufficient to support an inference that any of the decisionmakers in McCleskey's case acted with discriminatory purpose," Justice Powell wrote for the Court, rejecting Warren McCleskey's claim,

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39. *See id.* at 287 (explaining the findings of the Baldus study).

40. *Id.* at 312.

41. Phyllis Goldfarb, *Arriving Where We've Been: Death's Indignity and the Eighth Amendment*, 102 IOWA L. REV. ONLINE 386, 405 (2018) ("According to Powell's biographer, Powell stated after his retirement in 1987 that he not only regretted his *McCleskey* opinion, he also indicated that he would now vote to abolish the death penalty entirely."); *see also* State v. Santiago, 122 A.3d 1, 97 (Conn. 2015) (Norcott & McDonald, JJ., concurring) (internal citations omitted):

> Especially noteworthy is the fact that the author of the *majority* opinion in *McCleskey*, Justice Powell, later confided to his biographer that if he could change his vote in any one case, it would be *McCleskey*. One legal scholar explained Justice Powell's renunciation of his pivotal role in the *McCleskey* decision this way: "If one is known by the company that one keeps, Justice Powell no doubt wished for far better company for one of his final decisions, *McCleskey v. Kemp*. After the opinion's release, legal and lay commentators quickly compared *McCleskey* to infamous decisions like *Dred Scott*, *Korematsu*, and *Plessy*."

42. McCleskey v. Kemp, 481 U.S. 279, 312 (1987).

43. *See id.* at 313 ("[W]e hold that the Baldus study does not demonstrate a constitutionally significant risk of racial bias affecting the Georgia capital sentencing process.").

thereby sending McCleskey—a Black man—to his death.[44] In contrast, Justice Brennan—in a dissenting opinion joined by Justice Marshall—wrote: "Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment forbidden by the Eighth and Fourteenth Amendments, I would vacate the decision below insofar as it left undisturbed the death sentence imposed in this case."[45] Citing the damning statistics from the Baldus study and Justice Marshall's concurring opinion in *Godfrey v. Georgia*, Justice Brennan wrote in dissent: "[M]urder defendants in Georgia with white victims are more than four times as likely to receive the death sentence as are defendants with black victims. Nothing could convey more powerfully the intractable reality of the death penalty: 'that the effort to eliminate arbitrariness in the infliction of that ultimate sanction is so plainly doomed to failure that it—and the death penalty—must be abandoned altogether.'"[46]

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44. *Id.* at 297; *see also* Harris v. Vasquez, 949 F.2d 1497, 1541 (9th Cir. 1990) (Reinhardt, C.J., dissenting) ("Within the last several weeks, the state of Georgia executed Warren McCleskey notwithstanding the fact that (1) he offered proof that blacks were systematically discriminated against in death penalty cases and (2) the state had concealed material evidence that might have caused the jury to vote against capital punishment.").

45. *McCleskey*, 481 U.S. at 320 (Brennan, J., dissenting).

46. *Id.* (quoting Godfrey v. Georgia, 446 U.S. 420, 442 (1980) (Marshall, J., concurring)); *see id.* at 321 (internal citations omitted).

> At some point in this case, Warren McCleskey doubtless asked his lawyer whether a jury was likely to sentence him to die. A candid reply to this question would have been disturbing. First, counsel would have to tell McCleskey that few of the details of the crime or of McCleskey's past criminal conduct were more important than the fact that his victim was white. Furthermore, counsel would feel bound to tell McCleskey that defendants charged with killing white victims in Georgia are 4.3 times as likely to be sentenced to death as defendants charged with killing blacks. In addition, frankness would compel the disclosure that it was more likely than not that the race of McCleskey's victim would determine whether he received a death sentence: 6 of every 11 defendants convicted of killing a white person would not have received the death penalty if their victims had been black, while, among defendants with aggravating and mitigating factors comparable to McCleskey's, 20 of every 34 would not have been sentenced to die if their victims had been black. Finally, the assessment would not be

In spite of the Supreme Court's dreadful decision in *McCleskey* that has yet to be renounced by the nation's highest court, this Article concludes that the death penalty must be seen as a torturous and discriminatory practice and as a clear violation of the U.S. Constitution's Equal Protection Clause and other fundamental and constitutional rights.[47] Part I of the Article shows how, historically, American death sentences have been imposed—and executions have been carried out—in a highly discriminatory fashion, including on the basis of race.[48] The history of Virginia, for

> complete without the information that cases involving black defendants and white victims are more likely to result in a death sentence than cases featuring any other racial combination of defendant and victim. The story could be told in a variety of ways, but McCleskey could not fail to grasp its essential narrative line: there was a significant chance that race would play a prominent role in determining if he lived or died.

47. In other cases and contexts, the U.S. Supreme Court has denounced racial discrimination and insisted on equal protection of the laws. *E.g.*, Flowers v. Mississippi, 139 S. Ct. 2228, 2242 (2019) ("Equal justice under law requires a criminal trial free of racial discrimination in the jury selection process. Enforcing that constitutional principle, *Batson* ended the widespread practice in which prosecutors could (and often would) routinely strike all black prospective jurors in cases involving black defendants.") (citing Batson v. Kentucky, 476 U.S. 79 (1986); Buck v. Davis, 137 S. Ct. 759, 775 (2017) ("It would be patently unconstitutional for a State to argue that a defendant is liable to be a future danger because of his race."); Peña-Rodriguez v. Colorado, 137 S. Ct. 855, 867 (2017) ("It must become the heritage of our Nation to rise above racial classifications that are so inconsistent with our commitment to the equal dignity of all persons. This imperative to purge racial prejudice from the administration of justice was given new force and direction by the ratification of the Civil War Amendments."); Foster v. Chatman, 578 U.S. 488, 514 (2016) ("Two peremptory strikes on the basis of race are two more than the Constitution allows.").

48. *See* RANDALL G. SHELDEN & MORGHAN VÉLEZ YOUNG, OUR PUNITIVE SOCIETY: RACE, CLASS, GENDER, AND PUNISHMENT IN AMERICA 111–13 (2d ed. 2021):

> After emancipation, lynching became the means of controlling Blacks; that in 1892 "[t]he number of Black lynching victims was more than 2.5 times the number of white victims"; that "Black people were lynched for a variety of reasons, and often for no reason at all"; that "[o]ne source found 4,743 lynchings in the United State from 1882 until 1968; 1,297 whites were lynched, and 3,446 Blacks were lynched"; and that the Alabama-based Equal Justice Initiative documented 4,084 "racial terror lynchings in 12 Southern states" between 1877 and 1950.

example, illustrates the death penalty's racially discriminatory administration, ultimately leading lawmakers in 2021—among other factors—to do away with the state's ultimate sanction in that commonwealth.[49] Part II then recalls Justice Marshall's astute appraisal of the fatal flaws associated with state-sanctioned killing, arguing that the language of the Civil Rights Act of 1866[50] and the U.S. Constitution's Eighth and Fourteenth Amendments[51] must be read to forbid capital punishment. Indeed, the immutable characteristics of the death penalty and its highly discriminatory administration should have led the U.S. Supreme Court to *permanently* prohibit all executions—as a matter of American constitutional law—long ago.

Drawing upon Justice Thurgood Marshall's clear-eyed view of capital punishment's gross injustices, including its discriminatory application, Part III contends that a fair-minded interpretation of the U.S. Constitution demands a declaration by the U.S. Supreme Court that death sentences and executions violate fundamental human rights, including the right to be free from cruelty and torture. The Article, invoking the Eighth Amendment's Cruel and Unusual Punishments Clause and the Fourteenth Amendment's Equal Protection Clause, concludes that America's death penalty laws must be struck down because of their discriminatory use and capital punishment's inherently cruel and torturous

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49. *See, e.g.*, Bailey D. Barnes, *The Havoc Death Wreaks: Civil Rights Challenges to Capital Punishment*, 31 B.U. PUB. INT. L. J. 1, 45–46 (2022) (discussing the recent trends in death penalty abolition, as well as relevant provisions of the U.S. Constitution and civil rights legislation used to argue against the death penalty).

50. Civil Rights Act of 1866, 14 Stat. 27–30 (Apr. 9, 1866; reenacted 1870) (codified as amended at 42 U.S.C. §§ 1981–1982 (1987)).

51. *See generally* John D. Bessler, "*From the Founding to the Present: An Overview of Legal Thought and the Eighth Amendment's Evolution,*", *in* THE EIGHTH AMENDMENT AND ITS FUTURE IN A NEW AGE OF PUNISHMENT (Meghan J. Ryan & William W. Berry III eds., 2020) (noting that the text of the U.S. Constitution's Eighth Amendment, ratified on 1791, was modeled on similar language in the English Bill of Rights and the Virginia Declaration of Rights); THE OXFORD COMPANION TO AMERICAN LAW 416 (Kermit L. Hall ed. 2002) (describing that the Fourteenth Amendment was ratified in 1868 after the Civil War, and that amendment guaranteed "equal protection of the laws," and that the Fourteenth Amendment was later interpreted to incorporate the Eighth Amendment's Cruel and Unusual Punishment Clause against the states).

characteristics. The death penalty violates human dignity and basic human rights, including of offenders and their family members,[52] and it should be classified as a cruel and unusual punishment and an equal protection violation because *all* persons (whether guilty or innocent) are entitled to be protected from cruel and unusual and torturous treatment.

II. The Sordid and Racist History of America's Death Penalty: A Vestige of the Dark Ages

A. From Colonial to Nineteenth Century America: Slavery, Lynching, and Other Grotesque Forms of Social Control

The American death penalty will forever be associated with racism and the "peculiar institution" of slavery.[53] "From the

52. *See, e.g.*, Juan E. Méndez, *The Death Penalty and the Absolute Prohibition of Torture and Cruel, Inhuman, and Degrading Treatment or Punishment*, 20 HUM. RTS. BRIEF 2, 5 (2012) ("I believe it is necessary for the international community to discuss this issue further and for states to reconsider whether the death penalty *per se* fails to respect the inherent dignity of the human person and violates the prohibition of torture or CIDT."); John D. Bessler, *Taking Psychological Torture Seriously: The Torturous Nature of Credible Death Threats and the Collateral Consequences for Capital Punishment*, 11 NE. U.L. REV. 1, 55–56 (2019) (citing evidence that capital charges, death sentences, and executions inflict trauma on a host of individuals, including the condemned inmate's family members and friends); *see also* Rachel King, *No Due Process: How the Death Penalty Violates the Constitutional Rights of the Family Members of Death Row Inmates*, 16 B.U. PUB. INT. L.J. 195, 197–99; 209; 211–17 (2007) (arguing that the death penalty violates the inmates' families' constitutional "right to family"); Barnes, *supra* note 49, at 9 (describing the families of victims as "involuntary participants in the capital punishment arena" because they "are not involved with the death penalty by their own actions or omissions; rather, it is the alleged *defendant's* criminal actions and the state's decision to prosecute and seek a capital sentence").

53. *See* DAVID GARLAND, PECULIAR INSTITUTION: AMERICA'S DEATH PENALTY IN AN AGE OF ABOLITION 12 (2010) ("In the minds of many people, today's death penalty—which is more than ever before an institution of the Southern states—carries clear traces of racial lynching and is inextricably linked to the 'peculiar institution' of slavery that lies at the root of this blood-stained history."); Carol S. Steiker & Jordan M. Steiker, *Abolishing the American Death Penalty: The Court of Public Opinion Versus the U.S. Supreme Court*, 51 VAL. U.L. REV. 579, 582 (2017):

earliest colonial days, slavery and the death penalty were symbiotic," scholars Kevin Barry and Bharat Malkani write, explaining part of the punishment's long, sordid history: "In the southern states, one of the principal purposes behind the death penalty was to protect the white minority from violence and rebellion by an enslaved black majority. Capital punishment was therefore a vital component in the machinery of slavery: the perpetual threat of death served to keep slave populations under control."[54] With enslaved people making up nearly half of Virginia's population by 1750, "it is hard to overestimate the role of Virginia's death penalty as a tool of racial control," two other scholars, Corinna Barrett Lain and Douglas Ramseur, aptly observe.[55] As another academic, Alexandra Klein, wrote in 2021: "Virginia has *officially* executed 1,390 people, more than any other

> The American death penalty has always been tainted by racial discrimination. In the antebellum South, the use of capital punishment was closely allied with the slave economy that had been established in the colonial era. Capital offenses included crimes against slavery, such as encouraging slaves to escape or rise up against their masters. Execution methods employed against slaves were particularly gruesome, mirroring the especially harsh treatment reserved for those convicted of treason in England and elsewhere given the existential threat posed by such offending. Southern capital codes made the availability of the death penalty turn on the racial characteristics or slave status of the offender and victim.

54. Kevin Barry & Bharat Malkani, *The Death Penalty's Darkside: A Response to Phyllis Goldfarb's Matters of Strata: Race, Gender, and Class Structures in Capital Cases*, 74 WASH. & LEE L. REV. ONLINE 184, 188 (2017).

55. Corinna Barrett Lain & Douglas A. Ramseur, *Disrupting Death: How Specialized Capital Defenders Ground Virginia's Machinery of Death to a Halt*, 56 U. RICH. L. REV. 183, 194 (2021); *see id.* at 194–95:

> Enslaved people were already captive, already doing forced labor, and already subjected to a baseline of abject cruelty. Their lives were one of the few things they had left. Typical of the offenses in this category was Virginia's 1748 law making it a capital crime for enslaved people to prepare or administer medicine without the taker's consent, an obvious reflection of the fear that servants might try to poison their masters.

state."[56] Klein used the word "officially" because of Virginia's history of lynchings, with the Equal Justice Initiative calculating that, between 1877 and 1950, eighty-four people were lynched in Virginia.[57] Lynchings, Klein notes, "were arguably a form of 'extrajudicial execution' because they frequently involved either the deliberate ignorance or enthusiastic cooperation of local officials and were tools of social control, just like legislatively enacted capital punishment."[58]

In colonial times, the death penalty and other bodily punishments (e.g., lashing) were regularly used to punish enslaved persons who tried to escape human bondage[59] and state "slave codes" explicitly subjected Blacks to death sentences for a much wider array of conduct than others.[60] "Such laws," Barry and Malkani point out, "even compensated white slaveholders for the 'taking' of executed slaves."[61] As one source summarizes the history of the death penalty's discriminatory application in colonial times and early America: "The Slave Codes, enacted in a majority of the colonies between 1680 and the late 1880's, criminalized conduct by slaves that was legal for the white population and mandated more severe punishments for slaves than for their white

56. Alexandra L. Klein, *The Beginning of the End: Abolishing Capital Punishment in Virginia*, 77 WASH. & LEE L. REV. ONLINE 375, 376 (2021).

57. *See id.* (noting the gaps in historical records which do not account for extrajudicial killings).

58. *Id.*

59. *See* Kristi Tumminello Prinzo, *The United States—"Capital" of the World: An Analysis of Why the United States Practices Capital Punishment While the International Trend Is Towards Its Abolition*, 24 BROOK. J. INT'L L. 855, 875 (1999) ("[I]n the colonial era, while the death penalty was used as a form of punishment primarily for murderers, the South also utilized the death penalty for rapists and to punish runaway slaves and their accomplices.").

60. *See* Kevin M. Barry, *The Death Penalty and the Fundamental Right to Life*, 60 B.C. L. REV. 1545, 1569 (2019):

> [A]lthough many southern states, like their northern counterparts, reduced the number of crimes punishable by death, they did so only for whites—not blacks . . . Public executions remained popular in southern states long after they were banned in the North, particularly when the execution involved a black man convicted of raping a white woman.

61. Barry & Malkani, *supra* note 54, at 189.

counterparts. The laws also discriminated against free blacks."[62] Capital punishment's "original sin," law professors Carol Steiker and Jordan Steiker succinctly summarize the law's shameful history, is "the stain of racial discrimination."[63]

A review of centuries-old Virginia newspapers reveals the death penalty's cruel and torturous application[64] and its intersection with slavery, race, and overt racial prejudice.[65] One

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62. Vada Berger, et al., *Too Much Justice: A Legislative Response to* McCleskey v. Kemp, 24 HARV. C.R.-C.L. L. REV. 437, 440 (1989).

63. CAROL S. STEIKER & JORDAN M. STEIKER, COURTING DEATH: THE SUPREME COURT AND CAPITAL PUNISHMENT 3 (2016); *see id*. at 19:

> [T]he large increase in executions, especially of blacks, in the South during the eighteenth century was the direct result of the large influx of African slaves to that region. As the South's slave labor economy grew, so did the demand by slave owners for state assistance in disciplining the growing enslaved population, to promote economic productivity and to protect the increasingly outnumbered white population from much-feared slave violence or revolt.

64. *See, e.g.*, VA. GAZETTE (Williamsburg, Va.), Parks No. 121, Nov. 24, 1738, at 4 (alterations in original):

> *Williamsburg, Nov.* 24. This Day *Anthony Francis Dittond*, who receiv'd Sentence of Death, at the last General Court, for the Murder of Mr. *Evans*, the Coachmaker, as formerly mentioned, was executed at the usual Place near this City. He was a lusty Man, and after he had been turn'd off about 2 or 3 Minutes, the Executioner bore him down to strangle him and put him out of his Pain the sooner; in doing which, the Rope broke, and the Man fell down senseless and motionless; but in a short space of Time, he recovered his Senses, sate up, and talk'd again, begging the Minister and the Spectators heartily to pray for him. Then got into the Cart again himself, and was hanged till he was dead. His Corps was put into a Coffin; and we hear it is to be annatomiz'd by the Surgeons.

65. *See, e.g.*, "*Williamsburg, July 20*," VA. GAZETTE (Williamsburg, Va.), Rind No. 167, July 20, 1769, at 2:

> We hear from Stafford county, that the two slaves advertised in our Gazette of the 15th and 29th ult. for the murder of Mr. Knox, have been apprehended, tried, and condemned, together with one of the house wenches; and on the 11th instant two of them

newspaper advertisement that appeared in *The Virginia Gazette* in Williamsburg, Virginia, in 1771, illustrates the way in which Virginians once made of state-sanctioned killing against enslaved persons, including for non-homicide offenses. As that newspaper ad read:

> CHESTERFIELD, *January* 2, 1771
>
> RUN away from the Subscriber, on the 22d of *December*, a Mulatto Man Slave named WILL, about five Feet eight inches high, six and twenty Years of Age, an active strong well made Fellow. He has broke open my Store, and stolen many Things, *viz.* Shag, Broadcloth, Linen, Hats, and Checks. I expect he will endeavour to pass for a Freeman, in Order to make his Escape by Water. Whoever brings the said Slave to me, if taken fifty Miles from Home, shall receive TEN POUNDS Reward; if farther, or nearer, in Proportion to the Distance; and, as he is outlawed, I will give TEN POUNDS Reward for his Head, if separated from his Body. He has been much whipped for the Crime he committed, and expects to be hanged if taken; therefore he must be well secured.
>
> HENRY BATTE[66]

Another newspaper advertisement that appeared in *Rind's Virginia Gazette* in Williamsburg, Virginia, in 1775, under the name of William Byrd from Westover, Virginia, dated September 19, 1775, offered a reward of "THREE POUNDS for each" of "two

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> were hanged at Stafford court-house, and the third was to be executed last Tuesday, at the same place.

66. *See* VIRGINIA GAZETTE (Williamsburg, Va.), Purdie and Dixon No. 1019, Feb. 7, 1771, at 3 (showing that in that time period, the death penalty was often used for non-homicide offenses); s*ee, e.g.*, "WILLIAMSBURG, *January* 20, 1773," VIRGINIA GAZETTE (Williamsburg, Va.), Purdie and Dixon No. 1123, Feb. 4, 1773, at 4 (containing an advertisement taken out by Benjamin Bucktrout) (alterations in original):

> STOLEN from the subscriber, about the 4th or 5th Instant, two Horses, one of them a large Bay, with a Bob Tail and roached Mane, a natural Pacer, branded on the Buttock B, and is about ten or twelve Years old; the other is a young bay Horse, four Years old this Spring, branded on the left Buttock B, and has a hanging Mane and Switch Tail. I will give TEN POUNDS on Conviction of the Thief, provided he is hanged, or TEN SHILLINGS for each Horse if brought to me.

negroes, MICHAEL and AARON, late my property, who broke goal and escaped whilst under sentence of death."[67]

In spite of the American Revolution and the Declaration of Independence's invocation of the principle of equality,[68] the death penalty's use, including for enslaved people, continued unabated.[69] In antebellum Virginia, for instance, those held in human bondage regularly received severe punishments, whether corporal or capital in nature.[70] A number of enslaved persons were executed in Virginia in 1800 in the aftermath of what came to be known as Gabriel's Rebellion,[71] as were Nat Turner and others in the decades

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67. RIND'S VA. GAZETTE (Williamsburg, Va.), No. 491, Oct. 5, 1775, at 4 (alterations in original).

68. *See* THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) ("We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.").

69. *See generally* STUART BANNER, THE DEATH PENALTY: AN AMERICAN HISTORY (2002); Rob Warden & Daniel Lennard, *Death in America under Color of Law: Our Long, Inglorious Experience with Capital Punishment*, 13 NW. J. L. & SOC. POL'Y 194 (2018).

70. *See* Paula C. Johnson, *At the Intersection of Injustice: Experiences of African American Women in Crime and Sentencing*, 4 AM. U. J. GENDER & L. 1, 11 (1995):

> Capital punishment was invoked more frequently in the southern colonies, with slaves as the most common victims. In Virginia, for example, white authorities reserved the most severe sanctions for slaves. Between 1801 and 1865, Virginia authorities 'ordered . . . thousands of slaves [to] be whipped or given other corporal punishments, sent at least 983 slaves into exile between 1801 and 1865, and condemned at least 555 to death between 1706 and 1784 and executed 628 between 1785 and 1865.

Enslaved persons in the United States had long been subjected to bodily punishments. *E.g.*, JUDITH L. VAN BUSKIRK, STANDING IN THEIR OWN LIGHT: AFRICAN AMERICAN PATRIOTS IN THE AMERICAN REVOLUTION 39–40 (2017); MARVIN L. MICHAEL KAY & LORIN LEE CARY, SLAVERY IN NORTH CAROLINA, 1748–1775 109 (1995); TERANCE D. MIETHE & HONG LU, PUNISHMENT: A COMPARATIVE HISTORICAL PERSPECTIVE 96 (2005).

71. *See* Gillian Brockell, *Remembering Those Who Resisted Their Bondage,* DAILY PRESS, Aug. 26, 2019, at A7 (discussing "Gabriel's Rebellion" and observing that "at least 10 conspirators were tried at hanged, including Gabriel's two older brothers", that "26 were sentenced to death", that "Gov. Monroe wrote to Jefferson that dozens more could meet the 'hand of the Executioner'", and that "Gabriel was

to come.[72] Between 1801 and 1865, one scholar notes, Virginia authorities "ordered . . . thousands of slaves [to] be whipped or given other corporal punishments" and "sent at least 983 slaves

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hanged on Oct. 10, 1800, at the age of 24"); *see also Domestic Summary*, VT. GAZETTE Oct. 6, 1800, at 3 ("There has been an insurrection among the negroes, in Richmond, Virginia . . . . The plot was discovered and exploded; many of negroes concerned were apprehended, some have been executed, more are condemned, and governor Monroe has issued his proclamation, offering a reward of 500 dollars, for apprehending Gabriel, the ringleader, who has assumed the title of general."); *American Intelligence*, LANCASTER J., Oct. 18, 1800, at 2 (noting from Richmond, Virginia, on October 7, 1800: "GABRIEL, the black fellow, who has been so instrumental in exciting an insurrection among the negroes, had his trial yesterday; he was convicted of the fact upon the strongest testimony, and condemned to be hanged this day at the usual place of execution"); VA. ARGUS, Oct. 7, 1800, at 3 ("The noted GABRIEL, received his trial yesterday—He will be executed at the gallows in this city, this day."); VA. ARGUS, Oct. 14, 1800, at 3 ("Ten of the Slaves concerned in the late insurrection, were executed on Friday last. GABRIEL and two of his accomplices, in this city; two near Four-mile creek; and five others near the Brook. Among the latter were Smith's *GEORGE* and Young's *GILRERY*.").

72. *See* NAT TURNER, A SLAVE REBELLION IN HISTORY AND MEMORY 18 (Kenneth S. Greenberg ed., 2003) (noting that Nat Turner was hanged in Jerusalem, Virginia, in 1831); *see also* Alfred L. Brophy, *Book Review*, 65 J. LEGAL EDUC. 255, 257 (2015) (noting that "in the wake of Nat Turner's rebellion, enslaved people and perhaps a free person, too, were executed without trial") (reviewing KIRT VON DAACKE, FREEDOM HAS A FACE: RACE, IDENTITY, AND COMMUNITY IN JEFFERSON'S VIRGINIA (2012)); A. Leon Higginbotham, Jr. & Anne F. Jacobs, *The "Law Only as an Enemy": The Legitimization of Racial Powerlessness Through the Colonial and Antebellum Criminal Laws of Virginia*, 70 N.C. L. REV. 969, 988 n.72 (1992) (citation omitted):

> Nat Turner was born in Southampton County, Virginia in 1800. A literate man, well versed in the Bible, he considered himself a prophet to whom the Holy Spirit had given instruction to begin a slave rebellion in 1831. After delaying the uprising for a number of weeks, Turner and five fellow slaves killed five members of his master's family. Aided by 60 other slaves, Turner's uprising killed 55 whites in the space of 48 hours, but an attempted march on the county seat of Jerusalem was thwarted by the local militia. Although Turner himself was not captured and executed until several weeks later, the immediate response of whites was swift and brutal. In one day, over 120 blacks were lynched and many more were maimed and beaten in a 'reign of terror.

Id. ("Between 1800 and 1834, 66 blacks were executed and another 34 transported out of the Commonwealth for 'conspiracy and insurrections.'").

into exile."[73] Calling it "a much higher death toll than in any northern state," that scholar also pointed out that while at least 555 enslaved persons were condemned to death in Virginia between 1706 and 1784 (the period encompassing colonial times and the Revolutionary War), an estimated 628 enslaved persons were executed in Virginia between 1785 and 1865 (the post-Revolutionary War period extending through the Civil War).[74]

B. The Genealogy of Executions and Other Forms of Cruelty: Judicial Torture, Capital Punishment, and Corporal Punishments

Torture and bodily punishments have a long ancestry.[75] In prior times, before judicial torture and corporal punishments fell out of favor in representative democracies,[76] eventually being outlawed or abandoned by Western legal systems,[77] inflicting severe pain on the body was seen by many civil and religious

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73. *See* PHILIP J. SCHWARTZ, TWICE CONDEMNED: SLAVES AND THE CRIMINAL LAWS OF VIRGINIA, 1705-1865, at ix (Baton Rouge: Louisiana State Univ. Press ed.1988) (emphasizing the degree to which capital punishment was practiced in Virginia during the 19th century).

74. *Id*.

75. *See* Heikki Pihlajamäki, *The Painful Question: The Fate of Judicial Torture in Early Modern Sweden*, 25 LAW & HIST. REV. 557, 557–58 (2007) ("In the medieval statutory or Roman-canon theory of proof, judicial torture was originally designed to produce confessions in cases of serious crime in which 'full proof' in the form of confession or two eyewitnesses was needed to convict."); *see also id*. at 560 ("[I]n the Tudor period judicial torture was adopted for regular use to investigate certain serious crimes. Langbein has located eighty-one torture warrants issued by the Privy Council between 1540 and 1640. Most of the suspected crimes were political or religious, with a quarter of the warrants involving ordinary crimes such as burglary and horse stealing. The immediate purpose of English torture, which reached its zenith in the 1580s and 1590s, was to ward off the perceived threat from political opponents of the Elizabethan state, particularly Roman Catholics.").

76. *See* Marie Gottschalk, *Dismantling the Carceral State: The Future of Penal Policy Reform*, 84 TEX. L. REV. 1693, 1713 (2006) ("International and regional human rights laws, national constitutions, and statutes currently grant vast procedural protections to criminal defendants in most Western countries and place limits on such practices as corporal punishment and torture.").

77. *E.g.*, John D. Bessler, *The Anomaly of Executions: The Cruel and Unusual Punishments Clause in the 21st Century*, 2 BRIT. J. AM. LEGAL STUD. 297, 327–45 (2013) (discussing the outlawing and abandonment of non-lethal corporal punishments over time, and general disapproval over time in the United States).

authorities as proper and as a legitimate exercise of state power.[78] For example, in *Tortured Subjects* (2001), historian Lisa Silverman writes of religious understandings of suffering at one time in France: "In specific religious contexts, physical suffering was viewed as a positive technique for the destruction of selfishness, of ego, so as to make room in the heart for God. To suffer was to make room for God, God's will, and consciousness of the divine."[79] In *A Dictionary of the English Language*, the lexicographer Samuel Johnson—drawing upon works by Dryden, Shakespeare, Milton, Addison and Bacon—defined *torture* as: "Torments judicially inflicted; pain by which guilt is punished, or confession extorted." "Pain; anguish; pang." "To punish with tortures." "To vex; to excruciate; to torment." In another dictionary entry, Johnson defined *torment* as, among other things, "To put to pain; to harass with anguish"; "Any thing that gives pain"; "Pain; misery; anguish"; and "Penal anguish; torture."[80]

78. *E.g.*, Bessler, *A Century in the Making*, *supra* note 4, at 1012–13 ("[I]n 1630, a Scottish clergyman, Dr. Alexander Leighton, was sentenced by the Star Chamber to be branded, flogged, and pilloried, to have his nose slit, and to have one of his ears cut off. Likewise, in 1634, a prominent lawyer, William Prynne, was fined £5,000 by the Star Chamber, ordered to be imprisoned for life, stripped of his Oxford degree and his professional membership in Lincoln's Inn, sent to the pillory, and had his ears cut off for publishing a book, *Histriomastix*."). Methods of execution were grotesque and carried out publicly to demonstrate the state's power. *See also* Trisha Olson, *The Medieval Blood Sanction and the Divine Beneficence of Pain: 1100-1450*, 22 J.L. & RELIGION 63, 63 (2006-2007) ("Across medieval Western Europe, those who committed serious wrongs, such as homicide, arson, treason, and rape were subject to a wide range of capital punishments that were seemingly brutal, frequently bloody, and at times spectacular. Grisly images of an executioner dismembering a condemned's limbs from his torso, smashing his chest cavity, gouging his eyes, or piercing his body with hot pokers are the common stuff of scaffold art in the high Middle Ages. Such images attest to the critical role of pain in medieval capital punishment. Whereas in our day all attempts are made to render penal death painless, in the high and late Middle Ages, the tie between pain and death is not only tolerated but, at times, purposefully exacerbated.").

79. LISA SILVERMAN, TORTURED SUBJECTS: PAIN, TRUTH, AND THE BODY IN EARLY MODERN FRANCE 8 (2001).

80. SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE: IN WHICH THE WORDS ARE DEDUCED FROM THEIR ORIGINALS, EXPLAINED IN THEIR DIFFERENT MEANINGS, AND AUTHORISED BY THE NAMES OF THE WRITERS IN WHOSE WORKS THEY ARE FOUND (10th ed. 1792) (unpaginated).

In the seventeenth and eighteenth centuries, not only were the stocks and the pillory, along with ear cropping, still in use,[81] but many other barbaric forms of torture[82] and punishment were employed, especially for certain groups of offenders.[83] For example,

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81. *See* ROBERT MOWAT & PRESTON SLOSSON, HISTORY OF THE ENGLISH-SPEAKING PEOPLES 74, 189 (1943) (explaining the law's authorization of the pillory's use, along with punishments such as branding and flogging, lingered for quite some time); MYRA C. GLENN, CAMPAIGNS AGAINST CORPORAL PUNISHMENT: PRISONERS, SAILORS, WOMEN, AND CHILDREN IN ANTEBELLUM AMERICA (1984) (discussing campaigns against corporal punishment in America during the late eighteenth and early nineteenth centuries); Ex parte Wilson, 114 U.S. 417, 427 (1885) (noting that Congress did not abolish the pillory until 1839); Hadix v. Caruso, 461 F. Supp. 2d 574, 591–92 (W.D. Mich. 2006); State v. Cannon, 190 A.2d 514, 517 (Del. 1963) (noting the abolition of branding and cropping of ears); W. J. Michael Cody & Andy D. Bennett, *The Privatization of Correctional Institutions: The Tennessee Experience*, 40 VAND. L. REV. 829, 829 (1987) (noting that in 1829 "the Tennessee General Assembly, in accordance with a national reform movement," substituted "[i]mprisonment" for "whipping, branding, and stocks"); Daniel E. Hall, *When Caning Meets the Eighth Amendment: Whipping Offenders in the United States*, 4 WIDENER J. PUB. L. 403, 421 n.103 (1995) (noting that the Act of Feb. 28, 1839, ch. 36, § 5, 25 Stat. 321, 322 (1839) "abolishing whipping and standing in the stocks"); Brian Hauck et al., *Capital Punishment Legislation in Massachusetts*, 36 HARV. J. ON LEGIS. 479, 481 n.16 (1999) ("In 1805, the Massachusetts legislature abolished whipping, branding, the stocks, and the pillory.").

82. *E.g.*, Thomas W. Simon, *Icongraphy of Torture: Going Beyond the Tortuous Torture Debate*, 43 DENV. J. INT'L L. & POL'Y 45, 57–58 (2014):

> Three methods stand out. First, the *strappado* (pull, or *garrucha*, pulley, in Spanish), the "Queen of Torments," where the accused, with hands tied behind the back, is raised by ropes and pulleys. The weights would suspend the victim up to five degrees of duration and severity. With the *proto* (colt or rack), the torturer tied the victim's limbs to a frame, and then pulled in opposite directions until the joints became dislocated. Finally, the *toca* (cloth) or *interrogation o mejorado del aqua* (otherwise known today as waterboarding) "simulates" drowning. This also was called the submarine in medieval times.

83. *E.g.*, John D. Bessler, *What I Think About When I Think About the Death Penalty*, 62 ST. LOUIS U. L.J. 781, 791 (2018) ("In a speech he gave in Rochester, New York in 1852, the great abolitionist and writer Frederick Douglass took note of the fact that, in Virginia, seventy-two offenses were then punishable by death for blacks while only two were punishable by death for whites."); *see also* Craig Haney, *Commonsense Justice and Capital Punishment: Problematizing the "Will of the People,"* 3 PSYCHOL. PUB. POL'Y & L. 303, 329–30 (1997):

Black men accused of rape, if not lynched or executed, might be castrated following a conviction (a punishment prohibited for white men), and pilloried or whipped.[84] In eighteenth-century Virginia, an enslaved person who was "convicted of an attempt to ravish" a white woman would be punished by castration.[85] "Between 1889 and 1918 alone," Professor Bennett Capers writes, "white mobs lynched on average more than a hundred blacks a year, and this extralegal violence was often accompanied by castration."[86] Other offenders (*e.g.*, those committing slander) were sometimes sentenced to have their tongues cut out, bored, or mutilated.[87] Along with devices of torture, such as the thumbscrew, the rack, and the body-compressing "scavenger's

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> Throughout its history, the system of capital punishment in the United States has been plagued by the problem of racial discrimination. Louis Masur's (1989) study of capital punishment in the 18th and 19th centuries noted that even then, 'those whom the state hanged tended to be young, black, or foreign.' Most of the archival data collected in the pre-*Furman* years indicated that race-based discriminatory sentencing operated to the disadvantage of Black defendants, who were often many times more likely to receive the death penalty than Whites who committed similar crimes. Archival data collected in the post-*Furman* years suggests that race still plays a significant role, with race of victim now having an equal if not greater effect on death-sentencing rates.

84. *See* Kevin Mumford, *After Hugh: Statutory Race Segregation in Colonial America, 1630-1725*, 43 AM. J. LEGAL HIST. 280, 293 (1999) (describing the different treatment between Black and white men after being convicted of rape).

85. *See* Dorothy E. Roberts, *Crime, Race, and Reproduction*, 67 TUL. L. REV. 1945, 1972 (1993) ("In 1855, the Kansas Territorial Legislature made castration the penalty for any black or mulatto convicted of rape, attempted rape, or kidnapping of a white woman.").

86. *See* Bennett Capers, *Real Rape Too*, 99 CAL. L. REV. 1259, 1292 (2011) (noting the racially motivated violence that occurred in addition to legal convictions).

87. *See generally* JANE KAMENSKY, GOVERNING THE TONGUE: THE POLITICS OF SPEECH IN EARLY NEW ENGLAND 23 (1997); FRANK CHALK & KURT JONASSOHN, THE HISTORY AND SOCIOLOGY OF GENOCIDE: ANALYSES AND CASE STUDIES 6 (1990); FRANCISCA LOETZ, DEALINGS WITH GOD: FROM BLASPHEMERS IN EARLY MODERN ZURICH TO A CULTURAL HISTORY OF RELIGIOUSNESS 107 (Rosemary Selle, trans. 2009); MARTIN L. NEWELL & MASON H. NEWELL, THE LAW OF SLANDER AND LIBEL IN CIVIL AND CRIMINAL CASES 18 (3d ed. 1914).

daughter,"[88] whipping posts and ducking or "cucking" stools could be found in many Anglo-American locales, including in public squares or by bodies of water.[89] As one history of England, known for its notorious "Bloody Code,"[90] notes of common corporal punishments: "The stocks, pillory, and whipping-post were three different implements of punishment, but, as was the case at Wallingford, Berkshire, they were sometimes allied and combined. The stocks secured the feet, the pillory 'held in durance vile' the head and the hands, while the whipping-post imprisoned the hands only by clamps on the sides of the post."[91] "The ancient laws of Virginia," another source notes of that colonial slave-holding society, "declared that the court in every county shall cause to be set up near the court-house a pillory, pair of stocks, a whipping-

88. *See* JAMES HARVEY ROBINSON & CHARLES A. BEARD, OUTLINES OF EUROPEAN HISTORY 34 (1912) (listing examples of torture devices used to punish those in addition to their legally enforced punishments); *see also* CYNDI BANKS, PUNISHMENT IN AMERICA: A REFERENCE HANDBOOK 300 (2005) (noting that the "scavenger's daughter" was a "form of torture" in which "the accused's knees were pulled up against the chest and the feet held against the hips by iron bars," a position that "caused heavy bleeding from the nose and mouth" and that often crushed the victim's ribs and breastbone); NIGETTE M. SPIKES, DICTIONARY OF TORTURE (2014) (describing the scavenger's daughter as "[a] metal hoop with a large screw on top" in which "[t]he person kneels inside of the hoop" and "[t]he screw tightens and compresses the entire body"; "*The scavenger's daughter compressed the man so much that he bled out of every orifice, his fingernails, and his sweat*.").

89. *See* REG HAMILTON, COLONY: STRANGE ORIGINS OF ONE OF THE EARLIEST MODERN DEMOCRACIES 107 (2010) ("Punishment was a public spectacle, designed to teach good conduct. The pillory, stocks, a whipping post, and cage, stood in the market place until about 1830. A man might be punished by a whipping, for example, for stealing a rabbit."); *see also* ERNEST W. PETTIFER, PUNISHMENTS OF FORMER DAYS 104 (1992) (noting that the history of the ducking-stool or the "cucking-stool" goes back, at least, "to Norman times").

90. *See* John G. Douglass, *Confronting Death: Sixth Amendment Rights at Capital Sentencing*, 105 COLUM. L. REV. 1967, 2012 (2005) ("Early English common law recognized only a small number of capital crimes, ranging from rape and murder to burglary and larceny. Through the seventeenth and eighteenth centuries, legislation expanded England's 'Bloody Code' to include dozens more. By the reign of George III, English law punished around 150 to 200 crimes with death. The American colonists proved more reluctant to legislate death, but early colonial efforts to limit capital punishment were defeated in the eighteenth century when the Crown imposed stricter penal codes on the colonists.").

91. P. H. DITCHFIELD, VANISHING ENGLAND 218 (2014).

post and a ducking-stool, in such place as they shall think convenient . . . ."[92]

C. Quakers, the Enlightenment, and the Age of Beccaria: The Rise of the Anti-Death Penalty and Anti-Torture Movements

The anti-death penalty and anti-torture movements have centuries-old origins,[93] with some opposition to executions aired publicly in the seventeenth century, including by Quakers such as George Fox, William Penn and John Bellers,[94] and some privately

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92. J. LEWIS PEYTON, HISTORY OF AUGUSTA COUNTY, VIRGINIA 55 (1882).

93. *See* John D. Bessler, *The Abolitionist Movement Comes of Age: From Capital Punishment as a Lawful Sanction to a Peremptory, International Law Norm Barring Executions*, 77 MONT. L. REV. 7, 8 (2018). Today, the anti-death penalty movement is international in character. It includes advocacy by NGOs such as Amnesty International and Together Against the Death Penalty (or, as it is known in French, *Ensemble Contre la Peine de Mort* (ECPM)), and by the International Commission against the Death Penalty. *Id.* at 13 (noting the development of a global infrastructure to combat capital punishment).

94. *E.g.*, CAPITAL PUNISHMENT 59 (United Nations Department of Economic and Social Affairs, 1962):

> George Fox had raised the issue [of capital punishment] as early as 1651 in his letters to the judges and in particular in his pamphlet *To the Parliament and Commonwealth of England* published in 1659, submitting 59 proposals for reforms, one of which was the proposal, then a very bold one, that henceforth the penalty of death should be applied only to murder.

JEFFREY L. KIRCHMEIER, IMPRISONED BY THE PAST: WARREN MCCLESKEY AND THE AMERICAN DEATH PENALTY 46–47 (2015):

> From early on, some early settlers expressed concerns about capital punishment. South Jersey, in its Quaker-influenced Royal Charter, banned executions, and William Penn's 1682 "Great Law" of the Colony of Pennsylvania limited capital punishment to murder and treason. One may understand the Quaker opposition to capital punishment in light of the Puritan practice of punishing and hanging Quakers in the 1600s.

JOHN BELLERS, ESSAYS ABOUT THE POOR, MANUFACTURES, TRADE, PLANTATIONS, AND IMMORALITY, AND OF THE EXCELLENCY AND DIVINITY OF INWARD LIGHT (1699) (using Christian morals and philosophy to argue against capital punishment in his essay "Some Reasons against putting of Fellons to Death"); LOUIS P. MASUR, RITES OF EXECUTION: CAPITAL PUNISHMENT AND THE TRANSFORMATION OF AMERICAN CULTURE, 1776–1865 74 (1989) ("On both sides of the Atlantic, many of

by those fearful of the Inquisition and persecution.[95] "From the philosophical viewpoint," Carl Ludwig von Bar notes in his legal history, *A History of Continental Criminal Law*, "attacks were made upon capital punishment as early as Carpzov."[96] "Nothing is as cruel and inhumane," Benedict Carpzov opined in the seventeenth century, "as by torture to mangle humans created in God's image."[97] "During the first half of the eighteenth century, the extortion of confessions in criminal trials within and without the Inquisition gradually waned," Günter Frankenberg, a German law professor, writes of how torture (also referred to as the *painful question*) began to fall out of favor in European societies.[98]

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those who worked for the revision of the penal laws and abolition of capital punishment were Quakers: John Fothergill and John Coakley Lettsom in England, Caleb Lownes in Philadelphia, Thomas Eddy in New York.").

95. *E.g.*, AGAINST THE DEATH PENALTY, WRITINGS FROM THE FIRST ABOLITIONISTS—GIUSEPPE PELLI AND CESARE BECCARIA viii, 3 (Peter Garnsey trans., 2020) (noting that Giuseppe Bencivenni Pelli (1729-1808), an aristocrat from Florence who later served as the director of the Uffizi Gallery, wrote a treatise, *Against the Death Penalty*, three years before Cesare Beccaria authored his book, *On Crimes and Punishments*, advocating against capital punishment; that *Against the Death Penalty* was written between November 24, 1760 and January 6, 1761; that the unpublished, uncompleted manuscript "was published more than 250 years later" that that "it is the first systematic attack on the death penalty in history"); *see also id.* at 4:

> Previously, abolition had had its advocates, such as the English radical Gerrard Winstanley in 1649, writing from a religious perspective, and the Quaker John Bellers, in 1699, who employed arguments from utility. The list lengthens somewhat if we include thinkers such as Thomas More and Blaise Pascal, who were critical of the death penalty without being outright abolitionists. In this category one might also place two anonymous English pamphleteers, Solon Secundus (1695) and A Student in Politics (1754). Both protested against the plethora of public executions and pressed for an alternative punishment, which they called imprisonment and hard labour, or slavery, but they contemplated reduction of the use of the death penalty rather than total abolition.

96. CARL LUDWIG VON BAR, A HISTORY OF CONTINENTAL CRIMINAL LAW 239 n.12 (1916).

97. Mirjan Damaška, *The Quest for Due Process in the Age of Inquisition*, 60 AM. J. COMP. L. 919, 932 n.35 (2012).

98. Günter Frankenberg, *Torture and Taboo: An Essay Comparing Paradigms of Organized Cruelty*, 56 AM. J. COMP. L. 403, 408 (2008)

Although in 1720, he notes, Prussia's Frederick I permitted torture subject to royal review, one of his more enlightened successors, Frederick II ("Frederick the Great"), decided to abolish torture in 1740 (within just a month of his accension to the throne) except for "especially serious cases." In 1754, he went even further, ordering a complete cessation of judicial torture.[99] As the Enlightenment matured, the use of torture was subjected to even more intense scrutiny, with Beccaria and others articulating the reasons why torture should not be put to use.[100] "In the eighteenth and nineteenth centuries," Tobias Kelly of the University of Edinburgh stresses, taking note of Voltaire and Beccaria's advocacy against the once commonplace practice of state authorities intentionally inflicting severe physical pain, "the campaign against torture was used to mark opposition to the *ancien régime* in the name of the values of enlightened liberalism."[101]

England's Glorious Revolution of 1688-1689, which brought William and Mary to the throne, produced the English Bill of Rights—the first legal document barring cruel and unusual punishments.[102] And spurred on by the eighteenth-century

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> Torture is widely associated with the dark Middle Ages and characterized as the senseless and indiscriminate application of extreme physical pain and mental agony, directed against whoever was suspected of a crime. It is correct that torture, also referred to as the 'painful question,' can be traced back to the medieval administration of justice. Its origins, however, reach back to the Greco-Roman world whence violence in criminal legal procedures accompanied the reception of Roman Law and proliferated since the thirteenth century across Europe, including the Holy Roman Empire of the German Nation.

99. *See id.* ("Frederick ordered the complete cessation of judicial torture in 1754.").

100. *See* PIERS BEIRNE, INVENTING CRIMINOLOGY: ESSAYS ON THE RISE OF 'HOMO CRIMINALIS' 59 n.108 (1993) ("Beccaria's arguments on torture were greatly influenced by the counsel of his friend Pietro Verri, whose book *Osservazioni sulla tortura* was only published posthumously in 1804.").

101. TOBIAS KELLY, THIS SIDE OF SILENCE: HUMAN RIGHTS, TORTURE, AND THE RECOGNITION OF CRUELTY 7–8 (2012).

102. John D. Bessler, *From the Founding to the Present: An Overview of Legal Thought and the Eighth Amendment's Evolution*, *in* THE EIGHTH AMENDMENT AND ITS FUTURE IN A NEW AGE OF PUNISHMENT 12–13 (Meghan J. Ryan & William W. Berry III eds., 2020) (explaining how the English Bill of Rights influenced James

writings of Montesquieu, Voltaire, Beccaria, and others, comprehensive critiques of torture and capital punishment ripened and drove considerable law reform.[103] Both Montesquieu and Beccaria loathed unnecessary and disproportionate punishments, drawing the attention of Sir William Blackstone,[104] with Beccaria—in his popular book, *An Essay on Crimes and Punishments*—vigorously speaking out against torture while simultaneously questioning the need for executions, even in the case of the crime of murder.[105] Beccaria contended that torture is unlikely to produce truthful testimony and runs contrary to the long-established principle that no one innocent be punished. "No man," Beccaria wrote, "can be considered guilty before the judge has reached a verdict, nor can society deprive him of public protection until it has been established that he has violated the pacts that granted him such protection." Beccaria expressed the

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Madison's proposed amendments to the U.S. constitution in 1789, which would become known as the U.S. Bill of Rights).

103. Richard Delgado, *Watching the Opera in Silence: Disgust, Autonomy, and the Search for Universal Human Rights*, 70 U. PITT. L. REV. 277, 284 (2008):

> Voltaire brought attention to [Jean] Calas's mistreatment in a pamphlet and book in which he used the phrase, "human rights." Voltaire's outrage focused, however, not so much on torture itself but on the religious bigotry motivating the judges and police. Nevertheless, his work started a social re-evaluation of torture, and by the late 1700s several nations, including Sweden, Prussia, Austria, and Bohemia, had abolished it. Enlightenment works, such as Beccaria's Essays on Crimes and Punishment (1764), rejected judicial torture and even the death penalty. The public spectacles that accompanied executions came to seem tawdry.

(reviewing LYNN HUNT, INVENTING HUMAN RIGHTS: A HISTORY (2007)).

104. *See generally* JOHN D. BESSLER, THE BARON AND THE MARQUIS: LIBERTY, TYRANNY, AND THE ENLIGHTENMENT MAXIM THAT CAN REMAKE AMERICAN CRIMINAL JUSTICE (2019) (describing how Enlightenment theorists Baron de Montesquieu and Marquis Beccaria introduced and publicized the idea that any punishment that goes beyond necessity is "tyrannical").

105. *E.g.*, John D. Bessler, *The Economist and the Enlightenment: How Cesare Beccaria Changed Western Civilization*, 42 EUR. J. L. & ECON. 275, 288–91 (2016) (tracing how Beccaria's book, *An Essay on Crimes and Punishments,* had a global impact on Western culture and laws).

view that "a man judged infamous by the law" should not suffer "the dislocation of his bones." Although Beccaria's ideas on torture "were not new," Dutch lawyer Chris Ingelse writes, Beccaria's book made "persuasive arguments" and "achieved great success." By 1830, Ingelse observes, "torture had been abolished as a means of law enforcement in all European States" and "[m]easures against torture were also taken in the colonies."[106]

While Beccaria and his fellow Milanese associate, Pietro Verri, both sought to abolish torture, a practice international law now explicitly prohibits, only limited reform on that front had taken place before Beccaria's meteoric rise to prominence after the publication of his book, initially published in Italian as *Dei delitti e delle pene* (1764).[107] Aside from the 1740 and 1754 actions of Prussian king Frederick II, who called judicial torture "gruesome" and "an uncertain means to discover the truth," in Scandinavia, Sweden had outlawed torture for ordinary crimes in 1734, though it would not do so for all purposes until 1772. Holy Roman Empress Maria Theresa of Austria (1717-1780), the ruler of the Habsburg Empire, was slower to act, abolishing torture only in 1776, mainly at the urging of Austrian law professor Joseph von Sonnenfels. The son of a rabbi who converted to Catholicism, Sonnenfels—to whom Ludwig van Beethoven dedicated a piano sonata as a symbol of the Enlightenment—had condemned the barbarities of both capital and corporal punishments in 1767, later publishing a report on the abolition of torture in 1775.[108] Across the Atlantic, eighteenth-

106. CHRIS INGELSE, THE UN COMMITTEE AGAINST TORTURE: AN ASSESSMENT 29 (2001).

107. John D. Bessler, *The Marquis Beccaria: An Italian Penal Reformer's Meteoric Rise in the British Isles in the Transatlantic Republic of Letters*, 4 DICIOTTESIMO SECOLO 107, 107–08 (2019) (detailing the reception of Beccaria's book *Dei delitti e delle pene* in Britain and colonial America).

108. Jeremy Hugh Baron, *Folter Arzt: Interrogation of Prisoners in Austria in 1773*, 100 J. ROYAL SOC'Y MED. 262, 262–64 (2007) (recounting Sonnenfels's background and campaigns against torture); *see also* EDWARD CRANKSHAW, *The Rape of Silesia, in* MARIA THERESA (2011) (noting that although Empress Maria Theresa was "extremely proud of her new code of laws," published as the *Constitutio Criminalis Theresiana* in 1768-69, Joseph von Sonnenfels "started attacking aspects of this monumental code even before it had been printed" and that "[t]he main points of his attack," inspired by Beccaria's work,

> were directed against the continued employment of torture, against various forms of corporal punishment, more reconditely

century Americans also sounded their own alarms about torture. In the Virginia's ratification debate, one delegate, George Nicholas, put it this way: "If we had no security against torture but our declaration of rights, we might be tortured to-morrow; for it has been repeatedly infringed and disregarded." In response, George Mason—a fellow Virginian—replied that "the worthy gentleman was mistaken in his assertion that the bill of rights did not prohibit torture," saying a "clause of the bill of rights provided that no cruel and unusual punishments shall be inflicted; therefore, torture was included in the prohibition."[109]

The law is often slow to change, but Enlightenment writers shaped the intellectual landscape, injecting new ideas and new ways of thinking.[110] Following the publication of Cesare Beccaria's landscape-changing *Dei delitti e delle pene*, translated into English as *An Essay on Crimes and Punishments* (1767)[111] and advocating not only against the use of torture, but also against capital punishment, America's founders flirted with the death penalty's abolition and took concrete steps to curtail corporal punishments and executions as penitentiaries were authorized and built.[112]

> against the failure to distinguish between convicted prisoners and prisoners awaiting trial, or on remand, above all against capital punishment in the form of breaking on the wheel, impalement, quartering, etc., which still survived.

JOHN H. LANGBEIN, TORTURE AND THE LAW OF PROOF: EUROPE AND ENGLAND IN THE ANCIEN RÉGIME 63 (2006) ("Maria Theresa's privy councillor Josef von Sonnenfels prepared a memorandum in the early 1770s for internal circulation within the Austrian regime, calling for the abolition of judicial torture; the document later became public and acquired a reputation as one of the leading abolitionist tracts.").

109. BESSLER, CRUEL AND UNUSUAL, *supra* note 4, at 187–88.

110. *E.g.*, JONATHAN I. ISRAEL, DEMOCRATIC ENLIGHTENMENT: PHILOSOPHY, REVOLUTION, AND HUMAN RIGHTS 1750–1790 (2011) (demonstrating that the Enlightenment was a revolutionary process, driven by philosophical debate).

111. Bessler, *supra* note 107, at 107.

112. *E.g.*, JOHN D. BESSLER, THE BIRTH OF AMERICAN LAW: AN ITALIAN PHILOSOPHER AND THE AMERICAN REVOLUTION 3–4 (2014) (documenting Beccaria's significant influence on the U.S. Constitution, the Bill of Rights, and the creation of American law); JOHN D. BESSLER, THE CELEBRATED MARQUIS: AN ITALIAN NOBLE AND THE MAKING OF THE MODERN WORLD 233–35 (2018) (describing how Beccaria's *On Crimes and Punishments* helped to catalyze the American and French Revolutions); John D. Bessler, *Foreword: The Death Penalty in Decline: From Colonial America to the Present*, 50 CRIM. L. BULL. 245, 248–50 (2014) ("Early

Thomas Paine, the author of *Common Sense*, opposed executions, saying it is "sanguinary punishments which corrupt mankind" and referred to executions as "cruel spectacles";[113] Dr. Benjamin Rush—a signer of the Declaration of Independence—believed that the death penalty was improper for *any* crime, announcing that view in 1787 at Benjamin Franklin's house;[114] James Wilson, the Pennsylvania lawyer, and Benjamin Franklin, America's senior statesman, themselves sought to curtail the death penalty's use; and William Bradford—a prominent Pennsylvania lawyer who became the second Attorney General of the United States—wrote a lengthy legislative report, *An Enquiry How Far the Punishment of Death Is Necessary in Pennsylvania* (1793), finding that capital punishment was not a necessary punishment for crimes other than murder (and calling for further study of the issue in the case of the crime of murder).[115]

Beccaria's book shaped America's legal landscape before and after the Revolutionary War (1775-1783).[116] John Adams—the American revolutionary—quoted Beccaria's compact treatise at the Boston Massacre trial as he took on the unenviable task of representing British soldiers accused of murder. "I am for the prisoners at the bar," Adams said in 1770 in open court, "and shall apologize for it only in the words of the Marquis Beccaria: 'If by

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American constitutions—as well as writings by prominent American revolutionaries—reflect Beccaria's lasting impact and guiding hand.").

113. THOMAS PAINE, RIGHTS OF MAN AND COMMON SENSE 28 (1994).

114. *See* BENJAMIN RUSH, AN ENQUIRY INTO THE EFFECTS OF PUBLIC PUNISHMENTS UPON CRIMINALS AND SOCIETY 15 (Mar. 9, 1787):

> I have said nothing upon the manner of inflicting death as a punishment for crimes, because I consider it as an improper punishment for *any* crime. Even murder itself is propagated by the punishment of death for murder. Of this we have a remarkable proof in Italy. The Duke of Tuscany, soon after the publication of the Marquis of Beccaria's excellent treatise upon this subject, abolished death as a punishment for murder.

115. *See generally* WILLIAM BRADFORD, AN ENQUIRY HOW FAR THE PUNISHMENT OF DEATH IS NECESSARY IN PENNSYLVANIA (1793).

116. *See* John D. Bessler, *The Italian Enlightenment and the American Revolution: Cesare Beccaria's Forgotten Influence on American Law*, 37 MITCHELL HAMLINE L.J. PUB. POL'Y & PRAC. 1, 1 (2017) (discussing the influence Beccaria had on the American Revolution).

supporting the rights of mankind, and of invincible truth, I shall contribute to save from the agonies of death one unfortunate victim of tyranny, or ignorance, equally fatal, his blessings and tears of transport shall be sufficient consolation to me for the contempt of all mankind.'"[117] Likewise, Thomas Jefferson copied multiple passages from Beccaria's book into his commonplace book in the original Italian; drafted legislation in Virginia in the 1770s intended to restrict the death penalty's use to treason and murder, specifically citing Beccaria's work in the notes to his legislation; and—in an autobiographical sketch written near the end of his life—wrote this in the 1820s: "Beccaria and other writers on crimes and punishments had satisfied the reasonable world of the unrightfulness and inefficacy of the punishment of crimes by death."[118] Jefferson's friend and fellow Virginian, James Madison, himself pushed for the passage of Jefferson's legislation in Virginia.[119] That legislation failed to pass in the 1780s by a single vote, leading Madison to lament to Jefferson that "our old bloody code is by this event fully restored."[120] Madison recommended "Beccaria's works" for the Library of Congress in 1783,[121] and forty years later, in 1823, Madison wrote to a correspondent from Kentucky: "I should not regret a fair and full trial of the entire abolition of capital punishments, by any State willing to make it."[122]

117. BESSLER, CRUEL AND UNUSUAL, *supra* note 4, at 50.

118. *See* Richard C. Dieter, *Introduction: International Perspectives on the Death Penalty*, *in* COMPARATIVE CAPITAL PUNISHMENT 2, 3 (Carol S. Steiker & Jordan M. Steiker, eds., 2019) (quoting Thomas Jefferson's comments about the death penalty).

119. *See* DUMAS MALONE, JEFFERSON THE VIRGINIAN 263 (1948) (describing Madison's efforts as "valiant").

120. *Id.* at 269.

121. *See* James Madison, *Report on Books for Congress*, NAT'L ARCHIVES (Jan. 23, 1783) (listing Beccaria's works among those to be brought into the Library of Congress) [perma.cc/35QN-VK79].

122. *See* John D. Bessler, *The American Enlightenment: Eliminating Capital Punishment in the United States*, *in* CAPITAL PUNISHMENT: A HAZARD TO A SUSTAINABLE CRIMINAL JUSTICE SYSTEM? 93, 101 (Lill Scherdin, ed., 2016).

D. The Persistence of Cruelty and Discrimination: The Death Penalty and Inequality

In spite of the considerable interest in penal reform inspired by the writings of Montesquieu, Beccaria, and others,[123] the death penalty persisted on American soil, though its use was restricted in many places even as race continued to play a significant role in who was subjected to the punishment.[124] After Gabriel—a man enslaved by Thomas Prosser in Virginia—tried to organize an effort to secure his freedom in 1800, creating a flag reading "Death or Liberty," Virginia's then-governor, James Monroe, wrote to Thomas Jefferson from Richmond, Virginia, about the "great alarm here of late at the prospect of an insurrection of the Negroes in this city and its neighborhood."[125] A few days later, Monroe wrote to Jefferson again, saying "[w]e have had much trouble with the negroes here," that the "plan of an insurrection" had been "clearly proved," and that conspirators had already been "condemned & executed."[126] Telling Jefferson that "a display"—a reference to executions—had been made "to intimidate those people," Monroe predicted more hangings would follow but sought Jefferson's advice. "When to arrest the hand of the executioner is a question of great importance," Monroe wrote his friend, adding, "I shall be happy to have your opinion on these points."[127]

Jefferson, who held hundreds of persons in human bondage during his lifetime, expeditiously wrote back to Governor Monroe. "Where to stay the hand of the executioner is an important question," Jefferson replied, noting that "those who have escaped from the immediate danger, must have feelings which would

123. *See generally* BESSLER, CRUEL AND UNUSUAL, *supra* note 4.

124. *See* Carol S. Steiker & Jordan M. Steiker, *The American Death Penalty and the (In)visibility of Race*, 82 U. CHI. L. REV. 243, 246–47 (2015) ("At the time of the Founding, capital punishment was an entrenched legal and social practice . . . While the North progressively narrowed the ambit of capital punishment, and the Midwest inaugurated the mid-nineteenth-century-movement toward full-scale abolition, the South restricted the death penalty only for whites . . . .").

125. *See* BESSLER, CRUEL AND UNUSUAL, *supra* note 4, at 151–52.

126. *See id*. at 152.

127. *See* EDWARD J. LARSON, A MAGNIFICENT CATASTROPHE: THE TUMULTUOUS ELECTION OF 1800, AMERICA'S FIRST PRESIDENTIAL CAMPAIGN 194 (2007).

dispose them to extend the executions."[128] "[E]ven here, where every thing has been perfectly tranquil, but where a familiarity with slavery, and a possibility of danger from that quarter prepare the general mind for some severities," Jefferson wrote from Monticello in not so coded language about all the executions of the enslaved that had already been carried out, "there is a strong sentiment that there has been hanging enough."[129] "[T]he other states & the world at large will forever condemn us if we indulge in the principle of revenge, or go one step beyond absolute necessity."[130] After his arrest, Gabriel himself was put in irons, promptly sentenced to die, and then executed.[131] "Twenty-six men were condemned to death and executed in September and October," one history notes of the aftermath of Gabriel's Rebellion, pointing out that Federalist Robert Troup informed fellow Federalist Rufus King that "the gallows are in full operation" in Virginia.[132]

Before the Civil War, the death penalty was administered in the most overtly discriminatory way imaginable in southern locales[133] such as the Commonwealth of Virginia, though the exact

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128. 32 THE PAPERS OF THOMAS JEFFERSON 160 (Barbara B. Oberg, ed. 2005).

129. *Id.*

130. *Id.*

131. *See* BESSLER, CRUEL AND UNUSUAL, *supra* note 4, at 152–53.

132. *Introduction* to GABRIEL'S CONSPIRACY: A DOCUMENTARY HISTORY 10–11 (Philip J. Schwarz, ed., 2012).

133. *See Race and Capital Sentencing*, 101 HARV. L. REV. 1603, 1619 n.111 (1988) (quoting K. STAMPP, THE PECULIAR INSTITUTION: SLAVERY IN THE ANTEBELLUM SOUTH 210 (1956):

> The history of discrimination in sentencing extends throughout the United States, especially in the South. Prior to the Civil War, there existed a dual system of capital punishment that meted out more severe sentences to blacks, particularly in instances where the victim was white. Southern states provided for this racially based distinction in punishment in their respective slave codes: 'Every southern state defined a substantial number of felonies carrying capital punishment for slaves and lesser punishments for whites. In addition to murder of any degree, slaves received the death penalty for attempted murder, manslaughter, rape and attempted rape upon a white woman, rebellion and attempted rebellion, poisoning, robbery, and arson. A battery upon a white person might also carry a sentence of death under certain circumstances.

number of capital crimes and executions varied over time.[134] In a speech he delivered on July 5, 1852, in Rochester, New York to the town's Anti-Slavery Sewing Society, the famed orator and abolitionist Frederick Douglass excoriated the death penalty's discriminatory nature. "There are," Douglass recited long before the era of computerized legal research, "seventy-two crimes in the State of Virginia which, if committed by a black man (no matter how ignorant he be), subject him to the punishment of death; while only two of the same crimes will subject a white man to the like

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See Jason A. Gillmer*, United States v. Clary: Equal Protection and the Crack Statute*, 45 AM. U. L. REV. 497, 529 (1995):

> In colonial and antebellum Virginia, slaves could receive the death penalty for sixty-eight offenses, while whites could be put to death for only one, first-degree murder. Slaves throughout the South could receive the death penalty for murder, attempted murder, manslaughter, rape and attempted rape of a white woman, rebellion and attempted rebellion, poisoning, robbery, arson, and, in some instances, assault and battery on a white person. In Virginia, slaves could be executed for any crime that, if committed by a white person, called for a prison sentence of not less than three years. (citations omitted).

134. *See* Carol S. Steiker & Jordan M. Steiker, *The Racial Origins of the Supreme Court's Death Penalty Oversight*, 42 HUM. RTS. 14, 15 (2017).

> In antebellum Virginia, 'free African Americans (but not whites) could get the death penalty for rape, attempted rape, kidnapping a woman, and aggravated assault—all provided the victim was white; slaves in Virginia were eligible for death for commission of a mind-boggling sixty-six crimes.' At the same time, whites in Virginia could face death for just four crimes. Although Southern states did not narrow their capital statutes, even for whites, as much as the North, actual executions of whites for crimes other than murder became increasingly rare.

(quoting Sheri Lynn Johnson*, Coker v. Georgia: Of Rape, Race, and Burying the Past, in* DEATH PENALTY STORIES 191 (John H. Blume & Jordan M. Steiker eds., 2009)); *see* A. Leon Higginbotham, Jr. & Anne F. Jacobs, *The "Law Only as an Enemy": The Legitimization of Racial Powerlessness Through the Colonial and Antebellum Criminal Laws of Virginia*, 70 N.C. L. REV. 969, 977 (1992) (noting that, in Virginia, enslaved persons "could receive the death penalty for at least sixty-eight offenses, whereas for whites the same conduct either was at most punishable by imprisonment or was not a crime at all").

punishment."[135] "[T]he conscience of the nation must be roused," Douglass said, calling mid-nineteenth-century "shouts of liberty and equality" on July 4th mere "hypocrisy" amidst the "gross injustice and cruelty" of slavery.[136] And the racist character of America's death penalty persisted in spite of the country's hard-fought Civil War.[137] Even following the issuance of President Abraham Lincoln's Emancipation Proclamation,[138] the Union's victory in the war,[139] and the ratification of the Thirteenth and

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135. *See* Frederick Douglass at Rochester, New York, "The Meaning of July Fourth for the Negro" (July 5, 1852), *in* FREDERICK DOUGLASS: SELECTED SPEECHES AND WRITINGS 188, 196 (Philip S. Fone, ed. 1999).

136. *Id.*

137. *See* Steiker & Steiker, *supra* note 124, at 252–53:

> [O]ver the broad sweep of American history from 1608 to 1945, blacks, along with other minority groups, constituted a majority of those executed. Blacks alone constituted almost half of those executed in that long timeframe—and they would constitute a much larger proportion if lynch-mob executions were included in the count.

See also Hugo Adam Bedau, *Racism, Wrongful Convictions, and the Death Penalty*, 76 TENN. L. REV. 615, 618 (2009) ("The historic practice of mob lynching in America is important for several reasons, one of which is that it involved both the racial bias and the wrongful conviction objections to the death penalty. Historically, mob lynching has been the paradigm racist mode of quasi- or perhaps pseudo-punishment.").

138. *See* BURRUS M. CARNAHAN, ACT OF JUSTICE: LINCOLN'S EMANCIPATION PROCLAMATION AND THE LAW OF WAR 169 (2007) (noting that the Emancipation Proclamation was issued on January 1, 1863).

139. *See* HERMAN HATTAWAY & ARCHER JONES, HOW THE NORTH WON: A MILITARY HISTORY OF THE CIVIL WAR 272 (1991) (describing how Confederate forces treated African American soldiers with extreme brutality during the Civil War). During the Civil War, African American soldiers were treated with extreme brutality by Confederate forces, with summary executions becoming common. *See, e.g.*, LINCOLN ON RACE AND SLAVERY 276 (Henry Louis Gates, Jr & Donald Yacovone eds., 2009):

> In December 1862, Confederate president Jefferson Davis ordered that "all negro slaves captured in arms be at once delivered over to the executive authorities of the respective States to which they belong to be dealt with according to the laws of said States." Officially, the Confederate government considered all African Americans caught in Union blue to be criminals—not prisoners of war—and "in insurrection against the state." Eight months later, in the wake of the battle at Fort

Fourteenth Amendments,[140] the law's discriminatory use of capital punishment stubbornly continued.[141] "After the Civil War,"

> Wagner (outside of Charleston, South Carolina), state authorities charged captured soldiers from the famed Fifty-fourth Massachusetts Regiment with fomenting rebellion . . . . As news spread about the egregious Confederate policy and the maltreatment of captured African American soldiers, Lincoln came under enormous pressure to respond. His Order of Retaliation (General Order No. 252) put the Confederacy on notice that the United States would insist on proper treatment for all its soldiers, regardless of "class, color, or condition." Yet its threat to execute one rebel soldier for every Union soldier killed in violation of "the laws of war" proved toothless and was never enforced. Confederate leaders quickly abandoned attempts to try black soldiers as insurrectionists and allowed individual units to resolve the issue on the battlefield, where summary executions became common. Confederate atrocities reached new depths at the April 12, 1864, Battle of Fort Pillow . . . .

See also LAURENCE FRENCH & MAGDALENO MANZANÁREZ, NAFTA AND NEOCOLONIALISM: COMPARATIVE CRIMINAL, HUMAN AND SOCIAL JUSTICE 163 (2004):

> Freedmen soldiers fighting for the Union in the US Civil War were sometimes subjected to summary executions. In 1862, 292 black Union soldiers died at Fort Pillow, Tennessee following their surrender to Confederate General Nathan Bedford Forrest. Some of the wounded were even buried alive. General Forrest later founded the notorious Ku Klux Klan, which was responsible for a century of lynchings in the United States.

140. The Thirteenth Amendment, ratified on December 6, 1865, provides: "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." U.S. CONST., amend. XIII, § 1. The Fourteenth Amendment, ratified on July 9, 1868, provides in part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. U.S. CONST., amend. XIV, § 1.

141. *See* William J. Bowers & Glenn L. Pierce, *Arbitrariness and Discrimination Under Post-*Furman *Capital Statutes*, 26 CRIME & DELINQ. 563, 575 (1980):

American civil rights lawyer Stephen Bright writes, "southern criminal codes provided that crimes were punishable based on both the race of the defendant and the race of the victim with the far more severe penalties being imposed on African Americans who committed crimes against whites."[142] Georgia law, for instance, provided that the rape of white woman by a Black man "shall be" punishable by death, while the rape of a white woman by anyone else was punishable by a prison term of between two and twenty years and the rape of a Black women was punishable "by fine and imprisonment, at the discretion of the court."[143] "The southern states," Bright explains, "also perpetuated slavery through 'convict leasing.'"[144] As Bright observes of how that system operated: "African Americans were arrested for crimes—often minor charges such as loitering or not having papers—and then leased to coal companies, plantations, railroads and turpentine camps."[145] The

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> Before the Civil War, Black Codes in southern and border states made selected crimes punishable by death if committed by blacks. Some statutes even made the death penalty contingent upon race of both offender and victim; for example, an 1816 Georgia statute explicitly required the death penalty for rape or attempted rape if the crime was committed by a black against a white. After the Civil War, discriminatory patterns persisted *de facto* if not *de jure*. We know from data on more than 5,000 state-imposed executions since 1864 that over the past century blacks, as compared with whites, have been executed for lesser crimes, at younger ages, and more often without appeals, and that each of these differences is independent of the other two. And these data, of course, exclude the thousands of illicit executions, largely of blacks, carried out by lynch mobs during this period.

142. Stephen B. Bright, *The Role of Race, Poverty, Intellectual Disability, and Mental Illness in the Decline of the Death Penalty*, 49 U. RICH. L. REV. 671, 676 (2015).

143. *Id.* (internal citations omitted).

144. *Id.*

145. *See id.*; *see also id.* at 676–77:

> In 'Slavery by Another Name,' Douglas Blackmon describes how Alabama perpetuated slavery through convict leasing all the way until World War II. In 'Worse than Slavery,' David Oshinsky points out that convict leasing was worse than slavery because the slave owners at least had an interest in protecting their property, but leased convicts were disposable. Unlike the

Equal Justice Initiative has documented thousands of racial terror lynchings in the South,[146] including in Virginia,[147] but lynchings also occurred in northern states[148] and terrorized African American and other minority communities.[149]

> slave owner, the person or company that leased convicts had no interest in their nutrition, their health, the quality of their housing or any other aspect of their survival. They could literally be worked to death and then replaced by other leased convicts.

146. *See id.* at 677 ("Lynching was also used to maintain racial control after the Civil War. At least 4743 people were killed by lynch mobs. More than 90% of lynchings took place in the South, and three-fourths of the victims were African Americans. The death penalty is closely related to lynching."); *see also id.* (quoting DAN T. CARTER, SCOTTSBORO: A TRAGEDY OF THE AMERICAN SOUTH 115 (La. State Univ. Press rev. ed., 2007):

> The death penalty is closely related to lynching. As one historian observed: 'Southerners . . . discovered that lynchings were untidy and created a bad press . . . . [L]ynchings were increasingly replaced by situations in which the Southern legal system prostituted itself to the mob's demand. Responsible officials begged would-be lynchers to 'let the law take its course,' thus tacitly promising that there would be a quick trial and the death penalty . . . . [S]uch proceedings 'retained the essence of mob murder, shedding only its outward forms.'

147. *See* Klein, *supra* note 56, at 375–76 (noting that Virginia has a history of "extrajudicial executions through lynching").

148. *See* JOHN D. BESSLER, LEGACY OF VIOLENCE: LYNCH MOBS AND EXECUTIONS IN MINNESOTA 183–224 (2003) (discussing the lynching in Duluth, Minnesota, of three African American circus workers—Isaac McGhie, Elmer Jackson, and Elias Clayton—falsely suspected of the rape of a young white woman).

149. *See generally* JONATHAN MARKOVITZ, LEGACIES OF LYNCHING: RACIAL VIOLENCE AND MEMORY (2004); *see also* Richard Delgado, *The Law of the Noose: A History of Latino Lynching*, 44 HARV. C.R.-C.L. L. REV. 297, 299–300 (2009) (discussing lynchings of African Americans and Latinos in the United States); *see* David Garland, *Penal Excess and Surplus Meaning: Public Torture Lynchings in Twentieth-Century America*, 39 LAW & SOC'Y REV. 793, 798–802 (2005):

> [P]ublic torture lynchings were a mode of racial repression—and more obliquely, of class and gender control—that deliberately adopted the forms and rituals of criminal punishment . . . . The years around 1890 saw a sharp increase in reported lynchings of all kinds occurring in the Southern states and a significant change in the form and intensity of some of them. This wave of

III. The Development of American Law: From the 1866 Civil Rights Acts and the Fourteenth Amendment's Ratification to Justice Marshall's Advocacy and Perceptive Vision

A. The 1866 Civil Rights Act and the Fourteenth Amendment's Ratification

Throughout American history, punishments have not been meted out equally. Considerations of race, class, or social status affected what penalty or form of execution one might receive,[150] with racial discrimination—in its most extreme and odious form, slavery—once as overt as it possibly could be. In 1829, North Carolina's chief justice, Thomas Ruffin, wrote that "[t]he power of the master must be absolute, to render the submission of the slave perfect."[151] Enslaved persons were expressly prohibited from

> interracial violence—which involved race riots and terrorist attacks as well as lynchings—lasted for more than a generation, with the highest number of incidents occurring between 1899 and 1902 when more than 700 lynchings were reported . . . . During these years, many lynchings took place in front of large crowds and involved a degree of publicity, torture, and ceremony that had not occurred in the past. These public torture lynchings occurred all across the South but were especially frequent in states that had large African American populations and where cotton was the chief form of industry . . . .

150. *See, e.g.*, Richard S. Frase, *Historical and Comparative Perspectives on the Exceptional Severity of Sentencing in the United States*, 36 GEO. WASH. INT'L L. REV. 227, 227–28 (2004) (explaining that some locales retained social class distinctions and mild punishments reserved for aristocrats longer than others) (reviewing JAMES Q. WHITMAN, HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE (2003)); *see also* William W. Berry III, *American Procedural Exceptionalism: A Deterrent or a Catalyst for Death Penalty Abolition?*, 17 CORNELL J.L. & PUB. POL'Y 481, 486 (2008) (noting James Q. Whitman's *Harsh Justice* "compares the historical harshness of punishment utilized in America to that in Europe," arguing that "an awareness of status emerged from the anti-aristocratic revolutions in France and Germany during the nineteenth century, the outcome of which was a heightened view of the dignity of man and a decreased propensity to seek harsh punishments for crimes" and that "[a]s the 'status-aware' culture evolved, prisoners began to receive the same milder punishments formerly reserved for political and upper-class prisoners").

151. MARK V. TUSHNET, SLAVE LAW IN THE AMERICAN SOUTH: STATE V. MANN IN HISTORY AND LITERATURE 29 (2003).

testifying in court, with one Louisiana penal code providing: "The slave is entirely subject to the will of his master, who may correct or chastise him, though not with unusual rigor, nor so as to maim or mutilate him, or to expose him to the danger of loss of life, or to cause his death."[152] Such antebellum statutes—as law professor Scott Howe writes—were "designed to legitimize the use of commonly accepted, though brutal, methods of slave chastisement—such as whipping—as much as to prohibit more barbaric and unusual methods."[153] "A majority of the Supreme Court has never addressed the death penalty's historical roots in slavery," Kevin Barry and Bharat Malkani observe, pointing out that in *Furman*, "[d]espite the centrality of race to the issue of arbitrariness, only Justices Douglas and Marshall squarely addressed racial discrimination in their concurring opinions."[154]

Enslaved persons were regularly put to death, with writer William Goodell pointing out in 1853 that Louisiana's law was aimed at "the protection of slave *property*, rather than the preventing of *suffering* by the slave."[155] Goodell observed of one statute's "unusual rigor" language: "Such a law, instead of *correcting* prevailing usages, receives its definition *from* them. That which is '*usual*' is *authorized*, whatever it may be, sort of maiming, mutilation, and murder. And the more rigorous, severe, and cruel may be the prevailing usages of a community, the more rigorous, severe, and cruel they are expressly authorized to be."[156] As Goodell put it: "If it is '*usual*' to 'chastise' a slave by inflicting on him a hundred lashes, it is *lawful* to do so. If it is '*usual*' to add five hundred lashes more, it is equally *lawful*!"[157] "The masters and overseers," Goodell concluded, "have only to repeat their excessive punishments so frequently that they become '*usual*,' and the statute does not apply to them!"[158]

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152. LA. CIV. CODE ANN. art. 173 (1825).

153. Scott W. Howe, *Slavery as Punishment: Original Public Meaning, Cruel and Unusual Punishment, and the Neglected Clause in the Thirteenth Amendment*, 51 ARIZ. L. REV. 983, 1005 (2009).

154. Barry & Malkani, *supra* note 54, at 198.

155. *See* Bessler, *supra* note 4, at 314.

156. *Id.*

157. *Id.*

158. *Id.*

The law, however, inevitably evolves over time, and the United States has been on a quest—with lots of advances and setbacks—to achieve "a more perfect Union" ever since the United States Constitution was adopted and ratified. In that now centuries-long quest, two major developments occurred in the wake of the Civil War that pitted the Union against the Confederacy and, oftentimes, members of families against one another. First, Congress passed a series of civil rights acts beginning with the Civil Rights Act of 1866,[159] with other such laws to soon follow in 1870,[160] 1871,[161] and 1875.[162] Second, following all of the death and destruction wrought by the Civil War, which, in its wake, led to the assassination of President Abraham Lincoln by white supremacist John Wilkes Booth, and then the execution of those convicted of conspiring to take President Lincoln's life,[163] the United States ratified a series of constitutional amendments known as the Reconstruction Amendments.[164] The Thirteenth Amendment abolished slavery and involuntary servitude "except as a punishment for crime whereof the party shall have been duly convicted";[165] the Fourteenth Amendment provides that "[n]o state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process

159. Civil Rights Act of April 9, 1866, Pub. L. No. 39-26, 14 Stat. 27 (1866).

160. Civil Rights Act of May 31, 1870, ch. 114, 16 Stat. 140 (1870).

161. Act of Apr. 20, 1871, ch. 22, 17 Stat. 13. An Act to Enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, better known as the "Ku Klux Klan Act," sought to combat attacks on the rights of African Americans and to fulfill the goal of the Fourteenth Amendment to provide "equal protection of the laws." Timothy Verhoff, Comment, *Class Struggles: A Century After the Ku Klux Klan Act and Still Seeking Protection for the Disabled*, 1999 WIS. L. REV. 153, 161.

162. Civil Rights Act of Mar. 1, 1875, 18 Stat. 335.

163. *See* John D. Bessler, *The Rule of Law: A Necessary Pillar of Free and Democratic Societies for Protecting Human Rights*, 61 SANTA CLARA L. REV. 467, 535 (2021) (tracking the development of the rule of law in democratic societies throughout time).

164. See United States v. Cannon, 750 F.3d 492, 504 n.11 (5th Cir. 2014) (highlighting the courts expansive use of the Thirteenth Amendment to prohibit racially motivated violence in 18 U.S.C § 249(a)(1)); Jamison v. McClendon, 476 F. Supp.3d 386, 397 (S.D. Miss. 2020) (discussing the importance of the Reconstruction Amendments in amplifying 42 U.S.C. § 1983).

165. U.S. CONST., amend. XIII, § 1.

of law; nor deny to any person within its jurisdiction the equal protection of the laws";[166] and the Fifteenth Amendment states that "[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude."[167] By ending slavery and guaranteeing citizenship, due process, and equality to individuals throughout the United States, American law changed for the better, though social progress would be painfully slow to come.

Section 1 of the Civil Rights Act of 1866 provided in part:

That all persons born in the United States and not subject to any foreign power . . . are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for a crime whereof the party shall have been duly convicted, shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.[168]

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166. U.S. CONST., amend. XIV, § 1.

167. U.S. CONST., amend. XV, § 1.

168. Act of Apr. 9, 1866, ch. 31, § 1, 14 Stat. 27, 27. Section 2 of the Civil Rights Act of 1866 set forth penalties for violations of it, specifically providing:

> That any person who, under color of any law, statute, ordinance, regulation, or custom, shall subject, or cause to be subjected, any inhabitant of any State or Territory to the deprivation of any right secured or protected by this act, or to different punishment, pains, or penalties on account of such person having at any time been held in a condition of slavery or involuntary servitude, except as a punishment for any crime whereof the party shall have been duly convicted, or by reason of his color or race, than is prescribed for the punishment of white persons, shall be deemed guilty of a misdemeanor, and, on conviction, shall be punished by fine not exceeding one thousand dollars, or imprisonment not exceeding one year, or both, in the discretion of the court.

The Civil Rights Act of 1866 was enacted pursuant to § 2 of the Thirteenth Amendment, with one scholar writing of the act: "Supporters of the Act in Congress feared that a future Congress would attempt to repeal the Act or that the courts would limit its application. The fourteenth and fifteenth amendments to the Constitution were passed in large part to allay these fears and to provide a constitutionally secure foundation for the 1866 Act."[169]

The first section of the U.S. Constitution's Fourteenth Amendment—ratified by the American people in 1868—was intended in part to constitutionalize the Civil Rights Act of 1866.[170] That section began: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside."[171] Section 1 also provided: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."[172] In giving

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Id. at § 2.

169. Neil H. Abramson, Comment, *Arbitral Deference and the Right to Make and Enforce Contracts under 42 U.S.C. Section 1981*, 82 NW. U. L. REV. 109, 111 n.11 (1987).

170. *See* John D. Bessler, *The Inequality of America's Death Penalty: A Crossroads for Capital Punishment at the Intersection of the Eighth and Fourteenth Amendments*, 73 WASH. & LEE L. REV. ONLINE 487, 525–26 (2017) (arguing for the abolition of the death penalty in the United States because of the effect that race, gender, or class can have on the chances of the death penalty being imposed).

171. U.S. CONST. amend. XIV, § 1.

172. *Id.* The Civil Rights Act of 1866 that preceded the Fourteenth Amendment's ratification was likewise intended to guarantee equal treatment under the law. *E.g.*, Jam v. International Finance Corp., 139 S. Ct. 759, 768 (2019) ("In the Civil Rights Act of 1866 . . . Congress established a rule of equal treatment for newly freed slaves by giving them the 'same right' to make and enforce contracts and to buy and sell property 'as is enjoyed by white citizens.' That provision is of course understood to guarantee continuous equality between white and nonwhite citizens with respect to the rights in question.") (citations omitted); *see also* United States v. Vaello Madero, 142 S. Ct. 1539, 1548 (2022) (Thomas, J., concurring) ("Congress enacted the Civil Rights Act of 1866 to both repudiate *Dred Scott* and eradicate the Black Codes."); Timbs v. Indiana, 139 S. Ct. 682, 688–89 (2019) ("Following the Civil War, Southern States enacted Black

express implementing authority to the U.S. Congress, section 5 of the Fourteenth Amendment then stated as follows: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."[173] Just as the Civil Rights Act of 1866 required "like punishments, pains and penalties," so too did the Fourteenth Amendment's implementing legislation—the 1870 Enforcement Act—that reenacted the 1866 Civil Rights Act following the Fourteenth Amendment's ratification.[174]

B. The Judicial Opinions and Views of Justice Thurgood Marshall

The concurring opinion of Justice Thurgood Marshall in *Furman v. Georgia*, the case that temporarily outlawed the American death penalty, addressed why he believed the death penalty to be a "cruel and unusual punishment" prohibited by the U.S. Constitution's Eighth and Fourteenth Amendments.[175] After

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Codes to subjugate newly freed slaves and maintain the prewar racial hierarchy. Among these laws' provisions were draconian fines for violating broad proscriptions on 'vagrancy' and other dubious offenses. When newly freed slaves were unable to pay imposed fines, States often demanded involuntary labor instead. Congressional debates over the Civil Rights Act of 1866, the joint resolution that became the Fourteenth Amendment, and similar measures repeatedly mentioned the use of fines to coerce involuntary labor.") (citations omitted).

173. U.S. CONST., amend. XIV, § 5.

174. WILLIAM B. GLIDDEN, CONGRESS AND THE FOURTEENTH AMENDMENT: ENFORCING LIBERTY AND EQUALITY IN THE STATES 45 (2013). Section 16 of the 1870 Enforcement Act provided in part as follows: "That all persons within the jurisdiction of the United States . . . shall be subject to *like punishment*, pains, penalties, taxes, licenses, and exactions of every kind, and none other, any law, statute, ordinance, regulation, or custom to the contrary notwithstanding." An Act to Enforce the Right of Citizens of the United States to Vote in the Several States of this Union, and for Other Purposes, 41st Cong., 2d Sess., ch. 114, § 16 (May 31, 1870) (emphasis added). Section 18 of the Enforcement Act of 1870, also known as the Civil Rights Act of 1870, provided: "*And be it further enacted*, That the act to protect all persons in the United States in their civil rights, and furnish the means of their vindication, passed April nine, eighteen hundred and sixty-six, is hereby re-enacted; and sections sixteen and seventeen hereof shall be enforced according to the provisions of said act." *Id.* § 18.

175. *See* Furman v. Georgia, 408 U.S. 238, 315 (1972) (Marshall, J., concurring) ("We have this evidence before us now. There is no rational basis for

initially acknowledging the "ugly, vicious, reprehensible acts" that had resulted in the three death sentences under review by the U.S. Supreme Court in *Furman* and emphasizing that "[t]heir sheer brutality cannot and should not be minimized,"[176] Justice Marshall framed the issue as follows:

> [W]e are not called upon to condone the penalized conduct; we are asked only to examine the penalty imposed on each of the petitioners and to determine whether or not it violates the Eighth Amendment. The question then is not whether we condone rape or murder, for surely we do not; it is whether capital punishment is 'a punishment no longer consistent with our own self-respect' and, therefore, violative of the Eighth Amendment.[177]

Justice Marshall—who knew first-hand what it was like to lose a client to an execution—then took note of what was at stake in the case: "Candor compels me to confess that I am not oblivious to the fact that this is truly a matter of life and death. Not only does it involve the lives of these three petitioners, but those of the almost 600 other condemned men and women in this country currently awaiting execution."[178]

After laying out the origins, history, and application of the Eighth Amendment ban against cruel and unusual punishments,[179] Justice Marshall found that "[s]everal principles emerge" from prior case law "and serve as a beacon to an

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concluding that capital punishment is not excessive. It therefore violates the Eighth Amendment.").

176. *Id.* at 315 (Marshall, J., concurring)

> In No. 69-5003, Furman was convicted of murder for shooting the father of five children when he discovered that Furman had broken into his home early one morning. Nos. 69-5030 and 69-5031 involve state convictions for forcible rape. Jackson was found guilty of rape during the course of a robbery in the victim's home. The rape was accomplished as he held the pointed ends of scissors at the victim's throat. Branch also was convicted of a rape committed in the victim's home. No weapon was utilized, but physical force and threats of physical force were employed.

177. *Id.* at 315.

178. *Id.* at 316.

179. *Id.* at 316–28 (outlining Justice Marshall's approach in *Furman*).

enlightened decision in the instant cases."[180] "Perhaps the most important principle in analyzing 'cruel and unusual' punishment questions," Marshall stressed, "is one that is reiterated again and again in the prior opinions of the Court: i.e., the cruel and unusual language 'must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.'"[181] "Thus," he wrote, "a penalty that was permissible at one time in our Nation's history is not necessarily permissible today."[182] In seeking to "establish our standards for decision,"[183] Justice Marshall observed that "a punishment may be deemed cruel and unusual for any one of four distinct reasons."[184] As Marshall wrote of these four reasons:

• "First, there are certain punishments that inherently involve so much physical pain and suffering that civilized people cannot tolerate them—e.g., use of the rack, the thumbscrew, or other modes of torture."[185]

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180. *Id.* at 328.

181. *Id.* at 329.

182. *Id.* The "evolving standards of decency" test derives from a 1958 Supreme Court decision, Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion). In that case, the Court struck down denationalization for wartime desertion as a punishment; observed that the scope of the Eighth Amendment "is not static"; and appeared to suggest that, in the future, the death penalty might also be struck down as an impermissibly cruel punishment. *See id.* at 99 (italics added):

> At the outset, let us put to one side the death penalty as an index of the constitutional limit on punishment. Whatever the arguments may be against capital punishment, both on moral grounds and in terms of accomplishing the purposes of punishment—and they are forceful—the death penalty has been employed throughout our history, and, *in a day when it is still widely accepted*, it cannot be said to violate the constitutional concept of cruelty. But it is equally plain that the existence of the death penalty is not a license to the Government to devise any punishment short of death within the limit of its imagination.

183. Furman v. Georgia, 208 U.S. 238, 330 (1972) (Marshall, J., concurring).

184. *Id.*

185. *Id.* at 330 (internal citations omitted).

• "Second, there are punishments that are unusual, signifying that they were previously unknown as penalties for a given offense."[186]

• "Third, a penalty may be cruel and unusual because it is excessive and serves no valid legislative purpose. . . . [O]ne of the primary functions of the cruel and unusual punishments clause is to prevent excessive or unnecessary penalties . . ."[187]

• "Fourth, where a punishment is not excessive and serves a valid legislative purpose, it still may be invalid if popular sentiment abhors it. For example, if the evidence clearly demonstrated that capital punishment served valid legislative purposes, such punishment would, nevertheless, be unconstitutional if citizens found it to be morally unacceptable. A general abhorrence on the part of the public would, in effect, equate a modern punishment with those barred since the adoption of the Eighth Amendment."[188]

Justice Marshall acknowledged that he was considering a punishment that had been in use for many centuries. As Marshall wrote:

Capital punishment has been used to penalize various forms of conduct by members of society since the beginnings of civilization. Its precise origins are difficult to perceive, but there is some evidence that its roots lie in violent retaliation by members of a tribe or group, or by the tribe or group itself, against persons committing hostile acts toward group members. Thus, infliction of death as a penalty or objectionable conduct appears to have its beginnings in private vengeance.[189]

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186. *Id.* at 331.

187. *Id.* (internal citations omitted).

188. *Id.* at 332 (internal citations omitted). Justice Marshall then added: "It is immediately obvious, then, that since capital punishment is not a recent phenomenon, if it violates the Constitution, it does so because it is excessive or unnecessary, or because it is abhorrent to currently existing moral values." *Id.* at 332–33.

189. *Id.* at 333. In a recent book, I've documented the vengeance-seeking impulses long associated with capital prosecutions. Before the rise of public prosecutors, private parties (or lawyers retained by private parties) were responsible for bringing criminal prosecutions, whether for themselves or their murdered loved ones. Such private prosecutions took place in many death penalty cases. JOHN D. BESSLER, PRIVATE PROSECUTION IN AMERICA: ITS ORIGINS, HISTORY,

In tracing its history, he specifically recounted the circumstances of its use in England and the American colonies, noting how a variety of offenses were punishable by death in the Massachusetts Bay Colony and elsewhere.[190] He also noted that "[e]ven in the 17th century, there was some opposition to capital punishment in some of the colonies," with William Penn's "Great Act" of 1682 prescribing death only for premeditated murder and treason.[191] Justice Marshall also described penal reform efforts in 18th, 19th, and 20th century America—led by Dr. Benjamin Rush and William Bradford in Pennsylvania, various governors and lawmakers, and many others—focused on abolishing or restricting the death penalty's use.[192]

After describing the historical landscape, Justice Marshall—in his concurrence in *Furman*—emphasized that "[t]he question now to be faced is 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."[193] "To answer this question," he wrote, noting how the legal question before the Court had been shaped by the political agitation to abolish or curtail executions, "we must first examine whether or not the death penalty is today

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AND UNCONSTITUTIONALITY IN THE TWENTY-FIRST CENTURY (2022). As Justice Marshall described how the law developed over time:

> As individuals gradually ceded their personal prerogatives to a sovereign power, the sovereign accepted the authority to punish wrongdoing . . . . Individual vengeance gave way to the vengeance of the state, and capital punishment became a public function. Capital punishment worked its way into the laws of various countries, and was inflicted in a variety of macabre and horrific ways.

Furman v. Georgia, 208 U.S. 238, 333 (1972) (Marshall, J., concurring).

190. *Furman*, 408 U.S. at 333-34 (Marshall, J., concurring).

191. *Id.* at 335–36.

192. *Id.* at 336–41 (noting Benjamin Rush's role in opposition to the death penalty).

193. *Id*. at 341–42.

tantamount to excessive punishment."[194] Justice Marshall then stressed:

In order to assess whether or not death is an excessive or unnecessary penalty, it is necessary to consider the reasons why a legislature might select it as punishment for one or more offenses, and examine whether less severe penalties would satisfy the legitimate legislative wants as well as capital punishment. If they would, then the death penalty is unnecessary cruelty, and, therefore, unconstitutional.[195]

He added that "[t]here are six purposes conceivably served by capital punishment: retribution, deterrence, prevention of repetitive criminal acts, encouragement of guilty pleas and confessions, eugenics, and economy."[196]

Justice Marshall had something to say about each of the items he put in his list, finding that none of the warranted the death penalty's use. A snapshot of Marshall's views is set forth here using Marshall's own words:

• *Retribution*: "Punishment as retribution has been condemned by scholars for centuries, and the Eighth Amendment itself was adopted to prevent punishment from becoming synonymous with vengeance."[197] "[T]he Eighth Amendment is our insulation from our baser selves. The 'cruel and unusual' language limits the avenues through which vengeance can be channeled. Were this not so, the language would be empty and a return to the rack and other tortures would be possible in a given case."[198] "The history of the Eighth Amendment supports only the conclusion that retribution for its own sake is improper."[199]

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194. *Id*. at 342.

195. *Id*.

196. *Id*.

197. *Id*. at 343.

198. *Id*. at 345.

199. *Id*.; *see also* Saby Ghoshray, *Tracing the Moral Contours of the Evolving Standards of Decency: The Supreme Court's Capital Jurisprudence Post-*Roper, 45 J. CATH. LEGAL STUD. 561, 591 (2006):

> [W]hen he asserts that "[i]f retribution alone could serve as a justification for any particular penalty, then all penalties selected by the legislature would by definition be acceptable means for designating society's moral approbation of a particular act," Justice Marshall clearly challenges us to probe

• *Deterrence*: "[I]t is my firm opinion that the death penalty is a more severe sanction than life imprisonment. Admittedly, there are some persons who would rather die than languish in prison for a lifetime. But, whether or not they should be able to choose death as an alternative is a far different question from that presented here—i.e., whether the State can impose death as a punishment. Death is irrevocable; life imprisonment is not. Death, of course, makes rehabilitation impossible; life imprisonment does not."[200] "It must be kept in mind, then, that the question to be considered is not simply whether capital punishment is a deterrent, but whether it is a better deterrent than life imprisonment."[201] "Despite the fact that abolitionists have not proved non-deterrence beyond a reasonable doubt, they have succeeded in showing by clear and convincing evidence that capital punishment is not necessary as a deterrent to crime in our society. This is all that they must do. We would shirk our judicial responsibilities if we failed to accept the presently existing statistics and demanded more proof. It may be that we now possess all the proof that anyone could ever hope to assemble on the subject."[202] "I see no alternative but to conclude that capital punishment cannot be justified on the basis of its deterrent effect."[203]

> deeper into our collective humanity and confront the morality of vengeance. Implicit in our recognition of the morality of vengeance is the clarion call to correct our moral compass by determining the scope of vengeance out of which we shape our existing penological practices. This revelation, therefore, compels us to make value judgments on whether the call to evolve our civilization's march to maturity comports with the penological fundamentals that revolve around vengeance.

200. *Furman* v. Georgia, 408 U.S. 238, 345–46 (1972) (Marshall, J., concurring).

201. *Id*. at 346–47.

202. *Id*. at 353.

203. *Id*. at 354; *see also* Coyne, *supra* note 26, at 42 ("Justice Marshall's favorite illustration of capital punishment's lack of deterrent effect was the public hanging of pickpockets in seventeenth century England: "You remember the story in England when they made pickpocketing a capital offense? When they were hanging the first pickpocket, people were picking pockets in the crowd!"). Justice Marshall announced his view in *Furman* that "[c]apital punishment is unconstitutional because it is excessive and unnecessary punishment." *Furman*, 408 U.S. at 359 n.141 (Marshall, J., concurring) ("[Eighth Amendment] analysis parallels in some ways the analysis used in striking down legislation on the

• *Prevention of Repetitive Criminal Acts*: "Much of what must be said about the death penalty as a device to prevent recidivism is obvious—if a murderer is executed, he cannot possibly commit another offense. The fact is, however, that murderers are extremely unlikely to commit other crimes either in prison or upon their release."[204] "[I]f capital punishment were justified purely on the basis of preventing recidivism, it would have to be considered to be excessive; no general need to obliterate all capital offenders could have been demonstrated, nor any specific need in individual cases."[205]

• *Encouragement of Guilty Pleas and Confessions*: "If the death penalty is used to encourage guilty pleas and thus to deter suspects from exercising their rights under the Sixth Amendment to jury trials, it is unconstitutional. Its elimination would do little to impair the State's bargaining position in criminal cases, since life imprisonment remains a severe sanction which can be used as leverage for bargaining for pleas or confessions in exchange either for charges of lesser offenses or recommendations of leniency."[206]

• *Eugenics*: "[A]ny suggestions concerning the eugenic benefits of capital punishment are obviously meritless."[207] "[T]his Nation has never formally professed eugenic goals, and the history of the world does not look kindly on them."[208] "I can only conclude, as has virtually everyone else who has looked at the problem, that capital punishment cannot be defended on the basis of any eugenic purposes."[209]

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ground that it violates Fourteenth Amendment concepts of substantive due process.").

204. *Furman*, 208 U.S. at 354 (Marshall, J., concurring).

205. *Id*. at 355.

206. *Id*. at 355–56.

207. *Id*. at 356.

208. *Id*. at 357.

209. *Id*. For a discussion of why Thurgood Marshall—a man very familiar with racist stereotypes from his civil rights work—discussed the concept of eugenics in *Furman*, see Carol S. Steiker & Jordan M. Steiker, *Capital Punishment: A Century of Discontinuous Debate*, 100 J. CRIM. L. & CRIMINOLOGY 643, 655–56 (2010):

> We, the authors, first encountered the proposal that eugenics might undergird an argument in support of capital punishment as law clerks for

> Justice Thurgood Marshall. Working on capital cases in Justice Marshall's chambers, we took pains to familiarize ourselves with the Court's history of constitutional regulation of capital punishment and especially with the opinions of our boss, who joined the Court just before it began to "constitutionalize" the death penalty in the late 1960s. We were both struck by Justice Marshall's opinion in the landmark case of *Furman v. Georgia*, which temporarily struck down capital punishment as it was then administered in the United States. In order to assess whether the death penalty was an excessive or unnecessary punishment under the Eighth Amendment, Justice Marshall identified "six purposes conceivably served by capital punishment: retribution, deterrence, prevention of repetitive criminal acts, encouragement of guilty pleas and confessions, eugenics, and economy." The rest of list was familiar to us, even formulaic, but—eugenics?? It seemed to us at the time, in our youth and inexperience, that Justice Marshall was conjuring a straw man, positing an argument that no one actually made and that could not really be taken seriously.
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> A visit to the early twentieth century, however, puts flesh and blood on the supposed straw man of the argument from eugenics. The influence of the eugenics movement on those concerned with the problems of crime and punishment was enormous . . . . Cesare Lombroso and his student Enrico Ferri, of the Italian Positivist School, . . . developed biological theories of innate criminality. Lombroso sought to define the criminal type, Homo delinquens, as a throwback to an earlier evolutionary era. He believed that one could see "the nature of the criminal" in the physical attributes of criminals (large jaws, high cheek bones, handle-shaped ears, insensitivity to pain, etc.)—"an atavistic being who reproduces in his person the ferocious instincts of primitive humanity and the inferior animals." Ferri shared Lombroso's belief in the existence of congenital murderers with distinctive physical characteristics and defended the idea of the "born criminal" . . ."

See also id. at 657 ("[S]terilization and even castration were frequently at the center of eugenics-inspired proposals to prevent crime and punish criminals."); *id.* at 658:

> So why did Justice Marshall identify eugenics as a pro-death penalty argument? As one historian of the eugenics movement explains, "To the followers of Lombroso, the criminal problem was solved through emigration, perpetual imprisonment, and capital punishment to protect the present and to prevent the genetic spread of crime." Even those who opposed the death penalty in the early twentieth century found it easy to see and articulate the eugenic argument for capital punishment. As a prominent abolitionist explained in 1919, the death penalty

• *Economy*: "[A]s for the argument that it is cheaper to execute a capital offender than to imprison him for life, even assuming that such an argument, if true, would support a capital sanction, it is simply incorrect. A disproportionate amount of money spent on prisons is attributable to death row."[210] "The entire process is very costly."[211] "When all is said and done, there can be no doubt that it costs more to execute a man than to keep him in prison for life."[212]

Justice Marshall's ultimate conclusion: "the death penalty is an excessive and unnecessary punishment that violates the Eighth Amendment."[213] In laying out his judicial viewpoint on the subject, Justice Marshall—employing all of his experience and legal acumen—had this to say:

The point has now been reached at which deference to the legislatures is tantamount to abdication of our judicial roles as factfinders, judges, and ultimate arbiters of the Constitution. We know that at some point the presumption of constitutionality accorded legislative acts gives way to a realistic assessment of those acts. This point comes when there is sufficient evidence available so that judges can determine, not whether the legislature acted wisely, but whether it had any rational basis whatsoever for acting. We have this evidence before us now. There is no rational basis for concluding that capital punishment is not excessive. It therefore violates the Eighth Amendment.[214]

"In addition," Marshall added, "even if capital punishment is not excessive, it nonetheless violates the Eighth Amendment because it is morally unacceptable to the people of the United States at this time in their history."[215] Speaking with his own vast

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> "might be defended as an agency of conscious artificial selection for the elimination of dangerous biologic stocks from the community, in accordance with the ideas of the Positivist school of criminologists."

210. *Furman* v. Georgia, 408 U.S. 238, 357 (1972) (Marshall, J., concurring).
211. *Id*. at 358.
212. *Id*.
213. *Id*. at 358–59.
214. *Id*. at 359.
215. *Id*. at 360.

knowledge of America's criminal justice system,[216] Marshall stressed: "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."[217]

In *Furman*, Justice Marshall specifically highlighted the death penalty's discriminatory application and "the potential dangers of executing an innocent man."[218] "[A] look at the bare statistics regarding executions is enough to betray much of the discrimination," he wrote, giving these statistics from the twentieth century:

A total of 3,859 persons have been executed since 1930, of whom 1,751 were white and 2,066 were Negro. Of the executions, 3,334 were for murder; 1,664 of the executed murderers were white and 1,630 were Negro; 455 persons, including 48 whites and 405 Negroes, were executed for rape. It is immediately apparent that

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216. As an attorney for the NAACP Legal Defense Fund, Thurgood Marshall represented dozens of criminal defendants. Uelmen, *supra* note 33, at 403. In that work, he argued for the lives of his clients in death penalty cases and represented African Americans who were subjected to brutal interrogations in murder investigations. *Id.* at 404–05. One of his clients, a 19-year-old African man—Samuel Taylor—was executed after being represented by a local appointed attorney who did not object to the admission of a confession made by Taylor at 3:00 a.m. Taylor was accused and convicted of the rape of a 14-year-old white girl, and although Thurgood Marshall later challenged the voluntariness of the confession, the U.S. Supreme Court—in a 5-3 decision—ruled against Taylor. *Id.* at 405; *see generally* MICHAEL MELTSNER, CRUEL AND UNUSUAL: THE SUPREME COURT AND CAPITAL PUNISHMENT (1973) (chronicling the efforts of the NAACP's Legal Defense and Education Fund's efforts from 1961 through 1972 to have capital punishment declared unconstitutional).

217. *Furman*, 408 U.S. at 361 (Marshall, J., concurring); *see also id.* at 363 ("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.").

218. *Id.* at 366. The danger of wrongful convictions and wrongful executions are now well known. Between 1900 and 1987, one study concluded, more than 350 people were erroneously convicted of crimes potentially punishable by death in the U.S. and, of those cases, 116 individuals were sentenced to death and 23 were actually executed. Hugo A. Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21, 36 (1987); *see also* MICHAEL L. RADELET ET AL., IN SPITE OF INNOCENCE: ERRONEOUS CONVICTIONS IN CAPITAL CASES (1992) (discussing wrongful convictions in capital cases).

Negroes were executed far more often than whites in proportion to their percentage of the population.[219]

"Racial or other discriminations should not be surprising," Justice Marshall observed, pointing out that in *McGautha v. California* the U.S. Supreme Court had held in 1971 "that committing to the untrammeled discretion of the jury the power to pronounce life or death in capital cases is (not) offensive to anything in the Constitution."[220] "This was an open invitation to discrimination," Marshall stressed.[221] "Various studies have

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219. Furman v. Georgia, 408 U.S. 238, 364 (1972) (Marshall, J., concurring).

220. *Id.* at 365 (quoting McGautha v. California, 402 U.S. 183, 207 (1971)). In *McGautha*, Justice Marshall joined dissents written by Justice William O. Douglas and Justice Brennan that effectively embraced a living constitution theory of constitutional interpretation and that sought to reverse the first-degree murder convictions at issue. *McGautha*, 402 U.S. at 226, 245, 248 (Douglas, J., dissenting); *id.* at 241:

> The vestiges of law enshrined today have roots in barbaric procedures. Barbaric procedures such as ordeal by battle that became imbedded in the law were difficult to dislodge. Though torture was used to exact confessions, felonies mounted . . . . Once it was a capital offense to steal from the person something 'above the value of a shilling.'

Id. at 242:

> Who today would say it was not 'cruel and unusual punishment' within the meaning of the Eighth Amendment to impose the death sentence on a man who stole a loaf of bread, or in modern parlance, a sheet of food stamps? Who today would say that trial by battle satisfies the requirements of procedural due process?

Id. at 249 (Brennan, J., dissenting):

> Unlike the Court, I do not believe that the legislatures of the 50 States are so devoid of wisdom and the power of rational thought that they are unable to face the problem of capital punishment directly, and to determine for themselves the criteria under which convicted capital felons should be chosen to live or die.

221. *Id.* at 365 (Marshall, J., concurring); *see also id.*:

> There is also overwhelming evidence that the death penalty is employed against men and not women. Only 32 women have been executed since 1930, while 3,827 men have met a similar fate. It is difficult to understand why women have received such

shown," Marshall added, "that people whose innocence is later convincingly established are convicted and sentenced to death."[222]

Justice Marshall, who had seen the operation of capital punishment up close through his representation of criminal defendants as a lawyer,[223] saw executions as unjust and

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> favored treatment since the purposes allegedly served by capital punishment seemingly are equally applicable to both sexes.

Id. at 365-66:

> It also is evident that the burden of capital punishment falls upon the poor, the ignorant, and the under privileged members of society. It is the poor, and the members of minority groups who are least able to voice their complaints against capital punishment. Their impotence leaves them victims of a sanction that the wealthier, better-represented, just-as-guilty person can escape.

222. *Id.* at 366; *see also id.* at 367–68:

> We have no way of judging how many innocent persons have been executed but we can be certain that there were some. Whether there were many is an open question made difficult by the loss of those who were most knowledgeable about the crime for which they were convicted. Surely there will be more as long as capital punishment remains part of our penal law.

223. *See* Uelmen, *supra* note 33, at 403–04:

> Marshall's experience as a criminal defense lawyer was most apparent in death penalty cases and strongly influenced the course of his unflagging opposition to the death penalty. That opposition was rooted in his belief that the death penalty was administered in an arbitrary and discriminatory fashion even after the decision in *Gregg v. Georgia*. Justice Marshall appreciated the extent to which arbitrariness and discrimination were products of the states' failures to provide adequate representation for those on trial for their lives. The cases in which he excoriated the failures and lapses of appointed counsel in death cases have a special ring of authenticity, because they came from a lawyer who had himself assumed the responsibility of assigned counsel for death-row inmates.

See also Stephen B. Bright, *The Politics of Crime and the Death Penalty: Not "Soft on Crime," But Hard on the Bill of Rights*, 39 ST. LOUIS U. L.J. 479, 502 n.71 (1995) ("Justice Thurgood Marshall, who, unlike his colleagues on the Supreme Court,

immoral.[224] In arguing that executions were inconsistent with American values and in supporting the Court's decision to declare the death penalty unconstitutional, Justice Marshall came to these conclusions:

> At a time in our history when the streets of the Nation's cities inspire fear and despair, rather than pride and hope, it is difficult to maintain objectivity and concern for our fellow citizens. But, the measure of a country's greatness is its ability to retain compassion in time of crisis. No nation in the recorded history of man has a greater tradition of revering justice and fair treatment for all its citizens in times of turmoil, confusion, and tension than ours. This is a country which stands tallest in troubled times, a country that clings to fundamental principles, cherishes its constitutional heritage, and rejects simple solutions that compromise the values that lie at the roots of our democratic system.
>
> In striking down capital punishment, this Court does not malign our system of government. On the contrary, it pays homage to it. Only in a free society could right triumph in difficult times, and could civilization record its magnificent advancement. In recognizing the humanity of our fellow beings, we pay ourselves the highest tribute. We achieve 'a major milestone in the long road up from barbarism' and join the approximately 70 other jurisdictions in the world which celebrate their regard for civilization and humanity by shunning capital punishment.[225]

In later cases, Justice Marshall continued to speak out against death sentences.[226] In his dissent in *Gregg*, delivered in 1976 when the Supreme Court reinstated the death penalty, Marshall rejected the concept of retribution as a justification for capital

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had practical experience as a lawyer in capital cases, observed that '[t]he true impact of death qualification on the fairness of a trial is more devastating than the studies show'").

224. *See* Furman v. Georgia, 408 U.S. 238, 369 (Marshall, J., concurring) ("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.").

225. *Id.* at 371.

226. *See* Steiker, *The Long Road Up from Barbarism*, *supra* note 32, at 1131 (examining Justice Marshall's death penalty views and jurisprudence); *see also* Bigel, *supra* note 16, at 44 (discussing various cases).

punishment.[227] And in his 1980 concurrence in *Godfrey v. Georgia*,[228] Marshall explained "why"—in his view—"the enterprise on which the Court embarked in *Gregg v. Georgia* . . . increasingly appears to be doomed to failure."[229] In that concurrence, Marshall specifically wrote that the "disgraceful distorting effects of racial discrimination and poverty continue to be painfully visible in the imposition of death sentences."[230] Though dispirited by the death penalty's return to American law following the Court's decision in *Gregg*, he maintained at least a sliver of optimism for the future. "I remain hopeful," Marshall opined, "that even if the Court is unwilling to accept the view that the death penalty is so barbaric that it is in all circumstances cruel and unusual punishment forbidden by the Eighth and Fourteenth Amendments, it may eventually conclude that the effort to eliminate arbitrariness in the infliction of that ultimate sanction is so plainly doomed to failure that it—and the death penalty—must be abandoned altogether."[231] In other judicial opinions, Justice Marshall lamented the poor quality of legal representation afforded in many capital cases,[232] regularly invoked the "evolving standards of decency that mark the progress of a maturing society,"[233] and asserted that execution in a gas chamber is

227. *See* Gregg v. Georgia, 428 U.S. 153, 236–37 n. 18 (1976) (Marshall, J., dissenting); *see also id.* at 240 ("[t]he mere fact that the community demands the murderer's life in return for the evil he has done cannot sustain the death penalty"); *id.* at 240–41 ("[T]he taking of life 'because the wrongdoer deserves it' surely must fall, for such a punishment has as its very basis the total denial of the wrong-doer's dignity and worth.").

228. *See* Godfrey v. Georgia, 446 U.S. 420, 433–42 (1980) (Marshall, J., concurring) (arguing that the death penalty is in all circumstances forbidden by the Eighth and Fourteenth Amendments).

229. *Id.* at 434.

230. *Id.* at 439.

231. *Id.* at 442.

232. *E.g.*, Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime But for the Worst Lawyer*, 103 YALE L.J. 1835, 1841–42 (1994) ("Justice Thurgood Marshall observed that 'capital defendants frequently suffer the consequences of having trial counsel who are ill equipped to handle capital cases.'").

233. Gray v. Lucas, 463 U.S. 1237, 1244 (1983) (Marshall, J., dissenting) (internal citations omitted).

"unnecessarily cruel."[234] The infliction of "extreme pain over a span of 10 to 12 minutes," he opined of physically torturous pain, "surely must be characterized as 'lingering.'"[235]

IV. Vindicating Justice Thurgood Marshall's Jurisprudence: The Death Penalty as a Violation of Equal Protection of the Laws and Universal Human Rights

A. Thurgood Marshall's Pioneering Civil Rights Work

The ratification of the Fourteenth Amendment forever changed the Eighth Amendment calculus, just as Thurgood Marshall's civil rights work forever changed American society. Prior to the ratification of the Fourteenth Amendment and its Equal Protection Clause, American law did not concern itself with equality of treatment. Although the Declaration of Independence declared "that all men are created equal,"[236] the Fourteenth Amendment's guarantee of "equal protection of the laws"[237] set in motion the series of legal battles over racial and gender equality and other civil rights.[238] In spite of the fact that the Fourteenth

234. *See id.* at 1245 (explaining that alternative methods that cause less physical pain were available).

235. *Id.*

236. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

237. U.S. CONST. amend. XIV.

238. *E.g.*, Daniel S. Harawa, *Sacrificing Secrecy*, 55 GA. L. REV. 593, 632–33 (2021) ("[W]hile the Fourteenth Amendment's anti-discrimination principles were originally designed to protect against race-based discrimination, today the Fourteenth Amendment also protects against arbitrary gender-based, religion-based, citizenship-based, and sexual orientation-based discrimination."); Seth Davis, *The Thirteenth Amendment and Self-Determination*, 104 CORNELL L. REV. ONLINE 88, 105–06 (2019):

> The Fourteenth Amendment was aimed at eliminating the Black Codes, legislation designed to subordinate Black Americans in the South following the Civil War. But the Fourteenth Amendment's contemporary reach goes far beyond this form of race-based legislation. The Court has interpreted the Amendment to reach various forms of discrimination based upon gender and sexual orientation, to name but two examples. In so doing, the Court has extended the underlying

Amendment was ratified way back in 1868, discrimination—in many aspects of American life, including with respect to race, gender, sexual orientation, poverty, and the infliction of punishments—remained a stubborn reality in the United States. There were, for example, Jim Crow laws[239] enforcing racial segregation—laws upheld by the U.S. Supreme Court in its infamous *Plessy v. Ferguson* decision.[240] In that 1896 case, the

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> values of the Equal Protection Clause and drawn various analogies among groups and practices of discrimination.

239. *See, e.g.*, F. MICHAEL HIGGINBOTHAM, GHOSTS OF JIM CROW: ENDING RACISM IN POST-RACIAL AMERICA (2013) (discussing Jim Crow laws); *see also* Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 393 (1978) (Marshall, J., dissenting) ("In the wake of *Plessy,* many States expanded their Jim Crow laws, which had up until that time been limited primarily to passenger trains and schools. The segregation of the races was extended to residential areas, parks, hospitals, theaters, waiting rooms, and bathrooms.").

240. *See* Plessy v. Ferguson, 163 U.S. 537, 540–44 (1896) (upholding the constitutionality of statutes providing for "equal but separate accommodations for the white, and colored races" on railway passenger trains in spite of a legal challenge based on the Thirteenth and Fourteenth Amendments, and finding that "[l]aws permitting, and even requiring," the "separation" of "the two races" where "they are liable to be brought into contact, do not necessarily imply the inferiority of either race to the other, and have been generally, if not universally, recognized as within the competency of the state legislatures in the exercise of their police power"), *overruled by* Brown v. Board of Ed., 347 U.S. 483, 495 (1954):

> We conclude that in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment.

See also Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 391 (1978) (Marshall, J., dissenting):

> [I]n the notorious *Civil Rights Cases*, 109 U.S. 3 (1883), the Court strangled Congress' efforts to use its power to promote racial equality. In those cases the Court invalidated sections of the Civil Rights Act of 1875 that made it a crime to deny equal access to 'inns, public conveyances, theatres and other places of public amusement.' According to the Court, the Fourteenth Amendment gave Congress the power to proscribe only discriminatory action by the State. (internal citations omitted).

Court embraced a "separate but equal" legal doctrine that was not discarded until the Supreme Court's landmark 1954 decision in *Brown v. Board of Education*—a case argued for the plaintiffs by the NAACP's chief counsel, Thurgood Marshall.[241] The NAACP was, itself, formed in 1909 to combat the evils of lynching[242]—a practice associated with the Deep South, but one that also reared its ugly head on the East Coast and in the West and the Midwest, too.[243] Decades later, the NAACP later commenced its moratorium strategy against capital punishment.[244]

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241. *See, e.g.*, MARK V. TUSHNET, MAKING CIVIL RIGHTS LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1936-1961 (1994) (discussing Thurgood Marshall's role at the NAACP Legal Defense Fund); *see also* A. Leon Higginbotham, Jr., *Justice Thurgood Marshall: He Knew the Anguish of the Silenced and Gave Them a Voice*, 3 GEO. J. ON FIGHTING POVERTY 163, 164–65 (1996).

> Thurgood Marshall, more so than any other one person, was responsible for eradicating the *Plessy v. Ferguson* doctrine that Justice Burger called 'pernicious,' a doctrine that legitimized apartheid in a society that was racially separate and almost never equal in the allocation of resources . . . . As NAACP Chief Counsel, he exemplified what lawyers could and should do for the betterment of our country.

242. *E.g.*, ROBERT L. ZANGRADO, THE NAACP CRUSADE AGAINST LYNCHING, 1909-1950 (1980); *see also* Kelsey D. McCarthy, *The Battle of the Branches: The Impact of the Judiciary and Title VI on Desegregation in the American Public School System*, 52 SAN DIEGO L. REV. 967, 968 (2015) (noting the NAACP's formation in 1909 "in response to the extrajudicial practice of lynching and the growing number of race riots").

243. *See generally* CHRISTOPHER WALDREP, THE MANY FACES OF JUDGE LYNCH: EXTRALEGAL VIOLENCE AND PUNISHMENT IN AMERICA (2002); MICHAEL J. PFEIFER, ED., LYNCHING BEYOND DIXIE: AMERICAN MOB VIOLENCE OUTSIDE THE SOUTH (2013); KEN GONZALES-DAY, LYNCHING IN THE WEST, 1850-1935 (2006); SHERRILYN A. IFILL, ON THE COURTHOUSE LAWN: CONFRONTING THE LEGACY OF LYNCHING IN THE TWENTY-FIRST CENTURY (2007); JOHN D. BESSLER, LEGACY OF VIOLENCE: LYNCH MOBS AND EXECUTIONS IN MINNESOTA (2003).

244. *See* ANDREW NOVAK, THE GLOBAL DECLINE OF THE MANDATORY DEATH PENALTY: CONSTITUTIONAL JURISPRUDENCE AND LEGISLATIVE REFORM IN AFRICA, ASIA, AND THE CARIBBEAN 18 (2016):

> The Legal Defense Fund of the National Association for the Advancement of Colored People (NAACP), founded in 1940 by future Supreme Court Justice Thurgood Marshall, spearheaded a moratorium strategy to begin a constitutional attack on the

Justice Thurgood Marshall (1908-1993) was involved in many of the country's premier civil rights cases—whether as counsel for the NAACP or as a sitting justice.[245] And those cases fundamentally reshaped American society. He began his association with the NAACP in 1934, and he won his first major civil rights case, *Murray v. Pearson*, in the State of Maryland in 1936. Donald Murray had been denied entry to the University of Maryland's law school on account of his race, and Thurgood Marshall—working with his mentor, Charles Hamilton Houston, and working within the odious confines of the law as it then existed—successfully argued that Maryland had failed to "live up to the separate but equal facilities mandated by *Plessy v. Ferguson*."[246] It was as a U.S. Supreme Court advocate that Marshall also secured the landmark victory in *Brown v. Board of Education of Topeka* (1954), the decision declaring that the segregation of public schools violated the U.S. Constitution's Fourteenth Amendment.[247] As one history explains of the post-World War II period and the importance of the NAACP's civil rights work: "After the war, Marshall and Houston decided to attack *Plessy v. Ferguson* head-on by challenging separate but

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> discriminatory application of the death penalty by coordinating hundreds of challenges nationwide. The strategy began working as a flurry of death penalty appeals reduced the number of executions in the United States from 42 in 1961 to just two in 1967, and none between 1968 and 1972, even as the number of death row prisoners increased in that period. The logjam pressured the United States Supreme Court to grant certiorari to one of the NAACP's challenges.

245. *See, e.g.*, Doug Bend, *A Tireless Journey: An Analysis of Thurgood Marshall's Dedication to Equal Opportunity Fifteen Years After His Retirement from the Court*, 32 T. MARSHALL L. REV. 167 (2007); *see also* Lynn Adelman, *The Glorious Jurisprudence of Thurgood Marshall*, 7 HARV. L. & POL'Y REV. 113, 117–18 (2013) ("In addition to his trial work, Marshall argued thirty-two cases before the Supreme Court, winning twenty-nine. Among these were some of the most important cases of the twentieth century, including *Brown v. Board of Education*, *Sweatt v. Painter*, *McLaurin v. Oklahoma State Regents*, and *Shelley v. Kraemer*.").

246. ENCYCLOPEDIA OF THE SIXTIES: A DECADE OF CULTURE AND COUNTERCULTURE 401 (James S. Baugess & Abbe Allen Debolt eds., 2012).

247. *See generally* CHARLES J. OGLETREE, JR., ALL DELIBERATE SPEED: REFLECTIONS ON THE FIRST HALF-CENTURY OF *BROWN V. BOARD OF EDUCATION* (2005).

equal as it pertained to public education. The culmination of their efforts was *Brown v. Board of Education of Topeka*, in which the Supreme Court ruled that separate was inherently unequal and thus violated the equal protection clause of the Fourteenth Amendment."[248]

In between his legal victories in *Murray* and *Brown*, Thurgood Marshall argued before the U.S. Supreme Court in *Chambers v. Florida*,[249] winning the first of many cases he argued before the nation's highest court as an advocate before his appointment to the Supreme Court in 1967 by President Lyndon Johnson.[250] In *Chambers*, Marshall argued that the confessions of his clients—four African American men sentenced to death—had been extorted by violence, with the U.S. Supreme Court ultimately finding a Fourteenth Amendment due process violation and reversing a prior judgment for the State of Florida.[251] In an opinion written by Justice Hugo Black—one that delved into the aftermath of the murder of Robert Darcy, an elderly white man in Pompano, Florida, and the questioning of the petitioners and others who'd been taking into custody and been denied the right to counsel[252]—the Supreme Court ruled in *Chambers* of the history of procedural due process:

> From the popular hatred and abhorrence of illegal confinement, torture and extortion of confessions of violations of the 'law of the land' evolved the fundamental idea that no man's life, liberty or property be forfeited as criminal punishment for violation of that law until there had been a charge fairly made and fairly tried in a public tribunal free of prejudice, passion, excitement and tyrannical power. Thus, as assurance against

248. ENCYCLOPEDIA OF THE SIXTIES: A DECADE OF CULTURE AND COUNTERCULTURE, *supra* note 246, at 401.

249. 309 U.S. 227 (1940).

250. *See* THURGOOD MARSHALL, SUPREME JUSTICE: SPEECHES AND WRITINGS xvii (J. Clay Smith, Jr., ed. 2003) (detailing Thurgood Marshall's early career and appointments by President Johnson, first as Solicitor General and then as Associate Justice of the Supreme Court).

251. *Chambers*, 309 U.S. 227.

252. *See id.* at 229 (explaining how Robert Darcy's murder sparked public outcry which led to multiple African American men being arrested without warrants and subsequently held in jail); *see also id.* at 231 (summarizing the treatment of petitioners in custody who were repeatedly questioned without access to counsel, food, or water for days).

ancient evils, our country, in order to preserve 'the blessings of liberty', wrote into its basic law the requirement, among others, that the forfeiture of the lives, liberties or property of people accused of crime can only follow if procedural safeguards of due process have been obeyed.[253]

In ruling that torturous interrogation techniques were forbidden by the U.S. Constitution, Justice Black's opinion in *Chambers* emphasized:

The determination to preserve an accused's right to procedural due process sprang in large part from knowledge of the historical truth that the rights and liberties of people accused of crime could not be safely entrusted to secret inquisitorial processes. The testimony of centuries, in governments of varying kinds over populations of different races and beliefs, stood as proof that physical and mental torture and coercion had brought about the tragically unjust sacrifices of some who were the noblest and most useful of their generations. The rack, the thumbscrew, the wheel, solitary confinement, protracted questioning and cross questioning, and other ingenious forms of entrapment of the helpless or unpopular had left their wake of mutilated bodies and shattered minds along the way to the cross, the guillotine, the stake and the hangman's noose. And they who have suffered most from secret and dictatorial proceedings have almost always been the poor, the ignorant, the numerically weak, the friendless, and the powerless.[254]

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253. *Id.* at 236–37.

254. *Id.* at 237–38. In rejecting the State of Florida's arguments, Justice Black's opinion observed:

> We are not impressed by the argument that law enforcement methods such as those under review are necessary to uphold our laws. The Constitution proscribes such lawless means irrespective of the end. And this argument flouts the basic principle that all people must stand on an equality before the bar of justice in every American court. Today, as in ages past, we are not without tragic proof that the exalted power of some governments to punish manufactured crime dictatorially is the handmaid of tyranny. Under our constitutional system, courts stand against any winds that blow as havens of refuge for those who might otherwise suffer because they are helpless, weak, outnumbered, or because they are non-conforming victims of prejudice and public excitement. Due process of law, preserved

In another context, Thurgood Marshall—then as a Supreme Court justice—himself recognized that "the primary concern of the drafters" of the Eighth Amendment "was to proscribe 'torture(s)' and other 'barbar(ous)' methods of punishment."[255] In that case, *Estelle v. Gamble*,[256] Justice Marshall wrote for the Court and quoted two late-nineteenth century Supreme Court cases, *Wilkerson v. Utah* (1879) and *In re Kemmler* (1890), that held, respectively, that "punishments of torture . . . and all others in the same line of unnecessary cruelty, are forbidden by that amendment" and that "[p]unishments are cruel when they involve torture or a lingering death . . . "[257] "In the worst cases," Justice Marshall wrote in *Estelle* of the denial of medical care to inmates, "such a failure may actually produce physical 'torture or a lingering death,' the evils of most immediate concern to the drafters of the [Eighth] Amendment."[258] "Our more recent cases, however," Justice Marshall's opinion made clear, "have held that the [Eighth] Amendment proscribes more than physically barbarous punishments."[259] "The Amendment," Marshall emphasized, "embodies 'broad and idealistic concepts of dignity, civilized standards, humanity, and decency . . . ,' against which we must evaluate penal measures."[260] As noted earlier, Justice

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> for all by our Constitution, commands that no such practice as that disclosed by this record shall send any accused to his death. No higher duty, no more solemn responsibility, rests upon this Court, than that of translating into living law and maintaining this constitutional shield deliberately planned and inscribed for the benefit of every human being subject to our Constitution—of whatever race, creed or persuasion.
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> *Id.* at 240–41.

255. Estelle v. Gamble, 429 U.S. 97, 102 (1976).

256. 429 U.S. 97, 102 (1976).

257. *See id.* (quoting Wilkerson v. Utah, 99 U.S. 130, 136 (1879) & In re Kemmler, 136 U.S. 436, 437 (1890)).

258. *Id.* at 103.

259. *Id.* at 102 (citations omitted).

260. *See id.* (quoting Jackson v. Bishop, 404 F.2d 571, 579 (8th Cir. 1968)). In *Jackson v. Bishop*, 404 F.2d 571 (1968) the U.S. Court of Appeals for the Eighth Circuit—in an opinion written by then-circuit judge Harry Blackmun, the future Supreme Court justice—held that the lashing of Arkansas prisoners violated the Eighth Amendment's Cruel and Unusual Punishments Clause. Like Justice

Marshall steadfastly believed that "[t]he Eighth Amendment is our insulation from a baser selves."[261]

B. Developments in American Law Since Justice Marshall's Retirement and Death

In 1992, the year after Justice Marshall's retirement[262] but long after the promulgation of the Universal Declaration of Human Rights (1948) prohibiting torture and other cruel, inhuman or degrading treatment or punishment, the United States ratified the International Covenant on Civil and Political Rights ("ICCPR"), which had entered into force years earlier, in 1976.[263] Article 7 of the ICCPR states:

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be

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Marshall, Justice Blackmun ultimately came to see the death penalty as constitutional. *See* Callins v. Collins, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting):

> From this day forward, I no longer shall tinker with the machinery of death. For more than 20 years I have endeavored—indeed, I have struggled—along with a majority of this Court, to develop procedural and substantive rules that would lend more than the mere appearance of fairness to the death penalty endeavor. Rather than continue to coddle the Court's delusion that the desired level of fairness has been achieved and the need for regulation eviscerated, I feel morally and intellectually obligated simply to concede that the death penalty experiment has failed. It is virtually self-evident to me now that no combination of procedural rules or substantive regulations ever can save the death penalty from its inherent constitutional deficiencies.

261. CHARLES L. ZELDEN, THURGOOD MARSHALL: RACE, RIGHTS, AND THE STRUGGLE FOR A MORE PERFECT UNION 149 (2013).

262. *See* Henry J. Reske, *Marshall Retires for Health Reasons: First Black Justice Fought Discrimination As Litigator, Supreme Court Dissenter*, A.B.A. J. 14, 15 (1991) (explaining the reasons behind Justice Marshall's retirement from the bench which was announced on June 27, 1991).

263. *See* William A. Schabas, *Invalid Reservations to the International Covenant on Civil and Political Rights: Is the United States Still a Party?*, 21 BROOK. J. INT'L L. 277, 277 (1995) (describing the accession of the United States to the ICCPR on June 8, 1992).

subjected without his free consent to medical or scientific experimentation.[264]

The prior article—Article 6—addresses the right to life[265] as well as specific issues pertaining to the death penalty's use,[266] although, as worded, Article 6 of the ICCPR contemplates the death penalty's eventual abolition. Article 6(1) addresses the right to life generally, reading: "Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life."[267] Article 6(2) then begins: "*In countries which have not abolished the death penalty*, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and

264. International Covenant on Civil and Political Rights art. 7, *adopted* Dec. 19, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) [hereinafter ICCPR]. The ICCPR does not provide a specific definition of *torture* or the terms *cruel*, *inhuman*, or *degrading*. Those terms, however, have been developed in case law, with the term *torture* later specifically defined in the U.N. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 1, Dec. 10, 1984, 1465 U.N.T.S. 85 (entered into force June 26, 1987); *see also* David Weissbrodt & Cheryl Heilman, *Defining Torture and Cruel, Inhuman, and Degrading Treatment*, 29 LAW & INEQUAL. 343 (2011) (discussing the concepts of cruel, inhuman and degrading treatment). "Torture" has been described as "an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment." Declaration on the Protection of All Persons from Being Subjected to Torture, G.A. Res. 3452 (XXX), 30 U.N. GAOR Supp. (No. 34) 91, U.N. Doc. A/1034 (1975), art. 1.

265. Justice Marshall recognized the right to life as a fundamental right. Furman v. Georgia, 408 U.S. 238, 359 n.141 (1972) (Marshall, J., concurring) ("The concepts of cruel and unusual punishment and substantive due process become so close as to merge when the substantive due process argument is stated in the following manner: because capital punishment deprives an individual of a fundamental right (i.e., the right to life), the State needs a compelling interest to justify it. Thus stated the substantive due process argument reiterates what is essentially the primary purpose of the Cruel and Unusual Punishments Clause of the Eighth Amendment—i.e., punishment may not be more severe than is necessary to serve the legitimate interests of the State.") (citations omitted).

266. *See* ICCPR, *supra* note 264, at art. 6(4) ("Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases."); *see id*. at art. 6(5) ("Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.").

267. *Id.* at art. 6(1).

Punishment of the Crime of Genocide."[268] In addition, Article 6(6) reads: "*Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant*."[269]

Article 6(2) and Article 6(6) of the ICCPR, when read together, thus envision a one-way street toward abolition[270] and a time when

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268. *See id.* at art. 6(2) (italics added); *see also* Conall Mallory, *Abolitionist at Home and Abroad: A Right to Consular Assistance and the Death Penalty*, 17 MELB. J. INT'L L. 51, 65 (2016):

> This provision recognises from the outset that the obligation applies to those 'countries who have not abolished the death penalty', thereby only allowing for the use of execution by those who had retained the punishment at the time of signature. It is also clearly an exception to the general right to life enshrined in art 6(1). Moreover the text also denotes that the death penalty can only be used for the 'most serious crimes', thereby pinning the legality of the execution on a subjective basis that can be, and has been, restricted over time.

269. *See* ICCPR, *supra* note 264, at art. 6(6) (italics added).

270. *See* William A. Schabas, *International Law, the United States of America and Capital Punishment*, 31 SUFFOLK TRANSNAT'L L. REV. 377, 392 (2008).

> The [United Nations Human Rights] Committee explained that Article 6(2), which allows the death penalty in some circumstances, only applies to states that have not yet abolished the death penalty. Canada abolished the death penalty for all crimes in 1998, and the Committee said that as a result it could not avail itself of Article 6(2) of the ICCPR.

(citing Judge v. Canada, No. 829/1998, U.N. Doc. CCPR/C/78/D/829/1998 (2003)); *see also* Geoffrey Sawyer, Comment, *The Death Penalty Is Dead Wrong: Jus Cogens Norms and the Evolving Standards of Decency*, 22 PENN ST. INT'L L. REV. 459, 471–72 (2004) ("Article 6(2) of the ICCPR states that 'In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes.' The Human Rights Committee, which was established under the ICCPR, stated in a general comment about Article 6 that "the expression 'most serious crimes' must be read restrictively to mean that the death penalty should be a quite exceptional measure."); *see also* Richard B. Bilder & Joan Fitzpatrick, *Book Review*, 88 AM. J. INT'L L. 182, 182–83 (1994) (reviewing WILLIAM A. SCHABAS, THE ABOLITION OF THE DEATH PENALTY IN INTERNATIONAL LAW (1993)):

> The ICCPR contains significant restrictions on the death penalty, including prohibitions on execution of juvenile

the death penalty will be abolished worldwide.[271] When the widely ratified ICCPR was drafted, a number of countries—clinging to traditional practices in spite of the global movement to abolish the death penalty—sought to retain capital punishment.[272] "In order to clarify the 'general purpose' of the right to life," international law expert William Schabas wrote of Article 6 of the ICCPR, "the drafters added paragraph 6, which contemplates the eventual abolition of the death penalty, stating that '(n)othing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant.'"[273] "It is obvious," a Chinese academic, Su Caixia, adds, "that the abolition of the death penalty is still the ultimate goal of state parties to the

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> offenders and pregnant women, its limitation to the most serious crimes, and a right to seek pardon or commutation. Schabas thoroughly conveys the crosscurrents in the drafting process, including an important and passionately argued proposal for abolition submitted by Uruguay and Colombia (pp. 71-81). The drafting history illustrates how acceptance of the goal of eventual, though not immediate, abolition held through the drafting of the ICCPR, inspired in large part by the Uruguayan/Colombian proposal (p. 80). This common understanding received rather opaque expression in the language of Article 6(2) ("[i]n countries which have not abolished the death penalty") and Article 6(6) ("Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant.").

271. *See* Kevin Reed et al., *Race, Criminal Justice and the Death Penalty*, 15 WHITTIER L. REV. 395, 415–16 (1994) (discussing how Uruguay, Columbia, and even Islamic retentionist states, have "call[ed] for absolute and immediate abolition of the death penalty" and "expressed their attachment to ultimate abolition").

272. *See* Sonia Rosen & Stephen Journey, *Abolition of the Death Penalty: An Emerging Norm of International Law,* 14 HAMLINE J. PUB. L. & POL'Y 163, 165 (1993) ("By the end of January 1993, 115 countries had ratified and two countries had signed the ICCPR."); William A. Schabas, *Islam and the Death Penalty,* 9 WM. & MARY BILL RTS. J. 223, 225–26 (2000) (highlighting the role of Arab and Islamic states—Indonesia, Iran, Iraq, Jordan, Morocco, Saudi Arabia, Sudan, Syria, Tunisia, Yemen—in the death penalty debates when Latin America's "right to life" provision was "handily rejected on a roll-call vote, by fifty-one votes to nine, with twelve abstentions").

273. *See* William A. Schabas, *Invalid Reservations to the International Covenant on Civil and Political Rights: Is the United States Still a Party?,* 21 BROOK. J. INT'L L. 277, 298–99 (1995).

ICCPR."[274] "The Second Optional Protocol to the ICCPR," she observes, quoting the protocol adopted by the United Nations in 1989 but which the U.S. has never ratified,[275] "also reflects such aims: 'The States Parties to the present Protocol, [believe] that abolition of the death penalty contributes to enhancement of human dignity and progressive development of human rights, . . . [and are convinced] that all measures of abolition of the death penalty should be considered as progress in the enjoyment of the right to life.'"[276] The Second Optional Protocol to the ICCPR specifically calls for the abolition of the death penalty,[277] providing its very first article: "No one within the jurisdiction of a State Party to the present Protocol shall be executed."[278]

The U.N. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment entered into force in 1994 for the United States[279] after Justice Marshall's death

274. *See* Su Caixia, *The Present and Future: The Death Penalty in China's Penal Code,* 36 OKLA. CITY U. L. REV. 427, 429 (2011).

275. *See id.* at 429–30; *see also* Elizabeth Burleson, *Juvenile Execution, Terrorist Extradition, and Supreme Court Discretion to Consider International Death Penalty Jurisprudence,* 68 ALB. L. REV. 909, 917 (2005) ("While the United States ratified the ICCPR in 1992, it made a reservation to Article 6, allowing for the continued use of capital punishment in keeping with the U.S. Constitution."); Alice Storey, *Challenges and Opportunities for the United Nations' Universal Periodic Review: A Case Study on Capital Punishment in the United States,* 90 UMKC L. REV. 129, 145–46 (2021) (observing how, in 2010, the United States accepted six of the twenty-two death penalty recommendations, in full or in part).

276. *See* Caixia, *supra* note 274, at 429–30.

277. *See* Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty, G.A. res. 44/128, Dec. 15, 1989, (entered into force July 11, 1991) art. 1(2) ("Each State Party shall take all necessary measures to abolish the death penalty within its jurisdiction.").

278. *See id.* at art. 1(1); *but cf. id.* at art. 2(1) ("No reservation is admissible to the present Protocol, except for a reservation made at the time of ratification or accession that provides for the application of the death penalty in time of war pursuant to a conviction for a most serious crime of a military nature committed during wartime.").

279. *See* Taylor v. McDermott, 516 F. Supp. 3d 94, 106 (D. Mass. 2021) ("Following Senate ratification in 1990, the Convention entered into force in November 1994 for the United States.") (citing Regulations Concerning the Convention Against Torture, 64 Fed. Reg. 8478, 8478 (Feb. 1999)); *see also* United States v. Thetford, No. 3-11-CR-30159-RAL, 2014 U.S. Dist. LEXIS 179022, at *43 (D. S.D. Dec. 31, 2014) ("The Senate provided consent subject to the following declaration: 'That the United States declares that the provisions of Articles 1 through 16 of the Convention are not self-executing.'" (citing 136 Cong. Rec. 36,198 (Oct. 27, 1990)); *see also* Carmel I. Dooling, Comment, *The Finality of Final*

in 1993.[280] In truth, in spite of U.S. reservations, understandings and declarations ("RUDs") to that convention,[281] the death penalty *is* a torturous practice—and the law and jurists should not hesitate to classify it as such.[282] Not only do death sentences continue to be carried out in an arbitrary and discriminatory fashion,[283] but every

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Orders of Removal, 83 U. CHI. L. REV. 1459, 1467 n.62 (2016) ("The Senate consented to ratification in 1990, but the United States did not deposit its instruments of ratification until October 21, 1994.").

280. *See* U.W. Clemon & Bryan K. Fair, *Lawyers, Civil Disobedience, and Equality in the Twenty-first Century: Lessons from Two American Heroes,* 54 ALA. L. REV. 959, 970 (2003):

> Marshall was eighty-four years old when he died on January 24, 1993. He was simply worn out from a life and legal career that spanned most of the twentieth century. He held several of this country's highest legal positions, including federal Circuit Court judge, solicitor general, and Justice of the Supreme Court for twenty-four terms, retiring in June 1991.

281. *See* Aric K. Short, *Is the Alien Tort Statute Sacrosanct? Retaining Forum Non Conveniens in Human Rights Litigation,* 33 N.Y.U. J. INT'L L. & POL. 1001, 1066 n.292 (2001):

> Among other reservations to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the United States limited the definition of 'cruel, inhuman or degrading treatment or punishment' to 'cruel and unusual' punishment under the U.S. Constitution and expressly noted its opinion that international law does not prohibit the use of the death penalty.

(citing U.S. Reservations, Declarations, and Understandings, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 136 Cong. Rec. 36,198 (1990)); *see also* Faulder v. Johnson, 99 F. Supp. 2d 774, 777 (S.D. Tex. 1999) (noting that while the ICCPR and the Convention Against Torture both prohibit "torture" and "cruel, inhuman, or degrading punishment," the United States submitting understandings that state, in effect, that "this language " means "cruel and unusual punishment as defined by the Eighth Amendment, which does not include the death penalty"), *aff'd*, 178 F.3d 741 (5th Cir. 1999).

282. *See* Bessler, *supra* note 52, at 93 ("[A]n act of torture is an act of torture—and a country cannot turn a tortuous act into a non-tortuous one simply by labeling it as a "lawful sanction"".).

283. *See, e.g.*, Jordan Steiker, *The Long Road Up from Barbarism*, *supra* note 32, at 1133 (articulating how Justice Marshall continually decried both the death penalty's arbitrary and discriminatory application).; *see also* Uelmen, *supra* note

capital punishment regime makes use of credible death threats in bringing capital charges, imposing death sentences, and scheduling and carrying out executions.[284] Such threats, which put the subjects of them in imminent fear of death,[285] run afoul of the fundamental and universal rights to be free from cruelty and torture—human rights that Justice Marshall advanced, construed, and interpreted in his time.[286]

Indeed, the concept of torture is now clearly understood to prohibit both physical and mental forms of torture.[287] Because *non-lethal* corporal punishments have already been abandoned in Western penal systems and prohibited by law,[288] and because *mock*

33, at 403 ("Marshall's experience as a criminal defense lawyer was most apparent in death penalty cases and strongly influenced the course of his unflagging opposition to the death penalty.").

284. *See* Bessler, *supra* note 52, at 95.

285. *See* John D. Bessler, *Torture and Trauma: Why the Death Penalty Is Wrong and Should be Strictly Prohibited by American and International Law,* 58 WASHBURN L.J. 1, 93–97 (2019) (arguing that the death penalty is a tortuous act, both psychologically and physically, because it makes use of credible and imminent threats of death); *see also* JOHN BESSLER, THE DEATH PENALTY'S DENIAL OF FUNDAMENTAL HUMAN RIGHTS: INTERNATIONAL LAW, STATE PRACTICE, AND THE EMERGING ABOLITIONIST NORM (2022) (same).

286. *See, e.g.*, John F. Blevins, "*Lyons v. Oklahoma", the NAACP, and Coerced Confessions under the Hughes, Stone, and Vinson Courts, 1936-1949*, 90 VA. L. REV. 387, 389 (2004) (sharing Thurgood Marshall's account of W.D. Lyon's treatment at the hands of the Oklahoma law enforcement, who "beat and tortured Lyons, forcing him to feel the charred bones of recently murdered victims in order to obtain a confession"); *see also* Furman v. Georgia, 408 U.S. 238, 323–24 (1972) (Marshall, J., concurring) ("[T]he cruel and unusual punishments designation '"is usually applied to punishment which inflict torture, such as the rack, the thumb-screw, the iron boot, the stretching of limbs, and the like, which are attended with acute pain and suffering.'" (quoting O'Neil v. Vermont, 144 U.S. 323, 339 (1892) (Field, J., dissenting))); *id.* at 330 ("[T]here are certain punishments that inherently involve so much physical pain and suffering that civilized people cannot tolerate them—e.g., use of the rack, the thumbscrew, or other modes of torture.") (citing *O'Neil*, 144 U.S. at 330 (Field, J., dissenting)); *id.* at 272 (Brennan, J., concurring) ("The barbaric punishments condemned by history, 'punishments which inflict torture, such as the rack, the thumb-screw, the iron boot, the stretching of limbs, and the like,' are, of course, 'attended with acute pain and suffering.'") (quoting *O'Neil*, 144 U.S. at 339 (Field, J., dissenting)).

287. *See* JOHN D. BESSLER, THE DEATH PENALTY AS TORTURE: FROM THE DARK AGES TO ABOLITION 141–45 (2017) (discussing international law prohibitions on torture and cruel, inhuman and degrading treatment or punishment).

288. *See generally* John D. Bessler, *The Anomaly of Executions: The Cruel and Unusual Punishments Clause in the 21st Century,* 2 BRIT. J. AM. LEGAL STUD. 297 (2013).

or simulated executions are already considered to be a classic example of psychological torture,[289] *real* executions—punishments specifically designed to kill—must be prohibited by the Eighth Amendment's Cruel and Unusual Punishments Clause.[290] The "touchstone" of the Eighth Amendment is "human dignity,"[291] and the Cruel and Unusual Punishments Clause has long been understood to prohibit acts of torture.[292] The rights to be free from cruelty and torture are, in fact, universal human rights, with torture considered to be a violation of the law of nations[293] and the

289. *See generally* FORENSIC MEDICINE: CLINICAL AND PSYCHOLOGICAL ASPECTS 62 (Jason Payne-James, Anthony Busuttil & William Smock, eds., 2003).

290. *See* BESSLER, CRUEL AND UNUSUAL, *supra* note 4, at 242–43 (citing American cases that interpret the Eighth Amendment to prohibit psychological harm).

291. As noted earlier, Justice Marshall believed the death penalty violated human dignity because that punishment "has as its very basis the total denial of the wrong-doer's dignity and worth." Gregg v. Georgia, 428 U.S. 153, 240–41 (1976) (Marshall, J., dissenting).

292. Jenny-Brooke Condon, *When Cruelty Is the Point: Family Separation as Unconstitutional*, 56 HARV. C.R.-C.L. L. REV. 37, 65–66 (2021) (internal citations omitted):

> As Owen Fiss and other legal scholars have noted, the prohibition on torture 'is rooted in the Constitution itself.' Thus, the prohibition on torture predates the anti-torture rules embodied in international treaties and statutes implementing those obligations--including CAT and the federal torture statute. The Fifth, Eighth, and Fourteenth Amendments all prohibit torture. The Constitution's anti-torture principle operates as an overriding norm that applies whether someone is in custody and being punished or is subjected to severe pain or suffering for some other governmental aim.
>
> The Eighth Amendment prohibition on 'cruel and unusual punishments' absolutely forbids torture and all other punishments imposing similar 'unnecessary cruelty.' Indeed, outlawing torture and equivalent brutality was the central reason for the Amendment's adoption. For that reason, when the Court assesses punishments under the Eighth Amendment, it often refers to torture as a baseline against which to compare such conduct. The Court has stated that the Eighth Amendment is violated if punishments 'involve the unnecessary and wanton infliction of pain.'

293. Filártiga v. Peña-Irala, 630 F.2d 876, 884 (2d Cir. 1980) ("[W]e conclude that official torture is now prohibited by the law of nations.").

right to be free from torture being a well-established *jus cogens* norm of international law.[294] Justice Brennan—Justice Marshall's steadfast ally on death penalty issues—himself characterized the death penalty as a torturous practice in his concurrence in *Furman*.[295] The absolute prohibition of torture is designed to ensure that state actors do not engage in torturous practices, and if government officials are permitted to torture people who have done bad things in the past, then the right to be free from torture is not truly a universal right—as promised by the post-World War II Universal Declaration of Human Rights.

V. Conclusion

Capital punishment—the practice Justice Thurgood Marshall so vocally criticized—has been used for centuries,[296] though the global movement to abolish executions has accelerated substantially[297] since Marshall (as the U.S. solicitor general)

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294. Bessler, *supra* note 288, at 141–45.

295. *See* Furman v. Georgia, 408 U.S. 238, 287–89 (Brennan, J., concurring) (internal citations omitted):

> Death is today an unusually severe punishment, unusual in its pain, in its finality, and in its enormity. No other existing punishment is comparable to death in terms of physical and mental suffering. Although our information is not conclusive, it appears that there is no method available that guarantees an immediate and painless death. Since the discontinuance of flogging as a constitutionally permissible punishment, death remains as the only punishment that may involve the conscious infliction of physical pain. In addition, we know that mental pain is an inseparable part of our practice of punishing criminals by death, for the prospect of pending execution exacts a frightful toll during the inevitable long wait between the imposition of sentence and the actual infliction of death. As the California Supreme Court pointed out, 'the process of carrying out a verdict of death is often so degrading and brutalizing to the human spirit as to constitute psychological torture.'

296. *See id.* at 331 (Marshall, J., concurring) ("[C]apital punishment is certainly not a recent phenomenon.").

297. *E.g.*, John D. Bessler, *The Rule of Law: A Necessary Pillar of Free and Democratic Societies for Protecting Human Rights*, 61 SANTA CLARA L. REV. 467, 573 (2021) (discussing the adoption of multiple resolutions by the United Nations calling for a moratorium on executions).

predicted in 1965 at a news conference in Stockholm, Sweden, that the death penalty would be abolished throughout the United States.[298] In remarks delivered in the mid-1980s at the Judicial Conference of the Second Circuit, Justice Marshall spoke on the subject of the death penalty—what he called "an element of our criminal justice system about which I have thought and agonized a great deal during my career as an advocate and judge."[299] In those remarks, Justice Marshall focused not on Eighth Amendment theory or "the intricacies of death penalty jurisprudence," but on "the practicalities of the administration of the death penalty in this country.[300] He began by lamenting "the extraordinary unfairness that now surrounds the administration of the death penalty," and highlighted in particular the "very serious mistakes" made by counsel in handling capital cases and the lack of resources devoted to such cases.[301] Justice Marshall also took notice in the wake of *Gregg v. Georgia*[302] of "the willingness of the courts and the state governments to expedite proceedings in order to bring about speedy executions."[303] "Execution dates generally are set about one month before the execution is to occur," Marshall said, emphasizing that "[u]ntil an execution date is set, and the situation becomes urgent," capital defendants had been unable to secure post-conviction counsel for the collateral review of their cases.[304] "For the capital defendant whose execution looms," Marshall added, speaking of the frequent rush to judgment in capital cases, "the opportunity for deliberation, consideration, and

298. *See* ASSOCIATED PRESS, *Death Penalty on Its Way Out, Says Marshall,* ST. JOSEPH GAZETTE, Aug. 11, 1965, at 5 (speaking at a U.N. event on the prevention of crime, Marshall said that "there is a clear tendency to favor abolition" though he predicted "prosecuting attorneys would fight like made against" abolition); *see also Marshall Expects Death Penalty End,* KAN. CITY TIMES, Aug. 12, 1965, at 5A; *Death Penalty Doomed, Marshall Says,* PHILA. INQUIRER, Aug. 11, 1965, at 11.

299. Thurgood Marshall, *Remarks on the Death Penalty Made at the Judicial Conference of the Second Circuit*, 86 COLUM. L. REV. 1 (1986).

300. *See id.*

301. *See id.* at 1–4.

302. 428 U.S. 153 (1976).

303. *See* Marshall, *supra* note 299, at 4.

304. *See id.* at 5.

rebuttal vanishes" as courts expedite proceedings, with one death row inmate put to death after a 4–4 vote on a stay request.[305]

Justice Marshall knew first-hand what was at stake—life or death—in capital cases.[306] While Justice Marshall—in addressing the Judicial Conference of Second Circuit—made concrete suggestions to improve the death penalty's administration, he also made his long-held position on capital punishment clear in those remarks: "I do not mean to suggest that these changes would solve the problems inherent in the death penalty. I continue to oppose that sentence under all circumstances."[307] Indeed, Justice Marshall filed a final, strongly-worded dissent in a death penalty case—*Payne v. Tennessee*[308]—before retiring from the U.S. Supreme Court in 1991. "Power, not reason, is the new currency of this Court's decisionmaking," Justice Marshall began that dissent, observing that (1) "[f]our Terms ago," in *Booth v. Maryland*,[309] "a five-Justice majority of this Court held that 'victim impact' evidence of the type at issue in this case could not constitutionally be introduced during the penalty phase of a capital trial"; (2) "[b]y another 5–4 vote," in *South Carolina v. Gathers*,[310] " a majority of this Court rebuffed an attacking upon this ruling just two Terms ago"; and (3) "having expressly invited respondent to renew the attack, today's majority overrules *Booth* and *Gathers* and credits the dissenting views in those cases."[311] "Cast aside today," Marshall wrote in his dissent in *Payne*, "are those condemned to face society's ultimate penalty."[312] With Justice Marshall announcing his retirement the day *Payne* was decided,[313] he thus

305. *See id.* at 4, 6–7.

306. *See* Coyne, *supra* note 26, at 51 ("Justice Marshall kept a notebook which contained the number of death-row inmates and classified them according to race, sex, and national origin. Justice Marshall insisted that his law clerks regularly update the notebook.").

307. Marshall, *supra* note 299, at 8.

308. 501 U.S. 808 (1991).

309. 482 U.S. 496 (1987).

310. 490 U.S. 805 (1989).

311. Payne v. Tennessee, 501 U.S. 808, 843–44 (1991) (Marshall, J., dissenting).

312. *See id.* at 856 (explaining the grave impact of the majority's decision on capital defendants).

313. José Felipe Anderson, *When the Wall Has Fallen: Decades of Failure in the Supervision of Capital Juries,* 26 OHIO N.U. L. REV. 741, 768 n.235 (2000); *see*

took a parting shot at the death penalty's administration before returning to private life.[314]

Justice Marshall had an unwavering commitment to equal protection of the laws, and he regularly articulated his view that the death penalty violated the U.S. Constitution's prohibition on cruel and unusual punishments.[315] On the 200th anniversary of the U.S. Constitution, Justice Marshall observed that the government devised at the Constitutional Convention in Philadelphia "was defective from the start, requiring several amendments, a civil war, and momentous social transformation to attain the system of constitutional government, and its respect for the individual freedoms and human rights, we hold as fundamental today."[316] Referencing societal progress, the emergence of "equality by law," and "new constitutional principles" pertaining to the U.S. Constitution that "emerged to meet the challenges of a changing society," Justice Marshall—taking specific note of "the suffering, struggle, and sacrifice that has triumphed over much of what was wrong with the original document" and of "hopes not realized and promised not fulfilled"—indicated his plan "to celebrate the bicentennial of the Constitution as a living document, including the Bill of Rights and the other amendments protecting individual freedoms and human rights."[317] With the first total abolition of the death penalty in Western

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also Randall Coyne, *Taking the Death Penalty Personally: Justice Thurgood Marshall*, 47 OKLA. L. REV. 35, 54 (1994) (noting of Justice Marshall's dissent in *Payne*: "On June 27, 1991, within two short hours of reading this dissent, Justice Marshall announced his retirement.").

314. *See* Carolyn D. Richmond, *The Rehnquist Court: What Is in Store for Constitutional Law Precedent?,* 39 N.Y.L. SCH. L. REV. 511, 525 (1994) ("The *Payne* dissent was Justice Marshall's last opinion before he announced his retirement after a quarter century on the Court. It was also one of his most bitter dissents.").

315. *See* Wendy Brown-Scott, *Justice Thurgood Marshall and the Integrative Ideal*, 26 ARIZ. ST. L. J. 535, 536–37 (1994) (providing a detailed account of Marshall's commitment to equal protection over the course of his career).

316. Thurgood Marshall, *Remarks of Thurgood Marshall at the Annual Seminar of the San Francisco Patent and Trademark Law Association* (May 6, 1987) [perma.cc/D4E6-9GWL].

317. *See id.* (explaining Justice Marshall's view of the U.S. Constitution as a living document).

societies occurring in Tuscany in November 1786,[318] just months before the Constitutional Convention in Philadelphia, it is long past time for the U.S. Constitution to be interpreted to bar the death penalty's use—a ruling that would forbid a plainly torturous practice, that would protect the universal human right to be free from cruelty and torture, and that would finally vindicate Justice Marshall's vision of the U.S. Constitution as one that protects all equally, safeguarding all individuals from torture, excessive punishments,[319] and gratuitous and unnecessary cruelty.[320]

318. *See* EDICT OF THE GRAND DUKE OF TUSCANY, FOR THE REFORM OF CRIMINAL LAW IN HIS DOMINIONS (1789) (translating Peter Leopold's edict of November 30, 1786, which abolished the death penalty, from Italian into English).

319. *See* Gregg v. Georgia, 428 U.S. 153, 233 (Marshall, J., dissenting) (finding that "the death penalty is unconstitutional because it is excessive" and that "[a]n excessive penalty is invalid under the Cruel and Unusual Punishments Clause 'even though popular sentiment may favor' it").

320. *See* Furman v. Georgia, 408 U.S. 238, 342 (Marshall, J., concurring) (finding that the death penalty is unjustified when less severe penalties satisfy legitimate legislative goals); *see also* Ford v. Wainwright, 477 U.S. 399, 410 (1986) (writing for the Supreme Court in a decision outlawing the execution of the insane, Justice Marshall wrote of the need "to protect the dignity of society itself from the barbarity of exacting mindless vengeance"); *see also* State v. Santiago, 122 A.3d 1, 99 (Conn. 2015) ("As Justice Brennan explained in his concurrence in *Furman,* '[w]hen the overwhelming number of criminals who commit capital crimes go to prison, it cannot be concluded that death serves the purpose of retribution more effectively than imprisonment. The asserted public belief that murderers and rapists deserve to die is flatly inconsistent with the execution of a random few." (quoting Furman v. Georgia, 408 U.S. at 304–05 (Brennan, J., concurring))). Wrongful convictions are impossible to remedy if an execution has already occurred—a point Justice Marshall powerfully made using his signature wit. Coyne, *supra* note 26, at 51 (taking note of Justice Marshall's remark: "The difficulty is, if you make a mistake, you put a man in jail wrongfully, you can let him out. But death is rather permanent. And what do you do if you execute a man illegally, unconstitutionally, and find that out later? What do you say? 'Oops'?").