

Introduction

Thurgood Marshall

Thurgood Marshall wondered how it all had come to this. Just four years earlier, the Supreme Court had ruled the death penalty unconstitutional. The decision, in a case called *Furman v. Georgia*, earned a six-column headline in *The New York Times*, the first since man landed on the moon in 1969. On its editorial page the *Times* praised the Court for curing the “cancer of capital punishment.” Millions of Americans rejoiced in that decision, none more so than Thurgood Marshall who believed capital punishment to be the clearest expression of American racism and the ultimate tool of oppression. Now, to Marshall’s astonishment, in just a few moments the Supreme Court would reverse itself.

The Court Chamber was filled to capacity that day, the second of July, 1976. People had waited on line for hours, some overnight, to be among the first to hear the decision of the Court. Except to the Justices themselves the outcome of this historic case, *Gregg v. Georgia*, was not known and very much in doubt. A sense of dread permeated the crowd. Many people seemed to guess what was coming; others merely feared the worst.

In their robing room, the Justices dressed in silence. Often they would chat with one another before entering the Chamber, but on that Friday no one said a word. Thurgood Marshall barely looked up. Even the climate conspired to set the appropriate milieu for this red-letter day. On an otherwise fine summer morning, in the midst of an otherwise mild stretch of weather in the nation’s capital, heavy

clouds gathered over the Court Building, ominously shrouding the Chamber in darkness. Solemnly, the Justices took their seats on the bench, in front of the massive red velour curtains that dominated the courtroom. Chief Justice Warren Burger summarized the outcome of *Gregg* and its three companion cases. The audience immediately understood the significance of what he had said. The Chamber grew deathly quiet.

Burger called on Associate Justice Potter Stewart to announce the decision of the Court. Stewart's voice cracked and his hands shook as he read the opinion. In 1972, Stewart had voted with the majority in *Furman*. *Furman* did not hold the death penalty unconstitutional *per se*; it only dealt with capital punishment as imposed under the Georgia statute. Nevertheless, most of the Justices and legal experts believed that *Furman* meant the end of executions in America. To the surprise and consternation of many, including Thurgood Marshall, public support for the death penalty *increased* after *Furman*, and the states responded to the decision with a flurry of new statutes designed to address the concerns expressed by the Court. This surge of public opinion and legislative activity weighed heavily on the minds of the Justices. At a personal level, Stewart had substantial reservations about the death penalty. Marshall had lobbied hard for him to cast another vote against the death penalty in *Gregg*. But Stewart was above all else a pragmatist. In just the past several years, the Court had stretched to rule anti-abortion statutes unconstitutional and ordered busing of black schoolchildren to integrate urban school districts. The public had barely tolerated these decisions. The people could not have been clearer in telling the Supreme Court what it thought

about *Furman*. Much as he disliked the death penalty, and disappointing as it might be to Justice Marshall and the abolition-minded constituency gathered in the Chamber that day, Potter Stewart believed the Court had only so much political capital to expend. The public would not tolerate the Court stepping in to end the death penalty. The battle to end capital punishment in America had been lost.

Quietly, Stewart read. "Until *Furman*, the Court never confronted squarely the fundamental claim that the punishment of death always, regardless of the enormity of the offense, is cruel and unusual punishment," he said. "We now hold that the punishment of death does not invariably violate the Constitution."

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Justices do not generally read dissents from the bench. Thurgood Marshall read his. He addressed, first, what had happened in the United States since 1972. "I would be less than candid," Marshall said, "if I did not acknowledge that since the decision in *Furman*, the legislatures of 35 States have enacted new statutes authorizing the imposition of the death sentence for certain crimes. But if the constitutionality of the death penalty turns, as I have urged on the opinion of an informed citizenry, then even the enactment of new death statutes cannot be viewed as conclusive. A recent study has confirmed that the American people know little about the death penalty. If they were better informed, they would consider it shocking, unjust, and unacceptable."

He grew more passionate. “The enactment of the post-*Furman* statutes has no bearing whatsoever on the conclusion that the death penalty is unconstitutional because it is excessive. An excessive penalty is invalid under the Cruel and Unusual Punishments Clause even though popular sentiment may favor it. The inquiry here is simply whether the death penalty is necessary to accomplish the legitimate legislative purposes in punishment, or whether a less severe penalty – life imprisonment – would do as well.”

Here, Marshall analyzed data and explained that a deterrent effect of the death penalty had not been shown. He doubted Potter Stewart’s concern that failure to execute murderers would lead to lynching and vigilantism, ridiculed the idea that without capital punishment individuals would fail to realize that murder is wrong, and urged humility as to the fallibility of man. It is one thing to say that a human being deserves death, and quite another for society to make that judgment and carry it out.

He spit, fiercely and finally, “To be sustained under the Eighth Amendment, the death penalty must comport 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 men. Under these standards, the taking of life because the wrongdoer deserves it surely must fail, for such a punishment has its very basis the total denial of the wrongdoer’s dignity and worth.”

At this point, the Justices exited as they had entered, gravely, and without a word to one another. Marshall was exhausted and despondent. He did not even return to his chambers. Instead he drove, in the 20-foot, cream-colored Cadillac that

he bought for himself after his appointment to the Court in 1967, directly to his home on Lake Barcroft.

It was Marshall's 68th birthday, but he did not feel like celebrating.

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Lake Barcroft, a community of approximately 1,000 homes near Falls Church in Northern Virginia, was something of a purgatory for Thurgood Marshall. Marshall, by nature, was an urban creature. He was raised in the predominantly black Old West neighborhood of Baltimore City. As head of the Legal Defense Fund of the NAACP, Marshall lived from 1958 until his appointment in 1965 as Solicitor General in Morningside Gardens, a then-brand-new apartment development on the southern edge of Harlem. When he moved to D.C. to join the Johnson administration, Marshall and his wife, Cissy, rented a small, green townhome near L'Enfant Plaza in southwest Washington.

The Marshalls were happy enough at #64-A on G Street, but Thurgood developed an unfortunate tendency to get drunk and wander the streets of D.C. Marshall had always been a hard drinker, and sometimes when drunk his hands would wander a bit. In Washington, these occasional lapses of good judgment grew more frequent. So late in 1968, Cissy Marshall decided that it would be best to move the Justice to the suburbs. They borrowed \$52,000 and moved into a five-bedroom ranch in Lake Barcroft, becoming the first black family in what had previously been an all-white community. One neighbor told the *Washington Star* that they were not

happy about the Marshall's moving in since it "might be encouragement for more of the same." Needless to say, Thurgood Marshall did not exactly feel at home.

This was appropriate in many ways as Marshall did not exactly feel at home in the Supreme Court. As chief attorney for the NAACP Legal Defense Fund, Marshall had been at the forefront of every major civil rights battle of the '50s and '60s. He successfully challenged the University of Texas's racist admissions policy, toppled "separate but equal" once and for all in *Brown*, and secured Martin Luther King's release from a Georgia jail. Barnstorming the country, Marshall spoke to large and adoring audiences, and, with the notable exception of some Southern whites, was welcomed across the nation as a hero.

In 1961, Marshall became a judge on the Second Circuit Court of Appeals. Almost immediately, he disliked it. Marshall found the life of a judge tedious and isolating. He would stare for hours out the window of his chambers, watching the giant construction ball across the street, daydreaming. He found the life of Solicitor General only a little better. At least he was back on the front lines, but the positions he advocated on behalf of his client, the United States, were rarely those to which he had passionately devoted his life. When Lyndon Johnson offered to nominate him to the Supreme Court in 1967, Marshall hesitated. He did not want to become further isolated. But Marshall could scarcely resist the President who told him that he wanted young people of both races to come into the Supreme Court and ask who that "Negro" was, and for somebody to say "he's the solicitor general of the United States" or now, finally, a Justice of the Supreme Court.

As he had feared, Marshall felt isolated on the Court. Self-consciously a hedonist, Marshall had lived hard his entire life. He had prodigious appetites for food, wine and tobacco. On the road for the Legal Defense Fund, Marshall played cards until the wee hours and visited the nightclubs of America. This life ended once he became a judge, although Marshall's tenure as Solicitor General allowed his social animal a brief reprieve. He solidified his relationship with President Lyndon Johnson with bourbon and Dr Pepper. But this life ended once and for all when Marshall joined the Supreme Court. Marshall was distanced permanently from the legal community and from his friends.

Slowly but surely his health began to deteriorate. Deprived of social contact, Marshall smoked constantly and drank more, sometimes as much as three martinis at lunch. He gained weight; by the early 1970s, Marshall weighed over 230 pounds. In 1970, he was hospitalized with an antibiotic-resistant strain of pneumonia, sick enough that Marshall's physician and Chief Justice Burger told President Nixon that Marshall was far more ill than people realized. Stung by fallout from some public appearances, Marshall ventured outside the Court less and less often. He gave away his tickets to Richard Nixon's second inaugural and stayed home. He began to watch television excessively. He was trapped in the suburbs and trapped inside his own body. It was the sort of existence that gave a man of ideas lots of time to ruminate. That weekend, Marshall's mind raced with questions and remonstrations.

Where had it all gone wrong?

Were the lawyers to blame? Had Marshall's successors at the Legal Defense Fund sown the seeds of ultimate defeat by constructing the constitutionality of the

death penalty as an issue of race? Had their charismatic lead attorney, Anthony Amsterdam, blown it with a highly problematic oral argument in *Gregg*? Marshall knew that Potter Stewart, John Paul Stevens, and Harry Blackmun all had reservations about the death penalty. They would have been open to further procedural challenges, as their votes in the *Gregg*-companion cases proved. But Tony Amsterdam took an absolutist position of the death penalty. It was all or nothing, he said. Worse still, Amsterdam had come close to being rude to Harry Blackmun. Blackmun took it well, but Stewart, Byron White, and even William Brennan were all angry at Amsterdam's self-righteousness. Still, Amsterdam had brilliantly engineered the victory in *Furman*. It was hard to place the entire blame on him.

Were changes in the composition of the Court to blame? Possibly, but this explanation was also too easy. True, John Paul Stevens had replaced William Douglas on the bench. Douglas had been one of the strongest, most passionate liberal voices in the history of the Court. Stevens was a Ford-appointee. But Stevens had been a reasonable voice in the Justices' Conference Room. Stevens appeared to be a moderate and to have had a genuinely open mind on the issue of the death penalty.

Was the fault his own? Marshall had been active in holding together the majority in *Furman*. The decision, which produced nine separate opinions and more pages than any other in the history of the Court, was far from perfect, but it had done the job. Had Marshall not been adequately persuasive in steering the Court to decide cases that would make the death penalty appear more inhumane and

intolerable? Should he have advanced cases that emphasized the procedural difficulties of separating those who should live from those who should die? Had he failed, simply, to work hard enough to hold together the slim majority from *Furman*?

Was the decision simply the product of social forces in America that were larger than Thurgood Marshall or even the highest court in the land? Was the restoration of the death penalty inevitable given the nation's history of racism and the peculiar extension of the Christian ethic, which advocated protecting all life, except the lives of certain reviled criminals? Marshall didn't know. He only knew for sure that he felt bad, worse than he had felt in years.

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Marshall's deep reservations about capital punishment had their roots in his very first experiences as an attorney. Three cases made a particular impact on Marshall. The first occurred in 1933, during Marshall's third year in law school. Charles Hamilton Houston, the dean of Howard Law School, asked Marshall to help him represent George Crawford, a black man accused of murdering two white women. Marshall eagerly accepted. He was appalled by what he saw. The list of prospective jurors did not contain the name of even a single black man. Despite this obvious anomaly, the circuit court summarily rejected Houston's appeal that Virginia was illegally keeping blacks off of juries. At trial, the prosecution could not produce the murder weapon or a single witness to the crime. Still, the jury found him guilty. Houston regarded the representation as a success because Crawford

managed to escape the death penalty. Marshall later explained what he learned from Houston: "If you get a life term for a Negro charged with killing a white person in Virginia, you've won."

The second experience occurred shortly after Marshall graduated from Howard and entered private practice in Baltimore. Marshall struggled to make ends meet throughout this period, the heart of the Depression. During his first year in practice, Marshall ran a deficit of \$3,500. Years later he joked that he ate lots of peanut butter sandwiches during this time. His first big break was another murder trial. In 1934, James Gross and two accomplices were charged with killing the owner of a barbecue stand in Prince Georges County. Marshall's neighbor Pat Patterson knew Gross's parents and convinced them to hire Thurgood. At trial in eastern Maryland, Marshall was again appalled by what he saw. Marshall's client, Gross, was merely the getaway driver, but the Upper Marlboro jury convicted him and the others in a matter of days. All three defendants were sentenced to hang. Donald Parker, the ringleader, later had his sentence commuted to life imprisonment, but Gross was hanged in 1935. The only way Marshall could make sense of this disparity was that Parker's attorneys were white. Marshall felt ashamed by his inability to deliver for his client, but more powerfully aghast and enraged at the arbitrariness and prejudice of the system.

The final experience, five years later, solidified once and for all Marshall's belief in the racism of the death penalty. He represented W.D. Lyons, a simple black sharecropper accused of killing Elmer Rogers and his wife on New Year's Eve 1939. It was Marshall's first criminal case for the NAACP. Two white men confessed to the

murders, but their confession created a problem for Oklahoma Governor Leon Chase Phillips: the confessors were inmates who had been allowed unsupervised weekend passes to visit bars and whorehouses. Governor Phillips sent his brutish aide Vernon Cheatwood to clean up the mess. Cheatwood ordered the confessors released, arranged for them to exit into Texas, and announced that a search for the real perpetrator would begin. Several days later the police arrested Lyons. Lyons said he had been hunting rabbits near the Rogers's home but had nothing to do with the murders. Cheatwood thereupon began a series of vicious thrashings using a hardwood nightstick wrapped in leather, which Cheatwood called a "niggerbeater." After several days of these poundings, and of being deprived food and sleep, Lyons was confronted with the charred bones of the murder victims. Superstitious about bones, Lyons tried to crawl away, but Cheatwood held his face in the bones and told him that only a confession would make the torture stop. At this point, Lyons confessed.

At trial Marshall saw the usual. An all-white, all-male jury convicted Lyons in just five hours. The jury sentenced Lyons to merely life in prison, instead of the death penalty, but Marshall had no idea why. This final experience confirmed for Marshall that the administration of the death penalty in America was both discriminatory and random. He came to regard capital punishment as the worst vestige of legal racism in America. People supported it, Marshall believed, only because they did not know the real facts.

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Despite his reservations, as a judge Marshall had not always been a zealot on the death penalty. He was not an ideologue by nature. Though he was the most important civil rights lawyer of the 20th century, Marshall considered himself an advocate for human rights, not just for the rights of African-Americans. He deplored the separatism of Malcolm X and the excessive eagerness of Martin Luther King. He urged patience in the implementation of integration in the wake of *Brown*. Marshall was, in his own words, “the ultimate gradualist.”

As a judge on the Second Circuit Court of Appeals, Marshall had not been opposed to executing criminals. In 1961, Marshall sat on a panel of judges reviewing the appeal of Nathan Jackson, who was convicted of murdering a police officer in an exchange of gunfire following an armed robbery. Jackson was sentenced to die in large part of the basis of a confession that he gave five minutes after being administered Demerol as a pre-operative medication. Jackson claimed that this rendered his confession involuntary. The Second Circuit denied relief – and upheld the death sentence – on the sketchy theory that Demerol takes fifteen minutes to work and thus could not have affected the voluntariness of Jackson’s confession. Marshall concurred in the opinion.

It was only as a Justice of the Supreme Court that Marshall began to find a voice for these concerns that he suppressed during his career as an appellate court judge. Key to this development were several conversations Marshall had with William Brennan, his best friend on the Court. A long-time opponent of the death penalty, Brennan convinced Marshall that he should not feel restrained by his role

as a judge, as Marshall had felt during his time on the Second Circuit. The Supreme Court had a different and unique responsibility, Brennan argued, because the Court was a defendant's final place of appeal.

Brennan so thoroughly convinced Marshall on this point that it was ultimately Marshall who rallied the troops in *Furman*. In later years, Marshall would work short hours, sometimes watching television in his chambers. During the 1972 term, Marshall was at his energetic and passionate best. He moved from chamber to chamber trying, as appropriate, to convert the other Justices to the cause and to keep the fragile coalition in place. Many of Marshall's clerks regarded it as his finest hour on the Supreme Court. When the decision in *Furman* came down, Marshall rejoiced as he had not in years. His mood recalled the sheer ebullience he had felt in taking down the University of Texas Law School's whites-only admission policy and his soulful joy in winning *Brown*.

Now, just four years later, he felt utter despair. He believed the ground that had been won in *Furman* could not be regained, at least not any time soon. The United States would certainly retain the death penalty for the remainder of his lifetime, and likely for the lives of his children. He believed, presciently as it would turn out, that *Gregg* signaled a sharp move to the right for the Court and that he and his staunch friend and ally, William Brennan, were about to become marginalized. He saw his life work was crumbling before his eyes.

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Marshall spent much of the weekend staring out the window onto Lake Reston. Saturday afternoon, he watched some television. He called Brennan, but his friend was out for the day. He tried to go to bed early, but for hours could not settle. He finally succeeded in falling asleep, but awoke just a few hours later, around 4:00 A.M., with chest pains. Marshall began pacing around his home. After three hours, he began to get worried and called a doctor, who told Marshall to get himself to a hospital. At Bethesda Naval, the medical staff ran a series of tests. Despite Marshall's obesity and his lifetime of smoking, he had managed to avoid a heart attack. He had his first that weekend, and two more over the next three days. He feared the end was near.

"Is this it?" he asked the doctor.

"It sure is," he replied.