Introduction
Is This It?

Thurgood Marshall wondered how it had come to this. Just four years earlier, the Supreme Court had ruled the death penalty unconstitutional. That decision, in a case called *Furman v. Georgia*, earned a six-column headline in *The New York Times*, as large and as bold as when, equally improbably, men 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 government's ultimate tool of oppression.

The victory had been supremely improbable. In 1963, Supreme Court Justice Arthur Goldberg suggested, to the astonishment of his colleagues and the entire legal community, that the Constitution prohibited capital punishment. The proposal was every bit as brash, and its success every bit as unlikely, as President John Kennedy's exhortation two years earlier to land an American on the moon by the end of the decade. But Marshall's successors at the NAACP Legal Defense Fund seized the mantle and nine years later, a mere instant in the universe of constitutional litigation, won the ultimate triumph. *Furman* had not held the death penalty unconstitutional *per se*; it only dealt with capital punishment as then imposed under Georgia law. Nevertheless, most of the Justices, and most legal experts believed *Furman* meant the end of executions in America. Comparisons between the abolition campaign and the lunar program were irresistible. Kennedy's vision took eight years and two months to reach fruition. The crusade to end the death penalty took almost exactly one year longer. It was nothing less than a miracle. Now, to Marshall's astonishment, in 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. To the right of the bench were seated friends and relatives of the Justices. Interspersed amidst the Siena marble columns at the side of the courtroom, the law clerks sat in folding chairs, reluctant witnesses to history. Two American flags stood as twin sentries at the sides of the mahogany bench from which the decision would be delivered in a matter of moments. In the back of the room, a frieze depicted the struggle between good and evil.

A sense of dread permeated the crowd. Except to the Justices and their clerks the outcome of this historic case, *Gregg v. Georgia*, was not known and very much in doubt. Nevertheless, many people in the audience appeared to have guessed what was coming. Others simply 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 morning 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 day, 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.

Shortly after ten o'clock, the Justices solemnly emerged from massive velour curtains, which shrouded the high bench in crimson. They emerged in sets of three, through hidden gaps, creating the illusion that nine old men in black robes had appeared out of nowhere. The marshal called the room to order, pointlessly. Everyone had already fallen silent upon the judges' entrance. Several of the justices rocked back and forth in their leather chairs, anxiously waiting for the proceedings to begin.

After a few moments, Chief Justice Warren Burger said, "The dispositions in the following cases: Gregg against Georgia, Profitt against Florida, Jurek against Texas, and Woodson against North Carolina will be announced by Mr. Justice Stewart, Mr. Justice Stevens, and Mr. Justice Powell." The abolitionists in the audience immediately understood that this was bad news. They had held out hope for Potter Stewart, who had been with the majority in *Furman*. They had been optimistic too about John Paul Stevens, the newest member of the Court. There could be no question, though, about where Lewis Powell stood. He had been firmly against *Furman*. The fact that these three judges were announcing the results together meant that a deal had been struck. Almost certainly, this coalition would uphold capital punishment in part or in full.

The Chamber grew deathly quiet, as Burger called on Potter Stewart to announce the first of the decisions, *Gregg*. Stewart's voice cracked and his hands shook as he summarized the opinion. Four years earlier, Stewart had shared the view that *Furman* meant the end of the death penalty in the United States. He had struck a crucial bargain with Byron White in part based on his belief that capital punishment was on the way out. Marshall knew that his colleague took no joy in reversing the Court's direction. What happened after 1972 took Potter Stewart by surprise.

Truth was, these events had taken Marshall by surprise too. In *Furman*, Marshall proclaimed that Americans would oppose the death penalty if only they knew the facts. To his astonishment, public support for the death penalty substantially *increased* after *Furman*. 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, none more so than Potter Stewart. Stewart

had substantial moral reservations about the death penalty, but he was above all else a pragmatist. In the early seventies, the Court had stretched to rule anti-abortion statutes unconstitutional, ordered busing of black schoolchildren to integrate urban school districts, and, of course, struck down capital punishment. The public had barely tolerated these decisions.

Marshall believed that Stewart's essential judgment had been correct, and that it was just a matter of time and education before the public rejected capital punishment as the abomination it was. Stewart would not budge, though. Potter Stewart disliked the death penalty, but he believed the Court had only so much political capital to expend. After having expressed its views on capital punishment so clearly, the public would not tolerate a further intrusion by the Court. Thus the battle to end capital punishment in America was lost just four years after it was miraculously, brilliantly, and triumphantly won.

Quietly, Stewart read. "We consider at the outset the basic contention that the punishment of death for the crime of murder is under all circumstances cruel and unusual in violation of the Constitution.

"We reject that contention."

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Justices do not generally read dissents from the bench. Thurgood Marshall read his. He first addressed what had happened in the United States during the preceding four years. "Since the decision in *Furman*, the legislatures of thirty-five States have indeed enacted new statutes authorizing the imposition of the death sentence for certain crimes," Marshall said

in his Southern drawl. "I would be less than candid, if I did not acknowledge that these developments had a significant bearing on a realistic assessment of the moral acceptability of the death penalty to the American people. But if the constitutionality of the death penalty turns, as I have urged, on the opinion of an *informed* citizenry, then the enactment of new death statutes cannot be viewed as conclusive. In *Furman,* I observed that the American people are largely unaware of the information critical to a judgment on the morality of the death penalty. A recent study has confirmed that the American people know little about the death penalty, and that the opinions of an informed public would differ significantly."

He grew more passionate. His mistaken prediction was beside the point. Public opinion did not matter because the death penalty was excessive. "An excessive penalty is invalid under the Cruel and Unusual Punishments Clause even though popular sentiment may favor it," he said. "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 – such as life imprisonment – would do as well. The two purposes that sustain the death penalty as non-excessive in the Court's view are general deterrence and retribution."

Marshall disposed of each. The evidence of deterrence was inconclusive, he said. "The data which now exist show no correlation between the existence of capital punishment and lower rates of capital crime." Further, Marshall doubted Potter Stewart's concern that failure to execute murderers would lead to lynching and vigilantism. "It simply defies belief to suggest that the death penalty is necessary to prevent the American people from taking the law into their own hands," he said. Marshall 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, Marshall said, and quite another for society to make that judgment and carry it out.

Stewart, Stevens and Powell had justified the death penalty based in part on satisfying "society's instinct for retribution." This could not be the ultimate test. Marshall 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 objection in opposition to it" – he meant 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."

When Marshall finished, 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 twenty-foot, cream-colored Cadillac – a present to himself after his appointment to the Court in 1967 – directly to his home on Lake Barcroft. It was Marshall's sixty-eighth birthday, but he did not feel like celebrating.

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Lake Barcroft, a community of approximately one thousand homes near Falls Church in Northern Virginia, was a purgatory for Thurgood Marshall. By nature, Marshall was an urban creature. He was raised in the predominantly black Old West neighborhood of Baltimore City. As head of the NAACP Legal Defense Fund, Marshall lived from 1958

through 1965 in Morningside Gardens, a then new apartment development on the southern edge of Harlem. When he moved to Washington, D.C., to become United States Solicitor General for the Johnson administration, Marshall and his wife, Cissy, rented a small, green townhome near L'Enfant Plaza in the southwest quadrant of the capital.

The Marshalls were happy enough at #64-A on G Street, but Thurgood developed an unfortunate tendency to get drunk and wander the streets. Marshall had always been a hard drinker, and sometimes, after a few too many, his hands would wander. 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 her husband, by this time an Associate Justice of the Supreme Court, to the suburbs. They borrowed fifty-two thousand dollars 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 Marshalls 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 nineteen fifties and sixties. He successfully challenged the University of Texas's racist admissions policy, toppled "separate but equal" once and for all in *Brown v. Board of Education*, 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 conquering hero.

In 1961, John Kennedy appointed Marshall to a judgeship 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. The positions he advocated on behalf of his client, the United States, were rarely those to which he had passionately devoted his life. At least he was back on the front lines, doing what he did best. Of the thirty-two cases he argued before the Supreme Court, Marshall won twenty-nine.

When Lyndon Johnson offered to nominate him to the Supreme Court in 1967, Marshall hesitated. He did not want to become further detached. 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 is the solicitor general of the United States" and now, finally, a Justice of the Supreme Court.

As he feared, Marshall felt cut off 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. Being a judge cramped his style. His tenure as Solicitor General allowed Marshall's 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 permanently distanced 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 many as three martinis at lunch. He gained weight. By the early nineteen seventies,

Marshall weighed over 230 pounds. Concerned citizens wrote to him about his apparent poor health. He replied to one that he was down to three cigarettes a day. "So I guess there is no need to worry."

In 1970, Marshall was hospitalized with an antibiotic-resistant strain of pneumonia, sick enough that his physician and Chief Justice Burger each told President Nixon that Marshall was gravely ill. Marshall recovered, but further removed himself from public life. Stung by fallout from public appearances, Marshall already ventured outside the Court infrequently. Now 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 in 1976, freshly sore from the sting of defeat, Marshall doubted whether it had all been worth it. His 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 their 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 his oral argument in *Gregg*? Marshall knew that Potter Stewart, John Paul Stevens, and Harry Blackmun all had reservations about the death penalty. Their votes in the companion cases to *Gregg* proved that they would have been open to further procedural challenges. But Tony Amsterdam took an absolutist position of the death penalty. It was all or nothing, he told the Court. No law, no matter how carefully written, satisfied the Constitution.

Some of Marshall's brethren felt that Amsterdam was rude during the oral argument, especially to Harry Blackmun, with whom he had clashed over the years. Potter Stewart, Byron White, and William Brennan were all angry at Amsterdam's self-righteousness. Still, Amsterdam had brilliantly engineered the victory in *Furman*. Many people regarded him as the finest lawyer of his generation. In arguing against the new death penalty laws, Amsterdam had simply made the sort of judgment call lawyers make all the time. Oral arguments were mostly show anyway. Surely Tony Amsterdam's oral argument had not single-handedly changed the course of history. Placing sole responsibility at his hands did not seem reasonable. But what then?

Were changes in the composition of the Court to blame? Possibly, but this explanation was also too simple. 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 had been appointed by Gerald Ford. But Stevens had been a reasonable voice in the conferences on the cases. He appeared to be a moderate and to have maintained an open mind on the issue of the death penalty. And Douglas's record on the death penalty had been problematic in his own inimitable way. His intransigence on a case during the 1969 term undid a fragile majority that would have begun to chip away at capital punishment was still under the stewardship of the liberal Chief Justice, Earl Warren. Because of Douglas's stubbornness, the issue instead carried forward to Warren's successor, Warren Burger.

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 had done the job, but it was far from perfect. The truth

was, Marshall had been late to the issue. Thinking about what he could have done had he gotten involved sooner, raised another set of questions. Should he have steered 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*.

But Thurgood Marshall was only one man. Was the decision instead the product of social forces in America that were larger than any Justice 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 did not know. He only knew for sure that he felt bad, worse than he had felt in years.

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Marshall's reservations about capital punishment had their roots in his 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, but was appalled by what he saw. The list of prospective jurors did not contain the name of any black men. At trial, the prosecution could not produce the murder weapon or a single witness to the crime. Still, the jury found him guilty. The circuit court of appeals

summarily rejected Houston's argument that Virginia was illegally keeping blacks off of juries. Houston nevertheless 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 of his life, 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 drew no distinction among the defendants. All three were sentenced to die. 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. Bu this time,

Marshall had moved on to the NAACP, and this was his first criminal case there. Even by the standards of what Marshall had witnessed in law school and private practice, the Lyons case was an egregious miscarriage of justice. Two white men told the police they had committed the murder. Their confessions, though, created a problem for Oklahoma Governor Leon Chase Phillips: the men who admitted the crime were inmates who had been given 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 remains of the murder victims. Superstitious about bones, Lyons tried to crawl away, but Cheatwood held his face in the carcass 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 randomness was only marginally less disturbing than the instances when his clients had been treated more harshly for no reason. The experience confirmed for Marshall, once and for all, that the administration of the death penalty in America was arbitrary and discriminatory. 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.

Despite his deep reservations about the fairness of the application of the death penalty, during his first years as a judge, Marshall did not view capital punishment as unconstitutional. On the Second Circuit Court of Appeals, Marshall upheld death sentence In 1961, he 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. Even on the Supreme Court, Marshall took a long time to warm to the idea that the death penalty might violate the Eighth Amendment.

Several factors made Marshall slow to come around. The first was Marshall's skepticism about the wisdom of using the Court to implement social change. The concern would seem prescient years later. Though he was the most important civil rights lawyer of the twentieth century, and though he achieved many of his most significant victories before the Supreme Court, Marshall believed the courts could only run so far ahead of public opinion. In the implementation of integration in the wake of *Brown*, Marshall urged patience against the advice of many of closest colleagues. By nature, Marshall was not an ideologue. He 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 was, in his own words, "the ultimate gradualist." In the first Eighth Amendment case he heard as a member of the Supreme Court, a decision rejecting punishment for drug addiction. Marshall argued for a limiting principle. Without it, Justice Marshall wrote, the Court would become "under the aegis of the Cruel and Unusual Punishment Clause, the ultimate arbiter of the standards of criminal responsibility, in diverse areas of the criminal law, throughout the country."

Part of Marshall's concern was the people would reject overreaching court decisions, part that the courts would not do well micromanaging complex social issues, and part was that judges lacked basic insight into the people they were trying to help. A perfect example was *Powell v. Texas*, where the Warren Court reversed the conviction of a sixty-six-year-old shoeshine man, who had arrested for public intoxication and fined twenty dollars. As in the drug addiction case, the majority felt that Powell was being punished for his illness. Marshall was sympathetic, but he felt the issue was more complex than the majority allowed. "It would be tragic to return large numbers of helpless, sometimes dangerous and frequently unsanitary inebriates to the streets without even the opportunity to sober up adequately which a brief jail term provides," Marshall wrote. "Before we condemn the present practice, perhaps we ought to be able to present some clear promise of a better world for these unfortunate people."

Finally, Marshall had the dimmest view of the street criminal. He grew up on the streets of Baltimore, and he was not one to be conned. He told one law clerk, "I hate the death penalty. But I also hate the bastards who escape because we don't use the death penalty." To a former colleague advocating that criminal sentences be reviewable on appeal, Judge Marshall said, "I'm all in favor, so long as I can raise them." Michael Meltsner,

an attorney who began his career with Marshall at the NAACP Legal Defense Fund said, "Marshall was not sentimental about criminals in the way that white liberals sometimes are."

So Marshall was slow to come around, but come around he did. The racism of the system could not be denied, and, after years on the Court, Marshall began to find a voice for these concerns. Key to this evolution 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 1971-72 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 again, 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 crumbling before his eyes.

Marshall spent much of the weekend staring out the window onto Lake Reston. Saturday afternoon, he watched some television, and played a game of Monopoly with his son. He called Brennan, but his friend was out for the day. In the evening, he tried to go to bed early, but for the longest time could not settle. He finally succeeded in falling asleep, only to awake a few hours later, around four o'clock in the morning, with chest pains. Marshall began pacing around his home, hoping to feel better, but the walking did not help. 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. Marshall feared the end was near.

"Is this it?" he asked the doctor.

"It sure is," the doctor replied.