THREE DECADES OF TINKERING WITH THE MACHINERY OF DEATH:

A RHETORICAL HISTORY OF THE SUPREME COURT'S DEATH PENALTY

JURISPRUDENCE

by

MIKAELA JANET MALSIN

(Under the Direction of Belinda Stillion Southard)

ABSTRACT

This dissertation offers a rhetorical history of the Supreme Court's capital punishment jurisprudence through four pivotal cases, each capturing the rhetorical milieu of a decade: the 1970s, 1980s, and 1990s, respectively. I interrogate the fractured judicial voice, constitutive rhetoric, and *pathos* as I analyze *Furman v. Georgia*, *McCleskey v. Kemp*, *Payne v. Tennessee*, and *Callins v. Collins*. My readings suggest that in each capital punishment case, the justices wrangled over the nature of rhetoric and its role in justifying or invalidating capital punishment. Each analysis, then, identifies the fundamental rhetorical negotiations that animated the justices' opinions. I argue that in *Furman*, the question of capital punishment's constitutionality revealed a broader conflict over the Court's role in making decisions of life and death. I isolate three loci of the rhetorical struggle at the heart of that conflict, drawing upon the rhetoric of social change, the rhetoric of history, and stasis theory to illuminate the rhetoricity of the Court's dilemmas. I read *McCleskey v. Kemp* as a negotiation over the constitutive functions of judicial rhetoric, in which the majority opinions rejected a notion of the Court's rhetoric

as constitutive even as they constituted particular visions of social scientific evidence and of racial discrimination. By contrast, the minority opinions in *McCleskey* embraced the constitutive functions of judicial rhetoric. I assess the last two cases from the early 1990s as conflicting approaches to the role of emotion in capital punishment decisionmaking. The majority's decision in *Payne* validated the emotional undertones of disgust and vengeance toward the defendant and compassion for the victims, while Blackmun's dissent in *Callins* focused on compassion for the defendant. The Court in *Payne* also deflected the emotionality of its own rhetoric, while the *Callins* dissent explicitly leveraged its emotionality. I conclude with a discussion of the current state of the Court's death penalty jurisprudence and reflect upon the historical and rhetorical implications of the project.

INDEX WORDS: rhetoric, capital punishment, Supreme Court, rhetorical history

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by

MIKAELA JANET MALSIN

M.A., Wake Forest University, 2012

B.A., Emory University, 2010

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MIKAELA JANET MALSIN

Major Professor:	Belinda Stillion Southard
Committee:	Celeste Condit
	Edward Panetta
	Bjørn Stillion Southard
	Jody Clay Warner

Electronic Version Approved:

Suzanne Barbour
Dean of the Graduate School
The University of Georgia
May 2016

DEDICATION

This project is dedicated to my family.

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CHAPTER ONE

JUDICIAL RHETORIC, RHETORICAL HISTORY, AND CAPITAL PUNISHMENT

"Capital punishment is to the rest of all law as surrealism is to realism. It destroys the logic of the profession." — Norman Mailer

Introduction

Supreme Court Justice John Marshall Harlan wrote in 1971:

> To identify before the fact those characteristics of criminal homicides and their perpetrators which call for the death penalty, and to express these characteristics in language which can be fairly understood and applied by the sentencing authority, appear to be tasks which are beyond present human ability.[1]

Harlan expressed his doubts over the human capacity to communicate why a person should be sentenced to death in the midst of the Supreme Court's early attempts to navigate its role in and position on the American system of capital punishment. His words proved prescient in light of the subsequent avalanche of case law on how to apply and justify the death penalty.[2]

In the years after World War II, the Court attempted to reconcile public backlash against the death penalty with its historical use and assumed constitutional validity. After almost two centuries during which the Court rarely heard capital punishment cases and consistently refused to limit its application on constitutional grounds, the latter part of the twentieth century witnessed changes in the capital system. In the 1960s, a convergence of political and cultural

trends produced public antipathy against state-sponsored killing as well as a concentrated movement to abolish capital punishment. When challenges to the death penalty's constitutionality reached the Supreme Court, it initially declined to rule on the question of whether capital punishment violated the Eighth Amendment prohibition against cruel and unusual punishment. Yet it began to move incrementally toward implementing more procedural checks on the death penalty's administration. Then, in 1972, the Court issued a decision unlike any other in its history. With *Furman v. Georgia*, the Court ruled that capital punishment was unconstitutional because it constituted cruel and unusual punishment. However, *Furman* has been considered "confusing and sometimes contradictory" because neither the majority nor the minority could agree on a rationale for the decision. Indeed, each of the nine justices composed a separate opinion.[3] At more than 50,000 words and 232 pages, the decision was the lengthiest delivered by the Court to date (and remains its longest decision on the death penalty). The decision faced intense public and political backlash and was reversed four years later when the Court ruled that states had revised their capital statutes sufficiently to limit the "arbitrary and capricious" administration condemned in *Furman*. The 1976 restoration of capital punishment, however, did not return the death penalty to its formerly untouchable legal status: the Court would hear hundreds of cases on the constitutionality of the death penalty in the decades to come. Today, nearly forty years later, the Court continues to adjudicate cases that hinge upon the rhetorical justifications for capital punishment set forth in the 1970s, and as proponents and opponents of the death penalty find, the state of the Court's rhetoric on the death penalty remains puzzling in its contradictions and complexities. Robert Weisberg refers to the Court's "tortuous effort to contain capital punishment within the rule of law." James Liebman writes that the Court has been "tormented by the difficult interpretive questions, . . . the cognitive dissonance entailed

in peaceloving judges' attempts to justify this particularly raw form of state violence, and the struggle with the political branches that banning the violence would ignite."[4] The Court has, at various times, both rejected and justified the death penalty's constitutionality. It has also struggled with the role of judicial rhetoric itself in shaping the contours of death penalty law.

The Supreme Court's jurisprudence on the death penalty raises a number of questions for rhetorical scholars: First, how does the nation's highest judicial authority rhetorically authorize the end of a human life? Second, how does it negotiate and reflect upon its role in adjudicating capital punishment law? Third, what are the rhetorical strategies at play in the pivotal decisions over the death penalty? Fourth, what do these cases teach us about judicial rhetoric more broadly? Fifth, how have the Court's rhetorical strategies from the 1970s through the 1990s constructed a rhetorical history marked by negotiations over the Court's role in social change, the judicial relationship to history, the nature of evidence, social science, and racial discrimination, and the place for emotion in capital judgments? Finally, what can rhetorical scholars learn from this rhetorical history?

To answer these questions, this dissertation offers a rhetorical history of the Supreme Court's capital punishment jurisprudence through four pivotal cases that capture the rhetorical milieu of a decade, the 1970s, 1980s, and 1990s respectively. In what follows, this introductory chapter provides a justification for the project, situates the work within current scholarship on judicial rhetoric and rhetorical history, and offers an outline for the study.

Justification: Why a Rhetorical History of Capital Punishment Jurisprudence?

Given the enduring salience of the controversy over capital punishment in American public life and the Supreme Court's increasingly important place in that debate, it is surprising that rhetorical scholars have yet to attempt a focused rhetorical history of the Court's capital

punishment discourse. In addition to addressing this gap in rhetorical scholarship, this project offers valuable contributions to the study of rhetoric and public culture for several reasons. First, a rhetorical history of the Supreme Court's death penalty jurisprudence provides important insight into an institution that plays a distinctive rhetorical role in American public life while its rhetoric often operates to obscure the rhetorical dimension of its practice. Second, this study attends to the rhetorical dimensions of the law's violence in one of its most explicit manifestations. If the law is ultimately violent, we can see that most clearly in the rhetorical justifications for the state's authority to take its own citizens' lives. Finally, an analysis of the Court's key arguments regarding the death penalty reveals negotiations over the basic functions of American criminal justice, a particularly relevant concern as increasing numbers of practitioners and observers question whether our justice system is broken.

A rhetorical history of the Court's decisions on the death penalty has much to offer rhetorical scholarship. Indeed, Stephen J. Hartnett and Daniel M. Larson refer to the Supreme Court opinions in the critical 1970s death penalty cases as a "rhetorical smorgasbord . . . that awaits our scholarship" and argue, "Considering the ways such questions hinge entirely on textual and interpretive skills, the debates addressed here beg for the attention of rhetorical scholars."[5] While the Supreme Court is clearly a rhetorical institution, the rhetorical dimensions of its practice often evade attention.[6] Legal discussions of the Court's jurisprudence lack a rhetorical perspective that highlights the persuasive strategies at work as the justices work to convince one another, the legal community, and the general public that the death penalty should (or should not) remain legal. My analysis of pivotal decisions in the Court's capital punishment jurisprudence puts the legal field's understanding of these cases into conversation with rhetorical criticism.

The Supreme Court's rhetoric on the death penalty presents a particularly productive body of texts through which to consider the violence inherent in law, given the Court's position as the ultimate legal authority. This study examines how the nation's highest court both justifies and challenges—to itself and to the nation—that the state should retain the right to take its own citizens' lives. Because of the ostensibly apolitical nature of the Supreme Court (its members are unelected and serve lifelong terms, it reviews the decisions of Congress and the President as well as those of lower courts, its ultimate source of authority is the Constitution), analyzing its decisions offers insight into the most deeply held American values and beliefs. As Josina Makau writes, "Supreme Court rhetoric merits special attention. As the final arbiter in the legal system, the Supreme Court is expected to realize the highest expectations of its critical audiences."[7] That is, Court opinions should reflect the best versions of the arguments for and against the death penalty. Analysis of the majority and dissenting opinions in such cases reveals the most substantial sticking points encountered by the Court in its attempts to navigate its role in the administration of death. It is incumbent upon rhetorical scholars to confront the discourse that underlies the most explicit manifestation of the violence that some scholars find to be intrinsic to the law.[8] In Stephen Browne's words, "violence could be constitutive of discourse itself."[9] The Court's arguments about the death penalty bring this constitutive relationship into focus: Capital punishment produces material violence at the behest of the state; rhetorical critics must interrogate the signs and symbols that not only allow this practice to continue, but also reflect and influence the public's continued support for its retention.

Finally, the judicial rhetoric shaping capital punishment law merits particular attention in light of the growing recognition that the American criminal justice system needs reform. As the Prison Communication, Activism, Research, and Education collective puts it, "the prison-

industrial complex has become a sprawling behemoth threatening the health of democracy in America."[10] Accelerating incarceration rates combined with pervasive racial and class disparities prompt scholars and activists to call for sustained consideration of the arguments and representations that have facilitated the current crisis—and those that could perhaps hasten its end. The United States currently holds six million people under correctional control, more than were imprisoned in the Gulag Archipelago under Stalin.[11] As of 2006, one in every fourteen black men was behind bars, or one in every nine black men between the ages of twenty and thirty-five.[12] The institution of capital punishment reflects only one of many features within this complex, but it is one that warrants close examination. The United States retains the death penalty long after other industrialized nations have abandoned it; only China, Iraq, and Saudi Arabia carry out more executions than the U.S.[13] The United Nations has passed several resolutions calling for a moratorium on the death penalty, including a 2010 vote in which 109 nations voted in favor.[14] In addition, the racial and economic inequalities that saturate American criminal justice more broadly take on heightened significance when the stakes are life and death. The Court's negotiations over capital punishment reflect a range of arguments that speak to the basic functions of criminal justice in a democratic nation, and whether the death penalty fulfills those functions. We must consider these questions if we hope to resolve the crisis in contemporary American criminal punishment.

Reading Strategy

My project engages with scholarly conversations on judicial opinions as rhetorical artifacts and the relationships among rhetoric, history, and the law. Accordingly, in this section I discuss the extant scholarship in these areas and identify my intervention into these scholarly conversations.

The Rhetoric of the Judicial Opinion

Supreme Court opinions constitute a relatively recent and immensely fertile locus for rhetorical criticism. In 1964 Warren Wright proposed the judicial opinion as a unique rhetorical artifact through which "critics may be able to analyze another force at work in the American nation and thus transcribe a hitherto unwritten part of the history of American rhetoric."[15] Other rhetorical scholars have heeded Wright's call, examining the rhetorical constructions of actors, events, and issues in Supreme Court decisions in order to reveal the rhetorical resources at stake as well as their constitutive force in American society. Given the importance of judicial decisions in American public life, this branch of criticism has proven fruitful. As Katie L. Gibson puts it, critics have "rearticulated the relationship between rhetoric and the law to legitimate judicial opinion as an appropriate and productive site for rhetorical inquiry."[16] Accordingly, a small but rich body of literature has emerged analyzing the rhetorical features of Supreme Court opinions, applying various modes of criticism in order to illuminate the meanings and functions of particular decisions. Critics have analyzed the opinions in cases that marked milestones in many of the fundamental controversies of American public culture, from slavery and gay rights to abortion and racial equality.[17] Because opinions are grounded in the context in which they are decided, the study of Supreme Court decisions also offer one way to track how meaning changes over time. The Court often revisits issues and reinterprets similar evidence to produce a different legal outcome. Indeed, a dissenting opinion in one case sometimes lays the foundation for the future majority, as in Justice Harlan's famous dissent in *Plessy vs. Ferguson,* which has been cited as a key inventional resource for *Brown vs. Board of Education*.[18]

Thus, the judicial opinion constitutes a particular rhetorical form that both reflects and effects the discourse of the society in which it operates. The justices write opinions after hearing the full range of arguments from both sides of a case, and therefore the arguments, examples, and accounts that make it into an opinion mark (at least one justice's conception of) the most significant and persuasive dimensions of the case. The opinions become public when the decision is announced, so they also work to retroactively shape the meaning of the decision for the audience (which includes legal experts, interested parties, and in some cases, the public). James Boyd White has argued that the law "is most usefully seen . . . as a branch of rhetoric. . . . [A]s the central art by which community and culture are established, maintained, and transformed."[19] The importance of court decisions in public life comes into sharp focus when we consider that a "judicial opinion exists because a serious dispute or doctrinal issue cannot be resolved in any other way."[20] Intense rhetorical contestation has produced the call for a judicial arbiter to interpret the facts and texts in such a way as to resolve the question both for the moment and for the future. White concludes that rhetorical analysis of the law "directs our attention to the most significant questions of shared existence."[21]

Capital punishment certainly embodies such a question, especially as an issue of the ultimate aims and means of our criminal justice system whose stakes are literally life and death. That said, the judicial opinions that shape the law in this area have received too little attention as a rhetorical matter. Scholarly work has tracked the death penalty in popular culture and mass media, but we do not yet have a rhetorical account for how the nation's highest court justifies to itself and to the nation that the death penalty should maintain its validity under the Constitution.[22] Legal analysts have observed that the body of jurisprudence on the death penalty generates a rich rhetorical artifact, variously describing the language used in death penalty

opinions as “tortuous” and “tormented,” characterized by “disorder” and “cacophony.”[23] There is clearly something unsettled (or unsettling) in the capital punishment jurisprudence. The justices’ own ambivalence toward capital case law, noted above, enhances the sense that these texts are ripe for sustained rhetorical analysis. The questions for the rhetorical critic to interrogate include how justices simultaneously work within and push back against the constraints of judicial precedent; what texts constitute forms of evidence and how different actors interpret that evidence; and finally, what conventions shape the form of the opinion.[24]

A major claim of this project is that different judicial opinions call for distinct reading strategies. There is no “one size fits all” theoretical frame for the diverse texts and contexts covered by Supreme Court opinions, and an approach that successfully elucidates the rhetorical tensions in one decision may not work for another. As Marouf Hasian puts it, “Rather than searching for the ‘one’ best theory[,] . . . we need to be more cautious and attentive to the arguments that have been presented by both the winners and losers in a series of judicial controversies.”[25] Accordingly, in this project I engage in different reading strategies for each decision analyzed, according to the notable rhetorical features of each.[26] My project takes an historically informed approach to selecting interpretative tools. Because I trace the Court’s rhetoric on a single issue (the constitutionality of capital punishment) at different moments in time, the broader frame for the project is that of rhetorical history.

Rhetorical History

In this project I offer a rhetorical history that spotlights three cases in the Supreme Court’s death penalty jurisprudence and analyzes what they tell us about the functions of capital punishment in American public life and about judicial rhetoric more broadly. These cases are prismatic: Each served as the site that crystallized various contextual factors and played out a

range of transformations and consequences to the discourse of the death penalty. Each case offers unique insight into both the rhetoric and the history of the Court's jurisprudence on capital punishment.

Rhetorical history forms a rich tradition in the field of rhetoric. As Kathleen Turner writes, "Both as methodology and as perspective, rhetorical history offers insights that are central to the study of communication and unavailable through other approaches."[27] In particular, this approach "provides an understanding of rhetoric as process rather than as simply a product; [and] it creates an appreciation of both the commonalities among and the distinctiveness of rhetorical situations and responses."[28] My project examines the ongoing and evolving process of the Court's rhetorical negotiations over capital punishment, a dynamic discourse that has shifted in both obvious and subtle ways. This dissertation also interrogates the rhetorical situations and responses produced by the Court's decisions on capital punishment, a set of rhetorical artifacts that maintains some constants while shifting in significant ways. The rhetor—the Supreme Court—remains the same in its basic directive and the attendant rhetorical constraints, though it changes in its human composition. That is, the Court's basic mandate is to interpret laws in light of the American Constitution. Its decisions reflect negotiations over the facts of the case at hand, legal precedent, and the appropriate interpretations of constitutional law.

The study of the Supreme Court's rhetoric on capital punishment is particularly well suited to analysis through the lens of rhetorical history. The death penalty is a matter of enduring controversy in American public life and its popularity and functions have shifted substantially over time. However, the Court only began to consider the death penalty as an issue for sustained constitutional interpretation in the 1960s. Thus, the body of rhetoric comprised of the Court's landmark decisions in death penalty cases have developed relatively recently and is ripe for

analysis. The decisions often appear fraught with difficulty, emotional vulnerability, and traces of doubt. Liebman characterizes the Court's capital jurisprudence as conveying simultaneous ambivalence, inflexibility, anger, provocation, personalization, defensiveness, over-rationalization, and regret.[29] Other scholars have described contemporary Supreme Court capital jurisprudence as "weary," "foggy," and "paradoxical."[30] It remains to the rhetorical scholar to assess the factors—both textual and contextual—that give rise to such characterizations.

In constructing a rhetorical history, I abide by David Zarefsky's observation that "[h]istory and criticism are . . . overlapping circles. And rhetorical history is done in the area of overlap."[31] My work bridges the history of Supreme Court death penalty jurisprudence with criticism that draws out its rhetorical dimensions. Zarefsky's "four senses of rhetorical history" include the history of rhetoric, the rhetoric of history, the historical study of rhetorical practice, and rhetorical studies of historical events. My work on the Supreme Court's rhetoric on capital punishment lies at the nexus between these last two senses, the historical study of rhetorical events and the study of historical events from a rhetorical perspective.[32] The Supreme Court's opinions on the death penalty carry both historical and rhetorical significance, as rhetorical acts that have shaped the law and discourse surrounding the state's ability to take its own citizens' lives in the name of justice.

Work in rhetorical history offers theoretical contributions. As Moya Ann Ball points out, "doing rhetorical history generates theoretical as well as historical knowledge."[33] Accordingly, each case study in this project engages with and contributes to relevant rhetorical theory as it constructs the rhetorical history of the Supreme Court's capital punishment jurisprudence. Specifically, I interrogate the fractured judicial voice, constitutive rhetoric, and *pathos*. The theoretical contributions are derived inductively from each (con)textual analysis. To set the stage

before turning to these analyses, I will offer a “prehistory” of the Supreme Court’s capital punishment jurisprudence.[34]

Context Narrative: The American History of Capital Punishment

In order to situate the reader in the milieu of the Court’s death penalty jurisprudence, this section provides a narrative of the historical and rhetorical contexts that preceded and shaped the Supreme Court’s rhetoric of capital punishment jurisprudence in the 1960s and 1970s. Since the nation’s inception, the practice of capital punishment has waxed and waned in popularity, legality, and use. Many excellent accounts of that history exist.[35] For the purposes of this dissertation, I articulate the salient background features of the Court’s foray into death penalty jurisprudence, from the earliest days of the republic through the Court cases that set the stage for 1972’s *Furman v. Georgia*.

Colonial America: Death Penalty Opposition in a Time of Change

The American colonists imported practices of capital and corporal punishment from their English counterparts, at a time when most countries in the world practiced the death penalty (and had used it, in some cases, for centuries).[36] Public executions served to preserve order in the colonies. However, colonial law designated fewer crimes to be capital offenses compared to the British, apparently due to a shortage of labor.[37] Early American laws classified adultery, blasphemy, sodomy, theft, and many other crimes as capital offenses punishable by the death penalty, and these sentences were carried out in public.[38] What became known as “capital codes” differed among the various colonies, reflecting the “sporadic and choppy” nature of criminal law as the semi-autonomous colonies developed independently.[39] Outposts of death penalty abolitionism existed, particularly among Quakers.[40]

Resistance gained momentum in the late eighteenth century. Around the time of the Revolutionary War, the death penalty "became the subject of extensive public conflict.".[41] Jeffrey L. Kirchmeier explains that participants in the Revolutionary War "used the new freedoms and philosophies to question the right of government to take life."[42] Prominent abolitionists of the time included Thomas Paine and Dr. Benjamin Rush, and those favoring limitations included James Madison, Benjamin Franklin, John Jay, and Thomas Jefferson.[43] These and other advocates' efforts resulted in the passage of laws that restricted the death penalty's application.[44] At the same time, demographic shifts and the dissemination of Enlightenment thinking heralded the expansion of incarceration as punishment.[45] In the decades following the war, then, the penitentiary replaced capital punishment for most non-lethal crimes, and the site of the execution began to move from the town square to the privacy of the prison. As Louis P. Masur puts it, "Enlightenment concepts of balance, proportionality, and humanity in systems of punishment combined with a faith in the reformation of the criminal and redefined sensibilities about public space and social order to make capital punishment a repugnant practice."[46] One reform, introduced first in Pennsylvania, distinguished between degrees of murder, such that only first-degree murder would warrant the death penalty.[47] The ideas of Italian criminologist Cesare Beccaria had special significance for reformers.[48] Beccaria argued that capital punishment was too barbaric to serve as an effective deterrent, but could only incite violence by setting an example.[49] His famous treatise, *Essay on Crimes and Punishments,* was disseminated at a time when humanitarian Enlightenment values were beginning to take hold in both Europe and America.[50] This gradual shift in sensibilities, however, did not translate to any serious effort to eliminate the death penalty in the context of the 1787 Constitutional Convention, at which capital punishment was "briefly discussed" but ultimately included as one of the

punishments in the Bankruptcy and Treason Clauses.[51] Beccaria's ideas would, however, "[find] their way into the fabric of the eighth amendment."[52]

Interest in preventing the state from overreaching in the administration of criminal punishment contributed to the formation of the Bill of Rights in 1789.[53] When constructing these first constitutional amendments, Madison reviewed recommendations made by state conventions, several of which included restrictions on "cruel and unusual" punishments. This language came from the 1689 English Bill of Rights, also used by Virginia in its influential Declaration of Rights of 1776.[54] The Eighth Amendment, adopted with nine others in 1791, ultimately read: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[55] Before the Bill of Rights was finalized, some objected that the Eighth Amendment was too vague, but no viable alternative emerged.[56] Joseph A. Melusky and Keith Alan Pesto argue that the Eighth Amendment constituted primarily "rhetorical reassurance against the Bloody Assizes," a series of treason trials and executions in seventeenth-century England that still loomed large in the American imagination.[57] Indeed, the Eighth Amendment would lie mostly dormant for the better part of a century: in the process of carving out the separation of governmental powers in the young republic, early Supreme Court jurisprudence established that the legislature had the sole authority to write criminal code, or to decide how particular crimes would be punished. Because Congress and the Supreme Court generally agreed about what punishments were acceptable, the Eighth Amendment did not appear relevant.[58] Also included in the Bill of Rights was the Fifth Amendment, which explicitly referred to "capital crimes" and enumerated the rights to be granted before the state could take a person's life. Furthermore, the First U.S. Congress passed a federal death penalty law that made execution the mandatory sentence for murder, treason, piracy, forgery, and rescuing a person convicted of a

capital offense.[59] The death penalty, then, retained its place in American criminal law, even as opposition to its practice mounted.

Nineteenth Century America: Death Penalty Reform

Controversy over the death penalty came to a head in the early nineteenth century, against the backdrop of the Second Great Awakening. Industrialization and urbanization in the new country also brought rising crime rates, which made criminal law a focus of reform efforts.[60] David Brion Davis writes that in these years, the abolitionist movement "aroused violent debate over the ultimate source of justice, the degree of human responsibility, the fallibility of the courts, the progress or decline of society, the metaphysical origins of good and evil, and the authority of the Bible."[61] Enlightenment ideals continued to exert a progressive influence on American public culture, and public executions "were becoming chaotic" as large crowds and the presence of opposition generated riots.[62] The death penalty issue attracted interest from many, with members of the clergy especially motivated to achieve abolition. Reformers won legislative victories that limited the forms and application of the death penalty, particularly in northern states. In 1846, Michigan became the first state to abolish capital punishment, followed by Rhode Island in 1852 and Wisconsin in 1853.[63] Many states also introduced jury discretion around this time, allowing juries to issue binding recommendations that could spare the lives of those convicted of capital offenses.[64] However, by most accounts the abolition movement "reached its zenith" in the mid-1840s.[65] In the lead-up to the Civil War, the movement lost momentum as other issues consumed public and political attention. In Gershman's words, "U.S. reformist zeal, distracted by westward expansion, the Mexican War, the California Gold Rush, and growing sectional strife, was being directed toward other causes."[66] The Civil War effectively muted the controversy.

The years following the war saw, amidst the sociopolitical upheaval of Reconstruction, a period of slow reform to the capital punishment system. New laws limited local communities' ability to conduct executions without oversight; states moved from mandatory to discretionary death sentences; and interest grew in the development of more "humane" death penalty practices.[67] In 1897, Congress passed a law that limited the federal death penalty to five types of crimes and made it discretionary rather than mandatory, largely due to the efforts of a former Civil War general. Louis Filler argues that death penalty reforms in this period "appear more as end products of earlier eloquence and seasoned agitators" and that "new progress and interest centered in the larger area of prison reform and administration."[68] During this time, the Supreme Court also heard its first Eighth Amendment challenges to particular modes of execution. In *Wilkerson v. Utah* in 1878, the Court ruled that death by firing squad did not constitute cruel and unusual punishment, and distinguished Utah's execution practices from torture, which Justice Nathan Clifford noted would be prohibited by the Eighth Amendment.[69] With 1890's *In re Kemmler,* the Court made a similar judgment about the new technology of electrocution, arguing that the electric chair offered a markedly more humane mode of death penalty implementation than the gallows, which had been the predominant tool of execution for the previous century.[70]

The post-Reconstruction period was also marked by the prevalence of lynching, particularly in the South. In the late nineteenth century, lynching emerged to replace slavery as a mode of white racial domination. The practice constituted "a form of unofficial capital punishment, adjudication of guilt and execution by groups lacking the formal authority for either."[71] Public debate over the relationship between lynching and state-sanctioned capital punishment reflected uncertainty: some saw the death penalty as a necessary legal alternative to the violent extrajudicial executions, while others saw the two as mutually reinforcing tools of

racial oppression.[72] The controversy over this relationship, which continues to this day, demonstrates the conflicted attitudes that many Americans held toward the death penalty in the late nineteenth and early twentieth centuries.[73]

The broad support for social reform that burgeoned in the Progressive Era brought tempered success for death penalty opponents. As Gershman explains, "The Progressives felt they had an ability to change the world, because they believed that evils in society were the result of nurture not nature."[74] This core belief drove efforts to improve society by applying scientific principles to social problems.[75] Criminal law reforms of the period included the introduction of probation and parole, as well as institutional changes to penitentiaries, reformatories, and asylums. Opposition to the death penalty also grew. In 1900, an influential organization called the American League to Abolish Capital Punishment formed and began to lobby state legislatures.[76] Colorado, Kansas, Minnesota, Washington, Oregon, North and South Dakota, Tennessee, Arizona, and Missouri all abolished the death penalty between 1897 and 1917 (though a few of these maintained exceptions for certain crimes). However, some of these changes were short-lived, as high profile crimes and lynchings motivated a return to the death penalty in some of the same states.[77] The specter of lynching fueled the argument that "it was better for the organized machinery of the state to perform an execution than a lawless mob."[78] The abolitionist movement thus experienced both gains and losses in this period.

The early twentieth century also saw a new development in Eighth Amendment jurisprudence. In 1910, the Supreme Court considered the meaning of the Eighth Amendment more seriously than before. In *Weems v. United States*, a petitioner protested the sentence of fifteen years in irons and shackles for the crime of falsifying a document as "cruel and unusual." The Court ruled in favor of the petitioner, finding the punishment to violate the Eighth Amendment. The majority opinion

suggested that “the clause should be expanded beyond its original reach to cover any instance of disproportionate punishment.”[79] This decision interpreted the Eighth Amendment in a flexible manner, since it applied the clause to a punishment not considered by the constitutional Framers.[80] The Court thus freed itself from a strict reading of the Constitution based on “original intent.” This decision carried “enormous implications for future constitutional decision making” as its reasoning would eventually appear in death penalty cases that had not yet been conceived.[81]

Early Twentieth Century: Executions Wax and Wane

The onset of World War I had mixed effects on capital punishment in the United States. Kirchmeier suggests that, “as in the past, a war and a recession adversely affected the death penalty abolition movement.”[82] Indeed, several states that had eliminated the death penalty reinstated it, including Arizona, Missouri, Tennessee, Washington, and Oregon, and abolitionist movements in other states stalled. In Pennsylvania, for instance, an abolition law passed the Senate and appeared poised to pass the House, until an explosion in a munition factory in the state (feared to be the work of foreign militaries) triggered anxieties that contributed to the bill’s failure.[83] On the other hand, Gershman argues that “millions of deaths on European battlefields for no good cause helped engender revulsion to the taking of life.”[84] What is clear is that such distaste would not last into the 1920s.

A combination of various public fears and tensions produced heightened support for the death penalty in the Roaring Twenties. Opposition waned under the pressures of economic recession, labor violence, unrest from the Russian Revolution, racial hostilities, and fear of crime.[85] As Kirchmeier puts it, “many in society felt a need for capital punishment to maintain social order, prevent a drastic increase in lynchings, and help control a growing minority

population."[86] Furthermore, the public preoccupation with gangster crime prompted some states to consider making gang-related crimes capital offenses. Highly publicized kidnappings like that of the Lindbergh baby would have a similar effect.[87] Of course, abolitionist activists did not simply give up during this time. In 1925, an organization called the League for the Abolition of Capital Punishment launched a national campaign.[88] In 1929, Puerto Rico abolished the death penalty. Federal courts reviewed increasing numbers of death sentences.[89] Efforts to "humanize" capital punishment also met with some success; lethal gas was introduced as a mode of execution in 1924, first adopted by Nevada. The "humanity" of the gas chamber would later come into question, but at the time, the new technology was considered a vast improvement over the electric chair.[90]

Several high-profile capital cases in the 1920s and 1930s incited public debate over the death penalty. In Stuart Banner's words, "Every year or two there seemed to be a case that placed capital punishment in doubt."[91] In 1924, Nathan Leopold and Richard Loeb—two students from the University of Chicago—were convicted for the murder of a fourteen-year-old child. They escaped the death penalty through the efforts of legendary attorney Clarence Darrow, whose arguments against capital punishment were widely publicized.[92] In 1927 came one of the most famous executions in American history. Nicola Sacco and Bartolomeo Vanzetti were put to death for a murder that many believed they did not commit. Sacco and Vanzetti were Italian immigrants and devoted anarchists, and the trial had distinctly xenophobic and political overtones.[93] The execution sparked domestic and international outcry, fueling opposition to the death penalty. In 1928, the execution of Ruth Snyder for her husband's murder attracted attention when New York's *Daily News* published a photograph of her electrocution.[94] Another controversial case was Bruno Hauptmann's 1932 execution for kidnapping the twenty-month-old

child of Charles and Anne Morrow Lindbergh.[95] Many contested Hauptmann's guilt, but public outrage at the heinousness of the crime also ran high.[96] In 1936, Kentucky (one of the southern states to reinstate public executions) hanged a black man named Rainey Bethea for rape in murder, to an audience of 10,000. Public backlash resulted in the end of public executions for good.[97] Cases like these provoked controversy, reflecting a general ambivalence toward the death penalty that prevailed in the country. These doubts manifested themselves in a decline in both death sentences and actual executions, beginning in the 1930s and continuing through the 1940s.[98]

"Botched" executions, in which "public sensibilities are offended by a breakdown in routine procedures of convicting murderers and putting them to death," have occurred throughout American history, often provoking a period of backlash against the death penalty.[99] One such flawed execution in 1946 precipitated a Supreme Court case. A man named Willie Francis was scheduled to be electrocuted for murder in Louisiana. However, the electric chair malfunctioned during the execution, and Francis did not die. His attorneys appealed the decision to schedule a second execution on the grounds that the ruling constituted double jeopardy (violating the Fifth Amendment) and cruel and unusual punishment (violating the Eighth).[100] In *Louisiana ex rel. Francis v. Resweber,* the Court rejected Francis's claims in a 5-4 decision. The Court ruled that, because the state did not *intend* to cause Francis's suffering, the punishment was not cruel. Wrote Justice Stanley Forman Reed, "The fact that an unforeseeable accident prevented the prompt consummation cannot, it seem to us, add an element of cruelty to a subsequent execution. There is no purpose to inflict unnecessary pain."[101] Francis was executed (successfully) a year later.[102]

World War II and the brutality of Nazism instigated an international movement toward death penalty abolition, as countries grew uncomfortable with state-sponsored killing. Many nations in Western Europe eliminated capital punishment in the years following the war, and the Universal Declaration of Human Rights adopted by the United Nations in 1948 asserted a universal right to life.[103] Although the United States did not follow suit, American public opinion reflected mounting concerns about the death penalty. With the controversial executions of Caryl Chessman and Julius and Ethel Rosenberg, the abolitionist movement picked up steam, and public support for the death penalty declined precipitously. The Rosenbergs were executed for conspiracy to commit espionage in 1953. Though some supported the executions in the context of mounting Cold War fears, their case also drew international condemnation and domestic backlash against the harshness of the sentence.[104] Caryl Chessman was convicted of robbery, rape, and kidnapping in California in 1948. Chessman maintained his innocence throughout his twelve years on death row, and he attracted supporters through his four books.[105] By the time Chessman was executed in 1960, after nine stays of execution issued by the courts, California's capital laws had changed such that someone convicted of the same crimes would not have received the death penalty.[106] Chessman's case "transformed the way many Americans viewed the death penalty" due to the popular opposition it inspired.[107] Chessman's execution also occurred in the early stages of the death penalty's emergence as a key issue in local and national politics.

Civil Rights, the Death Penalty, and Judicial Activism

The civil rights movement heralded many changes in American society, and it influenced the debate over the death penalty as well. As legal scholar Corinna Lain puts it, "If the late 1950s and 1960s in the United States had one overriding theme, it was egalitarianism. Equality,

particularly before the law, was the very point of the civil rights movement and it pervaded the social, political, and legal reforms."[108] Capital punishment was identified as one civil rights issue marked by racial discrimination, though it took a backseat to the emphasis on reforms in education and voting rights. Similarly, the antiwar movement of the 1960s lent support to those opposing the death penalty, as another manifestation of government-sponsored violence.[109] Indeed, scholars find that "abolitionist momentum peaked" in the 1960s.[110] Many religious leaders and organizations voiced their opposition to the death penalty.[111] The number of executions was on the decline. Though many defendants continued to receive death sentences, juries issued them at lower rates, and institutional actors carried them out less and less frequently.[112] In May 1966, Gallup recorded the lowest level of support for capital punishment in its history, at 42%.[113]

The Supreme Court played a key role in the social changes of this era, reflected in "a so-called 'rights revolution' that incorporated the guarantees of the federal Bill of Rights into the Fourteenth Amendment."[114] The best known of these cases was 1954's *Brown v. Board of Education*, which struck down school segregation, but the Warren Court became famous for its broad interpretation of individual rights in other areas as well, particularly in criminal procedure. In 1966, the Court established what are now known as "Miranda rights" in *Miranda v. Arizona*, delineating the circumstances under which police could interrogate suspects.[115] The Court also expanded protections for defendants on issues like electronic eavesdropping, administrative searches, and the right to counsel.[116] These rulings contributed to what Stuart Banner calls the "standardization of criminal procedure."[117] The Warren Court thus claimed a judicial role in the social reform movements burgeoning in the nation, and this activism would soon extend to the death penalty.

One Supreme Court case in the 1950s would come to bear on the Court's rulings in the following decades. In 1957 the court heard a case called *Trop v. Dulles.* The petitioner, Albert Trop, had been dishonorably discharged from the Army for desertion, and his American citizenship was revoked. He challenged the expatriation on the grounds that it constituted cruel and unusual punishment.[118] In a 5-4 decision, the Court ruled in favor of Trop. In his majority opinion Chief Justice Earl Warren noted the scarcity of meaningful precedent on the Eighth Amendment, and observed that in *Weems* the Court had found the sentence of twelve years at hard labor to be cruel and unusual because it was disproportionate to the crime of document falsification. He wrote that the case demonstrated "that the words of the [Eighth] Amendment are not precise, and that their scope is not static. The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[119] The *Trop* decision thus reaffirmed the malleable nature of the Eighth Amendment, and Warren's opinion would be cited frequently in subsequent debates over the death penalty and its status in modern life.

In 1961, against the backdrop of shifting American opinions on capital punishment, a lawyer named Gerald Gottlieb published a piece called "Testing the Death Penalty" in a law journal. Based on cases like *Weems vs. United States* and *Trop v. Dulles*, he argued that the courts should "seriously consider the changed and advanced standards of our civilization in determining if the death penalty is unconstitutional as cruel and unusual punishment."[120] In 1963, Supreme Court Justice Arthur Goldberg circulated to his colleagues a memorandum that made the same argument, and suggested that the Court consider the issue in a set of upcoming capital cases that had not made Eighth Amendment claims. The document, co-written with Goldberg's young clerk Alan Dershowitz, shocked the other justices in its boldness and apparent disregard

for procedural precedent—Supreme Court justices do not, as a general practice, write or argue about issues that have not been presented in a case before the Court.[121] Though he faced pushback from the other justices, Goldberg published a version of the memo as a dissent in the denial of certiorari for one of the capital cases, *Rudolph v. Alabama*. That opinion caught the attention of lawyers and abolitionists throughout the country, and it especially interested the Legal Defense Fund of the National Association for the Advancement of Colored People (hereafter the LDF).

The LDF had formed in 1940 to litigate civil rights cases. The group, under Thurgood Marshall's leadership, provided the legal blueprint for *Brown v. Board of Education.* In 1967, after achieving legislative victories in the Civil Rights Act and the Voting Rights Act, the LDF turned its focus to the death penalty. With an acclaimed legal mastermind named Tony Amsterdam at the helm, the LDF launched "a moratorium strategy to contest every execution order throughout the United States, regardless of the crime, or circumstance, or race of the condemned."[122] The LDF's strategy was to "[force] the courts to deal with the constitutional question".[123] In the process, the movement worked to chip away at various elements of the capital system: They advocated two-phase trials that bifurcated the guilt or innocence ruling from the sentencing process, challenged the jury selection process which allowed prosecutors to strike jurors on the basis of their "doubts" about capital punishment, and criticized the lack of clear instructions for jurors in capital trials.[124] The ultimate aim remained to convince the Supreme Court to rule that the death penalty violated constitutional protections. The strategy produced a national moratorium, as states halted their executions "until a clearer legal picture emerged."[125]

Late 1960s and Early 1970s Court Jurisprudence on the Death Penalty

The first capital appeal to reach the Court under the LDF's campaign was a 1967 case called *United States v. Jackson*, which challenged the constitutionality of the federal Kidnapping Act. The statute dictated that the penalty for a kidnapping in which the victim did not survive would be either life imprisonment, or death—if a *jury* so decided. Because of the statute's wording, "If the accused either waived a jury trial and asserted his innocence in a trial before a judge, or if he pleaded guilty, the maximum penalty was life imprisonment."[126] The petitioners argued that this law discouraged the defendant from using his or her constitutional right to a jury trial, because that trial would include the risk of the death penalty, while trial before a judge or the choice to plead guilty would not.[127] The Supreme Court ruled that the capital punishment provision in the Act violated both the Sixth Amendment right to a jury trial and the Fifth Amendment right not to plead guilty. In a "nice display of judicial surgery," the Court found that this clause could be "severed from the remainder of the Act, thus maintaining the viability of the lesser sanctions" for kidnapping.[128] With the *Jackson* ruling, the Court set the tone for its decisions on capital punishment over the next five years: as the Court began what James Liebman calls its "slow dance with death," the justices demonstrated their willingness to consider challenges to the death penalty, while treading lightly in the decisions.[129] Nevertheless, the *Jackson* ruling "cast a cloud of potential unconstitutionality over various capital punishment statutes."[130]

In the 1968 case *Witherspoon v. Illinois*, the petitioner challenged the prosecutor's ability to remove potential jurors who expressed even minimal reservations ("conscientious scruples") about the death penalty.[131] The prosecution in Witherspoon's case had removed nearly half of the prospective jury pool on this basis, in the jury selection process called *voir dire*. This

prosecutorial discretion, known as "death qualification," existed in most states that retained capital punishment.[132] Lawyers for William Witherspoon drew upon academic research that suggested that the "death qualification" process produced juries more likely to convict.[133] The LDF, the American Civil Liberties Union, and the state of California (joined by twenty-four other state attorneys general) all filed amicus briefs in the case.[134] The Court decided in the petitioner's favor in a 6-3 decision, with Potter Stewart writing the majority opinion.[135] The decision noted that "death qualification" produced a jury that would not be impartial with respect to the death penalty, but argued that there was no empirical evidence that the jury would be more inclined to convict. As with its cautious ruling in *Jackson*, the Court "moved carefully," as it reversed the death sentence but allowed the conviction to stand.[136] In Liebman's words, both *Jackson* and *Witherspoon* "simply extended established constitutional controls to procedures used exclusively in capital cases."[137] The *Witherspoon* ruling did have the effect of vacating some existing death sentences because they had been issued by juries selected in the unconstitutional *voire dires*, though the sentences could still be re-issued.[138] Notably, after the decision was announced, Lyndon B. Johnson's attorney general asked Congress to abolish capital punishment—the only time in American history that a sitting President has openly taken this position.[139] Simultaneously, however, the 1968 presidential campaign had begun, and Richard Nixon campaigned on "law and order," appealing to a swath of the public "already upset by the Warren Court's supposed 'coddling' of criminals."[140] Some believed that the Warren Court's activism had contributed to the political and racial turmoil of the 1960s, which included riots, mass protests, assassinations, and street violence.

Two more capital cases came in March of 1969: *Boykin v. Alabama* and *Maxwell v. Bishop.* In *Boykin,* a black man in Alabama had been sentenced to death for robbery. Boykin's

appeal argued that the death penalty constituted cruel and unusual punishment for the crime of robbery, and that Boykin had entered a guilty plea without understanding that he could receive a death sentence for doing so. Tony Amsterdam for the LDF submitted what has been called "perhaps the most ingenious legal brief ever presented to the U.S. Supreme Court" detailing arguments for why capital punishment should be considered cruel and unusual in the instance of robbery.[141] Amsterdam evoked the concept of "evolving standards of decency" and pointed to the worldwide trend toward abolition.[142] In *Maxwell,* the case of a young black man in Arkansas sentenced to death for rape, the petitioner made three constitutional claims against the death penalty: that racial discrimination made Arkansas's jury sentencing unfair, that the absence of standards for the jury's discretion made the decisions too arbitrary, and that the unitary trial should be prohibited in capital cases[143]. Lawyers for Maxwell introduced a study by criminologist Marvin Wolfgang that indicated that race had a disproportionate effect on the likelihood of receiving a death sentence for rape.[144]

In both *Boykin* and *Maxwell* the Court "dodged the capital issues" and made narrow rulings.[145] In *Boykin* the Court granted the defendant a new trial on the basis that his guilty plea should be discounted since he had not realized the life-and-death stakes of his case, but did not address the more substantive concerns raised by the LDF. In *Maxwell*, the Court was "badly divided, unable to reach agreement on the key issues."[146] The difficulties were compounded by the shifting makeup of the Court over the period in which the case was under review: Abe Fortas resigned under the pressure of a public financial scandal, and was replaced by Harry Blackmun.[147] Chief Justice Earl Warren retired the same year, and was replaced by Warren E. Burger. Both Blackmun and Burger were more inclined to uphold the death penalty than their predecessors.[148] The justices ultimately reached a compromise to vacate Maxwell's death

sentence on the grounds that the jurors had been selected using the *voir dire* process that *Witherspoon* had made unconstitutional.

When *Maxwell* was announced, the Court agreed to hear a capital case that raised similar issues to those evaded by the previous rulings. *McGautha v. California* was the case of a man who had four prior felony convictions and was sentenced to death for first-degree murder committed during the course of an armed robbery. California's capital procedure at the time included a bifurcated trial, with a decision on guilt or innocence that preceded and was separated from the sentencing hearing. *McGautha* was considered along with the case of an Ohio man convicted of first-degree murder after what is commonly called a "unitary" trial, which determines both guilt and sentencing in the same proceeding.[149] Both appeals argued that the juries in their cases had too much discretion and insufficient guidance in the sentencing process, violating the Fourteenth Amendment guarantee of due process. The latter case, *Crampton v. Ohio,* also included the argument that unitary trials violated the Fifth Amendment right against self-incrimination, because the defendant could only speak on issues that might affect the sentencing decision if the defendant testified in the guilt phase of the trial.[150]

The decision in *McGautha* and *Crampton* was 6-3 to uphold the death sentences, rejecting the constitutional challenges. Justices Marshall, Douglas, and Brennan dissented, with both Douglas and Brennan writing dissenting opinions. Justice Harlan wrote a detailed opinion for the majority in which he argued first that the Court should not intervene in state policies to implement a "better system" of capital punishment. Harlan found that juries could make appropriate decisions without more specific standards, which he also believed would be impossible to formulate.[151] He noted that jury discretion had a long history in the United States.

On the issue of trial bifurcation, Harlan wrote that defendants face inevitable dilemmas in criminal trials, and that unitary trials did not violate the protection against self-incrimination.[152]

The *McGautha* ruling appeared to be a death knell for the death penalty abolition movement. By the time the decision was announced in 1971, the public seemed to back Nixon's "law and order" message and its attendant harsh approach to criminal justice. The combination of urban riots, campus protests, high-profile assassinations and murder, and rising crime rates set the stage for a conservative turn in the national mood.[153] The *McGautha* decision marked a major defeat in the judicial strategy for abolition. In ruling that due process of law did not require trial bifurcation or specific sentencing standards, the ruling "blunted two of the strongest weapons in the [LDF's] arsenal."[154] Justice Hugo Black also issued a concurring opinion that specifically refuted the argument, not raised in either case, that capital punishment itself violated the Constitution. Thus, "the legal momentum to derail capital punishment appeared to be over, although a number of fresh death penalty cases were circulating in the courts" including that of William Henry Furman in Georgia.[155]

Outline of Study

This project offers a rhetorical history of the Supreme Court's capital punishment jurisprudence. The historical context articulated above provides the backdrop for the Court's initial forays into adjudicating the constitutionality of the death penalty. Additionally, in each chapter, I provide a context narrative that situates the decision(s) within its more immediate moment. My readings suggest that in each capital punishment case, the justices wrangled over the nature of rhetoric and its role in justifying or invalidating capital punishment. Each analysis, then, identifies the fundamental rhetorical negotiations that animated the justices' opinions.

In Chapter Two, I analyze the uniquely fractured decision in *Furman v. Georgia*, which ruled the death penalty unconstitutional. *Furman* defied public and scholarly expectations that the Court speak in one or two consistent voices—rather than as a collection of justices with individual interpretive approaches. I argue that in *Furman*, the question of capital punishment's constitutionality revealed a broader conflict over the Court's role in making decisions of life and death. I isolate three loci of the rhetorical struggle at the heart of that conflict, drawing upon the rhetoric of social change, the rhetoric of history, and stasis theory to illuminate the rhetoricity of the Court's dilemmas. This chapter reflects upon the broader significance of the central conflicts that produced unprecedented fragmentation in the Court's rhetoric.

In Chapter Three, I examine the 1987 decision in *McCleskey v. Kemp*, which held that statistical evidence of racial disparities in capital sentencing did not constitute proof of unconstitutional discrimination. I read *McCleskey v. Kemp* as a negotiation over the constitutive functions of judicial rhetoric, in which the majority opinions rejected a notion of the Court's rhetoric as constitutive even as they constituted particular visions of social scientific evidence and of racial discrimination. By contrast, the minority opinions in *McCleskey* embraced the constitutive functions of judicial rhetoric. This chapter reframes theories of constitutive rhetoric away from the focus on particular identities or particular events and toward a consideration of the accumulation of historical and rhetorical articulations over time.

In Chapter Four, I assess two cases from the early 1990s as conflicting approaches to the role of emotion in capital punishment decisionmaking. The majority's decision in *Payne* validated the emotional undertones of disgust and vengeance toward the defendant and compassion for the victims, while Blackmun's dissent in *Callins* focused on compassion for the defendant. The Court in *Payne* also deflected the emotionality of its own rhetoric, while the

Callins dissent explicitly leveraged its emotionality. I argue that these cases demonstrate the inevitability and necessity of judicial emotion in the context of death penalty rhetoric.

These three case studies bring to the fore consistent themes across the Court's death penalty jurisprudence. In each case the justices wrestled with what constituted evidence for the purpose of capital decision-making. Each also raised questions about the weight and force of history. Likewise, each case wrestles with the historical evolution of public opinion on the death penalty and its relation to the key decisions. This work reveals the inherently contingent, socially- and culturally-inflected nature of judicial rhetoric, which militates against claims of determinism in judicial decisions or in history more broadly. As Peter Brooks and Paul Gewirtz write, "[J]udicial opinions are usually marked by a rhetoric of certainty and inevitability, a rhetoric that denies the complexity of the problem before the court and drives with a tone of self-assurance to its conclusion."[156] This project discloses the ambiguities and contingencies belied by such airs of certainty.

In the conclusion (chapter five), I summarize and synthesize the arguments in each chapter and discuss their rhetorical and historical implications. I close with a consideration of the current moment in Supreme Court capital jurisprudence.

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[24] See, e.g., Robert A. Ferguson, "The Judicial Opinion as Literary Genre," *Yale Journal of Law & the Humanities* 2(1990).

[25] Marouf Hasian, Jr., *Legal Memories and Amnesias in America's Rhetorical Culture* (Boulder, CO: Westview Press, 2000), 12.

[26] Specifically, in the first chapter, I analyze the *Furman* opinions for its key rhetorical tensions, the moments of fissure that defined a historically fractured Court decision. In the second chapter, I read the *McCleskey* decision for its constitutive function and for the distinct approaches to that function between the majority and dissenting opinions. In the third chapter, I read the opinions in *Payne v. Tennessee*, Justice Blackmun's *Callins* dissent and Justice Scalia's response for judicial emotion.

[27] Kathleen J. Turner, *Doing Rhetorical History: Concepts and Cases*, Studies in Rhetoric and Communication (Tuscaloosa: The University of Alabama Press, 1998), 2.

[28] Ibid.

[29] Liebman, "Slow Dancing with Death: The Supreme Court and Capital Punishment, 1963-2006."

[30] Stuart Banner, *The Death Penalty: An American History* (Cambridge, Mass: Harvard University Press, 2002); James S. Liebman, "Slow Dancing with Death: The Supreme Court and Capital Punishment, 1963-2006," *Columbia Law Review* 107, no. 1 (2007); Gary P. Gershman, *Death Penalty on Trial: A Handbook with Cases, Laws, and Documents*, Abc-Clio's on Trial Series (Santa Barbara, CA: ABC-CLIO, 2005).

[31] David Zarefsky, "Four Senses of Rhetorical History," in *Doing Rhetorical History: Concepts and Cases*, ed. Kathleen J. Turner (Tuscaloosa: The University of Alabama Press, 1998), 21.

[32] Ibid.

[33] Moya Ann Ball, "Theoretical Implications of Doing Rhetorical History: Groupthink, Foreign Policy Making, and Vietnam," ibid. (Tuscaloosa, AL: University of Alabama Press), 70.

[34] Burt, "Disorder in the Court: The Death Penalty and the Constitution," 1744.

[35] Stuart Banner, *The Death Penalty: An American History* (Cambridge, Mass: Harvard University Press, 2002); John D. Bessler, *Cruel & Unusual: The American Death Penalty and the Founders' Eighth Amendment*(Boston: Northeastern University Press, 2012); Michael A. Foley, *Arbitrary and Capricious: The Supreme Court, the Constitution, and the Death Penalty*(Westport, Conn: Praeger, 2003).

[36] David Brion Davis notes that the adoption of the death penalty for secular crimes is “associated historically with the rise of the modern state.” David Brion Davis, "The Movement to Abolish Capital Punishment in America, 1787-1861," *The American Historical Review* 63, no. 1 (1957): 23.

[37] Louis Filler, "Movements to Abolish the Death Penalty in the United States," *Annals of the American Academy of Political and Social Science* 284 (1952).

[38] Hugo Adam Bedau, *The Death Penalty in America: Current Controversies* (New York: Oxford University Press, 1998).

[39] Gary P. Gershman, *Death Penalty on Trial: A Handbook with Cases, Laws, and Documents*, Abc-Clio's on Trial Series (Santa Barbara, CA: ABC-CLIO, 2005), 20.

[40] Jeffrey L. Kirchmeier, *Imprisoned by the Past: Warren McCleskey and the American Death Penalty* (Oxford University Press, 2015); Joseph A. Melusky and Keith Alan Pesto, *Capital Punishment* (Santa Barbara, California: Greenwood, 2011).

[41] Louis P. Masur, *Rites of Execution: Capital Punishment and the Transformation of American Culture, 1776-1865*(New York: Oxford University Press, 1989), 4.

[42] Kirchmeier, *Imprisoned by the Past: Warren McCleskey and the American Death Penalty*, 47.

[43] Ibid.

[44] Lawrence M. Friedman, *Crime and Punishment in American History*(New York: BasicBooks, 1993).

[45] Mark Colvin, *Penitentiaries, Reformatories, and Chain Gangs: Social Theory and the History of Punishment in Nineteenth-Century America*(New York: St. Martin's Press, 1997); David J. Rothman, *The Discovery of the Asylum: Social Order and Disorder in the New Republic*, New Lines in Criminology (New York: Aldine de Gruyter, 2002).

[46] Masur, *Rites of Execution: Capital Punishment and the Transformation of American Culture, 1776-1865*, 4.

[47] Bedau, *The Death Penalty in America: Current Controversies*.

[48] Davis, "The Movement to Abolish Capital Punishment in America, 1787-1861."

[49] Banner, *The Death Penalty*; Gershman, *Death Penalty on Trial*.

[50] *Death Penalty on Trial*.

[51] Kirchmeier, *Imprisoned by the Past: Warren McCleskey and the American Death Penalty*, 48.

[52] Deborah A. Schwartz and Jay Wishingrad, "The Eighth Amendment, Beccaria, and the Enlightenment: An Historical Justification for the Weems V. United States Excessive Punishment Doctrine," *Buffalo Law Review* 24(1974): 785.

[53] Bessler, *Cruel & Unusual: The American Death Penalty and the Founders' Eighth Amendment*.

[54] Ibid.; Kirchmeier, *Imprisoned by the Past: Warren McCleskey and the American Death Penalty*.

[55] "The Constitution of the United States," Amendment 8.

[56] Evan J. Mandery, *A Wild Justice: The Death and Resurrection of Capital Punishment in America* (New York: W. W. Norton & Company, 2013).

[57] Melusky and Pesto, *Capital Punishment*, 74.

[58] Ibid., 75-76.

[59] Kirchmeier, *Imprisoned by the Past: Warren McCleskey and the American Death Penalty*.

[60] Gershman, *Death Penalty on Trial*.

[61] Davis, "The Movement to Abolish Capital Punishment in America, 1787-1861," 23.

[62] Gershman, *Death Penalty on Trial*, 26.

[63] Kirchmeier, *Imprisoned by the Past: Warren McCleskey and the American Death Penalty*, 51.

[64] Bedau, *The Death Penalty in America: Current Controversies*.

[65] Davis, "The Movement to Abolish Capital Punishment in America, 1787-1861," 42.

[66] Gershman, *Death Penalty on Trial*, 27.

[67] Kirchmeier, *Imprisoned by the Past: Warren McCleskey and the American Death Penalty*, 57.

[68] Filler, "Movements to Abolish the Death Penalty in the United States," 131.

[69] Michael A. Foley, *Arbitrary and Capricious: The Supreme Court, the Constitution, and the Death Penalty* (Westport, CT: Praeger, 2003).

[70] John D. Bessler, *Cruel & Unusual: The American Death Penalty and the Founders' Eighth Amendment* (Boston: Northeastern University Press, 2012); Foley, *Arbitrary and Capricious*.

[71] Stuart Banner, *The Death Penalty: An American History* (Cambridge, Mass: Harvard University Press, 2002), 229.

[72] Ibid.; Kirchmeier, *Imprisoned by the Past: Warren McCleskey and the American Death Penalty*.

[73] See, e.g., James W. Clarke, "Without Fear or Shame: Lynching, Capital Punishment and the Subculture of Violence in the American South," *British Journal of Political Science* 28, no. 2 (1998); David Garland, *Peculiar Institution: America's Death Penalty in an Age of Abolition* (Cambridge, MA: Belknap Press of Harvard University Press, 2010); Eliza Steelwater, *The Hangman's Knot: Lynching, Legal Execution, and America's Struggle with the Death Penalty* (Boulder, CO: Westview Press, 2003).

[74] Gershman, *Death Penalty on Trial*, 28.

[75] Ibid.

[76] Banner, *The Death Penalty*.

[77] Kirchmeier, *Imprisoned by the Past: Warren McCleskey and the American Death Penalty*.

[78] Gershman, *Death Penalty on Trial*, 27.

[79] Anthony F. Granucci, ""Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning," *California Law Review* 57, no. 4 (1969): 843.

[80] Bessler, *Cruel & Unusual: The American Death Penalty and the Founders' Eighth Amendment*, 197.

[81] Foley, *Arbitrary and Capricious*, 26.

[82] Kirchmeier, *Imprisoned by the Past: Warren McCleskey and the American Death Penalty*, 60.

[83] Filler, "Movements to Abolish the Death Penalty in the United States."

[84] Gershman, *Death Penalty on Trial*, 29.

[85] Ibid.; Kirchmeier, *Imprisoned by the Past: Warren McCleskey and the American Death Penalty*.

[86] *Imprisoned by the Past: Warren McCleskey and the American Death Penalty*, 61.

[87] Banner, *The Death Penalty*.

[88] Filler, "Movements to Abolish the Death Penalty in the United States."

[89] Jeffrey L. Kirchmeier, "Aggravating and Mitigating Factors: The Paradox of Today's Arbitrary and Mandatory Capital Punishment Scheme," *William & Mary Bill of Rights Journal* 6, no. 2 (1998).

[90] Banner, *The Death Penalty*.

[91] Ibid., 226.

[92] Kirchmeier, *Imprisoned by the Past: Warren McCleskey and the American Death Penalty*.

[93] Gershman, *Death Penalty on Trial*; Kirchmeier, *Imprisoned by the Past: Warren McCleskey and the American Death Penalty*.

[94] *Imprisoned by the Past: Warren McCleskey and the American Death Penalty*.

[95] Ibid.

[96] Gershman, *Death Penalty on Trial*; Kirchmeier, *Imprisoned by the Past: Warren McCleskey and the American Death Penalty*.

[97] *Imprisoned by the Past: Warren McCleskey and the American Death Penalty*, 64.

[98] Banner, *The Death Penalty*, 227-28.

[99] Herb Haines, "Flawed Executions, the Anti-Death Penalty Movement, and the Politics of Capital Punishment," *Social Problems* 39, no. 2 (1992): 125.

[100] Foley, *Arbitrary and Capricious*, 43-48.

[101] *Louisiana Ex Rel. Francis V. Resweber*, 329 Us 459(1947).

[102] Kirchmeier, *Imprisoned by the Past: Warren McCleskey and the American Death Penalty*, 65.

[103] Ibid., 67.

[104] Banner, *The Death Penalty*; Gershman, *Death Penalty on Trial*; Kirchmeier, *Imprisoned by the Past: Warren McCleskey and the American Death Penalty*.

[105] Gershman, *Death Penalty on Trial*.

[106] Kirchmeier, *Imprisoned by the Past: Warren McCleskey and the American Death Penalty*.

[107] Ibid., 71.

[108] Corinna B. Lain, "Furman Fundamentals," *Washington Law Review* 82(2007): 28.

[109] Kirchmeier, *Imprisoned by the Past: Warren McCleskey and the American Death Penalty*.

[110] Lain, "Furman Fundamentals," 33.

[111] Kirchmeier, *Imprisoned by the Past: Warren McCleskey and the American Death Penalty*; Oshinsky, *Capital Punishment on Trial: Furman V. Georgia and the Death Penalty in Modern America*.

[112] Lain, "Furman Fundamentals."; Oshinsky, *Capital Punishment on Trial: Furman V. Georgia and the Death Penalty in Modern America*.

[113] Robert M. Bohm, "American Death Penalty Opinion: Past, Present, and Future," in *America's Experiment with Capital Punishment: Reflections on the Past, Present, and Future of the Ultimate Penal Sanction*, ed. James R. Acker, Robert M. Bohm, and Charles S. Lanier (Durham, NC: Carolina Academic Press, 2003).

[114] Oshinsky, *Capital Punishment on Trial: Furman V. Georgia and the Death Penalty in Modern America*, 29.

[115] Banner, *The Death Penalty*.

[116] Jerold H. Israel, "Criminal Procedure, the Burger Court, and the Legacy of the Warren Court " *Michigan Law Review* 75, no. 7 (1977).

[117] Banner, *The Death Penalty*.

[118] Foley, *Arbitrary and Capricious*.

[119] *Trop v. Dulles*, 356 86 (1958).

[120] Gerald H. Gottlieb, "Testing the Death Penalty," *Southern California Law Review* 34 (1960-1961): 281.

[121] Mandery, *A Wild Justice*.

[122] David M. Oshinsky, *Capital Punishment on Trial: Furman v. Georgia and the Death Penalty in Modern America* (Lawrence, KS: University Press of Kansas, 2010), 32.

[123] Mandery, *A Wild Justice*, 65.

[124] Oshinsky, *Capital Punishment on Trial: Furman v. Georgia and the Death Penalty in Modern America*.

[125] Ibid., 34.

[126] Douglas A. Poe, "Capital Punishment Statutes in the Wake of United States v. Jackson: Some Unresolved Questions," *George Washington Law Review* 37 (1968): 721.

[127] Banner, *The Death Penalty*.

[128] Poe, "Capital Punishment Statutes in the Wake of United States v. Jackson: Some Unresolved Questions," 722.

[129] Liebman, "Slow Dancing with Death: The Supreme Court and Capital Punishment, 1963-2006."

[130] Poe, "Capital Punishment Statutes in the Wake of United States v. Jackson: Some Unresolved Questions," 743.

[131] J.L. Bernard and W.O. Dwyer, "Witherspoon v. Illinois: The Court Was Right," *Law & Psychology Review* 8 (1984): 105.

[132] Mandery, *A Wild Justice*.

[133] Ibid.; Oshinsky, *Capital Punishment on Trial: Furman v. Georgia and the Death Penalty in Modern America*.

[134] Bernard and Dwyer, "Witherspoon v. Illinois: The Court Was Right."

[135] Mandery, *A Wild Justice*.

[136] Oshinsky, *Capital Punishment on Trial: Furman v. Georgia and the Death Penalty in Modern America*, 35.

[137] Liebman, "Slow Dancing with Death: The Supreme Court and Capital Punishment, 1963-2006," 29.

[138] Banner, *The Death Penalty*.

[139] Oshinsky, *Capital Punishment on Trial: Furman v. Georgia and the Death Penalty in Modern America*.

[140] Ibid., 36.

[141] Herbert H. Haines, *Against Capital Punishment: The Anti-Death Penalty Movement in America, 1972-1994* (New York: Oxford University Press, 1996), 33.

[142] Michael Meltsner, *Cruel and Unusual the Supreme Court and Capital Punishment* (2011).

[143] Ibid.

[144] Samuel R. Gross, "David Baldus and the Legacy of McCleskey v. Kemp," *Iowa Law Review* 97, no. 6 (2012).

[145] Liebman, "Slow Dancing with Death: The Supreme Court and Capital Punishment, 1963-2006," 20.

[146] Oshinsky, *Capital Punishment on Trial: Furman v. Georgia and the Death Penalty in Modern America*, 28.

[147] Banner, *The Death Penalty*; Oshinsky, *Capital Punishment on Trial: Furman v. Georgia and the Death Penalty in Modern America*.

[148] Banner, *The Death Penalty*; Oshinsky, *Capital Punishment on Trial: Furman v. Georgia and the Death Penalty in Modern America*.

[149] James R. Acker and Charles S. Lanier, "Beyond Human Ability? The Rise and Fall of Death Penalty Legislation," in *America's Experiment with Capital Punishment*, ed. James R. Acker, Robert M. Bohm, and Charles S. Lanier (Durham, NC: Carolina Academic Press, 2003).

[150] Defendants in murder trials—particularly those with prior convictions—are often advised not to testify, because doing so opens them up to potentially damaging cross-examination. See Foley, 2003.

[151] Banner, *The Death Penalty*.

[152] David C. Baldus and George Woodworth, *Equal Justice and the Death Penalty: A Legal and Empirical Analysis* (Upne, 1990).

[153] Oshinsky, *Capital Punishment on Trial: Furman v. Georgia and the Death Penalty in Modern America*.

[154] Ibid., 38.

[155] Ibid., 39.

[156] Peter Brooks and Paul Gewirtz, *Law's Stories: Narrative and Rhetoric in the Law* (New Haven, CT: Yale University Press, 1996), 10.

CHAPTER 2

"A PASTICHE OF OPINIONS IN A FRAGMENTED COURT":[1]

FURMAN V. GEORGIA

Introduction

In 1972, the Supreme Court selected a set of cases with the intention of resolving whether capital punishment could be found unconstitutional under the Eighth or Fourteenth Amendments. This move followed several cases in which the Court heard death penalty cases, but declined to rule on the core constitutional issues raised by abolitionist advocates, causing what Daniel Polsby describes as "great ferment in the case law over the death penalty."[2] After nearly two hundred years in which the controversy over capital punishment was considered moral and political, but never constitutional, the Court had begun a cautious foray into death penalty adjudication. While the cases decided between 1963 and 1971 did little to establish a firm judicial stance on the death penalty, *Furman v. Georgia* marked the Court's attempt to settle the constitutional issues once and for all.

The resulting decision was unlike any other in Supreme Court history, a uniquely fragmented artifact of judicial rhetoric. Though certified to answer the single question of whether the death penalty violated the Constitution, *Furman v. Georgia* did not produce a single answer, nor even two answers between the majority and the dissenting opinions. Instead, the nine justices each wrote his own *per curiam* opinion with his own particular reasoning. Of the five justices in the majority, none joined even part of another's opinion. As Malcolm E. Wheeler notes, "no more than three of the five whose votes saved the lives of the petitioners agreed upon either the

nature of the question before the Court or the type of tests appropriately employed."[3] Legal scholar Patricia M. Wald explains that judges usually work to avoid *per curiam* opinions, because they signify "an inability of even two judges to agree what the law is or should be" and send "conflicting signals to the bar or the public as to how cases will be decided in the future."[4] Indeed, because of this signal, "most judges will compromise their preferred rationale and rhetoric to gain a full concurrence from other members of the panel."[5] That the justices in *Furman* could not achieve this kind of compromise speaks to the weight and divisiveness of the issues in the case, and of the death penalty itself. In David Oshinsky's words, *per curiam* opinions "represent the frustrations of a profoundly divided bench. In *Furman*, this fragmentation was complete."[6] The profound divisions engendered by the death penalty produced an accordingly fractured rhetorical specimen. Others have echoed this sense that the decision's rhetorical features compromised its efficacy. Robert A. Burt argues that the case undermined the Court itself, writing, "*Furman* deviated so starkly from the traditional format that it can be characterized as a decision in which there was not only no Court opinion but no Court—only a confederation of individual, even separately sovereign, Justices."[7] Critics' responses to the decision reveal the expectation that the Supreme Court should speak with as few voices as possible, rather than allow the nine individual members' perspectives to offer distinct interpretations.

The fragmentation of the *Furman* decision calls for a rhetorical perspective that can account for its unique features. Most assessments of the decision depict it as bizarre, disjointed, and indecipherable. Scholars have particularly criticized the Court's failure to speak in a unified voice, to offer rhetorical visions of the death penalty's constitutionality that cohered with one another. Norman Finkel writes that *Furman* "has the feel of an anthology desperately in need of

an editor."[8] Robert Weisberg characterizes the decision as "a badly orchestrated opera" and argues that the historical controversy over the case "is not so much about how to interpret the decision, but about whether there really ever was such a thing as a *Furman* decision at all."[9] Commentators found *Furman*'s multiplicity of judicial approaches to the law confounding. Other scholars have analyzed the decision's legal and political effects, but it remains to the rhetorical critic to unpack the dimensions of the decision that produced such incommensurable interpretations, that made it impossible for the opinions to meet public and scholarly expectations for a unified (or simply bifurcated) Court. Rhetorical scholars, attuned to the features of a text situated in context, must attend to those cases in which the Court presents itself as a fractured rhetorical actor, because such cases reveal the struggle for control over particular symbolic meanings. Explains Paul Gewirtz, multiple diverse opinions within one decision serve as "reminders that the sources of law at hand are far richer than any one account account exhausts, that each account contains the shaping mind of its describer, and that judges come to different understandings about what the law means."[10] I argue that in *Furman v. Georgia*, the question of capital punishment's constitutionality revealed the Court's divisions over enduring questions about how a democratic nation makes decisions of life and death. The *Furman* decision operates as a rich window into the full range of judicial approaches to issues of democracy and social change, historical interpretation, and criminal punishment.

In this chapter, I first assess the historical and rhetorical forces that shaped the decision, highlighting the uncertain development of judicial rhetoric on the death penalty, the "law and order" rhetoric that had begun to infiltrate the national consciousness in the early 1970s, and the shifting position of the Supreme Court as an agent for social change. I argue that the *Furman* decision marked a site of crystallization for a broader conflict over the nature of the law in

American public life. I then isolate three loci of the rhetorical struggle at the heart of that conflict. I turn to the rhetoric of social change, the rhetoric of history, and stasis theory to illuminate the rhetoricity of the Court's dilemmas. I argue that the Court could not reach consensus over its own role in American democracy; distinct visions of the Court's role—whether agent of social change or passive instrument of legislative action—reveal contrasting rhetorical stakes at a turning point in American judicial history. The rhetorical *topoi* that follow, motivated by the justices' positions on the appropriate role of the Court, centered on whether to read the history of capital punishment as determinative or dynamic, what constituted the core social functions of the death penalty, and how to assess whether it fulfilled those objectives. These divisions represented not only disagreement over constitutional interpretation, but deeply divergent approaches to judicial decision-making in the context of criminal punishment. The tensions elaborated in this chapter reveal deep-seated divisions over the role of the Court's rhetoric and the law itself in the context of state-sanctioned killing. Specifically, my reading reveals that the justices struggled over the Court's role as an agent of social change, its relationship to history, and its position as arbiter of evidence regarding the social functions of criminal punishment. These issues are fundamentally rhetorical, as they reflect wrangling over symbols and meaning in American public culture.

Because the decision was uniquely fractured, it does not fit neatly within the binary of majority and dissenting opinions.[11] As such, my reading strategy accounts for the arguments that differ from one justice to another, even among those who agreed on some principles. As I elucidate the three primary tensions within the *Furman* decision, then, I identify commonalities within both majority and dissenting opinions, but I also discuss distinctions within each. I

identify the key moments of contestation that reflect the complex rhetorical situation of the decision. In what follows, I articulate contextual forces that shaped *Furman*.

Context: From *McGautha* to *Furman*

Furman v. Georgia was the case of a twenty-six-year-old black man from Georgia, convicted of killing a man during a burglary gone wrong. The defendant, who claimed that he had fired the gun accidentally when he tripped, had only a sixth-grade education and documented mental disorders. An all-white jury found Furman guilty of murder, and a superior court judge sentenced him to death. When the Supreme Court agreed to hear Furman's case, "The Court certified a single question: 'Does the imposition and carrying out of the death penalty in this case constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments?'"[12] This narrow focus reflected the Court's desire finally to resolve whether capital punishment could be found unconstitutional, after years of equivocation on that question.

Amsterdam and his colleagues at the Legal Defense Fund felt that they had suffered a "severe setback" in *McGautha v. California*, a difficult blow after the late 1960s cases in which the Court declined to make major interventions into death penalty law but nevertheless limited the scope of its application and reversed several death sentences.[13] Aside from those tempered victories, the LDF had achieved minimal success. No court, state or federal, had struck down the death penalty as a result of a case brought or argued by the LDF, despite their concentrated efforts.[14] The group pledged, however, to double down on their work. Members felt that the campaign had at least raised the public visibility of racial discrimination in the capital punishment system.[15] The lawyers did not realize that the Court had selected the *Furman* cases deliberately to tackle the question of whether the death penalty could be found unconstitutional. Nevertheless, they prepared their arguments with "evidence from all corners."[16] The LDF wrote

a brief that surveyed the history of capital punishment and argued that contemporary standards of decency made the death penalty cruel and unusual.[17] That the Court granted certiorari demonstrated that "the issue was alive, offering abolitionists the chance . . . to press their argument on a national stage."[18] Indeed, the case would attract significant national attention.

Meanwhile, the political and public context appeared volatile. The LDF and the ACLU had initially taken up death penalty abolition in the context of its sharply declining popularity. Between 1964 and 1967, six states voted to eliminate capital punishment, and public opinion polls reflected diminished support. The number of executions continued to dwindle while an international abolitionist movement had gained steam.[19] But by 1972, as Kirchmeier explains, "the national anti-death penalty sentiment already was retreating. A new viewpoint developed out of frustrations over protests and social unrest, replacing the youthful rebellion of the 1960s on political and social issues."[20] Given the widespread social turmoil, politicians campaigning on "law and order" platforms met with increasing success in the late 1960s and early 1970s. In Stuart A. Scheingold's words, "Calls for law and order were . . . integrally linked to an unsettling sense of rapid and unwelcome social change as well as to the crime rate."[21] Indeed, Richard Nixon won the 1968 presidential election with broad approval for his strident tough-on-crime rhetoric.[22] The national disposition turned more conservative on most criminal justice issues, creating "an atmosphere that suggested Americans were more willing to crack down hard on criminals."[23] National polls indicated that a majority of the public (albeit a shrinking one) continued to favor capital punishment.[24] However, support for abolition had not disappeared entirely.

Several developments had emerged that seemed to favor abolition. No execution had been carried out since 1967. The California and New Jersey Supreme Courts both struck down

their death penalty statutes. Furthermore, the Arkansas governor had commuted all the death sentences in his state, the attorney general of Pennsylvania had ordered the state's electric chairs to be dismantled, and the Presidential Commission on Reform of Federal Laws recommended the death penalty's abolition.[25] However, the composition of the Court had also shifted in ways that seemed to support the death penalty's retention. Hugo Black and John Marshall Harlan had retired. To replace Black, Nixon appointed Lewis Powell, a corporate attorney and former president of the American Bar Association. For Harlan's seat Nixon appointed William Rehnquist, who had been an assistant attorney general in the Justice Department. Both new justices had strong "law and order" credentials that seemed to signal antipathy toward the LDF's cause. The judicial context was thus murky for those hoping to see judicial death penalty abolition.

Furman also came at a complex moment in Supreme Court history. As Stuart Banner puts it, the decision "stands at the confluence of three broader, interrelated trends in constitutional law, all of which were at their high point in the late 1960s and early 1970s."[26] These trends were the use of the judiciary as a vehicle of social change (exemplified by *Roe v. Wade,* which followed *Furman* by one year), the standardization of criminal procedure, and the application of constitutional law to limit institutional racism.[27] The Supreme Court stood as the most visible agent of these judicial movements, and all three supported a more active role for the Court. Under Chief Justice Earl Warren's leadership in the preceding decades, the Court had carved for itself a more progressive function in the political system, particularly in relation to individual rights and criminal justice.[28] The early years of the Burger Court carried on Warren's legacy, reflected in the death penalty cases *Maxwell* and *Boykin* that offered procedural protections in capital cases.[29] Of course, such judicial activism did not have unanimous support

either on or off the Court. Backlash to the Warren Court's activism played a role both in Nixon's 1968 presidential campaign and in the confirmation hearings for his appointees.[30] The *Furman* decision marked one instance of the justices' attempts to navigate the ongoing shifts in the Court's role in American political life.

The Court decided the *Furman* decision in the context of widespread social upheaval, an uneven pattern of successes and setbacks for the abolition movement, and uncertainty over the future of judicial activism. I turn now to my analysis of the decision, which reflects all of these sociopolitical factors.

Role of the Court in American Democracy

The first and perhaps most profound fissure in the *Furman* decision concerned the role of the Court in American democracy, and its relationship to social change. As Banner explains, "the Justices willing to use the constitution to strike down capital punishment… were believers in progress, in the capacity of the legal system to reflect and even promote cultural change."[31] By contrast, "The dissenting Justices tended to be more skeptical of the possibility of progress… [and] whether the courts were the proper governmental institutions for promoting progress."[32] The justices in the majority primarily constructed the Court as an agent of social change, while the dissenting justices cast the Court as a passive instrument of the legislative branch. The resulting opinions reflected radically divergent visions of the locus for social change in a democracy, and accordingly distinct rhetorical approaches.

Furman, of course, was neither the first nor the last staging grounds for debate over the proper roles of the judiciary and the legislature in relation to one another. As James Arnt Aune notes, "A recurring feature of American public and intellectual life in the twentieth century has been debate over the legitimacy of judicial review in a representative democracy."[33] What set

Furman apart was the depth and divisiveness of the Court's self-reflexivity on the issue. Dave Tell and Eric Carl Miller point out that in most Supreme Court decisions that raise issues related to the role of the Court—such as *Griswold v. Connecticut, Roe v. Wade,* or *Lawrence v. Texas*—"questions of judicial interference were introduced by protestors, malcontents, and others outside the judicial establishment."[34] In *Furman*, the validity or impropriety of the judicial intervention marked a major point of contention that fractured the Court. Moreover, the decision took place at a moment in American judicial history during which the Court had taken increasingly activist stances in cases that involved individual rights and liberties. Josina M. Makau and David Lawrence explain that between the 1930s and the 1970s, the Supreme Court's rhetoric marked "the evolution of a conception of democracy that required judicial intervention in the service of protecting minorities from a tyrannical or insensitive majority. . . .The Court's rhetoric appealed to an expansive notion of what it means to live in a democratic world."[35] However, not all observers agreed with the Court's expansion, and by 1972 the Burger Court had begun in some areas to shift away from activist positions.[36] The *Furman* decision, then, staged rhetorical negotiations over the role of the Court in American public life. Rhetorical theorists point out that movements for social change constitute particular rhetorical exchanges. Robert Cathcart writes that movements are "rhetorical transactions of a *special type*, distinguishable by the peculiar reciprocal rhetorical acts set off between the movement on one hand and the established system or controlling agency on the other."[37] In *Furman*, the Supreme Court justices argued over whether the Court counted itself as part of the movement or a fixture of the established system. This analysis in this section highlights the rhetorical wrangling over this role.

Justices in both the majority and the minority of *Furman* appealed to principles of democracy in their conceptions of the Court's function. This should come as no surprise, given

the centrality of democratic ideals to American political life and discourse. In Jeremy Engels's words, "Democracy is our modus operandi and final cause; it is the defining characteristic of American-ness and the United States' reason for existence. . . . In public discourse, democracy is a rhetorical trump card."[38] This rhetorical commitment pervades public deliberation, including judicial opinions.[39] Predictably, then, the Supreme Court justices in *Furman* concurred on the importance of upholding democratic ideals, but they diverged on the proper role of the Court and its rhetorical position in relation to those ideals. The justices in the majority established a vision of the Court as a responsible arbiter of constitutional rights, while the dissenters constructed the Court as an institution subordinate to the legislature with limited authority to make decisions. These contrasting views shaped disparate conceptions of how social change should occur in a democracy.

Justices in the minority constructed the Court as the wrong rhetorical agent for social change, on the basis of democratic principles. Justice Burger, for instance, cast the issue as one of democratic structure. He noted that the Court had never before invalidated a punishment on the basis of "a shift in the weight of accepted social values."[40] Burger argued that this prevailing pattern was democratically appropriate: "The Court's quiescence in this area can be attributed to the fact that in a democratic society legislatures, not courts, are constituted to respond to the will and consequently the moral values of the people."[41] In Burger's view, the simple constitutional separation of powers determined that the legislative branch should reflect popular "moral values," and as a result the Court had not previously intervened on behalf of those values. It was up to the elected branch of government to sort them out. Burger reminded the reader that "branding and the cutting off of ears, which were commonplace at the time of the adoption of the Constitution, passed from the penal scene without judicial intervention because they became

basically offensive to the people and the legislatures responded to this sentiment."[42] Burger analogized the death penalty to other punishments that had once been considered acceptable, but which the Court did not nullify. The rarity of judicial intervention proved, to Burger, that the Court had no role to play in interpreting public standards. This was the job of the legislative branch. Burger conceded that legislatures did not always serve this function quickly: "The paucity of judicial decisions invalidating legislatively prescribed punishments is powerful evidence that in this country legislatures have in fact been responsive—albeit belatedly at times—to changes in social attitudes and moral values."[43] Despite this belatedness, Burger declared that "in a democracy the legislative judgment is presumed to embody the basic standards of decency prevailing in the society."[44] Burger constructed the legislature as the democratically designated institution to account for American "standards of decency" even as they changed over time.

Justice Powell made an even stronger appeal to democracy in his dissent, which castigated the majority for its incautious rhetoric. Powell constructed the majority's decision as radically unconstitutional and as an unjustifiable intervention. He wrote disapprovingly of "the shattering effect this collection of views has on the root principles of *stare decisis*, federalism, judicial restraint and—most importantly—separation of powers."[45] The strength of Powell's language reflected the significance of *Furman* as a referendum on the proper rhetorical position of the Court. Powell saw the majority decision as destructive to core features of the Supreme Court's role in American public life. *Stare decisis,* federalism, judicial restraint, and separation of powers are all powerful concepts in legal rhetoric, considered fundamental in shaping judicial decisions.[46] That the majority's views had a "shattering effect" on these principles suggested that the decision radically undermined the Court's constitutional position. Powell also argued that the

scope of the decision was unprecedented: “I can recall no case in which . . . this Court has subordinated national and local democratic processes to such an extent.”[47] The Court, according to Powell, had overreached to such an extent that it subverted the democratic process itself. In his conclusion Powell returned to this theme: “It seems to me that the sweeping judicial action undertaken today reflects a basic lack of faith and confidence in the democratic process.”[48] On Powell’s view, the Court’s role had to remain limited in order to respect the process of democracy, and the majority displayed a lack of faith in that process. He cast the *Furman* ruling as the result of a fundamentally undemocratic approach to the law and of a misuse of rhetoric.

Powell repeatedly emphasized the gravity and scope of the decision’s effects on democracy, arguing that the Court’s rhetorical position carried too much weight and lacked the reflexivity of the legislature. In doing so, Powell constructed a vision of a “normal” democratic process that limited the Court’s role. He wrote that it was important to “keep in focus the enormity of the step undertaken by the Court today” because only a constitutional amendment could reverse the Court’s judgments, and in the absence of such an amendment, “The normal democratic process, as well as the opportunities for the several States to respond to the will of their people . . . is now shut off.”[49] According to Powell, the majority destabilized the normal democratic process. Powell viewed the (ostensible) finality of the Court’s decision as indicative of its antidemocratic rhetorical and legal force.[50] This irrevocability highlighted what was, for Powell, the key distinction that made the legislature a superior vehicle for social change. He argued,

> The sobering disadvantage of constitutional adjudication of this magnitude is the universality and permanence of the judgment. The enduring merit of legislative

> action is its responsiveness to the democratic process, and to revision and change: mistaken judgments may be corrected and refinements implemented.[51]

The Court, according to Powell, should not instigate social progress because its rigidity compromised its efficacy: its "universal" and "permanent" judgments could not be easily reversed, while the legislature could be "responsive" and "revise and change" its decisions. However, Powell suggested that the legislative branch should maintain these functions, insulated from Court action, even if that reactivity faltered: "[I]mpatience with the slowness, and even the unresponsiveness, of legislatures is no justification for judicial intrusion upon their historic powers."[52] Even if the legislature did *not* demonstrate the reflexivity and responsiveness that Powell touted, their "historic powers" dictated that the Court should stay out of matters within legislative purview. In Powell's account, the Court's ruling in *Furman* countered the ideals of democracy, while a legislature—even if it made precisely the same determination—would uphold those ideals. Judicial rhetoric, to Powell, should merely reflect social change, while legislative rhetoric could incorporate popular opinion and catalyze such change.

Justices in the majority also leveraged democratic ideals, but marshaled them in support of the Court as an agent for social change. Justice William Brennan interpreted the Court's intervention as a basic mandate of its role, rather than an inappropriate intrusion. Brennan cited the *Weems* opinion that "this 'restraint upon legislatures' possesses an 'expansive and vital character' that is 'essential . . . to the rule of law and the maintenance of individual freedom.'"[53] Brennan used the *Weems* decision to invoke the rule of law and individual freedom, two tropes central to American political ideals.[54] The rule of law refers to the accountability of governmental institutions and their tendency to enforce publicly promulgated legal expectations.[55] Individual freedom, of course, is considered one of the foundational principles of

American democracy.[56] Brennan drew upon these themes to rhetorically position the Court as a vital source of democratic accountability. Accordingly, Brennan wrote, "the responsibility lies with the courts to make certain that the prohibition of the [Cruel and Unusual Punishments] Clause is enforced."[57] The Court had the responsibility to serve as a check on legislatively enacted punishments, to ensure that these punishments did not violate the Eighth Amendment. Brennan contended that this judicial function was truly essential to the American political system: "That, indeed, is the only view consonant with our constitutional government."[58] The American system of government, to Brennan, dictated the Court's actions in *Furman*. The Bill of Rights, Brennan argued, called for the courts to adjudicate important legal issues outside of the realm of legislative politics. Capital punishment, to Brennan, presented just such an issue. Thus, "we must not, in the guise of 'judicial restraint,' abdicate our fundamental responsibility to enforce the Bill of Rights."[59] Brennan characterized dissenters' appeals to judicial restraint as rhetorical cover for an unacceptably passive approach to the law. He claimed the Court as the rightful locus for social change.

Justice Harry Blackmun's dissent constructed the responsibility of Court as almost precisely the opposite of Brennan's vision. Blackmun wrote that though he personally opposed capital punishment, he felt bound to uphold it because the Court lacked the proper authority to proscribe it. Blackmun referred to the reversal of death penalties in this case as "the easy choice," because in his view: "It is easier to strike the balance in favor of life and against death."[60] Blackmun stat his awareness of the life-and-death stakes of the Court's rhetoric in this case. However, Blackmun argued that the majority's choice would make sense only in a legislative or executive context, not as a court judgment. Indeed, Blackmun stated that if he were a legislator he would favor legislation abolishing the death penalty, and as a state governor he

would likely exercise clemency for death sentences.[61] But to Blackmun, the rhetorical authority for such a decision did not extend to the Court. He declared, "There—on the Legislative Branch of the State or Federal Government, and secondarily on the Executive Branch—is where the authority and responsibility for this kind of action lies."[62] It was solely the purview of the legislature, Blackmun argued, to invalidate capital punishment. By contrast, "Our task here, as must so frequently be emphasized and re-emphasized, is to pass upon the constitutionality of legislation that has been enacted and that is challenged. This is the sole task for judges."[63] Blackmun characterized the majority's decision as out of line with the Court's inherently limited duties. He viewed the Court's rhetorical task as passive in relation to the legislature, though he also referred to a recurring need to "emphasize and re-emphasize" the limited nature of this task and thus revealed the persistent wrangling over this function. The rhetorical negotiations over the Court's role were—as they are—ongoing.

Blackmun also reversed Brennan's formulation that the Court had a duty to adjudicate issues beyond the realm of politics. To Blackmun, the Court's very distance from the politics of elections meant that it had *less* of an ability or responsibility to account for public wishes. He explained, "I do not sit on these cases . . . as a legislator, responsive, at least in part, to the will of constituents."[64] Elected officials had some relationship to the people in whose interests they made decisions. The Court, Blackmun implied, did not—and should act (and speak) accordingly. He declared of recent congressional statutes that included death penalty provisions,

> [T]hese elected representatives of the people—far more conscious of the temper of the times, of the maturing of the society, and of the contemporary demands for man's dignity, than are we who sit cloistered on this Court—took it as settled that the death penalty then, as it always had been, was not in itself unconstitutional.[65]

Blackmun characterized elected officials as necessarily more closely "conscious" of the will of the public and the "temper of the times" than the isolated, "cloistered" members of the Court. The "contemporary demands for man's dignity" signified by campaigns like the civil rights movement could only be answered by elected representatives. For this reason, the Court should allow the legislature to remain the primary arbiter of death penalty law. Its rhetoric should reflect its position in relation to popular opinion. Blackmun cast the legislature as flexible and responsive to public will, compared to a judiciary that sat removed from the national pulse. Thus, to Blackmun, the Court should not interfere rhetorically in the laws created by legislative bodies.

One opinion straddled the divide between the justices who saw the Court as an agent of social change and those who viewed that position as a threat to democracy. Justice Byron White, though he decided with the majority, did not construct the Court as a grand mover of social change. Rather, he understated both the divergence between the majority and the minority, and the activism of the decision. He noted that judicial review "often involves a conflict between judicial and legislative judgment as to what the Constitution means or requires."[66] White pointed out that this conflict arose unavoidably in the practice of judicial review. In White's view, the core dispute was not the propriety of judicial intervention into legislative punishment, but the particular question of whether the death penalty justified that intervention. He argued, "Inevitably, then, there will be occasions when we will differ with Congress or state legislatures with respect to the validity of punishment. There will also be cases in which we shall strongly disagree among ourselves. Unfortunately, this is one of them."[67] White gestured to the stark fissures within the Court. He went on to minimize the impact of Court's intervention; he argued that the Court in *Furman* did not truly obstruct the legislature because juries ultimately made sentencing decisions. He asserted that legislative judgment on the death penalty "loses much of

its force" in the context of delegated sentencing authority and the jury's authority to reject the death penalty. Legislative decisions on capital punishment were already attenuated by the berth of discretion granted to juries in capital cases. Regardless of what a statute dictated, juries could choose to sentence differently. White continued that in his view, the discretion exercised in *Furman* specifically violated the Eighth Amendment. Even if the laws themselves did not constitute cruel and unusual punishment, juries' decisions did, which warranted the *Furman* ruling. White rendered the Court's decision not as a moral mandate or a counter to legislative excess, but as a simple judgment on the practice of a death penalty imposed so infrequently that it "ceases realistically to further" the "social ends it was deemed to serve."[68] These social ends, of course, comprised another core fissure within the decision. In White's opinion, however, *Furman* constituted a relatively routine instance of judicial review. He downplayed the justices' disputes and the ultimate implications of the Court's intervention.

White's narrow depiction of the controversy did not conform to others' views, on or off the Court. The justices diverged sharply on the proper role of the Supreme Court within the American system of democracy, and the decision had sweeping consequences. *Furman* was certainly viewed as a significant judicial intervention. Lain writes that *Furman* appeared to be "a perfect example of the Supreme Court's ability and inclination to play the proverbial 'countermajoritarian hero.'"[69] Whether or not the justices themselves saw the ruling in precisely such terms, the propriety of its action vis-à-vis the legislative branch marked a key fissure in the decision. At a time of contestation over the Court's role in American political life, the *Furman* decision represented one platform for those negotiations to play out. The resulting opinions reflected a range of sharply divergent discourses on judicial and legislative functions.

History as Determinative vs. History as Dynamic

The justices' distinct visions of the Court's role in American public life required grappling with the history of that role in the context of capital punishment, particularly given the paucity of case law on the death penalty's constitutional status. Banner notes that the "absence of the judge's conventional raw material—precedent, explicit text, and the like" lent the opinions an idiosyncratic quality.[70] An assessment of American capital punishment history substituted, in part, for such conventional materials. The justices in the majority adopted a dynamic reading of that history, arguing that various events and impulses justified a shift in constitutional law. The dissenting justices contended that historical and judicial precedent was binding upon the Court and left no room for the interpretations produced by the majority. This contestation marked the second essential tension in the *Furman* decision.

The assessment of history constitutes a key dimension of the Supreme Court's rhetorical authority. James Boyd White explains that within a judicial opinion,

> a wholly different dimension of legal life and thought becomes possible—the systematic and reasoned invocation of the past as precedent. With this practice, then, there can emerge an institution that simultaneously explains and limits itself over time.[71]

This rhetorical practice generates authority for the Court's decisions as people accept and trust its interpretations of history.[72] Charles A. Miller observes that the Supreme Court "has become the public interpreter of American political history."[73] Ambiguity or discord in the construction of the past, then, compromises a basic rhetorical function of the Court's opinions. The contrast in the *Furman* opinions in how to understand the past heightened the sense of a Court divided

against itself. Even within the majority and dissenting groups, justices differed in their constructions of history.

Historical interpretation is, of course, always already rhetorical. As Kathleen Turner writes, "the components of history are not simply variable but are called into existence in the process of constructing the history."[74] In every invocation of the historical record, justices engage in rhetorical construction. Legal scholars have also noted the contingent nature of historical argument in judicial writing. Richard Posner posits, "History in the narrow sense of what happened does not reveal meaning," and there exists an "unbridgeable gap between uninterpreted historical data, on the one hand, and claims about the meaning of constitutional provisions in cases decided today, on the other."[75] Precisely within that gap lies rhetoric. In the *Furman* decision, the various rhetorical constructions of history and its force—determinative or dynamic—reflected particular visions of the complex interrelationships among history, law, and rhetoric. The justices wrestled with what was past and its influence upon what would come to pass.

The minority opinions in *Furman* constructed the rhetorical history of capital punishment as deterministic. In particular, the justices pointed to the presence of the death penalty in the Constitution—the Framers' rhetoric that supported capital punishment—as a controlling factor that should shape contemporary law. Justice Rehnquist began his opinion with this argument. He wrote, "The Court's judgments today strike down a penalty that our Nation's legislators have thought necessary since our country was founded."[76] Rehnquist foregrounded the historical tradition, and particularly the rhetorical tradition of support for the death penalty, in his indictment of the majority. The question raised by the case, Rehnquist wrote, was how to compare the majority's ruling on capital punishment to the laws enacted by legislatures.

Rehnquist immediately responded to himself: "The answer, of course, is found in Hamilton's Federalist Paper No. 78 and in Chief Justice Marshall's classic opinion in *Marbury v. Madison*."[77] Rehnquist drew upon the rhetoric of his predecessors who argued for a limited judicial role in reviewing legislative judgments. To Rehnquist, the only possible reading of American political history made the majority's decision unconstitutional because it imposed a broad judicial judgment upon the legislative branch. Rehnquist then declared,

> The most expansive reading of the leading constitutional cases does not remotely suggest that this Court has been granted a roving commission . . . to strike down laws that are based upon notions of policy or morality suddenly found unacceptable by a majority of this Court.[78]

Rehnquist cast the constitutional record in incontrovertible terms: even the "most expansive" interpretation could not even "remotely" support the Supreme Court's decision to strike down laws that it "suddenly found unacceptable." The majority had made a decision that could not possibly find any support in the historical record. Rehnquist added that the "Framers of the Constitution would doubtless have agreed with the great English political philosopher John Stuart Mill" that a democratic political system should maintain checks upon the inherent human desire to impose one's will on others.[79] Again, Rehnquist called upon the rhetoric of a major political theorist to buttress his historical interpretation. In Rehnquist's view, the majority decision marked an unacceptable assertion of the Supreme Court's rhetorical authority, and any clear reading of constitutional history would agree with him.

In addition to appeals to the constitutional record, the dissenting justices asserted the primacy of their individual historical interpretations in order to support their positions. Chief Justice Burger conducted a close reading of Eighth Amendment history. He rebutted the

majority's arguments that the infrequency with which the death penalty was imposed had made the punishment so "unusual" that it violated the Eighth Amendment. Burger declared in his third paragraph, "History compels the conclusion that the Constitution prohibits all punishments of extreme and barbarous cruelty, regardless of how frequently or infrequently imposed."[80] Burger found that a historical reading should guide the justices forcefully toward his own conclusion—one that effectively disregarded the "unusual" argument. He cited "the most persuasive analysis of Parliament's adoption of the English Bill of Rights of 1689—the unquestioned source of the Eighth Amendment wording," asserting the rhetorical authority of his source. Burger read the historical record as unambiguous and thus yielded only one possible interpretation. Notably, his reference to the "most persuasive" historical scholarship reflected the rhetorical nature of historical construction, even as he argued for a conception of history that yielded no argument. If an historical reading could be more or less persuasive, it necessarily must involve rhetorical elements. Burger ended this section by reasserting the supremacy of his own historical exegesis: "It disregards the history of the Eighth Amendment and all the judicial comment that has followed to rely on the term 'unusual' as affecting the outcome of these cases."[81] Burger characterized history as one-dimensional, not open to contestation. The word "unusual" in the Eighth Amendment could not be interpreted as relevant to the contemporary decision in the way that the justices in the majority had read it because this had not been the prevailing interpretation in the past. Burger's construction of history denied its rhetoricity, as he treated his own reading as self-evident.

The dissenting justices also argued that the Court's prior rhetorical treatment of capital punishment—the fact that the Court had historically ruled in favor the death penalty—exerted a binding influence on the decision at hand. This argument fell in line with the American legal

tradition of *stare decisis*, which Robert Ferguson describes as the "understanding that like cases will be decided in like manner through precedent."[82] The problem in *Furman* was that very little case law existed for the kind of question at stake: that is, does something about the modern relationship to punishment differ enough from the context of the Constitution's writing to justify interpreting the Eighth Amendment in such a way as to invalidate the death penalty? Justice Lewis Powell read the scant legal record as definitive. He wrote that the Court had repeatedly "both assumed and asserted the constitutionality of capital punishment. In several cases that assumption provided a necessary foundation for the decision."[83] Powell contended that the Court's prior rhetoric, though answering different questions, should continue to shape the present decision. Previous "assumptions" that the death penalty was permissible presented an insurmountable challenge to the majority's decision. Powell continued that the majority "rejects as not decisive the clearest evidence that the Framers of the Constitution and the authors of the Fourteenth Amendment believed that those documents posed no barrier to the death penalty," and that the decision furthermore "brushes aside an unbroken line of precedent reaffirming the heretofore virtually unquestioned constitutionality of capital punishment."[84] Powell asserted that the majority's decision in *Furman* repudiated history by "rejecting as not decisive" the "clearest evidence" of the constitutional Framers' intents. He implied that the majority was cavalier in their reading of history, since they "brushed aside an unbroken line of precedent" in their decisions. Powell went on to declare, "Throughout our history, Justices of this Court have emphasized the gravity of decisions invalidating legislative judgments, admonishing the nine men who sit on this bench of the duty of self-restraint."[85] To Powell, the majority failed to account for the "gravity" of their decision in the face of a conclusive rhetorical pattern on the

Court, and abdicated the historical "duty" of restraint. Powell constructed judicial history as a strong, unequivocal force that the justices in the majority either ignored or disrespected.

To bolster their accounts of the majority's decision as ahistorical, the dissenting justices emphasized the recency of consensus against capital punishment. The minority opinions delegitimized any rhetorical support for abolition on the basis that it emerged only a short time before. Blackmun, for instance, declared that the authority to abolish capital punishment "should not be taken over by the judiciary in the modern guise of an Eighth Amendment issue."[86] Blackmun characterized the majority's Eighth Amendment arguments as providing a "modern guise"—an ahistorical construction—for abolition. He cited a series of Court decisions that had upheld the death penalty, including 1971's *McGautha v. California*. He wrote, "Suddenly, however, the course of decision is now the opposite way, with the Court evidently persuaded that somehow the passage of time has taken us to a place of greater maturity and outlook."[87] That the Court's rhetorical assessment against the death penalty was "sudden" indicated a sharp departure from history. Blackmun dismissed the argument that society might have evolved past the death penalty to a "place of greater maturity and outlook." He pointed out, "it is only one year since *McGautha*, only eight and one-half years since *Rudolph*, 14 years since *Trop*, and 25 years since *Francis*," and in Blackmun's view, "we have been presented with nothing that demonstrates a significant movement of any kind in these brief periods."[88] To Blackmun, the recency of Court decisions in favor of the death penalty strengthened their force in opposition to the majority's decision. He saw no significant evolution over these "brief periods." Moreover, Blackmun cast skepticism upon the majority's judgment "that we are less barbaric than we were in 1879, or in 1890, or in 1910, or in 1947, or in 1958, or in 1963, or a year ago, in 1971, when *Wilkerson, Kemmler, Weems, Francis, Trop, Rudolph,* and *McGautha* were respectively decided."[89] The

recitation of Court judgments in favor of the death penalty, including recent ones, reinforced Blackmun's argument that precedent was overwhelming on the issue. To Blackmun, the Court lacked the rhetorical agency to counter the weight of historical precedent. His interpretation rejected contemporary interpretation in favor of historical determinism.

By contrast, the justices in the majority read the history of the death penalty as dynamic and open to interpretation and re-evaluation. The concurring opinions granted the justices the rhetorical authority to reinterpret the past and to reshape the law. As noted in Blackmun's dissent, "The several concurring opinions acknowledge, as they must, that until today capital punishment was accepted and assumed as not unconstitutional *per se*."[90] However, the justices in the majority framed those acknowledgments in terms that characterized history as subject to reinterpretation. Justice William O. Douglas wrote early in his opinion, "There is an increasing recognition of the fact that the basic theme of equal protection is implicit in 'cruel and unusual' punishments."[91] Douglas saw other actors' rhetoric as validating the ruling. He cited a *Harvard Law Review* essay by former Supreme Court Justice Goldberg and his clerk Alan Dershowitz, as well as the President's Commission on Law Enforcement and Administration of Justice, both of which indicted the discriminatory application of capital punishment. Douglas identified a growing rhetorical consensus on the death penalty, an "increasing recognition" of a theme that had always existed in the history of the Eighth Amendment, but had previously gone unnoticed. Douglas then turned—like Burger—to the historical context of the Constitution's writing. He cited historian Irving Brant's account of the Bloody Assizes, "the reign of terror that occupied the closing years of the rule of Charles II and the opening years of the regime of James II."[92] Scholars, including Brant, argue that the constitutional Framers chose to prohibit cruel and unusual punishment in reaction to the "cruel and barbarous" executions inflicted on defendants

found guilty of treason during this era.[93] Douglas wrote of this context, "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."[94] Douglas asserted that the history of the Eighth Amendment reflected an intent to eradicate discrimination. A reexamination of this history, he argued, revealed that the Framers' desire for equal protection complicated the dissent's narrative. That is, the death penalty's existence in the Constitution did not simply guarantee its continued legitimacy in light of the Framers' desire to ensure equality. Like Burger for the minority, Douglas found an answer to the death penalty question in the historical record, but Douglas's account constructed that record as multifaceted and open to rhetorical reevaluation.

The Court's prior difficulties in interpreting the Eighth Amendment provided support for the majority justices' fluid reading and the Court's potential to reshape the record. Justice Brennan's opinion opened by emphasizing the interpretive challenges surrounding the Eighth Amendment. Brennan invoked the 1957 *Trop v. Dulles* opinion, which noted the Court's failure to assess the precise "scope" of the phrase "cruel and unusual," along with similar remarks from *Wilkerson v. Utah.*[95] According to Brennan, "The Cruel and Unusual Punishments Clause, like the other great clauses of the Constitution, is not susceptible of precise definition."[96] Despite that difficulty, Brennan wrote that the Court had the duty to "determine the constitutional validity of a challenged punishment, whatever that punishment may be. In these cases, 'that issue confronts us, and the task of resolving it is inescapably ours.'"[97] To Brennan, the task before the Court was difficult precisely because there was no one clear interpretation of the Eighth Amendment. The Court, however, had the rhetorical authority, the obligation, to offer its own historical reading.

Brennan's historical narrative acknowledged the rhetorical nature of interpretation in light of the record's ambiguity. He noted at the outset the impossibility of verifying the Framers' intentions, given that the Court could find "very little evidence of the Framers' intent in including the Cruel and Unusual Punishments Clause."[98] The Framers' intent, of course, was a key contention in the dissenters' arguments that the death penalty was valid because the Framers assumed and wished it to be so. Brennan argued that the unclear reasons for the Eighth Amendment's inclusion in the Constitution clouded the picture, and repeatedly emphasized the limited nature of the historical record. He concluded, "The 'import' of the Clause is, indeed, 'indefinite,' and for good reason."[99] Unlike Burger, Brennan read the historical record of the Eighth Amendment as indeterminate. He invoked the language of *Weems v. United States*, which provided the ground for Brennan's next argument for the dynamism of historical interpretation.

The Court had already seen fit, in Brennan's account, to deploy an evolving view of history. *Weems* was the 1910 decision that a fifteen-year prison sentence constituted cruel and unusual punishment for the crime of falsifying public documents. Brennan quoted from *Weems* that a constitutional provision "is enacted, it is true, from an experience of evils, but its general language should not, therefore, be necessarily confined to the form that evil had heretofore taken."[100] That is, constitutional language that derived from specific contexts must be extrapolated to new situations: "Time works changes, brings into existence new conditions and purposes. Therefore a principle to be vital must be capable of wider application than the mischief which gave it birth."[101] Brennan highlighted the *Weems* Court's argument that constitutional principles had to be applied in circumstances and contexts that evolved: a strict historical reading could not account for the inevitable changes wrought by time. This point foregrounded the contingencies of rhetoric. Even the Constitution, Brennan argued, could not be viewed as

immune from reflexivity. Brennan used the *Weems* decision as precedential support for his reading of history as dynamic, open to evolution. He observed, "Ours would indeed be a simple task were we required merely to measure a challenged punishment against those that history has long condemned. That narrow and unwarranted view of the Clause, however, was left behind with the 19th century."[102] The *Weems* opinion validated this progressive interpretation of the Eighth Amendment. Curiously, Brennan's argument asserted a relatively rigid historical interpretation in support of his anti-deterministic view. He declared that the fixed view of history was, clearly, an artifact of the past—exactly the sort of assertion whose logic he was challenging. This contradiction demonstrates the complexity of the tensions among various historical and rhetorical interpretations at play in *Furman*.

The justices in the majority, then, did not eschew all appeals to a static interpretation of history. Brennan asserted the Court's rhetorical authority to reinterpret the Eighth Amendment on the basis of historical pattern. He cited one more key line from *Weems*: "We know, therefore, that the Clause 'must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.'"[103] The theme of "evolving standards of decency" would come to play a key role in death penalty jurisprudence over the course of the late twentieth century as the Court struggled to define and interpret those standards. In Brennan's view, a clear review of the American history of capital punishment demonstrated gradual repudiation. Brennan traced the historical progression of death penalty law in the United States, noting the increasing restrictions placed upon its implementation over time. He wrote, "The evolution of this punishment evidences, not that it is an inevitable part of the American scene, but that it has proven progressively more troublesome to the national conscience."[104] To Brennan, the historical record reflected not a static embrace of the death penalty, but a dynamic process of progressive

renunciation. Because of the pattern by which states and courts limited capital punishment in ever more contexts, "Today death is a uniquely and unusually severe punishment. When examined by the principles applicable under the Cruel and Unusual Punishments Clause, death stands condemned as fatally offensive to human dignity."[105] Brennan found the contemporary state of capital punishment law to reflect an evolution in American thought that justified capital punishment abolition. In Brennan's view, the Court should reshape its own rhetorical position on the basis of that evolution.

The majority and dissenting opinions in *Furman* represented a negotiation over how to read the history of the death penalty in the United States. The majority offered a dynamic interpretation of that history, while the dissenters read it as rigid and decisive. The dynamic reading of history allowed the Court to engage its rhetorical agency to reshape the legal status of the death penalty, while the deterministic interpretation limited the Court's rhetorical authority over capital punishment and cast the justices as the instruments of the Framers' rhetoric. Even within these two approaches, however, there differences emerged. Burger conducted his own historical investigation while he preferred to rely on the authority of figures such as John Marshall and John Stuart Mill. Douglas argued that the theme of equal protection was always implicit in the Eighth Amendment and required only a re-evaluation to discover, while Brennan constructed the history of the Eighth Amendment as ambiguous and asserted the ascendancy of a reflexive interpretation of its principles as the basis for the decision. Each approach yielded a different configuration of the relationships among history, law, and rhetoric.

Charles Miller reminds us of the importance of historical interpretation in Supreme Court opinions when he observes, "The Court is the only public and official institution consciously and continuously concerned with relating past, present, and future in American life."[106] In the

Furman decision, where the stakes of this function were no less than life and death, the justices' efforts produced such disjunctive rhetorics of the past/present/future nexus that the ruling would have to be renegotiated four years later. Furthermore, in the disputes over historical interpretation, the justices also faced the question of how to assess the death penalty as a criminal punishment, an issue that similarly fractured the Court.

Premises, Evidence, and the Fundamental Purposes of Punishment

The third essential tension evident in the *Furman* decision was the contestation over the fundamental purpose of punishment in American society. Deliberating over the death penalty required the justices to assess what objectives a punishment ought to fulfill and to evaluate whether capital punishment met those objectives. The debate over the purposes of punishment in modern society dates back at least to the eighteenth century. Two primary theoretical justifications for punishment emerged: retributivism and utilitarianism. Retributivism reflects the notion that crime deserves punishment. The infliction of punishment, in this view, is an "intrinsic good."[107] Immanuel Kant is considered one of the most prominent theorists and advocates of retributivism.[108] The utilitarian perspective, by contrast, assesses the broader consequences of the punishment. Utilitarianism justifies punishment "not on the desert due the offender but on the actual, good consequences that are attained" from the punishment, particularly deterrence of future crime, prevention of the offender's recidivism, and rehabilitation of the offender.[109] For the utilitarian, the benefits of the punishment must outweigh the "evil of deliberately and intentionally inflicting suffering on human beings."[110] These two perspectives have operated within a dialectic in Western political thought, with each achieving various degrees of prominence at different historical moments and neither ever fully receding. Edmund L. Pincoffs summarizes, "the retributivistic and the utilitarian positions . . . are contraries. More seriously,

neither theory is alone adequate to provide a satisfactory rationale for punishment."[111] As the proceeding analysis demonstrates, the *Furman* Court espoused widely divergent interpretations of how to construct that rationale. In Banner's words, "The Justices divided along philosophical lines that would have been familiar to participants in the earlier death penalty debates going all the way back to the late eighteenth century."[112] *Furman v. Georgia* reflected the Court's fundamental inability to agree upon what objectives a punishment should fulfill, and whether the death penalty could be construed as satisfying those goals.

The Court's inability to resolve these questions had significant rhetorical implications. As Kirchmeier puts it, the Supreme Court "struggle[d] with. . . foundational questions about punishment."[113] More specifically, the Court struggled over whether retribution served an important role in American criminal justice, and whether the death penalty served as a deterrent. The justices drew upon these themes in their opinions, constructing the death penalty either as essential to retributive and deterrent aims or incapable of fulfilling them. Justice Black's dissent made clear the terms of the debate when he wrote, "Two of the several aims of punishment are generally associated with capital punishment—retribution and deterrence."[114] Evaluating the death penalty in the context of those aims required the justices to make arguments, based on evidence, as to whether the death penalty fulfilled those functions. As such, *Furman* reflected an inability to reach consensus on basic issues of *stasis*.

Stasis theory has a long tradition in rhetorical studies, partially originating with Aristotle and fully elucidated by Hermagoras.[115] In its most basic form, stasis theory helps to identify the central issues of contestation in a dispute, and has most often been applied to the rhetorical context of the courtroom.[116] George Pullman defines *stasis* as "moments when discourse pauses while evidence is judged," in which "a series of hierarchically organized questions can be used to

locate specific differences of opinion within a broader disagreement."[117] These questions generally establish fact, definition, quality, and jurisdiction for a debate or dispute.[118] Some questions, however, "interrupt discourse but do not elicit answers from which any useful agreement can be obtained," and such questions are *asystatic*.[119] In Hermogenes' account, there are four kinds of asystatic questions: monomeres, isazons, ellipes, and aporons.[120] In *Furman*, the social functions of the death penalty seemed to raise both an aporon, or a question that occurs "'when it is impossible to find a solution or even an end' to the inquiry," and an ellipes, or a "question about which the evidence is inconclusive."[121] Because both the premises and the evidence posed such incommensurable positions, the social aims of capital punishment generated asystatic questions that fractured the justices as they wrestled with their roles as arbiters of argumentative premises and evidence.

Retribution

Justice Black directly characterized retribution as an aporon. After narrowing down the social aims of the death penalty, Black discussed retribution as the center of a long-standing and irresolvable legal debate in which the Court had generally favored retribution. He argued that retribution had judicial validation, writing that the Court had in the past "consistently assumed that retribution is a legitimate dimension of the punishment of crimes."[122] Black cited two cases from the 1940s to buttress this claim, but did not discuss them in depth, though other dissenters wrote more extensively on the Court's record on retribution. Black had a broader point to make: "[R]esponsible thinkers of widely varying persuasions have debated the sociological and philosophical aspects of the retribution question for generations, neither side being able to convince the other."[123] In Black's view, there was little to be gained from arguing over retribution in *Furman* because there would be no resolution. Black constructed the issue of

retribution as an aporon that could not be resolved. This point, of course, proved prescient given the intractable splinters recognizable within the *Furman* Court. In this conflict, Black erred in favor of retribution: “It would be reading a great deal into the Eighth Amendment to hold that the punishments authorized by legislatures cannot constitutionally reflect a retributive purpose.”[124] Black saw retribution as an inherent dimension of punishment that could neither be fully supported nor invalidated under the Eighth Amendment.

Given the conflicts among even justices on the same side of the decision, there was no consensus that the retributive question was irresolvable. Justice Thurgood Marshall’s rhetoric on retribution opposed Black’s almost diametrically: in Marshall’s view, there was no aporon surrounding retribution, because the debate had been settled *against* retribution as a social function of punishment. Marshall acknowledged a public impulse toward retribution, but declared, “The solution to the problem lies in the fact that no one has ever seriously advanced retribution as a legitimate goal of our society. Defenses of capital punishment are always mounted on deterrent or other similar theories.”[125] Contrary to Black’s interpretation that the Court had validated retributive dispositions, Marshall argued that “no one” truly endorsed this perspective as legitimate. According to Marshall, the American people had collectively embraced the utilitarian approach to punishment. He continued, “It is the people of this country who have urged in the past that prisons rehabilitate as well as isolate offenders, and it is the people who have injected a sense of purpose into our penology.”[126] Marshall referred to penal reformists who emphasized rehabilitation and humanitarianism in criminal justice, particularly in the post-Civil War and Progressive eras.[127] Marshall extrapolated from those popular sentiments to the conclusion, “I cannot believe that at this stage in our history, the American people would ever knowingly support purposeless vengeance.”[128] In Marshall’s view, the history of criminal

justice and penal reform in the United States reflected a thorough repudiation of retribution as a purpose of punishment, and the Court's decision on the death penalty thus had no reason to incorporate it. That Marshall saw consensus where Black saw aporon highlighted the incommensurability of the justices' rhetoric on retribution.

The intransigence of the fundamental purposes of punishment was highlighted by Justice Powell's move to draw upon Justice Marshall's own prior rhetoric in the argument for retributivism. Powell wrote, "[T]his Court has acknowledged the existence of a retributive element in criminal sanctions and has never heretofore found it impermissible."[129] As evidence for this remark, Powell first cited Justice Black's decision in a 1949 case called *Williams v. New York,* in which the Court upheld a trial judge's sentence, which was, in Powell's view, "clearly retributive."[130] Powell then cited Marshall's opinion in *Powell v. Texas*, in which Marshall wrote that the Supreme Court "has never held that anything in the Constitution requires that penal sanctions be designed solely to achieve therapeutic or rehabilitative effects."[131] The context for Marshall's opinion had been a discussion of the possible effects of incarceration on an alcoholic criminal. Powell reappropriated the statement in support of his interpretation that the Court had implicitly endorsed retribution as a social purpose of punishment. That Powell could draw upon Marshall's own prior jurisprudence as he made a contrasting decision reflects the depth of the conflicts in *Furman.*

The retribution issue constituted an aporon in *Furman* in part because it raised questions of human nature. Powell, for instance, characterized retributivism as a basic impulse. He wrote, "While retribution alone may seem an unworthy justification in a moral sense, its utility in a system of criminal justice requiring public support has long been recognized."[132] According to Powell, retribution had long held a place in the criminal justice system because the public

exerted influence over that system and the public would demand retribution for crimes. He invoked the words of a British judge who had testified, "The truth is that some crimes are so outrageous that society insists on adequate punishment, because the wrong-doer deserves it, irrespective of whether it is a deterrent or not."[133] In this view, the desire for retribution was built into societal institutions. The utilitarian function of deterrence could ultimately be irrelevant, because the public would demand "adequate punishment" for certain crimes. Criminal punishment would inevitably reflect retributivist human instincts. David Goodwin writes that for some asystatic questions, "the inconclusiveness of the conflicting statements . . . demonstrates the limits of reason, identifying the source of impasse not with individual assertions, but with a human faculty belonging to both parties."[134] The impasse over the death penalty's function as a form of retribution stemmed, in part, from conflict over whether retribution constituted a basic human faculty. As Powell pointed out, "Mr. Justice Stewart makes much the same point in his opinion today."[135]

This point marked a rare moment of concurrence between the dissenters and one of the justices in the majority: Stewart did indeed construct retribution as an inherent human instinct. Stewart's decision for the majority was based solely on the arbitrariness and discrimination with which capital punishment had come to be imposed; he found it "unnecessary to reach the ultimate question" of whether the death penalty was unconstitutional in all circumstances.[136] He noted that if he were to resolve that broader question, he would have difficulty because the "instinct for retribution is part of the nature of man, and channeling that instinct in the administration of criminal justice serves an important purpose in promoting the stability of a society governed by law."[137] According to both Stewart and Powell—one in the majority, one in the minority—the law served to channel the basic wishes of its constituents, including the desire

for revenge. Stewart also argued that this function of the law was necessary to stave off a worse alternative: "When people begin to believe that organized society is unwilling or unable to impose upon criminal offenders they 'deserve,' then there are sown the seeds of anarchy—of self-help, vigilante justice, and lynch law."[138] In Stewart's view, the human instinct for retribution was so strong that it would be expressed inevitably in some form; the law should act as a bulwark against the more violent and chaotic possible expressions. Stewart differed from Powell on the scope and terms of the *Furman* decision, but asserted similar social functions of punishment.

The retributive function of punishment created an argumentative impasse among the justices that divided not only those who concurred among the dissenters, but also justices within the majority. Its role as aporon in the *Furman* decision was identified by Black, and though Marshall disputed this characterization, the conflicting premises surrounding retribution proved irreconcilable and thus asystatic.

Deterrence

In addition to the asystatic debate over retribution, the justices clashed over the role of capital punishment in deterring crime—a question about which the evidence was so inconclusive that it constituted an ellipes. The justices did not debate whether deterrence was a valuable function of punishment, but how to assess the death penalty's efficacy in fulfilling that aim. There existed little solid evidence in either direction. In Justice Brennan's words, "There is no more complex problem than determining the deterrent efficacy of the death penalty."[139] Justice Burger described this conflict as an "empirical stalemate" and summarized that abolitionists found no evidence to disprove deterrence, while "[t]hose favoring retention start from the intuitive notion that capital punishment should act as the most effective deterrent and note that

there is no convincing evidence that it does not."[140] Other justices agreed that the record was inconclusive. In Blackmun's words, "the statistics prove little, if anything."[141] Given the empirical quandary, deterrence served as a rhetorical Rorschach test for what constituted "evidence" and how the Court should treat an irresolvable dilemma.

The dearth of statistical evidence on deterrence proved open to maneuvering by either side. Justice Marshall, for the majority, re-cast the absence of evidence as support for the abolitionist position, because it demonstrated that the death penalty must not be *necessary* as a deterrent. He wrote that although abolitionists had not conclusively disproven deterrence, "they have succeeded in showing clear and convincing evidence that capital punishment is not necessary as a deterrent to crime in our society. That is all that they must do."[142] Through a series of negations, Marshall asserted that sparse extant evidence constituted sufficient support to prove that capital punishment was not a *necessary* deterrent. He changed the terms of the question: even if the death penalty might have some deterrent effect, Marshall shifted the premises of the debate such that the evidence would need to prove capital punishment to be an indispensable addition to other available punishments. The ellipes presented by a lack of solid empirical data merely demonstrated that the death penalty must not be irreplaceable.

Of course, justices in the minority viewed the evidence—inconclusive as it was—differently. Chief Justice Burger rebutted Marshall's framing in his dissent and characterized it as unprincipled. He wrote, "Numerous justifications have been advanced for shifting the burden, and they are not without their rhetorical appeal."[143] Burger drew upon the Platonic conception of rhetoric as a "sham art," a form of discourse that is superficially pleasing but intellectually bankrupt.[144] Though thoroughly repudiated within the field of rhetorical studies, this characterization of an argument as "mere rhetoric" still carries popular cachet. In contrast to such

platitudes, Burger framed his approach to the deterrence issue as grounded in fact and in the Constitution. He asserted that Marshall's arguments were "born of the urge to bypass an unresolved factual question."[145] Burger indicted the majority's response to the "unresolved factual question" of deterrence as simple evasion, because the facts remained irreconcilable. According to Burger, "Comparative deterrence is not a matter that lends itself to precise measurement; to shift the burden to the States is to provide an illusory solution to an enormously complex problem."[146] Burger characterized Marshall's argument as hollow and declared the question of deterrence to be, asystatically, unanswerable. The majority, according to Burger, came to facile conclusions that belied the complex statistical conundrum.

The ellipes posed by the statistical evidence opened the door for refutation on the merits of the deterrence argument. Brennan, like Burger, treated the issue as empirically unresolved, but argued that capital punishment could not logically serve as a meaningful deterrent. He took issue with the effects of "the practice of punishing criminals by death as it exists in the United States today."[147] He wrote that deterrence "cannot be appraised in the abstract. We are not presented with the theoretical question whether under any imaginable circumstances the threat of death might be a greater deterrent . . . than the threat of imprisonment."[148] The deterrence question, Brennan argued, was not theoretical. Rather, the Court needed to assess the particular circumstances and practices of American criminal justice. Brennan asserted that deterrence could only work if capital punishment was "invariably and swiftly imposed," which did not characterize the American system.[149] As a result of the capital system's inconsistencies, "A rational person contemplating murder or rape is confronted, not with the certainty of a speedy death, but with the slightest possibility that he will be executed in the distant future."[150] Brennan characterized the deterrent effect as one that could only work in particular circumstances, which

the American capital system did not facilitate. Because the death penalty would not be imposed inevitably or quickly, Brennan found its deterrent value lacking. He concluded, "[U]nverifiable possibilities are an insufficient basis upon which to conclude that that the threat of death today has any greater deterrent efficacy than the threat of imprisonment."[151] Brennan emphasized the precise realities of capital punishment in the contemporary American system in contrast to the "unverifiable possibilities" that could not be proven. The arguments for deterrence lacked dispositive force.

Later in his opinion, Brennan contrasted the persuasive potential of such possibilities to the extant empirical evidence. He cited a British Royal Commission's observation that the death penalty "has obviously failed as a deterrent when a murder is committed. We can number its failures. But we cannot number its successes. No one can ever know how many people have refrained from murder because of the fear of being hanged."[152] To Brennan, "This is the nub of the problem and it is exacerbated by the paucity of useful data." However, he noted that the United States "has what are generally considered to be the world's most reliable statistics."[153] Before citing those statistics, Brennan referred again to the merits of the *theories* of how deterrence works: "The two strongest arguments in favor of capital punishment as a deterrent are both logical hypotheses devoid of evidentiary support, but persuasive nonetheless."[154] Those hypotheses were the arguments that capital punishment must be an effective deterrent because humans fear and seek to avoid death at all costs, and that only the death penalty could deter criminals serving life sentences from killing within prison. Brennan observed, "Abolitionists attempt to disprove these hypotheses by amassing statistical evidence" to prove that criminal activity did not correlate to the existence of capital statutes.[155] Brennan cited "one of the leading authorities on capital punishment" as he laid out the case against deterrence.[156] This appeal to

authority continued as Brennan argued that the extant statistical evidence did not support the first hypothesis that the death penalty must be an effective deterrent. He noted that, despite certain deficiencies in the data, "most authorities have assumed" that the figures were useful, that "[b]oth the United Nations and Great Britain have acknowledged the validity of Sellin's statistics," and that "Sellin's evidence has been relied upon in international studies of capital punishment."[157] Brennan invoked international support for the evidence he touted. Brennan also wrote that "a substantial body of data" showed that the death penalty did not affect the homicide rate in prisons.[158] Despite the "paucity of useful data," then, Brennan cast the extant evidence as both authoritative and dispositive, as if to dispel the ellipes created by statistical inconclusivity. Brennan continuously contrasted what he saw as theoretical "hypotheses" of deterrence with the statistical evidence, which he cast as favoring the abolitionist position.

The ellipes of the evidence provided the minority with room to interpret in the opposite way. Justice Powell characterized the same data cited by Brennan as indeterminate. He conceded that statistical studies "tend to support the view that the death penalty has not been proved to be a superior deterrent."[159] However, Powell noted, "Some dispute the validity of this conclusion, pointing out that the studies do not show that the death penalty has no deterrent effect on any categories of crimes."[160] To Powell, the data lauded by Brennan was unconvincing, nowhere near the probative status that Brennan claimed for it. Powell continued, "On the basis of the literature and studies currently available, I find myself in agreement with the conclusions drawn by the Royal Commission following its exhaustive study of this issue."[161] Like Brennan, Powell appealed to the authority of an "exhaustive study," but he concluded differently. Powell declared that because deterrence could not be proven empirically, "It is accordingly important to view this question in a just perspective and not base a penal policy in relation to murder on exaggerated

estimates of the uniquely deterrent force of the death penalty."[162] Powell thus contended that the ambiguous empirical evidence did not dictate the Court's decision one way or the other. Instead, Powell constructed the deterrence question as one of rationality.[163]

Given the ellipes of the deterrence data, Justice Byron White turned to his own judgments of the criminal justice system. For White, the only evidence necessary to disprove deterrence was the rarity with which the death penalty was invoked. Its very infrequency proved that it could not effectively dissuade criminals. White referred to the empirical quandary analyzed by the other justices: "I need not restate the facts and figures that appear in the opinions of my Brethren. Nor can I 'prove' my conclusion from these data."[164] White stated plainly the ellipes with which the justices all wrestled—that a decision must be made despite the attenuated nature of the "facts and figures" on deterrence. White continued that his conclusion was "based on 10 years of almost daily exposure to the facts and circumstances of hundreds of federal and state criminal cases" involving capital crimes.[165] Where no empirical conclusion existed, White relied upon his own experiences, consonant with Walter Fisher's conception of narrative fidelity (whether a given claim "rings true" with one's life experience).[166] Rather than appealing to authority like Brennan or Powell, White drew upon his own observations of criminal law and punishment. These taught him that the death penalty was applied rarely and almost at random, with "no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not."[167] To White, this infrequency and apparent arbitrariness meant that capital punishment, "within the confines of the statutes now before us," served no useful purpose.[168] White could see no way to affirm the deterrent value of capital punishment, given the conditions of its administration. The evidence for White's decision, then, was his own assessment of current death penalty law. This judgment, of course, evaluated the precise capital statutes in place at the time, a detail that would

not escape the notice of capital punishment proponents who moved to undo the *Furman* ruling. While the statistical evidence (meager as it was) could not be altered, the vagaries of the laws that White denounced could be corrected.

All nine justices generally agreed that deterrence was a valuable aim of criminal punishment, and that the death penalty might reasonably be validated as socially useful if its deterrent function could be demonstrated. What fractured them in *Furman* was how to assess what constituted evidence. From White's total rejection of the data to Brennan's reliance on its expert authority, the majority justices interpreted the extant evidence in divergent ways. While Powell placed the burden on the Court to disprove the legislative rationality of capital statutes, Marshall put it to death penalty retentionists to prove that death was necessary. These rhetorical negotiations reflected not merely a set of justices who disagreed on matters of legal principle, but a Court splintered around the asystatic issues of evidence and premise.

Conclusion

The *Furman* decision constituted a site of crystallization for major rhetorical conflicts over the nature of law in American public life. At a moment of upheaval in the Supreme Court's rhetorical and political position as a locus for social change, the constitutionality of the death penalty raised enduring questions about how the Court makes decisions with regard to historical interpretation, the social functions of punishment, and how to assess whether capital punishment performed those functions. I have drawn upon the rhetoric of social change, the rhetoric of history, and stasis theory to help illuminate the justices' negotiations over these fundamental rhetorical dilemmas. The constellation of sociopolitical forces at work in the early 1970s—the shifting tides of public opinion on the death penalty, a renewed debate over the Supreme Court's position as a mechanism for social change, the conservative turn in public discourse on crime

and punishment—produced a remarkable outcome: a landmark decision that remains simultaneously jurisprudentially influential, historically anomalous, and widely noted for its perceived rhetorical oddities.

The ruling also had immediate instrumental and symbolic effects: it brought executions to a halt in the United States. Those prisoners on death row could no longer be put to death. According to most calculations, "*Furman* nullified the sentences of 587 men and 2 women awaiting execution: 323 blacks, 256 whites, 9 Hispanics, and 1 Native American."[169] Evan Mandery describes the jubilation that met the decision within prisons and among abolitionist activists.[170] In addition, *Furman* "stay[ed] the executioner's hand for years."[171] No death sentence could be imposed under existing statutes. The ruling was "widely seen as a death sentence for the death penalty," as John D. Bessler writes.[172] Most observers initially interpreted *Furman* as a decisive blow to capital punishment. One *Miami Herald* editorial declared, "The decision is a turning point in American justice and perhaps in the national attitude towards violence, crime, and punishment."[173] Several of the justices themselves believed that the death penalty would not return.[174]

The case of *Furman*, however, reveals that the legal effects of a decision cannot be divorced from its rhetorical qualities, particularly when the judicial voice is so fractured. Legal commentators expected the ruling, despite its apparent messiness, to end the death penalty in America for good. Instead, *Furman* highlighted a series of largely intractable rhetorical dilemmas and the public response to the ruling demonstrated the salience of those dilemmas. Peter Brooks and Paul Gewirtz write that in a judicial decision with multiple opinions, "there is a debate occurring within the text itself."[175] That debate occurs "within the text about its own meaning—what the case now being decided signifies for future cases, how it should be read as a

precedent in the future."[176] The instability of the decision, produced by its splintered nature, played out in its public reception. *Furman* met with substantial public retaliation and provoked particular ire from law enforcement officers, legislators, and President Nixon, who along with then-governor of California Ronald Reagan, "blasted the opinion and used it to feed the growing condemnation of the Supreme Court."[177] This intensified in the wake of the Court's next controversial decision, 1973's *Roe v. Wade.* Although *Roe* would remain in force despite a great deal of public antipathy, *Furman* "lacked the intellectual coherence to withstand the onslaught of public hostility."[178] The decision defied expectations of a unified voice within judicial rhetoric, and was met with extraordinary disapproval.

The post-*Furman* backlash against the Court dovetailed with the rising prominence of the "law and order" rhetoric championed by both Nixon and Reagan, as national sentiments favored increasingly harsh criminal punishments. Accordingly, *Furman* "angered a significant segment of American society," including the large swath of people who favored the death penalty.[179] In fact, public support for capital punishment actually spiked following the ruling.[180] L.S. Tao explains that *Furman* drew public attention to capital punishment as a constitutional issue, but instead of achieving abolition, the Court "revived a public debate and generated a considerable degree of legislative enthusiasm for its continued use."[181] This enthusiasm appeared in the form of what Franklin E. Zimring called a "legislative extravaganza of new death penalty statutes."[182] Rather than follow suit with the Court's ruling and abolish capital punishment, many states and even the US Congress passed laws that authorized its use. In 1976, the Supreme Court ruled the new statutes (except for those that made the death penalty mandatory for certain crimes) constitutional in a collection of cases known as *Gregg v. Georgia.*

That *Furman* was overruled so quickly speaks to the fundamentally contingent nature of judicial rhetoric, a feature not often highlighted even by rhetorical critics. Robert Ferguson notes that judicial opinions deploy the rhetoric of inevitability, which suggests that the outcome of the decision could never have been otherwise.[183] Court decisions, however, are always provisional because they can be reshaped by future rulings, as *Gregg* did to *Furman*. My historical-critical reading suggests some of the contingencies that shaped the *Furman* decision, but did not guarantee its legal durability.

Ultimately, *Furman* exposes the struggle encountered by Supreme Court justices in the attempt to come to terms with the most potent function of judicial rhetoric: to authorize the end of a human life. Though legal commentary on the decision reveals the prevailing expectation that the Court should speak in as few voices as possible, a rhetorical perspective highlights the burden for the Court in confronting the law's capacity for violence. As Robert Cover reminds us, "Violence at the hands of the state escalates of the interpretive enterprise."[184] When faced with those life-and-death stakes, the Court splintered around enduring questions at the heart of the legal system: the role of the judiciary in a democracy, the interpretation of the past, the social aims of criminal punishment. Supreme Court opinions play an important role in what Gewirtz and Brooks call "the ongoing articulation of the meaning of the laws."[185] The complex negotiations over democracy, history, and punishment in *Furman* demonstrate the need for rhetorical scholars to account for the moments in which the Court negotiates its own position within an enterprise that shapes social, political, and cultural life—and that also retains the power to authorize death.

Future rhetorical studies should attend to other moments at which the Court has spoken with many voices, and discover what fissures animated those decisions. We would do well to

understand what kinds of cases are most likely to produce fragmentation. Moreover, projects focused on reception and circulation would shed additional light on cases like *Furman*, to reveal how the Court's decisions are taken up when they reveal such fundamental tensions within an enduring controversy of public interest.

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[1] Liebman, "Slow Dancing with Death: The Supreme Court and Capital Punishment, 1963-2006," 99.

[2] Daniel D. Polsby, "The Death of Capital Punishment? Furman v. Georgia," *The Supreme Court Review* 1972 (1972): 2.

[3] Malcolm E. Wheeler, "Toward a Theory of Limited Punishment Ii: The Eighth Amendment after Furman v. Georgia," *Stanford Law Review* 25, no. 1 (1972): 62.

[4] Patricia M. Wald, "The Rhetoric of Results and the Results of Rhetoric: Judicial Writings," *The University of Chicago Law Review* 62, no. 4 (1995): 1377.

[5] Ibid.

[6] Oshinsky, *Capital Punishment on Trial: Furman v. Georgia and the Death Penalty in Modern America*, 50.

[7] Burt, "Disorder in the Court: The Death Penalty and the Constitution," 1758.

[8] Norman J. Finkel, *Commonsense Justice: Jurors' Notions of the Law* (Cambridge, MA: Harvard University Press, 2009), 172.

[9] Weisberg, "Deregulating Death," 315.

[10] Brooks and Gewirtz, *Law's Stories: Narrative and Rhetoric in the Law*, 11.

[11] Reading a judicial opinion for the negotiations between the majority and dissent is one common strategy for rhetorical critics. See, e.g., Katie L. Gibson, "United States v. Virginia: A

Rhetorical Battle between Progress and Preservation," *Women's Studies in Communication* 29, no. 2 (2006).

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[13] Michael Meltsner, *Cruel and Unusual the Supreme Court and Capital Punishment* (2011), 5.

[14] Jeffrey L. Kirchmeier, *Imprisoned by the Past: Warren McCleskey and the American Death Penalty* (Oxford University Press, 2015).

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[19] Corinna B. Lain, "Furman Fundamentals," *Washington Law Review* 82 (2007).

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[24] Banner, *The Death Penalty*.

[25] Epstein and Kobylka, *The Supreme Court and Legal Change: Abortion and the Death Penalty*, 68.

[26] Ibid., 264.

[27] Ibid., 264-65.

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[35] Josina M. Makau and David Lawrence, "Administrative Judicial Rhetoric: The Supreme Court's New Thesis of Political Morality," *Argumentation and Advocacy* 30, no. 4 (1994): 193.

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[41] Ibid.

[42] Ibid., 384.

[43] Ibid.

[44] Ibid.

[45] *Furman v. Georgia*, 408 238, 417 (1972).

[46] See, e.g., Emery G. III Lee, "Overruling Rhetoric: The Court's New Approach to Stare Decisis in Constitutional Cases," University of Toledo Law Review 33, no. 3 (2002); Jack Knight and Lee Epstein, "The Norm of Stare Decisis," American Journal of Political Science 40, no. 4 (1996).

[47] *Furman v. Georgia*, 418.

[48] Ibid., 465.

[49] Ibid., 461,62.

[50] Of course, the decision would prove not final at all, as *Gregg v. Georgia* essentially overturned it four years later.

[51] Ibid., 462.

[52] Ibid., 465.

[53] Ibid., 267.

[54] See, e.g., Thomas Carothers, "The Rule of Law Revival," *Foreign Affairs* 77, no. 2 (1998); Eric Foner, *The Story of American Freedom* (New York: W. W. Norton, 1998).

[55] William C. Whitford, "Rule of Law," *Wisconsin Law Review* 2000, no. 3 (2000).

[56] Francesca Polletta, *Freedom Is an Endless Meeting: Democracy in American Social Movements* (Chicago: University of Chicago Press, 2012).

[57] *Furman v. Georgia*, 267.

[58] Ibid., 268.

[59] Ibid., 269.

[60] Ibid., 410.

[61] Ibid.

[62] *Furman v. Georgia*, 410.

[63] Ibid., 411.

[64] Ibid., 410.

[65] Ibid., 413.

[66] Ibid., 314.

[67] Ibid.

[68] Ibid., 312.

[69] Corinna B. Lain, "Furman Fundamentals," *Washington Law Review* 82 (2007): 5.

[70] Banner, *The Death Penalty*, 261.

[71] James Boyd White, *From Expectation to Experience: Essays on Law and Legal Education* (Ann Arbor, MI: University of Michigan Press, 2000), 40.

[72] Charles A. Miller, *The Supreme Court and the Uses of History* (Cambridge, MA: Belknap Press of Harvard University Press, 1969).

[73] Miller, *The Supreme Court and the Uses of History*, 6.

[74] Turner, *Doing Rhetorical History: Concepts and Cases*, 11.

[75] Richard A. Posner, "Past-Dependency, Pragmatism, and Critique of History in Adjudication and Legal Scholarship," *The University of Chicago Law Review* 67, no. 3 (2000): 594.

[76] *Furman v. Georgia*, 465.

[77] Ibid., 466.

[78] Ibid., 467.

[79] Ibid.

[80] Ibid.

[81] Ibid., 380.

[82] Robert A. Ferguson, "Judicial Rhetoric and Ulysses in Government Hands," *Rhetoric & Public Affairs* 15, no. 3 (2012): 438.

[83] Ibid., 421.

[84] Ibid., 417.

[85] Ibid., 418.

[86] Ibid., 410.

[87] Ibid., 408.

[88] Ibid.

[89] Ibid., 410.

[90] Ibid., 407.

[91] Ibid., 249.

[92] Ibid., 254.

[93] William Hughes Mulligan, "Cruel and Unusual Punishments: The Proportionality Rule," *Fordham Law Review* 47, no. 5 (1979): 640.

[94] *Furman v. Georgia*, 255.

[95] Ibid.

[96] Ibid.

[97] Ibid.

[98] Ibid.

[99] Ibid., 263.

[100] Ibid., 264.

[101] Ibid.

[102] Ibid., 269.

[103] Ibid., 269-70.

[104] Ibid., 299.

[105] Ibid., 305.

[106] Charles A. Miller, *The Supreme Court and the Uses of History* (Cambridge, MA: Belknap Press of Harvard University Press, 1969), 193.

[107] Albert W. Alschuler, "The Changing Purposes of Criminal Punishment: A Retrospective on the Past Century and Some Thoughts About the Next," *The University of Chicago Law Review* 70, no. 1 (2003): 15.

[108] Don E. Scheid, "Kant's Retributivism," *Ethics* 93, no. 2 (1983).

[109] Russell L. Christopher, "Deterring Retributivism: The Injustice of "Just" Punishment," *Northwestern University Law Review* 96, no. 3 (2002): 848.

[110] Richard W. Burgh, "Do the Guilty Deserve Punishment? ," *The Journal of Philosophy* 79, no. 4 (1982): 194.

[111] Edmund L. Pincoffs, *The Rationale of Legal Punishment* (New York: Humanities Press, 1996), 2.

[112] Banner, *The Death Penalty*, 264.

[113] Kirchmeier, *Imprisoned by the Past: Warren McCleskey and the American Death Penalty*, 173.

[114] *Furman v. Georgia*, 395.

[115] Michael J. Hoppman, "A Modern Theory of Stasis," *Philosophy & Rhetoric* 47, no. 3 (2014); Wayne N. Thompson, "Stasis in Aristotle's Rhetoric," *Quarterly Journal of Speech* 58, no. 2 (1972).

[116] Ray Nadeau, "Hermogenes on Stasis: A Translation with an Introduction," *Speech Monographs* 31 (1964).

[117] George L. Pullman, "Deliberative Rhetoric and Forensic Stasis: Reconsidering the Scope and Function of an Ancient Rhetorical Heuristic in the Aftermath of the Thomas/Hill Controversy," *Rhetoric Society Quarterly* 25 (1995): 224.

[118] Thomas M. Conley, *Rhetoric in the European Tradition* (White Plains, NY: Longman, 1990).. These categories of question are based on Cicero's schema, which was based on the work of Hermagoras.

[119] Pullman, "Deliberative Rhetoric and Forensic Stasis: Reconsidering the Scope and Function of an Ancient Rhetorical Heuristic in the Aftermath of the Thomas/Hill Controversy," 225.

[120] Ray Nadeau, "Hermogenes on "Stock Issues" in Deliberative Speaking," *Communications Monographs* 25, no. 1 (1958). Accounts differ somewhat on the names and precise definitions of these questions; I adhere to Nadeau's categorization, also followed by Pullman.

[121] Pullman, "Deliberative Rhetoric and Forensic Stasis: Reconsidering the Scope and Function of an Ancient Rhetorical Heuristic in the Aftermath of the Thomas/Hill Controversy," 226.

[122] Ibid.

[123] Ibid.

[124] Ibid.

[125] Ibid.

[126] Ibid.

[127] The interest in rehabilitation reflects a utilitarian approach to punishment, since it seeks to extract a positive future outcome from punishment.

[128] *Furman v. Georgia*, 363.

[129] Ibid., 452.

[130] Ibid.

[131] Ibid.

[132] Ibid., 453.

[133] Ibid.

[134] David Goodwin, "Controversiae Meta-Asystatae and the New Rhetoric," *Rhetoric Society Quarterly* 19, no. 3 (1989): 213.

[135] Ibid., 454.

[136] Ibid., 306.

[137] Ibid., 308.

[138] Ibid.

[139] Ibid., 347.

[140] Ibid., 395.

[141] Ibid., 454.

[142] Ibid., 353.

[143] Ibid., 396.

[144] Trent Eades, "Plato, Rhetoric, and Silence," *Philosophy & Rhetoric* 29, no. 3 (1996): 244.

[145] *Furman v. Georgia*, 396.

[146] Ibid.

[147] Ibid., 302.

[148] Ibid.

[149] Ibid.

[150] Ibid.

[151] Ibid.

[152] Ibid., 347.

[153] *Furman v. Georgia*, 347.

[154] Ibid.

[155] Ibid., 349.

[156] Ibid.

[157] Ibid., 350, 51.

[158] Ibid., 352.

[159] Ibid., 454.

[160] Ibid., 454-55.

[161] Ibid., 455.

[162] Ibid.

[163] If there was no empirical basis for a decision on deterrence, Powell set the standard for Court intervention as a check on irrationality. Powell argued that the Court could not invalidate state capital schemes unless they were demonstrated not to be rational. He invoked a 1968 Supreme Court case that dealt with deterrence in relation to "punishment by fines for public drunkenness." In that case, "The Court was unwilling to strike down the Texas statute on grounds that it lacked a rational foundation." In other words, the Court had recently accepted deterrence as a valid justification for a particular punishment, and found the state's punishment scheme to be "rational." The burden, then, was on the Court to prove that the punishment in question violated this standard and lacked good reason. Powell continued, "legislative judgments as to the efficacy of particular punishments are presumptively rational and may not be struck down under the Eighth Amendment because this Court may think some alternative sanction would be more appropriate." Powell ascribed rationality to legislative judgments, arguing that the Court had to find a meaningful showing of irrationality to invalidate a legislatively sanctioned punishment. In the case of capital punishment, "the evidence and arguments advanced by petitioners… do not approach the showing traditionally required before a court declares that the legislature has acted irrationally." Thus, legislative capital schemes must be rational and the Court could not intervene.

[164] Ibid., 313.

[165] Ibid.

[166] Walter R. Fisher, "Narration as a Human Communication Paradigm: The Case of Public Moral Argument," *Communications Monographs* 51, no. 1 (1984).

[167] Ibid.

[168] Ibid.

[169] David M. Oshinsky, *Capital Punishment on Trial: Furman v. Georgia and the Death Penalty in Modern America* (Lawrence, Kansas: University Press of Kansas, 2010), 54.

[170] Evan J. Mandery, *A Wild Justice: The Death and Resurrection of Capital Punishment in America* (New York: W. W. Norton & Company, 2013).

[171] Martin Clancy and Tim O'Brien, *Murder at the Supreme Court: Lethal Crimes and Landmark Cases* (Amherst, NY: Prometheus Books, 2013), 43.

[172] John D. Bessler, *Cruel & Unusual: The American Death Penalty and the Founders' Eighth Amendment* (Boston: Northeastern University Press, 2012), 283.

[173] Cited in Mandery, *A Wild Justice*, 242.

[174] Kirchmeier, *Imprisoned by the Past: Warren McCleskey and the American Death Penalty*.

[175] Brooks and Gewirtz, *Law's Stories: Narrative and Rhetoric in the Law*, 12.

[176] Ibid.

[177] Gary P. Gershman, *Death Penalty on Trial: A Handbook with Cases, Laws, and Documents*, Abc-Clio's on Trial Series (Santa Barbara, Calif: ABC-CLIO, 2005), 60.

[178] Mandery, *A Wild Justice*, 277.

[179] Kirchmeier, *Imprisoned by the Past: Warren McCleskey and the American Death Penalty*, 94.

[180] Mandery, *A Wild Justice*.

[181] L.S. Tao, "Beyond Furman v. Georgia: The Need for a Morally Based Decision on Capital Punishment," *Notre Dame Law Review* 51, no. 4 (1976): 722.

[182] Franklin E. Zimring and Gordon Hawkins, "Capital Punishment and the Eighth Amendment: Furman and Gregg in Retrospect," *University of California Davis Law Review* 18 (1984): 950.

[183] Robert A. Ferguson, "The Judicial Opinion as Literary Genre," *Yale Journal of Law & the Humanities* 2 (1990).

[184] Robert M. Cover, *Narrative, Violence, and the Law: The Essays of Robert Cover* (Ann Arbor: University of Michigan Press, 1992), 153.

[185] Brooks and Gewirtz, *Law's Stories: Narrative and Rhetoric in the Law*, 10.

CHAPTER 3

"IMPRISONED BY THE PAST":[1] *MCCLESKEY V. KEMP*

Introduction

In 1987, the Supreme Court decided *McCleskey v. Kemp*, ruling that the petitioner's evidence of racial discrimination in Georgia's death penalty system did not amount to a constitutional violation. Although the Court "accepted the validity of the sophisticated statistical evidence McCleskey used to demonstrate that the killers of whites are disproportionately sentenced to death under Georgia law," the 5-4 majority determined that "evidence of disparate racial impact is not sufficient to reverse a death sentence on eighth or fourteenth amendment grounds."[2] *McCleskey* was a landmark decision, "heralded as the most significant death penalty case since the Court's sanctioning of Georgia's death penalty statute" four years after *Furman*.[3]

The significance of the decision had multiple dimensions: First, the Court "by a 5-4 vote preserved the American death penalty," because a ruling in McCleskey's favor would have rendered unconstitutional the racial disparities embedded in capital sentencing and thus would have serious consequences for the system of capital punishment itself.[4] Instead, *McCleskey v. Kemp* marked a major blow against efforts to restrict or eliminate capital punishment through the judicial system, as it "signaled the futility of continuing to place hope for abolishing the death penalty on the constitutional strategy that had once been so successful."[5] Abolitionists perceived that the Court had abdicated any role in the fight against the death penalty. Second, beyond its significance for the role of the Court in controversies over the death penalty, the decision established a high burden for the deployment of statistical evidence to prove racial

discrimination. The study cited by McCleskey's lawyers, conducted by criminologist David Baldus, was "uniformly praised by social scientists as the best study of any aspect of criminal sentencing ever conducted."[6] That the Court accepted its validity yet declined to accept its conclusions had negative implications for the relationship between social science and death penalty law. In Sheri L. Gronhovd's words, the Court "narrow[ed] the use of social science statistics in death penalty trials and appeals."[7] This facet of the ruling marked a break with precedent, as the Court had previously granted substantial latitude to legal claims of racial discrimination, including those that indicted jury selection in capital trials.[8] The *McCleskey* ruling backed away from a prior judicial trend that honored statistical evidence pointing to racial discrimination.

The decision attracted a great deal of criticism. In the *New York Times*, Pulitzer Prize-winning journalist Anthony Lewis wrote that the Court had "effectively condoned the expression of racism in a profound aspect of our law."[9] One prominent law review characterized the decision as "logically unsound, morally reprehensible, and legally unsupportable."[10] Harvard Law professor Randall Kennedy argued that the *McCleskey* majority "repressed the truth and validated racially oppressive official conduct."[11] Nevertheless, the decision remains in effect today, and racially based challenges to the death penalty have remained limited. Likewise, the opinion retains its performative power as an act of law, even as many commentators doubt its reasoning.

In this chapter I argue that *McCleskey v. Kemp* should be read as a negotiation over the constitutive function of judicial rhetoric insofar as the majority opinion deflected the constitutive nature of judicial rhetoric and the minority opinions embraced that function. In what follows, I briefly articulate a theory of constitutive rhetoric and its role in scholarship on judicial discourse.

I then discuss the context of the *McCleskey* decision. The central conflict in the case centered on the implications of Baldus's social scientific study in relation to claims of racial discrimination. Accordingly, I organize this chapter around the themes of social science and racial discrimination.

Constitutive Rhetoric and the Law

That rhetoric serves a constitutive function has become a basic assumption of rhetorical studies. Writes John Lyne, the "constitutive function of rhetoric . . . helps explain why the study of discourse is important independent of whether it can be demonstrated to have 'caused' events. . . . Rhetoric, seen in this light, exceeds the merely instrumental and serves to constitute parts of our world."[12] Maurice Charland helped to bring this perspective into focus with his influential essay, "Constitutive Rhetoric: The Case of the *Peuple Québécois*."[13] Charland posited that acts of persuasion help to call into being the subjects of the discourse. He argued that the "*peuple québecois*" were interpellated by a process of rhetorical narrative. Other scholars have explored and elaborated upon this constitutive perspective, and its alternative: the instrumental.[14] According to James Jasinski, in an instrumental framework "the force of a situated utterance is exhausted within the confines of the immediate situation."[15] By contrast, a constitutive approach to rhetorical history "explores the ways discursive strategies and textual dynamics shape and reshape the contours of political concepts and ideas."[16] Though the conceptual distinction remains analytically useful, scholars argue that two functions also inform one another within a mutually reinforcing dialectic.[17]

James Boyd White introduced the constitutive function of discourse to studies of the law, writing that constitutive rhetoric involves the "establishment of comprehensible relations and shared meanings, the making of the kind of community that enables people to say 'we' about

what they do and claim consistent meanings for it."[18] Though much work on constitutive rhetoric focuses on the formation of particular identities, White reminds us that legal rhetoric in particular plays an important role in constituting the relations among people and the values of a society.[19] He writes that legal rhetoric is "both substantively and procedurally" constitutive in nature, as it "creates a set of questions that reciprocally define and depend upon a world of thought and action; it creates a set of roles and voices by which meanings will be established and shared."[20] That is, judicial rhetoric directly shapes collective existence as it brings into force the particular outcomes directed by the decision, and it also influences the way we talk and think about concepts, issues, and people. As such, in this chapter I argue that we should consider constitutive rhetoric not only in terms of particular events or identities, but also as a force that accumulates over time. Constitutive effects do not always show up in the context of a single moment of interpellation; they can also accrue over time.

Judicial opinions, then, simultaneously reflect and effect social, cultural, and political norms and the rhetoric that governs them. This does not mean, however, that those who construct the opinions necessarily embrace (or even consider) the constitutive function of their work. As Jasinski puts it, "constitutive influence . . . is frequently epiphenomenal."[21] I argue that the *McCleskey* decision exposed the Supreme Court's struggle with this constitutive influence. The majority opinions minimized the constitutive nature of judicial rhetoric, while the minority opinions embraced it. This contestation played out over two *topoi* at issue in the *McCleskey* case: social science and racial discrimination. Through their constructions of these two (apparently disparate, but thematically linked) phenomena, the opinions reflected opposing visions of rhetoric's role in shaping social reality.

Context: From *Furman* to *McCleskey*

As noted previously, *Furman*'s ban on the death penalty lasted only four years. Legislatures seized upon the ambiguities perceived in the *Furman* decision, engendered by its fractured rhetoric. Because the majority opinions lacked a cohesive narrative that invalidated the death penalty, new capital statutes could conceivably remedy the identified problems in the laws that the case nullified. Politicians in five states declared their plans to draft such statutes the day after *Furman* was announced, kicking off "the biggest flurry of capital punishment legislation the nation had ever seen."[22] In the subsequent four years, thirty-five states and the federal government enacted new capital statutes. The new laws took one of two approaches to capital punishment: they either instituted strict guidance to limit and direct jury discretion, or they made the death penalty mandatory for certain crimes. These procedures were designed to deal with the Court's criticisms in *Furman*, and in particular the perceived directives by Justices Potter Stewart and Byron White "to either curtail randomness or use the death penalty more frequently."[23] Under the new statutes, hundreds of people were sentenced to death, though their executions could not be carried out until the Supreme Court ruled on the constitutionality of the new schemes. In 1976, the Court selected five murder cases designed to encompass "the full range of variations in the post-*Furman* statutes."[24] These cases would come to be known collectively as *Gregg v. Georgia*, and though the Court ruled against mandatory death sentences, it validated the other new capital statutes, functionally reversing the effects of *Furman*.

Because the *Gregg* decisions had cast a decisive blow against many of the core constitutional challenges to capital punishment, abolitionists and defense attorneys saw that "the only way they might get the Court to strike down the death penalty was if they could prove that

states used the death penalty in a racially discriminatory way."[25] Anthony Amsterdam, along with the NAACP Legal Defense Fund's attorney Jack Greenberg, worked to further arguments based on statistical evidence surrounding racial bias. The LDF had made these claims since the 1950s. Indeed, by some accounts, the group took up the cause of death penalty abolition as a direct result of experiences with racial discrimination and death penalty sentencing in Southern states.[26] Statistical discrimination had been one of the arguments in *Maxwell v. Bishop*, in which the defense drew upon a study by criminologist Marvin Wolfgang. Wolfgang studied about 3,000 rape convictions across eleven states between 1945 and 1965, and found that black men were seven times more likely to receive a death sentence than white men, and eighteen times more likely to receive the death penalty for raping a white woman, compared to any other racial combination. Justice Blackmun, for the Eighth Circuit Court of Appeals, wrote the opinion rejecting Maxwell's claim in 1968. Blackmun argued that the study "did not take into account every variable."[27] The Supreme Court heard the case and reversed the death sentence, but evaded the racial arguments. Lawyers for the LDF hoped that "more adequate data might support a successful challenge."[28] What became known as "the Baldus study" offered a possible source for such data.

The Baldus study constituted a major landmark in empirical research on race and its influence on capital punishment administration. It has become known as "the most comprehensive statistical analysis ever done on the racial demographics of capital sentencing in a single state."[29] David Baldus of the University of Iowa already had a pedigree as "an expert in the application of statistics to legal problems."[30] Baldus and his associates, Charles Pulaski and George Woodworth, analyzed both pre- and post- *Furman* death sentences from a sample of over 2,400 Georgia murder cases between 1973 and 1980.[31] The initial phase, called the *Procedural*

Reform Study, "was an uncommonly comprehensive sentencing study," but "lacked data on the strength of the evidence of the defendant's guilt, and . . . did not examine the possibility of pretrial discrimination."[32] The Baldus team corrected both limitations in the second phase, called the *Charging and Sentencing Study*. They found evidence that the post-*Furman* era, in which McCleskey was sentenced, reflected significant racial disparities in death penalty sentencing. Black defendants were slightly more likely to receive death sentences overall, but substantially more likely to be sentenced to death in the murder of white victims.[33] The study also found that the race of both defendant and victim had an effect on whether prosecutors sought the death penalty in the first place. The study suggested that the decisionmakers in capital cases, most of whom were white, expressed more concern for victims of their own race.[34] Baldus, Pulaski, and Woodworth felt that McCleskey's particular case "fell in a range where race had a material effect" on the outcomes.[35]

McCleskey v. Kemp was the case of a black man who robbed a furniture store in Georgia. A white police officer was shot and killed during the course of the robbery in which McCleskey had three accomplices. McCleskey was convicted of two counts of armed robbery and one count of murder.[36] In the penalty phase of the trial, under the Georgia capital statute approved by the *Gregg* ruling, the jury considered both "aggravating" and "mitigating" circumstances pertaining to the defendant and to the crime. While no mitigating evidence was presented, the jury found two aggravating considerations: the fact that the murder was committed during the course of a felony (the robbery) and the fact that the victim was a police officer both weighed in the jury's recommendation of the death penalty, which the trial court accepted.[37] McCleskey filed a series of appeals, one of which argued that the Georgia capital system was racially biased and thus violated the Eighth and Fourteenth Amendments. The case reached the Supreme Court only after

McCleskey's original writ of certiorari had been denied and after the Baldus study had been presented as part of a constitutional argument to be rejected by the district court and by the Eleventh Circuit.[38] Four of the nine Supreme Court justices voted to hear the case in its second instantiation, a sufficient minority to bring the case forward under the Court's "Rule of Four."[39] The Court finally faced a decision over racial discrimination in capital punishment administration. In a 5-4 ruling, the Court held against McCleskey. Justice Lewis Powell wrote the opinion for the majority. Justices William Brennan, Harry Blackmun, and John Paul Stevens each wrote dissenting opinions.

The Supreme Court's death penalty jurisprudence in the eleven years between *Gregg* and *McCleskey* had charted a crooked path. In the words of legal scholar Samuel R. Gross, the Court became "mired in an endless, contentious, and sometimes bizarre program of constitutional regulation of the death penalty."[40] *Gregg* seemed to establish for the Court an "ongoing regulatory role" in the administration of capital punishment.[41] Initially, the justices appeared to embrace that role. For the first several years, according to legal scholar Herbert Haines, the Court

> tacitly endorsed the theory that the taking of a human life by the State in punishment for a crime is the most awesome of all legal decisions and that it must therefore be done only after unusually stringent due process requirements have been fully met.[42]

In turn, the Court reversed several death sentences. However, around 1982, the Court changed course. In several decisions over the next several years, the Court signaled that it was, in Robert Weisberg's words, "going out of the business of telling the states how to administer the death penalty."[43] A series of rulings progressively weakened procedural requirements in death penalty cases and reduced the Court's involvement in death penalty administration.[44] Haines calls the

Court's death penalty decisions in the 1980s "a lopsided string of defeats for the defense bar."[45] McCleskey's appeal to the Supreme Court offered an opportunity for abolitionist lawyers to induce the Court's intervention in the capital system on behalf of racial equality, an issue that the Court had repeatedly sidestepped instead of directly confronting it.[46]

The political and legal context at the time that *McCleskey* came before the Court was generally conservative. As Jeffrey Kirchmeier puts it, "conservative law-and-order beliefs again dominated in the country."[47] Ronald Reagan, in his second presidential term, had marshaled popular support for the War on Drugs.[48] Public support for the death penalty had doubled since *Furman*. Polling data indicated that pro-death penalty sentiment had reached 71 percent by 1986.[49] Many people believed that the post-*Furman* modifications to capital statutes had resolved the most meaningful problems with death penalty administration.[50] The civil rights movement of the 1960s had lost much momentum and progressive reformers encountered backlash to policies such as affirmative action.[51] The Court itself appeared increasingly conservative. In 1987 Warren Burger had just retired, replaced by Chief Justice by William Rehnquist, and Rehnquist's former seat was taken by Antonin Scalia. Under both Burger and Rehnquist, the Court prioritized arguments for "public order" above the claims of individual rights, and rarely ruled in favor of criminal defendants.[52] Over the course of the 1980s, the Court also encountered a "wave of empiricism" marked by the rising prominence of empirical data in civil and criminal law.[53] The Court incorporated and generally favored statistical evidence in its evaluation of cases involving employment discrimination, housing law, voting rights, and capital jury selection.[54] According to David J. Macher, *McCleskey v. Kemp* "presented the Court with a unique opportunity to evaluate the role of statistical evidence in criminal law."[55] I turn next to the distinct approaches to this opportunity, reflected in the majority and minority opinions.

The *McCleskey* decision, then, marked a turning point in the Court's death penalty jurisprudence following years of uncertainty over the judiciary's role in the capital system. In the context of rising conservatism and shifting norms surrounding the use of social science in the courtroom, the Court took on the issue of racial discrimination in capital sentencing. The case forced the Court to articulate its conceptions of social scientific evidence and racial discrimination. In the next section, I argue that the majority primarily evaded the rhetorical dimensions of social scientific evidence, while the dissenting opinions highlighted them.

Constituting Social Scientific Evidence

A major question at stake in *McCleskey*—what constituted proof of racial discrimination in capital sentencing—raised epistemological questions about social scientific evidence and the burden of proof for such evidence, with corresponding implications for judicial rhetoric. In a judicial decision dealing with scientific evidence, the opinion must establish whether the evidence has sufficiently "proven" a point for the purposes of law. The majority in *McCleskey* constructed social scientific proof as a precise product of empirical data and specificity, while the dissenting opinions highlighted the contingent, rhetorical nature of social scientific evidence. Put differently, the majority assigned a non-rhetorical constitutive function to the social scientific data: only a certain form of evidence could constitute proof, while rhetoric had no place in the construction of scientific knowledge. As Marcus Paroske writes, "science itself cannot tell us when a knowledge claim has been proven enough to act based upon it."[56] The majority opinion in *McCleskey*, however, argued that social scientific data *could* "tell" whether discrimination had been proven, but that the data presented in the case had failed to do so. The contrasts between Justice Powell's opinion for the majority and Justice Brennan's dissenting opinion reflected a negotiation over the constitutive function of judicial rhetoric in relation to social science.

Scholars have argued for the rhetoricity of scientific (and, accordingly, social scientific) evidence since at least the late twentieth century.[57] Dilip Gaonkar notes that rhetoricians have begun to "show that the discursive practices of science, both internal and external, contain an unavoidable rhetorical component."[58] That empirical discourses are rhetorical, however, remains far from universally accepted. My reading of the majority opinion in *McCleskey* suggests that, although the justices in the majority firmly rejected the dissenters' rhetorical reading of Baldus's data, they also pointed to the rhetoricity of the social scientific evidence in question. Brennan's dissenting opinion, by contrast, embraced a rhetorical approach to social science as an appropriate mode of deliberation, creating a framework whereby judicial rhetoric could constitute the necessary proof of discrimination in its interpretation of the data.

The majority's decision hinged upon whether the Baldus study provided proof of racial discrimination. Justice Powell opened the majority opinion by stating these stakes clearly: "This case presents the question whether a complex statistical study that indicates a risk that racial considerations enter into capital sentencing determinations proves that petitioner McCleskey's capital sentence is unconstitutional under the Eighth or Fourteenth Amendment."[59] Powell thus set the opinion up to determine whether the social scientific evidence presented by McCleskey constituted proof. The majority would find the Baldus study valid, but not dispositive. As Michael Selmi puts it, for the majority "stating a claim of discrimination is one thing, while proving a claim is something altogether different."[60] The opinion accordingly constructed the social scientific evidence reflected in the Baldus study as sound statistical work that nevertheless did not constitute sufficient proof.[61] In an opinion that deflected the constitutive possibilities of judicial rhetoric, the majority set rigid standards for social scientific evidence to constitute proof.

In the majority's account, such evidence must be not only scientifically valid, but also particular to the case at hand.

Notably, the majority did not dispute Baldus's research or conclusions, but rather followed the Eleventh Circuit Court's decision and "assumed the validity of the study itself."[62] This was likely because the study was, according to observers in both law and social science, "the most comprehensive empirical record of racial patterns in the imposition of the death penalty that has ever been developed in this country, or that is likely to be developed."[63] The majority thus could not credibly argue that the Baldus study failed to constitute proof on the basis of some flaw in its methodology or data set. In fact, Powell's opinion approvingly described Baldus's work as "two sophisticated statistical studies" which Baldus had subjected to "extensive analysis," confirming its validity as social scientific evidence.[64] To argue that the work did not prove discrimination, then, the Court assessed proof as a matter of particularity.

Powell constructed specificity as a necessary component of social scientific proof. He wrote that to demonstrate a violation of the Equal Protection Clause, "McCleskey must prove that the decisionmakers in *his* case acted with discriminatory purpose."[65] Instead, Powell pointed out, McCleskey relied upon the Baldus study and did not cite specific discriminatory actions in his own trial. According to the majority, for social scientific evidence to constitute dispositive proof, it had to speak to the specific actors in the case. It was not enough to demonstrate an empirical pattern. McCleskey would have to apply that pattern to his own experience. In a footnote to this line, Powell quoted an expert who had testified for McCleskey's defense: "Models . . . talk about the effect on the average. They do not depict the experience of a single individual. . . . Whether in a given case that is the answer, it cannot be determined from statistics."[66] In other words, because social scientific data reflected general trends rather than

particular outcomes, evidence like the Baldus study could not constitute proof of discrimination in *any* given case. The majority, then, established particularity as a vital component of social scientific proof.

Later in the opinion, Powell applied the majority's standards for proof to constitutional law. He wrote that to evaluate McCleskey's case, the Court needed to assess the Baldus results for what they proved, and as Powell noted, "Even Professor Baldus does not contend that his statistics *prove* that race enters into any capital sentencing decisions or that race was a factor in McCleskey's particular case."[67] Rather, statistics could only show probability in general terms. Again, the absence of particularity in Baldus's study diminished its probative value. For the majority, statistical likelihood did not qualify as proof. Powell continued, "McCleskey asks us to accept the likelihood allegedly shown by the Baldus study as the constitutional measure of an unacceptable risk of racial prejudice influencing capital sentencing decisions. This we decline to do."[68] Powell extended the scientific metaphor to the court's task in judicial review, as he argued that the Baldus study did not qualify as the "constitutional measure" of possible racial prejudice. Even if this data demonstrated racial prejudice, Powell seemed to say, it did not do so in a way that could constitute "proof" for the purposes of the law. Paul S. Appelbaum notes that Powell here misinterpreted the data, because if the Baldus study was valid, as Powell assumed, then it demonstrated that the relationship between race and sentencing was "extraordinarily unlikely to have occurred by chance or to be explained by any combination of the many relevant, nonracial variables examined."[69] Accordingly, what Powell called the "likelihood allegedly shown by the Baldus study" would in fact meet most scientific standards for proof.[70] In declining to "accept the Baldus study as the constitutional measure of an unacceptable risk of racial prejudice," Powell rejected the epistemic force of the evidence.

To make this argument, Powell had to differentiate *McCleskey* from the circumstances of jury selection and Title VII employment discrimination, for which the Supreme Court had ruled that a criminal defendant did *not* need to prove "a pattern of discrimination in order to sustain a challenge."[71] That is, statistical evidence along the lines of the Baldus study had been accepted as sufficient "proof" of discrimination in the Court's own decisions regarding jury venire and Title VII claims.[72] The majority thus had to establish the difference in what constituted 'proof' for McCleskey's case. Powell wrote, "[T]he nature of the capital sentencing decision, and the relationship of the statistics to that decision, are fundamentally different from the corresponding elements in the venire-selection or Title VII cases."[73] Powell constructed social scientific proof of discrimination in the case of capital sentencing as qualitatively different from the role of such evidence in other instances.[74] Because the capital sentencing process is complex and involves multiple phases and decisionmakers, Powell declared,

> the application of an inference drawn from the general statistics to a specific decision in a trial and sentencing simply is not comparable to the application of an inference drawn from general statistics to a specific venire-selection or Title VII case. In those cases, the statistics relate to fewer entities, and fewer variables are relevant to the challenged decisions.[75]

Powell construed the capital sentencing process as uniquely multifaceted, such that what might qualify as social scientific proof of discrimination in other instances could not constitute that same proof for a capital defendant. Statistics could provide an inference in on case, but not the other.

Curiously, despite the majority's rigid empirical requirements for social scientific proof of discrimination, Powell at two points alluded to the rhetorical nature of statistical evidence. He

juxtaposed statistical evidence to rhetorical evidence as he further distinguished *McCleskey* from other discrimination cases: "Another important difference between the cases in which we have accepted statistics as proof of discriminatory intent and this case is that, in the venire-selection and title VII contexts, the decisionmaker has an opportunity to explain the statistical disparity."[76] That is, people who made a decision challenged as discriminatory (in line with statistical patterns) could, in other instances, argue the non-discriminatory reasons for their actions, while "the State has no practical opportunity to rebut the Baldus study."[77] Powell placed the social scientific findings in dialogic relation to other arguments: the "statistical disparity" constituted a form of evidence that could be "explained" or "rebutted," like any argument. In this passage Powell constructed the Baldus study as rhetoric, an argument that the State could counter if given the opportunity. As such, the opinion undermined its own standards for social scientific proof, since it placed the empirical and the rhetorical in direct conversation—pointing to a dialectic between the two. Furthermore, in a footnote describing Baldus's model, Powell wrote, "consideration of 20 further variables caused a significant drop in the statistical significance of race. In the [district] Court's view, this undermined the persuasiveness of the model that showed the greatest racial disparity."[78] By referring to the "persuasiveness" of the model, Powell evoked the rhetorical nature of social scientific data: he characterized the model as a form of discourse that could move its audience from one position to another, or convince the audience (in this case, the justices) that racial disparities had meaningful effects in capital sentencing. The majority opinion, then, did at brief moments leverage the rhetoricity of social scientific data, even as it purported to view the evidence in strictly empirical terms.

The rhetorical dimensions of social scientific evidence were highlighted and emphasized by Brennan's dissent, which granted the Court the constitutive power to shape the interpretation

of the data. The dissenters did not require Baldus's research to do all the work of proving discrimination by itself, but evaluated the *persuasive* force of the evidence. Specifically, Brennan evoked the logic of "good reasons," a core rhetorical principle, in his discussion of the evidence. Walter Fisher defined "good reasons" as "those elements that provide warrants for accepting or adhering to the advice fostered by any form of communication that can be considered rhetorical."[79] Josina M. Makau notes that this definition is "particularly appropriate in the Supreme Court rhetorical context," in which the Court must convince a composite audience, with varied expectations, that it has decided correctly.[80] Brennan's dissent evaluated the "good reasons" associated with the argument that McCleskey's case had been influenced by racial discrimination, and argued that the social scientific evidence *in combination with* other warrants provided a sound basis for deciding in McCleskey's favor. The minority viewed the Baldus study as one "good reason," one persuasive argument to be considered in its context among others. Brennan wrote, "Evaluation of McCleskey's evidence cannot rest solely on the numbers themselves. We must also ask whether the conclusion suggested by those numbers is consonant with our understanding of history and human experience."[81] Brennan's criteria evoked Fisher's concept of narrative fidelity, or whether a narrative "ring[s] true with the stories [the audience] know to be true in their lives."[82] For Brennan and the other dissenters, the empirical data did not need to be "persuasive" on its own (as in Powell's footnote), but might resonate, as in a rhetorical narrative, with what the justices knew to be true based on history and human experience. Brennan continued, "Georgia's legacy of a race-conscious criminal justice system, as well as this Court's own recognition of the persistent danger that racial attitudes may affect criminal proceedings, indicates that McCleskey's claim is not a fanciful product of mere statistical artifice."[83] The other contingencies considered by the justices in the minority

supported McCleskey's argument, and lent more weight to the empirical data. Brennan argued that even if the Baldus model was not persuasive by itself, an account of contextual factors, such as Georgia's history of racialized criminal punishment and the judicial precedent against racial discrimination, made the evidence convincing. Brennan also pointed to the constitutive force of the Court's rhetoric, as the "Court's own recognition" of racial problems in criminal law played a role in the judgment.

Brennan and the dissenters, unlike the majority, found this full contextual account sufficient to constitute proof. After detailing Georgia's history of racial animus in criminal justice, Brennan wrote, "History and its continuing legacy thus buttress the probative force of McCleskey's statistics. . . . The conclusions drawn from McCleskey's statistical evidence are therefore consistent with the lessons of social experience."[84] Again, Brennan's discussion of consistency with social experience evoked Fisher's argument that "good reasons" can be identified in part by whether a narrative fits within the audience's personal experience and worldview. That the dissenters accepted the "probative force" of the statistics as a result of their compatibility with social experience demonstrated that the minority evaluated the Baldus study, in context with social and historical experience, as proof of racial discrimination. Social scientific proof, then, emerged from a reading of data that also accounted for history and known experience, rather than from an expectation of data specific to the circumstances of the case, as the majority demanded. Brennan also highlighted the constitutive weight of the proof constructed by the decision: he wrote that the Court "rejects evidence, drawn from the most sophisticated capital sentencing analysis ever performed, that reveals that race more likely than not infects capital sentencing decisions. The Court's position converts a rebuttable presumption into a virtually conclusive one."[85] That is, because the majority declared that the Baldus study could

not prove discrimination in McCleskey's case, the opinion constructed a burden of proof nearly impossible to meet. In so doing, the Court turned presumption into fact. Brennan made explicit the constitutive effects of the Court's rhetoric, evaded by the majority.

Brennan contrasted his own rhetorical approach to the social scientific data with the rigid, mechanistic standards of the majority. He wrote, "The determination of the significance of his evidence is at its core an exercise in human moral judgment, not a mechanical statistical analysis."[86] For the minority, the Court's decision about how to assess the Baldus study (and McCleskey's claim more broadly) could not reflect only empirical, purportedly objective measures. The determination of whether racial discrimination influenced capital sentencing was rather, a "human moral judgment," in line with the functions of rhetoric. James F. Klumpp and Thomas A. Hollihan explain, "a society remakes its values in responding to problems and opportunities through rhetorical choice."[87] For such a judgment, social scientific data alone could not do the work necessary. Brennan continued, "It is true that every nuance of decision cannot be statistically captured, nor can any individual judgment be plumbed with absolute certainty."[88] Here, Brennan referenced the majority's argument that the Baldus study could not demonstrate discriminatory intent in the capital sentencing decisions that reflected racial disparity. Yet, Brennan argued, "the fact that we must always act without the illumination of complete knowledge cannot induce paralysis when we confront what is literally an issue of life and death."[89] These lines evoked the rhetorical concerns for contingency and uncertainty. In the *Rhetoric*, Aristotle established that public deliberation focuses on issues or situations that humans have the capacity to change, rather than those that cannot be altered—the *contingent* rather than the *necessary*.[90] Rhetoricians note that this principle requires that decisions be made in the face of uncertainty, or incomplete knowledge.[91] Brennan's argument, then, resonated with

a rhetorical approach to the social scientific evidence: although the data could not provide "complete knowledge" of the discriminatory dimensions of capital sentencing, the Court could not be "paralyzed" and had to make a decision. The dissenters chose to evaluate the evidence in its social and historical context and to consider the consequences of discrimination: capital punishment was an "issue of life and death." The stakes of the decision required a rhetorical assessment of the evidence that accounted for contingency and uncertainty, unlike the majority's anti-rhetorical call for dispositive confirmation of discriminatory intent.

The majority and dissenting opinions in *McCleskey* represented a negotiation over the constitutive qualities of social scientific evidence and judicial rhetoric. Brennan's opinion embraced a rhetorical reading of the social scientific evidence that granted the Court an epistemic role in shaping what the data *meant*. Although the majority rejected this reading, Powell's opinion also occasionally betrayed the ways in which such evidence had rhetorical dimensions. The majority's opinion itself had serious rhetorical implications for future capital cases, as it set an extremely high standard for a petitioner to prove discrimination—especially since the opinion accepted the facial validity of the Baldus study. In Mary Elizabeth Holland's words, the Court "conceded that this data was valid, but then proceeded to ignore the story it told."[92] Perhaps more precisely, the majority required the data to tell a more explicit story about McCleskey's individual case. As such, Selmi explains that the conclusion "was tantamount to suggesting that statistical analysis alone could not prove an individual claim of discrimination in the criminal context."[93] Other commentators have echoed the impossibly high burden of proof established by the majority and its ramifications for capital law.[94] The ideal social scientific proof constituted by the majority proved too stringent for petitioners to demonstrate that racial discrimination infected capital sentencing. This raises the question, of course, of what constitutes

discrimination. Thus, in order to understand the stakes of the *McCleskey* decision's rhetoric more fully, I turn now to the conception of racial discrimination articulated by the majority and minority decisions.

Constituting Racial Discrimination

In evaluating the social scientific evidence, the Court sought to determine whether McCleskey's death sentence had been affected by racial discrimination. The meaning of racial discrimination, then, was the second major constitutive force at work in the decision. In this section I argue that the distinct visions of racial discrimination articulated by the majority and dissenting opinions reflected different approaches to the constitutive power of judicial rhetoric. Powell's opinion for the majority constructed discrimination as a deliberate set of actions divorced from historical forces, while the dissenting opinions assessed discrimination as an historically inflected, systemic problem that devalued black lives. As the justices in the majority de-emphasized the South's history of racial discrimination in criminal justice, they rejected the Court's capacity to reshape that history. In the majority opinion's rhetorical disregard for the apparent disparities in value placed on black lives compared to white lives, the decision declined to reformulate that valuation. The dissenting justices, by contrast, acknowledged the devaluation of black lives reflected in the case, and argued for a judicial approach that would begin to correct for historical discrimination.

How the Court constitutes racial discrimination has significant implications for both the law and for the ways in which the law circulates. Josina M. Makau and David Lawrence remind us, "Supreme Court inventional strategies both reflect and help create cultural norms."[95] Judicial rhetoric on racial issues has proved particularly consequential, as laws and attitudes are continually reshaped. More specifically, Catherine Langford argues, "The legal framing of black

Americans influences the legal rights and protections with which they are afforded."[96] This extends to the framing of racial discrimination, which influences the ways in which particular governmental practices, and the discourses that constitute them, can be legitimized or challenged. Kenneth L. Schneyer writes that judges and justices "make decisions about people's lives, and in those decisions they create and perpetuate a way of talking about others."[97] This point is particularly salient in the context of discrimination cases, in which a justice is "faced overtly with the question of how to talk about a certain person with reference to other people."[98] Opinions in cases about discrimination inform the way we think and talk about what it means for one group of people to disempower others.

Although a complete rhetorical history outlining American legal and judicial rhetorics of discrimination is beyond the scope of this project, several considerations merit note. First, the Equal Protection Clause of the Fourteenth Amendment, which states that no state can deny to a person under its jurisdiction the equal protection of the laws, is the primary legal instrument by which citizens seek judicial relief from discrimination. Particularly since the early twentieth century, the Court has used the Clause frequently to strike down discriminatory legislation.[99] Second, a series of cases in the 1970s and 1980s began to place the burden to defendants to prove the elements of discrimination, notably including an intention on the part of governmental actors. As Langford explains, cases like *Milliken v. Bradley* and *Batson v. Kentucky* "shift[ed] the position of blacks from their status as a protected minority group to defenders of discrimination claims."[100] The *McCleskey* case, as we will see, reinforced this rhetorical move. Finally, judicial precedent "largely favors" a conception of discrimination that accounts for *any* role of race in decision-making, but the standards for what constitutes discrimination vary substantially by context.[101] Macher notes that the Court "has characterized racial discrimination

as 'especially pernicious in the administration of justice'" and also "recognized that discrimination now takes a more subtle form."[102] My discussion of the judicial rhetoric of discrimination is limited to the capital sentencing context at issue in *McCleskey*.

One major distinction between the majority and minority conceptions of racial discrimination in *McCleskey* lay in the treatment of the South's historical legacy of racism and racial violence, which many believed to be a central issue in the case. Writes Kirchmeier, McCleskey's arguments "had their foundations in the United States' history of racial discrimination connecting back to America's history of slavery and lynching, the latter of which was a practice used more in post–Civil War Georgia than any other state during the period."[103] The dissenting opinions in the case commented extensively on this history, concluding that Georgia's "legacy of a race-conscious criminal justice system" supported Baldus's conclusions about racial discrimination.[104] The majority opinion, by contrast, had little to say on the subject of this legacy; according to commentators like Mary Elizabeth Holland, the majority "virtually ignored evidence of historical racism in Georgia."[105]

The only explicit discussion of Georgia's history, which came in a footnote, created temporal distance between past and present. Powell declared that there was "no evidence . . . that the Georgia Legislature enacted the capital punishment statute to further a racially discriminatory purpose."[106] The footnote to this line read, "McCleskey relies on 'historical evidence' to support his claim of purposeful discrimination by the State. This evidence focuses on Georgia laws during and just after the Civil War. Of course, the 'historical background of the decision is one evidentiary source' for proof of intentional discrimination."[107] Powell conceded that the Supreme Court precedent on racial discrimination acknowledged historical forces. However, "unless historical evidence is reasonably contemporaneous with the challenged decision, it has little

probative value."[108] Again, Powell raised the standard of 'proof' for evidence of discrimination, here discounting historical evidence as a form of proof unless it conformed to some (unnamed) benchmark of recency. Powell concluded, "Although the history of racial discrimination in this country is undeniable, we cannot accept official actions taken long ago as evidence of current intent."[109] To the majority, historical discrimination in the state whose capital system was in question had little to do with the case at hand. Jasinski identifies the organization of time as a basic function of constitutive rhetoric. He writes that temporal experience in Western culture is "structured in terms of past, present, and future. But each of these general experiential structures . . . admit multiple constructions. For example, the past can be experienced as remote, irrelevant, inaccessible, or mysterious."[110] This construction of the past detached historical racism from current experience. Powell emphasized temporal distance between the forms of discrimination evident in the Civil War era and the racial disparities apparent in contemporary capital sentencing schemes.

Most commentators disagreed with Powell's rhetorical distancing of historical discrimination from contemporary practice. Many scholars have elucidated the continuities between post-Civil War lynching, in particular, and the death penalty as a mode of social control over black bodies.[111] Capital punishment has parallels to the use of lynching in its violent nature, its unique American history, and its geographic, racial, and economic patterns of practice.[112] Kirchmeier writes, "One might argue in some ways that legal executions—which rose sharply during the 1930s in many southern states as the number of lynchings dropped—replaced extralegal lynchings."[113] Given the continued racial imbalances in capital punishment practices, many contemporary discussions about the problems with the death penalty include an historical argument that traces execution practices back to lynching.[114]

Justice Brennan's dissent foregrounded the historical legacies that weighed upon the decision, and constructed discrimination as an historically inflected phenomenon. Brennan traced Georgia's history of racially disparate criminal punishment laws. He noted that the Supreme Court itself had "invalidated portions of the Georgia capital sentencing system three times over the past 15 years."[115] He acknowledged: "Citation of past practices does not justify the automatic condemnation of current ones. But it would be unrealistic to ignore the influence of history in assessing the plausible implications of McCleskey's evidence."[116] The American history of discrimination, particularly pernicious in Southern states like Georgia, influenced the dissenters' understanding of McCleskey's experience and evidence. Brennan wrote that despite recent efforts to eradicate discrimination from public life, "[W]e cannot pretend that in three decades we have completely escaped the grip of a historical legacy spanning centuries. Warren McCleskey's evidence confronts us with the subtle and persistent influence of the past."[117] Considered in the proper historical light, Brennan found McCleskey's evidence compelling. Brennan also noted that the evidence would be "disturbing . . . to a society that has formally repudiated racism," a reference to the "informal" or unintentional nature of the racism reflected in the case. Brennan concluded, "[W]e remain imprisoned by the past as long as we deny its influence in the present."[118] For Brennan, the present could not be separated from the past. In Jasinski's words, "Public practice and judgment can be thwarted when an enlarged view of time alienates individuals from the force of particular historical episodes."[119] Brennan rejected the majority's enlarged view of time, in favor of a judgment that acknowledged the force of relevant historical episodes.

Another facet of discrimination that differed between majority and minority was the role of intent. The *McCleskey* majority constructed racial discrimination as the product of intentional

decisions, such that the subtler structural devaluation of black lives did not constitute discrimination. The Baldus study had two major conclusions: one, that black defendants were slightly more likely to receive death sentences than whites. The more statistically significant finding, however, was that the race of the victim strongly predicted sentencing outcomes. That is, "Georgia prosecutors were more likely to seek a death sentence and Georgia juries were more likely to impose a death sentence in white-victim cases."[120] As Kennedy notes, observers outside the Court inferred from this finding "a devaluation of black victims: put bluntly, officials in Georgia '[place] a higher value on the lives of whites than blacks."[121] Similarly, Jeffrey Abramson writes that the majority downplayed the possibility "that an unconscious racism placing more value on white life than nonwhite life was playing a significant role in marking people for execution."[122] Notably, the drive to achieve recognition that "all black lives deserve humanity" has origins in the historical struggle for black freedom, and this particular appeal has recently circulated broadly in American public culture with the emergence of the Black Lives Matter movement.[123] Though the rhetoric of Black Lives Matter did not carry the requisite rhetorical resonance when *McCleskey* was decided, the Baldus study presented what Stephen Carter calls a "fundamental difficulty."[124] When faced with evidence that discrimination "might be responsible not only for the disproportionate execution of *murderers* who happen to be black, but for the inadequate protection of *murder victims* who happen to be black," the majority had to constitute discrimination as a function of conscious, deliberate actions rather than a systematic devaluation of black life.[125]

Accordingly, the majority opinion constructed intentionality as an essential component of discrimination. Powell wrote, "McCleskey would have to prove that the Georgia Legislature enacted or maintained the death penalty statute *because of* an anticipated discriminatory

effect."[126] In other words, to constitute discrimination, the laws must be created or extended with direct intent to induce racial disparities. Effects or outcomes that reflected racial animus, even systematically, did not qualify as discriminatory; it was not discrimination that a black defendant whose victim was white was twenty-two times more likely to receive the death penalty than if the victim had been black.[127] This startling statistic could only reflect discrimination if the Georgia Legislature deliberately designed it that way. In the majority's conception, prejudice had to reveal itself as intentional to constitute discrimination.

Disregard for the devaluation of black life also appeared in Powell's discussion of jury discretion. Powell declared that the "inherent lack of predictability of jury decisions does not justify their condemnation. On the contrary, it is the jury's function to make the difficult and uniquely human judgments that deify codification and that 'buil[d] discretion, equity, and flexibility into a legal system.'"[128] Powell extolled and prioritized the "uniquely human judgments" of jury discretion. But as commentators point out, the systematic devaluation of black life could be one of those human judgments that would influence juries' decisions. The data indicated that a jury was more likely to sentence a defendant to death for killing a white person than a black person. As Carter puts it, "When flexible juries use their discretion to impose the ultimate penalty, the lives of victims who happen to be black are simply worth less."[129] Powell, however, did not comment on such predispositions, but praised the "'qualities of human nature and varieties of human experience'" afforded by jury discretion.[130] The majority opinion, then, justified and thus replicated a system of prioritization that—regardless of intent—valued white lives above black lives.

The dissenting opinions, though they offered a broader conception of discrimination, did not strongly emphasize the devaluation of black lives. In Carter's words, this message was too

“stark” even for the dissenters, who “only hinted at the possibility that the true victims of the Georgia capital sentencing system are . . . the black people among those the criminal law is supposed to protect.”[131] Justice Brennan, however, did call attention to this dimension of discrimination at the outset of his opinion. He wrote that in an assessment of whether McCleskey was likely to receive a death sentence, “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.”[132] Because of the value placed on white lives by prosecutors and juries, the primary factor predicting McCleskey’s sentence was the race of the victim. Brennan argued that if McCleskey asked his lawyer whether he would receive the death penalty, “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.”[133] To Brennan, the significance of the victim’s race as a variable in Baldus’s findings had enormous import for the case. He cited the statistics specifically: “6 of every 11 defendants convicted of killing a white person would not have received the death penalty if their victims had been black.”[134] In comparison, “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.”[135] The race of the victim had meaningful statistical significance for the sentencing outcome in McCleskey’s case. In the hypothetical discussion between McCleskey and his lawyer, “the assessment would not be 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.”[136] In Brennan’s view, “McCleskey could not fail to grasp [the] essential narrative line” that his race, in combination with his victim’s race, all but guaranteed that he would be sentenced to death.[137] Though Brennan never made the explicit point that the data suggested a collective valuation of white lives above

black lives, he gestured to the ways in which Baldus's data made clear that discrimination manifested itself not only in higher rates of executions for black defendants, but also in lower rates for black victims. Thus, he created a broader picture of discrimination than that offered by the majority opinions.

The majority's rhetoric of discrimination was widely condemned. Kennedy writes that the rhetoric of the opinion "shows an egregious disregard for the sensibilities of black Americans" and "displays a complacency disturbingly reminiscent of the Court's race relations opinions around the turn of the century."[138] Carter characterizes the Court's response to McCleskey's claim of discrimination as "a labored 'So what?'"[139] Similarly, Abramson writes that the Court "shrugged off the bad news as if it were to be expected," and Holland argues that the Court "seemed unconcerned" about discrimination.[140] Powell constructed racial discrimination in ways that allowed the majority to reject McCleskey's arguments, but that also outraged many close observers of the Court's rhetoric.

Such criticism notwithstanding, the *McCleskey* decision and its rhetorical formulations of racial discrimination have had lasting implications. Gross writes, "*McCleskey* was a turning point in the constitutional regulation of the death penalty in the United States, and it has influenced our collective view of race in the criminal-justice system generally."[141] Specifically, by making the argument that racial discrimination in Georgia's death penalty administration could not be proven and thus perhaps did not exist, the decision problematized, and rendered less viable, possible remedies.[142] The majority's construction of racial discrimination as intentional and divorced from institutional history had material consequences for those seeking relief.

Conclusion

I have argued that the opinions in *McCleskey v. Kemp* reflected a negotiation over the constitutive functions of judicial rhetoric, centered on the *topoi* of social scientific evidence and racial discrimination. The majority opinion also contained a section that directly addressed the possible constitutive effects of a contrary ruling. That is, if the Court validated McCleskey's claim of discrimination, it "would have indicted the entire Georgia death penalty scheme."[143] If the Court rendered Georgia's capital system unconstitutional because of racial discrimination, similar arguments could be made against other states' schemes and other forms of criminal punishment where racial disparities existed. Some argue that a decision in McCleskey's favor would have opened the door for death penalty abolition.[144] The Court expressed apprehension over the generative power of its own rhetoric.[145]

Powell mentioned the possible consequences of a ruling for McCleskey as a final, "additional concern."[146] He wrote that McCleskey's claim, "taken to its logical conclusion, throws into serious question the principles that underlie our entire criminal justice system."[147] More specifically, "if we accepted McCleskey's claim that racial bias has impermissibly tainted the capital sentencing decision, we could soon be faced with similar claims as to other types of penalty."[148] Powell declined to cast doubt upon the integrity of the American criminal justice system writ large. He suggested a similar concern about the possible implications of a contrary decision vis-á-vis "unexplained discrepancies that correlate to membership in other minority groups, and even to gender."[149] The majority's decision marked a refusal to construct Georgia's death penalty apparatus in ways that could reshape death penalty administration more broadly. Put differently, Powell expressed the majority's disinterest in re-constituting how we talk about other people.[150]

In their dissents, both Brennan and Stevens referenced this hesitance. Brennan cited the Court's "fear that recognition of McCleskey's claim would open the door to widespread challenges to all aspects of criminal sentencing. . . . Taken on its face, such a statement seems to suggest a fear of too much justice."[151] Brennan pointed to the Court's capacity to reshape the law and broaden the scope of what constituted discrimination, and associated that power with justice itself. Similarly, Stevens wrote that the majority's decision "appears to be based on a fear that the acceptance of McCleskey's claim would sound the death knell for capital punishment in Georgia."[152] Stevens argued, along with other analysts, that this fear was unfounded, that the decision could be made in ways that preserved Georgia's capital scheme and differentiated among forms and outcomes of discrimination.[153] Both Brennan and Stevens saw the majority opinion as one that rejected the Court's own rhetorical capacities.

Although the majority evaded the constitutive nature of judicial rhetoric, the decision had both instrumental and constitutive effects that reverberated throughout the system of capital punishment. Instrumentally, as Baldus and Woodworth note, *McCleskey* "entirely removed the issue of race from the federal courts."[154] The majority's stringent standards for social scientific evidence and its articulation of discrimination as ahistorical and intentional made the racial disparities in death penalty sentencing nearly impossible to challenge. The decision also "crush[ed] the last major assault on the overall constitutionality of the death penalty in this country."[155] The Court had previously left open the door for charges of racial discrimination to invalidate capital sentencing schemes; *McCleskey* effectively dismantled such possibilities.

The constitutive effects of the decision continue to matter. In its narrow conception of legitimate social scientific evidence, the decision "narrowed the use of social science statistics in death penalty trials and appeals."[156] In the "fears, distrust, and misunderstandings associated with

statistical evidence" reflected in the opinion, the majority undermined the credibility of social science in the courtroom.[157] Moreover, the decision constructed a conception of discrimination that concealed its pervasiveness and its effects. Baldus writes that in retrospect, "it is clear that *McCleskey* has significantly legitimated tolerance for race discrimination" by reinforcing the impression that race discrimination was not a serious or actionable problem.[158] The articulation of discrimination as purposeful "obscure[d] the subtle manner in which race influences death penalty decision making."[159] The decision also provided the rhetorical justifications for lower courts to dismiss claims of discrimination, and has been cited in exactly this manner.[160] Capital defendants have faced enormous difficulties in demonstrating racial discrimination.

The decision also had rhetorical implications that proved more favorable for those interested in racial progress. Writes Kirchmeier, the case "helped expose the connections among race, lynching, and the death penalty."[161] Baldus's study, and its treatment by both the majority and minority received wide attention. Gross argues that race has become a powerful issue in the controversy over the death penalty because "everyone who cares *knows* that race plays a major role in determining who gets sentenced to death. And the single most important reason that 'everyone knows' this is what happened in *McCleskey*."[162] As a result, some groups used the decision to rally support for death penalty abolition among minority organizations.[163] Some even argued that following *McCleskey*, the Supreme Court became "more defensive about its decisions regarding race in capital punishment, at least for a short time."[164] In 1987, the Court issued more relief to black defendants in capital cases involving white victims than usual. However, McCleskey's ruling has stayed in force, with all the attendant judicial implications noted previously.

Almost two decades later, *McCleskey* retains notoriety. The decision "remains one of the most controversial decisions in the history of the Supreme Court" and garners comparisons to other infamous, widely repudiated decisions related to race, including *Dred Scott v. Sanford, Plessy v. Ferguson*, and *Korematsu v. United States*.[165] Even Powell has renounced the opinion: When asked in 1990 whether he would change his vote in any case, Powell cited *McCleskey*, and said that he "would vote the other way in any capital case" because he had "come to think that capital punishment should be abolished."[166]

Powell's change of heart is startling. His comment suggests that he came to see the Court's rhetorical capacities in a different light, only a few years after *McCleskey*. In this chapter, I hope to have illustrated the *McCleskey* decision's significance, not only as a major ruling in the history of the Court's death penalty jurisprudence, but as a negotiation over the constitutive force of judicial rhetoric. As White writes of constitutive rhetoric, "The central idea is not that of goods, but of voices and relations: what voices does the law allow to be heard, what relations does it establish among them? With what voice, or voices, does the law itself speak?"[167] The *McCleskey* decision reflects a fundamental disagreement over the Court's role in shaping those voices and relations.

The *topoi* in *McCleskey* strongly connected to themes that also dominated the *Furman* decision. Like *Furman*, the Court in *McCleskey* wrestled with the force of history (as they negotiated the legacies of racism within death penalty administration) and the nature of evidence (as they wrangled over the Baldus study and its implications). The tensions of the Court's first landmark death penalty decision, then, resonated again in the most significant capital punishment case of the 1980s. Beyond the basic question of whether the death penalty should remain

constitutional, these capital cases have revealed negotiations over the basic interpretive functions performed by the Court.

My analysis of *McCleskey* motivates a possible reconsideration of constitutive rhetoric, one that accounts for the weight of history. Rhetorical scholarship, exemplified by Charland's work on the "Peuple Quebeçois," often discusses rhetoric's constitutive function in terms of specific moments of interpellation that call particular identities into existence.[168] This model might miss the ways in which rhetorical formations accumulate constitutive force over time, and performs this function not only toward specific identities but also toward the relations among those identities. That is, the *McCleskey* decision reinforced a conception of racial discrimination that devalues black lives, and legitimized racially disparate encounters with the criminal justice system. This form of discrimination did not come into existence with *McCleskey*, but the decision intensified its force even as the majority rejected these constitutive effects. Future rhetorical work should take seriously the accumulation of constitutive rhetorics over time and explore how such discourses shape interactions as well as identities.

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[1] *McCleskey v. Kemp*, 481 US 279 (1987).

[2] Vada Berger et al., "Too Much Justice: A Legislative Reponse to McCleskey v. Kemp," *Harvard Civil Rights-Civil Liberties Law Review* 24 (1989): 437-38.

[3] Sheri L. Gronhovd, "Social Science Statistics in the Courtroom: The Debate Resurfaces in McCleskey v. Kemp," *Notre Dame Law Review* 62 (1986): 688.

[4] Kirchmeier, *Imprisoned by the Past: Warren McCleskey and the American Death Penalty*, 162.

[5] Haines, *Against Capital Punishment: The Anti-Death Penalty Movement in America, 1972-1994*, 76.

[6] Anthony G. Amsterdam, "Commentary: Race and the Death Penalty," *Criminal Justice Ethics* 7, no. 1 (1988): 84.

[7] Gronhovd, "Social Science Statistics in the Courtroom: The Debate Resurfaces in McCleskey v. Kemp," 689.

[8] Randall L. Kennedy, *Race, Crime, and the Law* (New York: Pantheon Books, 1997); Michael Selmi, "Proving Intentional Discrimination: The Reality of Supreme Court Rhetoric," *Georgetown Law Journal* 86 (1997).

[9] Quoted in Kirchmeier, *Imprisoned by the Past: Warren McCleskey and the American Death Penalty*, 162.

[10] Quoted in Randall L. Kennedy, "McCleskey v. Kemp: Race, Capital Punishment, and the Supreme Court," *Harvard Law Review* 101, no. 7 (1988): 1389.

[11] Ibid.

[12] John Lyne, "Rhetorics of Inquiry," *Quarterly Journal of Speech* 71 (1985): 68.

[13] Maurice Charland, "Constitutive Rhetoric: The Case of the Peuple Québécois," ibid.73, no. 2 (1987).

[14] See, e.g., James Jasinski and Jennifer R. Mercieca, "Analyzing Constitutive Rhetorics: The Virginia and Kentucky Resolutions and the "Principles of '98"," in *The Handbook of Rhetoric and Public Address*, ed. Shawn J. Parry-Giles and J. Michael Hogan (Chichester, West Sussex, U.K.; Malden, MA: Wiley-Blackwell, 2010); Robert L. Scott, "On Viewing Rhetoric as Epistemic," *Central States Speech Journal* 18 (1967).

[15] James Jasinski, "A Constitutive Framework for Rhetorical Historiography: Toward an Understanding of the Discursive (Re)Constitution of 'Constitution' in the Federalist Papers," in

Doing Rhetorical History: Concepts and Cases, ed. Kathleen J. Turner (Tuscaloosa, AL: The University of Alabama Press, 1998), 73.

[16] Ibid., 74.

[17] Michael C. Leff and Ebony A. Utley, "Instrumental and Constitutive Rhetoric in Martin Luther King Jr.'S" Letter from Birmingham Jail"," *Rhetoric & Public Affairs* 7, no. 1 (2004).

[18] James Boyd White, "Law as Rhetoric, Rhetoric as Law: The Arts of Cultural and Communal Life," *The University of Chicago Law Review* 52, no. 3 (1985): 693.

[19] See alsoHasian, *Legal Memories and Amnesias in America's Rhetorical Culture*.

[20] James Boyd White, *Heracles' Bow: Essays on the Rhetoric and Poetics of Law*, Rhetoric of the Human Sciences (Madison, WI: University of Wisconsin Press, 1985), 71.

[21] Jasinski, "A Constitutive Framework for Rhetorical Historiography: Toward an Understanding of the Discursive (Re)Constitution of 'Constitution' in the Federalist Papers," 78.

[22] Banner, *The Death Penalty*, 267.

[23] Mandery, *A Wild Justice*, 263.

[24] Banner, *The Death Penalty*, 271.

[25] Kirchmeier, *Imprisoned by the Past: Warren McCleskey and the American Death Penalty*, 141.

[26] Gross, "David Baldus and the Legacy of McCleskey v. Kemp."

[27] Kirchmeier, *Imprisoned by the Past: Warren McCleskey and the American Death Penalty*, 141.

[28] Haines, *Against Capital Punishment: The Anti-Death Penalty Movement in America, 1972-1994*, 76.

[29] Kennedy, "McCleskey v. Kemp: Race, Capital Punishment, and the Supreme Court," 1388.

[30] *Race, Crime, and the Law*, 328.

[31] David C. Baldus, Charles Pulaski, and George Woodworth, "Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience," *The Journal of Criminal Law & Criminology* 74, no. 3 (1983).

[32] Gross, "David Baldus and the Legacy of McCleskey v. Kemp," 1912.

[33] Baldus, Pulaski, and Woodworth, "Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience."

[34] Kirchmeier, *Imprisoned by the Past: Warren McCleskey and the American Death Penalty*, 142.

[35] Ibid., 143.

[36] Mary Elizabeth Holland, "McCleskey v. Kemp: Racism and the Death Penalty," *Connecticut Law Review* 20 (1987).

[37] Ibid.

[38] David J. Macher, "McCleskey v. Kemp: Race, Statistics and the Death Penalty," *Western State University Law Review* 15 (1987).

[39] Kirchmeier, *Imprisoned by the Past: Warren McCleskey and the American Death Penalty*.

[40] Gross, "David Baldus and the Legacy of McCleskey v. Kemp," 1909.

[41] Carol S. Steiker and Jordan M. Steiker, "Judicial Developments in Capital Punishment Law," in *America's Experiment with Capital Punishment: Reflections on the Past, Present, and Future of the Ultimate Penal Sanction*, ed. James R. Acker, Robert M. Bohm, and Charles S. Lanier (Durham, NC: Carolina Academic Press, 2003), 58.

[42] Haines, *Against Capital Punishment: The Anti-Death Penalty Movement in America, 1972-1994*, 74.

[43] Weisberg, "Deregulating Death," 305.

[44] Haines, *Against Capital Punishment: The Anti-Death Penalty Movement in America, 1972-1994*.

[45] Ibid., 75.

[46] Kirchmeier, *Imprisoned by the Past: Warren McCleskey and the American Death Penalty*.

[47] Ibid., 150.

[48] William N. Elwood, *Rhetoric in the War on Drugs : The Triumphs and Tragedies of Public Relations* (Westport, CT: Praeger, 1994).

[49] Hans Zeisel and Alec M. Gallup, "Death Penalty Sentiment in the United States," *Journal of Quantitative Criminology* 5, no. 3 (1989).

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[51] David C. Baldus and George Woodworth, "Race Discrimination and the Legitimacy of Capital Punishment: Reflections on the Interaction of Fact and Perception," *Depaul Law Review* 53 (2003).

[52] Carol S. Steiker, "Counter-Revolution in Constitutional Criminal Procedure? Two Audiences, Two Answers," *Michigan Law Review* 94, no. 8 (1996).

[53] Paul S. Appelbaum, "The Empirical Jurisprudence of the United States Supreme Court," *American Journal of Law and Medicine* 13, no. 2-3 (1987): 335.

[54] Kirchmeier, *Imprisoned by the Past: Warren McCleskey and the American Death Penalty*; Selmi, "Proving Intentional Discrimination: The Reality of Supreme Court Rhetoric."

[55] Macher, "McCleskey v. Kemp: Race, Statistics and the Death Penalty," 214.

[56] Marcus Paroske, "Overcoming Burdens of Proof in Science Regulation: Ephedra and the Fda," *Rhetoric & Public Affairs* 15, no. 3 (2012): 472.

[57] See, e.g., John S. Nelson, Allan Megill, and Deirdre N. McCloskey, *The Rhetoric of the Human Sciences: Language and Argument in Scholarship and Public Affairs* (Madison, WI: University of Wisconsin Press, 1987); Herbert W. Simons, *The Rhetorical Turn: Invention and Persuasion in the Conduct of Inquiry* (Chicago, IL: University of Chicago Press, 1990).

[58] Dilip Parameshwar Gaonkar, "The Idea of Rhetoric in the Rhetoric of Science," *The Southern Communication Journal* 58, no. 4 (Summer 1993): 267.

[59] *McCleskey v. Kemp*, 282-83.

[60] Selmi, "Proving Intentional Discrimination: The Reality of Supreme Court Rhetoric," 324.

[61] Samuel R. Gross, "Race and Death: The Judicial Evaluation of Evidence of Discrimination in Capital Sentencing," *University of California Davis Law Review* 18 (1984): 1275-76.

[62] *McCleskey v. Kemp*, 289.

[63] "Race and Death: The Judicial Evaluation of Evidence of Discrimination in Capital Sentencing," 1275-76.

[64] *McCleskey v. Kemp*, 286,87.

[65] Ibid., 293.

[66] Ibid., n11.

[67] Ibid., 308.

[68] Ibid., 309.

[69] Appelbaum, "The Empirical Jurisprudence of the United States Supreme Court," 343.

[70] Ibid.

[71] Selmi, "Proving Intentional Discrimination: The Reality of Supreme Court Rhetoric," 322.

[72] Macher, "McCleskey v. Kemp: Race, Statistics and the Death Penalty."

[73] *McCleskey v. Kemp*, 294.

[74] That "death is different" has been a recurring trope in Supreme Court decisions on the death penalty. Here, however, Powell drew upon the unique nature of capital punishment in a markedly different way than its usual application. See Kennedy, "McCleskey v. Kemp: Race, Capital Punishment, and the Supreme Court.".

[75] *McCleskey v. Kemp*, 295.

[76] Ibid., 296.

[77] Ibid.

[78] Ibid., n9.

[79] Walter R. Fisher, "Toward a Logic of Good Reasons," *Quarterly Journal of Speech* 64, no. 4 (1978): 378.

[80] Josina M. Makau, "The Supreme Court and Reasonableness," ibid.70 (1984): 394n16.

[81] *McCleskey v. Kemp*, 329.

[82] Fisher, "Narration as a Human Communication Paradigm: The Case of Public Moral Argument," 8.

[83] *McCleskey v. Kemp*, 329.

[84] Ibid., 334.

[85] Ibid., 337.

[86] Ibid., 335.

[87] James F. Klumpp and Thomas A. Hollihan, "Rhetorical Criticism as Moral Action," *Quarterly Journal of Speech* 75, no. 1 (1989): 90.

[88] *McCleskey v. Kemp*, 335.

[89] Ibid.

[90] Aristotle, *On Rhetoric : A Theory of Civic Discourse*, trans. George A. Kennedy, 2nd ed. ed. (New York: Oxford University Press, 2007).

[91] See, e.g., Thomas B. Farrell, "Philosophy against Rhetoric in Aristotle," *Philosophy & Rhetoric* 28, no. 3 (1995); Scott, "On Viewing Rhetoric as Epistemic."

[92] Holland, "McCleskey v. Kemp: Racism and the Death Penalty," 1070.

[93] Selmi, "Proving Intentional Discrimination: The Reality of Supreme Court Rhetoric," 320.

[94] Gronhovd, "Social Science Statistics in the Courtroom: The Debate Resurfaces in McCleskey v. Kemp."; Gross, "David Baldus and the Legacy of McCleskey v. Kemp."; Holland, "McCleskey v. Kemp: Racism and the Death Penalty."

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[96] Catherine L. Langford, "A Politics of Erasure: Race and Color-Blind Rhetoric in Supreme Court Opinions," in *Alta Conference on Argumentation* (National Communication Association, 2010), 290.

[97] Kenneth L. Schneyer, "Talking About Judges, Talking About Women: Constitutive Rhetoric in the Johnson Controls Case," *American Business Law Journal* 31, no. 1 (1993): 117.

[98] Ibid.

[99] Joseph Tussman and Jacobus tenBroek, "The Equal Protection of the Laws," *California Law Review* 37, no. 3 (1949).

[100] Langford, "A Politics of Erasure: Race and Color-Blind Rhetoric in Supreme Court Opinions," 291.

[101] Kennedy, *Race, Crime, and the Law*, 149.

[102] Macher, "McCleskey v. Kemp: Race, Statistics and the Death Penalty," 192` citing Rose v. Mitchell, 443 U.S. 545, 55 (1979).

[103] Kirchmeier, *Imprisoned by the Past: Warren McCleskey and the American Death Penalty*, 119.

[104] *McCleskey v. Kemp*, 329.

[105] Holland, "McCleskey v. Kemp: Racism and the Death Penalty," 1061.

[106] *McCleskey v. Kemp*, 298.

[107] Ibid., n20.

[108] Ibid.

[109] Ibid.

[110] Jasinski, "A Constitutive Framework for Rhetorical Historiography: Toward an Understanding of the Discursive (Re)Constitution of 'Constitution' in the Federalist Papers," 78.

[111] See, e.g., Stephen B. Bright, "Discrimination, Death and Denial: The Tolerance of Racial Discrimination in Infliction of the Death Penalty," *Santa Clara L. Rev.* 35 (1994); Jesse Jackson and Bruce Shapiro, *Legal Lynching: The Death Penalty and America's Future* (Anchor, 2003); Charles J. Ogletree Jr. and Austin Sarat, *From Lynch Mobs to the Killing State: Race and the Death Penalty in America* (NYU Press, 2006).

[112] Kirchmeier, *Imprisoned by the Past: Warren McCleskey and the American Death Penalty*, 136.

[113] Ibid.

[114] Banner, *The Death Penalty*; Bedau, *The Death Penalty in America: Current Controversies*.

[115] *McCleskey v. Kemp*, 330.

[116] Ibid., 332.

[117] Ibid., 344.

[118] Ibid.

[119] James Jasinski, "Rhetoric and Judgment in the Constitutional Ratification Debate of 1787–1788: An Exploration in the Relationship between Theory and Critical Practice," *Quarterly Journal of Speech* 78, no. 2 (1992): 213.

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[124] Stephen L. Carter, "When Victims Happen to Be Black," *The Yale Law Journal* 97, no. 3 (1988): 443.

[125] Ibid.

[126] *McCleskey v. Kemp*, 298.

[127] "When Victims Happen to Be Black."

[128] *McCleskey v. Kemp*, 311, citing H. Kalven & H. Zeisel, The American Jury 498 (1966).

[129] "When Victims Happen to Be Black," 444.

[130] *McCleskey v. Kemp*, 311, citing Peters v. Kiff, 407 U.S. 93, 503 (1972).

[131] "When Victims Happen to Be Black," 444-45.

[132] *McCleskey v. Kemp*, 321.

[133] Ibid.

[134] Ibid.

[135] Ibid.

[136] Ibid.

[137] Ibid.

[138] Kennedy, "McCleskey v. Kemp: Race, Capital Punishment, and the Supreme Court," 1417, 18.

[139] Carter, "When Victims Happen to Be Black," 441.

[140] Abramson, "Death-Is-Different Jurisprudence and the Role of the Capital Jury," 139; Holland, "McCleskey v. Kemp: Racism and the Death Penalty," 1051.

[141] Gross, "David Baldus and the Legacy of McCleskey v. Kemp," 1907.

[142] Kennedy, "McCleskey v. Kemp: Race, Capital Punishment, and the Supreme Court," 1416.

[143] Selmi, "Proving Intentional Discrimination: The Reality of Supreme Court Rhetoric," 323.

[144] Macher, "McCleskey v. Kemp: Race, Statistics and the Death Penalty."

[145] Kennedy, "McCleskey v. Kemp: Race, Capital Punishment, and the Supreme Court," 1413.

[146] *McCleskey v. Kemp*, 315.

[147] Ibid.

[148] Ibid., 315-16.

[149] Ibid., 317.

[150] Schneyer, "Talking About Judges, Talking About Women: Constitutive Rhetoric in the Johnson Controls Case."

[151] *McCleskey v. Kemp*, 339.

[152] Ibid., 367.

[153] Macher, "McCleskey v. Kemp: Race, Statistics and the Death Penalty."

[154] Baldus and Woodworth, "Race Discrimination and the Legitimacy of Capital Punishment: Reflections on the Interaction of Fact and Perception," 1439.

[155] Cited in Macher, "McCleskey v. Kemp: Race, Statistics and the Death Penalty."

[156] Gronhovd, "Social Science Statistics in the Courtroom: The Debate Resurfaces in McCleskey v. Kemp," 689.

[157] Ibid., 711.

[158] Baldus and Woodworth, "Race Discrimination and the Legitimacy of Capital Punishment: Reflections on the Interaction of Fact and Perception," 1438.

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[161] Kirchmeier, *Imprisoned by the Past: Warren McCleskey and the American Death Penalty*, 292.

[162] Gross, "David Baldus and the Legacy of McCleskey v. Kemp," 1922-23.

[163] Haines, *Against Capital Punishment: The Anti-Death Penalty Movement in America, 1972-1994*.

[164] Kirchmeier, *Imprisoned by the Past: Warren McCleskey and the American Death Penalty*, 163.

[165] Gross, "David Baldus and the Legacy of McCleskey v. Kemp," 1917-18.

[166] John Calvin Jeffries, *Justice Lewis F. Powell, Jr.* (New York, NY: C. Scribner's Sons, 1994), 451.

[167] White, *Heracles' Bow: Essays on the Rhetoric and Poetics of Law*, 42.

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CHAPTER 4

COUNTERING THE "CULTURAL SCRIPT OF JUDICIAL DISPASSION":[1] *PAYNE V. TENNESSEE* AND *CALLINS V. COLLINS*

Introduction

After the *McCleskey* decision, the American death penalty seemed unstoppable. The *McCleskey* ruling helped entrench capital punishment's legitimacy in public culture, and it all but erased the belief that the Supreme Court would play a significant role in death penalty abolition. Jeffrey Kirchmeier writes that anti-death penalty activists "realized that the Supreme Court would not end the American death penalty. . . . [O]ut of the ashes of *McCleskey v. Kemp*, abolitionists knew they had to re-energize and focus their energy elsewhere."[2] Accordingly, activists directed their efforts to state legislatures, but found limited success due to the death penalty's public and political popularity. Thus, capital punishment retained its place in the American punishment landscape, and the Court seemed to have moved out of the spotlight as a locus of the debate.

An interlude in the early 1990s, however, brought the Court's death penalty decisions back into focus as they animated a dimension of capital punishment jurisprudence that had not previously occupied a place in the national conversation: emotion. First, the Supreme Court abruptly reversed itself in a 1991 decision that sanctioned the introduction of victim impact statements in capital trials, only four years after ruling such statements unconstitutional. Then, a passionate dissent from a denial of certiorari in 1994's *Callins v. Collins* attracted national

attention. Both cases raised questions about the role of emotional argument in decisionmaking over capital punishment, though the opinions channeled such emotion toward different figures. Specifically, the majority opinions in *Payne* validated the emotional undertones of disgust, vengeance, and sympathy for the victims, while Blackmun's dissent in *Callins* focused on compassion for the defendant.

In this chapter, I argue that the opinions in *Payne v. Tennessee* and *Callins v. Collins* reflected rhetorical negotiations over emotionality in the Court's death penalty jurisprudence. The Court's rhetoric in *Payne* legitimized emotional argument in capital trials, but marshaled it exclusively in support of those affected by the crime. In contrast, Blackmun's emotionality in the *Callins* dissent called attention to the inevitability and necessity of judicial emotion throughout the death penalty decision-making process, and called for compassion toward the capital defendant. To make this case, I first articulate the historical context for the decisions, highlighting the late twentieth-century rise of the victims' rights movement and the Court's initial decisions on the use of victim impact evidence in capital trials. I then situate my argument within the scholarship on emotion and judicial rhetoric. Next, through a close reading of the opinions in *Payne* and *Callins*, I argue the following: First, that the *Payne* decision on victim impact evidence validated the salience of emotion in capital trials, though the majority opinions de-emphasized this dimension of the ruling as they referred to the emotional qualities of victim impact evidence in veiled terms. Second, in *Callins,* Blackmun made the case for compassion as a crucial corrective to the inevitable emotional dilemmas confronted in capital punishment jurisprudence. Finally, this chapter considers the significance of my reading for the study of emotion in legal rhetoric and for the broader rhetorical history of the Court's capital jurisprudence.

Context: From *McCleskey* to *Payne* and *Callins*

The decision in *Payne* marked what Austin Sarat calls "the high tide of the victims' rights movement."[3] Sarat describes the impetus for this movement as a "tide of resentment . . . rising against a system of public justice which allegedly appropriates and then silences the voice of the victim."[4] Though scholars agree that the movement's origins are difficult to pin down, its emergence can be pinpointed roughly to the 1960s, and the cause gained steam in the subsequent decades.[5] Advocates argued that, like other groups who fought for increased societal recognition in the 1960s and 1970s, the victims' movement "coalesced into a vibrant force, one to be reckoned with by the legislative, executive, and judicial branches of every level of government."[6] Proponents sought to increase victims' "participation, protection, and privacy" in American criminal law, demanding that "the personal interests of the victim be considered within the criminal justice system."[7] The movement appealed to public anxiety over high crime rates and corresponding concerns that the criminal justice system failed to account for victims' interests.[8]

The movement also emerged in concert with a broader shift in thinking about criminal punishment. Lynne Henderson notes that the 1980s saw a "revival of interest in retributivist theories of justice" in which "philosophers began to shift to arguments that vengeance and hatred were proper grounds for punishment."[9] These arguments rested upon the notion that a criminal offender deserved punishment in order to remedy the social ills inflicted by the crime, including the pain and suffering incurred by the victim. This model resembles the American system of criminal justice in the colonial era, in which the victims of crime sought private retribution against the offender.[10] Writes Abrahamson, "The method for avenging a harm evolved from

blood feuds to private and then public prosecution, and from compensation to the victim to punishment and rehabilitation of the offender."[11] The emphasis on rehabilitation in criminal punishment, dominant throughout the late nineteenth and early twentieth centuries, gave way to retributivist ideologies as public fears of crime and interest in victims' rights intensified.[12]

Retributivism has an inherent emotional dimension. David Garland notes that the re-emergence of retributivist principles in the discourses surrounding criminal punishment involved "changes in the emotional tone of crime policy."[13] In a retributive model, punishment constitutes in part an expression of the emotions engendered by the crime, such as anger and fear.[14] The victims' rights movement, which channeled retributivist sentiments, drew upon this emotional reservoir. As Elayne Rapping writes, the movement "depends on sentimental, emotionally loaded images and narratives to influence our common understandings of and attitudes about criminal justice." The emotions provoked by certain crimes provided a basis upon which to advocate for victims.[15]

By the time of the *Payne* decision, victims' rights advocates had achieved many political victories. In 1982, the United States Congress passed a Victim and Witness Protection Act, which established compensation funds for victims to receive remuneration from costs incurred by crime. The Act also required the use of victim impact statements in federal pre-sentence reports. Many states followed suit with similar legislation.[16] President Ronald Reagan created a Task Force on Victims of Crime to study victims' issues in criminal justice, and in 1985, the Task Force issued a recommendation for a constitutional amendment recognizing victims' rights.[17] Organizations and groups devoted to advocating for crime victims proliferated at both the national and local level. George H.W. Bush, following the lead of his predecessors, declared a "National Crime Victims' Rights Week."[18]

Within the broader context of a return to retributivism in the 1980s and 1990s, the death penalty experienced "a renaissance of sorts."[19] Capital punishment had become "a mantra of politicians and a rallying cry of the electorate."[20] Most politicians running for office publicly embraced the death penalty. Public support for the death penalty was at its peak, with 80 percent of poll respondents favoring capital punishment for individuals convicted of murder.[21] Thirty-eight states, the federal government, and the United States military held capital statutes, and the trend was "expansive," as several states reintroduced or broadened their capital laws.[22] Because of the death penalty's political popularity, legislatures participated actively in shaping the laws surrounding its use, with a host of statutes governing the "aggravating" factors that justified a death sentence for particular crimes. However, Franklin E. Zimring notes, over the course of the 1980s, actual executions became concentrated in a handful of (mostly Southern) states, "a self-selected sample of jurisdictions with long histories of high levels of executions."[23] Twenty-three of the states retaining the death penalty did not carry out an execution in the 1980s. On the other hand, some states restored their capital statutes in the context of heightened fear of crime.[24]

Amidst the death penalty's renaissance, the Supreme Court retreated from the role of supervising its administration. The *McCleskey* decision, notes Kennedy, "reflected and accelerated a process" of deregulation that had evolved over the preceding decade.[25] James Liebman writes that the Court "walled in its capital doctrine . . . and walled out from itself the substantive judgments about who deserves to die that it read the Constitution to require and continued ordering other actors to make."[26] For instance, in 1989, the Court declined to find a constitutional violation in the execution either of offenders who were 16 or 17 at the time of the crime, or of those who were mentally disabled.[27] Zimring writes that the Court appeared to want to make itself "a less important institution in the regulation of capital punishment and to make

capital cases a less conspicuous and less important part of the Court's workload."[28] The justices who drove the process of deregulation may have been motivated in part by the controversy and publicity surrounding capital cases, which were perceived to affect the Court's public legitimacy negatively.[29]

The Court did, however, issue a few decisions with significant effects on death penalty law. 1991's *Payne v. Tennessee* attracted legal attention because it unexpectedly reversed a Supreme Court ruling from only four years before, and provided the victims' rights movement with a key judicial victory. In *Booth v. Maryland*, decided in 1987 (the same year as *McCleskey*), the Court had held that it was unconstitutional for capital trials to include as evidence "victim impact statements," which consist of testimony from the victim's family members, usually detailing the victim's personal character, the effects of the crime on the family, and the family members' thoughts about the crime and the defendant. The decision in *Booth v. Maryland* had suggested that the introduction of victim impact statements as evidence in capital trials raised the likelihood of "arbitrary and capricious" death penalty administration.[30] Two years later, the Court had reinforced its judgment against victim impact evidence as it extended the same rationale to prohibit prosecutorial statements centered on the personal characteristics of the victim.[31] In *Payne v. Tennessee,* however, the Court repudiated these rulings and found that the "state had a legitimate interest" in allowing evidence that countered the defense's depiction of the defendant and the crime, including statements from the victim's loved ones.[32] Blackmun dissented in *Payne*; he did not write an opinion, but joined both Marshall's and Stevens's opinions for the minority.

Observers noted that the Court's decision in *Payne* had one particularly startling implication: it validated the introduction of evidence with an irrefutable emotional component

into capital trials.[33] As Mary Lay Schuster and Amy Propen write, victim impact statements "[bring] emotion directly into the courtroom."[34] The statements often include survivors' emotional expressions of their devastation over losing the victim.[35] Susan Bandes argues that victim impact statements map "the language of private grief onto an entirely different sort of emotion culture—collective, public, hierarchical, adversarial, coercive."[36] Many believe, and some empirical research has borne out, that the inclusion of such statements in capital trials provokes in jurors emotions that make them more likely to select the death penalty than not.[37] Justices Thurgood Marshall and John Paul Stevens both explicitly objected to this feature of victim impact evidence in their *Payne* dissents. Wrote Stevens, victim impact statements "[serve] no purpose other than to encourage jurors to decide in favor death rather than life on the basis of their emotions rather than their reason."[38] Stevens believed that victim impact evidence supported emotional decision-making at the expense of reason.

Stevens's comment points to a key reason that the Court's decision to sanction explicitly emotional evidence was particularly striking: the Court, in tune with broader American public discourse, tended to embrace the convention that legal decisions should be made in a state of complete emotional detachment. Terry A. Maroney explains, "Insistence on emotionless judging—that is, on judicial dispassion—is a cultural script of unusual longevity and potency."[39] Public commentary depicts emotion as a hindrance to objective and reasoned judgment; this assumption is "commonsense."[40] The *Payne* decision countered the many ways in which the Court had, as Samuel Pillsbury writes, "worked to ensure that 'any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion.'"[41] Justice Potter Stewart made this specific contradistinction between reason and emotion in *Furman v. Georgia*. Pillsbury explains that the Court had, since *Furman*, "undertaken an extensive regulatory project

aimed at suppressing emotive influence in capital cases by mandating rationalistic rules to guide sentencing."[42] By contrast, the *Payne* ruling meant that capital trials would include evidence that directly appealed to jurors' emotions.[43]

Around the same time that *Payne* brought victims' families' emotional trauma into the courtroom, Justice Blackmun was struggling with his own emotions. One of his clerks, Andrew Shapiro, noted Blackmun's "growing frustration with the Court's death-penalty decisions."[44] Blackmun had been on the record, since *Furman*, as personally opposing capital punishment. He wrote in his dissent that he would "yield to no one in the depth of my distaste, antipathy, and, indeed, abhorrence, for the death penalty. . . . That distaste is buttressed by a belief that capital punishment serves no useful purpose that can be demonstrated."[45] Despite these sentiments, because Blackmun believed the issue best left to the legislature, he initially voted to uphold capital sentences, including in *Furman* and the *Gregg* cases. In Blackmun's early tenure as a Justice, he voted against the defendant in capital cases at a higher rate than the Court writ large.[46] This pattern shifted around the late 1970s when Blackmun incrementally became "a reliable vote in support of death penalty claimants at the same time that the Court was becoming less hospitable to their claims."[47] Blackmun came to see the Court's role in continuing to sanction the death penalty, given the flaws that he felt had only become more apparent, as unacceptable.

Legal scholars have described Blackmun's judicial evolution on the death penalty in various ways, but all agree that his personal views did not shift, so much as the context for expressing them did. D. Grier Stephenson wrote in 1993 of Blackmun's capital jurisprudence, "On legislative judgments, skepticism supplanted deference; on sentencing procedures, concern replaced indifference; on the fairness of capital trials, doubt superseded confidence; on the strictures of the Eighth Amendment, toughness displaced permissiveness."[48] One particular

feature pervaded these changes: they represented the intensification of emotional response toward death penalty law. According to Blackmun's clerks, the *McCleskey* decision and the defendant's subsequent execution troubled the justice, who felt that the Court had authorized racism in capital sentencing.[49] At the same time that the Court made room for emotional evidence in the capital trial process, Blackmun found himself unwilling to contain his own emotions. In order to make this argument, I will now articulate my critical approach in this chapter.

"Hunter of Feeling": Theoretical and Methodological Notes

Although much public discourse and scholarship reflects the expectation that legal decisions should be made without emotion, the rhetorical scholarship on judicial opinions inevitably complicates this assumption. If judicial opinions are inherently rhetorical and rhetoric encompasses emotional appeal, then judicial discourse cannot escape emotionality. In this section, I discuss the extant scholarship on judicial rhetoric and emotion, and identify my reading strategy for the chapter.

First, a conceptualization of emotion is in order. Emotions help a person understand, judge, and relate to the world. This characterization draws upon several theoretical strands. Martha Nussbaum's work has been foundational in recuperating emotions as "intelligent responses to the perception of value," in contradistinction to the Western tradition that fruitlessly divorces reason and emotion.[50] Rhetorical critics have helped to rebut that divorce and articulate some of the ways in which emotion demonstrably underlies public reasoning on a variety of issues.[51] From this perspective, emotion is central to judgment. In recent years, scholars across disciplines have increasingly accepted emotion's cognitive features.[52] I assume, then, that Nussbaum is correct that emotions constitute in part "forms of evaluative judgment" crucial to

humans' interactions with the world.[53] Emotions also have a social or relational dimension, shaping how we relate to other human beings, and that relational component also informs the form and content of particular emotional experiences.[54] Indeed, emotion and sociality are mutually constitutive. Put succinctly by Robert Hariman and John Lucaites, "The emotional life of individuals and societies alike becomes articulated through a dense web of actual and virtual interactions."[55] Finally, emotions have associated "action tendencies," or patterned forms of response.[56] This is particularly important in the context of compassion, which Hariman defines as "an intentional act . . . of seeing the world from the position of the other's pain—and of adjusting one's place in the world accordingly."[57]

Analyzing *pathos* in a judicial opinion requires identifying markers of emotion in a genre perceived to be emotion-free. Warren Wright argues, "Emotional argument is anathema to judicial rhetoric. Although other participants in public discussion may appeal to pity, to anger, and to fear, these motives must not be allowed to shape the progress of the law."[58] The convention that justices should deliberate and argue without any emotional influence has proven durable and pervasive, and has roots in the Cartesian duality between emotion and reason.[59] Judicial rhetoric might be considered the genre that most exemplifies the enduring belief in this divide.[60] As Katie L. Gibson puts it, "The genre of judicial opinion is overwhelmingly shaped by the positivist commitments to neutrality, abstraction, and universality."[61] Departures from those commitments attend to meaningful signs of *pathos* at work.

In the *Rhetoric*, Aristotle defined *pathos* as "the means by which the several emotions may be produced or dissipated, and upon which depend the persuasive arguments connected with the emotions."[62] The critic must examine the ways in which persuasive arguments evoke or connote emotion, and how those emotions are connected to the argument made. This approach

counters the conventional assumption that legal rhetoric is governed by dispassionate rationality. Pillsbury writes, "Reading a legal opinion for emotion is different from reading for logic or doctrine. The reader becomes a hunter of feeling."[63] Though not a rhetorical critic in name, Pillsbury helps to analyze emotions that animate a legal opinion. Pillsbury explains,

> The judge's text of decision will supply many signs of emotion. Sometimes these are obvious, as where the judge uses overtly emotional language. More often emotion's traces appear in subtler ways. . . . We look to see if the factual account suggests active consideration of an individual or group's perspective, a sign of sympathy, or whether the fact presentation is pro forma or hostile, suggesting indifference or distaste.[64]

To identify "signs of emotion" in the text, I examine the language choices that suggest an emotional process at work in the rhetor's judgment, or urged by the rhetor. That is, I look for indications of the rhetor's moral judgments of what is just and unjust, and how these are related to others' pain or suffering. I will define my conceptualization of each emotion as it arises throughout the chapter. In what follows, I examine the *Payne* decision as a precursor to this dissent in which Blackmun's explicitly pathetic rhetoric militated against the dispassionate conventions of capital punishment jurisprudence.

Bringing "Revenge Out of the Shadows"[65]: Emotional Currents in *Payne v. Tennessee*

The *Payne* decision marked a break from the Court's past attempts to "neutralize the impact of emotions on the capital punishment decision."[66] In this section, I analyze the opinions in *Payne* for their treatment of emotion in capital law. My reading of the decision reveals that the Court's arguments in favor of including victim impact evidence in capital trials were compelled by the emotions inspired by such evidence. I identify three primary currents of emotion

underlying the decision: the evocation of disgust at the crime, the production of desire for vengeance against the defendant, and the marshaling of compassion toward the victim and his or her loved ones. I begin with what is perhaps the most vivid passage in the decision, Justice Rehnquist's appeal to disgust.

"Only to witness the brutal murders of his mother and baby sister"

The first notable emotional current in the *Payne* decision appears in the opening pages of William Rehnquist's opinion for the Court, which evoked disgust at the crime for which Payne was convicted. William Ian Miller theorizes disgust as a "moral and social sentiment" that reflects "a strong sense of aversion to something perceived as dangerous because of its powers to contaminate, infect, or pollute by proximity, contact, or ingestion."[67] That sense of aversion motivates the disgusted person to turn away from the object of disgust, which facilitates the creation and maintenance of social hierarchies in which human lives differ in their worth.[68] Dan M. Kahan points out that the disgust elicited by certain crimes comprises one of the key sentencing standards that triggers or justifies the death penalty: some criminal lives prove less worthy of preserving because of the heinous acts they have committed.[69] The Court's decision in *Payne* played upon the aversions generated by revulsion. As Markus Dubber writes, Rehnquist's opinion in particular "reeks of . . . raw disgust."[70] In particular, his account of the facts of the case evoked the strong aversion Rehnquist felt toward the material details of Payne's crime.

Justice Rehnquist's opinion set up his arguments with an emotional appeal to disgust based on the horrors of the defendant's crime. Any narrative reflects a set of rhetorical choices regarding what to include and exclude; in Rehnquist's opinion, the inclusion of extensive and graphic details worked to evoke disgust or outrage at the crime.[71] Rehnquist described the "horrifying scene" of the crime, with emphasis on the amount of blood present: the defendant

“appeared to be ‘sweating blood,’” blood “covered the walls and floor throughout the unit,” the surviving victim had to receive a transfusion of “400 to 500 cc’s more than his estimated normal blood volume” for his injuries.[72] Rehnquist catalogued each of the victims’ types and numbers of wounds, including the fact that the 28-year-old mother died not from one of her 84 wounds, but likely as a result of “bleeding from all of the wounds.”[73] These vivid details painted the picture of a particularly atrocious crime that would inspire disgust in most. Dubber suggests that the length and detail of the murder scene description “could have serve no other purpose but to arouse in the reader what Judge John T. Noonan has called the ‘natural desire to avenge the outrage and to eliminate its perpetrator.’”[74] The blood and gore of the narrative, which Martha Nussbaum cites as features that consistently elicit disgust, set up the arguments to follow in a manner that channeled disgust toward the defendant.[75]

Rehnquist leveraged the sanctity of motherhood and youth to establish that the nature of the crime constituted important evidence in a capital trial. He rehearsed the details of Payne’s crimes again as he cited the lower court’s opinion that when a defendant “deliberately picks a butcher knife out of a kitchen drawer and proceeds to stab to death a twenty-eight-year-old mother, her two and one-half year old daughter and her three and one-half year old son,” the court believed “the physical and mental condition of the boy he left for dead is surely relevant in determining his ‘blameworthiness.’”[76] Again Rehnquist invoked facets of Payne’s offenses (the victims’ young ages, the fact that the surviving son witnessed the murders) that would horrify jurors. He pointed to the victims’ social positions: mother and young children, both categories that elicit particular instincts of protection and inviolability in American society.[77] Details of Payne’s violation of these protected classes heightened the disgust suggested by Rehnquist, a response that he argued qualified as relevant information for capital sentencing. Thus, Rehnquist

implicitly embraced the cognitive dimension of emotion, as his argument for the importance of victim impact statements was based on the jury's need for emotionally-charged information.

Rehnquist's narrative mimicked one component, and, arguably, the intended effects, of victim impact evidence. Victim impact statements include statements of physical and/or emotional harm caused by the defendant and the crime, and thus often include graphic details.[78] Those details contribute to the emotional effects of victim impact evidence, as they often evoke strong responses toward the crime and the defendant. Rehnquist both validated this possible outcome and opened his opinion with a rhetorical move that replicated the functions of such statements. The narrative would achieve maximum potency if it also managed to induce the two other relevant emotional effects of victim impact evidence: vengeance and compassion.

A "keen public sense of justice"

One major controversy over victim impact statements centered upon their role in provoking the desire for vengeance against the defendant. There exists a wide and varied literature on the subject of vengeance and its role in criminal punishment, but for the purposes of this argument, I'll discuss how its definition pertains to the case under study.[79] Bandes explains and empirical research supports the argument that victim impact statements evoke "a complex set of emotions toward the defendant," but one response typically overrides others: outrage.[80] Such outrage can contribute to the desire for vengeance. According to Nussbaum and others, victim impact evidence arouses the "passion for revenge."[81] Following social psychological research, I define this passion as a particular strain of outrage, a high-intensity emotion that seeks to "give the avenger relief from a feeling of discomfort caused by that anger."[82] Robert Solomon adds that the form of outrage that characterizes vengeance can be distinguished from other forms of rage or anger because the former marks an "underlying motivational structure" for particular

actions.[83] Many have argued that victim impact statements provoke this emotional response in jurors.[84]

The *Payne* majority implicitly validated the passions for vengeance. Sarat writes that *Payne* "ended the repression of revenge and gave it constitutional legitimacy in a way that no other decision of the court ever had."[85] As noted previously, the Court's death penalty jurisprudence since *Furman* reflected the conventional bifurcation between reason and emotion, and worked to minimize the latter's role in capital decisionmaking. A key pillar of the decision in *Booth v. Maryland*, overruled by *Payne*, was that the introduction of victim impact evidence in capital trials risked inciting feelings of vengeance that would overwhelm other factors. Justice Powell wrote for the majority that victim impact statements "can serve no other purpose than to inflame the jury and divert it from deciding the case on the relevant evidence," and that the "admission of these emotionally charged opinions as to what conclusions the jury should draw from the evidence clearly is inconsistent with the reasoned decision-making we require in capital cases."[86] These statements, according to the majority, appealed to jurors' emotions and might "inflame" them toward the death sentence in cases where they might not otherwise select it. The majority in *Payne*, in reversing this judgment, accepted this possibility.

The majority opinions discussed the emotional dimensions of victim impact evidence in somewhat veiled terms. Rehnquist wrote that victim impact evidence constituted "simply another form or method of informing the sentencing authority about the specific harm caused by the crime in question, evidence of a general type long considered by sentencing authorities."[87] Victim impact evidence, in Rehnquist's account, carried no implications or qualities to set it apart from other information provided in a criminal trial. However, he later argued in rebutting *Booth*, "By turning the victim into a 'faceless stranger at the penalty phase of a capital trial,'

Booth deprives the State of the full moral force of its evidence."[88] Given the emotionally charged contents of victim impact statements, their "moral force" would entail the emotional responses of the jurors.[89] Sarat writes that victim impact evidence "provides a narrative which moves the jury. . . . [and] becomes the basis for vengeful action."[90] Rehnquist did not explicitly invoke vengeance, but his arguments validated the desire for vengeance inspired by victim impact evidence.

Justice O'Connor invoked the desire for revenge in a similarly indirect way. She wrote that murder "transforms a living person with hopes, dreams, and fears into a corpse, thereby taking away all that is special and unique about the person. The Constitution does not preclude a State from deciding to give some of that back."[91] As Sarat points out, O'Connor placed the jury in the position of the avenger: these lines marked "a rhetorical reminder of the essential structure of revenge—a payback."[92] Metaphors of debt and exchange dominate the rhetoric of vengeance, as one harm is exchanged for another.[93] O'Connor cast the capital jury as the arbiter of revenge on behalf of the victim, but did not explicitly refer to the emotional processes involved in that role. O'Connor, then, endorsed the emotional impact of victim impact evidence through a metaphorical reference to revenge.

Of the majority opinions, only Souter explicitly attended to the emotional dimensions of victim impact statements. He wrote that such statements "can of course be so inflammatory as to risk a verdict impermissibly based on passion, not deliberation."[94] That evidence can be "inflammatory" suggests that it can incite outrage, echoing Powell's argument in *Booth*. Souter brought the outrage implicit in victim impact evidence to the fore, and conceded the premise in the *Booth* decision that this passion might overwhelm other arguments. However, he also argued that "there is a traditional guard against the inflammatory risk, in the trial judge's authority and

responsibility to control the proceedings consistently with due process, on which ground defendants may object and, if necessary, appeal."[95] The procedural safeguards in the capital system, Souter argued, would prevent the desire for revenge from dominating capital sentencing. Souter, then, acknowledged the role of emotion in victim impact statements, but dismissed the concerns about that role on procedural grounds.

Even in the majority's largely veiled terms, Sarat argues that the *Payne* decision "brought revenge out of the shadows and accorded it an honored place in the jurisprudence of capital punishment."[96] The Court reversed its prior efforts to exclude evidence that would inflame the jury against the defendant. The defendant, however, is not the only object of emotional response inspired by victim impact evidence; the victims and their loved ones constitute perhaps the most significant loci of emotion.

A "glimpse into the life the defendant has chosen to extinguish"

The majority opinions encouraged compassionate judgments toward the victim and his or her family. Indeed, Dubber calls the decision a "highly combustible mixture of disgust and compassion."[97] The compassion in the *Payne* decision is directed toward the victims and, more notably, their loved ones. I adopt Nussbaum's precise definition of compassion as "a painful emotion occasioned by the awareness of another person's undeserved misfortune."[98] Compassion motivates action to respond to the other person's troubles.[99] Communication scholars have conceptualized compassionate judgment as

> a three-part experience composed of (1) *noticing* another's suffering (through paying attention and listening to emotional cues and context); (2) *feeling and connecting* (through perspective taking and empathy); and (3) *responding* to the suffering (through active attempts to alleviate the pain).[100]

The majority's opinions in *Payne* are suffused with arguments that rely upon noticing, feeling and connecting, and responding to the suffering of victims and their loved ones. This, indeed, may constitute the primary function of victim impact statements, which are "billed as encouraging empathy for the victim."[101]

The justices in the majority praised the role that victim impact evidence plays in humanizing the victim for the jury. Rehnquist wrote that the state has a legitimate interest in counteracting the mitigating evidence of the defense "by reminding the sentencer that just as the murderer should be considered as an individual, so too the victim is an individual whose death represents a unique loss to society and in particular to his family."[102] Rehnquist referred to the post-*Gregg* Court precedent that capital sentencing should be individualized, and argued that this particularity should extend to the victims. He advocated the "perspective taking" enabled by victim impact statements, as they would enable the jury to understand more fully the lives lost by the crime and the effects of that loss on the people around the victims. Rehnquist also wrote that victim impact statements in Payne's particular case "illustrated quite poignantly some of the harm that Payne's killing had caused."[103] The poignancy of the statements suggests their emotionality; the very word refers to an emotional response. Rehnquist thus approved of victim impact evidence because it allowed the jury to respond to the suffering of the victims and their loved ones and thus facilitated the expression of heightened compassion.

Justice O'Connor elaborated upon Rehnquist's compassionate orientation toward the victim. She cited a previous decision of Rehnquist's as she wrote that a "State may decide that the jury . . . should see a 'quick glimpse of the life petitioner chose to extinguish.'"[104] There can be no other reason that the jury "should" see a particular form of evidence aside from its possible effects on the decision. Rehnquist and O'Connor wanted the jury to consider more deeply the

loss of human life, pointing out that jurors could only manage a "quick glimpse" into victims' lives because the defendant had taken them. Like Rehnquist, O'Connor emphasized the compassion encouraged by victim impact evidence. She also wrote that there existed "no strong societal consensus that a jury may not take into account the loss suffered by a victim's family or that a murder victim must remain a faceless stranger at the penalty phase of a capital trial."[105] Rather than appearing as a "faceless stranger," O'Connor wanted to make the victim familiar to the jury as they made their sentencing decisions. That familiarity, of course, enables the jury to *feel* and *respond* to the suffering caused by the crime.

The compassionate judgments encouraged by the majority would not necessarily displace other thoughts or feelings toward the victims and their families. As Bandes points out, most people would enter a capital trial with empathy for those affected by the crime, and would especially feel this way at the sentencing stage—after finding the defendant guilty of a capital crime. Given the action tendencies associated with compassion, however, a heightened sense of compassion toward the victims and their loved ones would encourage the jury to "do something" about their suffering in response. That "something" in this context could only be the selection of the death penalty over other possible sentences. The Court, then, legitimized emotional reasoning in capital sentencing.

Pain and the *Payne* Legacy

The decision remains in effect. According to Dubber, *Payne* marked the "entrance of the victims' rights agenda into mainstream capital jurisprudence."[106] That agenda retains political popularity today. Although *Payne* attracted criticism within the legal community at the time for its deference to the victims' rights movement and its treatment of precedent, the issue no longer

appears to receive particular scrutiny. Most jurisdictions with the death penalty allow victim impact evidence at capital trials.[107]

Justice Stevens, in his *Payne* dissent, called attention to the emotional consequences of the majority's decision. He wrote that victim impact evidence "sheds no light on the defendant's guilt or moral culpability, and thus serves no purpose other than to encourage jurors to decide in favor of death rather than life on the basis of their emotions rather than their reason."[108] What the justices in the majority validated implicitly, Stevens made explicit, as he also reinforced the traditional Western duality between reason and emotion. Justice Marshall made similar points in his separate dissent. Marshall wrote that victim impact evidence made sentencing unacceptably arbitrary; such evidence was prejudicial "because of its inherent capacity to draw the jury's attention away from the character of the defendant and the circumstances of the crime to such illicit considerations as the eloquence with which family members express their grief."[109] To Marshall, victim impact evidence directed the jury's decisionmaking to center upon the emotions experienced and elicited by the victims' families. However, the majority never responded to his or Stevens's arguments on this front. Although Supreme Court Justices read one another's opinions and often respond to the arguments made therein, none of the Justices in the majority chose to refute the notion that victim impact evidence appealed to jurors' emotions. As Sarat puts it, the decision "brings passion to the house of reason and asks officials to reason about grief and rage."[110]

If *Payne* brought passion to the law's house of reason, Justice Harry Blackmun worked to ensure that it stayed there. As Blackmun's retirement grew near, he and his clerks searched for a case in which to announce his evolved assessment of capital punishment and the judicial role in its administration. They selected a writ of certiorari in the case of a Texas death row inmate

named Bruce Edward Callins, whose petition the Court denied. Blackmun issued an opinion dissenting from this denial. While *Payne* sanctioned emotional appeal in capital decisionmaking, Blackmun's dissent in *Callins* deployed an emotional appeal in its repudiation of the whole enterprise. Blackmun dissented from both the rhetorical and emotional currents of the moment.

A "Fusion of Compassion and Rigorous Legal Reasoning"[111]: *Callins v. Collins*

In this section, I read Justice Blackmun's dissent in Callins's 1994 denial of certiorari to highlight its emotionality. Specifically, I argue that the narrative of the man's death set the tone for the dissent by emphasizing the human stakes in capital punishment jurisprudence. Blackmun contrasted the dispassionate stance of the legal system with the reality of those human lives, a juxtaposition that called out for compassion. I analyze the way in which Blackmun disclosed his personal emotional struggle over the issue of the death penalty, and argue that he constructed his own emotional development as a reflection of a broader judicial struggle within the Supreme Court, and for other decision-makers in the death penalty process. I find that Blackmun evoked disgust as a special emotional cue that capital punishment jurisprudence was broken. Finally, I assess Blackmun's closing analysis as an indictment of the Court's dearth of compassion toward capital defendants.

"Seconds away from extinction"

From the very outset, Blackmun revealed his compassionate stance through a narrative that hypothesized how the petitioner's execution would unfold. Blackmun wrote,

> On February 23, 1994, at approximately 1:00 a.m., Bruce Edward Callins will be executed by the State of Texas. Intravenous tubes attached to his arms will carry the instrument of death, a toxic fluid designed specifically for the purpose of killing human beings. The witnesses, standing a few feet away, will behold

> Callins, no longer a defendant, an appellant, or a petitioner, but a man, strapped to a gurney, and seconds away from extinction.[112]

This account attracted attention from critics and proponents alike for its expressiveness.[113] It is difficult to imagine a clearer example of the "literary imagining and sympathy" espoused by Nussbaum, an exercise of the "capacity for humanity."[114] Blackmun dramatically "noticed" the human life at stake in the decision. He pointed to the way in which the legal process depersonalizes the individual involved and views him as a "defendant, appellant, or a petitioner" rather than as a person. More specifically, Blackmun highlighted the mechanical nature of the execution, which *fails* to "feel" or "connect" with the man who is seconds away from extinction. But when the state carries out the death penalty, it takes a human life, a reality that Blackmun worked to make explicit. He furthermore emphasized the strangeness of the death penalty ritual through the details of the "toxic fluid designed specifically for the purpose of killing human beings," delivered through "intravenous tubes" to the veins of "a man, strapped to a gurney, and seconds away from extinction" while witnesses observe. The implication was that execution is emotionally disturbing.

Blackmun's rhetorical choices were informed by his numerous confrontations with capital punishment over the course of his time on the Supreme Court, even in the cases where he voted to uphold its constitutionality. Blackmun had long been concerned with the failure of legal arguments to discuss or account for the human beings affected by Court decisions. In the Court's deliberations over *Furman v. Georgia*, the justice commented, "I am disturbed that not a word was said in argument about the victims and their families. I am inclined to affirm shakily."[115] By 1994, that sense of disquiet had crystallized into a conviction that death penalty jurisprudence should reflect, rather than obscure, the loss of a human life that such decisions entail. Moreover,

the victims and their families had received legal recognition and emotional validation in the *Payne* decision. As Laura Krugman Ray writes, in *Callins* Blackmun's "determined effort to put a human face on the plaintiff's suffering was intended . . . to discredit the majority."[116] Ray argues that this strategy of "humanizing the defendant" was successful.[117]

Reading through Blackmun's posthumously released papers, Martha Dragich Pearson discovered that the justice and his clerks had searched for the appropriate case in which to make the argument. Over the course of the 1993-1994 term, Blackmun and his clerks drafted opinions with "blank spaces where the name of the defendant and the name of the State would be filled in. The graphic images in the *Callins* dissent of the defendant . . . had been written with others—or with no one in particular—in mind."[118] Blackmun prepared to present his decision on the death penalty in this particular way, exposing the material consequences of capital punishment jurisprudence for the human beings behind the defendants' names. While Rehnquist and the others in the *Payne* majority decried the depersonalization of the victim in capital sentencing, Blackmun viewed the defendant as one whose humanity required attention and compassion.

The majority's response to Blackmun's dissent revealed the power of Blackmun's compassion-based argument. Justice Antonin Scalia took the unusual step of publishing a brief rebuttal to Blackmun's opinion. Justices do not generally respond when others dissent from the Court's denial of a petition, but Scalia felt compelled to respond.[119] He wrote that Blackmun chose

> one of the less brutal of the murders that regularly come before us—the murder of a man ripped by a bullet suddenly and unexpectedly, with no opportunity to prepare himself and his affairs, and left to bleed to death on the floor of a tavern. The death-by-injection which Justice Blackmun describes looks pretty desirable

> next to that. It looks even better next to some of the other cases currently before us which Justice Blackmun did not select as the vehicle for the announcement that the death penalty is always unconstitutional—for example, the case of the 11-year-old girl raped by four men and then killed by stuffing her panties down her throat.[120]

In this passage, Scalia replayed many characteristics of the *Payne* majority decisions. He used graphic details to invoke disgust at the crime and direct outrage at the defendant, in contradistinction to Blackmun's exercise of compassion toward the defendant. Scalia argued that Blackmun failed to account for all the human lives at issue in a capital case. In his view, Blackmun failed to exercise *sufficient* compassion because he did not attend to the victims' humanity: he did not *notice, feel,* or *respond to* the suffering of the victims. Scalia thus evoked the same appraisal processes associated with compassion, but directed that compassion toward different figures (the victims rather than the defendants).[121] In making this point, the rebuttal conceded that the emotional impact of human death was relevant to the decision, which, to an extent, demonstrates that Blackmun forced a discussion on emotional impact. As Justice Brennan has explained, dissent improves the quality of judicial decision-making by "forcing the prevailing side to deal with the hardest questions urged by the losing side."[122] By responding to the compassion evoked through Blackmun's opinion, and evoking the contrary emotions of disgust and outrage, Scalia implicitly legitimized the emotional argument of the dissent.[123]

"The machinery of death"

Perhaps the most emotionally evocative sentence in the dissent, "From this day forward, I will tinker no longer with the machinery of death," is also the most famous. As Cheryl Aviva Amitay notes, the line "was so stirring that Amnesty International entitled their latest death

penalty publication The Machinery of Death after his proclamation."[124] Notably, this is also the line upon which Jeffrey Rosen seized in his criticism of Blackmun's "emotional jurisprudence," describing the declaration as "melodramatic rhetoric . . . addressed not to Blackmun's colleagues, but to the largely unheeding public at large."[125] Melodrama, of course, suggests extremes of emotion. film scholar Ben Singer argues that melodrama's "interest is in overwrought emotion and heightened states of emotional urgency, tension, and tribulation."[126] Rosen, then, saw the statement as an overwrought emotional appeal, an unwarranted use of *pathos* in the attempt to win the public's agreement.

I believe Rosen missed the rhetorical significance of the line: it is not located in its power as an isolated pathetic appeal, but in the way that it reveals the emotional tensions inherent in death penalty jurisprudence. Blackmun reminded the Court that in the American criminal justice system, a subjective human judgment is the mechanism by which it is determined whether a defendant lives or dies. When a court adjusts capital sentencing schemes, or when a jury selects the most extreme possible punishment, it sets in motion a larger machine that kills people—as Blackmun articulated at the start of the dissent, even the most antiseptic procedures for killing feel inhumane when brought to the fore. He brought "attention, awareness, and observation" to the impersonal, uncompassionate nature of capital punishment.[127] The "melodrama" that Rosen indicted heightened that awareness, even to the "unheeding public at large," as it increased the opinion's circulation and inspired responses, including rebuttals such as Rosen's, which expanded the audience for the argument still further.

With the opening phrase "From this day forward," Blackmun also admitted his complicity in the current legal quagmire. He disclosed that in past cases he had failed to exercise the appropriate emotional caution on this issue. As noted previously, Blackmun had revealed his

true feelings against the death penalty in his *Furman* opinion. His extreme emotional conflict, then, had been a matter of public legal record since 1972. It was only in *Callins* that he finally incorporated those emotions about the death penalty into his legal judgment. As Dragich puts it, Blackmun's capital punishment jurisprudence had "follow[ed] a tortured path leading to his final pronouncement in *Callins*."[128] He would argue that he was not the only one to have struggled over this issue, rather, that the emotional conflict is endemic to capital punishment.

"Development in the American conscience"

Blackmun's dissent provided his own rhetorical history of the Court's capital jurisprudence. Throughout the opinion, Blackmun pointed to the emotionality of other judicial decision-makers forced to resolve the constitutional question of the death penalty. The narrative following the "machinery of death" revelation reflected Blackmun's now-famous evolution on the subject: "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."[129] Blackmun referred to his own emotional journey and his inability to reconcile capital punishment's inconsistencies. In the early 1990s, shortly after the Court had validated emotional argument in capital sentencing, Blackmun found himself ready to disclose the full extent of his emotional conflict.

As Blackmun explained the end of his struggle, he indicted his fellow Justices' failure to resolve that conflict: "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."[130] This passage reflected more than an explanation of Blackmun's thinking about the death penalty and its development over time. Blackmun submitted that other members of the Court (a majority,

even) have struggled—have faced an emotional ordeal—along with him. Moreover, he characterized the conclusion that the extant sentencing guidelines ensure fairness as mere delusion, detached from the reality that "the inevitability of factual, legal and moral error gives us a system that we know must wrongly kill some defendants."[131] The reference to his refusal to "coddle" that delusion suggested that other members of the Court have participated in a morally suspect pretense. Richard A. Primus argues that influential judicial dissents come "in a backward-looking form as well as a forward-looking one."[132] Blackmun's argument was fundamentally both forward- and backward- looking, as he constructed the Court's death penalty jurisprudence as an emotional journey to which other members could not admit. He had thus constructed part of what E. H. Carr called the "unending dialogue between the present and the past" that comprises history.[133]

Blackmun constructed the 1972 *Furman* decision as itself an emotionally charged struggle over the death penalty. Despite the upheaval and instability of the decision, Blackmun argued that its mission with respect to the death penalty was clear:

> *Furman* aspired to eliminate the vestiges of racism and the effects of poverty in capital sentencing; it deplored the 'wanton' and 'random' infliction of death by a government with constitutionally limited power. *Furman* demanded that the sentencer's discretion be directed and limited by the procedural rules and objective standards in order to minimize the risk of arbitrary and capricious sentences of death.[134]

Blackmun ascribed to *Furman* a set of emotional judgments on particular aspects of law. Each of the verbs he used denotes a fundamentally human "evaluative judgment": "aspire," or its noun form, *aspiration* includes what Nussbaum calls a "robust sense of future possibility" and

"deplored," or its gerund form, *deploring*, involves a strong negative reaction to something that should be eliminated.[135] That *Furman* "demanded" a kind of action implies not merely a legal mandate, but an intense expectation oriented toward the future. In sum, Blackmun constructed *Furman* as an emotional attempt to arrive at a reasoned moral judgment. Unfortunately, Blackmun argued, the search for fairness was futile: although "state legislatures and appellate courts struggled to provide judges and juries with sensible and objective guidelines," ultimately decisionmakers found that "discretion could not be eliminated from capital sentencing without threatening the fundamental fairness due a defendant when life is at stake."[136] According to Blackmun, legal apparatuses attempted to eliminate human subjectivity from death penalty administration, but failed to make the system fair. To explain why these efforts could not succeed, Blackmun turned again to a notion of the collective conscience, and to compassion.

Blackmun evoked a societal consensus on the need for compassion in capital punishment jurisprudence. He argued, "Just as contemporary society was no longer tolerant of the random or discriminatory infliction of the penalty of death, evolving standards of decency required due consideration of the uniqueness of each individual defendant when imposing society's ultimate penalty."[137] Blackmun referred to the language of *Furman* and the *Woodson v. North Carolina* decision, observing that the Court found mandatory death sentences to be unacceptable because, in the language of *Woodson,* the mandatory penalty process "excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind."[138] Thus, Blackmun invoked the Court's own explicit appeal to compassion. The Court, Blackmun recalled, had already found that the particularity of the human situation mattered in death penalty decision-making, and thus, that the possibility of compassion was important.

Blackmun argued that emotion is already embedded within death penalty law. He continued,

> This development in the American conscience would have presented no constitutional dilemma if fairness to the individual could be achieved without sacrificing the consistency and rationality promised in *Furman*. But over the past two decades, efforts to balance these competing constitutional commands have been to no avail.[139]

By referring to a "development in the American conscience," Blackmun once again highlighted the role that emotion plays in the law. He reminded us that laws are shaped by collective judgments that inevitably reflect emotion. As Daniel P. Sulmasy explains, the human conscience "unifies the cognitive, conative, and emotional aspects of the moral life by a commitment to integrity or moral wholeness," and as such, conscience comprises "the duty to unite one's powers of reason, emotion, and will into an integrated moral whole."[140] The conscience attends to the full range of human capacities and incorporates emotional reasoning in the determination of morality.[141] When he spoke to the "American conscience" and its evolving response to the human lives at risk in capital punishment, Blackmun revealed that emotion, specifically compassion, is already entrenched in death penalty jurisprudence. His dissent, then, challenged not only the majority's argument, but also the prevailing perception of judicial decision-making as emotionless.

"Morally irrelevant—indeed, repugnant"

Blackmun's compassionate stance was motivated in part by an emotion that had appeared in *Payne*: disgust. While Rehnquist in *Payne* appealed to disgust toward the defendant's crime, Blackmun invoked disgust at the racial animus inherent in death penalty sentencing. He wrote

that race “continues to play a major role in determining who shall live and who shall die.”[142] Reiterating that the death penalty is a matter of life and death (and thus of human suffering), Blackmun urged that we recognize the regressive role of race in these determinations: “Perhaps it should not be surprising that the biases and prejudices that infect society generally would influence the determination of who is sentenced to death.”[143] Here, Blackmun introduced the metaphor of racism as a virus that transforms a healthy body into something infected, something disgusting. Of disgust Nussbaum notes, “The basic idea is that past contact between an innocuous substance and a disgust substance causes rejection of the acceptable substance.”[144] To Blackmun, racism had infiltrated or infected administration of the death penalty, and rendered it unacceptable; thus, he rejected it.

Blackmun extended the infection metaphor as he built upon his rhetorical history of the Court’s jurisprudence. He named *McCleskey v. Kemp* as “a renowned example of racism infecting a capital-sentencing scheme.”[145] The decision from four years earlier still rankled Blackmun. He wrote that despite the “staggering evidence of racial prejudice” presented by the Baldus studies, “the majority turned its back on McCleskey’s claims, apparently troubled by the fact that Georgia had instituted more procedural and substantive safeguards than most other states since *Furman,* but was still unable to stamp out the virus of racism.”[146] As an incurable virus, racism evaded institutional protections. As a result, Blackmun found that the infected body (the death penalty) must be eliminated. In turn, he constructed the Court as an emotional rhetor when he stated that the majority was “troubled” by the idea that Georgia’s safeguards had failed to protect against this virus. Blackmun suggested that affective distress at racism in sentencing inflected the Court’s decision.

The discovery reflected in *McCleskey* that racism played a role in capital sentencing did not, to Blackmun, "justify the wholesale abandonment of the *Furman* promise" to prevent arbitrary and capricious death sentences.[147] Rather, the charge to achieve fairness mandated a different outcome:

> Where a morally irrelevant—indeed, a repugnant—consideration plays a major role in the determination of who shall live and who shall die, it suggests that the continued enforcement of the death penalty in light of its clear and admitted defects is deserving of a 'sober second thought.'[148]

Blackmun's emotional experience of disgust was intensified here: he described racial prejudice as *repugnant*, a stronger synonym for disgusting. In view of the evidence that this disgusting factor influences the death penalty, he recommended broad re-evaluation in line with his own judgment. Just as "those experiencing disgust . . . are motivated to turn away from or repel the object of disgust," Blackmun turned away from capital punishment.[149] He turned, instead, to compassion.

Because the other members of the Court had not rejected the death penalty, they could not have incorporated disgust in response to the revelations about racial discrimination. But Blackmun still ascribed a shift in his emotional register to the Court writ large. He wrote of the Court's rulings following *McCleskey*:

> In apparent frustration over its inability to strike an appropriate balance between the *Furman* promise of consistency and the *Lockett* requirement of individualized sentencing, the Court has retreated from the field, allowing relevant mitigating evidence to be discarded, vague aggravating circumstances to be employed, and

> providing no indication that the problem of race in the administration of death will ever be addressed.[150]

Blackmun attributed a new emotion, frustration, to the Court in its post-*McCleskey* jurisprudence. Frustration "involves the thwarting or blocking of a person's dominant motives, needs, drives, desires or purposes."[151] After finding the objective of fairness thwarted, Blackmun suggested, the Court gave up. It "retreated" from the earlier attempt (as in *Woodson v. North Carolina*) to marshal compassion toward the defendant. The Court had permitted "relevant mitigating evidence to be discarded"—evidence that might generate compassion for the defendant—but allowed "vague aggravating circumstances to be employed," including the range of victim impact evidence that functioned to evoke disgust or outrage at the defendant and heightened sympathy for the victims and their families. Blackmun pointed to emotionality in the Court's other capital decisions, but indicted the ends toward which it had been channeled.

"The path the court has chosen lessens us all"

In the last section of the dissent, Blackmun indicted the breakdown of compassion in death penalty jurisprudence. Blackmun explained, "My willingness to enforce the capital punishment statutes enacted by the States and the Federal Government . . . has always rested on . . . the federal judiciary's power to reach and correct claims of constitutional error."[152] In Blackmun's view, the Supreme Court had an obligation to remove errors that surface in death penalty jurisprudence, but to him, it had abdicated this role. Blackmun cited decisions that have progressively diminished the federal judiciary's willingness to exert compassion. In particular:

> The Court's refusal last term to afford Leonel Torres Herrera an evidentiary hearing, despite his colorable showing of actual innocence, demonstrates just how far afield the Court has strayed from its . . . obligations. In *Herrera*, only a bare

> majority of this Court could bring itself to state forthrightly that the execution of an actually innocent person violates the Eighth Amendment. . . . Certainly there will be individuals who are actually innocent who will be unable to make a better showing than what was made by Herrera. . . . The Court is unmoved by this dilemma, however; it prefers 'finality' in death sentences to reliable determinations of a capital defendant's guilt.[153]

In the final analysis, Blackmun found his fellow justices to lack compassion. They failed to recognize, relate, or react to defendants' suffering. He constructed the Court as emotionally indifferent, and problematized that dispassion. That the body "refused" to give Herrera an evidentiary hearing suggested a stubborn disinterest in the human consequences of the case. That a "bare majority" could only "bring itself" to rule against an "actually innocent" person's execution implied the absence of compassion for both the people and the constitutional questions at stake. The Court was "unmoved" by the prospect of an innocent defendant who could not meet the Court's evidentiary standards—it was unwilling to act to alleviate that pain, deferring instead to finality. As he described the decision in terms of the dearth of compassionate emotion, Blackmun indicted the Court's failure to consider the "human meaning of events and policies."[154]

This criticism was particularly potent in light of a comment by Justice William Brennan, which Blackmun quoted:

> Those whom we would banish from society or from the human community itself often speak in too faint a voice to be heard above society's demand for punishment. It is the particular role of courts to hear those voices, for the

> Constitution declares that the majoritarian chorus may not alone dictate the conditions of social life.[155]

According to Brennan, the law is inherently structured against the exercise of compassion for marginalized individuals—the majority fails to observe and respond to their suffering. The Court has the responsibility to respond and alleviate this pain, protecting those individuals' place in social life. Where the *Payne* decision had intervened on behalf of victims and their families, Blackmun declared the Court's obligation to step in for those who would be less likely to attract compassion from the rest of the world: the defendants. Blackmun saw the Court as a minoritarian emotional voice, and he leveraged his final days as a justice to advocate that the Court channel that voice in compassion for capital defendants.

Conclusion

Observers seized upon Blackmun's emotionality. *New York Times* reporter Linda Greenhouse described Blackmun's *Callins* dissent as "emotional, highly personal and solitary."[156] Bernard Harcourt characterized the opinion as "a pessimistic and critical confessional, weaving a tale of exasperation at the end of death penalty jurisprudence."[157] While Justice Brennan contended that the opinion constituted "the finest example of Justice Blackmun's fusion of compassion and legal reasoning," several commentators decried the display of emotion as inappropriate.[158] Posner, who claimed to "take the cognitive significance of emotion even more seriously than [Martha] Nussbaum" and to endorse emotion in judicial decision-making, nevertheless indicted Blackmun as too "emotionally involved in the immediacies of the case."[159] Similarly, Rosen wrote disparagingly of Blackmun's "melodramatic rhetoric."[160] And yet, critics' very responses revealed that the opinion was powerful. Those who did not agree with the decision or its reasoning felt compelled to rebut it, which, for a judicial

dissent, marks a form of success.[161] Blackmun forced his interlocutors to contend with his own emotion, with the emotion evoked by his opinion, and with the emotion inherent within the judicial process. The *Payne* decision had taken a step toward validating judicial emotion; Blackmun foregrounded it.

Despite the criticism, Blackmun's dissent in *Callins* achieved lasting rhetorical significance. Discussions of contemporary death penalty jurisprudence inevitably mention the opinion.[162] Blackmun undeniably moved the constitutional conversation forward, as he provided a new rhetorical strategy for capital punishment opponents and a new way of thinking about the "machinery of death." Sarat explains, "Blackmun's rhetoric enables opponents of capital punishment to respond to the overwhelming political consensus in favor of death as a punishment. . . . [T]hey can position themselves as defenders of law itself, as legal conservatives."[163] The South African Constitutional Court cited Blackmun's opinion in its case ending the death penalty.[164] The lasting resonance and relevance of Blackmun's words point to a dissent that challenged both the majority's argument and its foundational rhetorical assumptions.

The early 1990s, then, marked an unusual moment in the history of the Supreme Court's death penalty rhetoric. Despite the dominant paradigm of total judicial dispassion, *Payne* and *Callins* reflected rhetorical negotiations over emotionality in the capital context. Bandes writes that one "only has to read Chief Justice Rehnquist's two-page description of the crime in *Payne*, and Justice Blackmun's detailed description of the execution in *Callins v. Collins*, to understand both the power and the strategic capabilities" of emotional narrative.[165] Even as the Chief Justice opened with this emotional appeal, the justices in the *Payne* majority did not attend to emotion in their own decisions. However, they validated particular emotions channeled toward particular figures (disgust and outrage toward the defendants, compassion for the victims and their loved

ones). Blackmun's dissent, by contrast, called direct attention to the inevitability and necessity of judicial emotion in the context of the death penalty, and marshaled compassion for capital defendants. Because of the nature of death penalty jurisprudence and the Court's own difficulty resolving the constitutional questions, the expression of emotional involvement in the *Callins* opinion was inseparable from the reasoning therein.

Taken together, I believe that these two decisions call attention to the inevitability and necessity of judicial emotion in the context of the death penalty. This reading motivates a possible reorientation in our understanding of judicial rhetoric. If my theoretical proposition in this chapter is correct, and emotion is indeed both inevitable and important in judicial rhetoric, we would do well to account for that fact in both criticism and practice. Future studies should expand the range of opinions under review for emotional content. As Gerald Wetlaufer observed, "Law *is* rhetoric but the particular rhetoric embraced by the law operates through the systematic *denial* that it is rhetoric."[166] That denial plays out with particular consistency in legal disregard of *pathos.* Rhetorical scholars should attend to the consequences—both productive and destructive—of that exclusion.

The threads central to the Court's earlier decisions, highlighted in previous chapters of this dissertation, including the force of history and the nature of evidence, also appeared in the *Payne* and *Callins* opinions. In *Payne*, the majority rejected its own recent history as the Court ruled to include victim impact evidence in capital trials. In *Callins*, Blackmun dramatically repudiated his historical rulings on the death penalty in favor of his judgment that the Court's efforts had failed. History proved contingent rather than deterministic in both of these decisions. *Payne* and *Callins* also dealt with emotional dimensions of evidence in capital trials, as the former validated emotionally charged victim impact statements and the latter allowed his

emotional journey over capital punishment to shape his opinion. These cases, though they dealt with different aspects of capital punishment than either *Furman* or *McCleskey*, echoed some of the wranglings at play in the earlier decisions. Despite the instability that legal scholars identify within the Court's capital jurisprudence, my reading suggests that some tensions have endured.

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[78] Bruce A. Arrigo and Christopher R. Williams, "Victim Vices, Victim Voices, and Impact Statements: On the Place of Emotion and the Role of Restorative Justice in Capital Sentencing," *Crime & Delinquency* 49, no. 4 (2003).

[79] See, e.g., Nico H. Frijda, "The Lex Talonis: On Vengeance," in *Emotions: Essays on Emotion Theory*, ed. Stephanie H.M. van Goozen, Nanne E. van de Poll, and Joseph A. Sergeant (Hillsdale, NJ: Lawrence Erlbaum Associates, 1994); Susan Jacoby, *Wild Justice* (New York: Harper & Row, 1983); Robert C. Solomon, "Sympathy and Vengeance: The Role of the Emotions in Justice," in *Emotions: Essays on Emotion Theory*, ed. Stephanie H.M. van Goozen, Nanne E. van de Poll, and Joseph A. Sergeant (Hillsdale, NJ: Lawrence Erlbaum Associates, 1994).

[80] Bandes, "Empathy, Narrative, and Victim Impact Statements," 395.

[81] Martha C. Nussbaum, "Equity and Mercy," *Philosophy & Public Affairs* 22, no. 2 (1993): 122n93.

[82] Robert Ho et al., "Justice Versus Vengeance: Motives Underlying Punitive Judgements," *Personality and Individual Differences* 33, no. 3 (2002): 367.

[83] Robert C. Solomon, "Justive v. Vengeance: On Law and the Satisfaction of Emotion," in *The Passions of Law*, ed. Susan Bandes (New York: New York University Press, 1999).

[84] Arrigo and Williams, "Victim Vices, Victim Voices, and Impact Statements: On the Place of Emotion and the Role of Restorative Justice in Capital Sentencing."; Catherine Guastello, "Victim Impact Statements: Institutionalized Revenge," *Ariz. St. LJ* 37 (2005); Elizabeth E Joh,

"Narrating Pain: The Problem with Victim Impact Statements," *C. Cal. Interdisc. LJ* 10 (2000); Nussbaum, "Equity and Mercy."

[85] Austin Sarat, *Law's Violence* (Ann Arbor, MI: University of Michigan Press, 1995), 16.

[86] *Booth v. Maryland*, 482 US 496, 509 (1987).

[87] *Payne v. Tennessee*, 825.

[88] Ibid.

[89] Arrigo and Williams, "Victim Vices, Victim Voices, and Impact Statements: On the Place of Emotion and the Role of Restorative Justice in Capital Sentencing."

[90] Sarat, "Vengeance, Victims and the Identities of Law," 177.

[91] *Payne v. Tennessee*, 832.

[92] "Vengeance, Victims and the Identities of Law," 178.

[93] Solomon, "Justive v. Vengeance: On Law and the Satisfaction of Emotion."

[94] *Payne v. Tennessee*, 836.

[95] Ibid.

[96] "Justive v. Vengeance: On Law and the Satisfaction of Emotion," 172.

[97] Dubber, "Regulating the Tender Heart When the Axe Is Ready to Strike," 131.

[98] Martha C Nussbaum, *Upheavals of Thought: The Intelligence of Emotions* (Cambridge University Press, 2003).

[99] Jennifer L. Goetz, Dacher Keltner, and Emiliana Simon-Thomas, "Compassion: An Evolutionary Analysis and Empirical Review," *Psychological bulletin* 136, no. 3 (2010).

[100] Deborah Way and Sarah J. Tracy, "Conceptualizing Compassion as Recognizing, Relating and (Re) Acting: A Qualitative Study of Compassionate Communication at Hospice," *Communication Monographs* 79, no. 3 (2012): 301.

[101] Bandes, "Empathy, Narrative, and Victim Impact Statements," 405. Though the two ought to remain conceptually distinct, Bandes here uses “empathy” in the same sense that I use “compassion.”

[102] *Payne v. Tennessee*, 825, citing Justice White’s dissent in {, 1987 #301.}

[103] Ibid., 826.

[104] Ibid., 831, citing {, 1988 #320.

[105] Ibid., 831.

[106] Dubber, "Regulating the Tender Heart When the Axe Is Ready to Strike," 90.

[107] John H. Blume, "Ten Years of Payne: Victim Impact Evidence in Capital Cases," *Cornell Law Review* 88 (2003).

[108] *Payne v. Tennessee*, 856.

[109] {, 1991 #12@846}

[110] Sarat, "Vengeance, Victims and the Identities of Law," 181.

[111] Brennan, “A Tribute to Justice Harry A. Blackmun,” 1.

[112] *Callins v. Collins*, 510 Us 1141, 1128 (1994).

[113] Rosen, “Sentimental Journey: The Emotional Jurisprudence of Harry Blackmun.”

[114] Martha Craven Nussbaum, “The Language of Judging: Emotion in the Language of Judging,” *St. John’s Law Review* 70, no. 23 (Winter 1996): 1519.

[115] Mandery, *A Wild Justice*, 169.

[116] Laura Krugman Ray, "Judicial Personality: Rhetoric and Emotion in Supreme Court Opinions," *Washington and Lee Law Review* 59, no. 1 (2002): 230-31.

[117] Ibid., 231.

[118] Martha Dragich Pearson, "Reflections on Judging: A Discussion Following the Release of the Blackmun Papers: Revelations from the Blackmun Papers on the Development of Death Penalty Law," *Missouri Law Review* 70, no. 1183 (Fall 2005): 1197.

[119] Martin Clancy and Tim O'Brien, *Murder at the Supreme Court: Lethal Crimes and Landmark Cases* (Amherst, NY: Prometheus Books, 2013).

[120] *Callins v. Collins*, 1142-43.

[121] Notably, in the case of "an 11-year-old girl raped by four men and killed by stuffing her panties down her throat," the two death row inmates who had been convicted of the crime—Henry McCollum and Leon Brown—were released and exonerated in 2014 after DNA evidence implicated another man. See Dahlia Lithwick, "A Horrifying Miscarriage of Justice in North Carolina," *Slate*, September 3, 2014, http://www.slate.com/articles/news_and_politics/jurisprudence/2014/09/henry_lee_mccollum_cleared_by_dna_evidence_in_north_carolina_after_spending.2.html.

[122] William J. Brennan, "In Defense of Dissents," *Hastings Law Journal* 37 (1986): 430.

[123] Clancy and O'Brien also point out that Scalia "did not directly contradict Blackmun. Where Scalia was addressing the desirability of the death penalty. . . . Blackmun was addressing the efficacy of society's ultimate sanction." Clancy and O'Brien, *Murder at the Supreme Court: Lethal Crimes and Landmark Cases*, 350.

[124] Amitay, "Note: JUSTICE OR 'JUST US': The Anomalous Retention of the Death Penalty in the United States," 562, n45.

[125] Rosen, "Sentimental Journey: The Emotional Jurisprudence of Harry Blackmun," 17.

[126] Ben Singer, *Melodrama and Modernity: Early Sensational Cinema and Its Contexts* (New York: Columbia University Press, 2001), 45.

[127] Way and Tracy, "Conceptualizing Compassion as Recognizing, Relating and (Re)acting," 301.

[128] Martha J. Dragich, "Justice Blackmun, Franz Kafka, and Capital Punishment," *Missouri Law Review* 63 (1998): 863.

[129] *Callins v. Collins*, 1146.

[130] Ibid.

[131] *Callins v. Collins*, 1145-46.

[132] Richard A. Primus, "Canon, Anti-Canon, and Judicial Dissent," *Duke Law Journal* 48, no. 2 (November 1998): 278.

[133] Quoted in Turner, *Doing Rhetorical History: Concepts and Cases*.

[134] *Callins v. Collins*, 1150.

[135] Nussbaum, *Upheavals of Thought*, 22, 146.

[136] *Callins v. Collins*, 1150-51.

[137] Ibid., 1151.

[138] Ibid.

[139] Ibid.

[140] Daniel P. Sulmasy, "What Is Conscience and Why Is Respect for It So Important?," *Theoretical Medicine and Bioethics* 29, no. 3 (2008): 139.

[141] Blackmun's argument is somewhat reminiscent of Emile Durkheim's *conscience collective*, the collective moral order dictated by public sentiment. See David Garland, *Punishment and Modern Society: A Study in Social Theory* (University of Chicago Press, 2012).

[142] *Callins v. Collins*, 1153.

[143] Ibid.

[144] Nussbaum, *Upheavals of Thought*, 204.

[145] *Callins v. Collins*, 1153.

[146] Ibid., 1154.

[147] Ibid., 1154-55.

[148] Ibid.

[149]Robin L Nabi, "The Theoretical Versus the Lay Meaning of Disgust: Implications for Emotion Research," *Cognition & Emotion* 16, no. 5 (2002): 696..

[150] *Callins v. Collins*, 1156.

[151] S. Stansfeld Sargent, "Reaction to Frustration—a Critique and Hypothesis," *Psychological review* 55, no. 2 (1948): 108.

[152] *Callins v. Collins*, 1157.

[153] Ibid., 1158.

[154] Nussbaum, *Upheavals of Thought*, 14.

[155] Cited in *Callins v. Collins*, 1155.

[156] Linda Greenhouse, "Death Penalty Is Renounced by Blackmun," *The New York Times* 2/23/1994.

[157] Bernard E. Harcourt, "Note and Comment: Mature Adjudication: Interpretive Choice in Recent Death Penalty Cases," *Harvard Human Rights Journal* 9 (1996): 267.

[158] William J. Brennan, "A Tribute to Justice Harry A. Blackmun," *Harvard Law Review* 108 (November 1994): 3.

[159] Richard A. Posner, "Emotion Versus Emotionalism in Law," in *The Passions of Law*, ed. Susan A. Bandes (New York, NY: New York University Press, 1999), 322,24.

[160] Jeffrey Rosen, “Sentimental Journey: The Emotional Jurisprudence of Harry Blackmun,” *The New Republic*, May 2, 1994, 15.

[161] Matthew P. Bergman, "Dissent in the Judicial Process: Discord in Service of Harmony," *Denver University Law Review* 68, no. 1 (1999); Brennan, "In Defense of Dissents."; J. Louis Campbell, "The Spirit of Dissent," *Judicature* 66, no. 7 (1983); Catherine L. Langford, "Toward a Genre of Judicial Dissent: Lochner and Casey as Exemplars," *Communication Law Review* 9, no. 2 (2009); Kevin M. Stack, "The Practice of Dissent in the Supreme Court," *The Yale Law Journal* 105, no. 8 (1996).

[162] Cheryl Aviva Amitay, "Justice or "Just Us": The Anomalous Retention of the Death Penalty in the United States," *Maryland Journal of Contemporary Legal Issues* 7 (1996); R. M. Baird and S. E. Rosenbaum, *Punishment and the Death Penalty: The Current Debate* (Amherst, NY: Prometheus Books, 1995); Bernard E. Harcourt, "Note and Comment: Mature Adjudication: Interpretive Choice in Recent Death Penalty Cases," *Harvard Human Rights Journal* 9 (1996); Wesley Kendall and Joseph M. Siracusa, *The Death Penalty and Us Diplomacy: How Foreign Nations and International Organizations Influence Us Policy* (Lanham, MD: Rowman & Littlefield, 2013); Mandery, *A Wild Justice*; Tara L. Swafford, "Responding to Herrera v. Collins: Ensuring That Innocents Are Not Executed," *Case Western Reserve Law Review* 45 (1994); Kara Thompson, "The Aba’s Resolution Calling for a Moratorium on Executions: What Jurisdictions Can Do to Ensure That the Death Penalty Is Imposed Responsibly," *Arizona Law Review* 40 (1998); Jonathan Yehuda, "Tinkering with the Machinery of Death: Lethal Injection, Procedure, and the Retention of Capital Punishment in the United States," *New York University Law Review* 88, no. 6 (2013).

[163] Sarat, “Recapturing the Spirit of Furman: The American Bar Association and the New Abolitionist Politics,” 12.

[164] Mandery, *A Wild Justice*.

[165] Bandes, "Empathy, Narrative, and Victim Impact Statements," 391.

[166] Gerald B. Wetlaufer, “Rhetoric And Its Denial in Legal Discourse,” *Virginia Law Review* 76, no. 1545 (1990): 1555.

CHAPTER 5

CONCLUSION

Introduction

A startling 2015 opinion by Justice Stephen Breyer revealed that he imagines a new watershed ruling on the death penalty. Following a botched execution in Oklahoma in 2014, the Court decided a case called *Glossip v. Gross*, in which petitioners claimed that the lethal injection protocol used by the state violated the Eighth Amendment. The Court ruled against the petitioners, stating that the drug protocol did not constitute cruel and unusual punishment. Breyer joined Justice Sonia Sotomayor's dissent, but he also wrote a separate opinion in which he explained, "[R]ather than try to patch up the death penalty's legal wounds one at a time, I would ask for a full briefing on a more basic question: whether the death penalty violates the Constitution."[1] Breyer's articulation as to why capital punishment violated the Eighth Amendment echoed the themes sounded in previous cases beginning with *Furman*: arbitrary administration, racial disparities, and failure to deter. He asserted the Court's role in the path to abolition:

> [T]he matters I have discussed, such as lack of reliability, the arbitrary application of a serious and irreversible punishment, individual suffering caused by long delays, and lack of penological purpose are quintessentially judicial matters. . . . I recognize that in 1972 this Court, in a sense, turned to Congress and the state legislatures in its search for standards that would increase the fairness and reliability of imposing a death penalty. The legislatures responded. But, in the last

> four decades, considerable evidence has accumulated that those responses have not worked.[2]

Breyer drew upon the threads that wove throughout the previous four decades of death penalty jurisprudence, from the position of the Court as an agent of social change to the likelihood of racial discrimination in the sentencing process. The opinion revealed that the arguments made in pivotal Court cases on the death penalty in the past remain salient to the present.

Breyer's call for a fresh constitutional review of the death penalty takes on additional significance in the wake of Justice Antonin Scalia's death in 2016. Justice Scalia staunchly supported capital punishment, as demonstrated by his response to Justice Blackmun's *Callins* dissent. Writes Adam Lidgett for the International Business Times, Scalia's death "leaves the court split evenly on capital punishment," which is significant because President Obama "has the chance to add another liberal judge to the court, which legal experts say could lead to an increased number of death penalty cases for the court."[3] As of April 2016, President Barack Obama nominated Merrick Garland to Scalia's seat, but the timeline for his prospective confirmation is unclear given Senate Republicans' opposition to approving a Supreme Court nominee before the 2016 elections. Garland's position on the death penalty is also unclear, as his court has primarily adjudicated administrative matters.[4] Nevertheless, the upheaval in the Court's composition leaves the door open for a possible shift in its capital punishment jurisprudence.

Even if no meaningful shift occurs, the Supreme Court will continue to negotiate its place in the administration of the death penalty. As David Oshinsky argues, "What Justice Blackmun caustically referred to as tinkering with the machinery of death might be seen . . . as a continuing process, admittedly imperfect, to determine the acceptable limits of capital punishment in a society that strongly endorses its use."[5] This process began tentatively in the 1960s, launched in

earnest with *Furman v. Georgia*, and has seen many twists and turns since then. Robert A. Burt writes, "The disorder in the Court's processes testifies to a persistent tension within the Court regarding capital punishment."[6] This project has spotlighted three distinct moments in the Court's rhetorical journey and teased out some of the tensions to which Burt refers.

Overall, this dissertation has taken a long view of the Supreme Court's capital punishment rhetoric. In this conclusion, I will review this approach and discuss its scholarly contributions. I begin with a summary and synthesis of my three case studies and the reading strategies that accompany them. I then reflect upon the theoretical and historical implications of this project. Finally, I consider the current moment in the Court's death penalty jurisprudence, and suggest avenues for future rhetorical research.

The Rhetorical History of *Furman, McCleskey, Payne,* and *Callins*

In Chapter Two, I analyzed *Furman v. Georgia*, one of the most fractured decisions in Supreme Court history. In Martha Dragich Pearson's words, "many death penalty decisions are characterized by multiple opinions and bitter disagreements among members of the Court. *Furman* is the paradigm."[7] I argued that the starkest disagreements within the decision hinged upon the Court's role as an agent of social change, its relationship to history, and its position as arbiter of evidence regarding the social functions of criminal punishment. I drew upon the theories underpinning the rhetoric of social change, the rhetoric of history, and stasis to analyze these contestations and discussed the incommensurability of the various perspectives across nine opinions. I argued that the Court could not reach consensus over its role in American democracy and social change at a crucial moment in judicial history. These conflicting positions yielded dissension over whether to read the history of capital punishment as deterministic or dynamic, what constituted the social functions of the death penalty, and how to assess whether it fulfilled

those objectives. This chapter considered the significance of a splintered judicial voice emanating from the nation's highest Court in its deliberations over the ultimate criminal punishment. I posited that rhetorical scholars must attend to those moments in which the Court speaks with multiple voices, because such instances reveal fundamental and enduring fissures within the rhetorical institution that shapes our nation's constitutional law. Marouf Hasian notes that in any judicial decision, "there have necessarily been many other possible views of justice and equity that have never become dominant."[8] Splintered judicial decisions reveal the competing "views of justice and equity" about which the justices felt strongly enough to make their opinions part of the record even when they did not determine the final ruling.

In Chapter Three, I examined *McCleskey v. Kemp* through the lens of constitutive rhetoric, assessing the majority and minority opinions' distinct approaches to the constitutive functions of the Court's discourse. I found that the majority opinions rejected a view of their rhetoric as constitutive, even as they also constituted specific visions of social scientific evidence and racial discrimination. The minority opinions, by contrast, embraced judicial rhetoric's power to reshape what constituted both social science and discrimination. The majority constructed social scientific proof as a precise product of empirical data and specificity, while the minority emphasized the contingent, rhetorical nature of such evidence. The majority also constructed racial discrimination as a set of intentional actions isolated from historical context, while the dissenting opinions assessed discrimination as a systemic and historically inflected problem that devalued black lives. I advocated a sustained focus on how judicial rhetoric constitutes particular social formations in the course of its work, above and beyond the more dramatic "moments" of interpellation that often attract scholarly attention. This chapter motivates a reorientation in

thinking about constitutive rhetoric, away from particular identities in the context of particular events, and toward rhetorical accumulations over time.

In Chapter Four, I read *Payne v. Tennessee* and *Callins v. Collins* in conversation with one another. These two cases both highlighted distinct types of emotionality in judicial decision-making over the death penalty. I argued that *Payne v. Tennessee* legitimized emotional argument in capital trials, but channeled it exclusively in support of a crime victim's loved ones, marshaling disgust and vengeance toward the defendant but sympathy toward those afflicted by the crime. In response, Blackmun's emotionality in his *Callins* dissent marshaled compassion toward the capital defendant, as he revealed the inevitability and necessity of judicial emotion in the context of the death penalty. I argue that the opinions in these cases demonstrate that the enduring convention of judicial dispassion is untenable, particularly for capital punishment decisions.

Taken together, these cases reveal that Supreme Court decisions on the death penalty have important rhetorical implications. This project's rhetorical history suggests that the Court's decisions are both rhetorical and *about* rhetoric: they negotiate the sociopolitical roles of judicial rhetoric, its constitutive functions, and its persuasive strategies. While each chapter highlights the particular rhetorical strategies at work in watershed decisions, each chapter also contributes to a longitudinal study of how judicial rhetoric works within contingent, socially-, and culturally-inflected rhetorical moments. My analysis, then, counters the deterministic view of judicial opinions. Rather than fixed, stable sources of authority, judicial opinions represent negotiations over symbolic meaning that both shape and are shaped by their contexts.

Theoretical and Historical Implications

My theoretical approach in this dissertation establishes that different judicial decisions call for distinct reading strategies. The critic must account for and parse the uniquely fractured nature of *Furman*; the negotiations over judicial effect in *McCleskey* raise questions about constitutive rhetoric; and the emotional content of the *Payne* and *Callins* opinions demand a reading through the lens of *pathos*. This textually informed approach to selecting analytical tools allows the texts and contexts of the decisions to guide the reading. The analyses, thus, demonstrate the mutually reinforcing relationships among history, theory, and criticism.

Despite my interpretive pluralism, the historical approach of this project offers insight into persisting tensions within the Court's capital punishment jurisprudence that a study of a single case could not provide. The Court, for instance, has repeatedly struggled over what counts as evidence in capital decisionmaking; from arguing over statistics on deterrence, to assessing social scientific data on racial discrimination, to evaluating emotional forms of evidence. Furthermore, the force and status of history has continually served as a point of contestation: he Court faced the death penalty's constitutional history in *Furman* and weighed the significance of racism's legacy in *McCleskey*; in *Payne*, the Court repudiated its recent history in light of the victims' rights movement's momentum and arguments; and in *Callins*, Blackmun renounced his own judicial history as he declared his antipathy to the death penalty. The importance of public opinion also played a role in each case, as the justices considered whether and how current public attitudes might shape the progression of capital law. These threads remind us that the questions posed by the death penalty bear upon the fundamentals of public life. As Michael Foley puts it, "The death penalty raises one of those intractable social problems that does not

appear resolvable."[9] In its attempts to arrive at a judicial solution, the Court has revealed some of the sources of that intractability.

This project also puts the legal scholarship on capital punishment into conversation with rhetorical criticism. Legal analysts find the Court's decisions on capital punishment puzzling. Martha Dragich Pearson describes contemporary death penalty jurisprudence as "complex and inherently contradictory. . . . Dozens of decisions handed down over the past three decades densely fill in the outline of death penalty law, but fail to lay down rules with clarity and conviction."[10] A perspective focused primarily on legal precedent and principles cannot account for the full range of stakes when a Supreme Court justice writes an opinion to justify or repudiate the death penalty. That is, understanding the fluctuations and instabilities in the Court's capital punishment jurisprudence requires an approach that conceptualizes the decisions not only as legal artifacts, but also as rhetoric—persuasive efforts directed at a heterogeneous audience that includes the legal community, the other justices, and the general public. Peter Goodrich writes, "Law is . . . a genre of rhetoric which represses its moments of intention or fiction; it is a language that hides indeterminacy in the justificatory discourse of judgment."[11] This dissertation discloses the indeterminacy within the conventions of the Court's discourse. I have argued that each decision reflected a range of contextual factors, contingencies, and rhetorical strategies. Hasian reminds us,

> Empowered elites profit from the denial that law is rhetorical—the more we see it as a deductive, logical system of inquiry, the more we move away from the Greek notion of *phronesis*, or practical wisdom. Studying the 'rule of law' becomes the professional occupation of only a few rather than the duty of the many.[12]

Rhetorical analysis that highlights the rhetoricity of the Court's decisions allows us to avoid mystification in our discussions of the law, and thus to remain engaged in the conversations that shape it and our lives.

One particularly significant dimension of the Court's capital punishment rhetoric is its clear and intimate relationship to violence. As Robert Cover puts it, "capital cases . . . disclose far more of the structure of judicial interpretation than do other cases."[13] That is, judicial decisions that authorize or require the state to extinguish a human life make explicit the violence that underlies the law's work, its fundamental coercive power that governs our quotidian lives.[14] Stephen J. Hartnett has written that in the early days of the American republic, "Executing democracy . . . meant using the full force of the law, including capital and other corporeal punishment, to protect the law-abiding many from the violence of the depraved few."[15] Although the modern American state dispenses both capital and corporeal punishment far more rarely than in the colonial era, the death penalty continues to perform this function, marshaling the government's violence in response to the acts of violence perpetrated by particular citizens.

Violence, thus, takes on heightened significance in light of renewed scholarly and activist focus on the American criminal justice system in the age of mass incarceration. Research demonstrates that vulnerable populations including minorities, the economically disadvantaged, and LGBTQ individuals face disproportionate risks in the criminal justice complex.[16] These disparities, as well as concern about procedural errors and insufficient oversight, have prompted communication and cultural studies scholars to call for critical analysis of "the many ways the prison-industrial complex has reshaped our public discourse, penal policy, economic interests, and democratic practices."[17] A death sentence is a particularly stark possible outcome for those who navigate the criminal justice system, and the advent of DNA testing has revealed the

alarming risk that simple error may end the lives of innocent people. As of 2016, eighteen prisoners have been exonerated and released after DNA testing demonstrated that they did not commit the capital crime for which they served time on death row.[18] If we are to have any hope of correcting these problems, we must understand the discourses that enable and disable practices like capital punishment.

Notably, the cases considered here also share characteristics that expose important features of contemporary American capital punishment practice and law. All four cases heralded from Southern states, where the death penalty retains the most public and political support.[19] In all four, the defendants were black. All of the decisions split the justices as they raised questions about the fundamental purposes of criminal punishment in the United States. All four evinced awareness of public attitudes toward the death penalty and wrangled over the Court's response to those attitudes in relation to the Court's responsibilities toward the defendants. These features demonstrate the status of capital punishment in contemporary American society: the death penalty is waning in use, but still holds legitimacy in the Southern states with the most punitive legacies of criminal punishment. Racial disparities in death penalty administration persist. Capital punishment poses important questions about criminal justice that continue to divide the Court. Public opinion on the death penalty weighs upon the judicial decisions that shape its administration. Scholars and activists should keep these factors in mind as they consider the next steps in campaigns to reform or end capital punishment.

What Comes Next?

The Court has decided many death penalty cases since the early 1990s, though few have attracted substantial public attention. In the first decade of the twenty-first century, the Court made two decisions that narrowed the class of "death-eligible offenders": *Atkins v. Virginia*,

which prohibited execution of the intellectually disabled, and *Roper v. Simmons*, which restricted the death penalty to those who were 18 or older at the time of the offense. Legal analysts initially believed that these two cases marked "a significant new chapter in [the Supreme Court's] death penalty jurisprudence" because they revealed "an emerging conception of the proportionality requirement that the Court could extend to other capital punishment contexts."[20] However, the Court has not yet applied this progressive standard of proportionality to other crimes or criminals. On the whole, the Court's capital jurisprudence in the twenty-first century has followed a pattern that James Liebman describes as "reliable delegated proportionality judgments based on a netting-out of aggravation and mitigation."[21] That is, the Court continues to delegate capital decision-making responsibilities to legislators and sentencing bodies, and to guide sentencing discretion toward judgments that weigh aggravating and mitigating factors against one another. In its hesitance to issue broad rulings on the death penalty, the Court has continued the pattern that Robert Weisberg described as "deregulation."[22]

Today, public support for the death penalty is lower than it has been since before the *Furman* decision, with about 60 percent favoring the retention of capital punishment for some crimes.[23] One 2014 *Washington Post* poll found that a majority of Americans preferred life without parole to the death penalty as a sentence for murder.[24] Application of the death penalty has waned even more. The number of death sentences per year dropped below 100 in 2011, and actual executions have declined even further. In 2015, only twenty-eight executions were carried out across just six states, while six people were exonerated from death row.[25] The states of New York, New Jersey, New Mexico, Illinois, Connecticut, and Maryland have all abolished the death penalty in the twenty-first century, while Pennsylvania and Nebraska have informally halted the practice.[26] Law professor David Cole argues, "the abolition of capital punishment is probably

only a matter of time. Whether its end will come at the hands of the Supreme Court or the people remains to be seen."[27] It remains possible, then, that the Court will again take up the fundamental questions over which it has wrangled for almost fifty years—and even plausible that the outcome will be different.

This project offers only a glimpse into the vast rhetorical mine of the Court's death penalty jurisprudence. Many significant decisions remain to be analyzed, and many angles remain to be explored. If death penalty decisions resemble a labyrinthine machine, as some have argued, the rhetoric that sustains that machine merits continued scholarly scrutiny.[28] Most importantly, this rhetorical history should be filled out by analysis of the Court's other major decisions such as *Gregg v. Georgia*, *Atkins v. Virginia*, and *Roper v. Simmons*. Future studies might track the evolution of central concepts, like "cruel and unusual punishment" or "evolving standards of decency" over the course of the years and decisions. Rhetoricians might also examine the ways in which various crimes and offenders are represented in order to connect capital punishment to broader analyses of American criminal punishment discourse. Finally, this project traces certain individual justices' evolution on the issue of the death penalty; investigation into other members' developing views might reveal patterns in the justices' rhetorical transformations.

Wherever the future takes us, it is vital that we understand and reflect upon where we have been. In this project I have charted the uneven rhetorical terrain of the Court's death penalty jurisprudence between 1972 and 1994. Because the stakes of this enterprise are literally life and death, and because rhetorical scholars are uniquely positioned to track the discourse that informs capital punishment law, I consider this conclusion not an end but a beginning.

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[1] *Glossip v. Gross*, 135 S. Ct. 1885 (2015).

[2] Ibid.

[3] Adam Lidgett, "Scalia's Replacement and the Death Penalty: How a Liberal Supreme Court Judge Could Affect Capital Punishment Cases," *International Business Times* 2016.

[4] Richard Wolf, "Meet Merrick Garland, Obama's Scotus Nominee," *USA Today*, 3/16/16.

[5] Oshinsky, *Capital Punishment on Trial: Furman v. Georgia and the Death Penalty in Modern America*, 111.

[6] Burt, "Disorder in the Court: The Death Penalty and the Constitution," 1819.

[7] Dragich, "Justice Blackmun, Franz Kafka, and Capital Punishment," 909.

[8] Hasian, *Legal Memories and Amnesias in America's Rhetorical Culture*, 4.

[9] Foley, *Arbitrary and Capricious*, 16.

[10] Dragich, "Justice Blackmun, Franz Kafka, and Capital Punishment," 909.

[11] Peter Goodrich, "Of Law and Forgetting: Literature, Ethics, and Legal Judgment," *Archne* 1 (1994): 198.

[12] Hasian, *Legal Memories and Amnesias in America's Rhetorical Culture*, 4.

[13] Robert M. Cover, "Violence and the Word," *Yale Law Journal* (1986): 1623.

[14] See Michel Foucault, *Discipline and Punish: The Birth of the Prison* (New York, NY: Vintage Books, 1995).

[15] Stephen John Hartnett, *Executing Democracy: Capital Punishment & the Making of America, 1683-1807*, vol. I (East Lansing, MI: Michigan State University Press, 2010), 25.

[16] David Cole, *No Equal Justice: Race and Class in the American Criminal Justice System* (New York, NY: New Press, 1999); Joey L. Mogul, Andrea J. Ritchie, and Kay Whitlock, *Queer (in)Justice: The Criminalization of LGBT People in the United States* (Boston, MA: Beacon Press, 2011).

[17] PCARE, "Fighting the Prison–Industrial Complex: A Call to Communication and Cultural Studies Scholars to Change the World," 404.

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