

# THE NEWLY INFORMED DECENCY OF DEATH: *HALL V. FLORIDA* ENDORSES THE MARSHALL HYPOTHESIS IN EIGHTH AMENDMENT REVIEW OF THE DEATH PENALTY

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## I. INTRODUCTION

The farm animals overthrow Farmer Jones to secure their equality. Afterwards, the pigs, which led the revolt, form a new regime to rule the farm. They proclaim all animals to be equal. And, for a time, things are better. But the ideal of equality proves difficult to maintain in practice. The pigs become corrupt. They transmogrify into humanlike rulers of the very sort they had replaced. They begin walking upright, wearing clothes, dining with farmers, and reigning over the farm like dictators. Ultimately, as corrupt humans sometimes will, they rethink their proclamation of equality. While they still hold all animals to be equal, they now declare, “some animals are more equal than others.”<sup>1</sup>

Nearly thirty years after the 1945 publication of George Orwell’s *Animal Farm*,<sup>2</sup> the American death penalty underwent a regime change of its own. In *Furman v. Georgia*,<sup>3</sup> the United States Supreme Court found that the manner in which states were imposing the death penalty was cruel and unusual, in violation of the Eighth Amendment.<sup>4</sup> Each justice in the majority had different reasons, and each wrote separately.<sup>5</sup> Among the five of them, they described the practice of the day as wanton,

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1. GEORGE ORWELL, *ANIMAL FARM* 134 (1945).

2. *Id.*

3. 408 U.S. 238 (1972).

4. *See id.* at 239–40 (finding it unconstitutional to impose the death penalty under certain state statutes representative of the practice across the nation).

5. In fact, the Court “had not been so visibly fragmented since its earliest days,” agreeing only on “a terse per curiam statement announcing the result reached,” and issuing nine separate opinions, four in dissent. Robert A. Burt, *Disorder in the Court: The Death Penalty and the Constitution*, 85 MICH. L. REV. 1741, 1758 (1987).

freakish, discriminatory, pointless, arbitrary, and a result of ignorance.<sup>6</sup> But it was the practice of capital punishment the Court found unconstitutional—the way the death penalty was being doled out at the time—not the death penalty itself.<sup>7</sup> So the Court struck down the states' death penalty regimes, but gave them another chance to get it right.<sup>8</sup>

A few years later, in *Gregg v. Georgia*,<sup>9</sup> the Court revealed why.<sup>10</sup> It came down to state legislation.<sup>11</sup> Because most states kept the death penalty on the books, the Court concluded that death met the American people's then prevailing standard of decency and moral judgment.<sup>12</sup> As such, it did not violate the Eighth Amendment.<sup>13</sup> So it was public desire, as reflected by state legislation, that saved death from being found unconstitutional.<sup>14</sup> Like the animals on the newly christened Animal Farm, the American people wanted to pursue a new regime that lived up to their ideals, despite the failings of the old. So, like the animals proclaimed their equality, the Court described new safeguards of fairness and reliability that, when put into practice, would cure the injustices of the past.<sup>15</sup>

6. See *Furman*, 408 U.S. at 257 (Douglas, J., concurring) (calling the states' death penalty statutes "pregnant with discrimination"); *id.* at 305 (Brennan, J., concurring) (stating that "there is a strong probability that [the punishment of death] is inflicted arbitrarily"); *id.* at 310 (Stewart, J., concurring) (concluding that "the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed"); *id.* at 312 (White, J., concurring) (opining that the death penalty's "imposition would then be the pointless and needless extinction of life with only marginal contributions to any discernible social or public purpose"); *id.* at 366 (Marshall, J., concurring) (stating that "[i]gnorance is perpetuated and apathy soon becomes its mate, and we have today's situation" with capital punishment).

7. See *Gregg v. Georgia*, 428 U.S. 153, 188 (1976) (plurality) (recalling that "*Furman* did not hold that the infliction of the death penalty *per se* violates the Constitution's ban on cruel and unusual punishments," but only that death "could not be imposed under sentencing procedures that created a substantial risk that it would be inflicted in an arbitrary and capricious manner").

8. *Furman*, 408 U.S. at 239–40 (majority opinion). As later put by Justice Breyer, "the Court thought that the constitutional infirmities in the death penalty could be healed." *Glossip v. Gross*, 135 S. Ct. 2726, 2755 (2015) (Breyer, J., with Ginsburg, J., dissenting).

9. 428 U.S. at 153.

10. See *id.* at 168–69 (explaining that death's constitutionality "was presented and addressed in *Furman*" but "not resolved by the Court," and taking up that unresolved question).

11. See *id.* at 174 (discussing how the Eighth Amendment restricts legislative power).

12. See *id.* at 179–81 (explaining how legislation, elections, and juries have shown continued support of and insistence on capital punishment). While decency is only one of "four principles by which we may determine whether a particular punishment is 'cruel and unusual,'" it is heavily relied upon by the Court in holding death to be constitutional, and the Eighth Amendment principle relevant to the instant inquiry. *Furman*, 408 U.S. at 281 (Brennan, J., concurring).

13. See *Gregg*, 428 U.S. at 175 (contemplating the Eighth Amendment inquiry as "intertwined with an assessment of contemporary standards" within which "legislative judgment weighs heavily").

14. *Id.* at 175–76.

15. See *id.* at 195 (instructing that "the concerns expressed in *Furman* . . . can be met by a carefully drafted statute that ensures that the sentencing authority is given adequate information and guidance," which is best achieved "by a system that provides for a bifurcated proceeding at which

But Justice Marshall saw things differently. In *Furman*, he observed that “American citizens know almost nothing about capital punishment.”<sup>16</sup> They are not familiar with the myriad difficulties in its implementation. They may support an abstract and idealized death penalty—the prospect of taking life for life with utter fairness and reliability—but not the flawed reality of the actual practice.<sup>17</sup> Rather than looking to state legislation and opinion polls, Marshall proposed that the Court should “attempt to discern the probable opinion of an *informed* electorate.”<sup>18</sup> It should predict what the public’s moral judgment would be if informed with expert knowledge. That is, the Court should ask what people would think if they really knew death.

And Marshall had an answer to that question: the American people would find it morally unacceptable and reject it, making death itself unconstitutional.<sup>19</sup> They would see the inevitable fallibility, corruption, and injustice in the administration of death.<sup>20</sup> And they would not want to keep trying to get it right.

We might call this sort of inquiry “informed decency.”<sup>21</sup> But it, along with Marshall’s conclusion, has come to be called “the Marshall Hypothesis.”<sup>22</sup>

After *Furman*, the states redesigned death. They added new safeguards of fairness and reliability.<sup>23</sup> But, in years since, the lesson

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the sentencing authority is apprised of the information relevant to the imposition of sentence and provided with standards to guide its use of the information”).

16. *Furman*, 408 U.S. at 362 (Marshall, J., concurring) (citing studies to that effect).

17. Scholars have recognized the difference between the abstract ideal of the death penalty and its actual practice. See, e.g., C. Crystal Enekwa, Comment, *Capital Punishment and the Marshall Hypothesis: Reforming a Broken System of Punishment*, 80 TENN. L. REV. 411, 446 (2013) (arguing that, despite the idealized view of the death penalty, “[i]n reality, the only capital punishment system the United States can boast of today is permeated with arbitrariness, capriciousness, prejudice, and uncertainty”); Jack Greenberg, *Against the American System of Capital Punishment*, 99 HARV. L. REV. 1670, 1670 (1986) (“Death penalty proponents have assumed a system of capital punishment that simply does not exist. . . . But this idealized system is *not* the American system of capital punishment. . . . America simply does not have the kind of capital punishment system contemplated by death penalty partisans.”).

18. *Furman*, 408 U.S. at 361–62 n.145 (emphasis added).

19. See *id.* at 363 (“I cannot believe that at this stage in our history, the American people would ever knowingly support purposeless vengeance. Thus, I believe that the great mass of citizens would conclude . . . that the death penalty is immoral and therefore unconstitutional.”).

20. See *id.* at 362–66 (surveying the insufficient penological justifications, biases of administration, and injustices that weigh against death in an informed assessment of its morality and propriety).

21. See *id.* 314–71 (suggesting that expert knowledge should be considered in capital punishment sentencing); *infra* Part V (discussing informed decency of death).

22. Alan W. Clarke et al., *Executing the Innocent: The Next Step in the Marshall Hypotheses*, 26 N.Y.U. REV. L. & SOC. CHANGE 309, 310 (2001).

23. See *Gregg v. Georgia*, 428 U.S. 153, 180 (1976) (observing that most states responded to *Furman* “by specifying the factors to be weighed and the procedures to be followed in deciding when to impose a capital sentence”).

learned on Animal Farm has proven relevant. From time to time, the Supreme Court has found itself gazing into the farmhouse window at post-*Furman* death regimes that walk, talk, and look an awful lot like Farmer Jones. While *Furman* did away with the old regimes, caprice and unfairness remained in old forms and new and, in some respects, came back stronger after the transition. On occasion, the Court has had to return to the Eighth Amendment to prevent states from imposing death cruelly and unusually.<sup>24</sup>

But while the *Furman* Court took up the Eighth Amendment as a scythe to level the entire field, the Court has since taken it up as a spade, to dig out only the tallest weeds of injustice that grow high over death. It has removed features, but kept the larger regimes intact.<sup>25</sup> This happened once in *Atkins v. Virginia*,<sup>26</sup> where the Court found that the execution of intellectually disabled people violates the decency underlying the Eighth Amendment.<sup>27</sup> It happened again in 2014 in *Hall v. Florida*.<sup>28</sup>

In *Hall*, Florida sought to take the life of a man who scored one point too high—on an IQ test only accurate within five points—to be found intellectually disabled and ineligible for execution under *Atkins*.<sup>29</sup> In other words, the measured score was not precise enough to ensure Hall's actual IQ was not a point or five lower, in the constitutionally protected range. But Florida was going by that score, despite its uncertainty, and despite the lingering possibility that Hall was in fact intellectually disabled.<sup>30</sup> For once, the arbitrariness of capital punishment was simple math.

Like it had in *Furman* and *Gregg*, the Court set out in *Hall* to discern the current state of the evolving standard of decency. But this time the Court went in search of more informed views. The Court looked to experts, professional organizations, and the scientific community that

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24. See, e.g., *Roper v. Simmons*, 543 U.S. 551, 578 (2005) (holding that the death penalty for minors is unconstitutional); *Ford v. Wainwright*, 477 U.S. 399, 410 (1986) (holding that executing the insane is unconstitutional); *Enmund v. Florida*, 458 U.S. 782, 801 (1982) (concluding that the death penalty for a minor participant in a felony is unconstitutional); *Lockett v. Ohio*, 438 U.S. 586, 608 (1978) (holding that limiting mitigating evidence is unconstitutional); *Coker v. Georgia*, 433 U.S. 584, 598–600 (1977) (finding that the death penalty for rape is unconstitutional); *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (holding that the mandatory death penalty is unconstitutional). There is quite a bit more to the story of why the practices in these cases were adopted by the states and later struck down, but, suffice it to say, Eighth Amendment defects still plagued the death penalty after the watershed of *Furman* and *Gregg*.

25. Justice Breyer has referred to this approach as “try[ing] to patch up the death penalty’s legal wounds one at a time.” *Glossip v. Gross*, 135 S. Ct. 2726, 2755 (2015).

26. 536 U.S. 304 (2002).

27. *Id.* at 321.

28. 134 S. Ct. 1986 (2014).

29. *Id.* at 1990, 1992.

30. *Id.* at 1992.

created and understood the test.<sup>31</sup> After all, what does the average American citizen know of how the standard error of measurement in an IQ-testing instrument bears on the propriety of executing someone with diminished intellectual capacity? It is not an opinion-poll sort of thing. So the Court contemplated expert knowledge as informative of the legislative consensus on *Atkins* assessments,<sup>32</sup> much the same way Marshall had envisioned informing the public's sense of decency on the larger question of death's constitutionality. Accordingly, the Court found Florida's method unconstitutional<sup>33</sup> and, more than ever before, seemed to embrace the Marshall Hypothesis, in form if not in name, for the limited purpose of *Atkins* assessments.

Looking forward, it is unclear whether the Court will employ an analysis akin to the Marshall Hypothesis in Eighth Amendment review of the death penalty beyond the particular issue of *Hall*. There are serious criticisms of the Marshall Hypothesis, as old as *Furman* and as recent as Justice Alito's dissent in *Hall*. Heeding them, the Court may not pursue a more informed decency of death, but there is reason to believe it should.

Doing so makes good sense. *Hall* shows that expertise is needed to determine whether it is decent to take lives—that lay opinion alone is not sufficient. And because the greater machinery of death is every bit as arcane and technical as scoring IQ tests, the sort of expert knowledge required in *Hall* is also required to understand the decency of whole regimes. Certainly, there is nothing decent about making a life-or-death decision, of any sort, without relevant expertise, insight, and an appreciation for the full dimension of the issue. Perhaps it is time to let the death penalty be shaped by those who can see its shape.

If the Court were to subject death itself to a more informed decency, it would find strong evidence that death is cruel and unusual in violation of the Eighth Amendment. Numerous professional organizations, scholars, and experts in fields of science and law essential to the death penalty's reliability and fairness have identified fundamental flaws in the American death penalty and have called for both moratoria and abolition.<sup>34</sup> Decades after *Furman*, a fair and just death penalty regime

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31. *Id.* at 1993.

32. *Id.* (considering “psychiatric and professional studies” as “lead[ing] to a better understanding of how the legislative policies of various [s]tates . . . implement the *Atkins* rule,” which “informs [the] determination whether there is a consensus” for purposes of the Eighth Amendment analysis).

33. *Id.* at 2001 (finding that “Florida’s rule is invalid under the Constitution’s Cruel and Unusual Punishments Clause,” in part because it “is in direct opposition to the views of those who design, administer, and interpret the IQ test”).

34. See *infra* Part V (discussing the potential outcomes should the Supreme Court extend the informed decency approach to the ultimate question of the constitutionality of death itself).

still has not been achieved. It appears more than ever to be unachievable in practice. As on Animal Farm, the pitfalls of implementation swallow the ideal. Death's unconstitutionality is its impracticability.

In order to arrive at that conclusion, this Article proceeds in four parts. Part II describes the legislation-centric evaluation of decency undertaken by the Court in *Furman* and *Gregg* and later established firmly as the primary determinant of Eighth Amendment protection. Part III describes the Marshall Hypothesis: how Marshall would have the Court take the measure of decency by imagining the public's moral judgment informed with expertise and specialized knowledge. Part IV describes the way *Hall v. Florida* endorses the Marshall Hypothesis in the limited context of *Atkins* IQ assessments, relying on the knowledge of professional organizations where the subject of Eighth Amendment scrutiny is too arcane and technical for the uninformed moral judgment of the public to provide a satisfactory measure of decency. And Part V considers the possible result of the Supreme Court extending that approach to the ultimate question of the constitutionality of death itself. In other words, Part V envisions a newly informed decency of death.

Decency is conformity with an accepted standard of behavior and morality. Inherent in the concept is a collective judgment—an agreement as to where to draw the line. So too the line of Eighth Amendment protection must be drawn somewhere, along a single, shared standard. We all create that standard. Decency is all of us. And in this sense, we are, all of us, equal in decency. But then, some are more equal than others.

## II. HOW DECENCY IS EVALUATED UNDER FURMAN AND GREGG

At the time of *Furman* in 1972, the Supreme Court decided not to do away with death altogether.<sup>35</sup> Even though the Court saw great injustice in its implementation, it gave the states another chance to get it right.<sup>36</sup> In this way, the death penalty survived on the mere aspiration that it would

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35. Independent Lens, *Race to Execution*, PBS, <http://www.pbs.org/independentlens/racetoeexecution/casesofrace.html> (last visited Mar. 18, 2016).

36. The *Furman* decision has been described as an experimental bid for better data, in which the Court concluded that a "legislative redrafting exercise might generate information the Court could use to improve its own constitutional decisionmaking." James S. Liebman, *Slow Dancing with Death: The Supreme Court and Capital Punishment, 1963–2006*, 107 COLUM. L. REV. 1, 27 (2007). Indeed, "[i]f [s]tates wanted the death penalty, they could prove it by drafting and applying new, more careful, and more costly provisions. If most failed to reinstate, they thereby would bless the alleged abolitionist trend and enable the Court thereafter . . . to share responsibility with a majority of legislatures." *Id.* (footnote omitted).

one day become fair and just in practice.<sup>37</sup> Like in the early days of *Animal Farm*, all was promise.

One may wonder why that mere promise was enough for the *Furman* Court. But one has to go far to find out. The answer lies four thousand miles across an ocean and over seventy years away, in the midst of the Second World War, during the very year George Orwell was putting the finishing touches on his allegorical response to the First.

In 1944, a young private in the United States Army named Albert Trop was under disciplinary detention in French Morocco when he escaped a stockade at Casablanca.<sup>38</sup> He was later picked up, tried, and convicted of wartime desertion.<sup>39</sup> As part of his sentence, he lost his United States citizenship.<sup>40</sup> In 1958, the Supreme Court took up the question of whether that sentence violated the Eighth Amendment prohibition against cruel and unusual punishment.<sup>41</sup> In finding that indeed it did, Chief Justice Warren insisted that constitutional provisions “are not time-worn adages or hollow shibboleths,” but “vital, living principles.”<sup>42</sup> As such, the Warren Court found the American people’s “evolving standards of decency” to be the measure of what is cruel and unusual under the Eighth Amendment.<sup>43</sup>

The line gets redrawn as we go along and become more enlightened.<sup>44</sup> Denaturalization for desertion violated the then-prevailing standard, so it was unconstitutional.<sup>45</sup> Albert Trop had brought with him from Northern Africa the story that would shape American criminal punishment for decades to come.

So, returning to 1972, the *Furman* Court found itself asking what the still-evolving standard of decency had to say about the death penalty.<sup>46</sup> Members of the Court looked to state legislatures for guidance as to what the public thought was decent, as reflected in the consensus of its elected

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37. There was, however, a theoretical potential for *Furman* to end the American death penalty. Since the sort of discretionary review statutes at issue in *Furman* seemed the only form of capital punishment still constitutionally viable at the time of *Furman*, “[a]ll that needed to be done to declare the penalty unconstitutional . . . was to draw a deductively obvious conclusion” from *Furman*’s striking them down. *Id.*

38. *Trop v. Dulles*, 356 U.S. 86, 87 (1958).

39. *Id.* at 88.

40. *Id.*

41. *Id.* at 99.

42. *Id.* at 103.

43. *Id.* at 101.

44. See *Weems v. United States*, 217 U.S. 349, 378 (1910) (stating that the prohibition against cruel and unusual punishment “is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice”).

45. See *Trop*, 356 U.S. at 103 (holding that “the Eighth Amendment forbids Congress to punish by taking away citizenship”).

46. *Furman v. Georgia*, 408 U.S. 238, 269–70 (1972) (Brennan, J., concurring).

representatives.<sup>47</sup> The Court found declining but still viable support for the death penalty.<sup>48</sup> Indeed, forty states still had it on the books.<sup>49</sup>

A few years later, in 1976, the Court brought up *Gregg* to look at how the State of Georgia, like many others, had gone about fixing the problems identified in *Furman*.<sup>50</sup> Along the way, it explicitly upheld the constitutionality of death itself.<sup>51</sup> The Court found that “[t]he most marked indication of society’s endorsement of the death penalty for murder is the legislative response to *Furman*” in the at least thirty-five states that sought to repair their death penalty regimes, rather than abandon them, and that “the post-*Furman* statutes make clear that capital punishment itself has not been rejected by the elected representatives of the people.”<sup>52</sup>

After passing on death, the Court upheld Georgia’s new regime.<sup>53</sup> In doing so, it described how providing capital sentencers with “relevant information under fair procedural rules” and guidance as to how to weigh “particularly relevant” information constitutionalizes death, by ensuring sentencing discretion is “suitably directed and limited.”<sup>54</sup> In short, death is decent as long as “the sentencing authority is given adequate information and guidance.”<sup>55</sup>

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47. See, e.g., *id.* at 385 (Burger, C.J., with Blackmun, Powell, and Rehnquist, JJ., dissenting) (finding that, “[i]n looking for reliable indicia of contemporary attitude,” there is “none more trustworthy” than how many states have a death penalty).

48. See *id.* at 299 (Brennan, J., concurring) (recognizing the “progressive decline in, and the current rarity of, the infliction of death”).

49. See *id.* at 437 (Burger, C.J., with Blackmun, Powell, and Rehnquist, JJ., dissenting) (“Forty [s]tates, the District of Columbia, and the Federal Government still authorize the death penalty for a wide variety of crimes.” (footnote omitted)).

50. Corinna Barrett Lain, *Furman Fundamentals*, 82 WASH. L. REV. 1, 55 (2007). The Court may have felt pressure to do so because, “[b]y 1976, years of unexecuted death sentences had created a . . . ‘pileup on death row,’” and “the backlog pressed the Supreme Court to decide the death penalty’s constitutionality.” *Id.* (footnote omitted).

51. See *Gregg v. Georgia*, 428 U.S. 153, 187 (1976) (“We hold that the death penalty is not a form of punishment that may never be imposed . . .”). With this finding, the Court swung round from the stern admonishments it issued in *Furman*. “*Gregg* may not have formally overruled *Furman*, but it clearly turned its back on *Furman*’s ideals and constitutional command.” Lain, *supra* note 50, at 61. It seems the Court simply “followed the returns on the nationwide referendum it had organized” in *Furman* by tossing the ball back in the state legislatures’ court to decide just how badly they wanted to keep death on the books. Liebman, *supra* note 36, at 28.

52. *Gregg*, 428 U.S. at 179, 180–81 (footnote omitted).

53. *Id.* at 207.

54. *Id.* at 189, 192.

55. *Id.* at 195. On this point, unlike with its measure of decency, the Court favored well-informed opinion. *Id.* It demanded good information and critical, structured analysis in order to impose a single death penalty, but itself evaluated the decency of *all* impositions of death without much interest in either. *Id.*

A related criticism has been made of the *Furman* Court’s demand for more reliability from capital sentencing juries than it was able to achieve itself on the larger question of death’s constitutionality. Due to the fractionalized nature of the Court in *Furman*, it has been said that “*Furman* is virtually a caricature of the isolated jury in death cases . . . for which no attempt was



In later years, the Court became more entrenched in its reliance on state legislatures.<sup>56</sup> It dubbed them the “clearest and most reliable objective evidence of contemporary values.”<sup>57</sup> Decency became, more than anything, state legislation.

And this was the analysis on which the Court declined to strike down death when first faced with the question in *Furman*. It held on to the mere promise that death might one day be fairly and justly implemented, because the American people seemed to consider death itself a decent punishment. Most states seemed to want it. So death deserved a second chance.

### III. DECENCY PURSUANT TO THE MARSHALL HYPOTHESIS

But Marshall was done with second chances. He took an opposing view of the evolving standard of decency that sent his analysis on a course towards abolition and served as a powerful criticism of the Court’s approach in *Furman* and *Gregg*. The view that Marshall expressed in *Furman* is simple: if people do not understand the intricacies of something, they can hardly determine whether it is decent.<sup>58</sup> Has it not been said that the devil is in the details?

Marshall saw unfamiliarity, ignorance, and indifference as leading to the preservation of the death penalty as the *status quo*, “whether or not that is desirable, or desired.”<sup>59</sup> In effect, many states’ retention of the death penalty, to Marshall, was not the result of a continuous assessment of its propriety on the part of the American people, endlessly reaffirming the commitment to taking life. Rather, it was just the way things were, and thus the way things would tend to stay. Most people are busy going about their lives and do not take such an interest in the death penalty as to develop an appreciation for the vagaries of its workings and the weaknesses in its foundations. For most people, the question of whether the death penalty should be imposed is simply whether life should be taken for life, reductively excluding all the pitfalls and difficulties in

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made to formulate coherent standards by which individual [idiosyncrasies] might be tamed and the rule of law advanced.” Burt, *supra* note 5, at 1759. The Court could not follow its own advice, or achieve in *Furman* the sort of sureness of collective judgment that it demanded states create in their juries.

56. See *Atkins v. Virginia*, 536 U.S. 304, 312 (2002) (discussing cases where the Court relied on legislative evidence when determining the decency of the death penalty).

57. *Id.* (internal quotations omitted) (quoting *Penry v. Lynaugh*, 492 U.S. 302, 331 (1989), *abrogated by Atkins v. Virginia*, 536 U.S. 304 (2002)).

58. See *Furman v. Georgia*, 408 U.S. 238, 362–63 (1972) (Marshall, J., concurring) (discussing the American people’s lack of knowledge with regard to capital punishment).

59. *Id.* at 361–62 n.145.

determining whether, when, and how to impose it. In this sense, the people offer their support for an idealized abstraction of the death penalty, not the imperfect reality of it. Thus, to meaningfully assess the decency of death, courts would have to view it through a dual lens, combining expert knowledge with public judgment. Marshall believed that doing so would lead to the death penalty being found unconstitutional because the people would not support death if they truly understood its many failings.<sup>60</sup>

The Marshall Hypothesis is often broken into “two testable propositions,” which are (1) that the American people know little about the death penalty, and (2) that if they did, they would not support it.<sup>61</sup> Both have been hotly debated over the years.

While still contentious, the first testable proposition gains strong proof from *Hall*. Previously, the Court relied mostly on empirical studies such as a particularly comprehensive study in 1991 “[concluding] that the public lacks general knowledge about the death penalty and its administration.”<sup>62</sup> But the experience in *Hall* provides a different sort of proof. There, the simple fact that the general public is not composed of specialized scientists was all it took to find the public’s moral judgment alone insufficient to evaluate the decency of a scientific component of death. Certainly, the general public does not have the psychological expertise to factor the intricacies of IQ testing into its assessment of the death penalty. Because the criminal justice system depends inescapably on many types of science, forensic and otherwise,<sup>63</sup> there is much critical knowledge the public simply does not have, which is necessary to know death’s many details.

In this sense, Marshall’s view is, at bottom, difficult to impeach: people with expertise can better judge a thing than people without. If a sink in chambers springs a leak, the Supreme Court calls a plumber. If the lights go out, it calls an electrician. If computers crash, it calls information services. Some important and complicated matters require

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60. *Id.* at 362–63.

61. Clarke et al., *supra* note 22, at 310.

62. Dwight Aarons, *The Marshall Hypothesis and the Rise of Anti-Death Penalty Judges*, 80 TENN. L. REV. 381, 394 (2013).

63. See Donald E. Shelton, *Twenty-First Century Forensic Science Challenges for Trial Judges in Criminal Cases: Where the “Polybutadiene” Meets the “Bitumen,”* 18 WIDENER L.J. 309, 310 (2009) (“The seemingly rapid development of emerging scientific methods . . . has had, and will undoubtedly continue to have, an almost stunning impact on our justice system, particularly at the trial level.”). But see *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 596–97 (1993) (“Yet there are important differences between the quest for truth in the courtroom and the quest for truth in the laboratory. Scientific conclusions are subject to perpetual revision. Law, on the other hand, must resolve disputes finally and quickly.”).

special knowledge and experience. So why then, when death is at stake, would the Court call solely a person without relevant specialization and expertise? The death penalty is widely regarded as the most complex and multifarious area of law.<sup>64</sup> Why here, of all places, to turn away from informed opinion?

Even members of the Court have thrown up their hands, faced with death's complexity. Having struggled for some twenty-five years on the Court to constitutionalize the death penalty, Justice Blackmun finally threw in the towel and professed, "From this day forward, I no longer shall tinker with the machinery of death."<sup>65</sup> Justice Scalia has recognized the Court's failure to sort out death, challenging that "no one can be at ease with the stark reality that this Court's vacillating pronouncements have produced grossly inequitable treatment of those on death row."<sup>66</sup> Justice Ginsberg has described her need, upon first joining the Court, to have clerks work to educate her on death penalty law, because the "jurisprudence is dense."<sup>67</sup> And, just last year, Justice Breyer, joined by Justice Ginsburg in his dissent in *Glossip v. Gross*, concluded that "changes that have occurred during the past four decades," together with his "[twenty] years of experience" dealing with death on the Court, have led him to believe that "the death penalty, in and of itself, now likely constitutes a legally prohibited 'cruel and unusual punishment[t].'"<sup>68</sup>

To be sure, these justices knew a thing or two about critical analysis and criminal punishment when they made these statements and were better equipped than most of us to master both. How can the average American be expected to solve the jigsaw puzzle of policy, law, morality, and ethics that is the death penalty when it takes most of us a long career in the law toying with its many pieces to even begin to glimpse its full aspect? Marshall believed the American public should not be expected to

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64. See, e.g., Vivian Berger, *The Chiropractor as Brain Surgeon: Defense Lawyering in Capital Cases*, 18 N.Y.U. REV. L. & SOC. CHANGE 245, 254 (1991) (analogizing the death penalty to brain surgery); Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355, 371 (1995) ("It is undeniably true, as many critics have claimed, that the Court's death penalty doctrine is complex, arcane, and minutely detailed.").

65. *Callins v. Collins*, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting). It has been said that Justice Blackmun's reversal of position "rested more on his changing view of the role of the Court vis-à-vis the state legislatures than on his normative view of capital punishment." William W. Berry III, *Repudiating Death*, 101 J. CRIM. L. & CRIMINOLOGY 441, 462 (2011).

66. *Abdul-Kabir v. Quarterman*, 550 U.S. 233, 284 (2007) (Scalia, J., with Thomas, J., dissenting).

67. Marcia Coyle, *Ginsburg on Rulings, Race: Justice Says Public Dismay About Congress Spills over to High Court*, 36 NAT'L L.J., no. 52, Aug. 22, 2014, at 1.

68. *Glossip v. Gross*, 135 S. Ct. 2726, 2756 (2015).

master the death penalty any more than non-plumbers should be expected to replace valves, or non-electricians to diagnose power outages.

Thus, Marshall asked not whether the lay public supports the death penalty, but whether “people who were fully informed as to the purposes of the penalty and its liabilities” would support it.<sup>69</sup> In posing this question, Marshall did not suggest that the public’s moral judgment should be ignored or replaced with more informed opinions. Rather, he maintained that “[w]ith respect to this judgment, a violation of the Eighth Amendment is totally dependent on the predictable subjective, emotional reactions of informed citizens” to information they did not happen to have.<sup>70</sup> In Marshall’s view, the Eighth Amendment measure of decency should not be exclusive of the public’s gut impulses and instincts, but predictive of what its good judgment would be, given more complete and detailed information. Essentially, Marshall asked, what would happen if people knew the whole story?

Marshall’s answer to that question is the second proposition of his hypothesis. Based on the evidence available at the time, Marshall imagined that the public knew that death was not a better deterrent of murder than imprisonment, that the death penalty might actually promote violence and criminal activity, that convicted murderers are typically exemplar prisoners, that convicted murderers often become law-abiding citizens upon release, that the costs of execution exceed those of life imprisonment, that death is discriminatorily imposed against particular classes of people like the poor, and that “evidence [exists] that innocent people have been executed before their innocence can be proved.”<sup>71</sup> Surveying this landscape of little-known but critical information, Marshall concluded that the average citizen would find the grim reality of the death penalty “shocking to his conscience and sense of justice.”<sup>72</sup> The American people would not “knowingly support purposeless vengeance,” but rather, informed with all the information available, would hold the death penalty to be “immoral and therefore unconstitutional.”<sup>73</sup> In *Gregg*, Marshall recalled noting in *Furman* that “the American people are largely unaware of the information critical to a judgment on the morality of the death penalty, and [concluding] that if

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69. *Furman v. Georgia*, 408 U.S. 238, 361 (1972) (Marshall, J., concurring).

70. *Id.* at 362.

71. *Id.* at 362–64.

72. *Id.* at 369.

73. *Id.* at 363.

they were better informed they would consider it shocking, unjust, and unacceptable.”<sup>74</sup>

Marshall did not believe that the American people, if well informed, would try to rehabilitate or repair their death penalty regimes. That would not be possible because “[n]o matter how careful courts are, the possibility of perjured testimony, mistaken honest testimony, and human error remain all too real.”<sup>75</sup> This and other inescapable realities would lead the American people to conclude that fair, just, and decent killing of criminal defendants is an ideal impossible to attain. In other words, they would learn the lesson discovered on the Animal Farm. The American people would see that even if they got rid of Farmer Jones, the same old corruption, inequality, and injustice would return when they attempted to implement a new regime based on new proclamations of their ideals.

This second proposition of the Marshall Hypothesis remains heavily debated. One commentator has described it as “either naïve wishful thinking or antidemocratic paternalism.”<sup>76</sup> Another has shied from it, stating that “[i]t strikes me as arrogant to contend that those who disagree with me must be ignorant and that if they only knew the true facts, they would agree with me.”<sup>77</sup> Yet, there are studies demonstrating that lay proponents of the death penalty are indeed susceptible to being swayed by the sort of information Marshall had in mind. Various empirical research efforts have concluded that there is “qualified support for the proposition that information on sentencing innocent persons to death has a negative impact on support for the death penalty”;<sup>78</sup> that “[t]he more knowledgeable a person is about the death penalty before the study, the less likely it is that information on the operation of capital punishment will change that person’s views”;<sup>79</sup> and that “upon being informed about the operation of the death penalty, there is a decline in support for the penalty.”<sup>80</sup> While the results of such studies are indefinite and not without their detractors, it appears that there is at least some potential that America’s knowledge of problems with the death penalty could tug at its conscience. Whether it would tug hard enough to be death’s demise is a matter for the Court to decide at the end of an analysis like Marshall’s, not something that must be known in advance to justify the Court

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74. *Gregg v. Georgia*, 428 U.S. 153, 232 (1976) (Marshall, J., dissenting).

75. *Furman*, 408 U.S. at 367 (footnote omitted).

76. Carol S. Steiker, *The Marshall Hypothesis Revisited*, 52 HOW. L.J. 525, 528 (2009).

77. Michael Mello, *Certain Blood for Uncertain Reasons: A Love Letter to the Vermont Legislature on Not Reinstating Capital Punishment*, 32 VT. L. REV. 765, 772 n.39 (2008).

78. Clarke et al., *supra* note 22, at 334.

79. Aarons, *supra* note 62, at 393 (footnote omitted).

80. *Id.* at 394.

undertaking the analysis in the first place. In other words, criticisms of the second proposition of the Marshall Hypothesis do not weigh against the Court conducting a similar inquiry into whether, knowing all there is to know, America would end its affair with death. Not knowing the answer does not weigh against asking the question.

Beyond criticisms from scholars, there are several from the bench as old as the Hypothesis itself.<sup>81</sup> Chief Justice Burger wrote in *Furman* that he might have joined Justice Marshall if the Court was “possessed of [the] legislative power.”<sup>82</sup> But because the constitutional inquiry was supposed to be “divorced from personal feelings as to the morality and efficacy of the death penalty” and because the Court was obliged not to “seize upon the enigmatic character of the [Eighth Amendment] guarantee as an invitation to enact our personal predilections into law,” Burger could not follow Marshall.<sup>83</sup> Indeed, there is a danger in the Marshall Hypothesis of a court substituting its knowledge of the death penalty for the moral judgment of the American public that underlies Eighth Amendment decency.<sup>84</sup> Speculatively integrating expert knowledge into a lay moral judgment is a difficult row to hoe.

Justice Rehnquist has also offered reasons to limit the evaluation of decency to state legislation and imposition of death. In *Atkins*, he warned that reliance on international norms, professional organizations, and religious organizations would open up the inquiry surrounding the death penalty in an unmanageable way.<sup>85</sup> Perhaps the Marshall Hypothesis ushers in too many variable sources of information to be as sure as simply taking stock of the number of states that keep death on the books and the number that impose it.<sup>86</sup> That measure is reliable. That measure is consistent. Perhaps those qualities outweigh its dilettantism.

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81. The criticisms described here are responded to in Part V after reviewing empirical evidence and studies that weigh in favor of adopting the Marshall Hypothesis more broadly in Eighth Amendment jurisprudence.

82. *Furman v. Georgia*, 408 U.S. 238, 375 (1972) (Burger, C.J., with Blackmun, Powell and Rehnquist, JJ., dissenting).

83. *Id.* at 375–76.

84. In fact, each of the dissenters in *Furman* had a concern similar to this. As explained by one commentator, “[i]t is commonplace in a dissenting judicial opinion to charge that the majority has ignored canons of judicial restraint and wrongly relied on ‘personal’ or ‘policy’ views to invalidate legislation,” and “[a]ll of the dissenters in *Furman* invoked this formulation.” Burt, *supra* note 5, at 1757 (footnote omitted).

85. *Atkins v. Virginia*, 536 U.S. 304, 327 (2002) (Rehnquist, C.J., with Scalia and Thomas, J.J., dissenting).

86. Scholars too have expressed concerns as to whether Marshall’s approach, if adopted, would be at all tenable. See, e.g., Clarke et al., *supra* note 22, at 310 (“These simple propositions hide a world of complexity. First, what would it mean for a person to be ‘fully informed’? What level of information suffices?”).

Justice Alito has offered a criticism based in *stare decisis*. In *Hall*, he complained that looking to professional organizations simply breaks from the Supreme Court's long-established treatment of decency under the Eighth Amendment.<sup>87</sup> And, in large part, it does. Despite Justice Rehnquist's concerns in *Atkins* that the Court appeared to be flirting with professional organizations in its evaluation of decency,<sup>88</sup> the hardline stance of the Court has been for decades that state legislatures are the ultimate word on what the American people think is decent.<sup>89</sup>

Such criticisms prevented the Hypothesis from ever taking hold in Marshall's day. It failed to gain traction with the Court. The Court continued to look primarily to state legislatures for a measure of decency. And in time, its moment seemed to pass. But the law likes a comeback.

#### IV. HOW HALL V. FLORIDA ENDORSES THE MARSHALL HYPOTHESIS

The Supreme Court's decision in *Hall v. Florida* breathes new life into the Marshall Hypothesis and presents good reasons for moving past the criticisms that have prevented its broad acceptance. It started with the Florida Supreme Court facing a critical question as to Florida's compliance with *Atkins*. The Florida statute that defines intellectual disability for purposes of determining which defendants are categorically ineligible for the death penalty requires, among other things, an IQ of 70 or below.<sup>90</sup> But the clinical tests used to measure IQ have a standard error of measurement (SEM) of, generally speaking, plus or minus five.<sup>91</sup> The tests cannot identify actual IQ with exact precision, only a range within which each defendant's actual IQ is somewhere secreted.<sup>92</sup> In *Cherry v.*

87. *Hall v. Florida*, 134 S. Ct. 1886, 2002 (2014) (Alito, J., with Scalia, C.J., and Thomas, J., dissenting).

88. *See Atkins*, 536 U.S. at 322 (Rehnquist, C.J., with Scalia and Thomas, JJ., dissenting) ("I write separately . . . to call attention to the defects in the Court's decision to place weight on foreign laws, the views of professional and religious organizations, and opinion polls in reaching its conclusion.").

89. *See id.* at 312 (majority opinion) (recognizing legislatures as the "most reliable objective evidence of contemporary values").

90. FLA. STAT. § 921.137 (2013) (defining intellectually disabled as "significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior" with a "means performance that is two or more standard deviations from the mean score on a standardized intelligence test"); *Hall*, 134 S. Ct. at 1990 ("Florida law defines intellectual disability to require an IQ test score of 70 or less.").

91. *See Hall*, 134 S. Ct. at 1995 (majority opinion) (explaining that "[a] score of 71, for instance, is generally considered to reflect a range between 66 and 76" and citing a clinical diagnostic guide to include "a margin for measurement error (generally +5 points)" (internal quotations omitted)).

92. *See id.* ("The professionals who design, administer, and interpret IQ tests have agreed, for years now, that IQ test scores should be read not as a single fixed number but as a range.").

*State*,<sup>93</sup> the Florida Supreme Court faced the issue of whether the Florida statute excluded consideration of the SEM.<sup>94</sup> The Court found that it did because “the statute does not use the word approximate, nor does it reference the SEM.”<sup>95</sup> If a defendant scored a 71, he was eligible for death under the statute even if his actual IQ was 66. Diagnosing intellectual disability under *Atkins* was, in Florida, more a matter of statutory construction than the science of testing.

The Florida Supreme Court reached this conclusion because it was caught between two competing principles from *Atkins*. *Atkins* explicitly left to the states the task of enforcing its prohibition,<sup>96</sup> which suggested to many that the states were free to define intellectual disability however they saw fit. On the other hand, the *Atkins* Court noted that “statutory definitions . . . are not identical, but generally conform to the clinical definitions.”<sup>97</sup> There was the sense that intellectual disability still resided primarily in science. So *Atkins* threaded a needle between the sovereignty of state legislatures and the scientific, clinical nature of intellectual disability. The Florida Supreme Court was left to find the eye of that needle somewhere between honoring the Florida Legislature’s will and abiding by the clinical reality. And it ultimately decided that the Florida Legislature’s definition of IQ could rightly exclude consideration of the SEM.

*Cherry* was the law in Florida for seven years.<sup>98</sup> Defendants could be executed if they scored a 71 or above. It did not matter if they could have presented evidence to support the conclusion that their actual IQ was lower than their measured IQ. It did not matter if they would have been clinically diagnosed as intellectually disabled.

And that is how Freddie Lee Hall came before the Florida Supreme Court—with an IQ score of 71.<sup>99</sup> Applying its ruling in *Cherry*, the Florida

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93. 959 So. 2d 702 (Fla. 2007).

94. See *id.* at 712 (noting that the fundamental question raised in the appeal was “whether the rule and statute provide a strict cutoff of an IQ score of 70 in order to establish significantly subaverage intellectual functioning” or whether the Florida statute considers a range of scores under the SEM).

95. *Id.* at 713.

96. *Atkins v. Virginia*, 536 U.S. 304, 317 (2002).

97. *Id.* at 317 n.22.

98. *Hall v. Florida*, 134 S. Ct. 1986, 1990 (2014) (explaining Florida’s rule that “[i]f, from test scores, a prisoner is deemed to have an IQ above 70, all further exploration of intellectual disability is foreclosed,” and holding that such a rigid rule “creates an unacceptable risk that persons with intellectual disability will be executed, and thus is unconstitutional”), *abrogating* *Cherry v. State*, 959 So. 2d 702 (Fla. 2007).

99. *Id.* at 1992 (noting that “Hall had received nine IQ evaluations in 40 years, with scores ranging from 60 to 80,” which included “an IQ test score of 71”).



Supreme Court found that Hall did not fall within the category of defendants ineligible for execution due to intellectual disability.<sup>100</sup>

But the United States Supreme Court found otherwise. True to its treatment of Albert Trop, the Supreme Court in *Hall* again set out to review the nation's standard of decency. It asked whether the then prevailing standard would be violated by Hall's execution given how Florida's strict cutoff at 70 failed to account for the SEM.<sup>101</sup> But, unlike the Court's usual assessments of decency, it set out this time in search of more informed views. The Court found it "proper to consider the psychiatric and professional studies that elaborate on the purpose and meaning of IQ scores" in assessing Florida's strict cutoff at 70.<sup>102</sup>

This came as a surprise to many. Commentators have recognized the Court's disinclination to rely on empirical, scientific research in death penalty cases.<sup>103</sup> Indeed, in *Barefoot v. Estelle*,<sup>104</sup> where the Court considered the admissibility of psychiatrist testimony to the effect that a capital defendant poses a threat of future dangerousness,<sup>105</sup> the Court "dismissed an American Medical Association study indicating a two-thirds error rate in the reliability of psychiatric predictions because the study only showed that the experts are wrong 'most of the time,' and failed to prove that experts are not 'always wrong.'"<sup>106</sup> The Court going so far out of its way to reject a study conducted by a prominent professional organization led many "to wonder whether empirical evidence plays any role at all in the Court's decision making."<sup>107</sup> And with regard to Eighth Amendment review of the death penalty in particular, the Court had seemed to put a pin in the Marshall Hypothesis forty years ago and forgotten about it, instead wedding itself to state legislatures in drawing the parameters of Eighth Amendment protection.

The Court had something to say about this. It wrote, "[t]hat this Court, state courts, and state legislatures consult and are informed by the work of medical experts in determining intellectual disability *is unsurprising*," since "[s]ociety relies upon medical and professional

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100. See *Hall v. State*, 109 So. 3d 704, 709–10 (Fla. 2012) ("Hall asserts that the statutorily prescribed cutoff is arbitrary because it does not consider the range of scores mentioned in *Atkins*. We have previously found this argument to be meritless.").

101. *Hall*, 134 S. Ct. at 1994.

102. *Id.* at 1993.

103. Clarke et al., *supra* note 22, at 309 ("Supreme Court Justices rarely take into account empirical research when making decisions, and they seem particularly opposed to incorporating social-scientific scrutiny of the death penalty." (footnote omitted)).

104. 463 U.S. 880 (1983).

105. *Id.* at 884–85.

106. Clarke et al., *supra* note 22, at 309 (footnote omitted).

107. *Id.* (footnote omitted).

expertise to define and explain how to diagnose the mental condition at issue.”<sup>108</sup> Of course, the Court declaring that its analysis should not surprise anyone betrayed an awareness that the analysis was likely to do just that.<sup>109</sup>

Justice Alito perceived a deceit in the majority’s reasoning in *Hall*. He argued that reliance on the medical profession “marks a new and most unwise turn in our Eighth Amendment case law” and “sharply departs from the framework prescribed in prior Eighth Amendment cases.”<sup>110</sup> He saw no reason to break from “societal norms” as the chief determiner of whether the death penalty, as applied to Hall, was decent.<sup>111</sup>

But whatever sleight of hand there was in the Court’s reaching for professional norms in *Hall*, Justice Marshall’s teachings resonated in the essential finding: “In determining who qualifies as intellectually disabled, it is proper to consult the medical community’s opinions.”<sup>112</sup> As Marshall would imbue the public’s moral judgment about the death penalty with the teachings of experts, the *Hall* Court factored professional consensus into its accounting of state legislatures that have “passed legislation allowing defendants to present additional evidence of intellectual disability when their IQ test score is above 70.”<sup>113</sup> The Court found that Florida’s rule violated the Eighth Amendment because it cut the *Atkins* inquiry off if there was an IQ score above 70, “tak[ing] an IQ score as final and conclusive evidence of a defendant’s intellectual capacity, when experts in the field would consider other evidence,” since the SEM is “a statistical fact, a reflection of the inherent imprecision of the test itself.”<sup>114</sup> The strict cutoff at 70 fell short of the nation’s prevailing standard of decency, as reflected by the medical community’s understanding that IQ test results cannot support a strict cutoff.

The Court did not credit Marshall, or cite to his opinion in *Furman*, when it went in search of a more informed decency in *Hall*. But a different Eighth Amendment analysis arose with implications far beyond the narrow issue of *Hall*. The Marshall Hypothesis had finally won the day, even if not in name and even if limited to *Atkins* cases.

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108. *Hall v. Florida*, 134 S. Ct. 1986, 1993 (2014) (emphasis added).

109. I once barked “*I didn’t do it!*” before my mother could ask if I knew anything about the unfortunately positioned Joseph in her porcelain nativity set being clumsily overturned and, as a result, beheaded.

110. *Hall*, 134 S. Ct. at 2002 (Alito, J., with Scalia, C.J., and Thomas, J., dissenting).

111. *Id.*

112. *Id.* at 1993 (majority opinion).

113. *Id.* at 1997.

114. *Id.* at 1995.

V.      *IMPLICATIONS FOR THE CONSTITUTIONALITY OF DEATH ITSELF*

Relying on the knowledge of professional organizations, the *Hall* Court made no less profound a finding than that “Florida’s law contravenes our Nation’s commitment to dignity and its duty to teach human decency as the mark of a civilized world.”<sup>115</sup> Of course, that commitment and duty extend to the death penalty itself.

There is reason to believe that a broader adoption of informed decency—a robust application of the Marshall Hypothesis to capital punishment itself—would place death within the Eighth Amendment prohibition on cruel and unusual punishment. Professional organizations in science and law, death penalty experts, and researchers have made findings that, if fully appreciated by the public, could lead to an utter lack of faith in the reliability and fairness of the death penalty.<sup>116</sup> Under these findings, a model of informed decency inclines towards abolition.

“In 2009, the National Academy of Sciences (NAS) published a landmark report on forensic science,” described as “one of the most important developments in forensic science since the establishment of the crime laboratory in the 1920s.”<sup>117</sup> After spending years conducting a painstaking study of forensic techniques such as fingerprints, handwriting, and ballistics, the NAS concluded that “[t]he forensic science system, encompassing both research and practice, has serious problems that can only be addressed by a national commitment to overhaul the current structure that supports the forensic science community in this country.”<sup>118</sup> In the turbulent wake of the report, one commentator observed that “[t]he legal community now concedes, with varying degrees of urgency, that our system produces erroneous convictions based on discredited forensics,”<sup>119</sup> and the Supreme Court recognized “[s]erious deficiencies . . . in the forensic evidence used in

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115. *Id.* at 2001.

116. See *infra* Part V (discussing the flaws that the National Academy of Sciences, the American Psychological Association, the American Bar Association, the American Law Institution, and the Constitution Project have found with the death penalty).

117. Paul C. Giannelli, Daubert and Forensic Science: The Pitfalls of Law Enforcement Control of Scientific Research, 2011 U. ILL. L. REV. 53, 53 (2011) (referring to Comm. on Identifying the Needs of the Forensic Scis. Cmty., Nat’l Research Council, *Strengthening Forensic Science in the United States: A Path Forward*, NAT’L CRIM. JUST. REFERENCE SERV. (Aug. 2009), available at <https://www.ncjrs.gov/pdffiles1/nij/grants/228091.pdf> [hereinafter *The NAS Report*]).

118. Melendez-Diaz v. Massachusetts, 557 U.S. 305, 319 (2009) (quoting *The NAS Report*, *supra* note 117, at xx).

119. Pamela R. Metzger, *Cheating the Constitution*, 59 VAND. L. REV. 475, 491 (2006) (footnote omitted).

criminal trials.”<sup>120</sup> A pall of suspicion is cast over death in the wake of the pervasive failures of forensic sciences and the debunking of much of the basis for crime lab testimony used to support capital criminal convictions and sentences. In 2014, the NAS released another report, finding that at least 4.1 percent of defendants sentenced to death in the country are innocent.<sup>121</sup>

The American Psychological Association has also weighed in on death. In 2001, it called for each state to put a moratorium on imposition of the death penalty “until the jurisdiction implements policies and procedures that can be shown through psychological and other social science research to ameliorate [certain] deficiencies.”<sup>122</sup> In 2013, the president of that organization urged that it should go beyond the longstanding call for a moratorium and take an unqualified stance in favor of abolition.<sup>123</sup>

Since 1997, the American Bar Association has called for a moratorium on death due to the lack of fairness and reliability in death penalty regimes across the nation. It now observes that “[d]ecades after *Gregg v. Georgia* . . . numerous concerns have arisen over states’ ability to fairly and accurately determine who should be sentenced to death” and “[l]awyers, courts, social scientists, law enforcement personnel, victims’ families and many, many others have weighed in on what problems they perceive to exist in the system.”<sup>124</sup>

In 2009, the American Law Institute, which as part of its Model Penal Code had provided provisions for balancing aggravating and mitigating factors in capital sentencing, excised that section. The report that prompted the change stated that “[u]nless we are confident we can recommend procedures that would meet the most important of the concerns, the Institute should not play a further role in legitimating capital punishment, no matter how unintentionally, by retaining the section in the Model Penal Code.”<sup>125</sup>

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120. *Melendez-Diaz*, 557 U.S. at 319.

121. Debra Cassens Weiss, *Study: Scalia Was Wrong; About 1 in 25 People Sentenced to Death Are Likely Innocent*, A.B.A. J. (Apr. 29, 2014, 12:41 PM CDT), [http://www.abajournal.com/news/article/study\\_scalia\\_was\\_wrong\\_about\\_1\\_in\\_25\\_people\\_sentenced\\_to\\_death\\_are\\_likely\\_i](http://www.abajournal.com/news/article/study_scalia_was_wrong_about_1_in_25_people_sentenced_to_death_are_likely_i).

122. Am. Psychol. Ass’n, *The Death Penalty in the United States*, APA.ORG, <http://www.apa.org/about/policy/death-penalty.aspx> (last visited Mar. 18, 2016).

123. Donald N. Bersoff, *APA Should Stand up Against the Death Penalty*, AM. PSYCHOL. ASS’N (Oct. 2013), <http://www.apa.org/monitor/2013/10/pc.aspx>.

124. Am. Bar Ass’n, *State Death Penalty Assessments*, AMERICANBAR.ORG, [http://www.americanbar.org/groups/crsj/projects/death\\_penalty\\_due\\_process\\_review\\_project/state\\_death\\_penalty\\_assessments.html](http://www.americanbar.org/groups/crsj/projects/death_penalty_due_process_review_project/state_death_penalty_assessments.html) (last visited Mar. 18, 2016).

125. AM. LAW INST., REPORT OF THE COUNCIL TO THE MEMBERSHIP OF THE AMERICAN LAW INSTITUTE ON THE MATTER OF THE DEATH PENALTY 4 (Apr. 15, 2009), *available at* <http://www.deathpenaltyinfo.org/documents/alicon.pdf>.

In 2001, the Constitution Project called for death penalty reform because it found that most death penalty regimes “pose almost as great a risk of arbitrary, capricious, and discriminatory application as three decades ago, when the Court called for reform in *Furman v. Georgia*.”<sup>126</sup>

These leading organizations, at the forefront of science and law, have called into question, and in some instances outright rejected, the legitimacy and propriety of the death penalty. Their findings are based on years of research by hundreds of scientists and legal experts. They are complex and dense. They represent the sort of specialized expertise that takes lifetimes to develop and cannot be achieved by lay people engaged in life’s other pursuits. They represent the sort of sophisticated analyses that Justice Marshall would utilize beyond lay opinion. And the findings show that the technical knowledge needed in *Hall* (to determine the decency of executing *Atkins* defendants without considering the SEM) is also necessary, on a larger scale, to fully appreciate the decency of death itself.

The widespread doubt in the fairness and reliability of the death penalty held by those familiar with its inner workings—coupled with the likelihood that informing public judgment with expert knowledge would shake the public’s faith in the penalty—creates a greater pressure than ever before to desist in favoring uninformed views when shaping the Eighth Amendment contours of death.

After the initial drafting of this Article, the heated exchanges on the Supreme Court inspired by *Glossip v. Gross* perhaps gave a peek at the future (if indeed there is one) of what I have called informed decency. In *Glossip*, the Supreme Court undertook a post-*Hall* Eighth Amendment review of Oklahoma’s lethal injection protocol.<sup>127</sup> This Author watched that case closely for indications of whether a more informed decency would find traction on the Court. On the one hand, Justice Breyer did a painstaking review of “[a]lmost [forty] years of studies, surveys, and experience” to conclude that the imposition of the death penalty itself likely violates the Eighth Amendment.<sup>128</sup> Justice Breyer observed that the “circumstances and the evidence of the death penalty’s application have changed radically” since the Court concluded in *Gregg* that state statutes

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126. THE CONSTITUTION PROJECT, MANDATORY JUSTICE: EIGHTEEN REFORMS TO THE DEATH PENALTY 27 (2001).

127. *Glossip v. Gross*, 135 S. Ct. 2726, 2731 (2015).

128. See *id.* at 2755–56 (Breyer, J., with Ginsburg, J., dissenting) (stating that changes in the imposition of the death penalty over the past four decades, coupled with twenty years of experience on the Supreme Court, lead Justice Breyer to the conclusion that the death penalty violates the Eighth Amendment).

“contained safeguards sufficient to ensure that the penalty would be applied reliably and not arbitrarily.”<sup>129</sup>

On the other hand, Justice Scalia, who wrote separately in order to “respond to Justice BREYER’s plea for judicial abolition of the death penalty,” dismissed the information relied on by Justice Breyer, calling it “a ream of the most recent abolitionist studies (a superabundant genre).”<sup>130</sup> Justice Scalia then provided the fundamental counterargument to informed decency:

Justice BREYER’s dissent is the living refutation of *Trop*’s assumption that this Court has the capacity to recognize “evolving standards of decency.” Time and again, the People have voted to exact the death penalty as punishment for the most serious of crimes. Time and again, this Court has upheld that decision. And time and again, a vocal minority of this Court has insisted that things have “changed radically,” and has sought to replace the judgments of the People with their own standards of decency.<sup>131</sup>

Perhaps the battle lines are drawn already. It seems that embracing empirical data and scientific study will lead some justices to find that death’s impracticability has finally revealed it to be unconstitutional. And those justices that reject empirical data and scientific study as unreliable, legally irrelevant (as the State of Florida once rejected the SEM), or an improper consideration in addition to the public’s moral judgment, will continue to find death itself constitutional because, after all, death is just what we do.

However, embracing informed decency would not require us to say that the moral judgment of the public should have no place in shaping Eighth Amendment protection. Of course, it does and must. The beating pulse of the Eighth Amendment will always be the American people’s sense of moral right and human dignity. But their judgments are only as reliable as the understanding on which they are based. Because the information necessary to really know death is highly technical and arcane, it can only be incorporated into the assessment of decency by embracing science, expertise, and specialization. As the general public should always be the Eighth Amendment’s heart—scientists, lawyers, and scholars must be part of its mind.

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129. *Id.* at 2755.

130. *Id.* at 2746–47 (Scalia, J., with Thomas, J., concurring).

131. *Id.* at 2749 (citation omitted).

## VI. CONCLUSION

The animals on Animal Farm learned that there is no getting rid of Farmer Jones. Regimes come and go. They change form and put a different face on things. But, in the end, unfairness and injustice abide, resurface, and grow strong once again in regimes implemented by fallible and corruptible administrators. We have learned the same lesson over the years in our experience with the American death penalty. After some forty years of post-*Furman* experimentation with various safeguards of reliability and fairness in capital punishment, professional organizations and experts in science and law have concluded that arbitrariness and injustice remain.

Justice Marshall would rely on those experts in determining whether death is decent. The Supreme Court did so in *Hall*, with regard to one particular aspect of the American death penalty—*Atkins* IQ assessments. It should do so with regard to death itself because that larger question also depends on technical and arcane knowledge. The full dimensions of death should be knowingly cast.

Death still walks, talks, dresses in fancy clothes, and sleeps in the farmhouse. But not everyone can see that it does. Not everyone knows where to look or cares to go looking. Those that do should be relied on to define a newly informed decency of death.