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## **Why So Long? Examining the Nexus Between Case Complexity and Delay in Florida's Death Penalty System**

Corey Daniel Burton

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Why so Long? Examining the Nexus between Case Complexity and Delay in Florida's  
Death Penalty System

By

Corey Daniel Burton

Bachelor of Arts  
University of Louisville, 2007

Master of Science  
University of Louisville, 2012

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Accepted by:

John Burrow, Major Professor

Robert Brame, Committee Member

Brandon Applegate, Committee Member

Richard Tewksbury, Committee Member

Cheryl L. Addy, Vice Provost and Dean of the Graduate School

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## ABSTRACT

Over the last few decades, there has been greater recognition that increased time on death row is a significant problem in the United States that is getting worse. Beginning with the U.S. Supreme Court's denial of certiorari in *Lackey v. Texas* (514 U.S. 1045, 1995), numerous defendants have attempted to assert Eighth Amendment claims of cruel and unusual punishment on the grounds that the length of their death row confinement combined with their subsequent execution is unconstitutional. Although such claims have been unsuccessful in the U.S. Supreme Court, other federal courts have examined the issue. In 2014, the Central District of California struck down California's death penalty system on Eighth Amendment grounds, claiming that the system at the time, characterized by very lengthy periods of death row confinement, in no way furthered the death penalty's two classic penological purposes of deterrence or retribution (*Jones v. Chappell*, 31 F. Supp. 3<sup>rd</sup> 1050, Dist. Ct, C.D. Cal 2014). Although this decision was later overturned on procedural grounds, it represented the first instance in which a federal judge ruled a death penalty system unconstitutional, citing lengthy death row confinement as the core issue. The number of ways in which defendants can appeal their death sentences has increased significantly since the U.S. Supreme Court's ruling in *Gregg v. Georgia* (428 U.S. 153, 1976). Undoubtedly, the appeals process plays a critical role in lengthy death row confinement. However, less known are the reasons that such lengthy appeals processes have become so commonplace. Using data on defendants

sentenced to death in Florida from 1975-2013 (N=406), this study examines the role of case complexity in predicting increased time on death row and ultimately delay. In addition, other appellate-level and case-level variables are considered. Finally, implications for policy and directions for future research are presented.

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## CHAPTER 1

### INTRODUCTION

Long periods of death row confinement are a major problem in the United States. Justice Stephen Breyer's dissenting opinion in *Glossip v. Gross* (135 S. Ct. 2726, 2015) illustrates the essence of the problem. After addressing the potentially unreliable and arbitrary nature of the American death penalty in Parts I and II of his dissent in *Glossip*, Justice Breyer begins Part III of his opinion with the following observation:

“The problems of reliability and unfairness almost inevitably lead to a third independent constitutional problem: excessively long periods of time that individuals typically spend on death row, alive but under sentence of death. That is to say, delay is in part a problem that the Constitution's own demands create...” (*Glossip* 135 S. Ct. at 2764, Breyer, J., dissenting).

It is clear from Justice Breyer's dissent that the Supreme Court should treat death as quite distinct from other forms of punishment. It should come as no surprise that adjudicating death penalty cases will take longer than other criminal cases. The problem, however, as Justice Breyer attempts to illustrate in his dissent, is that this issue, paradoxically, has come to pass largely in the years since the U.S. Supreme Court began implementing measures to narrow the class of death-eligible defendants. Such measures were intended to yield a more predictable capital punishment process and a relatively small number of death row inmates who spend shorter amounts of time on death row. This has not, however, been the result.

Further discussion about the time American capital defendants spend on death row as well as some factors that contribute to longer periods under death row confinement is instructive. According to the U.S. Department of Justice, the amount of time capital defendants spend on death row is steadily increasing (Latzer & Cauthen, 2007). From 1977-1983, death row inmates spent an average of 51 months on death row, and the trend has continued upward ever since (Latzer & Cauthen, 2007). In 2005, the average stint on death row had increased to 147 months (Latzer & Cauthen, 2007), up from about 132 months in 2004 (Snell, 2011). As of 2012, this figure had increased to 190 months and dipped only slightly to 186 months in 2013 (Snell, 2014). Justice Breyer notes the following in *Glossip*:

“Nearly half of the 3,000 inmates now on death row have been there for more than 15 years. And, at present execution rates, it would take more than 75 years to carry out those 3,000 death sentences; thus, the average person on death row would spend an additional 37.5 years there before being executed.” (*Glossip* 135 S. Ct. at 2764-65, Breyer, J., dissenting).

But is an upward trend in the amount of time spent on death row necessarily an indicator of excessive delay? The answer may rest largely on how one defines delay. In any event, delay requires one to look beyond the amount of time that has passed between sentencing and execution. This is especially true given that the Supreme Court has built an entire body of legal protections and procedures that will result in the passage of some additional, but acceptable time in order to litigate the various issues that arise.

In terms of the upward trend in the amount of time defendants are spending on death row, several factors may be at play. First, the U.S. Supreme Court has encouraged and imposed stricter standards for death penalty appeals, sometimes referred to as super due process (Cauthen & Latzer, 2000). Namely, as a result of the Court’s decision in

Gregg v. Georgia (428 U.S. 153, 1976), death penalty cases must proceed in a bifurcated manner with guilt and sentencing occurring as two independent processes (Cauthen & Latzer, 2007). In addition, although not constitutionally required, many states require death sentences to be automatically appealed to the state's court of last resort, a process known as proportionality review (Cauthen & Latzer, 2000). Finally, capital cases by their nature present more legal issues overall, particularly on appeal, than non-capital cases (Cauthen & Latzer, 2000). A recent U.S. District Court ruling in California has left little doubt that the number of appeals available to defendants and the number of issues that may arise on appeal play a significant role in death row stints that can last, on average, 25 years (Jones v. Chappell, 31 F. Supp. 3d. 1050, Dist. Court, CD California, 2014).

Specifically, regarding the issue of automatic review, California is one state that does not require such review (Shatz, 2015). California's method for meeting the Supreme Court's requirement of narrowing the class of death-eligible defendants relies on a first-degree murder statute that contains special circumstances under which such cases become capital (Shatz, 2015)<sup>1</sup>. Paradoxically, however, California has included so many of these special circumstances in its first-degree murder statute that it has created a massive group

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<sup>1</sup> California's "Special Circumstances" are spelled out in CAL. PENAL CODE § 190.2(a) and include the following: "other murder" circumstances: the defendant was convicted of more than one murder ((a)(3)) or was previously convicted of murder ((a)(2)); "victim" circumstances: the defendant intentionally killed peace officer ((a)(7)), federal law enforcement officer or agent ((a)(8)), firefighter ((a)(9)), witness ((a)(10)), prosecutor or former prosecutor ((a)(11)), judge or former judge ((a)(12)), elected official or former elected official ((a)(13)) or juror ((a)(20)); "manner" circumstances: the murder was committed by a destructive device, bomb or explosive planted ((a)(4)) or mailed ((a)(6)) or was intentionally committed by lying in wait ((a)(15)), by the infliction of torture ((a)(18)), by poison ((a)(19)) or by shooting from a motor vehicle ((a)(21)); "motive" circumstances: the defendant committed the murder for financial gain ((a)(1)), to escape arrest ((a)(5)), because of the victim's race, color, religion, national origin or country of origin ((a)(16)) or to further the activities of a criminal street gang ((a)(22)); "commission of a felony" circumstances: the murder was committed while the defendant was engaged in, or an accomplice to robbery ((a)(17)(A)), kidnapping ((a)(17)(B)), rape ((a)(17)(C)), forcible sodomy ((a)(17)(D)), child molestation ((a)(17)(E)), forcible oral copulation ((a)(17)(F)), burglary ((a)(17)(G)), arson ((a)(17)(H)), train wrecking ((a)(17)(I)), mayhem ((a)(17)(J)), rape by instrument ((a)(17)(K)) or carjacking ((a)(17)(L)); and "catchall" circumstance: the murder was especially heinous, atrocious, or cruel ((a)(14)) (Shatz, 2015).

of death-eligible defendants (Shatz, 2015). Although the U.S. Supreme Court determined in *Pulley v. Harris* (465 U.S. 37, 1984) that automatic or proportionality review is not constitutionally required, California's death penalty system demonstrates that without such review, the Court's requirement that states narrow the class of death-eligible defendants is not being met and ultimately, lengthy periods of death row confinement can result.

Other reasons for delay, particularly in California but perhaps in other states as well, include habeas corpus appeals, the time required to procure appellate counsel, the time required for appellate counsel to become familiar with the trial record in a case and the time required for the state's court of last resort to place a case on its docket and ultimately render a decision (*Jones v. Chappell*, 31 F. Supp. 3d. 1050, Dist. Court, CD California, 2014). Again, reasonably lengthy periods of death row confinement should be expected. Certainly, if no process existed that permitted death row inmates to challenge their death sentences or if states did not impose additional safeguards, the result could, at worst, be a system in which death sentences are handed down in an unusually high number of cases and in which executions are administered in a completely indiscriminate fashion.

The issue of increased time on death row rightfully leads to a discussion about the costs of the death penalty. Although there is no uniform method for determining the precise cost of administering the death penalty (Dieter, 2009), the general consensus is that states pay more annually to maintain their individual death penalty systems than they would pay maintaining a system in which life imprisonment is the maximum allowable penalty (Dieter, 2009). On average, only about 1 in 10 death sentences result in an

execution (Dieter, 2009). Thus, the costs to states of maintaining their death penalty systems do not typically reflect the costs of those cases in which an execution occurs and instead, are more representative of the trials and appeals processes that occur across all cases (Dieter, 2009). It is estimated that death penalty cases cost about \$1 million more than non-capital cases (Dieter, 2009). However, only 1 in 3 death penalty cases results in a death sentence, meaning that states pay roughly \$3 million more to sentence a person to death than to hand down non-capital sanctions (Dieter, 2009). If only about 1 in 10 death sentences result in an execution, that means that each execution costs states roughly \$30 million dollars more to impose than a non-capital sanction (Dieter, 2009). To put it simply, the death penalty creates a huge cost to states' taxpayers and in most cases, the ultimate sanction is never imposed. It is important to note that these are national estimates and that these figures may be even larger depending on the state under examination.

A recent study examining county-level tax information in Texas found that capital trials lead to both an increase in property taxes and a decrease in funding for other public safety measures (Lundberg, 2019). In his work, Lundberg (2019) found that in the years in which any particular county in Texas experiences a capital trial, the average increase in local property taxes is around 2% or about \$660,000. In terms of the reduction in public safety expenditures, Lundberg (2019) estimates that any given county could reduce such expenditures by about \$1.4 million provided that the entire process, defined as the period from offense date to the conclusion of the trial, lasts approximately one year. Recent data out of Louisiana further illustrates the problem of cost. In their work, Johnson and Quigley (2019) found that the state of Louisiana has spent approximately \$200 million

over the last 15 years administering its death penalty. In that period, however, the state has only executed one person. Further, Louisiana has only executed 10 persons out of the 242 the state has sentenced to death since 1976 or about 4.1% (Johnson and Quigley, 2019). Thus, whether examining the last several years or going back decades, it is easy to question whether maintaining the death penalty in Louisiana is worth the cost.

One important question remains. What is delay? For purposes of this research, delay is defined as the cumulative amount of time that a defendant has spent on death row less the time taken for a state's court of last resort to render a decision in an automatic appeal. Given that lengthy appeals processes appear to be a significant contributing factor in extended periods of death row confinement, the point at which a decision is rendered in an automatic appeal seems an appropriate starting point. The present research draws on information from death row inmates in the state of Florida, a state that requires all death sentences to be automatically appealed to the state's Supreme Court.<sup>2</sup>

One of the criticisms that has arisen regarding the issue of excessive delay is that states may be to blame, in part, for excessive case processing time in ways that go well beyond the mere provision of post-conviction appeals. In fact, Justice Breyer makes this point on several occasions in a series of cases in which defendants attempted, unsuccessfully, to challenge the constitutionality of their death sentences in part based on delay. Justice Breyer's criticisms center on both the cruel and unusual nature of delay. Specifically, Justice Breyer argues that delay may be considered cruel especially when it is the result of faulty state appellate procedures (*Elledge v. Florida*, 525 U.S. 944, 1998; *Johnson v. Bredesen*, 130 S. Ct. 541, 2009; *Thompson v. McNeil*, 129 S.Ct. 1299).

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<sup>2</sup> See Florida Statute 921.141(4).

Justice Breyer has also argued that delay is almost certainly unusual when a defendant has spent 27 years on death row; in light of the fact that the average death row stint in the United States was around 11 or 12 years at the time the Supreme Court denied certiorari in *Foster v. Florida* (537 U.S. 990, 2002), a figure that is undoubtedly higher today. Finally, according to Justice Breyer, the cruelty of executing a defendant after a long period of delay is exacerbated when the defendant has reached a severely diminished physical or mental state (*Allen v. Ornoski*, 546 U.S. 1136, 2006). Although Justice Breyer has been championing the Supreme Court to grant certiorari in a delay related case for the last 2 decades, the empirical criminological literature has ignored the issue of death penalty delay. Without empirical analysis, defendants may have a difficult time successfully raising constitutional claims based on delay given the lack of specific factors defendants could identify as the cause of their delay. However, if such analysis were present and defendants could make constitutional claims based on the disparate impact of the death penalty, it is possible that similar claims could be made based on delay.

Additional factors, such as case complexity, could also play a role in the delay of capital cases. Although death row inmates in the United States are afforded numerous post-conviction appeals, this fact alone cannot fully explain the inordinate amount of time spent on death row. It is possible that extended case processing time created by states in the post-conviction process is much more complex than we realize. Therefore, a more nuanced analysis of time on death row is needed.

One approach that may be useful to our understanding of delay comes from the literature that examines the nexus between case complexity and case processing time (Cauthen & Latzer, 2008; Cauthen & Latzer, 2000; Ford, 2014; Heise, 2004; Lempert,

1981; Reiber & Weinberg, 2009; Sutton, 1990; Tidmarsh, 1992). However, these works often appear in legal or political science literature and not criminology and criminal justice journals. The works of Cauthen and Latzer (2008; 2000) attempt to empirically test the relationship between these two issues but are methodologically limited.

This project will attempt to fill a significant gap in the literature by defining and specifically examining delay. This project will examine the intersection between case complexity and death penalty delay. The goal of this research is to determine whether case complexity can be used, at least in part, to explain the inordinate delays that so many defendants experience between the disposition of an automatic appeal and their execution.

This dissertation will proceed as follows. Chapter 2 (LITERATURE REVIEW) will begin by broadly addressing the philosophical underpinnings of punishment and how specific philosophies of punishment can be applied to modern day capital punishment. In addition, this chapter will discuss the jurisprudential history of the death penalty in the United States and address various constitutional issues related to the methods and modes of execution. Additionally, Chapter 2 will examine the recent U.S. District Court ruling *Jones v. Chappell* (31 F. Supp. 3d. 1050, Dist. Court, CD California, 2014) and discuss the legal history of Lackey claims<sup>3</sup> and how they fit within the larger discussion of delay in capital cases. Finally, Chapter 2 will address the potential negative impacts of excessive delay on death row inmates; including a discussion of Dr. Stuart Grassian's work on the death row phenomenon.

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<sup>3</sup> In short, a Lackey Claim is a claim that a death row defendant's extended period on death row combined with their subsequent execution violates the cruel and unusual provision of the Eighth Amendment.

Chapter 3 (METHODS) will lay out the methodological justification for the present study. Importantly, this chapter will propose a definition for delay. Also, Chapter 3 will discuss the independent variables used in this study and their empirical foundations. Finally, Chapter 3 will explain the data collection process and the hypotheses to be tested.

Chapter 4 (ANALYSIS) will discuss the two statistical methods to be used for analyzing the data and testing the various independent variables against the dependent variable of delay (and time on death row as a point of comparison). In addition, this chapter will explain the categories that the researcher used in order to group the independent variables. Chapter 4 will also include the coding mechanism for each of the variables of interest, the diagnostics used to assess multicollinearity and tests used to assess model fit.

Chapter 5 (RESULTS) will present the results of each of the models and provide a breakdown of the notable results.

Finally, Chapter 6 (DISCUSSION) will examine the results of the study and provide possible explanations for those results. This chapter will also provide suggestions for methodological and analytical improvement for future studies and propose a new standard for prosecutors to use in capital cases that could serve to more effectively narrow the class of death-eligible defendants and reduce the processing time for capital cases nationwide.

## CHAPTER 2

### LITERATURE REVIEW

#### **Support for and Opposition to the Death Penalty in the United States**

In modern religious traditions, the death penalty has often been met with fierce opposition. Such opposition is evident in that many religions have established an official stance opposing the death penalty. Table 2.1 provides a sample of several religions' and denominations' official stance on the death penalty.

Religion	Support	Oppose
Christianity		
American Baptist Church		X
The Episcopal Church		X
Evangelical Lutheran Church of America		X
Presbyterian Church USA		X
The Roman Catholic Church		X
Southern Baptism	X	
The United Methodist Church		X
Islam	X	
Judaism		X

Religion	Support	Oppose
Buddhism		X
Hinduism		X

Source: Death Penalty Information Center (2019). Retrieved from <https://deathpenaltyinfo.org/facts-and-research/religious-statements/official-religious-statements>.

Overall, Table 2.1 reveals that the death penalty does not find a great deal of support on religious grounds. Many of the above religions and denominations have long held to their stances on the death penalty, often citing the practice as inconsistent with their teachings and emphasizing the value of every human life. In spite of many religions' long held opposition to the practice, it was not until 2018 that Pope Francis took the monumental step of changing the official stance of the Catholic Church on the death penalty, declaring it "inadmissible" and not in line with the beliefs of the church (Bordoni, 2018).

Despite many major religions and denominations officially denouncing the practice, public support for the death penalty remains relatively high. According to a recent Gallup poll, 55% of adults in the United States favor the death penalty for persons convicted of murder (Gallup, 2017). Although according to Gallup (2017) the percentage of Americans who support the death penalty has declined steadily since the mid-1990s, support for the death penalty has not dropped below 50% since the mid-1960s. Other polls reveal comparable levels of support for the death penalty although there is some evidence that there has been a steady decline in support from its peak in the 1990's. Recent Pew Research Center data and CBS polls show that 56% of Americans support

the death penalty (Dutton, de Pinto, Salvanto & Backus, 2015). Oliphant (2016), more recently, noted that the percentage of Americans in support of the death penalty may now be as low as 49%, which would be among the first polls to put support for capital punishment at less than 50% since the mid-1960's. In any event, each poll suggests that support for the death penalty is at its lowest levels in 40 years (Dutton et al., 2015; Oliphant, 2016).

The American public's continued support for the death penalty may be linked to the perception that it is fairly imposed. According to Gallup (2017), 51% of Americans believe that the death penalty is applied fairly. Although this figure represents a narrow majority and is down from its peak of 61% in 2005, many Americans still believe that the sentence is fair (Gallup, 2017). The belief that the death penalty is morally justified may also explain its continued support. For instance, Dutton et al. (2015) report that 63% of Americans believe that the death penalty is a morally justified punishment in cases of murder. That is to say that a majority of Americans believe that the evils of capital murder itself outweigh the moral costs of government sanctioned executions.

Continued public support for the death penalty, however, has not resulted in its increased use in recent years. Since 2007, eleven states (Connecticut<sup>4</sup>, Delaware, Illinois, Maryland, Nebraska<sup>5</sup>, New Jersey, New Hampshire, New Mexico<sup>6</sup>, New York, Utah<sup>7</sup> and Washington) have abolished the death penalty (Death Penalty Information Center, 2019).

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<sup>4</sup> Connecticut's overturning of the death penalty does not apply retroactively to those already under sentence of death and only requires that subsequent convicted murderers be, at most, sentenced to life without the possibility of parole.

<sup>5</sup> Nebraska has since reinstated the death penalty by way of popular referendum.

<sup>6</sup> New Mexico's overturning of the death penalty does not apply retroactively to those already under sentence of death.

<sup>7</sup> Utah has since reinstated the death penalty.

Overall, 21 states and the District of Columbia do not have the death penalty (Death Penalty Information Center, 2019). In addition, since 2011, four states' governors (California, Colorado, Oregon and Pennsylvania) have imposed moratoriums on their respective states' death penalty systems (Death Penalty Information Center, 2019).

Nationwide, 2014 saw the lowest number of executions since the U.S. Supreme Court reinstated the death penalty in *Gregg v. Georgia* (428 U.S. 153, 1976) and one of the lowest numbers of executions on record (Gallup, 2017).<sup>8</sup> Although there has been a slight upward trend over the last few years (2016-2018), the national rate of executions remains very low.<sup>9</sup> However, despite an increasing trend in death penalty abolitions by state legislatures and an increasing unwillingness of those states that retain the death penalty to actually carry out executions, public support remains high.

Support for the death penalty can be gleaned from other sources as well. Except for the four-year moratorium on executions following the U.S. Supreme Court's ruling in *Furman v. Georgia* (408 U.S. 238, 1972), the Court has stopped well short of abolishing the practice altogether. Instead, the Court has focused heavily on trying to narrow the class of death-eligible defendants. The Supreme Court has also addressed a number of issues ranging from lethal injection protocols and the types of drugs that can be used in executions (*Baze v. Rees*, 553 U.S. 35, 2008; *Glossip v. Gross*, 135 U.S. 2726, 2015) to whether and to what extent the death penalty can be imposed upon individuals with intellectual deficiencies (*Atkins v. Virginia*, 536 U.S. 534, 2002; *Hall v. Florida*, 572 U.S.

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<sup>8</sup> 35 people were executed nationwide in 2014, followed by just 28 executions nationwide in 2015 (Death Penalty Information Center, 2016).

<sup>9</sup> Nationwide, there were 20 executions in 2016, 23 executions in 2017 and 25 executions in 2018 (Death Penalty Information Center, 2019).

\_\_\_, 2014). Finally, the Court has addressed the importance of mitigation (factors that serve to diminish a defendant's culpability to commit capital murder) in cases such as *Woodson v. North Carolina* (428 U.S. 280, 1976), *Lockett v. Ohio* (438 U.S. 538, 1978) and *Roper v. Simmons* (543 U.S. 551, 2005).

Before addressing the jurisprudential history of the death penalty in the United States, it is important to briefly discuss the various philosophies of punishment and how they may inform our contemporary death penalty practices. The following section will draw upon the works of Hobbes, Plato, Bentham and Beccaria among others to illustrate the philosophical development of punishment over time and conflicting views about the purpose of punishment.

### **The Philosophy of Punishment**

An understanding of why the death penalty is deeply embedded into American jurisprudence requires consideration of its historical and philosophical underpinnings and purpose. Although public support for the death penalty in the United States remains relatively high (see Dutton et al., 2015; Gallup, 2015), the public largely views the death penalty as an ineffective deterrent to crime (Dutton et al., 2015). But how did the concept of deterrence or other justifications for the death penalty come to be a part of how we view capital punishment?

A starting point for this discussion can be found in the early work of philosopher Thomas Hobbes and his ideas about the role of government in creating a civilized society. Hobbes's book, *Leviathan*, written in 1651, describes a mythical creature consisting of a central figure and several tentacles protruding in several directions. The purpose of depicting such a figure of course is not to recount the exploits of a mythical

sea creature. Rather, this fictional creature is intended as a metaphor for how civilized society should function. The central figure represents a civilized state advanced by a central government while each of the protruding tentacles represents those non-governmental actors who have a responsibility to contribute to a civilized state (Hobbes, 1651). According to Hobbes, humans would exist in a state of nature in which every person is responsible for his own well-being. In such a state, humans are cutthroat and live an extremely violent and brutish existence (Hobbes, 1651). However, according to Hobbes, humankind would prefer to exist in a more peaceable state. Such a state is possible when peace and order are created as a result of a social contract. *Leviathan* serves as the root of our ideas about the social contract or the idea that those in power have a responsibility to provide security to society. In exchange, individuals must be civil and law abiding (Hobbes, 1651). Hobbes's ideas about the social contract inform our contemporary ideas about punishment by suggesting that a government figure is necessary to serve as a check on individuals who may otherwise desire to live violently; absent such control. The government not only retains the right to punish individuals who violate the social contract, but also has a responsibility to punish. Absent such a responsibility, human beings may be inclined to revert to a state of nature, counter to their innate desires of a peaceable existence.

Individual responsibility to live peaceably and government responsibility to punish those who undermine peace are necessary to maintain order. However, several questions arise regarding punishment. Does punishment contribute to order maintenance by correcting some sort of imbalance created by those who violate the social contract? Should the purpose of punishment be to restrict one's liberty such that further violations

of the social contract are impossible? Is the purpose of punishment to discourage society from violating the social contract? Or is it perhaps that punishment is meant to be solely retributive? Most important for our current inquiry is how do our ideas about punishment inform the use of the death penalty in America? What follows is a brief examination of the philosophical roots of utilitarianism, deterrence (related to utilitarianism) and retribution and how each of these philosophical ideas informs our understanding of the death penalty.

**Utilitarianism.** The use of punishment to correct undesirable behavior dates to ancient Greece. In his early work *Protagoras*, Greek philosopher Plato discussed the idea of righteousness and how it is essentially a learned behavior. Plato believed that influencing one's behavior through the punishment of socially unacceptable behavior was possible. These ancient ideas inform our modern ideas about punishment as a means of reformation. Reformation of the individual however, as discussed by Plato, is only part of the equation. When someone engages in socially unacceptable behavior, such as crime, there is always some type of societal harm. In the context of the death penalty, however, it is difficult to say which side Plato would have taken. For instance, Plato may have believed that even for the worst of the worst, these individuals could have been reformed through some other sanction. By the same token, it is possible that Plato would have viewed death as the only acceptable form of punishment for taking a life and that reform was not possible for the worst of society.

Utilitarianism views punishment not merely as the infliction of pain as a response to moral wrongdoing but justified inasmuch as it serves to restore harmony. Philosopher and reformist Jeremy Bentham espoused a utilitarian view of punishment (Bentham,

1789). Bentham placed emphasis on punishments that bring about the greatest degree of happiness to society (Bentham, 1789). According to Bentham, punishment is evil and is only just when the happiness achieved by society in inflicting the punishment outweighs the evils in its mode or application (Bentham, 1789). Bentham staunchly opposed the death penalty; although he did not appear to provide an alternative mode of punishment for capital crimes (Bentham, 1789). Alternatively, John Stuart Mill did not view punishment as inherently evil. Mill rejected the concept of the social contract but did believe that people should be held accountable for some actions that are harmful to others and that it is society's responsibility to punish wrongdoing (Mill, 1869). Mill, unlike Bentham, supported capital punishment and defended the practice primarily for its deterrent value (Mill, 1869). Mill's views, as espoused in *On Liberty*, were largely centered on the idea that society will continue to progress (Mill, 1869). As such, Mill argued in an 1868 speech given to the House of Commons in England that as society progresses, the process for determining guilt and imposing the death sentence would also progress, diminishing concerns about executing innocent persons. The question today then is whether Mill's views of a progressively better way of imposing the death penalty has been achieved and if not, whether it can actually be achieved.

Bentham and Mill were not alone among prominent philosophers in believing that punishment should serve a utilitarian purpose. John Locke shared this view as well and regarding the death penalty, Locke believed that its purpose should be reformatory and that some greater good must be achieved by society (Calvert, 1993). One criticism of this view, however, is that the death penalty cannot be considered reformatory even if some greater societal good is achieved (Calvert, 1993). This is due to its finality. Further,

complexities arise when trying to determine the actual threshold for “greater good.” The meaning of greater good rests on where one sits and one’s own individual beliefs.

**Deterrence.** Contemporary ideas about deterrence have their roots in the 1764 writings of Cesare Beccaria. Deterrence has three primary tenets; certainty, severity and celerity or swiftness of punishment in discouraging criminal behavior (Beccaria, 1764). A punishment is said to be a general deterrent if its imposition discourages society from committing a particular crime after weighing its costs and benefits (Wright, 2010). On the other hand, a punishment is a specific deterrent if the individual against whom the punishment is imposed determines that the costs (i.e. the pain) of the punishment outweigh any and all benefits of committing the same crime in the future (Beccaria, 1764). These basic ideas about deterrence are ones that have been reinforced over the centuries since Beccaria first proposed them.

Jeffrey Reiman (1990) acknowledges that, empirically speaking, the death penalty has typically not been found to be any greater a deterrent to committing murder than life imprisonment. Support for the notion that the death penalty is not an effective deterrent to capital murder as been reinforced time and again in subsequent empirical inquiries.<sup>10</sup> Further, Reiman (1990) questions what he refers to as the “common sense” view of the death penalty. According to Reiman (1990), people support the death penalty because they assume that death is the most frightening experience one can have. Therefore, if people want to avoid something as terrifying as death, they will refrain from committing

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<sup>10</sup> See National Research Council of the National Academies (2012). Deterrence and the Death Penalty. This report summarizes several decades of research and recommends that policymakers not utilize any research assessing whether capital punishment has any impact on homicide rates.

murder. Reiman (1990), however, argues that life imprisonment is not necessarily less frightening than death or that life imprisonment is incapable of deterring people from committing murder.

Immanuel Kant's view of morality may go a long way in explaining why the death penalty is not an effective deterrent to murder. Kant's view of the moral person essentially posits that people who engage in dishonest or deviant behavior do not recognize that they are contradicting themselves (Kant, 1785). Put another way, a person who commits a crime for purposes of depriving someone of a certain right does not realize that they are depriving the individual of a right and instead are focused on what they can gain from their behavior (Kant, 1785). In the context of murder, a person who plans and carries out someone's murder may be more focused on how they may benefit from committing the crime as opposed to the loss inflicted on the other person or their family. If this is true, then it is unlikely that such a person could be deterred from committing the crime. The murderer who cannot recognize the contradiction in depriving someone of life is not likely to be swayed by the future prospect of facing consequences for their actions.

**Retribution.** What is retribution? The Oxford English Dictionary (2016) defines the word as "punishment for bad conduct, criminal actions, etc., typically considered in terms of redress or repaying a debt to society; the avenging of wrong deeds, etc." Although the word itself is defined simply enough, the concept of retribution as a justification for punishment, especially within the context of the death penalty, is far more complex.

Hegel supported capital punishment as a societal response to murder (Stillman, 1976). Hegel, however, also believed that every offender should be treated as a moral being and with a degree of dignity (McTaggart, 1896). As such, Hegel viewed the infliction of pain as the most effective means by which offenders should be punished and that punishment, in order to be legitimate, must be carried out by other men (McTaggart, 1896). Hegel also viewed punishment as being a “right” that all men possess, a view shared by other notable philosophers such as Kant and Fichte (Dubber, 1998). But pain, according to Hegel, was a right that men possess because it is inherently good in correcting anti-social behavior, which in a civilized society all men should want (McTaggart, 1896). Pain by itself, however, will not correct criminal behavior. If pain in the form of punishment is to be effective, Hegel believed that the individual or individuals receiving the punishment must perceive that the person or persons inflicting the punishment are legitimate and moral themselves (McTaggart, 1896). Without such legitimacy, an offender is likely to view himself as a martyr and the infliction of pain is then rendered ineffective (McTaggart, 1896). Hegel’s views on pain and punishment, however, did not extend to all offenses. For instance, Hegel did not believe that the legal system should punish offenses such as the infliction of emotional pain given that such offenses do not deprive the victim of a tangible right (i.e. property right or personal security) (Stillman, 1976).

Philosopher John Locke also espoused a retributive view of punishment (Calvert, 1993). Locke’s view of retributive punishment, however, was arguably limited in the sense that the only punishment that offenders deserve is a punishment that serves to protect citizens’ rights (Tuckness, 2010). In fact, Locke would have rejected the idea of

any punishment that did not serve the greater good by preventing future crimes or by helping victims, namely in the way of restitution, which may better serve to restore harmony to society as opposed to strictly retribution (Tuckness, 2010). What were Locke's views on the death penalty?

According to Locke, criminals are "at war with society" and as such the government retains the right to punish them (Calvert, 1993). Locke viewed the death penalty as being reserved for a very small class of individuals; those who consciously and willfully commit an unjustifiable homicide (Calvert, 1993). One could argue that the U.S. Supreme Court has been on a continuous quest to reserve the death penalty for the narrowest class of individuals possible ever since its decision in *Gregg* (428 U.S. 153). The Court, for instance, struck down the death penalty for rape with its decisions in *Coker v. Georgia* (433 U.S. 584, 1977) and *Kennedy v. Louisiana* (554 U.S. 407, 2008). It seems likely then that Locke would have viewed rape in the same way as the Justices in the preceding cases. Locke would have viewed rape as a crime that does not justify the death penalty given that the defendant has not taken the victim's life in a literal sense.

Joel Feinberg takes an alternative stance on retribution. According to Feinberg, punishment should not be administered to educate an offender (Feinberg, 1974). Further, Feinberg posits that punishing the mentally ill and punishments based solely on deterrence are counterproductive (Feinberg, 1974). Feinberg also does not support the death penalty or any form of punishment that inflicts suffering (Feinberg, 1974). Notably, Feinberg views life imprisonment as adequately severe (Feinberg, 1974).

The U.S. Supreme Court has, for many years, reinforced the idea that punishments which result in unnecessary suffering are especially problematic. As early as

the late 1880s with its ruling in *In re Kemmler* (136 U.S. 436, 1890), the Court acknowledged the idea that “cruel and unusual” or “inhuman and barbarous” violate the Eighth Amendment. More recently in *Baze v. Rees* (553 U.S. 35, 2008), Chief Justice Roberts acknowledged that as less painful methods of execution become available, states should consider transitioning to those methods; however, defendants must also make a showing of more than a merely marginal reduction in pain if a constitutional violation is to be found. Such a position, however, may be at odds with Feinberg’s view that punishment should not inflict suffering or even Hegel’s view that criminals are to be treated as moral beings. Justice Alito’s position that defendants have a responsibility to find less painful alternatives, which he espoused in *Glossip v. Gross* (135 S. Ct. 2726, 2015), may be viewed by Feinberg and Hegel as missing the point. Feinberg would likely take issue with the idea that defendants are responsible for diminishing their own pain and suffering when a method of punishment arguably inflicts such suffering in the first place. Hegel would likely be left wondering whether leaving the discovery of a less painful alternative to the defendant constitutes treating the person as moral being with dignity.

Many of the ideas espoused within these philosophical traditions have been incorporated, in part, by the U.S. Supreme Court’s death penalty jurisprudence. At the same time, the Supreme Court has, from time to time deviated from many of these principles. A closer examination of some of the Court’s opinions will show that there has been both endorsement and rejection of these philosophical ideas at various times.

## **The Jurisprudential History of the Death Penalty in the United States**

It may be said that the development of the death penalty in the United States has occurred in several phases. Arguably, the U.S. Supreme Court's death penalty jurisprudence can be divided into four eras: 1) pre-Furman era; 2) Furman/Gregg era; 3) post-Gregg era; and 4) era of categorical exclusions. In the pages that follow, a discussion of the major decisions that were handed down during these eras will be provided. Importantly, this discussion will focus on the legal and philosophical rationales used by the Justices to support their opinions.

**Pre-Furman.** The Constitutional basis for the use of the death penalty in the United States has long been the subject of dispute (see Stinneford, 2014). As the legal development of the death penalty in this country suggests, prior to *Furman v. Georgia* (408 U.S. 238), the Court seemingly paid little attention to concerns about arbitrariness in the death penalty and instead focused its efforts largely on the constitutionality of the various methods of execution.

The first case from this period that reveals the nation's attitude about punishment is *Wilkerson v. Utah* (99 U.S. 130, 1878). In *Wilkerson*, the U.S. Supreme Court upheld a Utah statute permitting the use of public hanging, beheading and shooting as methods of punishment for those convicted of murder. Twelve years after *Wilkerson* in *In re Kemmler* (136 U.S. 436) the Court upheld the use of electrocution as a method of punishment, further expanding the range of options available to sentencing bodies. Perhaps the most important take away from *Kemmler* (136 U.S. 436), however, was the revelation of how the Court viewed the concept of cruel and unusual punishment at the time. Writing for the majority, Chief Justice Melville Fuller said,

“Punishments are cruel when they involve torture or a lingering death; but the punishment of death is not cruel, within the meaning of that word as used in the Constitution. It implies there something inhuman and barbarous, something more than the mere extinguishment of life” (*Kemmler* 136 U.S. at 447, Fuller, C.J., opinion).

One might surmise then, that Chief Justice Fuller viewed electrocution as a means of ensuring instantaneous death for the defendant. Given this notion, it is not difficult to see why Chief Justice Fuller stopped short of calling the death penalty cruel, even if it was, at the time, unusual.

Whether discussing the methods of administering the death penalty or administering punishment in general, the idea of proportionality in punishment did not enjoy much legal relevance until 1910. There are, however, two exceptions which illustrated the Court’s reluctance to incorporate the Eighth Amendment to the states. First, in 1866 the Court decided *Prevear v. Massachusetts* (72 U.S. 475, 1866). *Prevear* (72 U.S. 475) involved a defendant’s challenge to a \$50 fine and a three-month period of hard labor following his conviction for selling “intoxicating liquors.” The Court held that the Eighth Amendment only applied to the federal government and not to the states. In writing for a unanimous Court, Chief Justice Salmon Chase reasoned that the penalty imposed was not unusual at the time given that most other states imposed similar penalties for the same type of offense (*Prevear*, 72 U.S. 475). The Court added that if the Eighth Amendment had applied to the states at the time, the penalty imposed would not have violated the cruel and unusual provision of the Eighth Amendment (*Prevear*, 72 U.S. 475).

In *O’Neil v. Vermont* (144 U.S. 323, 1892), the Court also rejected a claim of cruel and unusual punishment on the grounds that the Eighth Amendment to the Constitution did not apply to the states. Like *Prevear*, this case involved the sale of

intoxicating liquors. The trial court found O'Neil guilty of multiple offenses and sentenced him to pay a fine of just over \$6,600 and a period of hard labor in a house of correction. However, in writing for the majority, Justice Samuel Blatchford implied that the Amendment "likely" applied to the states even though it had yet to be incorporated via the Due Process Clause of the Fourteenth Amendment. This was a key development in the sense that the door was left open to full incorporation of the Eighth Amendment at a later time. Incorporation would permit defendants to bring Eighth Amendment claims to federal court that would serve as an additional check to states' discretion in imposing punishments that are potentially cruel and unusual.

It was not until the Supreme Court decided *Weems v. United States* (217 U.S. 349, 1910) that the issue of proportionality came full circle. Although the Court's ruling in *Weems* did not address the idea of proportionality in the context of the death penalty, this ruling represented the first occasion in which the Court relied on the cruel and unusual provision of the Eighth Amendment to strike down an imposed punishment. *Weems*, a Coast Guard officer, was convicted of defrauding the United States government by falsifying an official document and received a fine of "4,000 pesetas" and 15 years imprisonment, a punishment he believed to be excessive considering the crime. Writing for the majority, Justice Joseph McKenna said that "it is a precept of justice that punishment for crime should be graduated and proportioned to offense" (*Weems* 217 U.S. at 367). Justice McKenna went on to say that, "What constitutes a cruel and unusual punishment has not been exactly decided. It has been said that ordinarily the terms imply something inhuman and barbarous, torture and the like..." (*Weems* 217 U.S. at 368, McKenna, J., opinion).

To be sure, the Court's ruling in *Weems* only dealt with proportionality in the context of fines and periods of incarceration. The *Weems* ruling does not address other methods of punishment such as various methods used to impose the death penalty.

Regarding electrocution, the Court held in *Francis v. ex rel. Resweber* (329 U.S. 459, 1947) that even in cases in which the first attempt at administering an execution fails, a second attempt does not necessarily violate the Eighth Amendment. The state of Louisiana convicted 16-year-old Willie Francis of murder and imposed a sentence of death (*Resweber*, 329 U.S. 459). During Francis' first execution attempt, an insufficient amount of electrical current passed through his body to kill him (*Resweber*, 329 U.S. 459). The state then sought a second attempt, asserting a technical error in the equipment. Francis argued that this second attempt constituted cruel and unusual punishment, in violation of the Eighth Amendment (*Resweber*, 329 U.S. 459).

In rejecting Francis' Eighth Amendment claim, the Court reasoned that the amendment was intended to protect defendants from torture, not technical errors committed by the state (*Resweber*, 329 U.S. 459). In writing for the Court, Justice Stanley Reed argued that any prior psychological distress Resweber may have suffered in preparing for and undergoing the first execution attempt was irrelevant (*Resweber*, 329 U.S. 459). Justice Reed was more concerned that each attempt did not wantonly inflict any unnecessary suffering upon the defendant. If this were the case, the state could not be said to have violated the Eighth Amendment simply by attempting the execution a second time (*Resweber*, 329 U.S. 459). To further illustrate his point, Justice Reed stated that:

“The situation of the unfortunate victim of this accident is just as though he had suffered the identical amount of mental anguish and physical pain in any other occurrence, such as, for example, a fire in the cell block.” (*Resweber*, 329 U.S. at 464, Reed, J., opinion).

Even if one agrees with Justice Reed's reasoning, Justice Felix Frankfurter's concurrence provides an interesting glimpse into the very human side of constitutional litigation. His views may be summed up as follows:

"Strongly drawn as I am to some of the sentiments expressed by my brother BURTON, I cannot rid myself of the conviction that were I to hold that Louisiana would transgress the Due Process Clause if the State were allowed, in the precise circumstances before us, to carry out the death sentence, I would be enforcing my private view rather than that consensus of society's opinion which, for purposes of due process, is the standard enjoined by the Constitution" (*Resweber* 329 U.S. at 471, Frankfurter, J., concurring).

Justice Frankfurter recognized the weight of two countervailing principles; recognition of the heinous nature of what the condemned are forced to endure and recognition that the Constitution holds states blameless for unintentional mistakes. In his dissent, Justice Harold Burton echoed the concerns of Justice Frankfurter. In a strongly worded opinion, Justice Burton stated,

"Taking human life by unnecessarily cruel means shocks the most fundamental instincts of civilized man. It should not be possible under the constitutional procedure of a self-governing people. Abhorrence of the cruelty of ancient forms of capital punishment has increased steadily until, today, some states have prohibited capital punishment altogether..." (*Resweber*, 329 U.S. at 473-4, Burton, J., dissenting).

Prior to 1958, no court had formally acknowledged that within the context of punishment, attitudes about the methods of punishment may be different at different times depending on changing societal values. The Supreme Court's decision in *Trop v. Dulles* (356 U.S. 86, 1958) represented a sea change in terms of how the Court would come to address both Eighth Amendment claims generally and death penalty challenges specifically. Although not a death penalty case, the ruling in *Trop* introduces the concept of "evolving standards of decency." *Trop* stems from an incident that occurred in 1944 in which Albert Trop, who was being confined at a military stockade in Casablanca, Morocco for a disciplinary violation, escaped from custody. Officials picked up Trop the

next day; although he asserted that he was willingly returning to the stockade. Nonetheless, a court martial found him guilty of military desertion and among other things, dishonorably discharged him from the military. Eight years later, Trop's application for a passport was denied on the grounds that he had forfeited his U.S. citizenship under Section 401(g) of the Nationality Act of 1940, stemming from his conviction and dishonorable discharge. Upon hearing Trop's challenge regarding his loss of citizenship under Section 401(g), the Court concluded that the deprivations imposed by the loss of citizenship as a punishment were unacceptably cruel and unusual (*Trop*, 356 U.S. 86). More importantly, Chief Justice Earl Warren summed up the Eighth Amendment in the following manner,

“...The words of the Amendment are not precise, and 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” (*Trop* 356 U.S. at 100-1, Warren, C.J., opinion).

Chief Justice Warren's opinion provides us with the roots of evolving standards of decency, a principle that would substantially inform how the Court would later address claims of cruel and unusual punishment. The principles embedded in evolving standards of decency dictate that punishment for any crime must comport with current societal values. Evolving standards of decency is a fluid concept that changes as society progresses. This concept would become vitally important in the years and decades to follow.

***Furman and Gregg.*** Prior to 1972, American criminal courts imposed the death penalty with little regard to the process by which it was carried out. Except for the *Kemmler* (136 U.S. 436) and *Resweber* (329 U.S. 459) rulings, the U.S. Supreme Court addressed issues surrounding the method and mode of execution only sporadically.

One exception to this seeming lack of concern for the death penalty process was the Court's ruling in *Witherspoon v. Illinois* (391 U.S. 510, 1968). In *Witherspoon*, the Court ruled that the state of Illinois erred in permitting the exclusion of people from juries who possess "conscientious scruples." The Court determined that this violated both the Sixth Amendment's guarantee of an impartial jury as well as the Due Process Clause of the Fourteenth Amendment. Such practices, the Court reasoned, would have the effect of creating juries that would be overly biased in favor of imposing a death sentence and therefore not impartial, as the Constitution requires (*Witherspoon*, 391 U.S. 510). Ultimately, *Witherspoon* overturned what had been a long-accepted practice of challenging jurors who possessed conscientious scruples against imposing the death penalty (see *Logan v. United States*, 144 U.S. 263, 1892). Several years after *Witherspoon* in *Wainwright v. Witt* (469 U.S. 412, 1985), the Court clarified the standard to be used when determining whether a prospective juror could be excluded from a death penalty case based on their beliefs about capital punishment. In its ruling, the Court determined that jurors could be excluded if their bias against the death penalty would totally prevent or significantly hinder a prospective juror's ability to evaluate the punishment on its merits or abide by the jury's instructions (*Wainwright v. Witt*, 469 U.S. 412).

Another exception to the seeming disinterest in death penalty procedure came in the Court's decision in *McGautha v. California* (402 U.S. 183, 1971). *McGautha* involved two separate challenges from defendants in California and Ohio. In each case, the juries responsible for determining guilt and punishment enjoyed virtually unfettered discretion in reaching their decision on the issues. In the Ohio case, the jury determined

both guilt and punishment in a single phase (*McGautha*, 402 U.S. 183). The Justices in *McGautha* found no constitutional error when death penalty defendants were convicted and sentenced in a single phase. Writing for the Court, Justice John Harlan seems to advocate a hands-off approach when dealing with this aspect of the process (i.e. unitary versus bifurcated proceedings). Instead, Justice Harlan was content to leave this determination to the states given that the Court's role was simply to determine whether a unitary proceeding was unconstitutional (*McGautha*, 402 U.S. 183). The Court's ruling in *McGautha* would partially frame the discussion about arbitrariness in the imposition of the death penalty by opening a discussion about the lack of due process that may be present when guilt and sentencing are conducted in a single phase.

The Court's approach to analyzing the death penalty changed with the *Furman* (408 U.S. 238) decision in 1972. *Furman* (408 U.S. 238) served as the impetus for what would be a de facto moratorium on the death penalty. This case, which together with *Jackson v. Georgia* and *Branch v. Texas*, involved a homicide committed during the commission of a home burglary (*Furman*, 408 U.S. 238). Following *Furman*'s conviction, the Court was tasked with determining whether the death penalty itself was a constitutional form of punishment for rape and murder. With only a plurality, the Justices took full advantage of the opportunity to espouse a wide range of views about the death penalty<sup>11</sup>. Justice William Brennan believed that the death penalty, especially when arbitrarily imposed, deprived the convicted person of his or her dignity (directly in line with Hegel's view that all offenders deserve to be treated with dignity). In his concurring

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<sup>11</sup> There was no agreement among the justices in the plurality about the reasons for which the death penalty should be invalidated, only that the death penalty, as administered at the time, was unconstitutional.

opinion, Justice Brennan argued that the death penalty is the most extreme form of punishment and addressed the issue of arbitrariness,

“When the punishment of death is inflicted in a trivial number of the cases in which it is legally available, the conclusion is virtually inescapable that it is being inflicted arbitrarily. Indeed, it smacks of little more than a lottery system...” (*Furman* 408 U.S. at 293, Brennan, J., concurring).

Justice Brennan was not alone in his antipathy for the death penalty. Justice Thurgood Marshall shared this belief and delineated his views in a separate concurring opinion. Parts of Justice Marshall’s opinion would form the basis of the Marshall Hypothesis. Specifically, Justice Marshall lays out the argument that the American people are, by and large, misinformed about the death penalty and that being more informed about the death penalty would make them less likely to favor it. The exception to this rule, however, applies to people who favor the death penalty for retributive reasons, in which case increased knowledge of the death penalty will have no impact on peoples’ opinion of the practice<sup>12</sup>. In his concurrence, Justice Marshall stated,

“...whether or not a punishment is cruel and unusual depends, not on whether its mere mention "shocks the conscience and sense of justice of the people," but on whether people who were fully informed as to the purposes of the penalty and its liabilities would find the penalty shocking, unjust, and unacceptable. In other words, the question with which we must deal is not whether a substantial proportion of American citizens would today, if polled, opine that capital punishment is barbarously cruel, but whether they would find it to be so in the light of all information presently available. This is not to suggest that with respect to this test of unconstitutionality people are required to act rationally; they are not. With respect to this judgment, a violation of the Eighth Amendment is totally dependent on the predictable subjective, emotional reactions of informed citizens.” (*Furman* 408 U.S. at 361-62, Marshall, J., concurring).

To further illustrate his point, Justice Marshall explained,

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<sup>12</sup> For recent tests of the Marshall Hypothesis, see Cochran, J. K. & Chamblin, M. B. (2005); Cochran, J. K., Sanders, B. & Chamblin, M. B. (2006) and Lee, G., Bohm, R. & Pazzani, L. (2014).

“It has often been noted that American citizens know almost nothing about capital punishment. Some of the conclusions arrived at in the preceding section and the supporting evidence would be critical to an informed judgment on the morality of the death penalty: *e. g.*, that the death penalty is no more effective a deterrent than life imprisonment, that convicted murderers are rarely executed, but are usually sentenced to a term in prison; that convicted murderers usually are model prisoners, and that they almost always become law abiding citizens upon their release from prison; that the costs of executing a capital offender exceed the costs of imprisoning him for life; that while in prison, a convict under sentence of death performs none of the useful functions that life prisoners perform; that no attempt is made in the sentencing process to ferret out likely recidivists for execution; and that the death penalty may actually stimulate criminal activity” (*Furman* 408 U.S. at 362-363, Marshall, J., concurring).

Contemporarily, this may go a long way in explaining why death penalty support continues to decline given that roughly 6 in 10 Americans do not believe in the deterrent effect of the death penalty (Dutton et al., 2015).

Despite the apparent support among some Justices for ending the death penalty, this support was not universal. Justice Douglas expressed concerns about arbitrariness and disproportionality in sentencing but only opined that the death penalty violated the Eighth Amendment at the time, and not in general (*Furman*, 408 U.S. 238). In his concurrence, Justice Douglas noted that,

“...we deal with a system of law and of justice that leaves to the uncontrolled discretion of judges or juries the determination whether defendants committing these crimes should die or be imprisoned. Under these laws no standards govern the selection of the penalty. People live or die, dependent on the whim of one man or of 12.” (*Furman* 408 U.S. at 253, Douglas, J., concurring).

Implicit in his words is the notion that Justice Douglas believes in the value of the death penalty itself but that the process is problematic. Justice Douglas likely did not intend to suggest that such standards would guarantee the elimination of an arbitrary death penalty, but he did seem optimistic that a predictable process would help ensure fairness in imposing a sentence that is otherwise constitutional.

Moreover, Justices Stewart and White agreed that the arbitrary nature of the death penalty was troubling but neither Justice saw any need to rule on the constitutionality of the death penalty itself (*Furman*, 408 U.S. 238). That is not to say, however, that Justice Stewart did not share the same disdain for arbitrariness in the death penalty as some of his colleagues. Justice Stewart summed up his views by stating, “These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual” (*Furman* 408 U.S. at 309). Justice Stewart, however, was only referring to the specific death sentences at issue in *Furman*. As discussed later, a reading of his opinion in *Gregg v. Georgia* (428 U.S. 153) four years later suggests that Justice Stewart’s concerns about arbitrariness seemed to diminish.

In the end, the Court’s decision in *Furman* coincided with a four-year death penalty moratorium while state legislatures revisited and refined their death penalty statutes<sup>13</sup>. Although the goal of such revisions was for states to create more predictable, systematic ways to impose the death penalty, the Court provided no guidance on what new guidelines should look like. This lack of guidance ultimately resulted in the Supreme Court revisiting the death penalty in *Gregg v. Georgia* (428 U.S. 153).

In *Gregg v. Georgia* (428 U.S. 153), the U.S. Supreme Court held that the death penalty in and of itself does not constitute cruel and unusual punishment. *Gregg* (428 U.S. 153) stems from Gregg’s challenge to his death sentence following convictions for robbery and murder. Ultimately, Gregg’s death sentence for the robbery conviction was reduced. However, Gregg challenged his death sentence for the murder conviction

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<sup>13</sup> Florida was the first state to revisit its death penalty statute, followed by 34 other states (“Reinstatement of the Death Penalty.” Findlaw, 2016).

(*Gregg*, 428 U.S. 153). Writing for the Court, Justice Stewart noted that “It is apparent from the text of the Constitution itself that the existence of capital punishment was accepted by the Framers” (*Gregg*, 428 U.S. at 177). Moreover, “the death penalty is said to serve two principal social purposes: retribution and deterrence of capital crimes by prospective offenders” (*Gregg*, 428 U.S. at 183). The Court reiterated, however, that the death penalty must be reserved for only the most extreme cases (*Gregg*, 428 U.S. 153). In this case, the Court upheld Georgia’s death penalty statute (*Gregg*, 428 U.S. 153).

Justice Stewart discussed the necessity of limiting the death penalty in noting that, “...where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action” (*Gregg* 428 U.S. at 189, Stewart, J., opinion).

Justice Stewart’s concerns about arbitrariness seemed to wane significantly as a result of the new processes for imposing the death penalty, namely, the recommendation that states use a bifurcated proceeding (treating the guilt and sentencing phases as two independent processes). This represents a significant shift in approach from the unitary proceeding previously upheld in *McGautha* (402 U.S.183). The most likely explanation for this shift may be an underlying propensity of juries who convict a defendant of murder to also impose the death penalty, which may create a system that is inherently biased in favor of imposing the death penalty for too wide a range of first-degree murderers. In order to ensure that the death penalty is reserved for the narrowest class of individuals, it is beneficial to allow a newly drawn jury to consider aggravating and mitigating factors without the burden of determining guilt or innocence first.

In addition, Georgia's capital sentencing bodies now had to rely on information about the defendant, the nature of the crime and analyses of other, similar death-eligible cases (*Gregg*, 428 U.S. 153). On this point Justice Stewart noted,

“While standards to guide a capital jury's sentencing deliberations are by necessity somewhat general, they do provide guidance to the sentencing authority and thereby reduce the likelihood that it will impose a sentence that fairly can be called capricious or arbitrary. Where the sentencing authority is required to specify the factors it relied upon in reaching its decision, the further safeguard of meaningful appellate review is available to ensure that death sentences are not imposed capriciously or in a freakish manner” (*Gregg* 428 U.S. at 193-195, Stewart, J., opinion).

Interestingly, although recognizing the importance of analyzing other, similar death-eligible cases, the Supreme Court would later rule that analyses of other death-eligible cases in the sentencing process are not constitutionally required (*Pulley v. Harris*, 465 U.S. 37, 1984). The question, however, is that without such analyses, can meaningful appellate review as envisioned by Justice Stewart occur? The answer to this question may rest on the effectiveness of other measures such as bifurcated proceedings and the extent to which sentencing juries consider aggravating and mitigating factors.

Justice Marshall's dissenting opinion in *Gregg* reiterated the importance of the Marshall Hypothesis and argued that even while 35 states had revised their death penalty statutes following *Furman*, the American public remained largely uninformed about the death penalty<sup>14</sup>. In addition, Justice Marshall took issue with an empirical study that was published following the Court's decision in *Furman* which showed that the death penalty

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<sup>14</sup> Justice Marshall cites the following in support of the claim that the American public remained largely ill-informed about the death penalty: Sarat & Vidmar, Public Opinion, The Death Penalty, and the Eighth Amendment: Testing the Marshall Hypothesis, 1976 *Wis. L. Rev.* 171.

is an effective deterrent to murder<sup>15</sup>. In any event, while the *Gregg* decision was a significant step toward ensuring a fairer process, this decision did not stop defendants from bringing additional, more nuanced challenges to states' death penalty procedures.

**Post-*Gregg* Challenges to Sentencing Schemes.** Following the U.S. Supreme Court's decision in *Gregg*, states were required to develop systematic methods for reducing arbitrariness in the death penalty. Although several states attempted to comply with the Court's demands, their solutions were still subject to numerous constitutional challenges.

For example, several plaintiffs raised challenges to the constitutionality of the death penalty itself. The first such challenge came in *Jurek v. Texas* (428 U.S. 262, 1976), where a petitioner challenged Texas' new death penalty statute following his conviction and death sentence, asserting that the Texas statute would simply lead to the arbitrary imposition of the death penalty (*Jurek*, 428 U.S. 262). The Court reiterated its holding in *Gregg* that the death penalty itself is not cruel and unusual and further ruled that states must consider more than just aggravating factors for the death penalty to be properly imposed. Justice Stewart, writing for the majority, observed that "In order to meet the requirements of U.S. Const. amends. VIII, XIV, a capital-sentencing system has to allow the sentencing authority to consider mitigating circumstances" (*Jurek*, 428 U.S. at 271). In a related case decided on the same day, *Profitt v. Florida* (428 U.S. 242, 1976), the Court further opined that the death penalty is not in and of itself unconstitutional. The Court further upheld the practice of the judge serving as the sole sentencing authority, a

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<sup>15</sup> See Ehrlich, I. The Deterrent Effect of Capital Punishment: A Question of Life and Death, 65 Am. Econ. Rev. 397 (June 1975).

practice that would eventually be revisited in *McGautha v. California* (*Proffitt*, 428 U.S. 242)<sup>16</sup>.

The state of North Carolina implemented procedures that would have required the death penalty for all defendants convicted of first-degree murder in a totally non-discretionary manner (i.e. without the consideration of mitigating factors). The Court, however, reasoned that such a scheme went too far. In *Woodson v. North Carolina* (428 U.S. 280, 1976), Justice Potter Stewart observed that public opinion generally did not support the mandatory imposition of the death penalty, even in cases of first-degree murder. Further, the Court reasoned that any mechanism that did not allow for the consideration of mitigating factors makes it impossible for juries to truly separate the worst of the worst from others who may be less culpable (*Woodson*, 428 U.S. 280). The Court reiterated the importance of mitigating factors in *Roberts v. Louisiana* (428 U.S. 325, 1976), where it struck down a Louisiana sentencing scheme that required the death penalty for certain classes of homicide without the need to consider mitigating factors. The Court further rejected the practice of instructing juries to consider lesser charges in the absence of evidence to support those lesser charges (*Roberts*, 428 U.S. 325). The danger with such a practice, the Court noted, was that jurors who do not favor the death penalty may choose to convict on the lesser charges based on this belief, creating a system that is inherently biased against the death penalty (*Roberts*, 428 U.S. 325). Thus, even to narrow the class of death-eligible defendants, the Court recognized that a

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<sup>16</sup> The Supreme Court deemed Florida's capital sentencing scheme to be unconstitutional in 2016 given that the state did not require a jury to unanimously impose death sentences (see *Hurst v. Florida*, 577 U.S. \_\_\_, 2016).

balancing act is required. Juries must fall somewhere in the middle of being too heavily in favor of the death penalty while not being too opposed to the practice.

During this era, the U.S. Supreme Court also determined that limiting the number of mitigating factors a jury may consider violates the Eighth Amendment. In *Lockett v. Ohio* (438 U.S. 538), the Court expanded on its ruling in *Woodson* by specifying that all mitigating factors related to the defendant or the offense must be considered before a death sentence may be fairly imposed. The *Woodson* decision stemmed from a North Carolina statute that required all persons convicted of first-degree murder in the state to be automatically sentenced to death. The Court, however, determined that such a practice violated the Eighth Amendment and that some mitigating factors must be considered in sentencing decisions. The ruling in *Lockett* further illustrates the point that the Court views the death penalty only as a last resort. The requirement that all possible mitigating factors be considered before sentencing a convicted person to death is clearly intended as a significant hurdle that makes death sentences much harder to impose relative to other sanctions. The Court reiterated this point in *Eddings v. Oklahoma* (455 U.S. 104, 1982), which involved a teenage boy convicted of a murder he committed at age 16. In imposing his death sentence, the trial court limited its consideration of mitigating factors to only the boy's youth. The Court rejected this practice and, affirming its stance in *Lockett*, ruled that all mitigating factors (in this case an abusive family history and emotional disturbance) must be considered (*Eddings*, 455 U.S. 104). In sum, the Court firmly established the importance of mitigating factors in the years following its decision in *Gregg*. Mitigating factors serve two primary purposes. First, mitigating factors work to

narrow the class of death-eligible defendants. Second, mitigating factors help to ensure that defendants are not mistakenly sentenced to death.

Even when individual statutory aggravating factors have been ruled unconstitutional, the Court has held that death sentences imposed under the statute may still be valid. In *Zant v. Stevens* (462 U.S. 862, 1983), for example, the Court upheld a defendant's conviction and death sentence after the U.S. Court of Appeals for the Eleventh Circuit overruled the use of one of Georgia's three statutory aggravating factors (*Zant*, 462 U.S. 862). In *Zant*, the majority sought to distinguish this case from the Court's ruling in *Stromberg v. California* (283 U.S. 359, 1931). In *Stromberg*, the Court determined that when a jury is provided with two or more independent rationales for imposing a guilty verdict and told that it may rely on *any* of those rationales, that verdict must be vacated if at least one of those rationales is found to be unconstitutional. The ruling in *Zant* is distinct in that the state of Georgia required *only one* aggravating factor to be present to support the imposition of a death sentence. The fact that one of the three aggravating factors was found to be invalid was determined to be irrelevant since there was no chance that this factor was used to determine whether Stevens would be sentenced to death (*Zant*, 462 U.S. 862). Further, Justice Stevens discussed how the finding of one statutory aggravating factor does not necessarily guarantee that the death penalty will be imposed. There is still a process by which sentencing juries have great discretion in determining who will be sentenced to death, thereby serving as an additional measure for narrowing the class of death-eligible defendants. Sentencing juries can do this by examining all factors presented during the sentencing phase and not just the presence of one aggravating factor (*Zant*, 462 U.S. 862).

Prosecutorial framing of the jury's role and the legal process has also been grounds for challenging a death sentence. In *Caldwell v. Mississippi* (472 U.S. 320, 1985), the Court struck down a death sentence on the grounds that prosecutors had mislead the jury during closing arguments at trial regarding the amount of responsibility vested upon them as jurors. Namely, the prosecutor in Caldwell's trial informed the jury to view their deliberations as not necessarily being the final determining factor of whether Caldwell would die, and that the Mississippi Supreme Court would ultimately make that determination on appeal (*Caldwell*, 472 U.S. 320, 1985). This was problematic because it effectively allowed the jury, at least in theory, to pass the buck to the Mississippi Supreme Court. However, there was no guarantee that the Mississippi Supreme Court would have the final say in determining Caldwell's fate given the many appeals that often occur throughout the death penalty process. Thus, such instructions from the prosecutor were disingenuous to say the least.

Also key in the discussion of the constitutionality of the death penalty is the issue of racial disparities. One Supreme Court decision prominent in the discussion of racial disparities and the death penalty is *McCleskey v. Kemp* (481 U.S. 279, 1987). *McCleskey* centers on a black defendant who was convicted of murdering a white police officer. McCleskey subsequently challenged his death sentence on the grounds that his sentence was racially motivated. To support his claim, McCleskey presented what is now widely known as the Baldus Study; showing that black defendants who kill white victims in the state of Georgia were more likely than any other group to receive the death penalty (see Baldus, Pulaski and Woodworth, 1983). In writing for a narrow 5-4 majority, Justice Lewis Powell rejected the use of an empirical study as evidence that McCleskey's

specific death sentence was racially motivated (*McCleskey*, 481 U.S. 279). Justice Powell noted that every death penalty case presents its own set of issues that must be weighed by the sentencing body in order to determine whether someone will receive the death penalty (*McCleskey*, 481 U.S. 279). Questions of whether racial disparities in imposing the death penalty exist, Justice Powell noted, are better suited for legislative bodies and not the courts (*McCleskey*, 481 U.S. 279)<sup>17</sup>.

Finally, the Court has determined that defendants convicted of rape cannot be executed. Immediately following *Gregg*, the Court overruled the practice of executing defendants convicted of raping adult women (*Coker v. Georgia*, 433 U.S. 584). The *Coker* decision illustrates the Court's conception of evolving standards of decency. At the time, Georgia was the only state that permitted the death penalty for the rape of an adult woman. In his majority opinion, Justice Byron White discussed the finality of the death penalty juxtaposed against the crime of rape which, although severe, does not deprive someone of life, at least not in a literal sense. He observed that,

“The death penalty, which is unique in its severity and irrevocability, is an excessive penalty for the rapist who does not take human life” (*Coker*, 433 U.S. at 598, White, J., opinion).

Further, in 2008, the Court effectively eliminated the death penalty in all cases of rape. In *Kennedy v. Louisiana* (554 U.S. 407), the Court invalidated a Louisiana statute permitting the death penalty for defendants convicted of raping a child under the age of 12. The Court again relied on proportionality in reasoning that in cases of rape, even the rape of a child, the death penalty is excessive (*Kennedy*, 554 U.S. 407). The Court also

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<sup>17</sup> Also key in this decision was the notion that defendants must demonstrate that sentence makers acted in a discriminatory fashion in their particular case, a standard that was not met in *McCleskey* (*McCleskey v. Kemp*, 481 U.S. 279).

relied on national consensus as a measure of evolving standards of decency in its ruling in *Kennedy*. Specifically, although 5 other states had statutes like Louisiana's at the time, the Court determined that this did not rise to the level of a national consensus supporting the death penalty in such cases.

“After reviewing the authorities informed by contemporary norms, including the history of the death penalty for the crime of child rape and other non-homicide crimes, current state statutes and new enactments, and the number of executions since 1964, the United States Supreme Court concludes there is a national consensus against capital punishment for the crime of child rape” (*Kennedy*, 554 U.S. at 434, Kennedy, J., opinion).

**Categorical Exclusions.** The Court's jurisprudence on categorical exclusions or defendants who do not have the same criminal culpability as other defendants dates to the pre-*Furman* years. For instance, the U.S. Supreme Court ruled that certain classes of defendants such as addicts (i.e. addicted to narcotics) cannot be prosecuted merely because of their status (*Robinson v. California*, 370 U.S. 660, 1962). To punish drug addicts for simply being drug addicts amounts to cruel and unusual punishment (*Robinson*, 370 U.S. 660). Six years later in *Powell v. Texas* (392 U.S. 514, 1968), the Court considered whether alcoholics should be included among the group of defendants who should be exempt from criminal punishment because of their status. In *Powell*, the Court distinguished between alcoholism as a status and public intoxication as a crime. Writing for the plurality, Justice Marshall rejected petitioner's argument that he was unable to control his alcohol consumption. Even if Powell could have demonstrated that he was not in control of his consumption, Justice Marshall argued that the law still would not protect him from prosecution for being drunk in public (*Powell v. Texas*, 392 U.S. 514). This is especially true given the lack of a nexus between one's status as an

alcoholic and whether someone can control themselves from going into public while intoxicated (*Powell v. Texas*, 392 U.S. 514).

Drug addicts and alcoholics, however, are not the groups of individuals for whom proportionality in punishment, especially where the death penalty is concerned, has been questioned. There are three special classes of defendants that are exempt from the death penalty: 1) the insane; 2) juveniles; and 3) the intellectually impaired (formerly referred to as the mentally retarded). It is important to note that regarding each of these groups, the Court has not always been willing to automatically grant such protections, a point explained further below.

Regarding defendants of diminished mental capacity, the U.S. Supreme Court has taken many years to develop a coherent and meaningful jurisprudence with regard to punishment. In *Buck v. Bell* (274 U.S. 200, 1927) for instance, the Court determined that no due process violation occurred when the state of Virginia imposed forced sterilization on defendant Carrie Buck. Writing for the Court, Justice Oliver Wendell Holmes defended the practice inasmuch as forced sterilization would prevent the propagation of future generations of feeble-minded people (*Buck*, 274 U.S. 200). Given that Virginia's law addressed merely a medical procedure that could not be imposed without some due process, the Court upheld the the practice (*Buck*, 274 U.S. 200).

Although Justice Holmes's position in this case may strike us today as insensitive, ideas about the link between feeble-mindedness and genetics were not new at the time he drafted his opinion in *Buck*. In his breakthrough research, Henry Goddard (1912) details the story of Martin Kallikak and the two sides of the Kallikak family. Martin Kallikak was said to have fathered children with two different women, one of "feeble-mindedness"

and another Quaker woman with a good family background (Goddard, 1912). It is said that the future generations of the feeble-minded woman went on to be characterized by mental deficiencies and a host of medical and social problems (Goddard, 1912). The future generations of the Quaker woman went on to be among the best society had to offer (Goddard, 1912). The only logical explanation then, was that the differences in people's behavior and well-being were strictly genetic (Goddard, 1912).

Years after the decision in *Buck* (274 U.S. 200), the Court began changing its stance regarding punishment and mental illness. In *Ford v. Wainwright* (477 U.S. 399, 1986), the Court determined that even for those defendants who were of sufficient mental capacity to understand their crime at the time they committed it, executing defendants who are deemed insane and cannot fully understand or appreciate their punishment violates the cruel and unusual provision of the Eighth Amendment.

Writing for the majority, Justice Marshall draws upon common law tradition and constructs a moral argument against the practice of executing the insane. Specifically, Justice Marshall argues that there is a long tradition that suggests executing the insane is simply offensive to humanity<sup>18</sup>, violates religious norms<sup>19</sup>, lacks a true deterrent value and serves no retributive purpose<sup>20</sup> (*Ford v. Wainwright*, 477 U.S. 399). Justice Marshall goes on to say that regarding executing the insane, these longstanding justifications against the practice no doubt have a place in American jurisprudence. Specifically, Justice Marshall stated:

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<sup>18</sup> See Sir Edward Coke, 3 Institutes 6 (6th ed. 1680).

<sup>19</sup> See Hawles, Remarks on the Trial of Mr. Charles Bateman, 11 How. St. Tr. 474, 477 (1685).

<sup>20</sup> See Hazard & Louisell, Death, the State, and the Insane: Stay of Execution, 9 UCLA L. Rev. 381, 387 (1962).

“This ancestral legacy has not outlived its time. Today, no State in the Union permits the execution of the insane. It is clear that the ancient and humane limitation upon the State's ability to execute its sentences has as firm a hold upon the jurisprudence of today as it had centuries ago in England. The various reasons put forth in support of the common-law restriction have no less logical, moral, and practical force than they did when first voiced. For today, no less than before, we may seriously question the retributive value of executing a person who has no comprehension of why he has been singled out and stripped of his fundamental right to life.” (*Ford*, 477 U.S. at 408-9, Marshall, J., opinion).

Ultimately, the ruling in *Ford* represents a dramatic shift from historical conceptions of insanity. Foucault (1961), for instance, wrote extensively about the meaning of insanity, particularly about how society has viewed the matter over time. Foucault (1961) describes insanity as shifting from being highly visible in society to a time when locking away the insane was more acceptable as a means of protecting society. The overarching assumption during the Renaissance period and even into the Enlightenment period was that people who were insane could only be cured by strict discipline and physical control (Foucault, 1961). Society viewed those who were insane as animals who were not subject to the same dignified treatment as normal humans (Foucault, 1961). Today, it seems that the insane are treated in a less animalistic fashion and truly deserving of leniency.

The U.S. Supreme Court has also subsumed juveniles within the ambit of groups that should be categorically excluded from the death penalty. However, these protections are of recent vintage (Streib, 2004). Although the Court would eventually determine that executing juveniles violates the Eighth Amendment, arguments in favor of this practice increasingly focused on the rising levels of violent juvenile crime, public fear of so-called “super predators” and policy makers’ desire to get tough on violent juvenile crime (Streib, 2004). Nonetheless, the process of excluding juveniles from the death penalty began with the Court’s ruling in *Thompson v. Oklahoma* (487 U.S. 815, 1988), where the

Court determined that executing defendants who committed murder before the age of 16 constituted cruel and unusual punishment. Relying on evolving standards of decency, Justice Stevens drew upon several factors to support his opinion. First, at the time, 18 states had set a minimum age threshold for executions and each of them had forbidden the execution of anyone under the age of 16 at the time of their offense (*Thompson v. Oklahoma*, 487 U.S. 815). Second, Justice Stevens cited evidence of a decline in the practice, noting that between 1982 and 1986, only 5 of the nearly 1,400 persons sentenced to death for homicide were under the age of 16 (*Thompson v. Oklahoma*, 487 U.S. 815). Finally, Justice Stevens discussed at length the idea that juveniles, in many ways, have reduced culpability compared to adults who commit the same offense (*Thompson v. Oklahoma*, 487 U.S. 815).

Although the Court seemed to resolve this issue as it related to defendants under the age of 16, it remained unclear whether defendants who were either 16 or 17 at the time of their crime would be eligible for the death penalty. After originally upholding the practice of executing minors in *Stanford v. Kentucky* (462 U.S. 361, 1989), the Court reached a different conclusion in *Roper v. Simmons* (543 U.S. 551, 2005). The *Roper* decision had its origins with 17-year-old Christopher Simmons who was sentenced to death in 1993. The issue in this case centered on the Missouri Supreme Court's interpretation of the Court's ruling in *Stanford v. Kentucky* (462 U.S. 361). The U.S. Supreme Court overturned Simmons' conviction on the grounds that national consensus no longer supported the execution of juvenile offenders (see *State of Missouri v. Christopher Simmons*, 944 S.W.2d 165). Writing for the Court, Justice Kennedy, drawing again on national consensus against the practice of executing juveniles stated simply,

“A majority of states have rejected the imposition of the death penalty on juvenile offenders under 18, and the United States Supreme Court holds this is required by the Eighth Amendment” (*Roper*, 543 U.S. at 568, Kennedy, J., opinion).

In addition, Justice Kennedy presented an argument centered on the lack of both deterrent and retributive value in executing persons under the age of 18 (*Roper*, 543 U.S. 551).

Justice Kennedy framed the difference in culpability between youthful offenders and adults in terms of youths’ immature behavior as they struggle to find their identity (*Roper*, 543 U.S. 551). Given that the death penalty should be reserved for the worst crimes committed by a narrow class of the most culpable defendants, juveniles should be excluded under the Eighth Amendment as they have not fully matured or developed a true sense of self (*Roper*, 543 U.S. 551). Justice Kennedy further recognized the importance of international opinion, which had largely rejected the practice of executing juveniles (*Roper*, 543 U.S. 551).

Prior to the decision in *Roper*, Streib (2004) noted many arguments against the practice of executing juveniles. For instance, violent juvenile offenders most often come from disadvantaged backgrounds and have not had an opportunity to “age out” of the effects of having a poor childhood (Streib, 2004). Further, the medical and scientific evidence suggests that brain development is still ongoing until a person’s late teen years and even into their twenties (Streib, 2004). Echoing Justice Kennedy’s concerns regarding the lack of a deterrent value in executing juveniles, Streib (2004) noted that juveniles do not have a fully developed concept of death and, seeing themselves as immortal, are not likely to factor death in to any cost-benefit analysis prior to committing pre-meditated murder. Streib (2004) also acknowledges the lack of retributive value in

the practice given the age of the offender and the prospect of punishing a child in the most severe manner.

Finally, the Court has addressed the practice of executing mentally retarded defendants (now referred to as intellectually deficient). The Court first addressed this class of defendants in *Penry v Lynaugh* (492 U.S. 302, 1989). In *Penry*, the Court addressed two key points. The first centered on jury instructions; specifically, whether juries must be informed of a defendant's mental capacity before considering it as a mitigating factor. Second, the Court addressed whether executing defendants who are intellectually deficient violates the Eighth Amendment. Although the majority acknowledged that juries must be instructed on a defendant's mental capacity, the Justices rejected the notion that executing intellectually deficient defendants violates the Eighth Amendment (*Penry*, 492 U.S. 302). The Court explained that "In light of the diverse capacities and life experiences of mentally retarded persons, it cannot be said that all mentally retarded people, by definition, can never act with the level of culpability associated with the death penalty" (*Penry*, 492 U.S. at 338-339). Writing for the majority in *Penry*, Justice Sandra Day O'Connor draws upon evolving standards of decency and specifically state legislative enactments as a determinant of national consensus in favor of or against a practice (*Penry*, 492 U.S. 302). At the time, only 2 states had either prohibited or were in the process of prohibiting the execution of intellectually deficient defendants (*Penry*, 492 U.S. 302). Justice O'Connor contrasts this figure from the previous decision in *Ford* noting that at the time, no state permitted the execution of the insane, constituting a national consensus against this practice (*Penry*, 492 U.S. 302). Regarding public opinion as a determinant of evolving standards of decency, Justice

O'Connor seems to downplay its importance unless such opinion leads to legislative enactments rejecting certain practices. Even though the public overwhelmingly rejected the practice of executing the intellectually deficient at the time of *Penry*, Justice O'Connor still relied entirely on state legislative enactments, which she believed to be the most objective measure of evolving standards of decency (*Penry*, 492 U.S. 302).

In 2002, however, the Court overturned its decision in *Penry*, ruling that executing intellectually deficient defendants serves neither a deterrent nor a retributive purpose and pointed out that many states had stopped executing intellectually deficient defendants altogether since *Penry* (*Atkins v. Virginia*, 536 U.S. 304, 2002). Following Daryl Atkins' murder conviction, the defense brought forth just one forensic psychologist who testified that Atkins was mildly intellectually deficient (*Atkins*, 536 U.S. 304).

Ultimately, the Virginia Supreme Court cited *Penry* in affirming Atkins' death sentence.

Writing for the majority in *Atkins*, Justice Stevens noted that,

“Retribution and deterrence of capital crimes by prospective offenders are the social purposes served by the death penalty. Unless the imposition of the death penalty on a mentally retarded person measurably contributes to one or both of these goals, it is nothing more than the purposeless and needless imposition of pain and suffering, and hence an unconstitutional punishment” (*Atkins*, 536 U.S. at 319, Stevens, J., opinion).

Justice Stevens expanded on Justice O'Connor's conception of evolving standards of decency previously outlined in *Penry*. Both Justices agree that state legislative enactments are an important consideration. However, Justice Stevens saw relatively little importance in the raw number of state legislative enactments invalidating a practice and instead focused on the upward trend of such enactments (*Atkins v. Virginia*, 536 U.S. 304). Justice Stevens noted that the decision in *Penry* served as an important impetus for states to begin reconsidering the practice of executing intellectually deficient defendants

(*Atkins v. Virginia*, 536 U.S. 304). In the years leading up to the *Atkins* decision, 17 additional states had banned this practice with two other states, one of which was Virginia, in the process of doing so (*Atkins v. Virginia*, 536 U.S. 304). Notably, Justices Stevens and O'Connor disagreed on how much culpability should attach to intellectually deficient defendants. While both Justices agreed that this class of defendants should be somewhat culpable, Justice Stevens rejected the idea that some penological purpose is served by executing them (*Atkins v. Virginia*, 536 U.S. 304, 2002).

In dissent, Justice Antonin Scalia criticized the majority's conception of national consensus and rejected the idea that executing all intellectually deficient defendants violates the Eighth Amendment (*Atkins v. Virginia*, 536 U.S. 304, 2002). Specifically, Justice Scalia disagreed with the idea that 47% of the states that permitted the death penalty for intellectually deficient defendants at the time constituted a national consensus, noting that the threshold for national consensus in other cases was much higher (*Atkins v. Virginia*, 536 U.S. 304, 2002). Justice Scalia wrote,

“Even that 47% figure is a distorted one. If one is to say, as the Court does today, that all executions of the mentally retarded are so morally repugnant as to violate our national "standards of decency," surely the "consensus" it points to must be one that has set its righteous face against all such executions. Not 18 States, but only seven -- 18% of death penalty jurisdictions -- have legislation of that scope.” (*Atkins*, 536 U.S. at 342, Scalia, J., dissenting).

Justice Scalia's argument further attacked the majority's reliance on the trend of legislative enactments as indicative of national consensus (*Atkins v. Virginia*, 536 U.S. 304, 2002). Specifically, Justice Scalia argued that national legislative trends *must* move toward abolition of the death penalty for the intellectually deficient as the only other direction would be backwards, which is highly unlikely (*Atkins v. Virginia*, 536 U.S. 304, 2002). Finally, Justice Scalia rejected the notion that executing defendants that are

only somewhat intellectually deficient does not further the penological purposes of deterrence or retribution (*Atkins v. Virginia*, 536 U.S. 304, 2002).

Although the practice of executing the intellectually deficient was rejected by the U.S. Supreme Court in *Atkins*, questions still arose regarding what constituted intellectual deficiency for purposes of the death penalty and whether the defendant's IQ was an adequate tool to make such determinations. The Court addressed this issue in *Hall v. Florida* (134 S. Ct. 1986, 2014). Following Freddie Hall's guilty verdict and several decades of appeals, the central issue in this case was whether Hall's intellectual deficiency, if not quantifiable beyond his IQ, could be considered a mitigating factor (*Hall*, 134 S. Ct. 1986). In *Hall*, the Court acknowledged that other factors related to a person's general intellectual functioning, in addition to IQ, should be used in to determine intellectual deficiency. In so doing, the Court rejected the use of 70 as the cutoff for IQ, noting that this standard was too narrow (*Hall*, 134 S. Ct. 1986). Justice Kennedy addressed this narrow standard by discussing Florida's lack of consideration of measurement error in IQ tests (*Hall*, 134 S. Ct. 1986). Specifically, Justice Kennedy noted that the average IQ score is about 100, with one standard deviation on an IQ test being about 15 points (*Hall*, 134 S. Ct. 1986). Florida's statute at the time defined intellectual deficiency as a score two standard deviations below the mean, which is how the state of Florida arrived at the cutoff score of 70 (*Hall*, 134 S. Ct. 1986). However, Justice Kennedy argued that like many other scientific tests, IQ tests are subject to measurement error (*Hall*, 134 S. Ct. 1986). Thus, a score of 71 (in Hall's case) should not be the only consideration in determining intellectual deficiency (*Hall*, 134 S. Ct. 1986). Justice Kennedy stated that sentencing bodies,

“cannot consider even substantial and weighty evidence of intellectual disability as measured and made manifest by the defendant’s failure or inability to adapt to his social and cultural environment, including medical histories, behavioral records, school tests and reports, and testimony regarding past behavior and family circumstances. This is so even though the medical community accepts that all of this evidence can be probative of intellectual disability, including for individuals who have an IQ test score above 70” (*Hall*, 134 S. Ct. at 1994, Kennedy, J., opinion).

The preceding discussion on the evolution and limits of the death penalty is instructive, but incomplete. Recently, an over centuries-old debate about pain and punishment and where this issue fits into a constitutional discussion about the death penalty has been reignited. The following section presents the issue and discusses recent challenges to state lethal injection protocols. The discussion about pain and punishment is a key element within the larger death penalty debate given the historic disagreements between philosophers (notably Bentham and Hegel) about the extent to which offenders should experience pain.

**The Role of Pain in Punishment.** The discussion of the role of pain in punishment dates to the writings of Hegel, who believed in the value of pain in punishment, but also viewed offenders as deserving of dignified treatment (McTaggart, 1896).

The U.S. Supreme Court’s constitutional stance on pain has evolved over the last century, beginning with its decision in *Kemmler* (136 U.S. 436) that upheld New York’s use of electrocution as a method of execution. Underlying Chief Justice Fuller’s opinion in *Kemmler* was the idea that electrocution was believed to result in instantaneous death and that such methods were not cruel and unusual. To reiterate, Chief Justice Fuller stated:

“Punishments are cruel when they involve torture or a lingering death; but the punishment of death is not cruel, within the meaning of that word as used in the

Constitution. It implies there something inhuman and barbarous, something more than the mere extinguishment of life” (*Kemmler* 136 U.S. at 447, Fuller, C.J., opinion).

Thus, the Court from early on has demonstrated a preference for methods of execution believed to result in as little pain as possible. Justice Reed’s majority opinion in *Resweber* reiterates this position. Although this case involved the issue of multiple attempts at execution, the Court ultimately did not make its determination based on the aggregate amount of psychological stress a defendant may experience as a result of multiple execution attempts. Rather, the emphasis centered on whether suffering during the actual (i.e. the successful) execution attempt itself was excessive. In his concurring opinion in *Furman*, Justice Brennan challenged the death penalty itself, fearing that imposing the death penalty served to deprive the defendant of his or her dignity; similar to the concerns Hegel expressed with regard to punishing offenders.

How do such ideas apply to the contemporary administration of the death penalty? A key issue facing many states using lethal injection involves their use of drug protocols (i.e. the process and the drugs administered) and whether they may result in torture for the condemned<sup>21</sup>. Recently, the U.S. Supreme Court addressed this issue, with the discussion specifically directed at the types of drugs used by states. The Court recently issued two key decisions in *Baze v. Rees* (553 U.S. 35, 2008) and *Glossip v. Gross* (135 S. Ct. 2726, 2015) that addressed some of the specifics about the contemporary debate regarding pain and punishment.

**Baze v. Rees (553 U.S. 35, 2008).** This case emerges from a challenge to Kentucky’s three-drug lethal injection protocol. Two inmates challenged the state’s use

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<sup>21</sup> As of 2019, 33 states, the U.S. military and the U.S. government permit defendants to be executed by lethal injection (Death Penalty Information Center, 2019).

of sodium thiopental, pancuronium bromide and potassium chloride, arguing that the drugs did not sufficiently reduce the pain inmates experience during an execution. The key consideration that emerged from the Court's decision in *Baze* is the idea that if and when progressively less painful methods of administering lethal injections emerge, states should consider transitioning to them (*Baze*, 553 U.S. 35). Writing for the Court, Chief Justice Roberts discussed alternative methods of punishment. Specifically, Chief Justice Roberts reiterated the standard that petitioners must meet if they are to successfully argue that a method of punishment does not adequately reduce the amount of pain experienced in executions. Chief Justice Roberts stated,

“Given what our cases have said about the nature of the risk of harm that is actionable under the Eighth Amendment, a condemned prisoner cannot successfully challenge a State's method of execution merely by showing a slightly or marginally safer alternative...Such an approach finds no support in our cases, would embroil the courts in ongoing scientific controversies beyond their expertise, and would substantially intrude on the role of state legislatures in implementing their execution procedures...” (*Baze*, 553 U.S. at 51, Roberts, C.J., opinion).

Ultimately, the Court determined in *Baze* that Kentucky's three-drug cocktail sufficiently reduced the pain a condemned person experiences during an execution (*Baze*, 553 U.S. 35). Key in the ruling, however, are the differing views of Justices Antonin Scalia and Ruth Bader Ginsburg that help elucidate the debate about pain in punishment.

Before discussing the issue of pain, Justice Scalia responded to Justice Stevens' claim that the death penalty itself is unconstitutional. In his concurrence, Justice Scalia drew first on the Fifth Amendment as evidence of the Framers' support for capital punishment. This is a logical point given that the Fifth Amendment guarantees the right to grand jury proceedings for anyone subject to prosecution for a “capital crime.” Further, the Due Process Clause of the Fifth Amendment states that no one may be deprived of

“life” without due process of law (*Baze*, 553 U.S. 35). In addition to his reliance on the Fifth Amendment, Justice Scalia attacks Justice Stevens’ assertions that the death penalty has no deterrent or retributive value (*Baze*, 553 U.S. 35). Justice Scalia criticized Justice Stevens’ ignorance of scientific literature that shows the death penalty is a deterrent (even if a majority of Americans today do not view it as an effective deterrent). In making his point, Justice Scalia cites a 2005 article in the *Stanford Law Review* authored by Cass Sunstein and Adrian Vermeule that presents the results of several studies showing that the death penalty has deterrent value. More specifically, Scalia calls attention to one of the studies listed in the article conducted by Dezhbakhsh, Rubin and Shepherd (2003) which concluded that every execution deters 18 murders. However, the death penalty’s deterrent effect continues to be widely debated in the research literature<sup>22</sup>. Further, Justice Scalia argued that the Court is in no position to determine whether the death penalty has retributive value as this is a completely subjective consideration (*Baze*, 553 U.S. 35).

Justice Scalia also disagrees with Justice Stevens’ assertion that the Eighth Amendment protects defendants from the kind of pain that the condemned person’s victim(s) experienced (*Baze*, 553 U.S. 35). Justice Scalia argued that this conclusion is faulty in the sense that pain is generally viewed as necessary for retribution; yet Justice Stevens, who argues that the death penalty has no retributive value, does not believe that executions should be painful (*Baze*, 553 U.S. 35). Logically then, one should ask how

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<sup>22</sup> One critic of such studies claiming that the death penalty is an effective deterrent is Jeffrey Fagan who, along with colleagues, has criticized this entire body of research as focusing too broadly on all classes of homicides and not specifically capital crimes (Fagan, Zimring and Geller, 2005, pg. 1806). This is an important methodological criticism of this body of work and one that Justice Scalia failed to acknowledge in his concurring opinion.

anyone can reject the death penalty for lacking retributive value while asserting that the infliction of pain yields a punishment that is unconstitutional.

In her dissenting opinion in *Baze*, Justice Ginsburg espoused an alternative view. Like Justice Stevens, Justice Ginsburg opposes the unnecessary infliction of pain in executions and drew upon several cases in the Court's history (see *Wilkerson*, *Kemmler* and *Resweber*) to support her assertion that the Court has long rejected the infliction of excessive pain. Justice Ginsburg called for the state of Kentucky to consider specific practices aimed at ensuring that inmates are in fact unconscious after being injected with sodium thiopental, the first drug in the state's lethal injection cocktail (*Baze*, 553 U.S. 35). Justice Ginsburg believed that under Kentucky's protocols, a conscious inmate who is subjected to the second and third drugs (pancuronium bromide and potassium chloride) would almost certainly experience excruciating pain (*Baze*, 553 U.S. 35). Justice Ginsburg suggested several ways that officials could confirm an inmate is unconscious (i.e. by touching the inmate's eyelashes or simply shaking the inmate and calling out his or her name) and noted that many states have already implemented such checks as standard procedure (*Baze*, 553 U.S. 35). Ultimately, however, Justice Ginsburg believes that other constitutional issues may arise if states were not to employ newer, less painful methods of execution (*Baze*, 553 U.S. 35). For these states, it is possible that those involved in the administration of executions could be totally unaware that a condemned person is experiencing a constitutionally unacceptable amount of pain. Lacking such consistency across states, one cannot be certain that constitutional violations do not regularly occur.

**Glossip v. Gross (135 S.Ct. 2726, 2015).** The *Glossip* case arose from the attempted execution of Clayton Lockett in Oklahoma. The three-drug combination used in Lockett’s execution took nearly 40 minutes to kill him, but the controversy in this case centers on the first drug in the cocktail, midazolam. Even after Oklahoma agreed to use a new four-drug combination following Lockett’s execution, midazolam became the centerpiece of the petitioners’ challenge to the U.S. Supreme Court. The question in *Glossip* was whether midazolam could reduce the risk of pain experienced by defendants so as not to create excessive pain during executions. At 5-4, this ruling was quite narrow; and the Justices used separate opinions to address the issues regarding the constitutionality of the death penalty and the reduction of pain in executions (*Glossip*, 135 S. Ct. 2726).

In *Glossip* (135 S. Ct. 2726), the majority suggested that less painful methods of punishment, if available, may be appropriate. This reiterates Justice Ginsburg’s assertion in *Baze*. However, the Court also noted that it is the responsibility of the defendant to find those alternatives if making the argument that current lethal injection protocols violate the Eighth Amendment. Relying on *Baze*, the majority determined that defendants must also show that available alternatives would reduce the pain of the execution by a substantial amount (*Glossip*, 135 S. Ct. 2726). The key to this decision lies in the word “substantial” and the Court emphasized the reduction of pain must be more than merely marginal (*Glossip*, 135 S. Ct. 2726). Writing for the Court in *Glossip*, Justice Samuel Alito argued that the defendants failed to establish that readily available alternatives were substantially less painful (*Glossip*, 135 S. Ct. 2726). Justice Alito also criticized petitioners’ reliance on the Court’s previous decision in *Hill v. McDonough* (547 U.S.

573, 2006); which dealt with defendant responsibility in seeking an alternative method as a civil matter and not as an Eighth Amendment issue.

Further, Justice Alito argued that since the death penalty has long been viewed as accepted practice, there must be a constitutional way to administer it (*Glossip*, 135 S. Ct. 2726). Justice Alito disagreed that it would be unconstitutional to revert to “more primitive” methods of execution that were used prior to lethal injection becoming the norm (*Glossip*, 135 S. Ct. 2726). Such primitive methods, according to Justice Alito, include a firing squad<sup>23</sup> (which the principal dissent in this case addresses) but would also include lethal gas<sup>24</sup> and electrocution<sup>25</sup> (*Glossip*, 135 S. Ct. 2726). Ultimately, however, the real question centered on what was meant by “more primitive.” In *Glossip*, “more primitive” appears to refer to a range of methods of execution that are constitutional and if properly administered, would not result in torture. Justice Alito does not appear to make the claim that “devolving” would harken back to a time when drawing and quartering, for instance, would have been acceptable. Justice Alito was simply making the point that if the death penalty is constitutional and no reasonable means of administering lethal injections exists, the alternative may be to turn to other

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<sup>23</sup> As of 2019, Mississippi, Oklahoma and Utah permit executions by firing squad. However, lethal injection is still considered the primary method of execution in each state (Death Penalty Information Center, 2019).

<sup>24</sup> As of 2019, Alabama, Arizona, California, Mississippi, Missouri, Oklahoma and Wyoming permit executions by lethal gas. However, lethal injection is still considered the primary method of execution in each state (Death Penalty Information Center, 2019).

<sup>25</sup> As of 2019, Alabama, Arkansas, Florida, Kentucky, Mississippi, Oklahoma, South Carolina, Tennessee and Virginia permit executions by electrocution. However, lethal injection is still considered the primary method of execution in each state (Death Penalty Information Center, 2019).

constitutionally acceptable methods of punishment unless and until the death penalty is deemed unconstitutional.

Theoretically, the ruling in *Glossip* does not completely close the door on future lethal injection claims although it may do so in practice. Given that defendants must be the ones to find a more than marginally less painful drug alternative, the outlook is bleak at best. If defendants were able to find a drug that eliminated pain in executions, states would do well (and would probably be constitutionally required) to use this drug. However, it seems unlikely that such a drug will ever be manufactured or even discovered. Pain is also subjective. Thus, knowing exactly when an alternative drug reaches the threshold of “substantially reducing the pain” is difficult at best. Given the Court’s stance on this issue, it also seems unlikely that states would “devolve” to drugs that caused defendants to experience a substantially greater amount of pain than the currently available options, eliminating the need to challenge the use of such drugs. Thus, practically speaking, a future successful lethal injection claim seems highly unlikely.

Justice Sotomayor disagreed that the burden of finding less painful alternatives rests on the defendants (*Glossip*, 135 S. Ct. 2726). Specifically, Justice Sotomayor asserted that the Court has set as a condition that a drug only creates an unconstitutional amount of pain and suffering if and only if no viable, less painful alternatives exist (*Glossip*, 135 S. Ct. 2726). However, such a condition would violate what Justice Sotomayor saw as a long recognized categorical exclusion of all cruel and unusual punishments (*Glossip*, 135 S. Ct. 2726).

Further, Justice Sotomayor wondered how such responsibility lies with the defendant when the use of midazolam creates a punishment that in her mind is

tantamount to being burned at the stake (*Glossip*, 135 S. Ct. 2726). Essentially, Justice Sotomayor questioned the expert testimony provided during the proceedings in this case regarding the effectiveness of midazolam and on this point, rejected the Court's conclusion that the defendants had failed to establish a constitutional violation (*Glossip*, 135 S. Ct. 2726). On the issue of known and available alternatives, Justice Sotomayor argued that the Court in *Glossip* misinterpreted the *Baze* ruling. Justice Sotomayor further asserted that *Baze* did not require defendants to prove that a less painful alternative was available. The ruling only required defendants to show that a substantial risk of pain was involved (*Glossip*, 135 S. Ct. 2726).

The oral arguments presented in *Glossip* present a glimpse into how the Court would ultimately decide the issues raised. During oral arguments, Justice Alito and petitioners' counsel's exchange presented a problematic paradox for the petitioners. In *Baze*, the Court upheld the use of sodium thiopental as capable of properly sedating a defendant, a point petitioners' counsel presented during oral arguments in *Glossip* (135 S.Ct. 2726). Justice Alito posed the question of why sodium thiopental was not used during Lockett's execution in Oklahoma, to which petitioners' counsel responded that the drug had been unavailable at the time (*Glossip v. Gross*, 2015). Given that the entire constitutional challenge in *Glossip* rested on midazolam's effectiveness, the problem centers on how the state of Oklahoma should be expected to use an arguably more effective drug (i.e. sodium thiopental) when that drug is unavailable and why midazolam is not a viable alternative, even if some pain is present.

Justice Alito emphasized that the Court has consistently ruled that the death penalty is constitutional (*Glossip v. Gross*, 2015). He also noted that people are free to

look to state legislatures and the U.S. Supreme Court to overturn the death penalty. However, there is an inherent contradiction in an abolitionist position that has made it increasingly difficult for states to administer pain free executions. Justice Alito further argued that abolitionists have accomplished this goal by helping block states' access to drugs that could be used to administer the death penalty in a more humane manner (*Glossip v. Gross*, 2015). One way abolitionists have limited states' access to drugs is by lobbying overseas drug makers to halt production of paralytic agents such as sodium thiopental and pentobarbital when such drugs are to be used in executions (*Glossip*, 135 S. Ct. 2726). Justice Alito described how the production of sodium thiopental came to a halt in the United States in 2009 only to be subsequently moved to Italy (*Glossip*, 135 S. Ct. 2726). Activists, however, would eventually persuade the Italian government and the drug manufacturer to stop production of sodium thiopental for purposes of carrying out executions in the United States (*Glossip*, 135 S. Ct. 2726). Once states ran out of sodium thiopental, they would eventually turn to pentobarbital, manufactured in Denmark (*Glossip*, 135 S. Ct. 2726). Eventually, however, anti-death penalty activists convinced the manufacturer to cease production of this drug for use in executions in the United States (*Glossip*, 135 S. Ct. 2726). Ultimately, Justice Alito would view the shipment of paralytic drugs overseas as a major hinderance to carrying out a constitutional punishment given the success of the anti-death penalty movement in this area, hence the contradiction.

An examination of *Baze* (553 U.S. 35) and *Glossip* (135 S. Ct. 2726) demonstrates substantial agreement between Justices Scalia and Alito and their views on pain in punishment. Neither Justice believes that pain free executions are necessary to

comport with the Constitution (see *Baze*, 553 U.S. 35 and *Glossip*, 135 S. Ct. 2726). However, both Justices reach this conclusion in different ways. Justice Scalia argues that it is problematic to assert that the death penalty has no retributive effect while simultaneously claiming that executions should be pain free (*Baze*, 553 U.S. 35). Justice Alito, on the other hand, is less concerned with the penological justifications for the death penalty and examines the issue in a more nuanced manner. He does not accept the assertion that states are required to eliminate pain in executions in light of the fact that abolitionists have assisted states in blocking access to more effective pain mitigating drugs (i.e. sodium thiopental) (*Glossip*, 135 S. Ct. 2726).

One might argue that the ruling in *Glossip* (135 S. Ct. 2726) is a setback for abolitionists. The Court is acknowledging that despite the possibility that painful or even botched executions may occur, that it is willing to grant states discretion in choosing their lethal injection drugs.

The death penalty debate in the United States is ongoing. Abolitionists are now focusing their efforts on another issue with potentially tremendous Eighth Amendment implications: delay. Delay in executions as an Eighth Amendment issue has long been rejected by the Supreme Court but recently found its way to a U.S. District Court. The Central District of California's ruling in *Jones v. Chappell* (31 F. Supp. 3<sup>rd</sup> 1050, Dist. Ct, C.D. Cal 2014), even though this ruling was recently overturned by the Ninth Circuit Court of Appeals on procedural grounds<sup>26</sup> represents what is potentially a major shift in

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<sup>26</sup> Judge Paul Watford of the U.S. Court of Appeals for the Ninth Circuit delivered the opinion of the Court; ruling that the U.S. District Court did not have the authority to decide on novel Constitutional questions such as excessive delay during habeas corpus review (see *Jones v. Davis*, 2015, 9<sup>th</sup> Cir.).

our understanding (and at the very least the legal recognition) of delay and where it fits in the Eighth Amendment discussion.<sup>27</sup> Prior to discussing the ruling in *Jones*, a brief examination of delay-related claims rejected by the U.S. Supreme Court is instructive.

### **Death Penalty Delay**

Given that some delay in case processing time is acceptable so that death row defendants have an adequate opportunity to show that their death sentences are unconstitutional, the current project focuses specifically on the appeals process beyond the direct appeal. The challenge becomes determining at what point extended case processing time becomes delay. Further, are there other issues such as the mental or physical state of the defendant that may help in making this determination? Death penalty delay combined with the defendant's eventual execution forms the basis of a Lackey Claim. What follows is an examination of the procedural history of Lackey Claims in the U.S. Supreme Court.

**Lackey Claims.** The term Lackey Claim has its roots in the original case that came before the U.S. Supreme Court involving a challenge to the practice of carrying out executions after long periods of delay (*Lackey v Texas*, 514 U.S. 1045, 1995). Specifically, in this case, Clarence Allen Lackey had been on death row for 17 years before making the claim that his prolonged death row confinement combined with his eventual execution violated the cruel and unusual provision of the Eighth Amendment. Justice Stevens acknowledged in *Lackey* (514 U.S. 1045) that the claim was, at the very

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<sup>27</sup> Although in Part III of his dissenting opinion in *Glossip v. Gross* (135 S. Ct. 2726, 2015), Justice Breyer talks at length about the issue of delay. Specifically, Justice Breyer argues that a death penalty system fraught with delay serves no legitimate penological purpose and would not have been what was envisioned by the Framers when the Bill of Rights was ratified.

least, novel and interesting. Although ultimately respecting his colleagues' denial of certiorari, Justice Stevens did not close the door on such claims, saying that the topic may be ripe for discussion after similar claims make their way through lower federal courts (*Lackey*, 514 U.S. 1045). Justice Stevens openly questioned whether carrying out executions after such long periods of time furthers the two classic penological justifications for the death penalty; deterrence and retribution. Also noteworthy is that more than a century prior to the denial of certiorari in *Lackey*, the Court had already questioned the utility of executions given the uncertainty created by long periods spent awaiting executions (*In re Medley*, 134 U.S. 160, 1890). Finally, Justice Stevens reminded the Court that international opinion has not favored executions after long periods of delay (*Pratt v. Attorney General of Jamaica*, 4 A11 E.R. 769, 1994). Ultimately, Justice Stevens' commentary in *Lackey* was very prescient as many of these same points would inform this debate over the next couple decades.

Comparable challenges have arisen in the years since *Lackey* with similar outcomes (see Table 2.2). Despite the lack of success, *Lackey* Claim proponents have at least one major advocate on the bench, Justice Steven Breyer. Also, what this series of cases reveals is that new elements are constantly being added to the *Lackey* discussion that may give its proponents hope for success. In *Elledge v. Florida* (525 U.S. 944, 1998), for instance, Justice Breyer presented the issue of state-created delay. Justice Breyer dissented from the denial of certiorari in *Elledge* which involved a challenge from an inmate who had spent 23 years on death row. In his dissent, Justice Breyer pondered how the state might be at fault for long delays particularly when the state's appellate procedures are inadequate (*Elledge*, 525 U.S. 944). Justice Breyer also cited international

opinion as indicative of the point that executions following long periods of delay may be constitutionally unacceptable. Drawing on *Soering v. United Kingdom* (11 EHRR 439, 1989), Justice Breyer noted the potential reluctance of foreign courts to extradite capital offenders to the United States stemming from concerns that these defendants will experience inhumane treatment as a result of extended periods of death row confinement (*Elledge*, 525 U.S. 944).

Table 2.2-Lackey Claims Denied Certiorari by the United State Supreme Court

<b>Seminal Case</b>	<b>Year</b>	<b>State/Jurisdiction</b>	<b>Years Since Sentence</b>
<i>Lackey v. Texas</i> 514 U.S. 1045	1995	Texas	17
<b>Other Cases</b>	<b>Year</b>	<b>State/Jurisdiction</b>	<b>Years Since Sentence</b>
<i>Elledge v. Florida</i> 525 U.S. 944	1998	Florida	23
<i>Knight v. Florida</i> 528 U.S. 990	1999	Florida	20
<i>Foster v. Florida</i> 537 U.S. 990	2002	Florida	27
<i>Smith v. Arizona</i> 552 U.S. 985	2007	Arizona	30
<i>Allen v. Ornoski</i> 546 U.S. 1136	2006	California	23
<i>Johnson v. Bredesen</i> 130 S.Ct. 531	2009	Tennessee	29
<i>Thompson v. McNeil</i> 129 S.Ct. 1299	2009	Florida	32
<i>Valle v. Florida</i> 132 S.Ct. 1	2011	Florida	33

Table 2.2-Lackey Claims Denied Certiorari by the United State Supreme Court (cont.)

Other Cases	Year	State/Jurisdiction	Years Since Sentence
<i>Moore v. Texas</i> 137 S.Ct. 1039 <sup>28</sup>	2017	Texas	35

The following year in *Knight v. Florida* (528 U.S. 990, 1999), Justice Breyer took a harder stance on the issue of state-created delay by stating bluntly that delays lasting for periods of more than 20 years *must* be the result of an inadequate appellate process. Justice Clarence Thomas presented an interesting counterargument in his decision to deny certiorari. Justice Thomas argued that it would simply be illogical to provide death row inmates with numerous appeals only to ultimately conclude that the resulting delay is unconstitutional (*Knight*, 528 U.S. 990). Although a compelling point, Justice Breyer would likely make the counterargument that Justice Thomas’ analysis does not reconcile the problem of state-created delay and it essentially assumes that any period of delay is acceptable if defendants exhaust all their appeals.

These same issues were again presented in *Foster v. Florida* (537 U.S. 990, 2002). *Foster* involved a challenge from a defendant who had spent 27 years on death row. Again dissenting, Justice Breyer supplemented his argument by presenting data on the average period of death row confinement which, at the time, was between 11 and 12 years (*Foster*, 537 U.S. 990). Using this figure, Justice Breyer concluded that Foster’s time on death row must be unusual, given the disparity between his time on death row

<sup>28</sup> This case, in which the Supreme Court heard oral arguments on November 29, 2016, also addressed whether prohibiting the use of current standards of determining intellectual disability and requiring the use of old standards violates the Eighth Amendment. The Court granted certiorari on this question but not on the Lackey issue.

compared to the national average (*Foster*, 537 U.S. 990). Further, Justice Breyer, using what might be considered an arbitrary number for what should be the upper limit on delay, argued that executing a defendant after 30 years exceeded the threshold for cruelty (see *Smith v. Arizona*, 552 U.S. 985, 2007).

In another case, Justice Breyer added that the defendant's mental or physical state should be considered. In *Allen v. Ornoski* (546 U.S. 1136, 2006), Justice Breyer questioned whether an inmate who had been on death row for 23 years but had reached the age of 76, was blind and confined to a wheelchair was constitutionally acceptable. Finally, in two cases denied review in 2009, Justice Breyer continued to acknowledge the merits of Lackey Claims while Justice Thomas continued to deny their value. In *Johnson v. Bredesen* (130 S.Ct. 541, 2009), and *Thompson v. McNeil* (129 S.Ct. 1299, 2009), Justice Breyer argued that delays of 29 and 32 years respectively are unacceptable and deserve consideration by the Court. Also, in both cases, Justice Breyer continued to assert that states must be at fault for such long delays. The most recent attempt made by a defendant to argue the constitutionality of the death penalty following a long period of delay was denied by the Court in 2011 and involved a defendant who had been on death row for 33 years (*Valle v. Florida*, 132 S.Ct. 1, 2011). Drawing on the length of Valle's delay relative to the average period spent on death row in the United States, Justice Breyer again argued in favor of allowing this type of case to be heard by the Court (*Valle*, 132 S.Ct. 1). However, the Court again denied certiorari. Justice Breyer would continue to address the problems with delay in Part III of his dissent in *Glossip*, noting that delays at the time the Eighth Amendment was adopted were extremely rare with executions typically occurring within days of sentencing. Ultimately, the dilemma that Justice

Breyer believes is most difficult to reconcile is how to solve the problem of delay without diminishing the procedural safeguards that must be in place when someone's life is at stake (*Glossip*, 135 S. Ct. 2726).

If the U.S. Supreme Court is ever to grant review to a *Lackey*-type case, the cases cited herein provide a somewhat grim outlook. However, even in light of an increasingly long history of rejection, Justice Stevens' sentiments in *Lackey* should be reexamined. More specifically, Justice Stevens acknowledged that challenges based on delay may be ripe for review after lower federal courts have had the opportunity to address the issue. Although one court decision is hardly enough for a consensus on the issue, *Lackey* proponents arguably scored their first major victory in July 2014, notwithstanding the setback they would experience in 2015 when the U.S. Court of Appeals for the Ninth Circuit overturned the lower court's decision. This case, however, is still significant in that for the first time, a federal judge acknowledged that delay in the death penalty is a significant problem worthy of official review.

*Jones v. Chappell* (31 F. Supp. 3<sup>rd</sup> 1050, Dist. Ct, C.D. Cal 2014). *Jones v. Chappell*, (31 F. Supp. 3<sup>rd</sup> 1050, Dist. Ct, C.D. Cal 2014) represents a tremendous shift in thought about the issue of delay in the federal court system. For the first time, a federal court declared that an entire state's death penalty system violated the Eighth Amendment when Judge Cormac Carney determined that California's death penalty system in no way furthered the two penological purposes of deterrence and retribution (31 F. Supp. 3<sup>rd</sup> 1050, Dist. Ct, C.D. Cal 2014). Judge Carney's views of the death penalty regarding California death row inmates were summed up as follows,

"...systemic delay has made their execution so unlikely that the death sentence carefully and deliberately imposed by the jury has been quietly transformed into one no rational

jury or legislature could ever impose: *life in prison, with the remote possibility of death*” (31 F. Supp. 3<sup>rd</sup> 1050, Dist. Ct, C.D. Cal 2014 at 1-2).

Ultimately, the state of California may have created a death penalty system fraught with the same issues of arbitrariness that the U.S. Supreme Court previously tried to remedy (*Furman*, 408 U.S. 238). In his opinion, Judge Carney provided an analysis of California’s death penalty process and illustrates the time required to complete each step. Judge Carney delineated the time required to file appeals, procure attorneys and have appeals heard at both the state and federal levels.

To begin, California reinstated the death penalty in 1978 and prior to Judge Carney’s ruling, had sentenced over 900 defendants to death (31 F. Supp. 3<sup>rd</sup> 1050, Dist. Ct, C.D. Cal 2014). However, of these individuals, the state had only executed 13 of them (31 F. Supp. 3<sup>rd</sup> 1050, Dist. Ct, C.D. Cal 2014). Such a disparity may leave one wondering what the purpose of California’s death penalty system was and moreover, what is so different about the 13 individuals who were ultimately executed compared to those who were not? Judge Carney cites several figures, which suggest that being executed in California was based on little more than chance and that those who were executed were no more criminally culpable than those who were not.

Citing figures from the California Department of Corrections and Rehabilitation, Judge Carney noted that 94 (or roughly 10 percent) of the individuals sentenced to death died of natural causes while 39 had their death sentences commuted by the federal court system, never to be resentenced to death (31 F. Supp. 3<sup>rd</sup> 1050, Dist. Ct, C.D. Cal 2014). However, 748 individuals remained on California’s death row as of Judge Carney’s 2014 ruling (31 F. Supp. 3<sup>rd</sup> 1050, Dist. Ct, C.D. Cal 2014). What is potentially troubling is the fact that more than 40 percent of California’s death row inmates had been on death row

for a period of at least 19 years (31 F. Supp. 3<sup>rd</sup> 1050, Dist. Ct, C.D. Cal 2014). But what are the specific reasons for such long delays? Citing figures from the California Commission on the Fair Administration of Justice (the Commission), Judge Carney addressed the factors believed to contribute to delay (31 F. Supp. 3<sup>rd</sup> 1050, Dist. Ct, C.D. Cal 2014). Releasing their final report in 2008, the Commission identified issues in 3 separate stages of the process; delays on direct appeal, delays in state collateral appeal and delays in federal collateral appeal.

California, unlike many other death penalty states, does not require all death sentences to be automatically reviewed by the state supreme court, although many are (31 F. Supp. 3<sup>rd</sup> 1050, Dist. Ct, C.D. Cal 2014). On average, death row defendants will wait 11.7 to 13.7 years between filing the direct appeal and the California Supreme Court rendering a decision (31 F. Supp. 3<sup>rd</sup> 1050, Dist. Ct, C.D. Cal 2014). The Commission identified several reasons that affect time on appeal. First, California death row inmates wait an average of 3-5 years to obtain counsel to file the appeal itself (31 F. Supp. 3<sup>rd</sup> 1050, Dist. Ct, C.D. Cal 2014). Further complicating this process is the fact that the state of California has minimum standards attorneys must meet to be qualified to litigate death penalty appeals; mainly that the attorneys have at least four years of law practice (31 F. Supp. 3<sup>rd</sup> 1050, Dist. Ct, C.D. Cal 2014). Judge Carney seems to put less weight on this requirement as the primary issue though, noting that there are more than enough attorneys in California with enough experience. Instead, Judge Carney concludes that such delays are tied to broader issues of underfunding of the state's death penalty system (31 F. Supp.

3<sup>rd</sup> 1050, Dist. Ct, C.D. Cal 2014)<sup>29</sup>. Procuring an attorney who is qualified to handle the appeal is only part of the problem. New issues arise when the attorney (who may be different than the defendant's trial attorney) must take the time to become familiar with the case record, research the applicable law and subsequently file the appellate brief, which is then followed by the state's reply brief as well as an additional brief filed by the plaintiff's attorney (31 F. Supp. 3<sup>rd</sup> 1050, Dist. Ct, C.D. Cal 2014). When all is said and done, these briefs may take up to an additional 4 years to complete (31 F. Supp. 3<sup>rd</sup> 1050, Dist. Ct, C.D. Cal 2014). The California Supreme Court must then place the case on its docket. The California Supreme Court hears only an average of 20-25 death penalty appeals per year (31 F. Supp. 3<sup>rd</sup> 1050, Dist. Ct, C.D. Cal 2014). Considering the number of inmates on the state's death row, additional delays are certain (31 F. Supp. 3<sup>rd</sup> 1050, Dist. Ct, C.D. Cal 2014). On average, direct appeal will take an additional 2-3 years (31 F. Supp. 3<sup>rd</sup> 1050, Dist. Ct, C.D. Cal 2014).

Beyond direct appeal, state collateral appeal presents its own hardships for death row inmates. Collateral (Habeas Corpus) appeal is simply the inmate challenging the constitutionality of his or her confinement (31 F. Supp. 3<sup>rd</sup> 1050, Dist. Ct, C.D. Cal 2014). The California Supreme Court advises inmates to seek state habeas relief shortly after the death sentence is imposed so that either a private attorney or an attorney from the Habeas Corpus Resource Center (HCRC) will have adequate time to familiarize themselves with the case record (if a new attorney will be handling collateral appeals),

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<sup>29</sup> See Bright, S. (1997). Neither equal nor just: The rationing and denial of legal services to the poor when life and liberty are at stake. *Ann. Surv. Am. L.* 783. Bright's work presents the case that many states are not able provide adequate pre or post-trial representation and resources to indigent defendants even in the years following the U.S. Supreme Court's ruling in *Gideon v. Wainwright* (372 U.S. 335, 1963).

research the merits of any constitutional or statutory challenges involved and file the appropriate briefs (31 F. Supp. 3<sup>rd</sup> 1050, Dist. Ct, C.D. Cal 2014). In practice, defendants wait an average of 8-10 years following their death sentence before they can file a state collateral appeal. If the inmate is able to secure counsel for the appeal, particularly court-appointed habeas counsel, funding issues place limits on the attorneys' ability to investigate the merits of any constitutional or statutory issues that may be present and limit the attorneys' ability to procure necessary experts (31 F. Supp. 3<sup>rd</sup> 1050, Dist. Ct, C.D. Cal 2014). As of June 2014, 359 of California's death row inmates did not have habeas counsel and of those, 159 had been waiting on the appointment of such counsel for at least 10 years (31 F. Supp. 3<sup>rd</sup> 1050, Dist. Ct, C.D. Cal 2014). In light of this fact, one wonders what effect the U.S. Supreme Court's ruling in *Ross v. Moffitt* (417 U.S. 600, 1974) may have. In *Ross*, the Court held that indigent defendants do not have an absolute right to counsel in any discretionary appeal. The Court reasoned that discretionary appeals are distinct from trials in the sense that trials involve a process of finding guilt beyond a reasonable doubt whereas appeals by their nature involve those who have already been found guilty (*Ross*, 417 U.S. 600). While appeals are undeniably valuable to defendants, the Court views them as more of a privilege for purposes of equal protection (*Ross*, 417 U.S. 600).

After a collateral petition is filed, the California Supreme Court needs an average of 22 months to issue its ruling (31 F. Supp. 3<sup>rd</sup> 1050, Dist. Ct, C.D. Cal 2014). Judge Carney noted, however, that this figure is only current as of 2008 when the Commission released its findings and further noted that available evidence suggests that this figure has doubled. As of Judge Carney's ruling, there were 176 pending collateral appeals before

the California Supreme Court and an average of 49 months had passed since the appeals were filed (31 F. Supp. 3<sup>rd</sup> 1050, Dist. Ct, C.D. Cal 2014).

Finally, Judge Carney indicated that issues related to delay in the appeals process are not limited to California and that many issues exist in the federal court system as well. Once defendants have exhausted all of their state-level appeals, they may file for habeas relief in federal district court that may eventually result in additional appeals to the U.S. Court of Appeals for the Ninth Circuit and ultimately the U.S. Supreme Court (31 F. Supp. 3<sup>rd</sup> 1050, Dist. Ct, C.D. Cal 2014). Often, however, new issues arise at the federal level and the case is sent back to the California Supreme Court for further proceedings (31 F. Supp. 3<sup>rd</sup> 1050, Dist. Ct, C.D. Cal 2014). These are known as exhaustion appeals and they take, on average, an additional 3.2 years to decide (31 F. Supp. 3<sup>rd</sup> 1050, Dist. Ct, C.D. Cal 2014). Overall, as of 2008, the entire federal appeals process for California's death row inmates took an average of 10.4 years (31 F. Supp. 3<sup>rd</sup> 1050, Dist. Ct, C.D. Cal 2014). Since California reinstated the death penalty in 1978, only 81 defendants have been able to exhaust all their appeals while the state has only executed 13 people in that time (31 F. Supp. 3<sup>rd</sup> 1050, Dist. Ct, C.D. Cal 2014).

In total, California death row inmates can expect to wait an average of 25 years before exhausting all their appeals, assuming they are even able to do so at all (31 F. Supp. 3<sup>rd</sup> 1050, Dist. Ct, C.D. Cal 2014). Judge Carney, like Justice Breyer in his dissent in *Glossip* (135 S. Ct. 2726), viewed such delay as somewhat of a paradox. When the U.S. Supreme Court issued its decision in *Furman*, Justice Stewart is famously quoted describing the arbitrary nature of the death penalty and that the Constitution,

“cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and freakishly imposed” (*Furman* 408 U.S. at 310, Stewart, J., concurring).

Judge Carney reiterated this sentiment in asserting that an arbitrarily imposed death penalty does not advance the two penological purposes of deterrence and retribution, which supporters of capital punishment argue that the death penalty achieves.

The paradox then, is that while defendants have a right to a fair process, particularly when their lives hang in the balance, the appeals process in California that seeks to ensure fairness is the very same process that is creating unfairness by creating delays that are excessive, resulting in a penalty that is being arbitrarily imposed.

Serious questions have been raised about how California’s death penalty system or any other death penalty system in the United States represents a significant improvement over the arbitrariness discussed in *Furman*. It is easy to make the argument that executing only 13 people out of over 900 that have been sentenced to death since 1978 is the epitome of the wanton and freakish imposition of the death penalty against which Justice Stewart warned in his concurrence in *Furman* (408 U.S. 238). Judge Carney recognizes this fact but why have other states been so slow to respond? And why has the U.S. Supreme Court failed to recognize this contradiction in its own decision in the more than two decades that have passed since *Lackey* (514 U.S. 1045)? These questions do not have simple answers. Perhaps, for some reason, state legislatures and the U.S. Supreme Court do not believe the issue is ripe for review. Ultimately, however, Judge Carney’s ruling in *Jones* represents a significant step toward recognition of this issue having constitutional importance and it potentially serves as the impetus other federal judges need to address the issue. Although the ruling is still short of Justice

Stevens' vision of having the issue percolate through the lower courts, it is a start. What is certain is that delay matters in analyzing the merits of the death penalty. Moreover, the issue of delay raises several additional legal and practical issues.

**The Issue of Delay and Why Effectiveness Matters.** The U.S. Supreme Court's decision in *Trop* (356 U.S. 86, 1958) introduced the concept of evolving standards of decency. This concept reminds us that as society matures and progresses, that we should revisit and refine our ideas and methods of punishment. The precise meaning of evolving standards of decency has continued to develop over time and while it is a fluid concept, the Court has identified several objective factors to assess whether various forms of punishment comport with the concept. Justice Sandra Day O'Connor noted in *Penry* (492 U.S. 302, 1989) that state legislative enactments may be instructive depending on the direction and pace of change in such enactments regarding a particular practice. In 2005, Justice Kennedy added the additional factor of scientific evidence, noting that such evidence should be considered in determining evolving standards of decency (*Roper*, 543 U.S. 551). Specifically, Justice Kennedy discusses the idea that juveniles are inherently more susceptible to immature and erratic behavior that may not be indicative of future criminality (*Roper*, 543 U.S. 551). Drawing on the field of psychiatry, Justice Kennedy noted,

“It is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption...If trained psychiatrists with the advantage of clinical testing and observation refrain, despite diagnostic expertise, from assessing any juvenile under 18 as having antisocial personality disorder, we conclude that states should refrain from asking jurors to issue a far graver condemnation--that a juvenile offender merits the death penalty.” (*Roper* 543 U.S. at 573, Kennedy, J., opinion).

As a third factor, Justice Kennedy believes it is important to draw on international opinion, even if international court decisions are not binding on American law and practice (*Roper*, 543 U.S. 551).

But what do these factors mean in the context of the death penalty? The Eighth Amendment protects citizens against cruel and unusual punishment. The psychological damage many death row inmates experience may be deserving of further consideration by the Court based on its own conception of evolving standards of decency. The international community, for instance, has already addressed the issues related to extended periods of delay (see *Soering* and *Pratt*). Further, Dr. Stuart Grassian's research on the death row phenomenon may be an important first step toward satisfying Justice Kennedy's belief that scientific evidence is an important consideration. However, the largest hurdle proponents of Lackey claims would have to overcome is getting state legislatures to recognize the merits of the death row phenomenon. As such, revisiting Dr. Grassian's findings and examining other scholars' work may be instructive.

The basis for the death row phenomenon can be found in Dr. Grassian's research on inmates and solitary confinement (Grassian, 1983). Although the effects of long-term incarceration in general cannot be understated, extended periods of solitary confinement may lead to several psychological issues including hallucinations, perceptual distortions and paranoia (Grassian, 1983). Numerous other scholars have found links between solitary confinement and various emotional and psychological issues including insomnia (Haney, 1993), anxiety (Anderson, Sestof, Lilleback, Gabrielsen, Hemmingsen and Kramp 2000; Haney, 1993), depression (Anderson et al., 2000), hopelessness (Haney, 1993), suicidal tendencies (Grassian, 1983; Haney, 1993) and self physical harm

(Benjamin & Lux, 1975) Further, there is evidence that such problems become worse when prison administrators either disregard or do not provide enough assistance to inmates under solitary confinement who show signs of severe emotional or psychological issues (Haney, 2003).

Interestingly, in his work, Dr. Grassian did not classify the inmates under study as insane. Rather, he concluded that for inmates subjected to extended periods of solitary confinement, their experience leads them to form “a clinically distinguishable syndrome” (Grassian, 1983, p. 1453). This distinction is critical in an Eighth Amendment inquiry. As noted above, The U.S. Supreme Court has identified certain classes of individuals who are not eligible for the death penalty due to either psychiatric or intellectual deficiencies (see *Atkins*, 536 U.S. 304 and *Ford*, 477 U.S. 399). The question then is how are those inmates who suffer from psychological maladies as a result of their death row confinement not treated as a special class, especially if state actions are responsible for their deteriorating mental condition? In any event, the mere possibility that state-created delay in capital punishment may create a distinct class of individuals like those identified in *Ford* (477 U.S. 399), for example, is perhaps worthy of consideration by the U.S. Supreme Court.

Although not binding on American law, precedent does exist for considering foreign laws and customs in shaping American law and practice. An example can be found in Justice Kennedy’s opinion in *Roper* (543 U.S. 551, 2005) where he acknowledged that international legal practice did not favor the execution of juveniles<sup>30</sup>.

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<sup>30</sup> Article 37 of the United Nations Convention on the Rights of the Child prohibits the death penalty for anyone committing a crime before the age of 18. Justice Kennedy emphasizes that at the time, every country in the world except for the United States and

International courts have also addressed the issue of delay, citing concerns with extraditing defendants to the United States given the possibility of the “death row phenomenon” resulting from lengthy periods of death row confinement (*Soering*, 11 EHRR 439). Further, In *Pratt* (4 A11 E.R. 769), the Privy Council<sup>31</sup> noted that prolonged periods of death row confinement amount to unacceptably inhumane treatment and are inherently degrading. Overall, relying on international opinion may be beneficial particularly when drawing upon trends in other countries whose legal systems are based in Anglo traditions. The United States is relatively young compared to some of these other nations that, for all intents and purposes, have a much longer and more thoughtful history with regard to penology, philosophy and legal practice. The drawback, however, is that the United States may lose its sense of autonomy when trying to apply best practices from other countries to American correctional problems.

In the end, there remains a question of why American death row inmates spend so much time on death row. The obvious answer to this question may be simply the breadth of appeals available to death row inmates at both the state and federal levels. Judge Carney’s delineation of the process California’s death row inmates experience is telling in the sense that it reveals the complexity and cumbersome nature of the appellate process. What is less clear, however, are the reasons that each of these steps in the

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Somalia had ratified this. *See also* ICCPR, Art. 6(5), 999 U. N. T. S., at 175 (prohibiting capital punishment for anyone under 18 at the time of offense); American Convention on Human Rights: Pact of San Jose, Costa Rica, Art. 4(5), Nov. 22, 1969, 1144 U. N. T. S. 146 (entered into force July 19, 1978) and African Charter on the Rights and Welfare of the Child, Art. 5(3), OAU Doc. CAB/LEG/24.9/49 (1990) (entered into force Nov. 29, 1999).

<sup>31</sup> The Privy Council is the highest court of appeal for many countries that comprise the United Kingdom as well as its overseas territories and other subsidiary courts (Judicial Committee of the Privy Council. <https://www.jcpc.uk/about/role-of-the-jcpc.html>).

process takes so long to resolve. Is the appellate process itself fundamentally flawed? Should we focus more on case attributes as potential explanations for the delay that death row inmates experience? Do more complex death penalty cases impact time on death row? The next section will attempt to provide some insight into how the complex nature of death penalty cases may plausibly explain the extraordinary length of time that many inmates spend on death row.

### **Case Complexity**

**Defining Case Complexity.** What is case complexity? James Cauthen and Barry Latzer (2000) attempted to operationalize case complexity by examining the number of headnotes and the length of appellate court opinions for both capital and non-capital cases in the state of New Jersey (Cauthen & Latzer, 2000). Their findings demonstrate how case complexity can help explain why capital cases take significantly longer to process than non-capital cases. Although instructive, their findings are based on several potentially questionable assumptions. With regard to the number of headnotes that appear in capital and non-capital appellate opinions, the assumption the authors make is that a greater number of headnotes equates to a greater number of issues that come up on appeal that would result in an increase in processing time. It is entirely possible that a new headnote does not introduce a new issue that makes the case more complex.

Further, Cauthen and Latzer (2008) conclude that, controlling for all other factors, increasing the length of an opinion by one page results in a 1.3 percent increase in case processing time. However, opinion length as a measure of case complexity ignores the possibility that some judges simply have different writing styles than other judges. Thus, it is difficult to conclude that an opinion of 30 pages in length presents issues that are

truly more complex than an opinion that is 20 pages in length if the latter judge simply writes in a more concise manner than the former judge.

Where criminology has come up short in measuring case complexity and examining its relationship with case processing time, the legal literature may offer some insight that helps begin to move our understanding of the issue forward. Heise (2004) provided what are arguably the most comprehensive measures of case complexity to date by accounting for the differences between how juries, judges and attorneys perceive case complexity. For example, Heise (2004) found differences between actors' perceptions of case complexity when the issue was measured by looking at individual factors of judges, juries, and attorneys as well as trial characteristics such as the number of defendants, number of victims, number of expert witnesses, whether there was a prior hung jury and trial length measured by number of trial days. Heise (2004) also finds considerable variation when examining death penalty cases versus other types of cases, noting that juries perceive death penalty cases to be more complex than other cases. Finally, although acknowledging relatively weak support for the influence of geography on perceptions of case complexity, Heise (2004) notes that such a relationship exists.

Stuart Ford (2014), on the one hand, takes a much different approach. As Ford (2014) explains,

“...something is complex when it is composed of many interconnected parts such that their interaction makes the whole difficult to understand or analyze. Complexity then becomes the state or condition of having these attributes. Thus....complexity occurs when multiple parts of a system interconnect and interact in such a way that the whole system becomes hard to understand or analyze (p. 12).”

Over time, the multiple parts that comprise complex court systems and processes have taken on many forms in the empirical and legal literature. Stempel (1998) does not

provide an actual definition of complexity but prefers to frame complexity using specific factors including: the number of litigants, the difficulties in bringing litigants and claims together, multiple forums (or multiple courts addressing the same issue), case processing time, difficulties related to choosing the applicable law, the technical nature of a case and a host of other issues related to what specifically is being litigated as well as attorney competence. Ford's (2014) definition, on the other hand, may be applied to any number of situations from criminal cases to the natural sciences and everything in between. Stempel's (1998) framing of complexity is arguably more useful in moving us closer to an understanding of how case complexity potentially impacts the death penalty in that he suggests specific variables to explore.

In any event, much of our current understanding about case complexity and its effects on the outcome of trials comes primarily from an examination of American civil trials (Ford, 2014). Although this literature (including Ford's 2014 work) is informative, defining and measuring case complexity has proven to be anything but a simple undertaking (Heise, 2004).

**Case Complexity and the U.S. Supreme Court.** One of the simplest measures of case complexity can be found in Scott Johnson's (1999) work examining how complexity may influence the number of opinions in cases that come before the U.S. Supreme Court. Specifically, Johnson (1999) posited that two factors make cases more complex and influence the number of concurring and dissenting opinions that are authored. The first factor is the number of legal issues raised. The number of legal issues raised is expected to have a direct relationship with how many separate opinions are drafted. Johnson (1999) predicted a similar relationship when examining the second predictor of

complexity, the number of legal provisions present in the case. Examining only those cases decided from 1986-1990, Johnson's analysis revealed that when two or more legal issues are raised, this corresponded with a higher number of cases in which there is one or more concurring or dissenting opinion. In 91% of the cases in which two or more legal issues were raised, there was at least one or more concurring or dissenting opinion (Johnson, 1999). Regarding the number of legal provisions implicated, 87% of those cases involving two or more legal provisions resulted in one or more concurring or dissenting opinion (Johnson, 1999).

**Case Complexity in Criminal Courts.** Criminal trials are cut from a cloth wholly different from civil cases. A number of these differences take center stage in the empirical investigations of Heuer and Penrod (1994) and Ford (2014). First, Larry Heuer and Steven Penrod (1994) examine legal complexity in both civil and criminal trials. More specifically, their work examines legal complexity, evidence complexity and the amount of information presented to juries. Additionally, they consider how factors including the number of witnesses, trial length, number of charges/claims, number of items of evidence, number of parties, complexity of defense arguments as well as complexity of prosecution arguments impact case outcomes.

Ford (2014) also provides us with a glimpse of what makes criminal cases complex. Drawing upon cases from the International Criminal Tribunal for the former Yugoslavia (ICTY), he concludes that these cases are far more complex than cases tried in the United States. In fact, he argues that many of the cases tried in the ICTY are among some of the most complex in the world, which means that many of the factors that make these cases complex are perhaps present in American criminal cases. The reason for this

increased complexity centers largely on the fact that the ICTY handles cases involving mass atrocities, which are not common in the United States (Ford, 2014). Nonetheless, he notes that even cases involving mass atrocities perpetrated in the United States are not of comparable complexity to the types of cases the ICTY hears. Ford (2014) further outlines his definition and method of measuring complexity and provides critiques of other methods of measuring complexity.

Ford (2014) provides critiques of the way other scholars have attempted to define complexity. For instance, he rejects Tidmarsh's (1992) definition of complexity. First, he argues that the definition used by Tidmarsh (1992) relies on factors that are too closely related to civil trials to be useful in an assessment of criminal cases. Second, he stresses the point that it is difficult to know at which point a case goes from being "routine" to "complex." As noted above, it is possible that criminal case complexity and more specifically capital case complexity requires a more nuanced analysis rather than attempting to dichotomize case complexity.

In terms of measuring complexity, Ford (2014) prefers to use a multi-pronged approach. Ford (2014), like many other scholars (see Reiber & Weiberg, 2009; Heuer & Penrod, 1994; Tidmarsh, 1992) views complexity as related to the law, facts of the case and the participants. Legal complexity is related to the actual law at hand (Ford, 2014). Cases become complex, for instance, if the law is dense, difficult to interpret, highly technical or heavily rule-based, relying predominantly on the facts of the case (Ford, 2014). Death penalty statutes may fit this definition if aggravating factors, for instance, are vague and left to subjective interpretation.

Factual complexity, unlike legal complexity, addresses the difficulties surrounding the facts that will ultimately be the subject of legal application (Ford, 2014). In a death penalty case, the facts may not always be clear given that witnesses' memories may fade, evidence may disappear and never be recovered, and multiple crime scenes may be involved as well as a host of other factors. Regarding the facts, cases become more complex if facts are technical, difficult or impossible to interpret or there are simply many facts to consider in a case (Ford, 2014). Finally, participant complexity involves the specific ways in which actors in the process contribute to case complexity (Ford, 2014). For example, the ways in which prosecutors or defense attorneys present cases can influence how complex the case seems (Ford, 2014). Juries may also play a role when cases seem so overwhelming that they are unable to adequately perform their role (Ford, 2014). Ford (2014) also notes that cases may involve multiple forms of complexity (i.e. legal and factual complexity together). In such cases, the overall complexity increases given that both legal and factual complexity have the effect of making the other worse (Ford, 2014).

In sum, case complexity has been conceptualized in several ways in various contexts. However, what is missing from the preceding discussion, and where this study attempts to fill the gap, is what all of this means in the context of death penalty cases. There seems little doubt that complex cases affect all actors involved in a wide range of legal processes and theoretically, death penalty cases should be no different. But what other processes are at work in death penalty cases that make them extraordinarily complex and thus result in delay? This study attempts to bridge a huge gap in the

criminological literature by linking ideas from other disciplines regarding case complexity and time on death row.

## CHAPTER 3

### METHODS

The problem of death penalty delay has long been established anecdotally by the U.S. Supreme Court, beginning with the Court's denial of certiorari in *Lackey v. Texas* (514 U.S. 1045, 1995). A string of additional cases that have been denied review by the Court since the *Lackey* decision have demonstrated that the period of time defendants are spending on death row prior to petitioning the Court for relief is steadily increasing<sup>32</sup>. It is not simply the length of time that is the issue, however. Defendants who spend extended periods of time on death row are subject to numerous psychological problems (see *Grassian*, 1983) and, in general, the cost of imposing and eventually carrying out a death sentence is significantly higher than imposing a sentence of life without the possibility of parole (see Chapter 1 INTRODUCTION). Given that the research has been mixed at best as far as whether the death penalty has any deterrent effect, even a staunch death penalty advocate may question its utility as a matter of public policy.

But what explains the fact that death penalty delay has become increasingly commonplace? This study, among the first of its kind, attempts to address this question

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<sup>32</sup> *Allen v. Ornoski*, 546 U.S. 1136; *Elledge v. Florida*, 525 U.S. 944; *Foster v. Florida*, 537 U.S. 990; *Johnson v. Bredesen*, 130 S.Ct. 541; *Knight v. Florida*, 528 U.S. 990; *Smith v. Arizona*, 552 U.S. 985; *Thompson v. McNeil*, 129 S.Ct. 1299 and *Valle v. Florida*, 132 S.Ct. 1.

by examining the nexus between case complexity and delay. This issue has been ignored in the criminological literature and its inquiries are mainly limited to works in political science and legal literature. Given the magnitude of this problem and its potential implications for public policy, an empirical analysis of the link between case complexity and death penalty delay is warranted.

### **Study Procedures**

In order to investigate the issue of complexity and delay, a database was constructed using information from all capital cases collected by the Florida Department of Corrections and the Florida Commission on Capital Cases (the Commission).<sup>33</sup> Information was collected on all defendants sentenced to death in Florida from 1975-2013 (N=406). Although Florida Governor Rick Scott defunded the Commission in 2011, all information collected prior to its closing is still publicly available on its website. The database was further supplemented with information extracted from written decisions from the Florida Supreme Court, U.S. District Courts of Appeal<sup>34</sup>, the United States Supreme Court, and appellate briefs submitted by both defendants and the state. Using key word searches in the Lexis-Nexis database, the researcher obtained information from initial appellate briefs, reply briefs, supplemental briefs and habeas briefs that were filed with the Florida Supreme Court and other federal appellate courts. A key advantage of

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<sup>33</sup> In 2011, Florida Governor Rick Scott abolished the Florida Commission on Capital Cases, which had served as a legal body responsible for reviewing capital convictions in the state of Florida. (see <http://floridainnocence.org/content/?tag=commission-on-capital-cases>).

<sup>34</sup> There are 3 U.S. District Courts in Florida; the U.S. District Court for the Northern District of Florida, the U.S. District Court for the Southern District of Florida and the U.S. District Court for the Middle District of Florida (see [http://www.flsd.uscourts.gov/?page\\_id=7850](http://www.flsd.uscourts.gov/?page_id=7850)).

this approach is that it permits the researcher to gather case-level information that is not currently available in any other database. Additionally, while the Commission was in operation, the information obtained was collected on a continuous basis, maximizing its accuracy. The key pitfall to using information from the Commission is that despite the accuracy of this information, it is only available thru 2011. However, other sources (see above) were useful in gathering additional information for cases still pending after 2011 (up to 2013 for the current study).

The preceding design improves upon several previous attempts to assess the impact of various case and appellate-level factors on case processing time and for this study, delay. To begin, Judge Carney's analysis of delay in California's death penalty system is instructive but incomplete (*Jones*, 31 F. Supp. 3<sup>rd</sup> 1050, Dist. Ct, C.D. Cal 2014). In his opinion, Judge Carney lays out myriad troubling descriptive statistics that describe the state of affairs in California since 1978. However, Judge Carney's analysis does not provide any assessment of what specifically may predict whether delay will occur (let alone provide a working definition of delay) and certainly not whether case complexity plays a role. Sipes (1984) chronicles a range of issues related to court delay at the state level and various measures that have been implemented in order to combat the problem. However, none of the solutions specifically address the issue of case complexity and are instead geared toward more efficient case management by actors involved in criminal and civil cases. Although Sipes (1984) acknowledges that some cases are atypical (perhaps because they are more complex), complex cases present difficulties in implementing some of the various measures aimed at reducing court delay (i.e. setting firm trial dates which may have to change based on various legal or procedural issues that

can arise). In any event, Sipes's (1984) work does not directly examine the nexus between case complexity and delay. Additionally, Martin and Prescott (1981) define case processing time as the time between the lower court's initial ruling and the time that a decision is rendered by an appellate court. Martin and Prescott (1981) provide a further breakdown of appellate case processing time to account for the fact that various court actors view case processing time in different ways and use different starting points. For the current study, the researcher has selected a specific start time (i.e. following the Florida Supreme Court's direct appeal ruling) to make capturing delay simpler and more consistent.

## **Hypotheses**

Death penalty delay is steadily worsening in terms of the length of time that defendants spend on death row (Latzer & Cauthen, 2007; Snell, 2011). Constitutionally, Justice Breyer has argued that death penalty delay has essentially created a system that serves no legitimate penological purpose and in many ways, presents the same issues of arbitrariness the U.S Supreme Court attempted to remedy with the *Furman* and *Gregg* decisions<sup>35</sup> What remains uncertain is the degree to which case complexity lengthens the amount of time defendants spend on death row.

There is some limited empirical support for the notion that case complexity impacts case processing time (Cauthen & Latzer, 2008; 2000) and thus lengthens the amount of time that defendants spend on death row. However, much of what we know about the operationalization of complexity is confined to the political science and legal

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<sup>35</sup> See Justice Breyer's dissenting opinion in *Glossip v. Gross* (135 S. Ct. 2726, 2015).

literature. Thus, the criminological enterprise would greatly benefit from a more thorough examination of the nexus between case complexity and death penalty delay.

There is some evidence that federal judges are beginning to take notice of the increasingly lengthy amount of time defendants awaiting execution are spending on death row (see *Jones v. Chappell*, 31 F. Supp. 3<sup>rd</sup> 1050, Dist. Ct, C.D. Cal 2014). However, we do not presently have answers regarding why such inordinate delay is becoming commonplace. While it is conceivable that the appellate process is too cumbersome and contributes significantly to the problem, there is still a great deal of uncertainty about whether it is the nature of death penalty cases themselves that results in periods on death row that for some defendants can span several decades. This research is an initial attempt to shed some light on the question of delay in death sentences and whether the complexity of death penalty cases contributes to this delay. Thus, this research is guided by two primary questions: 1.) What constitutes delay and how should it be measured? and 2.) Does the complexity of death penalty cases contribute to the delay that defendants experience?

Arguably, the number of legal issues present in a case before the U.S. Supreme Court influences opinion writing, perhaps because such cases are more complex (Johnson, 1999). It is possible that complex cases (as a function of the number of legal issues present), influence the Florida Supreme Court during capital cases which could also influence other courts in the appeals process as well. Thus, one operational definition of case complexity for this research is the number of legal issues present in the Florida Supreme Court's ruling on a defendant's direct appeal. This research hypothesizes a link between case complexity and death penalty delay in the following manner:

**H1:** An increase in the number of legal issues present in the Florida Supreme Court's direct appeal decision increases the likelihood of delay.

Johnson (1999) also notes that the number of legal rules cited influences opinion writing at the U.S. Supreme Court, perhaps because an increased number of legal authorities cited in a case is indicative of greater complexity. Thus, this research proposes an additional operational definition of case complexity (the number of legal authorities and rules cited in the Florida Supreme Court's ruling on a defendant's direct appeal). Additionally, this research hypothesizes a link between case complexity and death penalty delay in the following manner:

**H2:** An increase in the number of legal authorities and rules cited in the Florida Supreme Court's direct appeal decision increases the likelihood of delay.

### **Primary Independent Variables of Interest**

The number of legal issues raised and legal authorities and rules implicated are potentially key measures of case complexity. Johnson (1999) finds that these two variables, at a minimum, influence opinion writing at the U.S. Supreme Court, ostensibly because there are more issues and rules to discuss. This research posits that the same forces are potentially in play in Florida's death penalty system. For the current study, the variable Complexity 1 represents the total number of legal issues raised and it was coded (1=1-3 issues, 2=4-6 issues, 3=7-10 issues and 4=11 or more issues). Additionally, Complexity 2 represents the number of legal authorities and rules cited (authorities) and was coded (1=1-9 authorities, 2=10-14 authorities, 3=15-19 authorities, 4=20-30 authorities, 5=31-40 authorities, 6=41-60 authorities and 7=61 or more authorities).

## **Control Variables**

Several relevant control variables were also considered in the current study. These variables include the number of direct appeals filed with the Florida Supreme Court, the length of the Florida Supreme Court's direct appeal opinion, whether any judges in the Florida Supreme Court drafted a dissenting opinion on direct appeal, the number of state habeas appeals filed, the number of federal habeas appeals filed, the number of petitions for certiorari defendants submitted to the U.S. Supreme Court, whether the jury rendered a unanimous decision in sentencing, whether the defendant challenged any forensic evidence presented at trial, the number of expert witnesses who testified at trial, whether the defendant raised a competency dispute at trial, whether the defendant asserted some sort of brain injury or deformity, the number of Florida 3.850 and 3.851 motions filed, the number of issues raised in both the defendant's and state's appellate brief and the length of each of these briefs. Table 4.2 in the following chapter presents all the independent variables followed by a discussion of the coding mechanism for each variable.

## **Dependent Variable**

The dependent variable of interest for the current study is delay. For purposes of this research, delay is defined as the cumulative amount of time (measured in months) that a defendant has spent on death row less the amount of time between sentencing and the time required for the Florida Supreme Court to render a decision on a defendant's direct appeal. Where this resulting number exceeded the national average for time spent on death row, it was coded as 1. Where the resulting number did not exceed the national

average, as calculated by the Department of Justice, it was coded as 0<sup>36</sup>. There is some recognition that this measure is arbitrary<sup>37</sup> and it may likely raise several additional questions<sup>38</sup>; however, the calculation used here is merely a proxy measure of delay, albeit an unstable one. This study is also exploratory. Thus, this definition will require refinement as future studies attempt to examine this issue.

As a point of comparison, the researcher will also consider the count number of years spent on death row since the trial court's original verdict, irrespective of whether a defendant's time on death row exceeds the national average.

The impetus for defining delay in this manner is derived, in part, from the Department of Justice's calculation (see Snell, 2014) as well as Latzer & Cauthen's (2000; 2008) research on the capital appellate process. This definition of delay considers the idea that death row inmates must spend at least some time on death row before their appeals are litigated. Neubauer (1983), for instance, acknowledges that delay is often viewed as negative but that some delay is necessary simply as a function of the time required for cases to be litigated and resolved. Thus, Neubauer (1983) relies on case processing time or the time required to litigate a criminal case from start to finish. Neubauer (1983) views this as a more objective measure, however it is problematic for purposes of this project given that total case processing time captures both what Neubauer (1983) refers to as "normal" and "abnormal" case processing time. Neubauer's

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<sup>36</sup> The average number of months was log transformed in order to address issues of skew.

<sup>37</sup> It is implied that there is a normative measure for some established timeframe that cases should spend on appellate review. However, there is no such measure as Nieves (2006) points out.

<sup>38</sup> Among other things, there is an ongoing debate regarding how to appropriately measure case processing times in death penalty cases (see Hanson & Daley, 1995; Spurr, 2002).

(1983) work is also focused specifically on the period between arrest and sentencing in criminal cases and not the appeals process. Recognizing this limitation, this research will proceed as described above.

Neubauer's (1983) work is not the only study to examine case processing time. In a study conducted by the National Center for State Courts (NCSC), the researchers examined case processing time both in criminal and civil cases but did not devise a true working definition of delay (see Trotter & Cooper, 1982). In both instances (i.e. criminal and civil), the researchers simply identified various courts that were "faster" or "slower" than others. However, the case processing timeline may change based on differences in geographic locales (Trotter & Cooper, 1982). Thus, merely using median case processing time is not enough and does not account for such local factors. In other words, this method of determining when delay in case processing time is either present or not does not reconcile what Neubauer (1983) describes as "normal" and "abnormal" case processing time. Further, Luskin and Luskin (1986) examined several factors believed to influence case processing time (defined by the authors as the time between arraignment and disposition of a criminal case). Although instructive, their analysis does not set a minimum threshold for delay. In other words, although many of the authors' predicted relationships between the causes of long case processing time and actual case processing time hold true, questions remain about whether the relationships that they observed constitute delay.

## CHAPTER 4

### ANALYSIS

In this chapter, the specific analytic methods are presented. The major goal of this chapter is to begin to explore some of the processes that may influence the length of time that defendants who were sentenced between 1975 and 2013 have spent on death row and ultimately the factors that impact delay. These years are used for a couple reasons. First, the earliest cases were being adjudicated a few years before and following the reimposition of the death penalty following the U.S. Supreme Court's decision in *Gregg*, where arguably, the modern death penalty system came into existence. Second, this year also marks the beginning of the time period that coincides with the longest amount of time that a defendant has spent on death row in Florida (Thomas Knight and Charles Foster; 38 years on death row as of 2013) who each petitioned the U.S. Supreme Court asserting a Lackey Claim. As mentioned in Chapter 3 (METHODS), the factors that impact delay have been largely unexplored in the criminological literature. Thus, this chapter seeks to lay out a comprehensive analytic method for determining how various factors associated with case complexity and the appeals process may influence delay.

#### **Descriptive Statistics under Study**

The following table (Table 4.1) provides the descriptive statistics for the primary demographic variables of interest.

Table 4.1-Descriptive Statistics: Demographic Variables (N=406)

<b>Gender</b>	<b>N</b>	<b>Percentage</b>	<b>S.D.</b>
Male	401	98.8	-
Female	5	1.2	-
<b>Race</b>	<b>N</b>	<b>Percentage</b>	<b>S.D.</b>
White	243	59.9	-
Black	148	36.5	-
Hispanic/Latino	15	3.6	-
<b>Region</b>	<b>N</b>	<b>Percentage</b>	<b>S.D.</b>
North	180	44.3	-
Central	147	36.2	-
South	79	19.5	-
	<b>N</b>	<b>Mean (Years)</b>	<b>S.D.</b>
Age (as of 2013)	-	47.9	10.93
Time on Death Row (as of 2013)	-	15.3	9.63

Table 4.1 reveals some noteworthy information about the inmates in the dataset. As of 2013, the average time spent on death row was just over 15 years. The average age of a Florida death row inmate as of 2013 was nearly 48 years old and most of these inmates were white (59.9 percent) and overwhelmingly male (98.8 percent).

Next, Table 4.2 provides the descriptive statistics for the dependent variable (Delay) and the independent variables of interest.

Table 4.2-Descriptive Statistics (Dependent and Independent Variables)

<b>Delay</b>	<b>N</b>	<b>Percentage</b>	<b>S.D.</b>
No Delay	209	51.5	-
Delay	197	48.5	-
<b>Appeals Process Variables</b>	<b>N</b>	<b>Mean</b>	<b>S.D.</b>
Direct Appeals	380	1.21	.41
Opinion Length (In Pages)	389	2.66	1.33
FSC Dissent	347	.33	.47
State Habeas Appeals	404	.71	.71
Federal Habeas Appeals	373	.79	.87
Number of USSC Certiorari	375	1.14	.65
<b>Case Attribute Variables</b>	<b>N</b>	<b>Mean</b>	<b>S.D.</b>
Jury Unanimity	403	.20	.40
Forensic Dispute	364	.30	.46
Number of Expert Witnesses	388	1.70	1.05
Competency Dispute	389	.68	.47
Brain Disorder	376	.58	.50
3.850 Motions	404	1.34	1.17
3.851 Motions	403	.79	.80
<b>Case Complexity Variables</b>	<b>N</b>	<b>Mean</b>	<b>S.D.</b>
Complexity 1 (Issues in the FSC)	401	2.70	.92
Complexity 2 (Number of Rules or Authorities)	397	4.66	1.88
Appellate Brief Issues	396	2.37	1.00

Table 4.2-Descriptive Statistics (Dependent and Independent Variables) (cont.)

Appellate Brief Length (In Pages)	397	3.12	.98
State Reply Brief Issues	396	2.34	1.03
State Reply Brief Length (In Pages)	396	2.26	.67

For the current study, the researcher divided the variables in Table 4.2 into three separate categories: appeals process variables, case attribute variables and case complexity variables. The appeals process variables include the number of direct appeals filed with the Florida Supreme Court (1=once, 2=multiple) as well as the length (in pages) of the Florida Supreme Court’s initial direct appeal opinion (1=1-10, 2=11-20, 3=21-30, 4=31-50, 5=51 or more). Additionally, the researcher examined whether notable relationships emerge when examining the presence or absence of a dissenting opinion in the direct appeal ruling (0=No, 1=Yes) and the number of times a defendant filed for state habeas relief (0=None, 1=Once, 2=Multiple). Other variables the researcher considered were the number of federal habeas appeals filed (0=None, 1=Once, 2=Multiple) and how many times a defendant petitioned the U.S. Supreme Court for a writ of certiorari (0=None, 1=Once, 2=Multiple).

At the case level, the researcher examined jury unanimity (0=Not Unanimous, 1=Unanimous), whether the defendant disputed any forensic evidence (0=No, 1=Yes), the number of experts (psychologists or psychiatrists) that testified in a case (0=None, 1=1-2, 2=3, 3=4 or more), the presence or absence of a competency dispute (0=No, 1=Yes), the presence or absence of a claim of a brain disorder (0=No, 1=Yes) and the

number of Florida 3.850<sup>39</sup> (0=None, 1=One, 2=2-3, 3=4 or more) and 3.851<sup>40</sup> (0=None, 1=One, 2=Multiple) motions filed in a case. Heise's (2004) work provides the researcher with some empirical basis for examining these variables. Heise (2004) identified several variables that may make criminal cases more complex. Jury unanimity and the number of expert witnesses are worthy of further examination given that Heise (2004) found these two variables to be relatively strong indicators of case complexity.

Finally, the case complexity variables include Complexity 1 (1=1-3 issues, 2=4-6 issues, 3=7-10 issues, 4=11 or more issues), Complexity 2 (1=1-9 authorities, 2=10-14 authorities, 3=15-19 authorities, 4=20-30 authorities, 5=31-40 authorities, 6=41-60 authorities, 7=61 or more authorities), the number of appellate brief issues (1=1-3 issues, 2=4-6 issues, 3=7-10 issues, 4=11 or more issues), appellate brief length (1=1-50 pages, 2=51-74 pages, 3=75-100 pages, 4=101 or more pages), the number of issues raised in the state's reply (1=1-3 issues, 2=4-6 issues, 3=7-10 issues, 4=11 or more issues) and the length of the state's reply (1=1-50 pages, 2=51-100 pages, 3=101 or more pages).

For each type of variable, the researcher coded the variables in the above manner based on the determination that such coding may be more conducive to binary logistic regression and Poisson regression.

### **Binary Logistic Regression**

For the current study, a series of binary logistic regressions was used to examine the relationship between the independent variables and delay. Binary logistic regression

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<sup>39</sup> A 3.850 motion is a motion for post-conviction relief in the state of Florida often filed following a guilty conviction, guilty plea or no contest plea.

<sup>40</sup> A 3.851 motion is a motion for post-conviction relief in the state of Florida specific to death penalty cases that is often filed following a guilty conviction and subsequent death sentence.

is an appropriate method for analyzing the effects of either categorical or continuous variables on a dichotomous outcome (Peng, Lee & Ingersoll, 2002). The current study tests the relationship between case complexity (defined by the number of legal issues raised and the number of legal rules and authorities cited in the Florida Supreme Court's direct appeal opinion) against the binary outcome of delay (coded as 0=no delay and 1=delay). Specifically, given that logistic regression models are designed to calculate odds ratios (Peng et al., 2002), the current study examined the odds that the independent variables will be associated with an increased or decreased likelihood in the odds of delay (see H1 and H2 in Chapter 3, METHODS).

Binary logistic regression is appropriate for the current analysis because of the dichotomous dependent variable and the presence of one or more independent variables (Hoffman, 2003). The researcher also ensured that two additional assumptions were met. First, the data provides both independence of observations (each inmate in the sample is a separate individual and is included only once in the analyses) and a dependent variable with mutually exclusive and exhaustive categories (0=no delay and 1=delay). Second, the researcher ensured that a linear relationship was present between the log transformed independent variables and the dependent variable. The researcher tested this assumption using the Box-Tidwell procedure (see Box & Tidwell, 1962) for each of the binary logistic models. Across each of the logistic regression models, two of the log transformed independent variables (number of direct appeals and 3.851 motions) had a significant relationship with the dependent variable of delay. However, given the large sample size, such a significant relationship does not indicate a lack of linearity overall, satisfying this assumption (see Appendix A).

Prior to finalizing the appellate-level variables for analysis, the researcher first checked for multicollinearity among all the appellate-level independent variables using the Variance Inflation Factor (VIF). A VIF of exactly 1 indicates that there is no correlation between any given two variables in the model. A VIF of greater than 10 is considered a good indication that any two given independent variables are significantly correlated and would likely need to be addressed by removing one of them from the analysis. For the appeals process variables, the VIF ranged from 1.01 to 2.18, indicating that there is no significant correlation between any of the appeals process variables. The researcher used the same process for testing for multicollinearity for the case-level variables. For these variables, the VIF ranged from 1.01 to 1.66, indicating that no significant correlation is present between any of the case attribute variables. As with the previous two types of variables, the presence or absence of multicollinearity was assessed using the VIF. For the case complexity variables, the VIF ranged from 1.06 to 1.87, indicating that no significant correlation exists between any of the complexity variables. An additional test for multicollinearity was performed by noting the condition indices for each set of variables. Appendix B presents the minimum and maximum values for the condition indices for each group of variables.

### **Poisson Regression**

As a point of comparison, the researcher also used series of Poisson regressions. When using Poisson regression, however, the dependent variable was modified to reflect time on death row (simply measured as a count number of years spent on death row in Florida since sentencing).

Poisson regression is utilized for count data for the dependent variable and it measures changes in odds based on one or more independent variables (Coxe, West & Aiken, 2009). In the current study, the researcher analyzed the effects of changes in multiple independent variables on the increase or decrease in the likelihood of spending more time on death row.

Given that the first two assumptions of Poisson regression were met (count data for the dependent variable and one or more independent variables), prior to performing the analysis, the researcher then checked whether three additional assumptions were met. First, the researcher ensured that there was independence of observations given that each individual in the dataset is a separate person and that no person was analyzed more than once. Thus, it is not possible for any overlap to exist. Next, the researcher determined whether the distribution of counts followed a Poisson distribution (Coxe, et al., 2009). Finally, the researcher examined whether the mean and the variance of the model were identical (Coxe, et al., 2009). The researcher tested this assumption by examining the Pearson Chi Square value/degrees of freedom for each set of variables. In each case, this value was greater than .05, indicating that the proposed model fits the data appropriately (see Appendix C). Finally, the researcher further tested model fit by plotting the residuals for each set of variables. With each set of variables (appeals process, case attribute and case complexity), most of the residuals fell within two standard deviations of the mean; further indicating that the proposed models fit the data (see Appendices D, E and F).

## CHAPTER 5

### RESULTS

#### Binary Logistic Regression

**Appeals Process Model.** Table 5.1 presents the results of the appellate-level variables using delay as the dependent variable.

Table 5.1-Appeals Process Model (Binary Logistic Regression)	$\beta$	S.E.	Wald	Exp ( $\beta$ )	df
Complexity 1	.93	.29	10.10	2.53***	1
Complexity 2	1.09	.22	25.80	.34***	1
Direct Appeals	.36	.70	.27	1.44	1
Opinion Length	-.88	.25	12.97	.41***	1
FSC Dissent	.50	.52	.90	1.64	1
State Habeas Appeals	1.54	.43	12.91	4.64***	1
Federal Habeas Appeals	.87	.31	7.85	2.38**	1
Number USSC Cert.	1.35	.45	9.23	3.87**	1
Constant	1.10	1.35	.66	2.99	1

\* $p \leq .05$  \*\* $p \leq .01$  \*\*\* $p \leq .001$

Table 5.1 reveals several positive and significant relationships between the appellate-level variables and delay. Notably, Complexity 1 was associated with a 153% increase in the odds of delay. Other positive relationships included state habeas appeals being associated with a 364% increase in the odds of delay, federal habeas appeals being

associated with a 138% increase in the odds of delay and an increase in the number of petitions for certiorari to the U.S. Supreme Court being associated with a 287% increase in the odds of delay. Complexity 2, on the other hand, was associated with a 66% decrease in the odds of delay while state Supreme Court opinion length resulted in a 59% decrease in the odds of delay. The number of direct appeals and the presence of a dissenting opinion in the Florida Supreme Court were also associated with increased odds of delay. However, neither achieved statistical significance.

**Case Attribute Model.** Table 5.2 presents the results of the case-level variables using delay as the dependent variable.

Table 5.2-Case Attribute Model (Binary Logistic Regression)	$\beta$	S.E.	Wald	Exp ( $\beta$ )	df
Complexity 1	1.15	.32	13.03	3.15***	1
Complexity 2	-1.52	.24	39.08	.22***	1
Jury Unanimity	.14	.67	.04	1.15	1
Forensic Dispute	-.37	.59	.38	.69	1
Num. Expert Witnesses	.45	.30	2.34	1.57	1
Competency Dispute	-.53	.78	.46	.59	1
Brain Disorder	-.40	.73	.30	.67	1
3.850 Motions	2.79	.42	44.71	16.23***	1
3.851 Motions	.43	.36	1.45	1.54	1
Constant	-.56	1.26	.19	.57	1

\* $p \leq .05$  \*\* $p \leq .01$  \*\*\* $p \leq .001$

Like the appellate-level variables, positive and significant relationships emerged in the Case Attribute Model. Complexity 1 was associated with a 215% increase in the odds of delay. A particularly notable result in this model is observed when examining

3.850 motions, which were associated with a 1,523% increase in the odds of delay and statistically significant. Complexity 2 was also statistically significant but associated with a 78% decrease in the likelihood of delay. No other variables in the model achieved statistical significance.

**Case Complexity Model.** Table 5.3 presents the results of the complexity variables only; using delay as the dependent variable.

Table 5.3-Case Complexity Model (Binary Logistic Regression)	$\beta$	S.E.	Wald	Exp ( $\beta$ )	df
Complexity 1	1.04	.20	27.64	2.84***	1
Complexity 2	-1.28	.13	99.54	.28***	1
Appellate Brief Issues	-.18	.19	.89	.84	1
Appellate Brief Length	-.02	.18	.02	.98	1
State Reply Brief Issues	-.09	.19	.20	.92	1
State Reply Brief Length	-.03	.26	.02	.97	1
Constant	3.96	.74	28.54	52.54***	1

\* $p \leq .05$  \*\* $p \leq .01$  \*\*\* $p \leq .001$

As in the first two binary logistic models, both Complexity 1 and Complexity 2 emerged as significant, yet only Complexity 1 was associated with increased odds of delay (184% increase). Complexity 2, as observed in the other models was associated with a decrease in the odds of delay (72% decrease in this model). Neither the number of legal issues present in the defendant's brief to the Florida Supreme Court nor the state's reply brief emerged as significant. In addition, while state Supreme Court opinion length emerged as statistically significant in the Appeals Process model (albeit associated with decreased odds in the presence of delay), neither the length of the defendant's brief nor

the length of the state’s reply brief achieved statistical significance in the Case Complexity Model.

**Grand Model.** Table 5.4 presents the results of the Grand Model for all statistically significant variables across each of the original three binary logistic models.

Table 5.4-Grand Model (Binary Logistic Regression)	$\beta$	S.E.	Wald	Exp ( $\beta$ )	df
Complexity 1	.76	.32	5.63	2.14*	1
Complexity 2	-1.18	.27	19.15	.31***	1
Opinion Length	-.76	.29	6.78	.47**	1
State Habeas Appeals	.55	.55	.99	1.73	1
Federal Habeas Appeals	.71	.37	3.69	2.04	1
Number USSC Cert.	1.40	.53	6.95	4.07**	1
3.850 Motions	1.81	.35	26.87	6.09***	1
Constant	.43	1.15	.14	1.53	1

\* $p \leq .05$  \*\* $p \leq .01$  \*\*\* $p \leq .001$

When modeling each of the statistically significant variables together, Complexity 1 was still associated with increased odds of delay. Although Complexity 1 emerged as slightly less significant in the Grand Model, it still had a greater effect on the outcome than Complexity 2 (114% increase and a 69% decrease in odds respectively). The number of 3.850 motions filed remained significant but had less of an effect than when modeled with the other case-level variables (509% increase in odds). Also, the number of U.S. Supreme Court petitions for certiorari also emerged as significant in the Grand Model and was associated with a 307% increase in the odds of delay. Finally, Florida Supreme Court opinion length continued to emerge as significant in this final model but was again associated with a decrease in the odds of delay (53%).

## Poisson Regression

**Appeals Process Model.** Table 5.5 presents the results of the same appellate-level variables but instead examines time on death row as the dependent variable.

Table 5.5-Appeals Process Model (Poisson Regression)	$\beta$	S.E.	Wald $X^2$	Exp ( $\beta$ )	df
Complexity 1	.09	.03	11.42	1.09**	1
Complexity 2	-.04	.01	7.59	.96**	1
Direct Appeals	.19	.04	21.10	1.21***	1
Opinion Length	-.15	.02	39.64	.86***	1
FSC Dissent	.03	.04	.46	1.03	1
State Habeas Appeals	.21	.03	39.20	1.23***	1
Federal Habeas Appeals	.18	.03	34.73	1.20***	1
Number USSC Cert.	.12	.04	9.85	1.13**	1
(Intercept)	2.30	.12	386.24	9.98***	1

\* $p \leq .05$  \*\* $p \leq .01$  \*\*\* $p \leq .000$

Table 5.5 reveals that many of the same appellate-level variables achieved statistical significance like in the binary logistic model. Complexity 1 (9% increase), number of direct appeals (21% increase), state habeas appeals (23% increase), federal habeas appeals (20% increase) and the number of petitions for certiorari to the U.S. Supreme Court (13% increase) were all statistically significant and associated with increases in the odds of greater time on death row. Notably, the number of direct appeals achieved statistical significance in this model but not in the previous binary logistic model. Also, Complexity 2 and state Supreme Court opinion length were associated with decreases in the outcome variable and each achieved statistical significance as in the binary logistic model. Finally, the presence of a dissenting opinion in the Florida

Supreme Court was associated with a slight increase in the odds of greater time on death row but did not achieve statistical significance.

**Case Attribute Model.** Table 5.6 presents the results of the same case-level variables but instead examines time on death row as the outcome variable.

Table 5.6-Case Attribute Model (Poisson Regression)	$\beta$	S.E.	Wald $X^2$	Exp ( $\beta$ )	df
Complexity 1	.09	.02	12.61	1.09***	1
Complexity 2	-.09	.01	37.22	.92***	1
Jury Unanimity	.03	.06	.28	1.03	1
Forensic Dispute	.07	.04	2.52	1.07	1
Num. Expert Witnesses	.07	.02	8.86	1.07**	1
Competency Dispute	-.10	.06	2.99	.90	1
Brain Disorder	.05	.05	.86	1.05	1
3.850 Motions	.40	.03	242.47	1.48***	1
3.851 Motions	.04	.02	2.26	1.04	1
(Intercept)	2.05	.11	341.35	7.78***	1

\* $p \leq .05$  \*\* $p \leq .01$  \*\*\* $p \leq .001$

Table 5.6 reveals that Complexity 1 is again associated with increased odds of greater time on death row (9%) and, as in previous models, statistically significant. Complexity 2 is once again statistically significant but associated with a decrease in the outcome (8%). Interestingly, the number of expert witnesses who testified at trial was statistically significant in this model (although not in the binary logistic model) and associated with a slight increase in the odds of increased time on death row (7%). Finally, the number of 3.850 motions was associated with increases in the outcome but not nearly

to the extent observed in the binary logistic model (48% increase in the odds of increased time on death row).

**Case Complexity Model.** Table 5.7 presents the results of the complexity variables examining time on death row as the dependent variable.

Table 5.7-Case Complexity Model (Poisson Regression)	$\beta$	S.E.	Wald X <sup>2</sup>	Exp ( $\beta$ )	df
Complexity 1	.11	.03	13.44	1.12***	1
Complexity 2	-.18	.01	182.26	.83***	1
Appellate Brief Issues	.04	.03	1.42	1.04	1
Appellate Brief Length	.04	.03	1.27	1.04	1
State Reply Brief Issues	-.09	.04	6.26	.92*	1
State Reply Brief Length	-.03	.04	.66	.97	1
(Intercept)	3.28	.13	629.14	26.61***	1

\*p $\leq$ .05 \*\*p $\leq$ .01 \*\*\*p $\leq$ .001

Table 5.7 reveals similar results with the complexity variables. Complexity 1 and Complexity 2 again achieved statistical significance and were associated with similar effects on the dependent variable (12% increase in odds and 17% decreased odds respectively). Notably, the number of state reply brief issues achieved statistical significance in this model but was associated with an 8% decrease in the odds of increased time on death row.

**Grand Model.** Table 5.8 presents the results of the Grand Model for all statistically significant variables across each of the three Poisson models.

Table 5.8-Grand Model (Poisson Regression)	$\beta$	S.E.	Wald X <sup>2</sup>	Exp ( $\beta$ )	df
Complexity 1	.09	.02	16.01	1.09***	1
Complexity 2	-.03	.01	5.55	.97*	1

Table 5.8-Grand Model (Poisson Regression) (cont.)	$\beta$	S.E.	Wald X <sup>2</sup>	Exp ( $\beta$ )	df
Direct Appeals	.16	.04	17.71	1.17***	1
Opinion Length	-.11	.02	28.39	.90***	1
State Habeas Appeals	.10	.03	10.46	1.11**	1
Federal Habeas Appeals	.10	.03	11.00	1.10**	1
Number USSC Cert.	.05	.03	2.28	1.05	1
Num. Expert Witnesses	.02	.02	1.17	1.02	1
3.850 Motions	.24	.02	106.35	1.28***	1
State Reply Brief Issues	-.04	.02	4.46	.96**	1
(Intercept)	2.10	.10	430.35	8.13***	1

\*p $\leq$ .05 \*\*p $\leq$ .01 \*\*\*p $\leq$ .001

Table 5.8 reveals that when modeled together, several variables maintain their significance and have similar effects on time on death row. Complexity 1 and Complexity 2 were again statistically significant. Complexity 1 was associated with an increase in the odds of more time on death row and Complexity 2 was associated with a decrease in the odds of time more time on death row (9% increase and a 3% decrease respectively). Other statistically significant variables associated with increases in the odds of greater time on death row in this model include the number of direct appeals (17% increase), the number of state habeas appeals (11% increase), the number of federal habeas appeals (10% increase) and the number of 3.850 motions filed (28% increase). Two other variables were statistically significant but associated with decreases in the odds of greater time on death row. Florida Supreme Court opinion length was associated with a 10% decrease in the odds of greater time on death row while the number of issues present in

the state's reply brief was associated with a 4% decrease in the odds of more time on death row.

## CHAPTER 6

### DISCUSSION

Overall, several key relationships emerged across all of the analyses that should prompt further inquiry into the relationship between case complexity and either death penalty delay or time on death row. Undue delay in litigating and imposing capital punishment in the United States creates problems in terms of the psychological impact on death row inmates<sup>41</sup>, cost to local and state governments compared to non-capital sanctions<sup>42</sup> and the sheer backlog of capital cases in state court systems which creates an unnecessary and untenable burden on the various actors in the justice system. Thus, the field of Criminology would benefit from more studies that address the problem of delay as more than merely a function of the number of state and federal level appeals afforded to capital defendants. An understanding of case complexity and other variables' impact on delay and time on death row will not result in cases that are less complex but may help criminal justice actors either streamline the process in order to reduce unnecessary delay or narrow the class of death-eligible defendants; which was the U.S. Supreme Court's goal when it decided *Gregg v. Georgia*. What follows is a discussion of the results as well as what these results could mean for policy and future research.

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<sup>41</sup> See Anderson et al., (2000); Benjamin & Lux (1975); Grassian (1983) Haney (2003) and Haney (1993).

<sup>42</sup> See Johnson & Quigley (2019) and Lundberg (2019) for recent discussions of key findings related to such costs.

An increase in the number of appeals was associated with an increased likelihood of delay and greater time on death row. State habeas appeals, federal habeas appeals and U.S. Supreme Court petitions for certiorari all occur well after the Florida Supreme Court renders its initial direct appeal ruling and likely occur beyond the point at which a defendant's time on death row exceeds the national average, thus resulting in delay (see Snell, 2014). Many of these appeals may even be filed and adjudicated after a defendant is already in the delay period. This probably explains the relatively great effects for each of these three types of appeals in both the binary logistic and Poisson models. Although not statistically significant, a dissenting opinion in the Florida Supreme Court being associated with a slight increase in the odds of greater time on death row is notable. A dissenting opinion is indicative of disagreement among one or more judges. Such disagreements may later reveal further issues that will arise in subsequent appeals which could, in turn, lengthen a defendant's time on death row.

It was hypothesized that Complexity 1 would be associated with an increased likelihood of delay, a relationship that emerged in both appellate-level models. In their research, Cauthen and Latzer (2000) noted that the number of legal issues present likely contributes to longer case processing time. Longer case processing time, in turn, leads to possible delay. The number of legal rules and authorities cited in a case (Complexity 2) resulted in a decrease in the odds of delay in the binary logistic models and a decreased likelihood in the odds of greater time on death row in the Poisson models. The higher odds associated with the number of legal issues is likely a function of these same issues being the actual subject of subsequent appeals, which when greater, would increase the amount of time required to exhaust these appeals. The number of legal rules and

authorities cited, on the other hand, may not be indicative of more issues that will arise on appeal and may simply reflect a particular judge's preference in what to reference when laying out the various issues in the direct appeal opinion. It is uncertain, however, why citing a greater number of authorities would lead to decreased odds in delay and greater time on death row. However, it is noteworthy that this result remains consistent across all the models in both analyses.

At first glance, it may be surprising that the number of direct appeals filed did not achieve statistical significance in the binary logistic model. This could simply be due to the relatively small percentage of cases in which the defendant filed multiple direct appeals (only 79 of the 380 cases). However, in the Poisson model, the number of direct appeals filed was associated with more time on death row and statistically significant. This result reinforces findings by Latzer and Cauthen (2007) noting that direct appeals in the New Jersey Supreme Court can take 2-4 years to fully litigate. This could be due to the fact that direct appeals to the Florida Supreme Court are filed early in the process and possibly adjudicated before the delay period begins. Thus, this would not increase the odds of delay but would increase the odds of greater time on death row. Further, the number of expert witnesses who testified during the trial may be indicative of subsequent issues that arise on appeal (i.e. competence, diminished brain capacity) and thus explain the increased odds of greater time on death row. This variable, however, did not achieve statistical significance in the binary model which could simply mean that such issues arise on appeal early in the appeals process prior to the delay period.

The complexity variables showed similar effects in the Case Attribute models. Complexity 1 and Complexity 2 are once again noteworthy. Even when controlling for

various case-level variables, Complexity 1 still emerged as a predictor of increased likelihood of delay whereas Complexity 2 was associated with decreased odds of delay. Similarly, in the Poisson model, Complexity 1 was associated with increased odds of greater time on death row while Complexity 2 was associated with decreased odds of more time on death row. In each case, this simply may be indicative of the fact that the legal issues present are what predicts a lengthier overall process as opposed to differences in what judges choose to cite in the direct appeal opinion.

The high increase in the odds of delay associated with the number of 3.850 motions filed may be due to the relatively high number of defendants who filed multiple 3.850 motions. As noted previously, 3.850 motions are more general in nature. This may explain why so many more defendants file multiple 3.850 motions versus 3.851 motions; which are more specific to death penalty cases. In any event, 3.850 motions, particularly the second 3.850 motion and beyond may be filed later in the death penalty process close to or during the period of delay. This may explain why this effect is so great in the binary logistic model.

Complexity 1 (in the Case Complexity models and others) has consistently been shown to impact delay (time on death row in the Poisson models) in the hypothesized direction. Whether controlling for various appellate-level variables, case-level variables or other case complexity variables, the number of legal issues raised (Complexity 1) and the number of legal rules or authorities cited (Complexity 2) achieved statistical significance in all the binary logistic and Poisson models even though their effects on the outcome were vastly different.

A hypothetical example of how Complexity 2 may not factor into an increase in the odds of delay or greater time on death row may center on one judge summarily dismissing a defendant's claim that certain aggravating factors were not present while another judge may outline previous cases (authorities) in which such aggravating factors were present. In either case, the fact that a defendant is arguing against the presence of various aggravating circumstances is what remains consistent and subject to a subsequent appeal. The number of citations are free to fluctuate based on the judge drafting the opinion. Additionally, sentencing juries (comprised of lay persons), are tasked with determining the presence of various mitigating and aggravating factors in deciding whether to impose a death sentence. Juries are not tasked with determining which legal authorities support the presence of an aggravating factor. Thus, the true complexity of a case probably lies within the presence of the legal issue itself and not necessarily whether a judge in the Florida Supreme Court cites various authorities in their opinion.

Even when modeled with the other statistically significant variables, Complexity 1 remained consistent in terms of significance and increased odds of delay and time on death row. This may be indicative of the ability of the number of legal issues present to serve as a reliable indicator of the increase in the odds of delay and time on death row, regardless of what other variables are modeled with it. Complexity 2 still achieves statistical significance in both grand models and lends further credence to the notion that the number of authorities cited still fails to be a reliable indicator of the likelihood of delay and greater time on death row. The fact that the number of U.S. Supreme Court petitions for certiorari filed and the number of 3.850 motions filed achieved statistical significance and were associated with increased odds in the presence of delay is once

again likely indicative of the fact that such appeals are filed later in the process.

Petitioning the U.S. Supreme Court is usually done at or near the end of the appeals process, perhaps during the delay period. Thus, it is not surprising that these petitions are associated with increased odds in delay. Finally, it is possible that Florida Supreme Court opinion length is associated with decreases in both the odds of delay and greater time on death row because a thorough explanation of the issues on direct appeal decreases the length of time needed to address other issues in subsequent appeals. Notably, these results contradict previous findings by Cauthen and Latzer (2008) who found that opinion length was related to a slight increase in case processing time.

Several other variables achieved statistical significance and predict greater odds of more time on death row in the grand Poisson model. Not surprisingly, all these variables are centered on the appeals process and an increase in the number of various petitions and motions filed. These variables include state-level appellate variables (the number of direct appeals, the number of state habeas appeals and the number of 3.850 motions filed) as well as the number of federal habeas appeals filed. Intuitively, filing a greater number of these appeals will be associated with greater odds of increased time on death row even if they are not necessarily associated with delay.

### **Implications for Policy and Practice**

The challenge with concluding that complex cases, at least in terms of the number of legal issues present in a case, contribute to increased odds of delay or time on death row lies in what policymakers can do with this information. Even if this study, combined with subsequent studies that address the methodological limitations of the current study lead to the same conclusions, specific policy decisions may be difficult. No matter how

one defines or measures case complexity, death penalty cases are not likely to become less complex. As Eighth Amendment jurisprudence continues to address the various issues surrounding the death penalty, this is likely to lead to even more factors that courts will have to consider in cases on appeal. Regarding Lackey Claims, Justice Breyer's concerns about state-created delay are not likely to be rectified. One could anticipate that more defendants will try to petition the U.S. Supreme Court asserting Lackey Claims as time on death row and delay continue to increase. It will be interesting to see whether Justice Thomas will continue to argue against Lackey Claims on the grounds that defendants who exhaust the full range of appeals cannot subsequently assert an Eighth Amendment claim of cruel and unusual punishment (*Knight v. Florida*, 528 U.S. 990).

A potential moral and political issue that may be difficult to reconcile is the issue of speeding up a defendant's path to death. While extended periods of death row confinement may certainly contribute to negative impacts on a defendant's psychological well-being (see Grassian, 1983) or cost more for taxpayers, cases cannot simply be made less complex. In addition, decreasing the amount of time it takes to execute a defendant by streamlining the process potentially leads to executions that are too hasty, especially in the face of numerous legal issues that may be present. It may be difficult to imagine certain political circles supporting a candidate who favored more expedient executions, particularly if it is perceived that defendants' civil rights are being diminished. However, this is essentially what occurred with the passage of the Timely Justice Act of 2013.<sup>43</sup>

This legislation, signed into law by former Florida Governor Rick Scott, has among some of its key provisions the requirement that a death warrant be signed within

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<sup>43</sup> See Florida Statute 922.052(2)(a).

30 days following clemency and that executions be carried out within 180 days of the death warrant being signed. Overall, such timelines probably do not have the effect of significantly speeding up the overall path to execution. This is because clemency review occurs very late in the death penalty process after many other appeals have been exhausted. However, the law is controversial given that any attempt to speed up a death penalty process fraught with numerous errors throughout may be viewed as unethical and ineffective at addressing the actual issues in the system. It may be akin to ignoring the more obvious issues that occur early in the process and trying to attach an unrelated solution at the end. Nonetheless, the law remains in effect even though the results of this study suggest that it may be ineffective at combating the more overarching issues of delay and increased time on death row.

Another piece of legislation worth noting is the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA).<sup>44</sup> AEDPA, among other things, places a one year limit on state prisoners attempting to file habeas corpus appeals in federal court and specifies that absent certain exceptions, state-level defendants must exhaust state-level remedies before petitioning for a federal writ of habeas corpus, a rule known as procedural default.<sup>45</sup> Given that state-level appeals typically several years to exhaust, this likely results in a significant limitation on the availability of a key federal remedy.

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<sup>44</sup> See Anti-Terrorism and Effective Death Penalty Act (Public Law 104–132, 1996).

<sup>45</sup> A couple key exceptions to this rule which would permit the defendant to file for habeas relief in federal court without exhausting state-level appeals are lack of exhaustion based on prejudice or a significant miscarriage of justice (Anti-Terrorism and Effective Death Penalty Act (Public Law 104–132, 1996).

## **Limitations/Directions for Future Research**

Given that this study is among the first of its kind, subsequent studies should address the various methodological and analytical limitations of the current study. First, future studies would benefit from data and methods that provide more predictive power than binary logistic regression or Poisson regression. One alternative method is the Chi-Square Automatic Interaction Detector (CHAID) which can also be used to test for interaction effects among the various independent variables (Kane, 1999). An understanding of how various interactions impact the dependent variable of delay would provide a richer understanding of some of the processes at work in the current study. Further, the dependent variable will continue to need refinement in future studies. The current study has proposed one operational definition of delay but it is possible that delay would be better measured by a standard period of months or years and not necessarily the national average for time on death row. Perhaps using a state's average (10.93 years in the current study) as opposed to the national average would be better given that death penalty systems can differ greatly between states.

One could also argue that this study merely addresses the reasons that cases become old and that there is little to no difference between cases that are old and cases where delay is present. However, the distinction lies in having a threshold for delay which informs us of when cases have become unacceptably old. While these two concepts are related, "old" is a standard that can be defined however one chooses while a specific definition of delay can be studied empirically and used to make informed policy decisions.

In addition, future studies should attempt to cover states beyond Florida that have relatively high death row populations yet carry out so few executions that inmates spend lengthy periods on death row. The researcher also relied on Snell's calculation of the national average for time on death row, but this calculation does not account for any periods of acceptable delay (i.e. the time between initial sentencing and a state appellate courts' ruling on direct appeal) which was considered in this study. A future study would perhaps provide a more accurate determination of delay if Snell's figures were recalculated to account for the period between sentencing and a direct appeal decision. Future researchers would be wise to account for this lag when determining a national average for time on death row.

Finally, case complexity could vary between inmates in the study as the available case law cited or even the legal issues that arise would be different for an inmate sentenced in the 1970's versus an inmate sentenced in the 2010's. Perhaps a study that subdivides the sample into various time frames based on relevant cut points where death penalty jurisprudence significantly changed (i.e. U.S. Supreme Court rulings in *Gregg*, *Ford* or *Atkins*) would provide a unique opportunity to better observe what impacts changes in the law have on delay and time on death row.

### **Conclusion: A New Standard for Capital Punishment?**

Since the U.S. Supreme Court's decision in *Gregg v. Georgia* (428 U.S. 153), the Court has struck down practices in numerous states' death penalty systems that would have diminished the rights of death row defendants<sup>46</sup>. While death row defendants can

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<sup>46</sup> See *Jurek v. Texas* (428 U.S. 262, 1976), *Woodson v. North Carolina* (428 U.S. 280, 1976), *Lockett v. Ohio* (438 U.S. 538, 1978), *Zant v. Stevens* (462 U.S. 862, 1983), *Caldwell v. Mississippi* (472 U.S. 320, 1985) for a range of cases involving the consideration of aggravating and mitigating factors.

challenge their death sentences on several grounds, the Court's protections have arguably, and ironically, contributed to delay. It is not accurate to say the Court has made capital cases more complex. However, the ability of defendants to challenge their death sentences on a progressively increasing number of grounds is a direct result of the protections the Court has afforded capital defendants over the last several decades.

Following the end of the nation's four-year de facto moratorium on the death penalty that occurred as a result of the Court's decision in *Gregg*, the Court's goal was to encourage states to draft new death penalty statutes that would eliminate the arbitrary and capricious nature with which capital punishment was being imposed. The death penalty, it was said, should be reserved only for the worst of the worst (*Furman v. Georgia*, 408 U.S. 238, 1972; *Glossip v. Gross*, 135 S. Ct. 2726, 2015; *Gregg v. Georgia*, 428 U.S. 153, 1976). Today, however, one could argue that the Court's protections have created the same issues of arbitrariness and capriciousness that such protections were meant to prevent. If this is true, what is the solution? One could posit a range of solutions from all out abolition of the death penalty to the less practical and virtually impossible solution of reducing the number of appeals afforded to capital defendants. It would also be impractical to deprive a capital defendant of his or her ability to raise issues of competence to stand trial, dispute forensic evidence presented at trial, argue that a brain disorder reduces their criminal culpability or raise any number of issues that are commonly subjects of state and federal appeals. If states and the federal government continue to keep their death penalty statutes on the books, how will the Court's goal of only sentencing and executing the worst of the worst in a non-arbitrary manner be achieved? Is this goal even attainable?

The legal standard for a criminal conviction in every jurisdiction is guilt beyond a reasonable doubt. While it can be difficult to come up with a blanket definition of this concept, it has been defined partially as,

“...the evidence is fully satisfied, all the facts are proven and guilt is established.” (FindLaw, 2019).

Defining reasonable doubt alone is also useful. Reasonable doubt has been defined as,

“A doubt especially about the guilt of a criminal defendant that arises or remains upon fair and thorough consideration of the evidence or lack thereof.” (Merriam-Webster, 2019).

Regardless of how either concept is defined, the standard for criminal conviction falls below absolute certainty yet above the well-known standard of probable cause, which is necessary for arrest. However, probable cause arrests and convictions beyond a reasonable doubt occur in many contexts and for any number of crimes, minor and serious. Capital cases though, are different given the finality and irreversibility of death. They have been treated as such for several decades. Yet to ensure that the death penalty is reserved for only the worst of the worst, the American justice system continues to apply the same legal standard for imposing it. The result has been a death penalty system in several states that sentences many people to death who will never be executed.

What may be necessary is an enhanced way for prosecutors to determine whether they will seek the death penalty in a particular case. This new method would still use the bifurcated process currently in place by which death penalty cases are adjudicated. Such a method, however, would require prosecutors to apply a rule that assesses a defendant in a way that exceeds the standard of either probable cause or guilt beyond a reasonable doubt. This proposed new method for seeking the death penalty could include the following:

1. A prosecutor's determination that enough evidence exists that is likely to lead to a trial jury finding of guilt beyond a reasonable doubt in a capital murder case;
2. A prosecutor's determination that a sentencing jury is likely to unanimously determine the following:
  - a. A state's minimum threshold for aggravating factors has been met;
  - b. Those aggravating factors outweigh any and all mitigating factors;
  - c. **The evidence of a capital defendant's guilt is so overwhelming that no fathomable reason currently exists or could foreseeably exist that would EVER undermine the trial jury's determination of guilt or the sentencing jury's imposition of the death penalty.**

Since the U.S. Supreme Court's decision in *Gregg*, sentencing juries have been required to consider aggravating and mitigating factors and guilt beyond a reasonable doubt has long been the standard for conviction in criminal trials. However, section 2(C) of the proposed new guidelines above provides a new, albeit very high threshold for prosecutors to seek the death penalty. Prosecutors would now be required to make an additional determination of whether potential guilt beyond a reasonable doubt extends to a level of culpability that approaches certainty, even if certainty cannot be achieved. An increasingly growing body of science surrounding the use of DNA evidence, while not necessary to discuss here, lends credence to the notion that a standard of near certainty is possible. DNA evidence would still need to be assessed in light of other factors. However, DNA provides a very powerful method of supporting guilt and, conversely, proving innocence.

In the end, criminal cases are complex and are probably never going to become less complex. The U.S. Supreme Court has for decades afforded capital defendants an increasing number of protections and given the severity and finality of death, rightfully so. However, American death row inmates continue to spend longer and longer periods of time on death row and a viable solution, short of all out abolition of the practice, seems at first glance difficult to achieve. However, if the death penalty is to remain on the books in

state and federal jurisdictions, years of research (a fraction of it outlined in this study), Justice Breyer's recognition of the validity of Lackey Claims and Judge Carney's analysis in *Jones* establish that death penalty delay is a problem worth addressing. The problem is getting worse, but it is also gaining recognition despite the dearth of research into its causes. If the goal is to ensure that the death penalty is truly reserved for the worst of the worst and to address the myriad issues created by death penalty delay, it is possible that the solution lies in creating higher standards for seeking the death penalty such that those who are ultimately sentenced to death and choose to exhaust their appeals truly represent the most serious cases. If a prosecutor cannot determine that a case likely achieves a threshold greater than our current conception of guilt beyond a reasonable doubt, then perhaps seeking a sentence of life without the possibility of parole is best. A method that forces prosecutors to more carefully consider cases at the beginning stages of the process may better serve to achieve the goals of the U.S. Supreme Court. In addition, such a method serves to mitigate Justice Breyer's concerns about state-created delay, significantly cut costs to states in maintaining their death penalty systems and diminish what in many states is an unworkable backlog of capital cases.

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APPENDIX A

BOX-TIDWELL PROCEDURE

<b>Variable</b>	<b>Sig.</b>
<b>Appeals Process Variables</b>	
Direct Appeals_LN	.020
Opinion Length_LN	.293
FSC Dissent_LN	.506
State Habeas Appeals_LN	.720
Federal Habeas Appeals_LN	.696
Number USSC Cert_LN	.302
<b>Case Attribute Variables</b>	
Jury Unanimity_LN	.895
Forensic Dispute_LN	.908
Num. Expert Witnesses_LN	.081
Competency Dispute_LN	.954
Brain Disorder_LN	.700
3.850 Motions_LN	.194
3.851 Motions_LN	.050
<b>Case Complexity Variables</b>	
Complexity 1_LN	.682
Complexity 2_LN	.965

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<b>Case Complexity Variables (cont.)</b>	<b>Sig.</b>
Appellate Brief Issues_LN	.806
Appellate Brief Length_LN	.846
State Reply Brief Issues_LN	.510
State Reply Brief Length_LN	.225

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APPENDIX B

CONDITION INDICES

	Minimum Condition Index Value	Maximum Condition Index Value
Appeals Proc. Variables	1.00	16.51
Case Attr. Variables	1.00	14.56
Case Comp. Variables	1.00	13.13

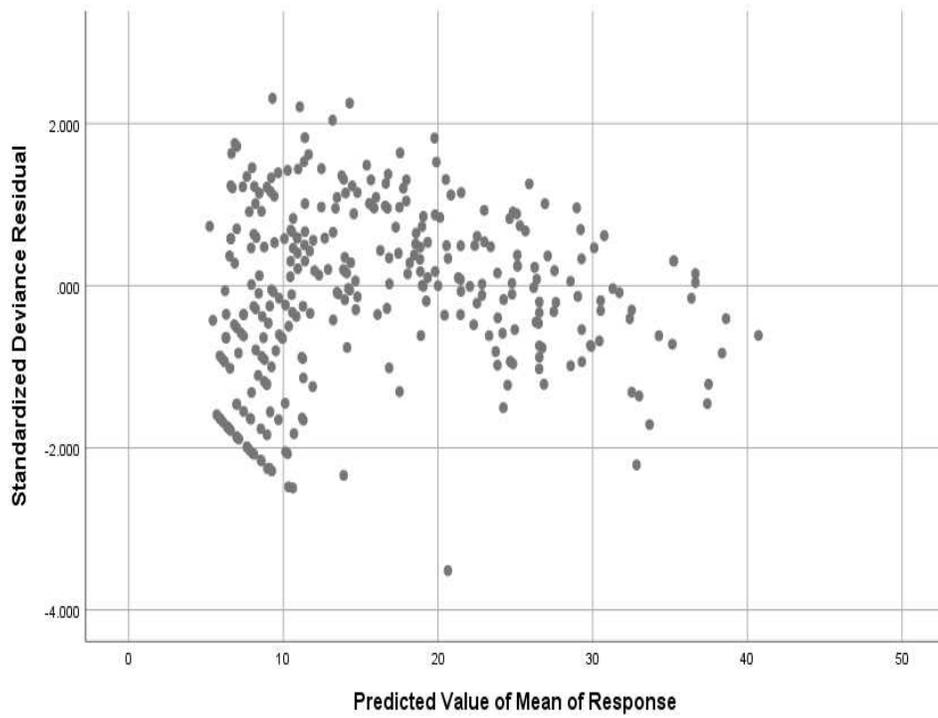
APPENDIX C

PEARSON CHI SQUARE COEFFICIENTS

	Appeals Process Variables	Case Attribute Variables	Case Complexity Variables
Value	744.57	778.18	1587.15
df	316	314	373
Value/df	2.36	2.48	4.26

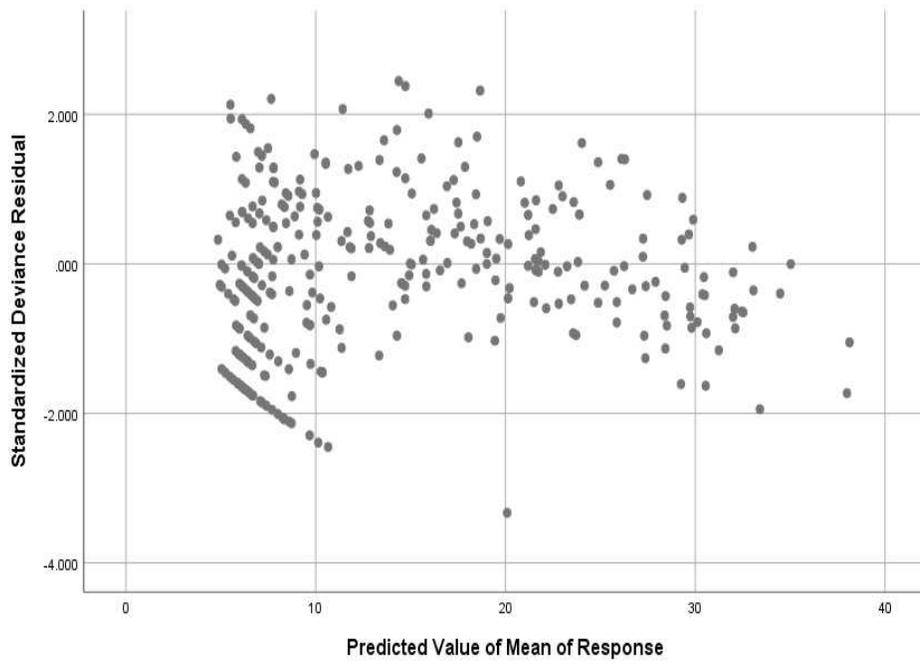
## APPENDIX D

### POISSON RESIDUALS FOR APPEALS PROCESS VARIABLES



APPENDIX E

POISSON RESIDUALS FOR CASE ATTRIBUTE VARIABLES



## APPENDIX F

### POISSON RESIDUALS FOR CASE COMPLEXITY VARIABLES

