

Murder Appeals, Delayed Executions, and the Origins of Jamaican Death Penalty Jurisprudence

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In December 1993, the Judicial Committee of the Privy Council ruled in *Pratt and Morgan v. The Attorney General for Jamaica* that excessive delay in the enforcement of death sentences—defined with some caveats as more than 5 years from the time of conviction to execution—was “inhuman” and therefore unconstitutional. The Judicial Committee also reversed earlier rulings in finding that the 5 year time frame for appeals should include those delays that resulted from legal proceedings initiated by prisoners themselves.¹ The result was to clear death row cells across most of the British Caribbean, with the capital sentences of more than

1. Judgment, *Pratt and Morgan v. The Attorney General for Jamaica and another (Jamaica)* [1993], UKPC 37. The earlier decisions that *Pratt* reversed were *Stanley Abbot v. The Attorney General of Trinidad and Tobago and Others (Trinidad and Tobago)* [1979] UKPC 15 and *Noel Riley and Others v. The Attorney General and Another (Jamaica)* [1982] UKPC 23. The Judicial Committee of the Privy Council sits in London, and was the final court of appeal for the British Empire. It retains that status for several former colonies, including Jamaica and several other Commonwealth nations in the Caribbean. In this article, the institution is referred to as “the Judicial Committee” to distinguish it from the Jamaica Privy Council (JPC), which was an advisory board to the governor of Jamaica. On the history of the Judicial Committee, see David B. Swinfin, *Imperial Appeal: the Debate*

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100 condemned prisoners commuted in Jamaica alone.² *Pratt* also ushered in a new era of Judicial Committee activism in Caribbean death penalty cases that resulted in a series of further safeguards against executions, including the abolition of mandatory death sentences.³ The cumulative effect of these judgments is that there has not been an execution in Jamaica since 1988, even though capital punishment remains legal and, amidst persistently high rates of violent crime across the region, political support for a resumption of hanging is strong.⁴

The Judicial Committee's unprecedented findings in *Pratt* were, in part, a result of new approaches to human rights in late-twentieth century British law and culture that stemmed from decisions in the European Court of Human Rights, prominent miscarriages of justice in the United Kingdom, the British government's concern to strengthen human rights protections in Hong Kong before its handover to the Chinese, and the efforts of anti-death penalty campaigners and lawyers.⁵ At the same time,

on the Appeal to the Privy Council, 1833-1986 (Manchester: Manchester University Press, 1987).

2. At the time of the judgment, there were 105 prisoners who had spent at least 5 years on death row, and their Lordships recommended that these cases be immediately referred to the Jamaica Privy Council for commutation to life imprisonment. In practice, no death sentences were commuted—apart from those of *Pratt* and *Morgan* themselves—until March 1995. Judgment, *Pratt and Morgan*, 1; and “Review of Death Row cases ends,” *Gleaner*, April 12, 1995, 2.

3. On developments in Caribbean death penalty jurisprudence since *Pratt and Morgan* see John S. Jeremie, “The Caribbean Death Penalty Saga,” *Law Quarterly Review* 128 (2012): 31–37; Dennis Morrison, “The Judicial Committee of the Privy Council and the Death Penalty in the Commonwealth Caribbean: Studies in Judicial Activism,” *Nova Law Review* 30 (2006): 403–24; Stephen Vasciannie, “The Decision of the Judicial Committee of the Privy Council in the Lambert Watson Case from Jamaica on the Mandatory Death Penalty and the Question of Fragmentation,” *New York University Journal of International Law and Politics* 41 (2009): 837–70.

4. It should be noted, however, that although *Pratt* initiated this process, it is no longer an impediment to executions in Jamaica. Under Jamaica's Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act of 2011, death sentences cannot be ruled unconstitutional because of the length of delay between sentencing and execution or the conditions in which condemned prisoners are held pending execution. Jamaica Parliament, The Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act, 2011 http://www.japarliament.gov.jm/attachments/341_The%20Charter%20of%20Fundamental%20Rights%20and%2028Constitutional%20Amendment%29%20Act,%202011.pdf (May 12, 2013).

5. Geoffrey Robertson, *The Justice Game* (London: Vintage, 1999), 92–93. See also Julian B. Knowles, “Capital Punishment in the Commonwealth Caribbean: Colonial Inheritance, Colonial Remedy?” in *Capital Punishment: Strategies for Abolition*, ed. Peter Hodgkinson, and William A. Schabas (Cambridge: Cambridge University Press, 2004), 290–91.

however, Jamaican constitutional law ensured that the decisions were also firmly rooted in the history of United Kingdom death penalty practice. When Jamaica declared independence in 1962, its new constitution prohibited “torture, inhuman or degrading punishment,” but a special savings clause in the document exempted existing forms of punishment from that requirement.⁶ With Britain moving toward abolition of capital punishment in the early 1960s and the Judicial Committee remaining Jamaica’s highest court of appeal after independence, the savings clause was designed to protect the death penalty in Jamaica from future constitutional challenges.

In *Riley v. Attorney-General of Jamaica* (1982), the Judicial Committee interpreted the savings clause to mean that “the legality of a delayed execution by hanging could never have been questioned before independence,” and as a result delayed executions remained legal in the postcolonial era.⁷ The ruling in *Pratt* reversed that decision. As Geoffrey Robertson, QC, who represented Pratt and Morgan before the Judicial Committee, explained, “[t]he mistake made by the judges in *Riley* was to infer from the acceptability of hanging a murderer in 1962 that the constitution preserved hanging for all purposes and in any circumstances.⁸ But what was in fact preserved was death by hanging *as it had been carried out in 1962*[.]” The success of Pratt and Morgan’s legal team was to show that executions under United Kingdom law “had always been carried out expeditiously” and that “delays in terms of years [were] unheard of.” As Lord Griffiths explained in his majority opinion in the case, since 1836, English criminal law had required that condemned prisoners be hanged within 4 weeks of sentencing, and evidence from the Royal Commission on Capital Punishment, 1949–53, showed that this standard was still largely adhered to in the mid-twentieth century. Griffiths also

6. In addition to the “special” constitutional savings clause, which protects from judicial challenge “specific penalties or punishments that were in existence at independence,” Jamaica’s 1962 Constitution also included a general savings clause “insulating from fundamental rights challenge those laws that were in force prior to the adoption of the constitution.” Similar savings clauses were adopted by most British Caribbean nations on independence. See Margaret A. Burnham, “Saving Constitutional Rights from Judicial Scrutiny: The Savings Clause in the Law of the Commonwealth Caribbean,” *Inter-American Law Review* 36 (2005), 250.

7. *Riley* was an appeal by five condemned men who had been held on death row in Jamaica for more than 6 years.

8. As well as in *Riley*, the Judicial Committee also “rejected the argument that post-conviction delay rendered execution unconstitutional” in *De Freitas v. Benny*, (1975), a case appealed from Trinidad and Tobago. See Knowles, “Capital Punishment in the Commonwealth Caribbean,” 292; and Robertson, *The Justice Game*, 96. See also The Lord Scarman and Philip Sapsford, QC, “The Death Penalty: Can Delay Render Execution Unlawful?” *Anglo-American Law Review* 25 (1996): 265–85.

recognized the appellants' argument that similar standards applied in Jamaica where the "custom and practice" of executions had emulated that in the United Kingdom since at least the 1868 Capital Punishment Within Prison's Act, and a strict timetable for handling appeals to the Judicial Committee of the Privy Council was adopted in 1960 that aimed to ensure "that sentence of death is carried out as speedily as possible consistent with the condemned man's right to petition for special leave."⁹

History was central to the Judicial Committee's ruling in *Pratt*, and in particular, the judgment turned on an understanding of the nature and form of capital punishment in colonial Jamaica. It is, therefore, striking that the appellants presented little evidence to the Court that spoke directly to this issue. Jamaican law did not specify precisely how death sentences should be implemented, only that they should, in accordance with the 1864 Offences against the Person Act, "be carried into execution as heretofore has been the practice." The appellants noted that their research had "not found any example of a prolonged delay," between conviction and execution in colonial Jamaica, but there was no discussion of this point, and evidence from individual cases was limited to an appendix showing that in the first 8 years after Jamaican independence, from 1962 to 1970, no execution on the island was delayed for more than 18 months after conviction, and most occurred far more quickly.¹⁰

The absence from the appellants' case of a more detailed history of the law and practice of delayed executions in Jamaica did not have significant legal ramifications; the Judicial Committee still ruled in favor of Pratt and Morgan after all. It is, however, a matter of considerable political and cultural note that the particular history of Jamaican capital punishment did not feature more prominently in the case—and especially in the published judgment—because it resulted in a ruling consistent with a narrative put forward by the respondents in *Pratt*, and widely promoted since that time by supporters of the death penalty in Jamaica, that the Judicial Committee had imposed on the Jamaican people standards for capital punishment that were rooted in foreign legal cultures and crime and punishment concerns, and that were insensitive to the particular circumstances, crime control demands, and penal culture of the Caribbean.¹¹ In this reading, British courts have performed a volte-face since independence, undermining, in an undemocratic and ironic form of neocolonialism, penal practices that were once endorsed and enforced by British officials.¹²

9. Judgment, *Pratt and Morgan*, 2.

10. Case for the Appellants, *Pratt and Morgan*, 9–34 (quotes at 11 and 18).

11. Case for the Respondents, *Pratt and Morgan*.

12. These arguments were particularly powerful in the 1990s and early 2000s because of the very high murder rates in many Caribbean nations. See, for example, "Respect Our Views," *Gleaner*, October 21, 2009, 1. On the "backlash" against human rights litigation

Through analysis of the very first death penalty appeals that were heard in Jamaica in the mid-1930s and 1940s, this article argues that the roots of modern Caribbean death penalty jurisprudence—and particularly the signal importance of delayed executions—can be found not only in the decisions of late-twentieth century British judges interpreting colonial-era laws and customs rooted in English precedent, but also the actions of mid-twentieth century judges, politicians and officials in Jamaica, including African Jamaican legislators and lawyers who pressed for the establishment of a Court of Appeal, and the Jamaican prisoners and their legal representatives who strived to overturn capital sentences in that era. Speaking specifically to *Pratt*, the early Jamaican death penalty appeals reveal that the practice of sparing convicts from the gallows because of a delay in executing them has deep local roots in Jamaica. Invariably, it was not the courts that acted on delays, but rather the governor and the Jamaica Privy Council (JPC), who together reviewed and had the power to commute all death sentences in colonial Jamaica, as well as in the Jamaican dependencies of the Cayman Islands and the Turks and Caicos Islands, which play a particularly important role in the present analysis.¹³ Rather than a straightforward act of clemency, however, it is significant that following the introduction of criminal appeals in 1935, the JPC's decisions were routinely made in dialogue with legal processes and opinions. This legal culture of death penalty decision making in late-colonial Jamaica is, therefore, consistent with the Judicial Committee's groundbreaking ruling in *Lewis v. Attorney General for Jamaica* (2000) that clemency proceedings are an integral part of the criminal justice process and should be subject to judicial review.¹⁴

In its concern with ongoing and controversial debates over the administration of the death penalty in Jamaica, the involvement of the British legal system in Jamaican constitutional affairs in the postcolonial era, and the significance of delays to the enforcement of capital sentences, this article is consistent with what Al Brophy has recently identified as a “trend toward self-conscious engagement with the present” among legal historians. Specifically, the article presents, in Brophy's terms, an example of applied legal history as “useable legal history.” It does so both in the sense that it

in the Caribbean more generally, see Laurence R. Helfer, “Overlegalizing Human Rights: International Relations Theory and the Commonwealth Caribbean Backlash Against Human Rights Regimes,” *Columbia Law Review* 102 (2002): 1832–911.

13. The Cayman Islands was a Jamaican dependency from 1863 to 1959, and the Turks and Caicos Islands was a Jamaican dependency from 1874 to 1959.

14. On *Lewis*, see Vasciannie, “The Decision of the Judicial Committee of the Privy Council,” 853–54n50.

recovers a neglected part of Jamaica's criminal justice past that has the potential to reframe contemporary death penalty debates inside and outside the legal arena, and through illuminating the central role of diverse actors "outside the traditional seats of power"—including condemned prisoners and Jamaican attorneys and politicians—in Jamaica's death penalty history.¹⁵ The research also has implications for death penalty law and debates in other contexts, notably the United States, where, on average, more than a decade elapses between sentencing and execution in death penalty cases. Whereas the Judicial Committee has found that the Jamaican constitution demands continuity between past and present in death penalty practices, Supreme Court rulings since the 1950s have interpreted the Eighth Amendment of the United States Constitution to require that executions be adapted to evolving standards of decency, thereby undermining the influence of historical precedents. This issue is taken up in detail in the article's conclusion.

The Death Penalty and the Law in Early-Twentieth Century Jamaica

Judicial and political concern with delayed executions in Jamaica developed in the 1930s and 1940s alongside the introduction of the right of appeal in criminal cases. Until 1935, defendants facing criminal charges in Jamaica's circuit courts, where the most serious offenses and all capital cases were tried, had no right to challenge any aspect of their prosecution or sentence. With no prospect that a death sentence could be overturned in the courts, the only way that condemned prisoners could escape the gallows was through the clemency power of the JPC.¹⁶ Comprising the

15. Alfred L. Brophy, "Introducing Applied Legal History," *Law and History Review* 13 (2013): 233–38.

16. Appeals could be launched from criminal proceedings in the lower, resident magistrate's courts and in civil cases and were heard by the Jamaica Supreme Court. The practice of denying the right of appeal to circuit court criminal defendants was a feature of Jamaica's common law heritage that dated to the establishment of the island's Supreme Court of Judicature in 1681. Following the restructuring of Jamaica's courts in 1879, the policy was confirmed by the Jamaica Supreme Court in *Rex v. De Leon and Quallo* (1888), an arson case appealed from the Kingston Circuit Court on the grounds of "substantial defects appearing on the face of the record of the proceedings." Although defendants could not launch appeals, the judge in a criminal case could refer a disputed legal matter for consideration by the full panel of Supreme Court judges; however, one prominent lawyer could recall only a single occasion when this had occurred in more than 20 years. Criminal defendants in Jamaica could also petition the Judicial Committee of the Privy Council in London, but this was, likewise, of little practical value as the process was prohibitively expensive until a form of legal aid was introduced in 1925. In any case, the Judicial Committee

governor and an advisory board that usually included the attorney general, colonial secretary, and a handful of other senior government officials, the JPC commuted the sentences of 98 out of 224 condemned prisoners (44%) to life imprisonment between 1867 and 1935.¹⁷ By law, and in practice, clemency in Jamaica during this period was an act of mercy, granted in most cases because of the circumstances of the crime or the identity of the defendant or victim, rather than a concern with any legally defined notion of justice.¹⁸ The JPC routinely commuted the death sentences of all women, for example, and often, although not always, spared the lives of youthful convicts.¹⁹ That is not to say that the JPC's decisions were entirely divorced from legal considerations. The opinion of the judges who

ruled repeatedly in the early twentieth century that it would not act as a routine court of criminal appeal, and would interfere with the business of local courts only to redress violations of due process that were so gross as to render the proceedings "virtually a farce," and, consequently, "a matter of general imperial concern." See John E. R. Stephens, *Supreme Court Decisions of Jamaica and Privy Council Decisions, from 1774–1823* (London: C. F. Roworth, 1924), 536–43; and "The Legislative Council Continued its Spring Session Yesterday," *Gleaner*, March 26, 1930, 6. The Judicial Committee quote is from the Bermuda murder case of *Arnold v. King-Emperor* (1914). See "Appeal Fails," *Gleaner*, January 7, 1914, 3; and Norman Bentwich, *The Practice of the Privy Council in Judicial Matters* (London: Sweet and Maxwell, 1937), 138.

17. In the early nineteenth century, Jamaica retained the death penalty for a wide range of offenses, including crimes against property, rioting, and rape. Beginning in 1840, however, the number of capital crimes was reduced, and in 1856, sweeping legislation prohibited the death penalty in Jamaica for any crime that was not a capital offense in Britain. In practice, all of the death sentences imposed in Jamaica during the period of this study were for murder. On the development of Jamaica's death penalty laws, see Jonathan Dalby, *Crime and Punishment in Jamaica, 1756–1856* (University of the West Indies, 2000), 77; and Hugh V. T. Chambers, *Essays on the Jamaican Legal System and Certain Aspects of the Substantive Law together with a Concise History of the Courts in Jamaica from 1660 to the Present Time* (Kingston: Metro Press, 1974), 104–6. Figures on death sentences, clemency, and execution here and throughout the article are based on a database created by the author from the Minutes of the Jamaica Privy Council, and supplemented and cross-checked by reports in the *Gleaner* newspaper and Jamaica's annual prison and police reports. The JPC minutes for 1867 to 1939 and from 1945 to 1951 are held under the title Jamaica, Sessional Papers, Privy Council (hereafter JSPPC), 1867–1939 at the National Archives of the UK, London (hereafter TNA), CO140. Minutes from the period 1939–1945 are filed as "Privy Council Minute Book" at the Jamaica Archives, Spanish Town (JA), 1B/5/3/42 to 1B/5/3/45.

18. For a valuable discussion and point of comparison on the role of mercy in capital punishment in the British Empire, see Stacey Hynd, "Murder and Mercy: Capital Punishment in Colonial Kenya, ca. 1909–1956," *International Journal of African Historical Studies* 45 (2012): 81–101.

19. Between 1867 and 1939, twenty-four women were sentenced to death in Jamaica, but only one was executed: Agnes Hire in 1891. See JSPPC, September 10, 1891, TNA, CO140/202.

presided over murder trials on the facts of the case could influence clemency deliberations, but the JPC did not act on account of due process irregularities in this period, except in a very small number of cases, when concerns about the prosecution evidence brought the safety of a conviction into doubt. In 1893, for example, Luke Glover was spared the gallows following widespread public criticism of his trial. In a damning editorial, Jamaica's leading daily newspaper, the *Gleaner*, condemned the prosecution as incompetent and inconsistent in its arguments, and criticized the appointment of an inexperienced defense attorney in such an important case. "Had an advocate of some standing . . . been assigned to defend Glover," the *Gleaner* speculated, "it is not too much to assume that the jury would have brought in a verdict of manslaughter and the sentence would have been imprisonment for life."²⁰ The case prompted further debate when Glover's solicitor, H. R. Walters, claimed in a petition to the JPC in support of clemency that one of the jurors in the case was mentally ill and had previously been deemed "unfit to serve on the public staff." Other cases generated fewer column inches, but similar outcomes. In 1915, Edward Rodney's death sentence was commuted "in view of the circumstantial nature of the evidence," and William Nemi was granted clemency 2 years later because the evidence at his trial suggested that he had not "expressly intend[ed]" to kill his brother.²¹

On other occasions when the JPC was cognizant of concerns about procedural irregularities in capital cases, there is little evidence that these served as the basis for clemency. When Mary Bodden was tried in 1920 for the murder of a 10-year-old girl in the Cayman Islands, for example, the jury recommended mercy partly on the grounds that Bodden had been represented in court by the same attorney, a Mr. Goring, as her co-accused, Farrell Jackson. In the course of the trial, Goring withheld testimony from the jury that might have supported Bodden's case but would have increased the likelihood of Jackson's conviction; however, in explaining its decision to grant clemency, the JPC referred only to the trial judge's opinion that Bodden had not been the principal in the case, and did not possess the strength to have committed the murder herself.²² In 1931, the case of Felix Hall was similarly decided according to doubts about

20. "The Case of Luke Glover," *Gleaner*, September 12, 1893, 4.

21. JSPPC, October 19, 1915 and October 30, 1917, TNA, CO140/246.

22. Charles H. Yorke-Slader to the Colonial Secretary, December 26, 1919, Jamaica Archives, Spanish Town (JA), 1B/5/76/3/298. *Rex v. Farrell Jackson and Mary Ann Bodden for Murder, Jamaica Dispatches*, 1920 vol 1., 318–54; JPC Minutes, January 20, 1920. It was rare that more than one person was executed for any murder. There were fifteen cases between 1867 and 1939 in which two or more defendants were convicted of murder, and among the thirty-six condemned prisoners in these cases, twenty were granted clemency.

the evidence and without reference to acknowledged violations of due process. As the *Gleaner* highlighted in an editorial entitled “Very Serious,” witnesses for the defense had been interviewed prior to the trial by the prosecution, and although this was not illegal, it was contrary to usual practice, which was considered a safeguard against witness tampering. As the trial judge in the case explained, ensuring that witnesses were not pressured or coerced by the police or prosecuting lawyers was central to the “impartial justice” that formed “part of the moral foundations of our British polity [;]” however, the *Gleaner* remained confident that in Hall’s particular case, the judge would have advised the jury to disregard any evidence that he thought was tainted, and ultimately it was right that “a technical mistake in procedure, not really illegal” had not been allowed to “obscure the patent fact” that Hall was guilty.²³ Whether these procedural irregularities influenced the JPC is unknown, but in an extensive report on the clemency decision, the *Gleaner* made no reference to the matter and instead cited the nature of the crime as the reason for mercy.²⁴

The Origins of Criminal Appeals in Jamaica

In the 1930s, the prosecution of murder trials and the review of death sentences in Jamaica were fundamentally altered by far-reaching legal reforms that reflected a growing concern with due process in capital cases among the legal profession, including African Jamaican lawyers, the colonial government in Kingston, and British officials in London. Innovations included the introduction of legal aid and the right to an attorney for murder defendants, new legislation defining infanticide as a noncapital crime, and the founding of a court of appeal with jurisdiction over criminal trials. In England, a criminal court of appeal had been established in 1907, but initial calls in the 1910s for a comparable institution in Jamaica were met with ambivalence from government officials, and even though the JPC lent its support to appellate reform in 1920, no practical steps were taken to act on this government commitment for another decade. By the early 1930s, however, there was widespread backing for reform among the political and legal elite, including Governor Reginald Stubbs, Attorney-General M. V. Camacho, approximately half of the elected members of the Legislative Council, and the Jamaica Law Society.²⁵ Both Stubbs and

23. “Very Serious,” *Gleaner*, January 21, 1931, 12.

24. “Felix Hall Will Not Suffer the Death Penalty,” *Gleaner* February 14, 1931, 6.

25. Attorney General to Colonial Secretary, November 5, 1931, TNA, CO323/1240/43; Representation of the West Indies Young Men’s Political and Democratic Club (1931), JA, IB/5/77/140.

Camacho acknowledged that their positions on criminal appeals had evolved over the years, with Stubbs writing that he was particularly swayed by the advocacy of the African Jamaican legislator and attorney J.A.G. Smith. Camacho, meanwhile, spoke of how his views had been shaped by his personal experiences dealing with miscarriages of justice and the cases of condemned murderers who claimed to be innocent but lacked any remedy in the courts. It is likely that both men, and the colonial elite more generally, were also influenced by shifting government policy in London, where the Secretary of State for the Colonies, Lord Passmore, called in 1930 for the introduction of criminal appeals heard by independent courts throughout the British Empire.²⁶

Popular attitudes toward criminal appeals in 1930s Jamaica are harder to gauge. Many elected members of the Legislative Council argued against reform, largely on grounds of cost and for fear that criminals might evade justice on legal technicalities. They claimed that as many as 90% of Jamaicans backed their position, but at a time when the island's electorate included less than 2% of the population, legislators were hardly representative of majority opinion and were often principally concerned with protecting the financial interests of the relatively wealthy taxpayers who had voted them into office.²⁷ It is notable, also, that Smith, the most prominent supporter of criminal appeals, was one of Jamaica's few black legislators, and as representative of the more than 90% of Jamaicans who were of African descent as any elected politician before the Second World War. Described in one debate on the Court of Appeal bill as "leading counsel for the defendants—who were the people," Smith tapped into longstanding popular distrust of the Jamaican judicial system and was also motivated by his own experiences representing impoverished black murder defendants at trial.²⁸ As far back as 1916, he had petitioned the then-governor for a

26. "Bill to Establish Appeal Court Passes the Committee Stage of Council," *Gleaner* May 6, 1932, 7; Memorandum of M.V. Camacho, May 11, 1933, Courts of Criminal Appeal, Formation in the Colonies, Jamaica, TNA, CO323/1240/43.

27. From 1884, Jamaica's Legislative Council was a hybrid institution in which some seats were elected, but government members were appointed. The elected members did have the power to veto government bills, although the governor could overrule this in certain circumstances. See James Carnegie, *Some Aspects of Jamaica's Politics, 1918–1939* (Kingston: Institute of Jamaica, 1973), 15.

28. The injustices regularly faced by African Jamaicans in local courts have been cited as a major cause of the 1865 uprising at Morant Bay, and distrust of the criminal justice system persisted into the twentieth century. See Rande W. Kostal, *A Jurisprudence of Power: Victorian Empire and the Rule of Law* (New York: Oxford University Press, 2005), 96; Patrick Bryan, *The Jamaican People, 1880–1902: Race, Class, and Social Control* (University of West Indies Press, 2000), 22–30; and Martin Thomas, "The Political Economy of Colonial Violence in Interwar Jamaica," paper presented at "Terror and the

pardon for his client, the convicted murderer Edward Rodney, whose death sentence had been commuted, but who still faced a lifetime in prison without the right to appeal his conviction. When Smith and other advocates of criminal appeals made their case in the legislative chamber, cries of “Hear, hear!” rang from the public gallery, which also suggests there was some support for their position beyond the political class.²⁹

The primary argument of the various supporters of appellate reform was that the right of appeal was essential in criminal cases to protect law-abiding Jamaicans from wrongful conviction. They also made the case that it would reaffirm the “majesty” of British justice, serve as a symbolic statement that Jamaica was “progressing along proper lines,” and address long-standing structural problems in the organization of the colony’s Supreme Court.³⁰ As it as then constituted, the Jamaica Supreme Court comprised three judges, one of whom was the chief justice. Collectively, these men heard appeals from resident magistrates’ courts and circuit court civil cases, and as individuals they also presided over both civil and criminal circuit court trials of first instance.³¹ In the opinion of Sir William Morrison, an elected Jamaican legislator and ardent supporter of criminal appeals, the judges’ dual roles fundamentally compromised the appellate process, inhibiting the development of the “completely different” mind-set—detached from individual cases and alive to legal precedent—that appeal hearings demanded. In the worst cases, a judge might be involved in hearing an appeal against his own judgment from a lower court. Even if justices usually excused themselves from cases in which they had such a direct interest, in practice this only created a further problem, as the space left on the appeal court bench was usually filled by the judge of the Kingston Court, an arrangement that had little to commend

Making of Modern Europe’ conference, Stanford University, April 2008, 6 <http://francestanford.stanford.edu/sites/francestanford.stanford.edu/files/Thomas.pdf> (December 18, 2012).

29. “Council Proceeds to Deal With Colony’s Judicial Estimates,” *Gleaner*, May 16, 1934, 6.

30. Criminal appeals were debated frequently by the Legislative Council in the early 1930s and similar arguments repeatedly advanced. See, for example, “Hon. J.A.G. Smith Advocates Formation of Court of Criminal Appeal,” *Gleaner*, November 27, 1929, 10 and “Hon. Legislative Council Resumes Business of this Island,” *Gleaner*, November 20, 1931, 6.

31. The court structure in Jamaica was distinct from all other British Caribbean colonies where, beginning in 1919, the West Indian Court of Appeal served as the highest local appellate court. The West Indian Court was composed of the chief justices of its various constituent colonies, and unlike the Jamaica Supreme Court, was consequently independent of the trial court judges in any one colony. See Memorandum of M.V. Camacho, May 11, 1933, TNA, CO323/1240/43.

it beyond the logistical convenience of the judge's proximity to the Supreme Court building in the city.

Established in 1909 to deal with civil cases in Kingston and the surrounding parish of St. Andrew that formerly were the preserve of resident magistrates, the Kingston Court was a unique institution. It did not handle any criminal proceedings, and the judge was not required to have legal training. This was a not inconsiderable hindrance to effective service as an appeals judge on the highest court in the land, as Chief Justice Sir F. Barrett Lennard pointed out in the late 1920s when describing the Kingston judge's opinion on questions of law as invariably "valueless." By the 1930s, the Kingston Court was also mired in delays as a result of its overcrowded docket, and this situation was compounded when the judge was called away to fill a gap on the Supreme Court.³²

The introduction of criminal appeals provided an opportunity to reform this system; supporters argued that changes to the structure of the Supreme Court were essential to legitimize the appeals process. On this basis, the government, supported by Smith and a handful of other elected legislators, introduced a bill to establish an independent Court of Appeal with criminal jurisdiction to the Jamaica Legislative Council, in November 1931. The legislation provided for the division of the Supreme Court into two separate and independent branches: the chief justice and a newly appointed judge of the Court of Appeal would hear all appellate business, whereas the two other High Court judges would conduct circuit court trials and attend to the Supreme Court's various other functions.³³ These proposals, however, were expensive. Estimates of the total cost ranged from £1,500 to £4,500 and encompassed the salaries not only of the additional judge, but also of an appeal court registrar and at least two shorthand writers who would be needed to ensure that accurate trial transcripts were available for the appeal hearings. For opponents of the legislation, these expenses were unconscionable at a time when much of the population faced intense economic hardship. When the Court of Appeal Act was passed in 1932, therefore, it included a clause allowing the governor to postpone its implementation until a future date when Jamaica's economic outlook had improved. An estimate of the court costs was included in the government's budget proposal for 1933–34, but dropped in the wake of severe and costly hurricanes. The following year, Jamaica's newly appointed governor, Edward Denham,

32. Sir F. Barrett Lennard, Memorandum on Supreme Court of Jamaica, July 11, 1928, TNA, CO 137/787/17. On the problems of the Kingston Court, see also "Hon. J.A.G. Smith Advocates Formation of Court of Criminal Appeal," *Gleaner*, November 27, 1929, 10; and "The Legislative Council," *Gleaner*, March 26, 1930, 6.

33. Memorandum of M.V. Camacho, May 11, 1933, TNA, CO323/1240/43.

stated his opposition to the Court of Appeal, claiming that it retained little support among either the elected members of the legislature or the general public. With the chief justice advising that the Supreme Court was struggling to handle a backlog of cases under the existing system, however, and conscious that his predecessor had given assent to the bill, Denham nonetheless approved the legislation in June 1935, and the Court of Appeal sat for the first time the following November.³⁴

The inauguration of the Court of Appeal did not put an end to the controversy that surrounded the institution, and critics raised particular concerns about the new bifurcated Supreme Court structure. Opponents of criminal appeals had long highlighted three main procedural issues that they argued would compromise the administration of justice. First, they warned that a two man court of appeal would inevitably lead to split decisions, with the highly unsatisfactory result that original judgments would be called into question but left to stand. Second, with two of the four Supreme Court judges barred from hearing appeals, it would prove necessary to appoint temporary, and likely inexperienced, substitutes whenever the chief justice or the judge of the Court of Appeal was away from Jamaica, and during periods when either position was vacant. Third, with the chief justice restricted to appellate cases, the new system left only two judges to handle the extensive work of the circuit courts, which would result in delays to the routine trial of civil and criminal cases.³⁵

In practice, each of these problems quickly came to pass. When the new judge of the Court of Appeal, Justice Sherlock, took leave in 1936, Governor Denham secured authority from Secretary of State for the Colonies Ormsby Gore to appoint a trial judge to fill the temporary vacancy, thereby collapsing the distinction between the trial and appellate benches that had been so integral to the reforms.³⁶ Moreover, by 1938, substantial delays had built up on circuit court dockets. Where previously three judges had been available to sit in circuit court trials, now there were only two, and to compound the situation, there were sharp increases in the late 1930s both in the number of criminal trials and the amount of court time demanded by increasingly complex cases.³⁷ The Jamaica Law

34. Edward Denham to Colonial Secretary, October 23, 1935, TNA, CO 137/801/21, and April 13, 1938, TNA, CO137/827/12.

35. Lyall Grant, Memorandum on the Court of Appeal Law 1932, to Governor Alexander Slater, May 1, 1933, TNA, CO323/1240/43; and Donald Fitz-Ritson to Colonial Secretary, June 21, 1932, TNA, CO137/827/12, 52–53.

36. Ormsby Gore to Edward Denham, June 23, 1936, TNA, CO/137/810/4.

37. In the Home Circuit Court, which served Kingston and the surrounding parish of St. Andrew, 350% more criminal cases were heard in 1937 than in 1935. See Edward Denham to Colonial Secretary, April 13, 1938, TNA, CO137/827/12.

Society joined Denham and Attorney-General Camacho, formerly a strong supporter of the new system, in demanding that the division of the Supreme Court into trial and appellate branches be entirely abandoned and all four judges empowered to hear appeals, with any three forming a quorum. In the Law Society's assessment, this reform was a political as much as a legal necessity. Citing a "spirit of labour unrest" in Jamaica, which would lead to mass demonstrations later in the year, the Society argued in a memorial to the Colonial Office that failure to ensure "the proper and speedy administration of justice for which the British Empire has become famed," would "have a marked and seriously detrimental effect upon the situation and conditions in the Island."³⁸ By 1939, even Smith and Campbell accepted that change was necessary. They argued that a third appeal court judge was required to make the system work effectively, but with no prospect of such an expensive appointment being made, they supported legislation abolishing the separation of the Supreme Court's trial and appellate branches.³⁹ It was amidst this ongoing administrative instability that Jamaica's first murder appeals were heard, and over the following years, Supreme Court reforms would shape the handling and political fallout of cases in which capital punishment was at stake and issues of delayed executions came to the fore.

Capital Punishment, the Court of Appeal, and the Jamaica Privy Council

The Jamaica Court of Appeal heard its first murder case in June 1936, when lawyers for Frank Valentine, convicted of shooting dead his wife, claimed that the judge's summing up and directions to the jury at his trial were misleading on both the law and the facts of the case. Representing Valentine, Norman Manley argued that the trial judge had misrepresented the defense's argument that the evidence showed the killing to have been an accident and could not reasonably support the view that Valentine had deliberately set out to commit murder. Manley was Jamaica's most prominent and brilliant attorney in the 1930s, and regularly dominated the invariably younger, less experienced, and overstretched prosecution lawyers he faced in court.⁴⁰ Nonetheless, after 5 days of hearings, the two Court of Appeal justices were divided in their opinions on the

38. Memorial of the Jamaica Law Society to Colonial Secretary, January 1938, TNA, CO137/827/12, 48.

39. "Council Hear Requests for Land Settlement," *Gleaner*, July 1, 1939, 31.

40. Chief Justice Fiennes Barrett-Lennard to Colonial Secretary A.S. Jeef, September 25, 1930, JA, 1B/5/79/196-1930.

Valentine case. Justice H. I. C. Brown agreed with Manley that the trial judge had expressed strong views on the evidence in his summing up that tended to imply that Valentine was guilty, and he had not given a sufficient explanation to the jury that they were not bound by his interpretation, but could decide the facts of the case for themselves. Acting Chief Justice D. T. J. Sherlock, however, disagreed. He conceded that “there were parts of the summing up that might have been better expressed,” but concluded that the trial judge had adequately summarized the defense case and at least implicitly explained the primacy of the jury’s assessment of the evidence.⁴¹

With the Court of Appeal split, Valentine’s original death sentence was upheld, but when the case subsequently came before the JPC, the punishment was commuted to life imprisonment. The *Gleaner* attributed this outcome to a strong recommendation of mercy from the jury, noting that it could not recall an occasion when “a similar expression of a jury’s feeling” had not swayed the privy councillors.⁴² The trial judge, however, was stridently opposed to clemency, and with Valentine one of only four out of twenty-three men convicted of murdering women in the 1930s whose sentence was commuted, there is reason to suspect that the decision was influenced by the Court of Appeal proceedings. The JPC minutes made note of the fact that the case had been heard by the appellate judges, and the attendant publicity, indecisive outcome, and relentless focus on the failings of the trial judge during the appeal hearing likely weighed in Valentine’s favor in the eyes of the privy councillors, who might otherwise have been swayed by the trial judge’s views, as they often were in similar cases.⁴³

Section 36 of the Court of Appeal Law explicitly stated that nothing in the new appellate arrangements would “affect the prerogative of mercy,” but the Valentine case was only the first example of how the interplay between criminal appeals and the clemency process reshaped the disposition of capital cases in Jamaica.⁴⁴ Notwithstanding that Valentine’s death

41. “No Substantial Miscarriage of Justice in Valentine Case,” *Gleaner*, July 15, 1936, 6; and “Reasons Why Hon. H. I. C. Brown would Allow the Appeal in the Valentine Murder Case,” *Gleaner*, July 24, 1936, 5.

42. “The Sentence,” *Gleaner*, August 8, 1936, 12.

43. A recent study finds a similar connection between death penalty appeals and clemency in New York, where governors in the mid-twentieth century consistently commuted death sentences “that were not unanimously affirmed on appeal,” and thereby blurred “the traditional demarcation between executive clemency and judicial review.” See James R. Acker, Talia Harmon, and Craig Rivera, “Merciful Justice: Lessons from 50 Years of New York Death Penalty Commutations,” *Criminal Justice Review* 35 (2010): 189–90.

44. See “Court of Appeal Law (1935),” in *Laws of Jamaica*. Rev. ed. 6:4696, 1938.

sentence was commuted, overall the establishment of the Court of Appeal caused the JPC to limit its intervention in death penalty cases. Since 1860, the rate at which death sentences were commuted to life imprisonment in Jamaica had rarely dropped below 40% in any 5 year period, and had often been above 60%. In keeping with this pattern, during the 6 years before the Court of Appeal's first session, the JPC had commuted 50% of death sentences (seventeen out of thirty-four), but over the next 7 years from November 1935 to December 1942, this figure fell to a historic low of only 13% (five out of thirty-seven).⁴⁵ The late 1930s was a tumultuous time in Jamaica, and it is possible that the decline of executive clemency was in part a response to political instability, especially the growing labor unrest that culminated in rioting in Westmoreland and Kingston in 1938, and the death of several protesters who were shot by police. None of the death sentences in this period, however, involved overtly political murders and the timing of the drop-off in clemency coincided so closely with the introduction of criminal appeals as to suggest strongly that the JPC consciously ceded some of its traditional role in death penalty decision making as it became more confident in the justice of trial outcomes.

Speaking in a 1931 debate on the Court of Appeal Act, Attorney-General Camacho had argued that without criminal appeals, the governor and Privy Council had no assurance beyond the word of the trial judge that capital cases had been prosecuted in accordance with due process. They relied largely on the judge's notes of evidence to decide whether death sentences should or should not be implemented, but could not know "if the Judge by some mistake, admitted evidence erroneously, or what was more important, did not allow in information or evidence which would have saved a man[.]"⁴⁶ By the late 1930s, there were several reasons for the JPC to have more faith in the standards of justice in Jamaican capital trials. First, convicted murderers took up the opportunity to appeal in substantial numbers. Between 1936 and 1939, appeal applications were submitted by at least seven of twenty condemned prisoners, and there were a further eight applications out of nine cases in 1940 and 1941. Second, in the early 1940s, condemned prisoners started to appeal to the Judicial Committee of the Privy Council in London, and in two cases this resulted in death sentences being quashed. Third, the overall percentage of murder prosecutions that resulted in convictions declined from more

45. This pattern persisted after the Second World War, with the Privy Council Minutes recording only seven grants of clemency in thirty-three cases decided between 1945 and 1951, a rate of 21%.

46. "Bill to Establish Appeal Court Passes the Committee Stage of Council," *Gleaner*, May 6, 1932, 7.

than 50% in the early 1930s to less than 30% by 1938, suggesting that the impact of legal reforms was not limited to individual cases at the appellate level, but also influenced earlier stages of the criminal justice process. Specifically, it appears that some of the less clear-cut murder cases that might previously have ended in commutable death sentences were not prosecuted, or resulted in not guilty verdicts or convictions on lesser charges.⁴⁷ It is particularly notable that although thirty-four women stood trial for murder between 1921 and 1938, only four were convicted and sentenced to death, the last being Mary Rowe in June 1930. Partly a result of new legislation defining infanticide as a noncapital crime, these figures marked a sharp fall in the number of women sentenced to death compared with earlier decades, and represented the criminal justice system effectively assuming responsibility for preventing the execution of women, a function that the JPC had previously served through exercise of the clemency power.⁴⁸

Despite the decline in murder conviction rates and the frequency with which murder convicts sought leave to appeal, the number of executions in Jamaica remained relatively constant during the 1930s and 1940s. This was the result of varied factors, including population growth and an increase in murder prosecutions, but more importantly, it reflected the growing reluctance of the JPC to interfere with death sentences coupled with the fact that most appeals proved unsuccessful.⁴⁹ Across the first 6 years of the Court of Appeal's operation, only two murder convictions were reduced to manslaughter, and one was quashed. The first successful appellant was Fonseca Edwards, a district constable in St. Elizabeth parish convicted in 1937 of murdering Melbourne Coke, a suspected member of a band of robbers in the town of Braes River. With Norman Manley again arguing the case, the Court of Appeal was persuaded that the trial judge erred in his summing up by not advising the jury that when Edwards fired the fatal shot he might have intended to frighten rather than kill Coke, a circumstance that could justify a manslaughter conviction. It would be another 3 years before the appellate bench overturned a second death sentence, which might suggest that the appeal judges were unusually sympathetic to Fonseca Edwards on account of his status as an officer of

47. Reports in the *Gleaner* were used to estimate the number of appeals filed. Murder conviction figures based on a 5 year moving average calculated from data in the *Blue Books for the Island of Jamaica*, 1882–1938.

48. *Blue Books for the Island of Jamaica*, 1921–1938.

49. The number of executions in mid-twentieth century Jamaica fluctuated greatly from year to year, but on average there were 3.7 executions per year between 1930 and 1939 and 4.8 per year from 1940 to 1949. The most executions in any 1 year was 8 in 1943, and only one person was hanged in 1932 and 1934, respectively.

the law. At the sentencing stage, however, they imposed a 12 year prison term, which was reasonably standard for manslaughter at the time, and indicates that they were not swayed by Manley's mitigating arguments. These included the "hysterical" fear of crime in Braes River at the time of the shooting, Edwards's passionate desire to bring the robbers to justice, and the fact that Coke had brandished a knife, as well as the suggestion that similar cases of police brutality were sufficiently unusual as to not necessitate exemplary punishment.⁵⁰

Details of successful appeals in the early 1940s further indicate that a concern with due process could trump the circumstances of the crime and identity of the defendant in the deliberations of the appeal court justices. Like that of Fonseca Edwards, Joseph Johnson's 1940 appeal saw a manslaughter conviction substituted for the death penalty, this time with a 10 year sentence. Again, the appeal turned on the judge's directions to the jury, which Johnson's counsel argued should have left open the possibility of a manslaughter conviction based on a defence of provocation. Instead, the judge explicitly advised the jury that there was no evidence to support an interpretation of the crime as manslaughter, and although the Court of Appeal doubted that this had any impact on the verdict, it accepted that it should have been left to the jury to decide, "whether anything in the evidence left them in uncertainty as to the extent of provocation."⁵¹

The following year brought an even clearer, and far more controversial, example of a convicted murderer escaping the gallows via a legal technicality. Ashbel Davies had been jointly convicted with Louise Anderson in the St. Mary Circuit Court for the murder of Anderson's infant daughter. Anderson received a life sentence because she was pregnant, but Davies was sentenced to death. On appeal, however, both convictions were overturned on the grounds that the trial judge had incorrectly denied one of the challenges made by Davies's attorneys during jury selection. What is more, the appellate justices ruled that under the Court of Appeal Law they had no power to order a new trial, and that Davies and Anderson had to be freed.⁵² The Court described this outcome as a "grave miscarriage of justice," and within 2 months the Legislative Council had amended the Court of Appeal legislation to ensure that it could not be repeated.⁵³

The 1941 amendment was part of an ongoing process of reforming Jamaica's Court of Appeal Law that had significant implications for the

50. "Court of Appeal Sets Aside Death Sentence," *Gleaner*, November 6, 1937, 1, 15.

51. "Johnson Murder Verdict Reduced to Manslaughter," *Gleaner*, May 7, 1940, 1, 6.

52. "Court Reserves Judgment in Murder Appeal," *Gleaner*, 8 April 1941, 7; and "Law Leads to Grave Miscarriage of Justice," *Gleaner*, April 12, 1941, 21.

53. "Short Session of the Legislature Yesterday," *Gleaner*, June 11, 1941, 15.

handling of capital cases during the desperate weeks that followed the imposition of death sentences as condemned prisoners struggled to save themselves from execution. Other issues that generated concern in the late 1930s were the quality of legal representation for the condemned, and the procedures by which appellate justices handled appeal applications. As was the case throughout the Court of Appeal's development, these were questions of both politics and law, and they were addressed by politicians in both Kingston and London, as well as by judges. After denying clemency to John Codrington in March 1937, the JPC recommended that the Court of Appeal Law should be revised to ensure that condemned prisoners received legal advice on whether there were grounds for appeal, and throughout any appellate hearings.⁵⁴ Within 12 months, these proposals took on a new urgency when the case of 20-year-old laborer George Brown was brought to the attention of the Colonial Office in London. In December 1937, Brown was executed for murdering Cyril Forrester following a dispute over a dice game. Forrester had lost money to Brown and when he attempted to seize it back on a roadside near the small town of Christiana, in Manchester Parish, Brown sliced him fatally with a machete.⁵⁵ The jury recommended mercy for Brown on account of his youth, and the defense counsel, F. C. Tomlinson, entered an appeal that centered on threats supposedly made toward Brown by Forrester in the hours before the killing, and that might have been interpreted by the court as provocation. Brown was, nonetheless, hanged without any further legal hearings after the Court of Appeal refused leave to appeal, a decision that was taken by a single judge in chambers without oral argument. Tomlinson criticized the merits and process of the decision and claimed that he had received no official notification that Brown was to be hanged, only learning the news through an article in the *Gleaner* on the eve of the execution. Chief Justice Robert Furness alleged that Tomlinson was trying to save face after mishandling the appeal, and nearly 15 months later, a Colonial Office investigation did conclude that the Court had acted in accordance with the law, although it added that it was "unfortunate" that with the prisoner's life at stake there had not been an opportunity for a full hearing in open court.⁵⁶

Even before the Colonial Office communicated its thoughts on the case to Jamaica Governor Arthur Richards, the island's legislature had acted to

54. Under the original legislation, the Court of Appeal could assign a solicitor and/or counsel to an appellant when it appeared "desirable in the interest of justice" and the appellant could not otherwise afford legal representation. "The Court of Appeal Law (November 6, 1935)," in *Laws of Jamaica*, Rev. ed., 6:4686, 1938.

55. "Manchester Slayer to be Hanged," *Gleaner*, December 9, 1937, 1.

56. G. Brown Execution for Murder, December 18, 1939, TNA, CO 137/837/13.

reform the murder appeal system. The 1938 Poor Prisoners' (Capital Offences) Defence Law required that applications for leave to appeal against death sentences should be heard in open court, and should afford the prosecution and defense an opportunity to argue the case.⁵⁷ In addition, the law increased legal aid for murder defendants who lacked the means to employ an attorney. Defense counsel would be paid up to £3 3/- for representing a murder suspect in a hearing before a resident magistrate and £5 5/- for appearing at a circuit court trial, rising to £10 10/- in cases that the presiding judge ruled to be "of exceptional length or difficulty." Additional fees were payable for travel connected with the case, viewing the locality of the crime when the Court considered it necessary, and other expenses "reasonably incurred."⁵⁸ Finally, in accordance with the JPC's recommendation, legal aid was extended to appeals against capital convictions for the first time. The *Gleaner* welcomed the law, arguing that together with the right of appeal, it ensured that indigent murder defendants could "secure full justice from the enlarged legal machinery,"⁵⁹ although some legal professionals were less sanguine about the impact the reforms would have on the standard of Jamaican justice. Addressing the Legislative Council in May 1939, Campbell explained that he no longer represented murder defendants, because of the paltry rewards such cases offered, and the "humiliation" involved in having fees authorized by court officials. In Campbell's assessment, the consequence was that "young" and inexperienced barristers were frequently assigned to capital cases, and that standards of justice suffered accordingly.⁶⁰

It is difficult to assess the merits of Campbell's allegations. There were certainly occasions when lawyers such as Manley, Tomlinson, and Smith made strenuous and successful efforts on behalf of their clients in murder cases, but further research is required on the overall quality of legal representation in capital prosecutions during this era. What is clear, however, is that the enforcement of the death penalty was a far more legalistic process by 1940 than it had been 5 years previously. With murder appeals frequent

57. G. Brown Execution for Murder, TNA, CO 137/837/13.

58. "Defence of Poor Charged with Capital Offence Govt's Care," *Gleaner*, April 22, 1938, 20.

59. "Twenty-Five Bills Ready for Legislative Council," *Gleaner*, February 12, 1938, 1.

60. "Thursday Afternoon's Proceedings in the Legislature," *Gleaner*, May 20, 1939, 29. Campbell's criticisms reflected in part that although the 1938 Poor Prisoners Law increased the basic fee payable to defense counsel in murder trials, unlike earlier legislation, it did not provide for a daily refresher fee and as a result, for any trial lasting more than 1 day, the total remuneration that a defense lawyer could claim declined. This was apparently an oversight, and it was corrected by an amendment in 1948. See "The Poor Prisoners' (Capital Offences) Defence (Amendment) Law, 1948," JA, 1B/31/387-1948.

and death sentences commuted less regularly than in the early 1930s, the decision as to whether a condemned prisoner would die on the gallows was increasingly a matter for the courts rather than the politicians of the JPC. This shift was further apparent in the case of those capital sentences that the JPC did commute in the years after the establishment of the Court of Appeal. Death sentences in this period were still commuted on grounds that might be described as “merciful.” Teenage murder convicts Eric Foster in 1941 and Percival Wells in 1943 were spared partly on account of their youth, several older prisoners escaped the gallows because the JPC accepted that they had killed unintentionally, and at least two prisoners in the 1940s were granted clemency on account of insanity. So, too, was a man who stabbed his wife to death in 1937 and claimed in defense that she had “scandalized” him after leaving home to live with her mother and becoming friendly with another man.⁶¹ Nonetheless, such cases were far less common than in previous years. Moreover, two new issues stand out as influencing JPC clemency decisions in this period, and rather than mercy, they turned explicitly on questions of justice that were directly related to the conduct of trial and appellate proceedings: first, delays in the enforcement of executions, which invariably were a result of the new appeals system, and second, perceived failings or errors in the operation of that system.

Death Penalty Appeals and Delayed Executions in the 1940s

In 1940, Hubert Fulford became the first murder convict to have his death sentence commuted by the JPC because of a delayed execution resulting from the criminal appeals process. Fulford was convicted in 1940 for the murder of his wife in the Turks and Caicos Islands, which had been a Jamaican dependency since 1873. The remote location forced the Jamaican authorities to compromise ordinary due process requirements. A resident magistrate was sent from Jamaica to try the case and, in the absence of any qualified lawyers, laymen were appointed to handle both the prosecution and the defense. Although there was no suggestion of deliberate malpractice, there were doubts about the impartiality of both men: the appointed prosecutor was the district magistrate who had conducted the preliminary investigation into the case and determined that Fulford should be sent for trial, and the assigned defense counsel, a Mr. Tatem, was also

61. Jamaica Privy Council Minute Book (hereafter JPCMB), July 28, 1941, JA, 1B/5/3/43; May 31, 1943 and November 1, 1943, JA, 1B/5/3/44; JSPPC, February 8, 1945, December 20, 1946, and February 13, 1947, TNA, CO 140/359.

on the government payroll in his regular job as superintendent of government roadworks at Caicos. This conflict of interests was a technical violation of statutory requirements, but more importantly, Tatem's inexperience materially affected the outcome of the trial. He called only one witness (whose testimony was dismissed as irrelevant by Dudley Evelyn, one of the barristers who argued the case on appeal) and failed to recognize that the only possible defense was insanity, which, in Evelyn's view, was a complex case to make even for legal professionals. Compounding these errors, after the death sentence was passed, Tatem did not submit a notice of appeal within the required 14 day time period. As a result, the case proceeded directly to the JPC, which denied clemency for what the governor described as a "brutal murder and clear case."⁶²

As throughout most of the British Empire, execution dates in Jamaica were ordinarily set for 2 weeks after the sentence had been confirmed by the JPC, but in Fulford's case, this time frame was unrealistic as there was no gallows readily available in the Turks and Caicos Islands. This provided an opportunity for Fulford's supporters to launch a legal challenge to the sentence that marked the beginning of several months of political wrangling over the handling of the case. On August 9, 1940, Allan Stowe Wood, a prominent Grand Turk resident who had been investigating Fulford's conviction, sent an urgent telegram to the Colonial Office reporting that Fulford had been tried without legal counsel and was awaiting execution. The Secretary of State for the Colonies, Lord Moyne, demanded an explanation from Jamaica Governor Arthur Richards, who replied that the JPC had not considered the legal irregularities in the case sufficient to warrant clemency, but Colonial Office officials nonetheless urged that the matter be reconsidered. Meanwhile in Jamaica, Fulford's legal representatives pursued redress in the Supreme Court, arguing that an appeal should be allowed even though the normal deadlines had long since passed. According to Wood's account, Fulford was unaware he even had the right to appeal until he was informed by Wood himself 2 months after he was convicted, and the failure to meet the deadline for filing an appeal was, therefore, a consequence of poor legal representation. By November 1940, the Jamaican government had advised Wood that in the circumstances it would not oppose an appeal if an application were forthcoming, but when the case was finally brought before the Supreme Court the following month, the judges did not veer from the regulations, and ruled they had no jurisdiction, because of the period of time that had passed since the death sentence was imposed. In what was likely an attempt to deflect criticism of this decision, the Court argued that even if the appeal

62. Governor Arthur Richards to Colonial Office, August 15, 1940, TNA, CO 137/846/11.

had been received on time, the issues raised concerning Fulford's state of mind at the time of the murder and the absence of a qualified defense lawyer would not have justified overturning the original verdict. Applying reasoning that appears inconsistent when read alongside the Joseph Johnson ruling earlier the same year that asserted the primacy of the jury in determining the facts of a case, the Court argued that there was no evidence that Fulford was insane, and the quality of his defense was, therefore, inconsequential.⁶³

At this point, Fulford's options in the Jamaican courts were exhausted, but his supporters made further representations to the JPC, which took the unprecedented step of considering the case for a second time in January 1941. Taking into consideration that Fulford had spent more than 6 months on death row, the JPC unanimously decided that his sentence should be commuted to life imprisonment.⁶⁴ This was not the first time that a condemned prisoner had been saved by a delay in executing the death penalty. In 1880, the JPC spared Edward Gordon after his scheduled execution for murdering an Indian fellow convict in Saint Catherine's District Prison was postponed to allow for an investigation into Gordon's mental state. Medical reports concluded that Gordon was sane, but the JPC noted "it is not the practice to execute the capital sentence after a respite," and Gordon's sentence was commuted.⁶⁵ Four years later, Letitia Macdermot was 8 months pregnant when she was sentenced to death for murdering her young son, and the JPC commuted her punishment on the grounds that the necessary delay in implementing her execution to allow for the child's birth would be intolerably "cruel."⁶⁶ The Fulford case, however, marked a new and important departure. It was both the first time that a death sentence was commuted because of a delay generated by legal appeals, and the first time that clemency was granted following intervention in a case from authorities in London.

In the wake of the Fulford case, new regulations were introduced allowing members of the Jamaica Bar to practice before the Supreme Court of

63. "Murder Conviction from Turks Island Upheld on Appeal," *Gleaner*, December 4, 1940, 17.

64. According to official correspondence, the JPC's decision to reconsider the case was taken even earlier when Fulford had spent "nearly five months" on death row. Officer Administering the Government to Lord Moyne, February 28, 1941, TNA, CO 137/846/11.

65. JSPPC, July 5, 1880, TNA, CO 140/173.

66. Report of commutation of death sentence passed on Letitia McDermott, January 21, 1884, TNA, CO 137/513/15. A capital sentence should not have been imposed on McDermott in the first place. The Offences Against the Person Law of 1864 provided for pregnant women convicted of capital crimes in Jamaica to be sentenced to penal servitude for life rather than death. See "The Offences Against the Person Law (1864)," in *Laws of Jamaica*, Rev. ed., 5:4499, 1938.

the Turks Islands, and ensuring that both the prosecution and defense in future murder trials in the dependency would be conducted by qualified counsel.⁶⁷ Three years later, however, another case originating from the Turks and Caicos Islands saw a further extension of the principle that delayed death sentences should not be enforced. On this occasion, there was no suggestion that the rights of the condemned prisoner, Daniel Youth, had been compromised. On the contrary, Youth appealed his conviction for murdering his neighbor, Poland Smith, at the Bight of Blue Hills in July 1942, not only to the Jamaica Court of Appeal, but also the Judicial Committee of the Privy Council in London. This was the first criminal case that the Judicial Committee ever heard from Jamaica, and the remote location of the original trial was significant to this groundbreaking event. As there were no facilities for executions in the Turks and Caicos Islands and the law required that condemned prisoners must be hanged locally, a gallows would have to be constructed according to legal specifications in Jamaica and transported to Grand Turk, along with an executioner. With limited shipping between the islands, the *Gleaner* estimated that this would take at least 2 months, allowing Youth's supporters more time to petition the Judicial Committee in London than condemned prisoners ordinarily had in Jamaica. The JPC initially planned to approve Youth's execution without waiting for the Judicial Committee's ruling on the case, prompting the *Gleaner* to ask, in a dramatic report, "Can England be got to intervene in time?"⁶⁸ In the event, Youth's execution was postponed pending the Judicial Committee's decision, with legal commentators in Jamaica warning that officials could face indictment for murder if Youth was hanged and his conviction subsequently quashed. Like Jamaica's own appellate judges, however, the law lords in London who comprised the Judicial Committee rejected Youth's claim that a statement made by his wife, Amelia, and entered by the prosecution during his trial, should have been ruled inadmissible under laws regulating the testimony of spouses in criminal trials.⁶⁹

By the time the Judicial Committee handed down its judgment and brought an end to the legal proceedings in the Daniel Youth case, nearly 2 and a half years had passed since the original sentence of death. After

67. Murder Trials, Legal Aid, TNA, CO 137/853/4.

68. "Gallows, Hangman To Go To Grand Turk for Hanging," *Gleaner*, July 29, 1943, 1.

69. Amelia was charged jointly with Daniel and also found guilty of the murder, although her death sentence was quickly commuted, and she did not appeal the conviction. In the opinion of both appellate courts, the trial judge had made sufficiently clear to the jury that the statement in question was relevant only to the case against Amelia herself and should not be considered as evidence either for or against Daniel. See "Seek Delay in Execution," *Gleaner*, July 31, 1943, 1; and *Daniel Youth v. The King*, Privy Council Appeal, 1944.

the first failed appeal to the Jamaica Supreme Court, the case had gone before the JPC and clemency was refused, but following the Judicial Committee ruling, the case went back to the JPC once more, and although the facts of the case remained unchanged—indeed, the trial outcome had been affirmed by the judges in England—the punishment was commuted to life imprisonment. As recorded in the Privy Council Minutes, the decision was unanimous, on account of “the considerable period for which Youth had lain under sentence of death and the various delays which had occurred through no fault of the condemned man.” Several weeks later, Youth was brought to Kingston to serve his sentence in the General Penitentiary. His wife had died some time earlier in the jail at Grand Turk.⁷⁰

The remote location of the Turks and Caicos Islands meant that the cases of Fulford and Youth were unrepresentative of most capital sentences reviewed by the JPC, but the clemency from which both men benefited was a consequence less of geography than of the widespread concern with delayed executions that was a feature of Jamaican and British penal culture. Even as the Youth case reached its final resolution, delayed executions continued to exercise prison authorities, the courts, and the Jamaican government. In March 1945, the Board of Visitors of the St. Catherine District Prison criticized the time taken by the JPC to consider clemency applications, drawing Governor John Huggins’s attention to figures from 1944 showing an average delay of nearly 6 weeks between sentencing and execution. Huggins responded by setting out plans in March 1945 for the JPC to circulate papers on death penalty cases and reach decisions more promptly, although over the following years, postconviction delays nonetheless continued to mount, and between 1945 and 1951, prisoners spent an average of more than 11 weeks on death row before the JPC ruled on clemency.⁷¹ The Board of Visitors persistently voiced its disapproval of this situation, and delays in the administration of appeals and executions continued to result in clemency even as the overall level of commuted death sentences remained low. The most remarkable example of how sensitive the Jamaican government was to the charge that executions were unreasonably delayed was the 1946 case of Percival Bennett who was convicted in Portland Parish for the murder of a woman named

70. JPCMB, December 11, 1944, JA, 1B/5/3/45; “Life Sentence Instead Of Gallows for Turks Islander,” *Gleaner*, December 20, 1944, 1.

71. For death sentences handed down in the 1930s before the Valentine case in 1936, the average time from sentencing to the decision of the JPC was 27 days. Through the rest of the decade, the average delay was 50 days, and between July 1945 and May 1951 it was 81 days. Figures calculated from JSPPC, 1930 to 1939 and July 1945 to May 1951. Details of the Board of Visitors’ complaint are from JSPPC, March 2, 1945, TNA, CO 140/359.

Rebecca Anderson. When Bennett's case first came before the JPC on January 29, 1946, a decision on clemency was postponed, and an urgent report was commissioned on Bennett's mental health. Four days later, with the report in hand, the JPC upheld the death sentence, and Bennett's execution was set for February 19, but a prison warders' strike prevented the hanging from being performed on that day, and with the Director of Prisons unable to predict when the warders would return to duty, the JPC concluded that there was no option but to commute the punishment to life imprisonment.⁷²

Throughout this period, political debate on delayed executions in both Jamaica and Britain was mostly conducted in reference to humanitarian concerns. In 1945, after Harold White had waited more than a year to hear the outcome of his appeal to the Judicial Committee, the director of prisons sought urgent news, noting that the delay preyed on White's mental and physical condition and left him "exceedingly distressed."⁷³ Similarly, when the JPC decided later the same year that Nathaniel Lightbourne's execution in the Turks and Caicos Islands should proceed despite the fact it would take several weeks to construct a gallows in Jamaica and ship it, along with a hangman, to the dependency, there was considerable debate as to when would be the most humane moment to inform the prisoner of the scheduled execution date. Pressure was also brought to bear on the Jamaican authorities by Colonial Office officials, for whom delayed executions were an issue of concern throughout the Empire. In July 1944, a circular was sent to all colonial governments requesting that steps be taken to expedite appeals to the Judicial Committee so as to avoid long delays between sentencing and execution in cases in which the appeal was rejected. In particular, there was a concern to ensure that the Judicial Committee was informed promptly that an appeal was imminent so that preparations could be made to hear the case, and prisoners were required to provide evidence to the governor that the necessary papers, instructions and, where appropriate, payment, had been sent to a solicitor in England by registered mail. Colonial governors were urged to adopt a set of rules originally drawn up by Indian officials, and with the exception of Bermuda, where the attorney general and chief justice initially argued that legislation was required to impose such regulations, all local governments in the British Caribbean

72. Case of Percival Bennett, JSPPC, January 29, and February 2 and 18, 1946, TNA, CO 140/359. See also "Death Sentence Commuted to Life Imprisonment," *Gleaner*, February 20, 1946, 1.

73. Director of Prisons, [telegram], to Colonial Secretary, May 26, 1945, JA, 1B/5/77/196-1943. White would become the first Jamaican condemned to death to appeal successfully to the Judicial Committee.

assented to the measures by 1946.⁷⁴ The following year, delayed executions became a more pressing matter of public and cross-party political concern in the United Kingdom when the fate of five prisoners in the Gold Coast, who had been scheduled for execution between four and six times each over a period of 2 years, was debated in the House of Commons. Winston Churchill decried the situation as “an affront to every decent tradition of British administration,” Labour MP Hopkin Morris, called it “a disgrace to the name of Britain,” and leader of the Liberal Party Clement Davies asserted to the House that postponed death sentences had never in history been executed, “as it is realised that that would deeply shock public sentiment[.]” Underlining the seriousness of the issue, other MPs described delayed executions as a matter of “great urgency” to the country, and “an attack on the administration of justice in a Colony.”⁷⁵

Back in Jamaica, the new rules on Judicial Committee appeals saw cases processed more rapidly by the end of the 1940s; Cyril Waugh’s murder conviction was quashed by the Judicial Committee within 10 months in 1949, for example, but the regulations were also subject to further refinements in response to prisoners launching appeals in new and unanticipated ways. In January 1951, Charles Rainford’s grave was already prepared when he sought leave to appeal to the Judicial Committee the day before his scheduled execution. He was granted a 7 day stay by Governor John Huggins, but failed to show reasons why the case should be heard, and was hanged at the end of the week. A few months later, the JPC drew up proposals to prohibit condemned prisoners from initiating appeals within 3 days of their execution date.⁷⁶

The Rainford case ended with a new restriction imposed on convicted murderers’ right of appeal, but other late appeals demonstrated how increased regulation and legalization of clemency decision making could destabilize the administration of capital punishment. When Adolphus Delpratt was convicted in November 1949 for the murder of Agatha Francis at Morant Bay, he gave oral notice of his intention to appeal at the time he was sentenced, but no formal application was submitted within the 14 day period required by law. In early February 1950, Delpratt’s

74. Secretary of State for the Colonies Oliver Stanley, Circular, July 18, 1944, TNA, CO/323/1878.

75. “Death Sentences, Gold Coast (Respites),” HC Deb March 3, 1947, 434:c41–48 <http://hansard.millbanksystems.com/commons/1947/mar/03/death-sentences-gold-coast-respites> (May 1, 2013).

76. *Cyril Waugh v. The King*, Privy Council Appeal, 1949; “His Grave Dug,” *Gleaner*, January 10, 1951, 1; “Slayer Dies on Gallows,” *Gleaner*, January 17, 1951, 7; and JSPPC, May 10, 1951, TNA, CO 140/359.

counsel, Basil Rowe, sought an extension to the deadline, but the Court of Appeal was empowered only to grant more time for appeals in noncapital cases, and had no jurisdiction when the crime was murder. When the case came up before the JPC 3 weeks later, the attorney general argued that even though the murder was “premeditated and cold blooded,” there was no alternative but to commute the death sentence, because the Chief Justice was of opinion that the judge in Delpratt’s trial had misdirected the jury, and that an appeal would have been successful if it had been filed on time. This decision had potentially far-reaching consequences, and in an attempt to limit its impact, a note was made in the JPC minutes that the case should not be considered a precedent for future occasions when a condemned prisoner might submit a late appeal. The number of executions in Jamaica would remain stable and then increase through the 1950s and 1960s, but it is apparent nonetheless that the courts and the JPC faced an ongoing struggle to enforce capital punishment in an era of death penalty appeals that had blurred the traditional dividing line between law and clemency.⁷⁷ The implications of this development would continue to play out over several more decades, and laid the foundations for the Judicial Committee death penalty rulings of the late-twentieth century.

Conclusion

The origins of modern Jamaican death penalty jurisprudence lie in the cases heard before the Court of Appeal in the late 1930s and 1940s. Analysis of these cases shows that concerns about delayed executions in Jamaica were not new in the late-twentieth century, but were the key issue in the very first Jamaica murder appeals nearly 60 years earlier. What is more, they reveal that the handling of clemency petitions, which the Judicial Committee of the Privy Council only recognized as an element of the judicial process in 2000, has been closely connected with the operation, logic, and decisions of the criminal courts since that same era. This is not to suggest that the death penalty was administered in Jamaica with greater justice or humanity as a result of the introduction of the right of appeal. Condemned prisoners who were wrongly convicted or who had committed a killing of relatively low magnitude probably had more chance of escaping the gallows before passage of the Court of Appeal Act, when the JPC commuted death sentences relatively freely, than in an era when guilty verdicts could be challenged in law, for although appeals were rarely

77. JSPPC, February 25, 1950, TNA, CO 140/359.

successful, the very fact that they could be launched at all led to a scaling back of clemency.

The ongoing debates over the extent and quality of legal aid for murder defendants, the regular failings of defense counsel to file appeals and adequately represent their clients, and the years of administrative conflict and confusion that accompanied the Court of Appeals' founding also reveal a legal system that rarely operated as its creators envisaged, and in which chance delays could play as significant a role as law or justice in determining whether individual murder convicts lived or died. From this perspective, the evidence from Jamaica death penalty cases challenges historian Martin Wiener's assessment that "an essential fairness marked the colonial Caribbean justice system" of the 1930s; however, it undoubtedly lends weight to Wiener's further conclusion that in what was an era of growing colonial upheaval, equal justice under law had become "perhaps the only principle that had a hope of preserving British authority."⁷⁸ That, at least, was the conclusion reached by many colonial officials, and even if the routine abuses suffered by lower class Jamaicans at the hands of the police and the brutal state sponsored violence of the late 1930s rendered the image hollow at the local level, it still resonated powerfully on the global stage. In the United States, for example, the *New York Sun* newspaper overlooked the unsuccessful outcome of Daniel Youth's appeal to the Judicial Committee and eulogized in 1944 that, "even amid the strains of war, the poor fisherman was able to gain the ear of his King so that nothing might prevent the ends of justice from being served."⁷⁹

Opposition to delayed executions was a matter of British imperial policy by the 1940s, but in light of ongoing conflicts between the Jamaica government and the Judicial Committee of the Privy Council over the death penalty since *Pratt and Morgan*, it is significant to recognize that the issue's prominence in death penalty debates also had earlier, local origins in Jamaica, and did not develop only through the decisions of British law lords and politicians in London or even colonial administrators and judges in Kingston. Rather, delayed executions became significant at least in part because of the agitation of Jamaican lawyers, prisoners, and politicians in support of the right of criminal appeal, and their subsequent efforts to use

78. Martin Wiener, *An Empire on Trial: Race, Murder, and Justice under British Rule, 1870–1935* (Cambridge: Cambridge University Press, 2009), 229. On the centrality of law to British rule in Jamaica, see also Diana Paton, *No Bond but the Law: Punishment, Race, and Gender in Jamaican State Formation, 1780–1870* (Durham: Duke University Press, 2004); and Rande W. Kostal, *A Jurisprudence of Power: Victorian Empire and the Rule of Law* (Oxford: Oxford University Press, 2005).

79. "New York Sun' Writes on Youth Murder Case," *Gleaner*, December 7, 1944, 10.

that right to fight capital sentences in the courts. Equally important, the principle that delayed executions should be commuted was firmly established in Jamaica long before the savings clause in the country's 1962 constitution sought to freeze capital punishment at a moment in time, and protect it from future tampering by the courts in an era of growing support for the abolition of the death penalty. With a constitution that made the past so central to the future of capital punishment in Jamaica, the Judicial Committee of the Privy Council would have been well served to consider this history of death penalty delays on the island in its decision in *Pratt and Morgan*. The judgment would have been stronger for engaging with the particular history of the death penalty in Jamaica rather than the general history of the punishment in the British legal tradition, as it would have established more clearly that delayed executions were anathema to Jamaican law and custom in 1962, and, consequently, unconstitutional thereafter. More than this, however, *Pratt* might have had greater legitimacy among the Jamaican public and politicians who regularly criticized the moratorium on executions since 1988 as representing the undemocratic influence of foreign jurisprudence and European human rights culture.

The ramifications of *Pratt*, and the issue of delayed executions more broadly, have remained contentious in Jamaica, and profoundly shaped developments in human rights and constitutional law on the island in the 1990s and the early twenty-first century. In 1997, Jamaica became the first country in the world to withdraw the right of individual petition to the United Nations Human Rights Committee (UNHRC) in consequence of the delay in the enforcement of death sentences that was caused by petitions filed by condemned prisoners. In reaching its conclusion that 5 years was the maximum time that a condemned prisoner could constitutionally be held on death row, the Judicial Committee allowed up to 18 months for appeals to international bodies, but in practice, appeals to the UNHRC often took much longer, and made it almost impossible for executions to occur within 5 years of sentencing. Opposition to *Pratt* has also been a key factor driving political and legal support for replacing the Judicial Committee with the Caribbean Court of Justice (CCJ) as the nation's highest court, although based on the CCJ's rulings in death penalty cases to date, it is far from certain that this would facilitate a resumption of executions as some proponents of the move suggest.⁸⁰ Finally, controversy

80. Natalia Schiffrin, "Jamaica Withdraws the Right of Individual Petition under the International Covenant on Civil and Political Rights," *The American Journal of International Law* 92 (1998): 563. On the CCJ and the death penalty, see Anthony Gifford, "The Death Penalty: Developments in Caribbean Jurisprudence," *International Journal of Legal Information* 37 (2009): 202.

over delayed executions was at the heart of nearly 20 years of intense political debate over a constitutional amendment to establish a Charter of Fundamental Rights and Freedoms that was first proposed by then Prime Minister Edward Seaga in the early 1990s. Ostensibly intended to protect the Jamaican people from their government, the Charter of Rights was only signed into law in 2011, following a controversial cross-party agreement that it should include provisions to ensure that neither postsentence delays of more than 5 years, nor the conditions in which condemned prisoners were held on death row, could impede the execution of capital sentences. The history recovered in this article demonstrates that this development is profoundly at odds with the practice of executions in Jamaica's past, and with both the spirit and substance of the island's constitution adopted at independence.⁸¹

Outside of the Jamaican and British context, delayed executions have also prompted debate and litigation in the United States, where the average delay between sentencing and execution has increased from 6.5 years to 16.5 years since the last execution occurred in Jamaica in 1988. In *Lackey v. Texas* (1995), and several similar subsequent cases, prisoners who have spent many years on death row have asked the United States Supreme Court to rule whether their long confinement awaiting death constitutes cruel and unusual punishment in violation of the Eighth Amendment.⁸² The Court has repeatedly denied certiorari in these cases; however, there have been divisions among the justices and, with substantial numbers of the more than 3,000 prisoners on death row in the United States in 2013 having spent decades in custody, and anti-death penalty sentiment growing in recent years, delayed executions are likely to remain contentious.⁸³

As in the cases heard by the Judicial Committee of the Privy Council, history has assumed a prominent place in United States justices' deliberations on death penalty delays. Justice Clarence Thomas has justified his position that no length of delay can render an execution unconstitutional, in part by reference to the absence of legal precedent. In a memorandum on the denial of certiorari in *Lackey*, however, Justice John Paul Stevens noted that a delay of many years, "if it ever occurred, certainly would have been rare in 1789, and thus the practice of the Framers would not justify a denial

81. Jamaica Parliament, The Charter of Fundamental Rights.

82. For a recent analysis of the issues in *Lackey*, see Erin Simmons, "Challenging an Execution after Prolonged Confinement on Death Row [*Lackey* Revisited]," *Case Western Reserve Law Review* 59 (2009): 1249–70.

83. Deborah Fins, *Death Row U.S.A. Summer 2013*, NAACP Legal Defense and Educational Fund, 2013 http://www.naacpldf.org/files/our-work/DRUSA_Summer_2013.pdf (February 20, 2014).

of petitioner's claim." This argument is consistent with evidence from historical case studies that show that executions in the United States invariably occurred within days or weeks of sentencing throughout the eighteenth and nineteenth centuries, as they did in British jurisdictions, and that it was only in the mid-twentieth century that condemned prisoners routinely began to spend years rather than months on death row.⁸⁴ Notwithstanding, if so-called "Lackey claims" are to have success in the future, it is unlikely that it will be on the basis of arguments rooted in past execution practices. Since *Trop v Dulles* (1958), Supreme Court judgments in Eighth Amendment cases have mostly been based on assessments of what Chief Justice Warren described as "evolving standards of decency that mark the progress of a maturing society." With regard to the role of history in death penalty jurisprudence, this has the opposite effect of Jamaica's savings clause in that it privileges the present over the past. As such, although the evolving standards of decency test has been responsible for significant changes in capital sentencing procedures and the manner in which condemned prisoners are put to death in recent decades, it has little bearing on the issue of delayed executions, and consequently leaves condemned prisoners in the United States with a less usable past and one less tool to challenge their extended incarceration on death row than their Jamaican counterparts.⁸⁵

84. Memorandum of Justice Stevens respecting the denial of certiorari, *Clarence Allen Lackey v. Texas*, March 27, 1995 <http://www.law.cornell.edu/supct/html/94-8262.ZA.html> (February 20, 2014). See Kathleen M. Flynn, "The 'Agony of Suspense': How Protracted Death Row Confinement Gives Rise to an Eighth Amendment Claim of Cruel and Unusual Punishment," *Washington and Lee Law Review* 54 (1997): 300–302. Dwight Aarons, "Can Inordinate Delay Between a Death Sentence and Execution Constitute Cruel and Unusual Punishment?" *Seton Hall Law Review* 29 (1998–99): 178–81.

85. Recent decisions suggest that the Supreme Court may be moving away from relying on the evolving standards of decency test in Eighth Amendment cases. See John F. Stinneford, "Evolving Away from Evolving Standards of Decency," *Federal Sentencing Reporter* 23 (2010): 87–91.

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