Image Crafting: The US Supreme Court and Death Penalty Decision-Making 1972-2019

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Abstract

The category of US Supreme Court 'death penalty cases' covers a multitude of issues. After *Furman v. Georgia* (1972) established the modern death penalty debate and *Gregg v. Georgia* (1976) reaffirmed the constitutionality of the death penalty, closer analysis of subsequent cases in this broad category dispels the notion of the general 'death penalty case.' Instead, this is best viewed as three sub-categories; eligibility, methods, and procedural. This thesis focuses on the first two; death penalty eligibility, and methods of execution.

This allows a clearer insight into what the Court did in its decisions: image crafting. The Court attempted to present an image of legitimacy to the public to mitigate accusations that its decisions here stemmed from the Justices' subjective personal views. However, in reality these decisions were steered by the Justices' personal predilections and analysis of these cases contradicts claims from the Justices that their views and interpretations did not influence decision-making.

In eligibility cases the Court's fervent focus on evolving standards of decency was intended to present the image of decisions premised on societal standards and removed from the Justices' personal predilections. Instead, these predilections came through in how the Justices interpreted evolving standards data, which provided the means to their desired end. In this context the swing Justices were most influential.

In methods cases the Court's conservatives changed approach, as looking to evolving standards would not have met their desired end of upholding the death penalty and bolstering it against future constitutional attacks. Instead, they based their rulings on

precedent and used this to present an image of legitimacy where underneath the Court once again acted on the views of the Justices.

Throughout its eligibility and methods decisions, the Court worked carefully to craft a favourable public image whilst still pursuing the preferences of the Justices.

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I wanna thank me for always being a giver and trying to give more than I receive.

I wanna thank me for trying to do more right than wrong.

I wanna thank me for just being me at all times."[1]

[1] Snoop Dogg accepting his star on the Hollywood Walk of Fame, *AP Archive,* (19th November 2018), https://www.youtube.com/watch?v=S_afBIxYyyc.

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Introduction

Overview

By considering the strategy of image crafting, it is possible to gain a keener insight into the United States Supreme Court's decision-making process. Image crafting, in the context of this thesis, refers to the efforts made to influence the way that the public views the Court as an institution and its Justices. Here, the public is defined in broad terms as the American people, as well as institutions which might have closer insights into the courts such as the media and lawyers. An examination of the Court's 1972-2019 written death penalty decisions demonstrates that the Court as an institution, and the Justices as individuals, actively worked to craft an image of legitimacy in public life. However, under the surface of this, the Court's actions and decision-making were not in line with the image it was trying to present. This raises broader questions about the importance of image crafting in the Court's decisions, for example how they try to cover this up, whether it makes some Justices more influential than others, and whether this has consistently been applied across the Court's death penalty cases.

Through its death penalty decision-making the Court has sought to craft a favourable public image of itself. Despite a seeming focus on appearing objective and removing the personal predilections of the Justices from their death penalty rulings, this is just an image crafted by the Justices and instead these predilections come through in how they interpret data and where they place the focus for the basis of their decisions. In eligibility cases this image is crafted using the guise of evolving standards of decency, and later in methods cases the same is done under the guise of precedent.

Few topics that come before the Court are quite as controversial as the death penalty and genuine cases of life and death are in the balance when the Court decides on a death penalty case. For this reason, this makes an effective case study for thinking about what motivates the Justices as this issue taps into far more than legal issues. It brings to the fore emotional, moral, political, penological, and sometimes religious questions which the Justices are not immune to, and so is a strong example for where other factors may permeate the Court's decision-making.

Where this thesis provides a contribution that other studies do not, is in bridging the gap between historical and legal scholarship. Often studies of the Court or the death penalty focus on one or the other, the history or the law, whereas this thesis is a legal history of US Supreme Court decision-making on the death penalty. It considers the historical context in which the Court's decisions were made and uses this to provide further insight into its legal decision-making. Furthermore, this thesis adds a further contribution through breaking down the paradigm of a single category of 'death penalty case' instead viewing this as being split into various issues such as death penalty eligibility, methods of execution, and death penalty procedures. This helps us to gain a much greater understanding of the nuances of the Court's opinions on the death penalty which then provides a more detailed picture of what the Court is actually doing in these opinions, how it is doing it, and why it is doing it.

Context

The Court follows the same process to reach each of its decisions.[1] Firstly, the Court grants a *writ of certiorari* to a party that petitions the Court to review the decisions of lower courts and orders the lower court to send the case record for review. The Justices on the Court decide which cases they choose to hear, and four of the nine Justices must vote to accept a case. Sometimes four of the nine Justices might create bloc influence and accept a case if they think they can easily convince a fifth, and thus have the votes for their ruling. Most participate in the "cert pool" where the incoming petitions are divided amongst the Justices who in turn divide the petitions amongst their law clerks. The clerks read the petitions, write a brief on them, and recommend whether the case should be accepted. These briefs and recommendations are then discussed by the Justices at a Justices Conference. The Justices can also vote to grant stays, for example a stay of execution, here five of the nine Justices must vote to grant a stay. If the Court denies a writ of certiorari the decision of the lower Court stands. Today the Court typically accepts only around 60-70 of the over 8,000 cases it is asked to review each year.

Once the Court has granted *a petition for certiorari* the petitioner is asked to provide a brief on the issue at hand. After this has been filed, the responding party is then asked to provide a respondent's brief. Both parties are then allowed to file shorter briefs responding to the opposing party. Here the US Government can also file briefs, alongside those who do not have a direct stake in the case but have an interest in the

[1] This discussion draws on information from "Supreme Court Procedures," *United States Courts*: https://www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/supreme-1.

outcome, known as an *amicus curiae* who submit *amicus* briefs in which they provide their own arguments and recommendations on the case. Amicus briefs advise the Court about how to analyse and decide a case, and can be of particular use where the case discusses an issue where the author of the amicus brief has expertise. Anti-death penalty groups, for example, the Innocence Project or Human Rights Watch, commonly provide amicus briefs in death penalty cases.[2] Briefs in favour of the death penalty often come from the state. Sometimes briefs come through from those in support of neither party, for example expert groups whose aim is to inform the case rather that to necessarily influence it, for example the American Society of Anaesthesiologists has provided amicus briefs in support of neither party in death penalty cases.[3]

After reading the various briefs the Court next moves to oral arguments. Here both parties' lawyers are usually given 30 minutes (important or complex cases can be granted longer) to make their case before the Court, with most of the time spent answering questions from the Justices to help them clarify particulars of the case which will help them reach their decision. Counsel for the petitioner is allowed to reserve some of their 30 minutes for rebuttal after the respondent's counsel has addressed the Court.

After oral arguments the Justices must then decide on the case, and they do so at the Justices' Conference. Supreme Court protocol dictates that only Justices are allowed in the Conference room and the Justices discuss the case and have an opportunity to state their views and discuss any issues or questions they have. They go round the room in

[2] The Innocence Project submitted an amicus brief for *Glossip v. Gross* 576 U.S. 863 (2015), and Human Rights watch submitted an amicus brief for *Baze v. Rees* 553 U.S. 35 (2008).

[3] The American Society of Anaesthesiologists submitted an amicus brief in support of neither party in *Baze v. Rees* 553 U.S. 35 (2008).

> order of seniority, starting with the Chief Justice and ending with the most junior Justice, and speak uninterrupted by the other Justices. After this the Chief Justice casts a vote, and again in order of seniority the other Justices cast their votes. The most senior Justice in the majority assigns a Justice in the majority to write the Court's opinion, and the most senior dissenting Justice assigns a dissenting Justice to write the dissent. A Justice may choose to write a concurrence if they agree with the outcome of the case, but not on the rationale for it. Furthermore, a Justice may write a separate dissent for the same reason.

The Justices then begin drafting opinions and circulating them amongst the other Justices to get their input and suggestions for edits, and to help bolster their arguments. The Justice writing the opinion has to take the feedback from the Justices who sided with them into account or risk losing support for their position, or losing the majority holding. It is common for Justices to change their votes during this process as they read and discuss majority and dissenting drafts, and in some cases the majority opinion loses support and becomes the dissent. One of the most famous examples of this being in *Lee v. Weisman* 505 U.S. 577 (1992) where Justice Kennedy went from writing the majority to uphold the inclusion of clergy who offer prayers at official public school ceremonies to instead striking this down and maintaining previous precedent in limiting the role of religion in public schools. Justices on opposing sides will use drafts of a majority, concurrence, or dissent to inform and shape their opinion. This process of drafting and circulating is meticulous and often several drafts are written and circulated before being finalised. The Justices make and suggest edits to one another, for example in the drafting of *Enmund v. Florida* Justice White wrote to Justice Blackmun agreeing to edits he suggested, stating, "I shall eliminate the sentence beginning at the bottom of page 2 of my dissent… Also, I shall… make other minor changes that may

confirm the dissent more closely to your views."[4] After this point the Justices agree to the Court's opinion and sign onto it. Once the final decisions are written the Court hands down its opinions, often on the last day of the Court's term. The Justice who authored the opinion will summarise it from the bench during a session of the Court which are held regularly, after this it becomes available to the public alongside any other opinions in the case.

The Justices do not tackle their large workload alone, they hire law clerks to assist them. Law clerks' work typically includes writing bench memos on cases accepted by the Court (short memos used by Justices in preparing for oral arguments, they summarise the main facts and arguments of the case), preparing questions for oral arguments, legal research, assisting with the drafting of opinions, liaising with other Justices' chambers, and gathering insight into other Justices' views on issues, though their exact responsibilities are determined by their hiring Justice.[5] Law clerks are not permitted into the Conference, but ahead of Conference the Justices will discuss the cases with their clerks, seeking their perspectives and input in order to help inform and shape their view. Indeed, clerks often act as advisors to the Justices and help to gather information to increase the Justice's understanding of an issue or by providing personal input based on their own experiences and knowledge in order to help the Justice decide how to vote.[6] For example, Justice Blackmun's papers show one of his clerks, Michelle,

[4] Memo from Justice White to Justice Blackmun re 81-5321 *Enmund v. Florida*, 22nd June 1982, Box I:572, 91-5321 *Enmund v. Florida*, Byron R. White, Papers, Manuscript Division, Library of Congress, Washington, D.C. (Hereafter White Papers).

[5] Mark C. Miller, "Law Clerks and Their Influence at the US Supreme Court: Comments on Recent Works by Peppers and Ward," *Law & Social Inquiry*, Vol. 39, No. 3 (2014), pp. 741–57, p. 3, http://www.jstor.org/stable/24545677.

[6] C.D. Kromphardt, "US Supreme Court Law Clerks as Information Sources," *Journal of Law and Courts*, Vol. 3, No. 2 (2015), pp. 277-304, p. 278. https://www.cambridge.org/core/journals/journal-of-law-and-courts/article/abs/us-supreme-court-law-clerks-as-information-sources/8E8C879F150D6991078B2082F8FC6EB4.

conducting research into scheduled executions, looking for any raising extraordinary claims and relaying this information to Blackmun, suggesting that, "Instead of searching for the ideal vehicle for the dissent, the dissent should be tailored to any death case."[7] Law clerks contribute to the drafting process, helping the Justices with drafting and editing opinions. For example, in *Coker v. Georgia* (1977) one of Justice White's clerks suggested in a memo that the scope of White's opinion was too narrow, commenting, "I wasn't sure whether the suggested addition of the words 'of an adult woman' following 'rape'… should be accepted," as well as offering some grammatical edits.[8] Each Justice has between three and four clerks per Court term, often recent law school graduates at the top of their class.

The Justices select their own clerks, often seeking to hire "ideological compatriots" i.e. those whose judicial philosophy aligns with their own.[9] Lawrence Baum and Corey Ditslear attribute the importance of selecting an law clerks that share a Justice's views to a concern that clerks will engage in ideological sabotage and attempt to shift policy toward the views of the clerk.[10] Kromphardt attributes this to time-saving as, "justices will worry less about shirking if they believe the clerks to whom they delegate share their preferences."[11] For this reason, Justices often safeguard against this by selecting clerks who have worked for judges in lower courts who share their views.[12] Justice

[7] Memo re: Capital Cases 27th January 1994, Box 648, 93-7054 *Callins v. Collins* (not argued) Harry A. Blackmun Papers, Manuscript Division, Library of Congress, Washington, D.C. (Hereafter Blackmun Papers).
[8] White Papers - Memorandum from E.G. to Justice White 31st August 1977, Box I:387, 75-5444 *Coker v. Georgia*.
[9] C.D. Kromphardt, "US Supreme Court Law Clerks as Information Sources," p. 282.
[10] Corey Ditslear, and Lawrence Baum, "Selection of Law Clerks and Polarization in the U.S. Supreme Court," *The Journal of Politics*, Vol. 63, No. 3 (2001), pp. 869–85, p. 871, http://www.jstor.org/stable/2691717.
[11] C.D. Kromphardt, "US Supreme Court Law Clerks as Information Sources," p. 282.
[12] Corey Ditslear, and Lawrence Baum, "Selection of Law Clerks and Polarization in the U.S. Supreme Court," p. 871.

Thomas, for example, only hires clerks with an ideological vision that is the same as his, comparing hiring a clerk to "selecting mates for a foxhole."[13] Similarly, between 1993 and 1995, Justices Souter, Stevens and Ginsburg (all appointed to the Court by Democratic presidents) drew more than two-thirds of their clerks from Democratic appointees, Scalia and Rehnquist drew 95% of their clerks from Republican appointees.[14] This lack of willingness to be open to alternative views, particularly from the conservatives on the Court, was reflected in their death penalty decision-making. In particular in the refusal to consider alternative indicators of societal standards in eligibility cases, or to deviate from precedent in methods cases. Instead, they demonstrated an ideological rigidity. On the other hand, some Justices prefer a range of views, such as Justices Powell and Stevens. Justice Powell preferred differing views in order to stir "crosswinds" through his chambers.[15] The 1975-1980 term showed that Justice Stewart was more inclined to choose clerks from Democratically appointed judges than expected, and Justice Stevens more likely to select conservative clerks than would be anticipated.[16] Similarly, in the mid-1990s, Justice O'Connor deviated from the expected direction and stood out in her willingness to select clerks from Democratically appointed judges.[17] This demonstrates where some Justices are more willing to listen to alternative points of view and to work alongside these. For Justice O'Connor this is particularly significant due to her role as a swing vote, particularly in a death penalty

[13] C.D. Kromphardt, "US Supreme Court Law Clerks as Information Sources," p. 282.
[14] Corey Ditslear, and Lawrence Baum, "Selection of Law Clerks and Polarization in the U.S. Supreme Court," p. 882.
[15] C.D. Kromphardt, "US Supreme Court Law Clerks as Information Sources," p. 281.
[16] Corey Ditslear, and Lawrence Baum, "Selection of Law Clerks and Polarization in the U.S. Supreme Court," p. 882.
[17] Corey Ditslear, and Lawrence Baum, "Selection of Law Clerks and Polarization in the U.S. Supreme Court," p. 877.

context as here she was more likely to vary her approach based on the information and arguments at hand.

The impact of Justices clerks on death penalty cases is largely comparable to their influence on other cases. The Justices papers in death penalty cases highlight that clerks played a role in researching, in drafting of opinions, and in feeding back the views from other Justices. For example, Harry Blackmun's files contain memos from his clerks with research on contemporary death penalty bills in the US, demonstrating where the clerks conducted research to help inform an opinion.[18] The impact of this on the cases addressed in this thesis, and on death penalty cases more broadly, has been that the clerks have assisted the Justices in considering a vast array of research from a heavily saturated field. They have helped to inform the Justices of past and present practices, legislation, and debates all of which has fed into the Court's opinions. With such a heavy focus on societal standards, this research was paramount to ensure that Justices had a good awareness of the death penalty and its practice and could then utilise this in their opinions.

The Justices on the Court express a very clear and consistent position on the role of the Court and their role as a Justice; this position is rooted in impartiality and legitimacy. In 1971 Robert Bork argued in "Neutral Principles and Some First Amendment Problems" that, "Society consents to be ruled undemocratically within defined areas by certain enduring principles believed to be stated in, and placed beyond the reach of majorities by, the Constitution."[19] Bork went on to argue that the Court's power is legitimised only

[18] Blackmun Papers - Memo January 26th 1972 from MAL, Box 135, 69 5003 *Furman v. Georgia*.
[19] R. Bork, "Neutral Principles and Some First Amendment Problems," *Indiana Law Review*, Vol. 47, No. 1 (1971), pp. 1-35, p. 3.

when the Court, "has, and can demonstrate in reasoned opinions that it has a valid theory, derived from the Constitution."[20] Without such a theory, Bork posits, there is a risk of Justices seemingly imposing their own values overtly or doing so under the guise of an applied theory which in turn would violate, "the postulates of the Madisonian model that alone justifies its power."[21]

When asked about judicial impartiality, the Justices themselves have noted the importance of Justices not imposing their own views on an issue. In a 1986 speech at Harvard Law School commemorating the 50th anniversary of the Supreme Court Building, Justice William Brennan stated,

> "I have been persuaded that death is unconstitutional by the arguments of lawyers who, I am convinced, have made the better – and I mean the better reasoned – cases. This is not to suggest that underneath the robes, I am not, that we are all not, a human being with personal views and moral sensibilities and religious scruples. But it is to say that above all, I am a judge."[22]

In 2005 Chief Justice John Roberts stated before Congress that,

> "We don't turn a matter over to a judge because we want his view about what the best idea is, what the best solution is. It is because we want him or her to apply the law.... They are constrained when they do that. They

[20] R. Bork, "Neutral Principles and Some First Amendment Problems," p. 3.
[21] R. Bork, "Neutral Principles and Some First Amendment Problems," p. 3.
[22] Transcript of address to Harvard Law School 1986**,** Box I: 863, Speech, "Constitutional Adjudication and the Death Penalty: A View from the Court," 1986 Fiftieth anniversary of the Supreme Court Building, 1985 Judicial Conference of the United States, Bicentennial Committee Correspondence, 1975-1981, William J. Brennan Papers, Manuscript Division, Library of Congress, Washington, D.C. (Hereafter Brennan Papers).

need to be bound down by rules and precedents ... the rules, the laws that you [Congress] pass, the precedents that judges before them have shaped."[23]

In her opening statement for her confirmation hearing Justice Elena Kagan noted that what 'Equal Justice Under Law', "commands of judges is even-handedness and impartiality."[24] In Justice Neil Gorsuch's 2017 confirmation hearing opening statement he expressed a similar view that, "these days we sometimes hear judges cynically described as politicians in robes seeking to enforce their own politics rather than striving to apply the law impartially. If I thought that were true, I'd hang up the robe."[25] The Justices on the Court stress that they are neutral and that their decisions are removed from political or personal predilections. This emphasis from the Justices on the need to appear neutral, and the Court's development of tests and doctrines to facilitate this, suggests that the Justices themselves recognise the importance of this to the Court's work.

In response to President Donald Trump's attack on the partiality of Judge Jon. S. Tigar in 2018, branding him an "Obama judge", Chief Justice Roberts issued the statement, "We do not have Obama judges or Trump judges, Bush judges or Clinton judges… What we have is an extraordinary group of dedicated judges doing their level best to do equal right to those appearing before them."[26] More recently, Justice Stephen Breyer

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[23] Michael A. Bailey, and Forrest Maltzman, "Does Legal Doctrine Matter? Unpacking Law and Policy Preferences on the U.S. Supreme Court," *The American Political Science Review*, Vol. 102, No. 3 (2008), pp. 369–84, p. 369, http://www.jstor.org/stable/27644526.

[24] Elyse Siegel, "Elena Kagan Confirmation Hearing: Opening Statement (EXCERPTS)," *Huffington Post*, (28th June 2010), https://www.huffingtonpost.co.uk/entry/elena-kagan-confirmation_n_627840.

[25] "Here's Judge Gorsuch's Full Opening Statement," *NBC News*, (20th March 2017), https://www.nbcnews.com/news/us-news/here-s-judge-gorsuch-s-full-opening-statement-n735961.

[26] Editorial Board, "John Roberts said there are no Trump judges or Obama judges. Clarence Thomas didn't get the memo", *The Washington Post: The Post's View Opinion,* (28th June 2018),

criticised the approach by journalists or politicians and others of referring to the Justices by the president who nominated them, arguing that it reinforces the idea, "that Supreme Court justices are primarily political officials or 'junior league' politicians themselves rather than jurists," whereas Breyer posited that, "The justices tend to believe that differences among judges mostly reflect not politics but jurisprudential differences."[27] Indeed, the Court is steadfast in its insistence that its decisions do not stem from the personal preferences and ideologies of the Justices, rather, that its decisions, "are supported, indeed compelled, by a proper understanding of the Constitution of the United States."[28]

This perception that the Justices have of themselves and the institution, and which they make very public, does not line up with the reality. The reality is that the Justices on the Court are not completely removed from the issues they face, and when it comes to the death penalty, eligibility and methods cases reveal that the Justices do in fact act based on their own views working backwards from this point and image craft to rationalise and legitimise this. In eligibility cases the Justices assess and interpret data representing societal standards to meet whichever end they require, and in methods cases they switched approach entirely in order to base their decisions on precedent which served to uphold the death penalty. Yet the Court relied on image crafting to cover all of this up. They did so because the public perception of the Court matters to the Justices and the institution, and whilst the public image that they craft is not reflective of the reality

https://www.washingtonpost.com/opinions/john-roberts-said-there-are-no-trump-judges-or-obama-judges-clarence-thomas-didnt-get-the-memo/2019/06/28/00ec5db0-99c6-11e9-8d0a-5edd7e2025b1_story.html?noredirect=on&utm_term=.a92b5ba506bd.

[27] Joan Biskupic, "Stephen Breyer worries about Supreme Court's public standing in current political era," *CNN Politics*, (Tuesday 6th April 2021), https://edition.cnn.com/2021/04/06/politics/stephen-breyer-harvard-speech/index.html.

[28] R. Bork, "Neutral Principles and Some First Amendment Problems," p. 3.

of how they work, they cannot be seen to be acting to obtain their preferred outcomes. The neutrality that the Justices claim exists does not apply in this context, nor does the Court operate in the way that the Justices say it does.

Models of Judicial Decision-Making

With regards to what influences judicial decision-making, there exists a body of legal and historical scholarship that gives considerable weight to decision-making models as tools for explaining the actions of the Court. Three main models are evident. The Legal (precedent) Model, the Attitudinal Model, and the Strategic (Rational-Choice) Model.[29] These models do have utility, for example they provide a framework for how to think about the Court's decisions and the actions of the Justices. In the context of this thesis, they also allow for comparisons between the various models so as to assess which might be most explanatory in a particular context. Although they are also not without their limitations as viewing all of the Court's decisions through one particular model would not allow for the full understanding of the Court's decision-making that this thesis provides and would restrict an assessment of how the Court operates. In particular, contextual factors should be considered of value when examining Court decision-making, and these models often fail to do so. Considering these models, and the context of the Court's decisions helps provide a better understanding of the Court's decision-making.

[29] J. Segal, and H. Spaeth, *The Supreme Court and the Attitudinal Model,* (Cambridge: Cambridge University Press, 1993), p. 44.

The oldest and most traditional model is the Legal Model. This model typically represents how people used to view the Court before subsequent theories challenged this assumption. The Legal Model assumes that Justices rely on 'legitimate' legal authorities such as the Constitution, statutes and precedents when making their decisions.[30] The Legal Model argues that, "judges exercise little or no discretion; that they do not speak; rather, the Constitution and the laws speak through them. Accordingly, judicial decisions merely apply the law objectively, dispassionately, and impartially."[31] This model is based on the notion that as society evolves so too will its laws, and that the Court, "strives for consistency and legitimacy in its decisions."[32] Under this model Justices are expected to set aside their own ideas and preferences and instead focus on, "the intent of the framers, the use of neutral principles, and precedent."[33] The assertions above demonstrate that the Justices both believe and advocate this perception of themselves, perhaps because of how it is rooted in tradition and long-held beliefs about how the Court functions and its position in government. Indeed, this also fits best with the image that the Court seeks to craft – an institution that respects authorities where the Justices do not pursue their own agendas, rather they act as neutral arbiters. In a death penalty context, the Legal Model appears most applicable in methods cases where it has some superficial explanatory use as the Court relied heavily on precedent, including that from the Constitution, to inform its decisions in these cases. However, closer analysis shows this is not the case. For example, to view methods cases purely through the lens of the Legal Model would in fact be

[30] Richard L. Pacelle, et al, *Decision Making by the Modern Supreme Court*, (Cambridge University Press: New York, 2011) p. 2. Richard L. Pacelle, et al, *Decision Making by the Modern Supreme Court*, p. 29.
[31] J. Segal, and H. Spaeth, *The Supreme Court and the Attitudinal Model,* p. 33.
[32] Richard L. Pacelle, et al, *Decision Making by the Modern Supreme Court*, p. 9.
[33] Richard L. Pacelle, et al, *Decision Making by the Modern Supreme Court*, 29.

counterproductive as the conservatives on the Court relied on these legitimate authorities in order to justify and legitimise decisions which aligned with their personal views on the matter, rather than to remove such views from their decision-making.

The Legal Model has its flaws. Segal and Spaeth describe this view as, "mythology that the justices, their lower court colleagues, and off-the-bench apologists have so insistently and persistently verbalized."[34] Richard Pacelle describes it as "naïve" to believe that Justices will "find" the law in such authorities.[35] Similarly, scholars such as Cornell Clayton argue that, "at some level, all political behaviour must be explained with some reference to individual values, attitudes or personalities."[36] Furthermore, the Legal Model holds that the Court is to be "deferential to the elected branches of government," which could be seen to contradict the long standing and long defended notion of three equal branches of government and a system of checks and balances as this diminishes the authority of the Court to act independently of the other two branches.[37]

The Attitudinal Model argues that judges are unconstrained when it comes to decision making and that, as a result of this, decisions and votes stem from the individual ideas and preferences of each judge. The strongest proponents of this model, Segal and Spaeth, argue, "that original intent, precedent, and neutral principles are not the determinants of decisions but rather rationales to cover the exercise of naked policy preferences."[38] A lifetime tenure on the highest court in the country ensures that

[34] J. Segal, and H. Spaeth, *The Supreme Court and the Attitudinal Model,* p. 33.
[35] Richard L. Pacelle, et al, *Decision Making by the Modern Supreme Court*, p. 2.
[36] Cornell W. Clayton, and Howard Gillman, *Supreme Court Decision Making: New Institutionalist Approaches*, (Chicago: University of Chicago Press, 1999), p. 3.
[37] Richard L. Pacelle, et al, *Decision Making by the Modern Supreme Court*, p. 28.
[38] Richard L. Pacelle, et al, *Decision Making by the Modern Supreme Court*, p. 34.

Supreme Court Justices, "are free to pursue policy goals in making their decisions," and that, "the Supreme Court decides disputes in light of the facts of the case *vis-à-vis* the ideological attitudes and values of the justices. Simply put, Rehnquist votes the way he does because he is extremely conservative; Marshall voted the way he did because he is extremely liberal."[39]

The notion that the Justices on the Court might be influenced by external factors, as fitting with the Attitudinal Model, is well debated. Many, for example editorialists, private organisations, and jurists, the most notable of which being Justice Sandra Day O'Connor have expressed concern that political pressures can and do influence judicial decision-making. As such there has been research conducted to assess if judicial behaviour responds to differences in political environments and the responses of judges to the incentives and constraints they face.[40] The argument that Justices can and do impose their own views in cases has some support. Chief Justice Charles Evans Hughes even went so far as to say that, "We live under a Constitution, but the Constitution is what judges say it is."[41] Scholars such as Donald Songer and Stephanie Lindquist share this view, "A half century of empirical scholarship has now firmly established that the ideological values and the policy preferences of Supreme Court justices have a profound impact on their decisions in many cases."[42] However, a less extreme interpretation suggests that under favourable conditions, i.e. when the

[39] Richard L. Pacelle, et al, *Decision Making by the Modern Supreme Court*, p. 34. J. Segal, and H. Spaeth, *The Supreme Court and the Attitudinal Model,* p. 33.
[40] Berdejo C, Yuchtman N., "Crime, Punishment, and Politics: An Analysis of Political Cycles in Criminal Sentencing," *Review of Economics and Statistics*, Vol. 95, No. 3 (2013), pp.741-756, p. 743.
[41] Richard L. Pacelle, et al, *Decision Making by the Modern Supreme Court*, p. 2.
[42] Donald R. Songer and Stefanie A. Lindquist, "Not the Whole Story: The Impact of Justices' Values on Supreme Court Decision Making," p. 1049.

Executive and/or Congress follow the same ideological lines as a majority on the Court, it is easier for the Justices to pursue their policy goals.[43]

Similarly, when public opinion aligns with the goals of a majority of Justices it is easier for them to pursue policy goals and harder for those of the opposing view to resist. As Robert McCloskey notes, it "is hard to find a single historical instance when the Court has stood firm for very long against a really clear wave of public demand."[44] This notion that judicial decisions and policy goals are in some ways influenced or legitimized by public opinion carries weight. In 1921 Justice Benjamin Cardozo wrote that Justices are influenced by the same issues and pressures as the average American: "great tides and currents which engulf the rest of men do not turn aside in their course and pass the judges by."[45] This view has scholarly support, for example, Louis Fisher stated plainly that, "Courts are obviously buffeted by social pressures."[46]

On social issues such as the death penalty the Court has looked to evolving standards of decency when making its decisions. An early example of this is *Francis v. Resweber* (1947) in which Justice Felix Frankfurter, in light of juries refusing to hand down guilty verdicts where death sentences were likely, "felt obliged to follow, 'that consensus of society's opinion which, for the purposes of due process, is the standard enjoyed by the Constitution.'"[47] Indeed, throughout the Court's long history with the death penalty, "Changes in cultural beliefs explain the various stages of the Eighth Amendment's

[43] Richard L. Pacelle, et al, *Decision Making by the Modern Supreme Court*, p.10.
[44] Robert McCloskey, *The American Supreme Court: Fifth Edition*, (University of Chicago Press: Chicago, 2016), p. 230.
[45] Benjamin N. Cardozo, *The Nature of the Judicial Process*, (Yale University Press: New Haven, 1921), p. 168.
[46] L. Fisher, *Constitutional Dialogues: Interpretation as Political Process,* (New Jersey: Princeton University Press, 1988), p. 11.
[47] L. Fisher, *Constitutional Dialogues: Interpretation as Political Process,* p. 14.

injunction against "cruel and unusual punishments."[48] For example, in *Re Kemmler* (1890) the Court upheld the constitutionality of using the electric chair as a method of execution, a punishment which now, although never ruled so by the Court, is widely deemed as a cruel and unusual punishment. Yet, at the time this method was seen as a more humane advancement in the practice of executions, and the death penalty was commonly practiced and supported. Further examples of this, "can be seen in interpretations of the Eighth Amendment that rely on the evolving standards of decency that mark the progress of a maturing society", and where the Court looks to "contemporary human knowledge" to guide their decisions.[49] By interpreting these standards to fit a desired outcome the Attitudinal Model allows the Court to reach a desired outcome whilst examining these contemporary standards.

Lastly, the Strategic Model sits somewhat in the middle of the Attitudinal and Legal Models. It assumes that whilst Justices have the freedom and desire to purse their own ideas and policy preferences, they are also aware of the internal and external constraints that they face, for example, the response from the elected branches and the views of their colleagues.[50] As a result they are not completely free to create policy. Richard Pacelle summarises this model succinctly as depicting Justices as "rational, sophisticated actors."[51] Furthermore, Clayton argues that the restrictions the Legal Model suggests the Justices face do not always prevent them from enacting their views through the Court's decisions as, despite institutional constraints, "justices may be able to express their ideal policy preferences without concern for the choices of other

[48] L. Fisher, *Constitutional Dialogues: Interpretation as Political Process,* p. 75.
[49] L. Fisher, *Constitutional Dialogues: Interpretation as Political Process,* p. 75. L. Fisher, *Constitutional Dialogues: Interpretation as Political Process,* p. 76.
[50] Richard L. Pacelle, et al, *Decision Making by the Modern Supreme Court*, p. 40.
[51] Richard L. Pacelle, et al, *Decision Making by the Modern Supreme Court*, p. 39.

justices or reactions by Congress and the President."[52] Clayton argues that the Justices, "are not unsophisticated actors who make decisions based merely on their own ideological attitudes," but sees them as, "strategic actors who realise that their ability to achieve their goals depends on a consideration of the preferences of other actors, of the choices they expect others to make, and of the institutional context in which they act."[53] In respect of eligibility cases, the Attitudinal and Strategic Models have some explanatory use, but within this there are three variable factors which correspond with (and I argue, influence) image crafting in these eligibility cases: legitimate sources, evolving standards, and swing justices.

It is hard for scholars to definitively attribute one model or other to the Justices on the Court. This is because some may be more strategically motivated than others, and thus one model cannot cover the motivations of every Justice on the Court on every issue. Considering whether the Justices' votes are influenced by external pressures such as anti- or pro-death penalty campaigns, without suggesting one model to be more applicable, Thomas Marshall suggests that, under the Attitudinal Model, "it may be that the justices usually vote their own values, and interest group positions add relatively little to this process," whereas strategically motivated Justices, "fear specific interest groups much less than public opinion," and more generally, interest groups, "also suffer from whatever judicial deference exists among the justices."[54]

[52] Cornell W. Clayton. and Howard Gillman, *Supreme Court Decision Making: New Institutionalist Approaches*, p. 57.
[53] Cornell W. Clayton, and Howard Gillman, *Supreme Court Decision Making: New Institutionalist Approaches*, p. 216.
[54] Thomas R. Marshall, *Public Opinion and the Rehnquist Court*, (State University of New York Press, 2008), p.75.

These models are of value for the various explanations they offer for the Court's decisions and they provide a framework for us to think about how and why the Court decides cases the way it does. However, they are also problematic. They look at the Court's decisions in generalised terms, yet when looking at the decisions of the Court from a death penalty perspective it is immediately apparent that generalisations can very rarely be made here. Indeed, "the justices' opinions frequently intermingle elements of one model with another," though they, "most frequently assert that they reach their decisions through plain meaning and intent."[55] There are too many variants and factors at play and so putting all of the Court's death penalty decisions under one umbrella, or in this case attributing them to one model, fails to account for these nuances. For example, as will later be discussed in this thesis, in cases concerning methods of execution the Court's thus far unwavering reliance on precedent initially suggests that the Justices decisions are more in line with the Legal Model. On the other hand, in cases regarding eligibility and non-trigger pullers, also to be discussed at a later point, precedent does not weigh as strongly in the Court's decisions.[56] Instead, the Justices have looked to less empirical and authoritative sources such as evolving standards of decency which would suggest a closer adherence to the Strategic or Attitudinal Models.

With this in mind, Lim Youngsik's argument that the Legal and Attitudinal Models are "complimentary, rather than competing," is appropriate.[57] These models offer a useful framework for thinking about how and why Justices come to the decisions that they do,

[55] J. Segal, and H. Spaeth, *The Supreme Court and the Attitudinal Model,* p. 34.
[56] As will be expanded on later in this thesis, non-trigger pullers refer to offenders who did not themselves kill the victim but are still sentenced for their murder.
[57] Youngsik, Lim, "An Empirical Analysis of Supreme Court Justices' Decision Making," *The Journal of Legal Studies*, Vol. 29, No. 2 (2000), pp. 721–752, p. 724, www.jstor.org/stable/10.1086/468091.

but no single model offers a fully comprehensive rationale for judicial decision-making, especially in death penalty cases. Further critiques of these models have been levelled, with one lawyer stating that, "They fill journal pages, I don't know how many forests have died in service of these theories," and noting that, "there are big differences between individual justices, and I think there are big differences in the way these theories play out depending on a specific case or the specific legal issue presented," and therefore "they're useful analytical devices within limit."[58]

Image Crafting

Image crafting emerged in *Gregg v. Georgia* in 1976, in response to the 1972 *Furman* decision which many perceived undermined the legitimacy of the Court and its decisions as the ruling was fractured and it was unclear what the Court's holding was premised upon. The Court's public image suffered as a result of the unclear decision and in *Gregg* the Court sought to remedy this. The Justices employed pre-existing tests to help them image craft after *Gregg*. The notion of evolving standards and whether society deemed a punishment acceptable had a longer history and had been explored by the Court in earlier non-death penalty cases (such as in *Trop v. Dulles,* 356 U.S. 86, 1958) but for the purpose of judicial decision-making, rather than for image crafting. Justices Marshall and Brennan also touched on this in their opinions in *Furman* but this did not get the attention or support of a majority.[59] From this point image crafting underpinned the Court's death penalty decision-making, with different Justices across

[58] 'Ezra' Interview. Conducted by Catriona Bide, 9th September 2020.
[59] *Furman v. Georgia,* 408 U.S. 238, 316 (1972) Justice Marshall concurring. *Furman v. Georgia,* 408 U.S. 238, 269 (1972) Justice Brennan concurring. This is examined in more detail later in this thesis.

different Courts all shaping their death penalty opinions in such a way as to present a legitimate public image of the Court.

Understanding image crafting's centrality to the Court's decisions and the reasoning behind them, particularly in capital cases is important as it provides us with a greater understanding of the institution and how it operates. It demonstrates that how the Justices and Court might say they operate and decide cases is not necessarily how it operates in actuality. For example, where the Court stressed the need to rely on objective criteria in death penalty cases, yet did not settle on how to assess these criteria.[60] This in turn is useful for gaining a better understanding of how this branch of government operates, for understanding the Court's rulings, and for how these shape American law and culture. For capital cases in particular understanding image crafting is perhaps most useful for activists and lawyers, as it indicates where there is potential in appealing to the personal predilections of the Justices, for example Justice Kennedy who was influential in this area and for whom there were many strands that lawyers could follow to appeal to him. Furthermore, image crafting is of interest to legal scholars as it casts light on the fact that what these death penalty opinions demonstrate superficially – legitimacy, the application of evolving standards, theory, and a framework behind these decisions – does not actually exist in this context.

This is not to say that the Court's work is rife with duplicity, rather that in this death penalty context this is what the Justices were doing. An assessment of another issue, or across a different time span might yield a different picture of the Court's actions. For this reason, it is important to avoid simplistic black-and-white interpretations of the

[60] *Coker v. Georgia*, 433 U.S. 584, 592 (1977). This is examined in more detail later in this thesis.

actions of the Court and the Justices, and instead – as this thesis does – take a nuanced view of their work.

What image crafting does tell us, however, is that the notion of neutrality and impartiality in law should be taken with a pinch of salt. Justices are after all only human. It tells us that leaders can obfuscate the truth and that the perception of an institution may not always align with the reality, and that criteria which are seemingly 'objective' can be established to rationalise subjective choices. It demonstrates the perceived fragility of the Court as a democratic institution, that the Justices believe that its legitimacy is dependant on how the institution is perceived by the public. This concept of image crafting could have broader significance for other areas of public life. The notion of whether there is a disconnect between how an individual or institution claims to operate versus how it actually operates could apply to other branches of government and to other individuals, and this matters for understanding them better. It is possible that politicians, as individuals who are influenced by similar pressures and information as Supreme Court Justices, might act in the same way as their public image determines their electability. Therefore, the concept of image crafting could have wider implications, applicability, and relevance for looking at how we can better understand not just the Court, but other political institutions and actors too. In a death penalty context, the stakes were high for the Court. They were dealing with cases that had real life and death consequences and an issue that was highly charged both politically and morally. It was critical for the Court's public appearance for it to appear to be handling and deciding these cases in the right way. As image crafting was so critical and deep rooted in the Court's death penalty cases, it is very likely that there are elements of this

approach at play on other issues too and that the Justices image craft in other cases. Given how crucial image crafting is to death penalty decision-making there is certainly scope for scholars to apply the approach applied in this thesis, of analysing Court decisions and considering image crafting in relation to this, in order to assess the extent of the Court's use of image crafting in its decision-making on other issues.

The Court and whether it links to and reflects public opinion is a facet of a much larger discussion amongst scholars and lawyers about how the Court works.[61] However, image crafting, particularly in this context, has been overlooked. The Court's image crafting in a death penalty context is not so much motivated by public opinion on death penalty issues, rather by public perception of the institution. Image crafting is relevant to the broader discussion about how the Court works because it provides a reason for how and why the Court rationalises its decisions and explains how the Court perceives its position in public life. Understanding image crafting here is important for our understanding of the Court because it demonstrates how the Justices are active crafters of their own image, and it demonstrates the disconnect between how the Justices view themselves and the institution versus the reality, as how they portray the institution is not necessarily what they do.

In image crafting, the Court faces two tensions. First is the question of what the place of the law is within democratic society, how the two can fit and coexist together. This is combined with the second tension, that the Justices on the Supreme Court are nine humans and US citizens, yet they also symbolise an idea of justice. Philosophically they

[61] See works such as Lee Epstein, & Andrew D. Martin, "Does Public Opinion Influence the Supreme Court? Possibly Yes (But We're Not Sure Why)," *University of Pennsylvania Journal of Constitutional Law*, Vol. 13 (2010), https://scholarship.law.upenn.edu/jcl/vol13/iss2/2.

represent both a person and a symbol of justice, but the issue is that justice is perfect whereas people are not. The Justices on the Court are aware of these tensions and it means that, despite not having to worry about securing electoral victories, they need to create a favourable image of themselves and the institution to the public, and this is why they image craft. Being unelected whilst also often acting as the final decision-maker on many issues due to the American system of checks and balances means that the Court runs the risk of appearing dictatorial. This is compounded with the fact that just nine Justices are selected to represent the entire nation. The decisions of the Court, therefore, cannot appear to be based on the whims of whoever sits on the Court at any given time, otherwise this would risk undermining the legitimacy of the Court entirely. The conflict associated with this is most famously outlined by Alexander Bickel in *The Least Dangerous Branch*. Here Bickel notes that, "judicial review is a counter majoritarian force in our system," and that it demonstrates, "a form of distrust of the legislature."[62] Bickel's work grapples with the question of how judicial review by the Court, as a non-democratic and unelected institution, can be justified where the government gets its legitimacy from majority rule. It is a question of the Court's legitimacy. The solution for this, Bickel argues, is for judges to identify and enact legal principles in place of the will that elected institutions express. This preoccupation with appearing legitimate is apparent in the Court's decision-making, certainly in the sense that they do not want to appear to act on the personal whims of the Justices. Furthermore, the Court has no enforcement power, so it is entirely reliant on its ability to bring the public round to its position or to persuade the other branches of

[62] Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics*, (Yale University Press, 1986), p. 16. Alexander M. Bickel, *The Least Dangerous Branch,* p. 21.

government to enact its rulings. To achieve this is much easier when the Court is seen as neutral, rather than serving one party or political or personal view more than another.

In an eligibility and methods context, the Court image crafted through attempting to base and explain its decision-making on factors which are deemed legally legitimate, which is to say that they were grounds for decision-making which – on the surface – removed the personal views of the Justices from the larger issue and opinion. For eligibility this was done through looking at evolving standards of decency, most commonly assessed through state legislation; looking at whether a majority of states allowed or prohibited the death penalty in a given context and ruling in line with this. A shortfall with the Court's approach of looking to state death penalty legislation is that as and when the Court does this to assess how states handle the death penalty, its investigations are limited only to those states that have the death penalty on their books, as the states without the death penalty do not have legislation to address how it would be used. This means that in some instances the Court can actually only look at states that actively have death penalty legislation, and therefore its assessments are not reflective of the nation as a whole. When discussing the per se constitutionality of the death penalty, the Justices avoid this issue by considering the states that do not have the death penalty in their assessment. But when, for example, looking at the constitutionality of executing a 16-year-old, the Court is de facto limited only to those states that have the death penalty on their books and thus its assessment of societal standards cannot reflect society as a whole.

The Court tended to focus on what it called objective data in these decisions, but really, rather than objective, these data should instead be described as empirical data which the Justices each interpreted for themselves. What the Justices perceived as, and claimed to be, objective was not necessarily the reality. There was a disconnect between what the Court believed was objective and how it believed it was acting objectively, and the reality in which this was far from the case. For methods of execution cases the Court applied a different approach, but one still rooted in the aim of presenting an image of legitimacy, by looking to precedent and at Court rulings from the past to inform its decisions in the present. Superficially both precedent and societal standards are a firm basis for decision-making and provide a framework for the Court to work through these various issues without the Justices personal views interfering. However, closer examination of the decision-making in eligibility and methods cases reveal these to simply be a cover for the very subjective assessments and decision-making that was taking place in reality.

On a Court where division of views and decisions, particularly in a death penalty context, were the norm, image crafting created some unity with the Justices, even between those with contrasting legal and political views. There was agreement in the relevance of evolving standards to the Court's decision-making, and the rationale that this approach seemingly separated the views of the Justices from their opinions, there was also agreement in the use of state legislation to inform evolving standards assessments. Where disunity emerged here was in differences of how the Court's assessments of evolving standards should be conducted, and on the final rulings and outcomes of cases. But this preoccupation on how the Court and its death penalty decisions were to be perceived, and for them to appear as objective as possible, was a

common thread amongst the different Justices across different Courts. This level of unity contrasts sharply to the very divided Court that we see today, but it demonstrates acknowledgement from the Justices on the need for death penalty decisions to be handled very carefully in part due to the sensitive subject at hand, but also for the implications these decisions can have for the public image of the Court and its Justices.

Identifying and understanding image crafting, how and why it was employed in these circumstances, is significant for several reasons. Mostly, it equips us with a better understanding of the Court. This is because it adds another factor into the many that might influence its decision-making, whether in a death penalty context or otherwise, which has so far been overlooked. It also casts light on how the Justices view themselves and the Court versus the reality, and the two are far from the same. Image crafting is proof that the Justices are aware of this disparity and so worked to bring the two closer together, or at least to present the image of them being the same or more similar. Throughout its decisions here – eligibility cases in particular – the Court was adamant that the Justices were removing their personal predilections from their decision making, but in fact the decisions were steeped in individual views and preferences. Applying this approach of considering image crafting as a tactic actively being used by the Court in its decision-making may well cast a similar light on other issues that come before the Court. Image crafting also demonstrates where the Court's decisions should not be taken solely at face value, it is important to closely examine them, to compare and contrast them. It also shows how broad categories, such as 'death penalty cases,' can be reductive for our understanding of the Court and of issues such as the death penalty. There is far more operating under the surface and nuances than these broad categories allow.

This thesis examines how we can use the US Supreme Court's death penalty cases as a lens through which to view and understand the workings of the Court, both in terms of its individual Justices and as an institution. It looks at why the Justices rule in the ways that they do and what influences their holdings and their reasoning in death penalty cases. This helps to create a more detailed picture of the institution and how it operates, which in turn means that its rulings can be better understood. Such insights are of use for those bringing cases before the Court as it helps them to better understand the institution and individuals they are engaging with and thus use this to inform their work. Examining the factors that influence decisions allows us to gain a more in-depth understanding of the Court's rulings, which in a death penalty context is important as these decisions have real life and death implications. Furthermore, this helps us to critically analyse an unelected branch of government and an institution whose opinions determine whether individuals live or die. This thesis also examines whether and how the Court's rulings, and the rationales for them, have developed over time or changed. This demonstrates how the Court has evolved over time and how its handling of the death penalty has also evolved. It demonstrates where different Justices may be more relevant or significant than others and how their roles, position, and influence change which in turn affects the Court's rulings. This also helps us understand the death penalty more broadly by looking at how the Court has impacted and influenced its practice and evolution, where it has helped maintain its legitimacy and upheld its use and where it has narrowed and limited it. Lastly, this thesis assesses whether some factors, for example a particular Justice, or the issue at hand, are more influential than others in deciding the outcomes of these cases. It helps to identify Justices who were particularly influential on the issue of the death penalty so that we

can ascertain how they shaped the Court's jurisprudence on this issue. This can be useful for lawyers bringing cases to the Court as it helps them identify how they might appeal to different Justices. Examining influential issues is also of note in a death penalty context as it helps us to understand where the Court may or may not be more likely to intervene, either to narrow or uphold, and it demonstrates that on one issue there can be a lot of inconsistencies and variation in the Court's actions and rulings and so a nuanced approach to assessing broad issues like the death penalty is most appropriate.

Methodology

The time frame for this investigation spans from 1972 to 2019. 1972 provides the starting point for this thesis as it was then that the Court decided *Furman v. Georgia,* which rendered the death penalty unconstitutional as it was applied at the time. This established the modern death penalty debate as it brought up questions and created standards which directed discussion on this issue subsequently. For an issue that is ongoing and which the Court still engages with today, a cut off point for the time frame of this thesis had to be established. 2019 provides the end date for this thesis so as to bring the study of the Court's death penalty decision-making largely up to date, particularly in a methods context which is the more contemporary issue addressed in this thesis. This time frame allows for the discussion of all of the major eligibility and methods cases, it also allows some space to see their wider influence and application, thus providing a rounded picture of these cases and their impact. Within this time frame, the Court switched its focus from cases concerning death penalty eligibility to methods of execution, as such the focus of this thesis follows this approach and also

shifts. This divides this discussion of the modern death penalty into two distinct issues and time frames covering different themes and with fundamentally different issues at hand. The first from 1972 – c.2008 follows the Court's focus on death penalty eligibility where centrist, swing Justices carried the most influence in these rulings. From 2008 onwards the focus shifted to methods of execution and to a new phase of the modern death penalty where the conservative bloc that we recognise in the present day was the main determinant of these rulings.

The modern death penalty from 1972 to 2019 is also an effective lens through which to more closely examine the Court's strategy of image crafting because it has developed relatively recently. This means that the body of cases on this issue, particularly with regards to issues concerning methods of execution and eligibility, is relatively small and well documented meaning that it is easier to see what the Court is doing on this issue. Despite the short time span the period has seen shifts in American society as well as in the Court's composition, and thus the findings here cannot be attributed to circumstance or a particular Court. Most significant, however, is the Court's approach in death penalty cases and how this changed, which demonstrates something more at play in the Court's decision-making than the Justices would suggest. The same emotional, moral, political, penological, and sometimes religious preferences on the death penalty that this issue espouses influence the Justices in their decision-making and they shape their decisions according to their personal views but frame it in such a way as to try to cover it up. This thesis sheds light on the tactical nature of the Court's death penalty decisions, and demonstrates how it has consistently applied this approach of image crafting in death penalty cases over decades.

Closer analysis of these cases highlights the differences between them where normally they would all be grouped under the same umbrella. When taking this approach, it becomes apparent that we can understand image crafting and the Court's decision-making better if we recognise that there is not simply one category of death-penalty case. Broadly, there are three main areas: eligibility cases, methods cases, and a third category of procedural cases. This changes how we view and understand the death penalty as it dispels the notion of a death penalty case as a category and instead sees these as three separate issues, each handled differently. These cases might all fall under the broader issue of the death penalty, but in order to gain a better insight into the Court's decision-making they should be differentiated. This thesis seeks to dispel the notion that there is just one type of death penalty case, however, only two of the three types of case – eligibility and methods- will be examined here. This is primarily motivated by the desire to gain an in depth understanding of the Court's decisions, rather than a broad one. The Court's procedural cases are extremely narrow, focusing in on very particular elements of a case, and are extremely technical as they are about rule following and application; it is dealing with single, very specific issues one at a time. For this reason, the focus is on eligibility and methods cases as these cases offer more scope for the Court to image craft as they often make sweeping constitutional rulings in these cases, furthermore there is more scope for accusations of the Justices imposing their personal views in eligibility and methods cases as the focus here is on moral issues rather than rules.

This study also does not examine the issue of race and the death penalty. Whilst this is undoubtedly a huge part of the contemporary death penalty debate, it does not form part of the discussion here as it is not touched upon in any great detail by the Court in

its eligibility or methods decisions.[63] As this study is built from the Court's decisions themselves, where the discussion of race plays no large part, it is therefore not discussed within the context of this thesis. However, the notion of image crafting, and the methodology applied here in examining this as a tactic could be applied in cases concerning race, which would serve to gain an even more detailed understanding of the Court's death penalty decision-making.[64]

This study follows a historical, source-based method to understand the Court and its workings through the lens of its death penalty jurisprudence. Drawing primarily on the Court's opinions, it utilises them not only for the final ruling, the focus of much legal attention, but also for the words and phrases used, the arguments made, and the approaches taken. Too often study of the Court's ruling stops at the final result, but fully understanding the Court as an institution and how such rulings come about requires a deeper look at the Justices' words and actions and how far the two align.

When deciding on how to approach this research, I settled on a chronological approach, as opposed to a biographical one. This was because my focus and interest were not so much on the Justices and what their particular backgrounds or views were, rather, the thesis was focused on if and how these views impact on the Court's decision-making. My research focus is on image crafting and US Supreme Court decision-making. It is interested in the Justices as components of a larger institution, rather than just as

[63] The Court did examine race and the death penalty in *McCleskey v. Kemp* 481 U.S. 279 (1987), where it assessed whether a statistical study proved that McCleskey's sentence violated the Eighth and Fourteenth Amendments.

[64] For further reading on this topic see works such as: R. J. Maratea and David P., *Keys Race and the Death Penalty: The Legacy of McCleskey V. Kemp*, (United Kingdom, Lynne Rienner Publishers, Incorporated, 2016). Allen, Howard W., et al. *Race, Class, and the Death Penalty: Capital Punishment in American History*, (United States, State University of New York Press, 2009). Austin Sarat and Charles J. Ogletree, Jr., *From Lynch Mobs to the Killing State: Race and the Death Penalty in America*, (United Kingdom, NYU Press, 2006).

individuals, and whilst I examine individual Justices and their decisions throughout, this is in relation to the institution as a whole. Furthermore, I had concerns that a biographical approach could stray too far into the narrative of the Justices' lives and views and away from the thesis's research questions. This is not to say that a biographical approach to this topic would not be of value, certainly there is scope for some work on this, but that is not the aim of this particular project.

In my research I made use of a range of primary and secondary sources. The most significant sources used in this thesis are the Court's written death penalty opinions. These form the foundation for the thesis. Reading and analysing these cases highlighted the research questions this thesis asks and answers, demonstrated key themes, and also contributed to the structuring of this thesis. With regards to secondary literature, this thesis draws on the large body of articles and books on this subject which offer contemporary and timely assessments of these death penalty cases and issues.

This thesis also made use of primary source material in the form of some of the Justices' papers at the Library of Congress in Washington DC. The selection of these particular Justices' papers was made primarily due to financial constraints which necessitated the need to visit one archive with as much potential material as possible. This thesis made use of the papers of Justices Harry A. Blackmun, William J. Brennan, William O. Douglas, Byron White and Thurgood Marshall. These papers were selected as the Justices were on the Court and decided Supreme Court death penalty cases in the time frame explored by this thesis. The majority of the material in these files consisted of drafts and revisions to death penalty cases, in addition to some memoranda between the Justices. Some of the papers where the collection was more extensive, for example

Justice Blackmun, also contained articles and letters from the public. At this stage in my research, I kept my search criteria fairly broad, opting for collecting a large amount of information which I later sifted through for more relevant documents as my thesis became more focused. I approached this large amount of material one Justice at a time, focusing firstly on any files relating specifically to death penalty cases for each. I then read through each of the relevant papers, looking for where they might cast light on decision-making, on the workings and dynamics of the Court, and where they might contribute something more pertinent or something different to what is already revealed in the Justices published opinions.

Due to Justices papers being heavily restricted, with many portions closed to the public for decades after a Justice's tenure on the Court, it was not possible to gain access to the papers of more recent Justices and more recent death penalty cases. This meant that in the methods chapter of this thesis I was not able to utilise these papers to gain an insight into personal views affecting the views of the Justices. Instead, these conclusions had to be drawn from other sources, largely from statements made by the Justices of the per se constitutionality of the death penalty or where they expressed a personal view or individual interpretation of the issue at hand in their methods opinions. For some Justices, expressions of their views can be found in other sources, for example in interviews and through the media. This demonstrates some of the difficulties in ascertaining the personal motivations of Supreme Court Justices, not just in a death penalty context, and in getting under the bonnet of an institution like the Supreme Court where these insights are so closely protected and restricted. It is for this reason that doing so historically is important for shedding light on what the Court might

be doing now but which is unclear because of image crafting and the lack of access to contemporary documents.

A major challenge which I faced whilst researching and writing this thesis was the COVID pandemic. Lockdowns and travel restrictions meant that I did not have access to the sources that I otherwise would have sought to utilise. As such, I made the decision to conduct interviews with individuals who have experience with the death penalty either in a legal or in a campaigning capacity. In Spring 2020 I began looking for interviewees. Through internet research I created a list of individuals and organisations. I looked for both large scale and small organisations, as well as for high profile individuals and also individuals with a less prominent public profile, all with strong links to the death penalty either in a legal or a campaigning capacity. For example, I looked through petitions to the Court and transcripts of oral arguments for individuals who had argued death penalty cases before the Court and law companies that had represented plaintiffs in death penalty cases. I tried to contact a mix of organisations and individuals who were both pro- and anti-death penalty. I approached individuals who I was interested in interviewing through a variety of means: email, Twitter, LinkedIn to name a few. I provided some background to my project and enquired about whether they might be interested in being interviewed for it. Responses to my enquiries were very limited. I attribute this largely to the pandemic and that at that particular moment in time this simply was not a priority for many individuals and organisations. I was also conscious of the volume of enquiries and correspondence received by large organisations. Three individuals agreed to be interviewed and were very generous and forthcoming with their time. Rev. Patrick Delahanty has spent decades campaigning against the death penalty and was one of the founders of the Kentucky Coalition to Abolish the Death

Penalty in 1987. Ed Monahan, who I was put in contact with by Rev. Delahanty, began work as a public defender in 1976 and has held roles such as Kentucky Public Advocate, president of the Kentucky Association of Criminal Defense Lawyers, and Executive Director for the National Association for Public Defense Fund for Justice. *Ezra*, who requested to remain anonymous, is a lawyer with experience of bringing cases to the Supreme Court. Due to pandemic travel restrictions and all of the interviewees being based in the US, I made the decision early that I would conduct interviews electronically. This was done in the form of two Zoom calls and one phone call. In interviews lasting a couple of hours each, the interviewees were asked questions relating to the death penalty and the Supreme Court more broadly, and also about their work and views more specifically.

The result has been an extremely positive one. These interviews offer a new insight into the Court and its relationship with the death penalty through a combination of insights that is unique to this project. They provide a personal and individual voice, detailing individual experiences and insights and situating them within a much larger dialogue. The scope of the careers and experience of the individuals interviewed meant that I was able to largely cover the timeframe of this thesis, as the interviewees had decades worth of experience but have also been involved in the more contemporary methods debates covered in this thesis. In some regards, these interviews provided material that contributed to this original piece of research more effectively than written primary sources, as the combination of interviews and the insights they provide are exclusive to this project and have not been applied or access by other researchers. They provided in-depth knowledge and expertise on the death penalty, the Supreme Court, and its functions, directly from the individuals involved, rather than from papers or archival

material. Furthermore, I was able to tailor these interviews directly to my research questions so as to try as best as I could to not leave any gaps, whereas, as restrictions on the Justices papers for example demonstrate, this can be a difficulty when looking at written primary source material. As such these interviews were useful in confirming and exemplifying many of my arguments, for example the significance of Justice Kennedy as a swing Justice in a death penalty context. The interviews provided primary source material that I would not have otherwise had, and the combination of the three different interviews further bolsters the original contribution of this thesis.

This thesis is divided into five chapters. Throughout these five chapters, discussion of theories of judicial decision-making is interwoven with analysis of the cases, in order to demonstrate their utility and their limitations.

Chapter 1 is a scene-setter chapter, establishing the historical, political, and legal context, providing the foundation for the Court's death penalty decisions which is crucial for understanding not only the broader death penalty debate but also the approaches and shifts adopted by the Court. Chapter 1 also examines the existing literature on this topic and demonstrates where this thesis sits amongst this as well as its original contributions to the field.

Chapter 2, which examines *Furman* and *Gregg*, establishes the legal context for the Court and its decision-making in modern death penalty issues. Unpacking these two cases highlights and provides information on key themes which were to remerge throughout the Court's subsequent dealings with the death penalty. Chapter 2 also demonstrates where the Court began its initial attempts at image crafting, and how this

approach began to take shape. This chapter links to the broader thesis by setting the foundations for the rest of the discussion and cases that are to follow.

Chapter 3 looks at the Court's decisions in eligibility cases. Chapter 3 makes clear how the Court was heavily focused on legitimate indicators and criteria to inform its decision-making, and how this stemmed from concern about its public image and attempts to image craft. The chapter then explores evolving standards of decency, the focus of the Court in eligibility decision-making, as this was perceived by the Court to best fit its criteria for being a legitimate and objective factor on which the Court could base its decision. However, despite claiming that this approach removed the personal views of the Justices, instead these came through in how the Justices interpreted evolving standards data. This approach was just a cover for the Justices operating to serve their own views on the issue at hand.

Chapter 4 is the consequence of Chapter 3. It outlines how, as a result of the Justices using evolving standards to serve their own views, the swing Justices on the Court became most influential on this issue as it was typically those in the centre who could command a majority support for their interpretation of evolving standards based on the Court's chosen legitimate indicators. It examines the key swing Justices on this issue, identifying where they influenced or were influenced by the other Justices and how these individuals largely dictated the direction of the Court's death penalty eligibility decisions. Throughout the Court's eligibility decisions, it attempted to craft an image of legitimacy, premised mostly on its focus on evolving standards of decency, but the reality was that these decisions simply came down to whichever Justice could

find the most support for their interpretation of societal standards, and this usually rested in the middle ground.

Chapter 5 examines methods of execution cases. It is comparably smaller than Chapter 3 due to it covering just three cases and a much shorter time span. This chapter further cements the argument made in Chapter 3 that the Justices act with impunity as it demonstrates where they abandoned their long-established approach of looking to evolving standards to instead focus on precedent as the basis for their decisions. This change in approach was down to the fact that no interpretation of evolving standards data would produce the result desired by the conservative majority – one which upheld the method in question and did not throw the death penalty entirely into question. As such, the Court sought other means to uphold the death penalty but to appear to act legitimately whilst doing so. Image crafting here came from the Court looking instead to precedent. The contrasts in the Court's approach which Chapters 3 and 5 demonstrate reveal the Court's image crafting tactics even more clearly.

It is important to analyse and understand institutions such as the US Supreme Court. This thesis provides a greater insight into how it operates and sheds light on decision-making on a hugely important issue in the death penalty. It reveals how the Court operates in its death penalty-decision making and the importance with which it views its public image. This thesis does so through in-depth analysis of the Court's opinions and examining how these develop and change over time and how Justices rationalise and evidence these opinions differently. It uses the death penalty as a lens through which to better understand the institution of the Court.

Chapter 1: Setting the Scene

In order to understand the contribution of both this thesis and of the Court's death penalty decision-making, some context is required. With regards to situating this thesis within its broader field, this project straddles both history and law; as such it fits in a substantial body of literature covering both the history of the death penalty, and all the legal facets of this subject too. It would not be unreasonable to describe this topic as being saturated in terms of the amount of scholarly attention it has received, which makes finding unique insights into such a topic all the more important. The following chapter explores the strengths and weaknesses of the extant literature and demonstrates the contribution made by this thesis.

Following on from this, the second half of this chapter explores the history of the modern death penalty in the United States. This is a long and complicated history and so some understanding of this is useful for situating the discussions of the death penalty and the Court's cases that are to follow in this thesis. It outlines the decline of the death penalty in the 1960s and its resurrection in the 1970s through to its peak in the 1990s. It examines factors such as changes in methods of execution and in the political climate, and also the actions of campaign groups. All of this creates the backdrop against which the Court's decisions were made, and so creates a greater understanding of their decisions and their impact.

Literature Review

Longer histories of the death penalty have been well covered by scholars. These histories help provide a broader picture of the death penalty and an insight into how it has evolved

over time. In particular they help our understanding of the death penalty and of the Court by providing a broad understanding of the issue from which further works can build on in more nuance and more detail. However, whilst these works provide a good general context, often their analysis of Court decisions and actions is extremely limited, if existent at all. They cover the historic side of the death penalty to great effect, but their contribution to understanding the legal aspect of this history is more limited. Stuart Banner's *The Death Penalty: An American History* is perhaps the best example of such work. Here Banner provides a comprehensive history of the death penalty from the colonies through to the turn of the 21st Century.[1] Banner's work hints at themes covered in this thesis, such as societal standards and lack of coherence in the application of the death penalty. In covering the long history of the death penalty in the US, works like Banner's highlight and establish the main themes that emerge on the death penalty, looking at things such as methods, at reform, at opposition, and the journey to the Court. Banner argues that in comparison to European countries which abandoned the death penalty, in the US public opinion plays a stronger role in policy making and that is why it has bucked the trend of the rest of the western world and retained capital punishment. In his discussion of the modern death penalty, he also argues that the attempts to resurrect the death penalty in 1976 resulted in a system where execution was still like being struck by lightning and rife with systematic racial bias. This provides a good overall picture of the death penalty and the politics around it, but fails to go into great detail about the Court or its decision-making. It provides useful context, but often detail is lacking.

[1] Stuart Banner, *The Death Penalty: An American History,* (Cambridge, Massachusetts: Harvard University Press, 2002). See also Gordon Morris Bakken, *Invitation to an Execution: A History of the Death Penalty in the United States*, (University of New Mexico Press, 2010). Jacqueline Herrmann, *The History of the Death Penalty in the United States*, (Germany: GRIN Verlag, 2008). Cynthia Morris and Bryan Vila, *Capital Punishment in the United States: A Documentary History*, (United Kingdom: Greenwood Press, 1997).

Similarly, some writers use one particular issue to focus their discussion of the history of the death penalty as a means of grappling with such a large subject, and providing a detailed picture of one facet of this topic, for example Anthony Galvin's *Old Sparky: The Electric Chair and the History of the Death Penalty*.[2] More nuanced studies such as Galvin's help to demonstrate that the death penalty is linked to and made up of many themes and issues, it is not merely a series of cases and executions, there are all sorts of practical, social, and political issues at play. As this thesis demonstrates, these issues are often interlinked; discussed here through the Court's image-crafting. Galvin, a crime journalist, looks at the history of the death penalty but through the lens of electrocution as a way to frame his discussion of the issue, though he also touches on the history of the various other methods of execution. Galvin's approach is similar to this thesis which uses the death penalty as a lens to discuss the Court's decision-making. Honing in on a particular issue helps to focus in on what is otherwise too large an issue to comprehensibly examine in its entirety. Much of the detail provided by Galvin is not really new. Where it appears to offer novelty is in its framing of its focus around the electric chair, however this is somewhat diminished by his decision to focus on other issues such as last meals, famous executions, and last words. His contribution to the field, like Banner and others, is in the bigger picture that they present of the death penalty and the methods for carrying this out. Indeed, Galvin states that this was his agenda with this work, to put the electric chair in its wider historical and social context, with a view to fuelling further debate and revisiting the question of capital punishment in the US.[3]

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[2] Anthony Galvin, *Old Sparky: The Electric Chair and the History of the Death Penalty*. (New York: Carrel Books, 2015). See also David V. Baker, *Women and Capital Punishment in the United States: An Analytical History*, (United States McFarland Incorporated Publishers, 2016).

[3] "Anthony Galvin talks about his latest book 'Old Sparky,' *Creative Authors*, (20th July 2015), https://www.creativeauthors.co.uk/anthony-galvin-talks-about-his-latest-book-old-sparky/.

This thesis does not seek to add to the long and comprehensive histories of the death penalty that already exist, rather it demonstrates how they can form the foundation for a better understanding of more nuanced areas of the death penalty – in this case the Court's decision-making and image crafting. This thesis utilises such works to situate its discussion within the broader history and context of the death penalty and to help assess the applicability of the various theories of judicial decision-making.

Many histories of the death penalty are written with a motive in mind. This can be seen with histories of the death penalty which are focused on abolition. The main approach used by authors of these works is to highlight the flaws in the practical application of the death penalty or in the system in which it functions. These books are written with an intent to inform the reader about the problems with capital punishment and how it could be abolished. They are aimed to influence the reader and have a policy goal in mind. They help to provide an understanding of an abolitionist narrative and anti-death penalty stance on the issue. They make this case clear and evidence and articulate these arguments well. Whilst they are not intended to provide an overall and unbiased account of the death penalty's history, such clearly ideologically motivated works can raise questions surrounding the information and issues they chose to cover. In an ideologically motivated piece, the author will likely choose material that serves their argument and thus material that might be more pertinent or more insightful to a broader view of the death penalty or the Court may be omitted if it does not serve the text's main purpose of persuasion. For example, Peter Hodgkinson and William Schabas's *Capital Punishment: Strategies for Abolition*, is a compilation of studies from an abolitionist perspective.[4] The book is both

[4] Peter Hodgkinson, and William Schabas, *Capital Punishment: Strategies for Abolition*, (Cambridge: Cambridge University Press, 2004).

advisory – reaching out to abolitionists and making recommendations to them - as well as informative in informing a wider readership about various aspects of the death penalty and their associated flaws. The book is written almost like an abolitionist's guide to capital punishment and covers many issues in order to highlight the flaws in the death penalty, for example botched executions, alternative sanctions, and the ethics of the death penalty. One of the most forceful arguments comes from Hodgkinson in his criticism of contemporary abolitionist movements. He argues that they need more effective strategies and tactics at all levels (regional, national, and global), in order for them to sustain the momentum they were building at the time.[5] Similarly, abolitionist Roger E. Schwed wrote *Abolition and Capital Punishment: The United States' Judicial, Political, and Moral Barometer* to speak out against capital punishment.[6] Schwed's objectives here were to focus on the work of abolitionists prior to the 1960s and review their efforts in that time and subsequently. He examines the arguments made by supporters of capital punishment such as retribution and deterrence with a view to unpicking these, before highlighting the irrevocability of the death penalty, and its arbitrary nature. Here Schwed uses these factors to argue against the death penalty on the basis that it cannot be administered fairly and without discrimination, but he adds little to the debate as he simply reiterates well-established and well-debated issues. In contrast to both of these, this thesis does not seek to advise abolitionists, or any party, on approaches, nor is it written with any motive in

[5] Peter Hodgkinson, "Capital Punishment: improve it or remove it?" in *Capital Punishment: Strategies for Abolition*, edited by Peter Hodgkinson, and William Schabas, (Cambridge: Cambridge University Press, 2004), p. 2.

[6] Roger E. Schwed, *Abolition and Capital Punishment: The United States' Judicial, Political, and Moral Barometer*, (New York: AMS Press, 1983). Further examples of works written with a motive include, Jordan Steiker, *Death Penalty Stories* (New York: Foundation Press, 2009) and Robert A. Stein, "The History and Future of Capital Punishment in the United States," *San Diego Law Review* Vol. 54, No. 1 (February-March 2017), pp. 1-20. See also: Robert J. Norris, *Exonerated: A History of the Innocence Movement*, (NYU Press, New York, 2017).

mind beyond that to better understand the Court and how it operates. These works are best considered alongside less ideologically motivated works in order to create the fullest picture. These types of publications speak to a particular audience and perspective, but they are about advocacy rather than understanding. This can be helpful for understanding the death penalty from an abolitionist perspective, but can also be limiting as they do not offer an impartial and fully representative analysis of the death penalty.

Histories of the anti-death penalty movement are a useful tool for helping us understand the work and campaigns by anti-death penalty activists, their tactics and how these changed and developed over time. They provide context for the Court's decision-making and demonstrate the evolution of the death penalty debate. There are benefits to such works as they provide a detailed insight into one side of the death penalty debate, but this is also their shortcoming as they are one-sided and written from a particular perspective and therefore are written to persuade the readers of the shortcomings of this system, rather than provide a complete and impartial overview. In *Against Capital Punishment: The Anti-Death Penalty Movement in America, 1972-1994* Herbert Haines emphasises the relevance of anti-death penalty activists during a time where many believed their influence was very limited, but notes that the weakness of the American anti-death penalty movement plays a large part in why the US bucked international trends towards abolition.[7] Haines follows a similar approach to this project and considers the abolitionist movement and the various organisations in relation to a broader context, in this case in relation to literature on social movements in order to detail the strategies of these groups. His tone is

[7] Herbert H. Haines, *Against Capital Punishment: The Anti-Death Penalty Movement in America, 1972-1994* (New York: Oxford University Press, 1996). See also Herbert H. Haines, "Flawed Executions, the Anti-Death Penalty Movement, and the Politics of Capital Punishment," *Social Problems*, Vol. 39, No. 2 (1992), pp. 125–138, www.jstor.org/stable/3097033.

optimistic that support for the death penalty can be reversed and thus the book is written with a view to account for the movement's successes; in stopping the use of capital punishment taking place on a massive scale, and its failures; in being unable to align the US with other western countries in abolishing the death penalty. Where these works are motivated to inform the reader of the issues associated with capital punishment, this thesis is not focused on commenting on the morality of this issue. Rather, it considers the discussions of the anti-death penalty movement to contextualise the Court's decisions and as an insight into societal standards during this period. This is in order to cast light on the Court's decision-making and think about the Court's decisions and its image crafting within the context that they are produced. All of which provides a better understanding of how the Court operates, how it sees its position in society, and the image that it presents.

There exists a field dedicated to case studies of various Courts and Justices. These works examine a particular Court, time frame, or Justice more closely and provide a closer insight into the subject. These works help us to understand a particular Court or Justice better: how they operated, the dynamics amongst the Justices, their views on particular issues or cases, and a better understanding of the people behind the robes. All of this also creates a better understanding of the Court's decision-making, particularly where they shed light on the behind-the-scenes discussions and debates on a particular issue. Furthermore, these works demonstrate where it can be useful to compare and contrast the actions of a Justice or of a Court, to look for where there is consistency, agreement, compromise, or indeed the opposite which can reveal compelling insights into the Court's decision-making. Key texts which provide an insight into the behind-the-scenes workings of the Court and the thoughts and actions of the Justices which have inspired this project include *The Brethren: Inside The Supreme Court* and *Closed Chambers: The Rise, Fall, and Future of the Modern*

Supreme Court.[8] These detail what happened behind closed doors and offer an insight into the Court that the opinions do not. Both texts look at the Court as it decided death penalty cases. However, they are focused more on the dynamics between, and the reactions, from the Justices, rather than looking to understand the wider issue of Court decision-making as this thesis does. Where *The Brethren* also focuses on a narrower aspect of the Court (here it is the timeframe of 1969 -1975, the early years of the Burger Court), *Closed Chambers* covers a much longer time frame, and both rather than being issue-specific take a broader look at various issues addressed by the Court. Therefore, they offer a good overview of the Court and its behind the scenes working, but cannot show how the dynamics of a particular issue impacted on the Court's decision-making, which is what this project focuses on instead. Motivated by a similar interest in what goes on behind the Court's decisions, this project has utilised archival material in the form of Justices' papers in order to gain a similar behind the scenes insight.

The question of what influences the Court's decision-making is one that scholars have grappled with for some time. As such, a substantial body of work has emerged which attempts to understand and explain the Court's decision-making. From this several theories have emerged and this thesis draws on and tests these theories. There are three main theories of decision-making which scholars engage with, these have been outlined in the Introduction to this thesis, but to briefly recap. The first is the Legal Model which suggests that the Justices rely on authorities such as the Constitution in their decision-making. Second is the Attitudinal Model which suggests that the Justices decide cases solely based

[8] B. Woodward and S. Armstrong, *The Brethren: Inside The Supreme Court*, (New York: Avon Books, 1981). Edward Lazarus, *Closed Chambers: The Rise, Fall, and Future of the Modern Supreme Court*, (New York: Penguin Books, 2005).

on their personal views. Lastly, the Strategic Model suggests that the Justices can pursue their own preferences but are constrained to some degree. These works which offer modules of decision-making help us to better think about how the Court operates and provide frameworks and labels for thinking about these actions, these can then be tested and applied to cases and issues. Perhaps the most well-known work outlining a theory of decision-making is Jeffrey Segal and Harold Spaeth's *The Supreme Court and the Attitudinal Model Revisited* (2002).[9] Here Segal and Spaeth argue that the Attitudinal Model is most applicable. Other works weigh the three models comparatively, outlining and considering the applicability of each.[10] This provides a better overview of the theories, and also demonstrates their strengths and pitfalls through critically analysing them. Such an approach is useful as it flags strengths and weaknesses in these theories for subsequent scholars to consider when assessing their applicability.

This thesis takes these three models and examines where they may or may not be applicable in the context of the Court's various death penalty eligibility and methods cases and also utilises them to shed light on the Supreme Court's workings in this area. Indeed, other works in this field have often been focused on testing these theories. Works such as Saul Brenner and Marc Steir's "Retesting Segal and Spaeth's Stare Decisis Model," attempt to do this.[11] However, their approach differs to that of this thesis as their study examines decisions represented by empirical data, such as the percentage of the time a Justice voted to conform to precedent, rather than analysing the Court's opinions. Whilst empirical data

[9] J. Segal, & H. Spaeth, *The Supreme Court and the Attitudinal Model Revisited,* (Cambridge: Cambridge University Press, 2002).
[10] See Richard L., Pacelle et al. *Decision Making by the Modern Supreme Court*. Cambridge University Press, 2011.
[11] S. Brenner and M. Steir, "Retesting Segal and Spaeth's Stare Decisis Model," *American Journal of Political Science*, Vol. 40, No. 4 (November 1996), pp. 1036-1048, https://www.jstor.org/stable/2111741?seq=1#metadata_info_tab_contents.

can help to quantify the Court's opinions, it does not get to the core of what the Court is actually saying in them. When seeking a better understanding of Court decision-making, it has proved more useful to examine the decisions themselves. Here it is possible to contrast the words of the Justices themselves where it is possible to analyse and compare the various written opinions to see where approaches and positions vary. Indeed, there is a body of work that attempts to understand the Court better through looking at empirical data. Works such as Youngsik Lim's empirical analysis of the Court's decision-making present one approach of thinking about and analysing how the Court works.[12] Such an approach works well for covering a multitude of issues and cases based on votes. However, it fails to examine the reasoning behind the votes which is where this thesis intervenes and focuses. Youngsik agrees arguing that, "the fundamental problem in empirically analysing Supreme Court justices' decision making is that a case before the Supreme Court is not necessarily independent of the justices."[13] This thesis is comparable to such works in that it also seeks a better understanding of the Court's decision-making, yet it differs as it does so through qualitative analysis (i.e., the case study of death penalty eligibility and methods and by analysis of the Court's opinions) rather than a quantitative approach.

Empirical research has also been conducted in order to try and quantify the role of the Swing Justice. James Acker's "A Different Agenda: The Supreme Court, Empirical Research Evidence, and Capital Punishment Decisions, 1986-1989" and Peter Enns and Patrick Wohlfarth's "The Swing Justice" are examples of such work.[14] Acker's study examines the

[12] Youngsik Lim, "An Empirical Analysis of Supreme Court Justices' Decision Making," *The Journal of Legal Studies*, Vol. 29, No. 2 (2000), pp. 721–752, www.jstor.org/stable/10.1086/468091.
[13] Youngsik Lim, "An Empirical Analysis of Supreme Court Justices' Decision Making," p. 748.
[14] James R. Acker, "A Different Agenda: The Supreme Court, Empirical Research Evidence, and Capital Punishment Decisions, 1986-1989." *Law & Society Review*, Vol. 27, No. 1 (1993), pp. 65–88. Peter K. Enns and Patrick C. Wohlfarth, "The Swing Justice," *The Journal of Politics*, Vol. 75, No. 4 (2013), pp. 1089–1107, www.jstor.org/stable/10.1017/s0022381613001035.

Court's use of social science research in its death penalty cases, and found an unwillingness to incorporate the results of relevant social science findings into recent major capital punishment decisions. However, this approach also overlooks the content of the opinions themselves, instead boiling them down to percentages of how often social science was cited, rather than what the Justices actually argued. For this reason, its actual insight into the decisions themselves is very limited. Enns and Wolfarth use empirical data to argue that the swing Justice typically relies less on attitudinal considerations, and more on strategic and legal considerations than other Justices on the Court. This thesis grapples with the same question in Chapter 4 which considers the influence of swing Justices on the Court's decision-making. But again, differs in approach by focusing on the Court's opinions and the Justices actions, rather than breaking these down into data. Both of these works are comparable to this thesis in noting the significance of swing voters in an eligibility context, but these studies are data driven, rather than stemming from a close analysis of the Court's opinions. Data can go some way to providing an insight into decision-making, but numbers alone are limited in what they offer. These works could be best described as legal scholarship, whereas this investigation falls into the category of legal history, and thus the approaches to the subject matter of swing Justices are very different.

Within the field of death penalty literature, the largest area is the legal coverage of the Court. This typically comes in the form of articles, the rationale for this being that the law changes, often very quickly, and thus articles are a timely and contemporary way of outlining a particular issue or discussion with less of a risk that events will overtake them and render them irrelevant, as might be the case with a book.[15] For any Supreme Court

[15] Examples include, but are by no means limited to: "Furman v. Georgia - Deathknell for Capital Punishment?" *St. John's Law Review*, Vol. 47, No. 1, Article 5 (2012), pp. 107-147,

death penalty case there are articles written examining the decision or the issue it addresses more closely. They provide closer analysis and explanation of a case or an issue which is useful for helping to develop a strong understanding of a particular case, group of cases, or issue. Furthermore, they are less focused on putting a particular line of argument or point of view across, rather they attempt to understand and explain the case or issue at hand, they are written to inform rather than to persuade. These more focused analyses of cases and issues help to develop an in depth understanding of the particular subject. However, on occasion they are so narrowly focused that they do not highlight the links to the social, political, or historical context surrounding the issue. Indeed, this is a broader problem with legal articles as the lawyers who write them do not offer a good history of the subject. This is sufficient for gaining an understanding simply of the case at hand, but for seeking to understand a broader issue or institution such as the death penalty and the Supreme Court, looking at cases in narrow isolation without consideration for their wider context limits our understanding of them as we cannot see their influence and impact.

Similarly, articles written by historians often fail to fully explore the legal issues at play. The reasons for this vary, but often the issue is that law is a complicated field and historians do not always have the same knowledge or skills to engage wit this. Furthermore, the disciplines are different in many ways and so finding an approach that crosses both disciplines effectively can be challenging. For this reason, both lawyers and historians miss

https://scholarship.law.stjohns.edu/lawreview/vol47/iss1/5. Julian Killingley, "Killing Me Softly: Baze v. Rees," *Human Rights Law Review*, Volume 8, No. 3 (1 January 2008), pp. 560–569, https://doi.org/10.1093/hrlr/ngn015. Douglas Kolly, "Gregg v. Georgia: The Search for the Civilized Standard," *Detriot College of Law,* Vol. 1976, No. 3 (1976) pp. 645-662. Courtney Butler, "Baze v. Rees: Lethal Injection as a Constitutional Method of Execution," *Denver University Law Review,* Vol. 86, No. 2 (2009), pp. 509-534. Mary Graw Leary, "Kennedy v. Louisiana: A Chapter of Subtle Changes in the Supreme Court's Book on the Death Penalty," *Federal Sentencing Reporter*, Vol. 21, No. 2 (2008), pp. 98–106, www.jstor.org/stable/10.1525/fsr.2008.21.2.98.

the connections which this thesis makes between law and history. This thesis applies the approach of looking at specifics – at two specific categories of death penalty case – and analyses the Court's decisions here closely, but it also looks to the bigger picture of the context surrounding these cases in order to provide this more rounded understanding of the decisions and the context in which they occur and the Court operates. This creates a better balance between the legal and historical analysis.

Public opinion and how far the Court is influenced by or linked to this is another area explored by scholars. Works such as Barry Friedman's claim that public opinion acts as a check on the Court's decision-making and means that the Justices try to keep their decisions largely in line with public opinion.[16] They primarily argue that the Court is not as far removed from public opinion as commonly thought, and often attribute this as being a limit on the actions on the Court. Image crafting, as outlined in this thesis, recognises the same constraint, however it builds on this as it notes how the Justices work around this to follow their own views – which may or indeed may not be in line with, and influenced by, public opinion – and then rationalise their position using image crafting. Certainly, public opinion and image crafting are linked, but they are not the same thing. Image crafting is more concerned with the public's view of the Court as an institution, rather than the

[16] See work such as: Barry Friedman, *The Will of the People: How Public Opinion Has Influenced the Supreme Court and Shaped the Meaning of the Constitution*, (Farrar, Straus and Giroux, 2010). Thomas R. Marshall, *American Public Opinion and the Modern Supreme Court, 1930-2020: A Representative Institution*, (United States, Lexington Books, 2022). Thomas R. Marshall, *Public Opinion and the Rehnquist Court*, (State University of New York Press, 2008). Christopher J. Casillas, et al. "How Public Opinion Constrains the U.S. Supreme Court." *American Journal of Political Science*, Vol. 55, No. 1 (2011), pp. 74–88, http://www.jstor.org/stable/25766255**.** David Jacobs, and Stephanie L. Kent, "The Determinants of Executions since 1951: How Politics, Protests, Public Opinion, and Social Divisions Shape Capital Punishment," *Social Problems*, Vol. 54, No. 3 (2007), pp. 297–318, www.jstor.org/stable/10.1525/sp.2007.54.3.297. Donald R. Songer, and Stefanie A. Lindquist, "Not the Whole Story: The Impact of Justices' Values on Supreme Court Decision Making," *American Journal of Political Science*, Vol. 40, No. 4 (1996), pp. 1049–1063, www.jstor.org/stable/2111742.

public's view on a particular issue. This thesis, therefore, nuances discussion about the connections between the Court and public opinion.

The notion of image crafting and its relevance in a death penalty context is where this thesis contributes to this body of literature. Some work has looked to explore similar research questions about what influences decision-making, but has placed emphasis elsewhere and most significantly do not put forward the notion of image crafting in this context. For example, "Logical and Consistent? An Analysis of Supreme Court Opinions Regarding the Death Penalty," by Matthew B. Robinson and Kathleen M. Simon examines how the Justices justified their decisions in death penalty cases in the 1970s and 1980s.[17] Their work is comparable to this thesis in that it acknowledges that different explanations can explain inconsistencies in rationales, just as this thesis argues that different models of decision-making may better account for the rulings in different cases. Furthermore, this work is motivated by similar interests as this project – better understanding of the Court's decision-making – but differs in many ways. Most significant is that Robinson and Simon do not consider image crafting, nor do they look at methods cases due to the time frame and the date their work was written, which are fundamental aspects of this thesis. Similarly, Robinson and Simon's is a closer study of four cases, rather than an assessment of the Court's decisions in an entire category of case, this provides a more closely focused analysis of the Court's decision-making, allowing us to understand it better in these very narrow conditions. By considering just four cases it helps to provide a framework for thinking about the Court's decision-making on a smaller, more nuanced, scale. Similarly, "The Vicissitudes

[17] Matthew B. Robinson and Kathleen M. Simon, "Logical and Consistent?" An Analysis of Supreme Court Opinions Regarding the Death Penalty," *Justice Policy Journal*, Vol. 3, No. 1 (Spring 2006), pp. 1-59, http://www.cjcj.org/uploads/cjcj/documents/logical_and.pdf.

of Death by Decree: Forces Influencing Capital Punishment Decision Making in State Supreme Courts," by Melinda Gann Hall and Paul Brace demonstrates where we can gain an understanding of judicial decision-making from a different perspective, here at state level rather than at federal level. Here Gann and Brace argue that the discretion inherent in the system is exercised according to the Justice's preferences and other political calculations; a similar conclusion to that of this thesis, but based upon a different focus and set of evidence. However, Hall and Brace also find that the personal attributes of the Justices had an effect on voting in capital cases.[18] Considering decision-making at a different level helps to test theories of judicial decision-making on a larger scale (on account of there being far more federal judges), this lends credibility to these theories perhaps more so than when using Supreme Court Justices to assess them, as there is a wider pool of decisions and decision-makers that can be examined to inform these assessments.

This project is situated amongst other work which seeks to gain insights into the Court's decision-making, and which note the importance of the Justices views on the matter, but none make the link between image crafting and decision-making. There is a whole body of literature which considers the Court's relation to public opinion, but image crafting here is not about aligning the Court to public opinion on the death penalty per se. Rather, it is about crafting a favourable public image of the Court as an institution, an image of legitimacy. This is indeed linked to the Court not appearing to be out of step with the American people, hence its focus on evolving standards of decency, but the two are not

[18] Melinda Gann Hall and Paul Brace "The Vicissitudes of Death by Decree: Forces Influencing Capital Punishment Decision Making in State Supreme Courts," *Social Science Quarterly*, Volume 75, No. 1 (March 1994), pp. 136-151, https://capitalpunishmentincontext.org/files/resources/remedies/forcescappun.pdf.

the same. The biggest contribution that this thesis makes to the literature is the notion of image crafting in a death penalty context. There are lots of legal studies which analyse death penalty cases and lots of historical studies which explore the context of the Court's decision-making, but this project links the two. Through close textual analysis and contextualisation this thesis reveals what the Court is doing in its decision-making, how this compares across eligibility and methods cases, and highlights the inconsistencies which are covered up through the Court's image crafting.

Legal, Historical, and Political Context

Having situated this thesis amongst its broader field of scholarship, it is important to also provide some historical, political and legal context for the Court's decisions during the 1972-2019 period. The history of the death penalty in the United States is long and complex. As noted above, several texts outline its history from the colonies through to the present day. For this thesis, the history of the modern death penalty is relevant as it is important to understand the context in which the Court was operating and in which its decisions were being made. This helps to demonstrate where the Court's decisions aligned with, contradicted, and influenced the death penalty in the US. For this reason, a chronological outline of American society and politics surrounding the death penalty during this period merits exploring.

Both the Attitudinal and Strategic Models suggest that external factors influence the Court's decision-making either directly or indirectly. If these factors are influential, as these models suggest, then it is important to understand the context these decisions took place in so as to assess how far they shaped the Court's decision-making. Furthermore, such

context is useful when thinking about image crafting, to see what conditions the Court was attempting to establish its image in relation to.

Prior to the 1970s, the controversies and rhetoric surrounding the death penalty were much more subdued than they are today, and, "anyone suggesting that the nation's highest court would ever render a judgment like *Furman* would not have been taken seriously."[19] The idea that the Constitution barred all forms of execution was virtually unheard of until the 1960s when the anti-death penalty movement began to focus on the courts, rather than legislation, as a route to abolition. Herbert Haines notes that this view began to shift as a result of two law review articles published in 1961 which suggested that the death penalty could be open to attacks from litigators.[20] In the first, Gerald Gottlieb, an antitrust attorney, suggested that although capital punishment was accepted by the Framers at the time the Constitution was ratified, executions may still be seen to be inconsistent with contemporary societal standards and thus in violation of the Eighth Amendment.[21] In the second, Walter E. Oberer argued that excluding potential jurors who opposed the death penalty was more likely to produce juries who were more willing to hand down guilty verdicts which stacked the odds disproportionately against the defendant's claim of their innocence.[22] These articles struck a chord with anti-death penalty lawyers and highlighted the potential legal avenues to abolition which individuals such as Anthony Amsterdam - one of the leading lawyers in opposition to the death penalty in modern times - set out to

[19] Herbert H Haines, *Against Capital Punishment: The Anti-Death Penalty Movement in America*, *1972-1994*, p. 23

[20] Herbert H. Haines, *Against Capital Punishment: The Anti-Death Penalty Movement in America, 1972-1994*, p. 26.

[21] Gerald H. Gottlieb, "Testing the Death Penalty," *Southern California Law Review,* Vol. 34, No. 3 (Spring 1961), pp. 268-281, https://heinonline.org/HOL/P?h=hein.journals/scal34&i=280.

[22] Walter E. Oberer, "Does Disqualification of Jurors for Scruples Against Capital Punishment Constitute Denial of Fair Trial on Issue of Guilt," *Texas Law Review,* Vol. 39, No. 5 (May 1961), pp. 545-567, https://heinonline.org/HOL/P?h=hein.journals/tlr39&i=569.

pursue.[23] Jack Himmelstein of the National Association for the Advancement of Colored People's Legal Defense and Educational Fund (LDF) said of Amsterdam, his colleague and leading anti-death penalty lawyer, "The legal acceptance and historical force of the death penalty were considered a given… It was the power of Tony's mind and heart that said, 'That doesn't have to be the case.'"[24]

Alongside this, execution rates across the US began to decline: where in 1935, 199 executions occurred, by 1945 there were 117 and by 1955 only 76.[25] Between 1960 and 1976 there were 191 executions in total.[26] Polling data also reflected a decline in public support for the death penalty, reaching an all-time low of 42% in 1966, rising slightly by October 1971 to 49% from a Gallup poll high of 68% in 1953.[27] Public protests against the death penalty also began to increase. Attitudes were changing and this was feeding into how the death penalty was practiced, both in the US and internationally. In 1948 the UN adopted the Universal Declaration of Human Rights which included a right to life, and the UK abolished the death penalty in 1965. Indeed, it was clear that the climate in the US with regards to the death penalty was undergoing changes which the Court was eventually going to have to address.

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[23] Anthony Amsterdam is a lawyer and university professor. He worked for the NAACP Legal Defence and Educational Fund and was the lawyer who successfully argued on behalf of the petitioner in *Furman v. Georgia* (1972).

[24] Nadya Labi**,** **"**A Man Against the Machine," *NYU Law Magazine*, https://blogs.law.nyu.edu/magazine/2007/a-man-against-the-machine/.

[25] Jolie McLaughlin, "The Price of Justice: Interest-Convergence, Cost, and the Anti-death Penalty Movement," *Northwestern University Law Review*, Vol. 108, No. 2 (2014), pp. 675-710, p. 685.

[26] "History of the Death Penalty: The Abolitionist Movement*," Death Penalty Information Center*, https://deathpenaltyinfo.org/facts-and-research/history-of-the-death-penalty/the-abolitionist-movement.

[27] "History of the Death Penalty: The Abolitionist Movement*," Death Penalty Information Center*, https://deathpenaltyinfo.org/facts-and-research/history-of-the-death-penalty/the-abolitionist-movement. "Death Penalty," *Gallup*, https://news.gallup.com/poll/1606/death-penalty.aspx.

This period also saw the development of anti-death penalty groups across the nation. The LDF - founded in 1940 - which had been involved in defending black Americans in capital rape cases since the 1950s began to broaden its campaign. Explaining his support for abolition, LDF executive director Jack Greenberg, argued that, "One cannot ignore the prejudices, not merely racial, that bring a jury to select this man and not another for death, indeed to select any man for death for any crime."[28] New groups, such as Citizens Against Legalized Murder (CALM), the New Jersey Council to Abolish Capital Punishment, and the Ohio Committee to Abolish Capital Punishment, who were affiliated with the American League to Abolish Capital Punishment (ALACP) also emerged during this time.[29] This in turn spurred major civil rights organisation, the American Civil Liberties Union (ACLU), to overcome internal dissent about whether the death penalty was within their remit and adopt an official position against capital punishment in 1965 and to develop a "Capital Punishment Project" in the 1970s to, "help coordinate the activities of anti-death penalty organizations throughout the country."[30] This demonstrated that the death penalty was coming to be seen as a civil rights issue and a facet of a much larger debate surrounding civil rights in the US. The result of such action was that between 1957 and 1965 abolition bills were passed in Delaware, Oregon, West Virginia, Hawaii, and Alaska, and Vermont, New York, and New Mexico enacted legislation limiting the death penalty to "extraordinary offenses."[31] These state-level victories and dip in support for executions led to a push

[28] James A. McCafferty, *Capital Punishment*, (Chicago: Aldine/Atherton Inc., 1972), p. 235.
[29] "History," *NAACP Legal Defense and Educational Fund*, https://www.naacpldf.org/about-us/history/. Herbert H. Haines, *Against Capital Punishment: The Anti-Death Penalty Movement in America, 1972-1994*, p. 25. Jolie McLaughlin, "The Price of Justice: Interest-Convergence, Cost, and the Anti-death Penalty Movement," p. 685.
[30] Jolie McLaughlin, "The Price of Justice: Interest-Convergence, Cost, and the Anti-death Penalty Movement," p. 685.
[31] Jolie McLaughlin, "The Price of Justice: Interest-Convergence, Cost, and the Anti-death Penalty Movement," p. 685.

amongst anti-death penalty campaigners to challenge the constitutionality of the death penalty and leading civil liberties groups such as the LDF and the ACLU provided valuable legal assistance.

Lawyers from both the LDF and the ACLU spearheaded the tactic of using the courts as a route to abolition by challenging the constitutionality of the death penalty. As well as the articles from Gottlieb and Oberer this approach was, in part, sparked by a memo by Supreme Court Justice Arthur Goldberg, circulated to the justices in 1963 and later circulated in legal communities. In the memo Goldberg expressed his view that, whilst the other Justices may not agree with his view that the death penalty was barbaric, they should still consider the Eighth and Fourteenth Amendment issues involved, suggesting that the Court may be receptive to constitutional arguments against the death penalty. This "rang like an alarm clock in the offices of civil rights lawyers."[32] Evidence of Goldberg's doubts about the death penalty further emerged in a dissent against the Court's decision not to grant certiorari in *Rudolph v. Alabama* (1963). This case examined whether the Eighth and Fourteenth Amendments to the Constitution permitted the imposition of the death penalty on a convicted rapist who had neither taken nor endangered human life. Goldberg argued that the Court needed to address three questions:

> Whether, in view of the worldwide trend against the death penalty as a punishment for rape, such an application is a violation of the "evolving standards of decency" that go along with the moral evolution of society… whether death is a disproportionate penalty for any crime in which no life

[32] Herbert H. Haines, *Against Capital Punishment: The Anti-Death Penalty Movement in America, 1972-1994*, p. 26. Stuart Banner, *The Death Penalty: An American History*, p. 250.

> is taken… and whether lesser punishments can serve the same legal purposes as execution — thus making death for rape "unnecessary cruelty."[33]

As Banner notes, "the effect of Goldberg's dissent was to concentrate death penalty litigation in the hands of a few extremely intelligent and highly motivated lawyers with considerable experience in persuading courts to adopt new legal positions."[34] Goldberg later disclosed to his wife that this was what he intended to happen.[35]

LDF and ACLU anti-death penalty activists planned to try to stop all executions whilst simultaneously challenging the death penalty on constitutional grounds, creating a backlog of death-row prisoners and demonstrating to the American people that they could do without executions.[36] 1966 saw the development of a moratorium strategy aimed at "shifting the legal and moral pressures onto those who would restart the implementation of capital punishment," after its decline in use during the 1960s.[37] Very few governors were willing to preside over mass executions, and thus the burden shifted to the courts.[38] Amsterdam and the LDF began an education campaign, circulating draft documents of legal arguments outlining how current death penalty statutes violated the Fourteenth Amendment in order to equip legal representatives around the US with a means of intervening in hundreds of death penalty cases across the country.[39] In the words of LDF

[33] Herbert H. Haines, *Against Capital Punishment: The Anti-Death Penalty Movement in America, 1972-1994*, p. 26.
[34] Stuart Banner, *The Death Penalty: An American History*, p. 250.
[35] Stuart Banner, *The Death Penalty: An American History*, p. 250.
[36] Michael Meltsner, "Litigating against the Death Penalty: The Strategy behind Furman," *The Yale Law Journal,* Vol. 82, No. 6 (May, 1973), pp. 1111-1139, p. 1113, https://www.jstor.org/stable/795558.
[37] Roger E. Schwed, *Abolition and Capital Punishment: The United States' Judicial, Political, and Moral Barometer*, p. 107.
[38] Michael Meltsner, "Litigating against the Death Penalty: The Strategy behind Furman," p. 1113.
[39] Michael Meltsner, "Litigating against the Death Penalty: The Strategy behind Furman," p. 1113.

fund lawyer, Amsterdam, the result would be that, "the courts would then have to face the awful reality that a decision in favor of capital punishment would start the bloodbath again," or they would have to abolish capital punishment.[40] The LDF and ACLU were, of course, hoping for the latter.

In 1968 the LDF organised a National Conference on Capital Punishment to outline how they planned on implementing this moratorium. Over one hundred lawyers and advocates were in attendance as they sought to develop, "a more cohesive litigation strategy for ending the death penalty."[41] At the conference, "the LDF indicated that it wanted to concentrate solely on its legal campaign, and not on educating the legislatures or the populace at large," and thus the tactic of pursuing a legal route to abolishing the death penalty began in earnest.[42] The LDF outlined the arguments it felt the Justices of the Supreme Court may be more receptive to: to show racial discrimination in capital sentencing; to attack the practice of using death-qualified juries; to attack the use of a single trial in determining both the guilt and the sentence of the defendant; and lastly, that it was unconstitutional to leave decisions of life and death in the "unfettered" hands of a jury.[43] When considering the substantive use of Eighth Amendment challenges in death penalty litigation in more recent decades and how it is now perhaps the most dominant legal challenge which anti-death penalty lawyers will pursue, it is noteworthy that, at this time, the LDF did not consider attacking capital punishment on the basis that it was

[40] Roger E. Schwed, *Abolition and Capital Punishment: The United States' Judicial, Political, and Moral Barometer*, p. 108.
[41] Jolie McLaughlin, "The Price of Justice: Interest-Convergence, Cost, and the Anti-death Penalty Movement," p. 686.
[42] Roger E. Schwed, *Abolition and Capital Punishment: The United States' Judicial, Political, and Moral Barometer*, p. 113.
[43] Roger E. Schwed, *Abolition and Capital Punishment: The United States' Judicial, Political, and Moral Barometer*, p. 113-117.

unconstitutional under the Eighth Amendment's clause against "cruel and unusual punishment" as posing a strong chance of success.[44] Indeed, during the conference, Amsterdam stressed the "limited value of the Eighth Amendment as a legal argument."[45]

At federal level, Congress did not present a favourable route for abolition. A memo from one of Justice Harry Blackmun's law clerks (signed MAL) suggests that the Court was aware of this, noting that,

> Bills have been introduced to the House to eliminate the death penalty for crimes punishable under any law of the United States, the District of Columbia, Puerto Rico and the territories and possessions, and to 'suspend the death penalty for two years.' It is my understanding that no action has been taken on the bills. In March and July, 1968, Senator Hart held hearings on S 1760, a bill to abolish the death penalty under the laws of the United States. It seems that Hart was the only Senator to participate in the hearings and that no action was taken on the bill.[46]

This suggests that the Court was aware of the position it was in as the anti-death penalty movement's best hope for abolition and as a branch of government more sympathetic to their cause. This perhaps put more pressure on those Justices who opposed the death penalty and made their decision higher stakes, as it appeared at the time that the only route for abolition rested in the hands of Justices. Thus, it was important for them to forcefully articulate their arguments and to try to bring as many other Justices around to

[44] Roger E. Schwed, *Abolition and Capital Punishment: The United States' Judicial, Political, and Moral Barometer*, p. 118.
[45] Roger E. Schwed, *Abolition and Capital Punishment: The United States' Judicial, Political, and Moral Barometer*, p. 118.
[46] Blackmun Papers - Memo January 26th 1972 from MAL, Box 135, 69 5003 *Furman v. Georgia*.

their position, or as close to it, as possible. However, the opinions by Justices Blackmun, William Rehnquist, and Chief Justice Warren E. Burger in *Furman*, in which deference to the legislature was stressed, indicate that this lack of opportunity for abolition via Congress did not persuade some Justices of the merits of abolition via the Court. In fact, it may have had the opposite effect as it convinced them that judicial deference was necessary in order to maintain a legitimate public image of the Court and for it not to be seen as activist.

The pressure was mounting on the Court to address the death penalty issue. By 1972 the death penalty had been abolished in nine states, a further four had no individuals on death row, and anti-death penalty bills were being debated by legislatures in Massachusetts and California. More prisoners than ever were appealing their cases and winning. Between 1945 and 1960 criminal cases represented 14-17% of state Supreme Court business, but between 1965 and 1970 represented 28%.[47] The issue of criminal rights, driven by the Warren Court, was becoming more salient in the US and the death penalty was part of this trend. Furthermore, a March 1972 memo from Justice Blackmun to the Supreme Court conference shows that during the time the Court was looking at *Furman* there were, "about 15 new capital cases that have accumulated this term."[48] This shows that questions surrounding the death penalty were building, with no answers provided, and pressure for clarity from the Court was increasing. The efforts of the anti-death penalty movement and of specific groups such as the LDF culminated in the Supreme Court decision in *Furman v. Georgia* in 1972. In this decision, the Court held that the death penalty was unconstitutional as applied at the time. The *per curiam* opinion held that the death penalty violated the

[47] Stuart Banner, *The Death Penalty: An American History*, p. 246.
[48] Blackmun Papers - Memorandum to the Conference March 27th 1972, Box 135, 69 5003 *Furman v. Georgia*.

Constitution as it was then applied, but did not explicitly state that it was unconstitutional in all cases.

During the period in which *Furman* was decided, crime and punishment was a major issue in the US. Alongside the civil unrest and urban uprisings seen during the 1960s, crime rates had increased, with reported street crime quadrupling and the homicide rate doubling.[49] Drug use - in particular the growing use of heroin - urbanisation, and unemployment were the main components in this increase in crime. A 1969 poll found that 81% of Americans believed that law and order had broken down, and private polls commissioned by the Democrats found that, "law and order was an immediate, personal priority with virtually all Americans."[50] Perceptions of this unrest and violence varied. Many liberals viewed this as a result of structural inequalities in contrast to conservatives who viewed these issues as proof that liberal policies towards crime had failed and that a tougher stance on crime was needed.[51] Michael Flamm succinctly articulated the feelings of many:

> "At a popular level, law and order resonated both as a social ideal and political slogan because it combined an understandable concern over the rising number of traditional crimes — robberies and rapes, muggings and murders—with implicit and explicit unease about civil rights, civil liberties, urban riots, anti-war protests, moral values, and drug use."[52]

[49] Desai Bindu, "The Crime of Cruel and Unusual Punishment in the US," *Economic and Political Weekly*, Vol. 48, No. 51 (2013), p. 29-33, p. 31.
[50] Desai Bindu, "The Crime of Cruel and Unusual Punishment in the US," p. 163.
[51] Mical Raz, "Treating Addiction or Reducing Crime? Methadone Maintenance and Drug Policy Under the Nixon Administration," *Journal of Policy History*, Vol. 29, No. 1 (January, 2017), pp. 58–86, p. 61.
[52] Michael W. Flamm, *Law and Order: Street Crime, Civil Unrest, and the Crisis of Liberalism in the 1960s*, (Columbia University Press, 2005), p. 4.

It was President Richard Nixon's belief that this shift in society had stemmed from the liberalism of the 1960s which had, "adopted an overly tolerant or 'permissive' attitude toward social deviance", which in turn led to a "decline in respect for public authority and the rule of law."[53] In response to this unrest and growth in crime, a key component of Nixon's 1968 presidential campaign was his law-and-order agenda. This came to be a dominant theme of Nixon's presidential race, with Nixon making seventeen speeches solely addressing law and order.[54] Historians such as Flamm identify this policy as being crucial in determining Nixon's electoral success, arguing that, "law and order was the most important domestic issue in the presidential election and arguably the decisive factor in Richard Nixon's narrow triumph over Hubert Humphrey."[55]

This law-and-order agenda applied not only to legislation, but also to Nixon's approach to the judiciary. Many conservatives, Nixon included, believed that liberal policy had also contributed to civil unrest by seemingly prioritising the rights of accused criminals over law enforcement officials. This was most evident in the judicial branch under the Warren Court. Decisions such as *Gideon v. Wainwright* (1963), *Escobedo v. Illinois* (1964), and *Miranda v. Arizona* (1966) which guaranteed the right to assistance of counsel at trial, then upon arrest, and required that law enforcement officials advise suspects of their right to remain silent and to an attorney, respectively, were subject to strong criticism from conservatives and were seen as, "a hindrance to police seeking to hold back a tide of barbarism."[56] Many

[53] Richard Nixon, "What Has Happened to America?", *The Reader's Digest*, October 1967, pp. 49-54. Reprinted with permission from the October 1967, https://college.cengage.com/history/ayers_primary_sources/nixon_1967.htm.
[54] Mical Raz, "Treating Addiction or Reducing Crime? Methadone Maintenance and Drug Policy Under the Nixon Administration," p. 61.
[55] Michael W. Flamm, *Law and Order: Street Crime, Civil Unrest, and the Crisis of Liberalism in the 1960s*, p. 2.
[56] Doug Rossinow, *The Reagan Era: A History of the 1980s*, (Columbia University Press, 2015) www.jstor.org/stable/10.7312/ross16988, p. 148.

criticised the Court's poor timing as Justices, "chose to ramp up the level of constitutional regulation of state and local criminal justice at a time when crime was rising sharply and criminal punishment was falling substantially."[57] Despite his endorsement of Warren as Chief Justice when he was Vice President, by 1968 Nixon had retracted this, denounced the work of the Warren Court, and was outspoken in his criticism of the Warren Court's decisions regarding criminal defendants.[58] Nixon attributed the blame for America's "lawless society" to judges "who have gone too far in weakening the peace forces against the criminal forces," and believed that the Warren Court, "had twisted the Constitution to serve its own purposes, created a maze of legal technicalities that worked only to frustrate legitimate law enforcement efforts."[59] In his May 8th 1968 address, "Toward Freedom from Fear" Nixon decried that the, "barbed wire... legalisms that a majority of one of the Supreme Court has erected to protect a suspect from invasion of his rights has effectively shielded hundreds of criminals from punishment as provided in the prior laws."[60] One of the many ways Nixon pledged to achieve a tougher response to crime was through nominating Justices who would interpret the Constitution strictly and fairly and objectively.[61] It was his belief that Justices with strict constructionist views – those who interpret the Constitution literally and as it is written - "could be expected not only to put

[57] William, J. Stuntz, *The Collapse of American Criminal Justice*, (Cambridge, MA: Harvard University Press, 2011), p. 228.
[58] William, J. Stuntz, *The Collapse of American Criminal Justice*, p. 228.
[59] Richard Nixon, "Address Accepting the Presidential Nomination at the Republican National Convention in Miami Beach, Florida," August 8th 1968, *The American Presidency Project*, https://www.presidency.ucsb.edu/documents/address-accepting-the-presidential-nomination-the-republican-national-convention-miami. Jerold, H. Israel., "Criminal Procedure, the Burger Court, and the Legacy of the Warren Court." In F.G. Lee (ed.), Neither *Conservative nor Liberal: The Burger Court in Civil Rights and Liberties*, (Malabar: Krieger Publishing Company, 1983), pp. 80-100, p. 80.
[60] Richard Nixon, Remarks in New York City: "Toward Freedom from Fear," May 8th 1968, *The American Presidency Project,* https://www.presidency.ucsb.edu/documents/remarks-new-york-city-toward-freedom-from-fear.
[61] Jerold, H. Israel., "Criminal Procedure, the Burger Court, and the Legacy of the Warren Court," In F.G. Lee (ed.), Neither *Conservative nor Liberal: The Burger Court in Civil Rights and Liberties*, (Malabar: Krieger Publishing Company, 1983), pp. 80-100, p. 80.

an end to the creation of further legal rights for the accused, but might even trim back on some of the Warren Court 'excesses'."[62]

Following electoral victory, the Nixon administration acted upon the tough-on-crime rhetoric espoused during the 1968 campaign which was ridden with racial undertones. The president brought his law-and-order message to the forefront of the fight against drug abuse. "A national awareness of the gravity of the situation is needed," read President Nixon's special message to Congress on control of narcotics of July 14, 1969.[63] "A new urgency and concerted national policy are needed at the Federal level to begin to cope with this growing menace to the general welfare of the United States."[64] One manifestation of this was the 'War on Drugs', the "most expansive antidrug campaign in American history," which developed between 1969 and 1971.[65] Nixon's 'War on Drugs' offered further opportunity for discussion of crime and punishment within the United States, which fed into the perception of the development of a lawless and dangerous culture which threatened the nation. Nixon publicly commented that a, "tide of drug abuse … has swept America in the last decade," and warned that, "the problem has assumed the dimensions of a national emergency."[66] Nixon's language when discussing drug use in America showed that he viewed this crusade as being like fighting a war on a domestic front. In public

[62] Jerold, H. Israel., "Criminal Procedure, the Burger Court, and the Legacy of the Warren Court," p. 80.
[63] Richard Nixon, "Special Message to the Congress on Control of Narcotics and Dangerous Drugs," July 14th 1969, *The American Presidency Project*, https://www.presidency.ucsb.edu/documents/special-message-the-congress-control-narcotics-and-dangerous-drugs.
[64] Richard Nixon, "Special Message to the Congress on Control of Narcotics and Dangerous Drugs," July 14th 1969, *The American Presidency Project*, https://www.presidency.ucsb.edu/documents/special-message-the-congress-control-narcotics-and-dangerous-drugs.
[65] Jeremy Kuzmarov, *The Myth of the Addicted Army: Vietnam and the Modern War on Drugs*, (Massachusetts: University of Massachusetts Press, 2009) www.jstor.org/stable/j.ctt5vk836 , p. 101. Matthew R. Pembleton, *Containing Addiction: The Federal Bureau of Narcotics and the Origins of America's Global Drug War*, (University of Massachusetts Press, 2017), p. 8.
[66] Matthew R. Pembleton, *Containing Addiction: The Federal Bureau of Narcotics and the Origins of America's Global Drug War*, p. 288.

comments widely believed to have marked the start of the 'war on drugs,' Nixon described drug abuse as, "America's public enemy number one," arguing that the US must, ""wage a new, all- out offensive."[67]

During his time in office Nixon was able to transform the make-up of the Court, making four appointments in just three years. Nixon succeeded in putting four conservative Justices on the Court: 1969 saw the replacement of Chief Justice Warren with Warren E. Burger, in 1970 Harry Blackmun replaced Abe Fortas, in 1972 Lewis Powell replaced Hugo Black, and that same year Rehnquist, the most conservative of Nixon's nominees, replaced John Marshall Harlan.[68] After Burger's confirmation Anthony Lewis, a liberal columnist for the *New York Times*, wrote, "When Warren E. Burger succeeded Earl Warren as Chief Justice of the United States in 1969, many expected to see the more striking constitutional doctrines of the Warren years rolled back or even abandoned."[69] These Justices were put on the Court because Nixon believed that they would take a hard stance on criminal rights issues. It was framed as though this was because of their various judicial philosophies, but it is likely that these Justices were also nominated in part because their personal views also aligned with what Nixon was trying to achieve. Of Nixon's nominees, all four would initially vote to uphold the death penalty, with only Blackmun later changing position on the issue. Nixon's aim to put conservatives on the Court was successful, and this impacted on death penalty decisions to come.

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[67] Richard Nixon, "Remarks About an Intensified Program for Drug Abuse Prevention and Control," June 17th 1971, *The American Presidency Project*, https://www.presidency.ucsb.edu/documents/remarks-about-intensified-program-for-drug-abuse-prevention-and-control.

[68] "Justices 1789 to Present", *Supreme Court of the United States*, https://www.supremecourt.gov/about/members_text.aspx

[69] Anthony Lewis, "A Talk with Warren on Crime, the Court the Country," *The New York Times*, (19th October 1969).

At the time *Furman* came before the Court in 1972, there were many external factors at play. The federal government had spent the past three years attempting to crack down on crime and drug use in the US and the makeup of the Court was more conservative than it had been for some years. Yet perhaps surprisingly, these policies and public concern about high crime rates did not translate into pro-death penalty sentiment at this point. A May 1966 Gallup poll found that only 42% of Americans favoured the death penalty for a person convicted of murder, the lowest level in Gallup's death penalty polling thus far, and by 1972 still only 50% were in favour.[70] It is noteworthy that two branches of government, the executive and legislative, were going in one direction with regards to crime and punishment, but in the case of the death penalty, the most extreme form of punishment, the Court ultimately went in the other direction. The Court made the distinction that a public that favoured a tough on crime stance from the government did not necessarily demand the greater use of the death penalty. In the various opinions in *Furman* the Court tapped into a range of concerns surrounding the administration of the death penalty at the time and so were able to get a rounded view of the issue and this distinction became clearer. Many of the more conservative Justices on the Court, however, stated that they would simply have deferred to the legislature, thus producing a result that would actually have gone against public opinion, the more in-depth and wider ranging discussion from those who formed the plurality brought the Court's opinion more in line with the public's views.

[70] "Death Penalty," *Gallup*, https://news.gallup.com/poll/1606/death-penalty.aspx.

In a memo to Justice Brennan shortly after the *Furman* decision, Justice William O. Douglas wrote: "I hope total abolition is what we accomplished."[71] Whilst *Furman* was a successful result for the anti-death penalty movement, this success was short-lived. Douglas's hopes were not to be realised, and instead the reaction from many states was to simply redraft their death penalty statutes, rather than abandon the death penalty altogether. In the immediate aftermath of *Furman,* prisoners around the country on death row had their sentences commuted to life without parole, but support for the death penalty continued to increase, reaching 66% by April 1976.[72] Crime was continuing its upward trend during this period and the vast majority of the American people favoured a tough approach to crime which meant that, "it was inevitable that the states would pass new death penalty legislation", or risk appearing "soft, as the tough on crime rhetoric gripping the nation finally made its way through to the death penalty where it had not before."[73] As a result, the states began reacting to the *Furman* decision immediately, with each state legislature interpreting the Court's murky decision in *Furman* as best as they could when enacting new death penalty statutes. By the time the Court heard its next death penalty case, *Gregg v. Georgia*, in 1976, thirty-four states had restored capital punishment and over 600 people had been sentenced to death.[74]

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[71] Handwritten note attached to letter from the Library of Congress dated July 21st 1972, Part II: Supreme Court File, 1952-1980, Box 1541, *Capital Punishment, 1967-1973*, William O. Douglas Papers, Manuscript Division, Library of Congress, Washington, D.C. (Hereafter Douglas Papers).

[72] "Death Penalty," *Gallup*, https://news.gallup.com/poll/1606/death-penalty.aspx.

[73] R. Schwed, *Abolition and Capital Punishment: The United States' Judicial, Political, And Moral Barometer*, p. 143. Hugo Adam Bedau, "Gregg v. Georgia and the New Death Penalty," *Criminal Justice Ethics* Vol. 4, No. 2 (Summer/Fall 1985), p. 4.

[74] Edward Lazarus, Closed *Chambers: The Rise, Fall, and Future of the Modern Supreme Court*, p. 107. The exact number of death sentences is unclear, other scholars such as R. Schwed in *Abolition and Capital Punishment*, p. 145, have listed number as being as high as 611 people whereas others such as Jan Górecki, in *Capital Punishment: Criminal Law and Social Evolution* (New York: Columbia University Press, 1983), p. 17 put the number lower at 460.

The reaction of the states to the Court's ruling in *Furman* varied widely. Whilst there were differences amongst these newly developed death penalty statutes, one thing was very clear: *Furman* was not a step towards abolition, rather it was a step towards ensuring equality of application, and, "The speed with which all this legislation was passed was a testimonial to the nation's fervent desire to have capital punishment laws on the books."[75] Only two states, North Dakota and Vermont, abolished the death penalty after their statutes were invalidated by *Furman*.[76] Because the Court did not set clear guidelines for the states to follow when enacting new death penalty legislation, responses ranged from enacting mandatory sentencing schemes to passing legislation for guided discretion in sentencing, to constitutional amendments.[77]

Perhaps the most controversial of these statutes was mandatory sentencing, enacted by many states as a remedy to arbitrariness. These were put into place through various means including by judicial fiat, enacting mandatory death penalty statutes for a specific list of crimes, and constitutional amendments.[78] On one hand it was viewed that arbitrariness could be avoided by removing the element of choice in sentencing an individual convicted of a capital offence.[79] This, however, did not fit with the accepted practice of individualised sentencing, and, "it flew directly in the face of an unswerving historical development against tying the trial court's hands in capital sentencing."[80] On the other hand, some states such as Florida, Texas, and Georgia adopted an alternative approach and required juries to consider the mitigating and aggravating circumstances in the case when making their

[75] R. Schwed, *Abolition and Capital Punishment*, p. 144.
[76] "State by State," *The Death Penalty Information Center*, https://deathpenaltyinfo.org/state-and-federal-info/state-by-state.
[77] See R. Schwed, *Abolition and Capital Punishment*, p. 144 for further details.
[78] R. Schwed, *Abolition and Capital Punishment*, p. 144.
[79] Hugo Adam Bedau, "*Gregg v. Georgia* and the New Death Penalty," p. 4.
[80] Hugo Adam Bedau, "*Gregg v. Georgia* and the New Death Penalty," p. 4.

decision, allowing for guided discretion in death penalty sentencing.[81] The individuals sentenced to death during this time were in limbo as it remained unclear which of the many death penalty statutes enacted since 1972 were permissible under *Furman* and so those sentenced could not be executed by the state. As Douglas Kolly notes, these statutes were, "no more than an interpretation," of *Furman* and so clarification and guidance from the Court was desperately needed.[82] New Jersey Governor, Brenan Byrne, even went so far as to decide to wait until the Court addressed what was constitutionally permissible before signing any new capital punishment legislation.[83]

With regards to the anti-death penalty movements, the years following *Furman* saw campaigners and groups once again have to shift their tactics and focus. This time switching from a campaign mounted towards the Court, back to a campaign focused on state legislatures and trying to persuade them to abolish their death penalty statutes rather than redraft those which were declared unconstitutional by *Furman*.[84] Ultimately, the conditions under which the next death penalty case that came to the Court was decided in 1976 were considerably less favourable for the anti-death penalty movement than they had been four years prior.[85]

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[81] Douglas Kolly, "*Gregg v. Georgia*: The Search for the Civilized Standard," p, 651. R. Schwed, *Abolition and Capital Punishment*, p. 144.
[82] Douglas Kolly, "*Gregg v. Georgia*: The Search for the Civilized Standard," p, 652.
[83] R. Schwed, *Abolition and Capital Punishment*, p. 144.
[84] Jolie McLaughlin, "The Price of Justice: Interest-Convergence, Cost, and the Anti-death Penalty Movement," p. 688. Further histories of the anti-death penalty at this time can be found in: Herbert Haines, "Flawed Executions, the Anti-Death Penalty Movement, and the Politics of Capital Punishment," pp. 125–138., www.jstor.org/stable/3097033, Hadar Aviram, and Ryan Newby, "Death Row Economics: The Rise of Fiscally Prudent Anti-Death Penalty Activism," *Criminal Justice*, Vol. 28, No. 1 (2013), pp. 33-40.
[85] See: Herbert H. Haines, *Against Capital Punishment: The Anti-Death Penalty Movement in America, 1972-1994*. Hadar Aviram, and Ryan Newby, "Death Row Economics: The Rise of Fiscally Prudent Anti-Death Penalty Activism," *Criminal Justice*, No. 1 (2013). George Brauchler, and Rich Orman, "Lies, Damn Lies, and Anti-Death Penalty Research," *Denver Law Review*, Vol. 93, No. 3 (July 2016) pp. 635–714. Herbert Haines, "Flawed Executions, the Anti-Death Penalty Movement, and the Politics of Capital Punishment," pp. 125–138, www.jstor.org/stable/3097033. Marnie Lowe, "Resonance, Radicalism, and the Death Penalty: A Framing

In 1976 the Court revisited the issue of the death penalty. This time the Court reaffirmed the constitutionality of the death penalty and stated that, if carefully employed, it could be administered in a constitutionally permissible way. When *Gregg* was decided in 1976 death sentences had begun increasing dramatically with 137 death sentences handed down in 1977 alone, reaching 315 in 1996.[86] The death row population grew from more than 400 in 1977 to 3,600 at its peak in 2000.[87] The number of executions also began to rise, in 1984 it hit double digits with 21 executions, and this peaked at 98 executions in 1999, and between 1977 and 2019 1,512 executions were carried out.[88] One lawyer who clerked at the Supreme Court in the late 1990s noted that, "The late 90s was a time when the death penalty was being rather vigorously enforced by a number of states. There was a large number of executions that took place the year that I clerked..."[89]

The resurgence of executions and death penalty sentencing occurred as part of a wider crackdown on crime during this time. Spurred by political rhetoric the 1970s – 1990s saw a late modern punitive turn of which capital punishment was a part. Legislators and law enforcement officials moved away from penological goals of rehabilitation and turned instead to retribution and punishment. As a result, Americans were far more willing to

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Analysis of the Anti-Death Penalty Movement, 1965-2014" (April 2018), https://escholarship.org/content/qt9sg5t66n/qt9sg5t66n.pdf.

[86] "Death Sentences in the United States Since 1977," *Death Penalty Information Center*, https://deathpenaltyinfo.org/facts-and-research/sentencing-data/death-sentences-in-the-united-states-from-1977-by-state-and-by-year. Austin Sarat, Robert Kermes, Haley Cambra, Adelyn Curran, Margaret Kiley, and Keshav. Pant, "The Rhetoric of Abolition: Continuity and Change in the Struggle Against America's Death Penalty, 1900-2010," *Journal of Criminal Law & Criminology*, Vol. 107, No.4 (Fall 2017), pp. 757-780, p. 758, https://scholarlycommons.law.northwestern.edu/jclc/vol107/iss4/6.

[87] "A Continuing Conflict: A History of Capital Punishment in the United States," *Gale Essential Overviews: Scholarly*, Gale, (2016), https://www.gale.com/open-access/death-penalty.

[88] "A Continuing Conflict: A History of Capital Punishment in the United States," *Gale Essential Overviews: Scholarly*, Gale, (2016), https://www.gale.com/open-access/death-penalty. "Executions Overview," *Death Penalty Information Center*, https://deathpenaltyinfo.org/executions/executions-overview.

[89] 'Ezra' Interview. Conducted by Catriona Bide, 9th September 2020.

support both greater use of the death penalty and the expansion of the prison system.[90] Thus a rise in both executions and incarceration rates happened simultaneously. Marie Gottschalk noted how the debates on the death penalty in the 1970s helped to contribute to the construction of the carceral state, "Because capital punishment had been anchored for decades in the judicial system, the legal debate surrounding the death penalty set up important parameters that helped lock in the carceral state."[91] As Elizabeth Hinton notes, the War on Drugs should be viewed as just one component of a larger set of anticrime policies primarily focused on black youths and their families but which ensnared millions of Americans.[92] The rise in executions and death sentences occurred alongside a rise in the incarceration of black Americans, as by the mid-1990s when execution rates were almost at a peak the combined incarceration (prison and jail) rate for adult black males in the United States was nearly 7,000 per 100,000 compared to about 1,000 per 100,000 for adult white males.[93] Alongside this, by 1996 the incarceration rate for drug offenders had increased more than nine-fold, to 148 per 100,000.[94] The 1980s and 1990s saw incarceration become, "de facto urban policy for impoverished communities of colour in America's cities."[95] Capital punishment was just one facet of a larger rise in incarceration and in a clamp down on crime. During the Clinton administration the prison population grew from 1.3 million to 2 million and the number of executions to ninety-eight.[96] As

[90] Marie Gottschalk, *The Prison and the Gallows: The Politics of Mass Incarceration in America*, (Cambridge University Press, 2006), p. 33.
[91] Marie Gottschalk, *The Prison and the Gallows,* p. 234.
[92] Elizabeth, Hinton, *From the War on Poverty to the War on Crime: The Making of Mass Incarceration in America*, (Harvard University Press, 2016), p.11.
[93] Marie Gottschalk, *The Prison and the Gallows*, p. 19.
[94] Marie Gottschalk, *The Prison and the Gallows*, p. 31.
[95] Robert T. Chase, *Caging Borders and Carceral States: Incarcerations, Immigration Detentions, and Resistance*, (The University of North Carolina Press, 2019), p. 347.
[96] Robert T. Chase, *Caging Borders and Carceral States,* p. 347.

Gottschalk noted, "The persistence of capital punishment is another key feature of the U.S. carceral state."[97]

Related to this, the war against immigration and the detention of migrants functioned within the larger context of increasing mass incarceration in the US. The Reagan administration's calls to expand the carceral states through its War on Drugs reflected its other goals of containing and reducing Latin American mass migration through increasing law enforcement functions.[98] Migration became increasingly criminalised in the 1980s in what scholars termed "crimmigration" and as such detention and imprisonment became virtually indistinguishable.[99]

The growth in the number of executions and death sentences, however, was not sustained and the turn of the century saw these numbers slowly start to decline. In 2016 only 13 states imposed death sentences, and just 31 defendants were sentenced to death.[100] The rate of change in this area has been fast, from 1996–2000, there were almost 500 different counties that imposed death, whereas in 2016 this was only 26 counties, and only one county, Los Angeles, sentenced more than one person to death.[101] From 1972-2019 11 States abolished the death penalty and three more introduced gubernatorial moratoriums.[102] The decline in the number of death sentences and executions, and in

[97] Marie Gottschalk, *The Prison and the Gallows*, p. 22.
[98] Kristina, Shull, *Detention Empire: Reagan's War on Immigrants and the Seeds of Resistance*, (University of North Carolina Press, 2022), http://www.jstor.org/stable/10.5149/9781469669885_shull, p. 2.
[99] Kristina, Shull, *Detention Empire*, p. 3.
[100] Ankur Desai, and Brandon L. Garrett, "The State of the Death Penalty," *Notre Dame Law Review*, Vol. 94, (2019), pp. 1255-1312, p. 1255, https://scholarship.law.duke.edu/faculty_scholarship/3829.
[101] Brandon L. Garrett, "Rare as Hens' Teeth: The New Geography of the American Death Penalty," *American Bar Association*, (1st January, 2017), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/2016-17-vol-42/vol--42--no--2---the-death-penalty--how-far-have-we-come-/rare-as-hens_-teeth--the-new-geography-of-the-american-death-pen/.
[102] "State by State," *Death Penalty Information Center*, https://deathpenaltyinfo.org/state-and-federal-info/state-by-state.

support for the death penalty are intertwined. Public opinion turning against the death penalty meant that juries were less likely to accept the death penalty except for the most extreme circumstances. Elected officials such as governors, prosecutors, legislators were less willing to push for death sentences as it would not serve them politically, and eventually many states passed legislation to remove the death penalty from their books which was supported by a majority in the state. All of this contributed to the decline in death sentences and executions.

As Ankur Desai and Brandon Garrett note, "The rate of change and the 'consistency of the direction of change' in the past two decades is marked."[103] Where public support for the death penalty increased steadily throughout the 1970s, reaching 80% by the 1980s and 1990s and with less than 20% of Americans opposed, this began a slow decline since the mid-1990s, reaching a low of just 55% of Americans supporting the death penalty in 2017 bringing support in a circle back to earlier levels when 59% supported the death penalty in 1953.[104] As Frank Baumgartner points out this decline in support has been slow for two reasons, firstly because, "the issue has limited salience," as it does not directly affect most Americans, and also because, "most Americans' views on the death penalty are closely linked to their moral or religious sentiments," and for most people these views do not change over time.[105]

[103] Ankur Desai, and Brandon L. Garrett, "The State of the Death Penalty," p. 1293.
[104] Frank R. Baumgartner, et al., *The Decline of the Death Penalty and the Discovery of Innocence*, (Cambridge University Press, 2008), p. 45, p.7. "Death Penalty," *Gallup*, https://news.gallup.com/poll/1606/Death-Penalty.aspx. Frank R. Baumgartner, et al., *The Decline of the Death Penalty and the Discovery of Innocence*, p. 179.
[105] Frank R. Baumgartner, et al., *The Decline of the Death Penalty and the Discovery of Innocence*, p.182.

Other factors also played a role. From the mid-1990s there was a national decline in murder rates, and in crime rates more generally.[106] By the end of the 1990s the homicide rate in the US had fallen for eight years running, from 9.8% per 100,000 in 1991 to 5.8% in 1999, back to levels last seen in the 1960s before the murder rate increased drastically. The rate of violent crime also dropped by almost a third between 1993 and 1999.[107] Secondly, the late 1980s and 1990s saw a vast increase in the number of states enacting life without parole (LWOP) sentencing.[108] By the mid-1990s LWOP was available as a sentence for murder in about half of the states, and today is authorised in nearly every death penalty state, and in every state except for Alaska which has a maximum punishment of 99 years imprisonment.[109] LWOP sentences also contributed to the decline in support for the death penalty. As Reverend Patrick Delahanty of the Kentucky Coalition to Abolish the Death Penalty noted in Kentucky,

> If people are just asked one question: Do you support the death penalty? The number of people who would say yes to that is still well over 50%, probably 70-75% or somewhere in that area. But if you give then the choice of life without parole then support for the death penalty falls to something like 30% and most people support life without parole.[110]

States' creation of trial offices to handle the investigation and litigation of death penalty cases also played a role. These allowed for better legal representation and handling of cases for those on death row which made it harder for prosecutors to mount successful death

[106] Ankur Desai, and Brandon L. Garrett, "The State of the Death Penalty," p. 1258.
[107] Michael W. Flamm, *Law and Order : Street Crime, Civil Unrest, and the Crisis of Liberalism in the 1960s*, p. 184.
[108] Ankur Desai, and Brandon L. Garrett, "The State of the Death Penalty," p. 1275.
[109] Carol S. Steiker and Jordan M. Steiker, Courting Death: The Supreme Court and Capital Punishment, (The Belknap Press of Harvard University, 2016), p. 296.
[110] Reverend Patrick Delahanty Interview. Conducted by Catriona Bide, 18th February 2021.

penalty cases on account of poor legal representation or lack of investigation into the case. For example, in Virginia after regional trial offices were created in the early 2000s there was a sharp decline in death sentences and in 2021 Virginia abolished the death penalty entirely.[111]

The introduction of DNA testing in 1985 and the subsequent growth of the innocence movement was also a crucial element in Eighth Amendment issues more broadly. DNA testing was described as being, "virtually fool proof" in exonerating the innocent.[112] As *Time* magazine noted in 2009, since the introduction of DNA testing, over 240 convictions have been overturned in 33 states and the District of Columbia, furthermore, 17 people have been released from death row after DNA evidence cleared them. As of 2017 this number had risen to 20.[113] In 2000 the Innocence Protection Act was introduced to Congress. It allows inmates to have DNA testing considered in support of their appeals if doing so has the potential to demonstrate evidence of innocence. It also created a commission to develop standards for death penalty defence counsel.[114] The rise of the innocence frame from the mid-1990s saw the tough on crime policies advocated by the Nixon, Reagan and Clinton administrations begin to be reversed.[115] From the mid-1990s as support for the death penalty began to slowly decline, the death penalty discourse

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[111] Brandon L. Garrett, "Rare as Hens' Teeth: The New Geography of the American Death Penalty," *American Bar Association*, (1st January 2017), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/2016-17-vol-42/vol--42--no--2---the-death-penalty--how-far-have-we-come-/rare-as-hens_-teeth--the-new-geography-of-the-american-death-pen/.

[112] Randy James, "A Brief history of DNA Testing," *TIME*, (Friday, June 19, 2009), http://content.time.com/time/nation/article/0,8599,1905706,00.html.

[113] Randy James, "A Brief history of DNA Testing," *TIME*. Brandon L. Garrett, "Rare as Hens' Teeth: The New Geography of the American Death Penalty," *American Bar Association*, (1st January, 2017), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/2016-17-vol-42/vol--42--no--2---the-death-penalty--how-far-have-we-come-/rare-as-hens_-teeth--the-new-geography-of-the-american-death-pen/.

[114] Frank R. Baumgartner, et al., *The Decline of the Death Penalty and the Discovery of Innocence*, p. 92.

[115] Frank R. Baumgartner, et al., *The Decline of the Death Penalty and the Discovery of Innocence*, p. 203.

shifted and rather than focusing on broader constitutional and moral issues began to focus more on the administration of capital punishment, "from being victim-centered to focusing on the rights of the criminal defendant," and the innocence frame began to dominate the debate.[116] High profile scandals in the late 1990s further highlighted the flaws in the US legal system such as in Illinois, which in 1995 had a death row population of 155, where 13 defendants were exonerated after convictions and death sentences.[117] Austin Sarat et al stress the significance of this shift arguing that, "If the American death penalty eventually does end, it will be in no small part because abolitionists altered their political and legal arguments and, in doing so, successfully reframed the death penalty debate."[118] They note that abolitionists used wrongful convictions, "to change the story about capital punishment and the public's understanding of what is at stake when the state kills."[119] More broadly, the anti-death penalty movement's approach also focused mainly on issues such as the arbitrariness of the death penalty, an issue raised by the Court first in Furman, highlighting systematic bias and arbitrariness in death penalty sentencing based on race, geographical location, socio-economic condition, gender, and educational level, with racial disproportionalities being increasingly emphasized in recent years.[120]

[116] Sheherezade C. Malik & D. Paul Holdsworth, "A Survey of the History of the Death Penalty in the United States," *University of Richmond Law Review,* Vol. 49, (2015), pp. 693-710, p. 709.
[117] Franklin E. Zimring, *The* Contradictions *of American Capital Punishment* (Oxford: Oxford University Press, 2003), p. 274.
[118] Austin Sarat, Robert Kermes, Haley Cambra, Adelyn Curran, Margaret Kiley, and Keshav. Pant, "The Rhetoric of Abolition: Continuity and Change in the Struggle Against America's Death Penalty, 1900-2010," *Journal of Criminal Law & Criminology*, Vol. 107, No.4 (Fall 2017), pp. 757-780, p. 758, https://scholarlycommons.law.northwestern.edu/jclc/vol107/iss4/6.
[119] Austin Sarat, "The Rhetoric of Abolition: Continuity and Change in the Struggle Against America's Death Penalty, 1900-2010," p. 759.
[120] Austin Sarat, "The Rhetoric of Abolition: Continuity and Change in the Struggle Against America's Death Penalty, 1900-2010," p. 767.

In the 1980s and 1990s more groups and organisations began to emerge within the anti-death penalty movement.[121] In 1983 Centurion Ministries, the first of what would later be known as the innocence projects, was founded in New Jersey. The organisation was dedicated to identifying and freeing innocent people from prison and had helped exonerate more than 14 people from life sentences or death row by 2008. 1985 saw the creation of the MacArthur Justice Center at the University of Chicago Law School, a non-profit public-interest law firm which worked to raise awareness of issues in the death penalty system. In 1990 the Death Penalty Information Center (DPIC), a non-profit organisation which provided information and analysis to the media and public, was created. Further groups such as the Kentucky Coalition to Abolish the Death Penalty (1987), Equal Justice Initiative (1989) and the Cardozo Innocence Project (1992), also emerged during this time. Many of these groups were highly influential, especially in regard to working with legislatures at both state and federal level. For example, in 1993 the DPIC were asked by Representative Don Edwards, Chair of the House Judiciary Subcommittee on Civil and Constitutional Rights, to work with the subcommittee to produce a report on the dangers of wrongful executions. The cumulative effect of the emergence of such groups was that a national movement emerged which was able to increasingly highlight examples of miscarriages of justice. This in turn, "led lawmakers and governors to take the issue seriously," which created more news coverage, which "affected public thinking," leading to more funding for investigations. The innocence movement became, as Frank Baumgartner describes it, a, "self-reinforcing process that transformed the debate."[122]

[121] The discussion in the following paragraph draws on the research and work done by Frank Baumgartner. Frank R. Baumgartner, et al., *The Decline of the Death Penalty and the Discovery of Innocence*, p. 101.
[122] Frank R. Baumgartner, et al., *The Decline of the Death Penalty and the Discovery of Innocence*, p. 101.

Throughout the 1990s crime and punishment remained on the political agenda. In 1988 the issue of the death penalty sunk the candidacy of Democrat Michael S. Dukakis when in a debate he said that he would oppose an execution even if his wife were raped and murdered. President Clinton on the other hand was keen to give an image of being tough on crime and had a record of being in favour of the death penalty. He returned to Arkansas just before the New Hampshire Primary in order to preside over the execution of Ricky Ray Rector, a brain-damaged black man sentenced to death by an all-white jury for the murder of a white police officer.[123] It was believed at the time that a record of favouring the death penalty would serve as a boost for Democratic presidential candidates and Clinton wanted to, "get as much political mileage out of it as possible."[124] During his presidency President Clinton signed the 1994 Crime Bill which included priorities such as federal grants for more community police officers, gun control, boot camps and drug treatment for criminal addicts, habeas corpus reform, and comprehensive death penalty legislation.[125] The bill provided the death penalty for more than sixty offences, and allowed many crimes which in the past could only be punished by death in state courts to also be punishable by death in federal courts.[126] The 21st century has seen the political mood on this issue shift. Nowadays political campaigns, "which previously elicited nothing short of ardent support for the death penalty," even nationally, now include candidates, "whose support ranges

[123] Michael W. Flamm, *Law and Order: Street Crime, Civil Unrest, and the Crisis of Liberalism in the 1960s*, p. 183.
[124] Stephen B. Bright, "The Politics of Crime and the Death Penalty: Not Soft on Crime, but Hard on the Bill of Rights," *Saint Louis University Law Journal*, Vol. 39, No. 2 (Winter 1995), p. 479-504, p. 483, https://heinonline.org/HOL/P?h=hein.journals/stlulj39&i=491. Stephen B. Bright, "The Politics of Crime and the Death Penalty: Not Soft on Crime, but Hard on the Bill of Rights," p. 484.
[125] Bill McCollum, "The Struggle for Effective Anti-Crime Legislation - An Analysis of the Violent Crime Control and Law Enforcement Act of 1994," *University of Dayton Law Review,* Vol. 20, No. 2 (Winter 1995), p. 561-566, p. 563, https://heinonline.org/HOL/P?h=hein.journals/udlr20&i=569.
[126] Stephen B. Bright, "The Politics of Crime and the Death Penalty: Not Soft on Crime, but Hard on the Bill of Rights," p. 479.

from tentative to non-existent," and, "it is difficult to find politicians, advocacy organizations, or ordinary citizens lamenting the death penalty's predicted demise."[127] Indeed, during the 2020 presidential campaign most of the Democratic candidates opposed the death penalty and some publicly stated that they would support a federal moratorium.[128] This has reflected the decline in the number of executions and reduced support for the death penalty, and has demonstrated the way in which all of these factors are interlinked and how the practice of the death penalty, public and political support for it have slowly declined since their peak in the late 1990s.

As well as an increase in demonstrations and action by anti-death penalty groups, more recently there has been a decline in demonstrations by pro-death penalty groups such as victims' rights organisations. In the 1980s and 1990s such groups were influential in helping push pro-death penalty initiatives through state legislatures and were often present at executions. However, today, "the relatives and friends of victims no longer speak with one voice about the death penalty," and face rivalry from groups on the opposing side, for example the Kansas group Murder Victims' Families for Reconciliation; a group composed of family members of murder victims which has publicly expressed concerns about how the death penalty fails as a response to the tragedy of murder.[129]

Pressure from major international organisations against the death penalty began to mount and global organisations began to get involved in campaigning in the US, focusing on issues such as fair trials, dangers of executing the innocent, and due process concerns. Amnesty International was the first major international organisation to get involved in the US death

[127] Carol S. Steiker and Jordan M. Steiker, Courting Death: The Supreme Court and Capital Punishment, p. 194.
[128] Tim Arango, "Democrats Rethink the Death Penalty, and Its Politics," *New York Times*, (7th April 2019), https://www.nytimes.com/2019/04/07/us/politics/death-penalty-democrats.html.
[129] Carol S. Steiker and Jordan M. Steiker, Courting Death: The Supreme Court and Capital Punishment, p. 215.

penalty debate in the mid-1970s.[130] At the close of their 1977 conference, French politician and death penalty abolitionist Robert Badinter said that, "Amnesty International's greatest merit is that it does not simply treat the death penalty as though it were a separate issue that could be resolved by abolition, without also mounting a constant and vigorous defence against attacks on fundamental human rights, of which the right to life is but the first."[131] Wendy Wong notes that Amnesty's contribution to making the death penalty debate more high profile was twofold. Firstly, it explicitly linked the death penalty to human rights, meaning that the same rules and norms could be used to attack it, and it, "changed a largely domesticized conversation into one about international norms."[132] Secondly, it gave Amnesty and death penalty opponents more leverage through allowing both domestic lobbying and the build-up of international support.[133] Wong notes that, "it is easy to credit Amnesty with internationalizing opposition to the death penalty, even if its campaign did not lead to its abolishment in the United States."[134]

In maintaining its use of the death penalty, the US became one of the global outliers. As executions were on the rise in the US during the 1980s its practice became increasingly unpopular internationally. The 1980s saw treaties such as the 1984 United Nations Convention Against Torture and the 1989 Convention on the Rights of the Child, and by the millennium a significant majority of countries had abolished the death penalty.[135] By this

[130] Franklin E. Zimring, *The* Contradiction*s of American Capital Punishment* (Oxford: Oxford University Press, 2003), p. 39.
[131] Franklin E. Zimring, *The Contradictions of American Capital Punishment*, p. 59.
[132] Wendy H. Wong, "Amnesty International: The NGO That Made Human Rights Important," *Internal Affairs: How the Structure of NGOs Transforms Human Rights*, (Cornell University Press, 2012), p. 110.
[133] Wendy H. Wong, "Amnesty International: The NGO That Made Human Rights Important," p. 110.
[134] Wendy H. Wong, "Amnesty International: The NGO That Made Human Rights Important," p. 111.
[135] Sheherezade C. Malik & D. Paul Holdsworth, "A Survey of the History of the Death Penalty in the United States," p. 705.

point the USA was one of the world's leaders in executions, amongst many of its political adversaries like Iran, North Korea, Iraq and China.[136]

After several decades of the Court handling death penalty eligibility questions, there was scarce ground left for them to cover. As one lawyer stated, "There was a few lingering eligibility questions… I think the Supreme Court more or less settled itself on that the death penalty was here to stay and with the political orientation of the Justices that have come on in the past twenty years being predominantly conservative leaning, and at no point did the Court shift over to a five-member identifiable liberal leaning majority, the feeling is its pointless to try the straight up eligibility argument."[137] Thus the eligibility route to abolition was largely closed. From here the debate then evolved, switching from issues of eligibility to issues of method.

The days of public hangings and shootings were long gone as the spectacle of public executions became less tolerable to society. Electrocution, previously the most used method of execution, fell out of use due to the horrific death it inflicted on the individual and increased awareness and revulsion among the American people at this. Peaking at 149 deaths by execution in 1935, this fell to 16 in 1987 and fell further to just one in 2013.[138] As it now stands, only 8 states authorise the electric chair as a method of execution, all of which have lethal injection as the primary method of execution.[139] Execution by firing squad, whilst being the method for the execution of Gary Gilmore in 1977, the first

[136] Sheherezade C. Malik & D. Paul Holdsworth, "A Survey of the History of the Death Penalty in the United States," p. 705.
[137] 'Ezra' Interview. Conducted by Catriona Bide, 9th September 2020.
[138] "Every Execution in U.S. History in a Single Chart," *Time Magazine,* 25th April 2017, https://time.com/82375/every-execution-in-u-s-history-in-a-single-chart/
[139] "Methods of Execution," *Death Penalty Information Center*, https://deathpenaltyinfo.org/executions/methods-of-execution.

execution after *Gregg* ended the death penalty moratorium, similarly declined in use with only 3 firing squad executions having taken place since 1976.[140] Lethal gas became an increasingly rare form of execution as once more the American people grew more aware and less tolerant of this torturous method. A December 1984 Gallup poll found that 72% of Americans supported the death penalty for murder, but that lethal injection was the method by 56%, compared to 16% for the gas chamber and 6% for the electric chair.[141] States began to remove the gas chamber from their books, with New Mexico and Nevada switching to lethal injection in 1979 and 1983 respectively, followed by Mississippi in 1984.[142]

More 'humane,' and sometimes more economical, methods of execution were, however, sought out because, as Austin Sarat notes, "the continued legitimacy of the state's power to kill depended on maintaining the appearance of painless death."[143] Due to its lack of use during the 1970s moratorium, Oklahoma's electric chair needed $60,000 worth of repairs. Stanley Deutsch MD, professor of anaesthesiology at the University made recommendations for medications that could be used for executions.[144] Indeed, the US's turn to lethal injection was reflective of, "growing reliance on medicine as a response to philosophical, financial, and political pressures to eliminate the death penalty."[145] In 1977 as states enacted new death penalty statutes in the wake of *Gregg* and *Furman* and the

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[140] "Methods of Execution," *Death Penalty Information Center*, https://deathpenaltyinfo.org/executions/methods-of-execution.

[141] Scott, Christianson, "The Last Gasp: The Rise and Fall of the American Gas Chamber," (University of California Press: 2010), p. 211.

[142] Scott, Christianson, "The Last Gasp: The Rise and Fall of the American Gas Chamber," p. 212.

[143] Austin Sarat et al, "Botched Executions and the Struggle to End Capital Punishment: A Twentieth-Century Story," *Law & Social Inquiry*, Vol. 38, No. 3, Summer (2013), pp. 694-721, p. 697.

[144] Jonathan Groner, "Lethal Injection and the Medicalization of Capital Punishment in the United States," *Health and Human Rights*, Vol. 6, No. 1 (2002), pp. 64–79, p. 66. *JSTOR*, www.jstor.org/stable/4065314.

[145] Deborah Denno, "The Lethal Injection Quandary: How Medicine Has Dismantled the Death Penalty," *Ford Law Review*, Vol 76, No. 1 (2007), pp. 49-128, p. 62.

number of death sentences increased, Oklahoma became the first state to introduce the lethal injection as a method of execution, though the first execution using this method did not take place until 1982.[146] From then it became the main method for execution within the United States, with 1352 executions by lethal injection taking place since 1976.[147] Despite its prominence, there was no set standard for the use of the lethal injection. After *Furman* when the states went their separate ways in drafting their own death penalty protocols this diversity also translated into lethal injection protocols. Indeed, "states have scrambled in wildly different directions because they do not know which direction is right. Nor do they attempt to find out."[148] Even in legal terms, courts have not defined the meaning of 'protocol,' rather it is a blanket term.[149]

Alongside these difficulties in procuring execution drugs and subsequent experimentation, lethal injection protocols varied drastically across the death penalty states. Some states had detailed regulations whereas others did not have written protocols. Some mandated the use of certain drugs or types of drugs in a certain order whilst others were much vaguer. Several states authorised multiple methods of execution and there was variation in how a method was then selected.[150] Comparisons can be drawn between the diversity of protocols for methods of execution seen more contemporarily, and the range of execution protocols that existed before *Furman*. Although the diversity here is more limited to lethal injection protocols, there still appears to be varying approaches, standards and specifics.

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[146] "Description of Each Execution Method," *Death Penalty Information Center*, https://deathpenaltyinfo.org/executions/methods-of-execution/description-of-each-method.
[147] "Methods of Execution," *Death Penalty Information Center*, https://deathpenaltyinfo.org/executions/methods-of-execution.
[148] Deborah Denno, "The Lethal Injection Quandary: How Medicine Has Dismantled the Death Penalty," p. 93.
[149] Deborah Denno, "The Lethal Injection Quandary: How Medicine Has Dismantled the Death Penalty," p. 91.
[150] "A New Test for Evaluating Eighth Amendment Challenges to Lethal Injections," *Harvard Law Review*, Vol. 120, No. 5, (2007), pp. 1301–22, p. 1302, http://www.jstor.org/stable/40042020.

Generally states tend to use the same process for executing prisoners, a three drug protocol: the first to induce unconsciousness, then a muscle relaxant for paralysis, then one to induce cardiac arrest.[151] These developments in lethal injection protocols impacted on the types of cases being reviewed by the Court as it was due to the questions raised regarding such protocols that the Court began to examine methods of execution cases. Issues surrounding lethal injection protocols have reached the Court more recently, as from 2006 lower courts began to look upon claims surrounding lethal injections more favourably, but today no court, including the Supreme Court, has ever declared an execution protocol unconstitutional. In 2008 in *Baze v. Rees* – which will be discussed in greater detail in Chapter 5 – the Court incorporated issues of methods of execution into its modern death penalty discussion when it addressed the question of whether Kentucky's four-drug lethal injection protocol violated the Eighth Amendment. In a 7-2 ruling, with four concurrences and one dissent, the Court upheld the protocol. However, challenges are directed at the administration of lethal injections rather than challenging lethal injections per se.[152]

More recently the issue of lethal injections has become further complicated. As the US stands with a minority of countries which practice the death penalty there has been increasing resistance and litigation from the manufacturers, particularly those in Europe, of the drugs used in lethal injection protocols to supply them to the US. As early as 2001 representatives from pharmaceutical companies were quoted strongly objecting to the use of their products in executions and made requests to prison officials that their drugs not be used in execution protocols.[153] This was compounded by pressure from the anti-death

[151] "A New Test for Evaluating Eighth Amendment Challenges to Lethal Injections," p. 1302.
[152] "A New Test for Evaluating Eighth Amendment Challenges to Lethal Injections," p. 1304.
[153] Ty Alper, "The United States Execution Drug Shortage: A Consequence of Our Values," T*he Brown Journal of World Affairs*, Vol. 21, No. 1 (2014), pp. 27–39, p. 33, www.jstor.org/stable/24591028.

penalty movement where activists sought to work with drug companies to persuade them against allowing their products to be used in executions.[154] Some Departments of Corrections were left claiming it was difficult or impossible to obtain the right drugs for executions.[155] The result was that "states face a new and vexing obstacle to carrying out executions," and this has contributed to delayed executions, an overall decline in the death penalty, states experimenting with different drugs to form their lethal injection protocols.[156] Ty Alper cites the example of Oklahoma as one of the states which has illegally procured drugs of "unknown provenance" with sometimes disastrous consequences such as the 2014 botched execution of Michael Lee Wilson who as he was being put to death cried out, "I feel my whole body burning."[157]

In the modern death penalty era, states such as Texas and Virginia have had a disproportionate effect on the death penalty in the US due to their willingness to execute individuals. The Texas and Virginia executions rates since 1976 stand at 587 and 113 respectively.[158] Texas, which has executed more than a third of the national total, was the first state to carry out an execution by lethal injection with the execution of Charles Brooks in 1982, and only implemented life without parole sentencing in capital cases in 2005.[159] Several procedural cases concerning death penalty statutes in Texas came before the Court, and there have been many instances of controversy.[160] Virginia has executed a

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[154] Ty Alper, "The United States Execution Drug Shortage: A Consequence of Our Values p. 35.
[155] Megan McCracken and Jennifer Moreno, "Through the Glass Darkly: What Oklahoma's Lethal Injection Regime Tells Us about Secrecy, Incompetence, Disregard, and Experimentation Nationwide," *Human Rights*, Vol. 42, No. 2 (2017), pp. 6–25, p. 8, www.jstor.org/stable/26423433.
[156] Ty Alper, "The United States Execution Drug Shortage: A Consequence of Our Value," p. 27.
[157] Ty Alper, "The United States Execution Drug Shortage: A Consequence of Our Value," p. 27.
[158] "Fact Sheet," *Death Penalty Information Center*, https://dpic-cdn.org/production/documents/pdf/FactSheet.pdf.
[159] "Texas," Death Penalty Information Center, https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/texas.
[160] See *Trevino v. Thaler* 569 U.S. 413 (2013) and *Buck v. Davis* 580 U.S. _ (2017) as examples. Controversies include the 1995 execution of Mario Marquez, a prisoner with an IQ of 65 and the adaptive skills of a 7-year-

higher percentage of its death-row prisoners than any other state.[161] Similarly to Texas and many other death penalty states, Virginia saw controversies surrounding innocence after the introduction of DNA evidence.[162] However, the number of executions dwindled from the turn of the century, and Virginia became even more politically significant after it became the first southern state to abolish the death penalty altogether in 2021.[163]

In terms of influencing the Court and the modern death penalty perhaps the most significant were Oklahoma, Kentucky, and Georgia. It was the persistence of these states to keep the death penalty and certain protocols on their books that resulted in various issues reaching the Court. In turn the Court's decisions in these cases shaped the modern death penalty. As previously referenced, Oklahoma was the first state to introduce lethal injection in 1977 and so led the way in procedural reform and establishing this as the primary method of execution across the US. Oklahoma's death penalty statutes reached the Supreme Court on two occasions, first in allowing for the execution of 15-year-olds, which upon being struck down reshaped and significantly narrowed death penalty eligibility. Second, the upholding of Oklahoma's protocol outlining the use of midazolam for executions by the Court protected against wider challenges the constitutionality of the death penalty.[164] Furthermore, the state has the second highest number of executions after

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old, or the exoneration of Michael Morton through DNA evidence 24 years after he was sentenced to life in prison. "Texas," Death Penalty Information Center, https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/texas.

[161] "Virginia," *Death Penalty Information Center*, https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/virginia.

[162] In 1984, Earl Washington, a 22-year-old black man with an I.Q. of 69, was wrongfully convicted of rape and murder. He was sentenced to death row in Virginia, and spent over 17 years in prison. See: "Earl Washington," *The Innocence Project*, https://innocenceproject.org/cases/earl-washington/.

[163] "Virginia," *Death Penalty Information Center*, https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/virginia.

[164] *Thompson v. Oklahoma* 487 U.S. 815 (1988), and *Glossip v. Gross,* 576 U.S. 863 (2015). Both of these issues are explored in greater detail later in this thesis.

Texas, with 124 since 1976.[165] Kentucky was also influential as its death penalty statutes also concerning age and methods (*Stanford* and *Baze*) came before the Supreme Court, again these cases narrowed the category of those eligible, and bolstered the death penalty against broader constitutional challenges via the undermining of methods of execution.[166] Since 1976 77 executions have taken place in Georgia. [167] The state saw three major cases come before the Court in the 1970s (*Furman*, *Gregg* and *Coker*) in an early push to keep the death penalty on its books.[168] These initial cases were pivotal in affirming the constitutionality of the death penalty and also in establishing that it should be reserved for only when life is taken. These cases established the debates that were to follow in the coming decades and so Georgia has had the most significant and long-term impact on the death penalty in the US.

It was against this backdrop that the Court was tasked with handing down its decisions on various death penalty issues. The implications of the Court's decisions here were the difference between life and death for the many on death row during this time. In dealing with an issue that raised inflammatory and emotive moral, political and legal debates the Court had to tread carefully. In the eyes of conservative Americans, the Court's public image had suffered as a result of the perceived leniency of the Warren Court on criminal rights. The Justices were aware how their public image was particularly vulnerable in this

[165] "Fact Sheet," *Death Penalty Information Center*, https://dpic-cdn.org/production/documents/pdf/FactSheet.pdf.

[166] *Stanford v. Kentucky,* 492 U.S. 361 (1989) and *Baze v. Rees,* 553 U.S. 35 (2008). Both of these issues are explored in greater detail later in this thesis.

[167] "Fact Sheet," *Death Penalty Information Center*, https://dpic-cdn.org/production/documents/pdf/FactSheet.pdf.

[168] *Furman v. Georgia,* 408 U.S. 238 (1972), *Gregg v. Georgia,* 428 U.S. 153 (1976), and *Coker v. Georgia,* 433 U.S. 584 (1977). These three cases are explored in greater detail later in this thesis.

area of law and so the Court had to carefully devise a way to uphold, and to some extent rebuild, the public image of the Court on the issue of criminal rights and more broadly, but to do so without compromising on the closely held views of the individual Justices which permeated decision-making here at every juncture. For this reason, in its eligibility and methods cases the Court engaged in image crafting so as to uphold a public image of legitimacy.

The above provides a scene setter for the discussion of the Court's decision-making in the chapters to follow. It demonstrates the complexities of this debate and the many issues and factors at play. The degree to which these influenced the Court's decisions will be explored and critiqued in order to understand the Court and its death penalty decision-making better.

Chapter 2: *Furman* and *Gregg*

The Supreme Court discovered image crafting in a death penalty context in a case of trial and error, or rather with error first. In *Furman v. Georgia* (1972) the Court's decision was fractious and it was unclear precisely what the Court based its decision on. Whereas by *Gregg v. Georgia* (1976) the Court established its focus on objectivity so as to preserve its image and to ensure the legitimacy of its rulings and thus of the Court as an institution. *Furman v. Georgia* and *Gregg v. Georgia* provide the starting point for this enquiry as they marked the beginning of the modern death penalty and the start of the Court's long involvement with death penalty issues. These two cases were crucial for establishing the debates and themes that were to re-emerge in subsequent decades, for establishing the factors which influenced the Court's decisions, and they were also where the Court developed its decision-making approaches. This chapter explores these two cases in greater detail, firstly through closer examination and analysis of *Furman* and then of *Gregg*. Two significant things emerged from these cases. Firstly, *Furman* saw the emergence of evolving standards of decency as an influential factor in decision-making (though this was not adopted by the majority) and introduced so-called objective indicators as the measure of this. This was in order to present the image that the Court's decisions were not based on the individual views of the Justices and thus uphold the legitimacy of the Court. *Gregg* saw this become fully adopted into the Court's death penalty jurisprudence and objective indicators were utilised to assess societal standards, though issues arose around this which were to continue throughout the period. Secondly, *Gregg* affirmed the per se constitutionality of the death penalty and so subsequent cases presupposed a death penalty.

Furman was significant as it created a huge platform for debate amongst the Justices and the resultant nine separate opinions touched on a variety of issues that each Justice felt was relevant. As such, the factors which influenced each Justice - and consequently the Court - varied widely and so the *Furman* decision was in many ways unclear, especially with regards to what was influencing the Court's decision. There were many factors discussed and different viewpoints put across and few gained majority support in *Furman* – except its most basic holding that the death penalty in the cases before the Court constituted cruel and unusual punishment in violation of the Eighth Amendment.[1] In attempting to tackle such a large and contentious issue the Court in *Furman* was very fractured and as a result the decision-influencing factors were very individualised. This was recognised by the Justices themselves, as a memo from Justice Lewis Powell to Justice Blackmun demonstrates, "I am not joining your opinion in the capital cases only because of its manifest personal character."[2] This was problematic for the Court as an institution as, especially in these cases which were real life and death issues, a clear standard for the Court's decision-making was needed. *Gregg* saw the Court's death penalty debate become more focused and when the Court revisited the issue the points of discussion, influential factors, and key themes were properly established. There was more agreement amongst the Justices, though the result was still a plurality holding. In *Gregg* the Court honed in on some of the themes raised in *Furman* and set standards for their application going forward.

Further themes such as penological theory were also highlighted in both *Furman* and *Gregg*. These were discussed in-depth in *Gregg* and in subsequent cases but did not gain

[1] *Furman v. Georgia,* 408 U.S. 238, 240 (1972).
[2] Blackmun Papers - Memo from Justice Powell to Justice Blackmun Re: Capital Cases, June 17th 1972, Box 135, 69 5003 *Furman v. Georgia*.

the same kind of traction as evolving standards as they were harder to empirically measure and so did not form the basis for the Court's decisions. *Furman* and *Gregg* also introduced the issue of arbitrariness in death penalty sentencing, but this did not garner the same level of agreement or support for it to be significant or influential in these cases nor in later ones. However, its appearance in the Court's discussion was notable as it demonstrated where *Furman* covered a whole manner of different issues in the death penalty debate, and although arbitrariness was not the focus of the Court subsequently, it is still an issue highlighted by the anti-death penalty movement today.

William Henry Furman was committing a burglary when he was discovered by the home's owner. Whilst fleeing the home Furman tripped and the gun he was carrying went off, killing the resident. Furman was arrested, tried for murder, and found guilty. As the shooting occurred during the commission of a felony, he was sentenced to death under Georgia state law. The sentence was appealed to the Supreme Court on the grounds that the death penalty in this case constituted a cruel and unusual punishment. It was decided along with two other death penalty cases, *Jackson v. Georgia* and *Branch v. Texas*, which concerned the constitutionality of the death sentence for rape and for murder respectively. The NAACP Legal Defence and Educational Fund (LDF) helped push the cases to the Court, advocating for the petitioners in *Furman*, *Jackson*, and *Branch*.[3] The Court had originally begun drafting its opinion on a fourth case, *Aikens v. California*, which the LDF had originally planned to take to the Court, but this was thrown out when the California Supreme

[3] Samuel R. Gross, "The Death Penalty, Public Opinion, and Politics in the United States," *Saint Louis University Law Journal*, Vol. 63, No. 4 (2018), pp. 763 – 780, p. 767, https://scholarship.law.slu.edu/lj/vol62/iss4/3.

Court struck down California's capital punishment statute in *People v. Anderson* in 1972. In *Furman* the Court was faced with the question of whether the imposition of the death penalty constituted cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.

The Justices privately recognised that a majority holding was unlikely to be found. In a memo to the conference dated 14th June 1972, Justice Brennan wrote that, "since there is to be no Court opinion I suggest that, as in the similar situation last year in the Pentagon Papers case, a per curium will be required…"[4] The result was a one page *per curiam* and a further 242 pages of separate opinions.[5] At 50,000 words it was the longest opinion in the Court's history thus far. The *per curiam*, written by Justices Potter Stewart, Byron White and William O. Douglas, found agreement only in that the imposition of the death penalty in these cases violated the Eighth Amendment, but their reasoning behind this varied widely. Justice White argued that the purposes and justifications for the death penalty were insufficient to justify the death sentences in these cases. Justice Douglas focused on equal protection guarantees within the Eighth Amendment and whether the death penalty was being administered fairly, concluding that it was not.[6] Justice Stewart claimed that the arbitrary nature with which the death penalty was imposed in these cases made it unconstitutional. Justices William Brennan and Thurgood Marshall went a step further, both arguing that in all cases the death penalty constituted a cruel and unusual punishment. Brennan found that the death penalty violated the principles of human dignity and that contemporary society considered the punishment unacceptable. Marshall placed

[4] Brennan Papers - Memo to conference from Justice Brennan, 14th June 1972, BOX I:272, 69-5003 *Furman v. Georgia*. A per curium is a court opinion issued in the name of the Court rather than specific judges.
[5] B. Woodward, S. Armstrong, *The Brethren: Inside The Supreme Court* (New York: Avon Books, 1981), p. 220.
[6] The Equal Protection Clause of the Fourteenth Amendment demands that a state must treat all individuals in the same manner as those under similar conditions and in similar circumstances.

his focus on societal standards, what made a punishment cruel, and the purposes the death penalty served, arguing that societal standards stood against the death penalty and that it was not fulfilling its penological functions. The dissenting opinions came from all of the Justices appointed by President Nixon: Chief Justice Warren Burger and Justices Harry Blackmun, Lewis F. Powell, and William H. Rehnquist. Chief Justice Burger, alongside Justices Blackmun and Powell, argued that the Court had gone beyond its role in this case, and responsibility for assessing the constitutionality of the death penalty lay with the legislative branch. Rehnquist reiterated this, arguing that the Court should show deference to legislative judgment. This demonstrated early concern by some Justices about the Court being seen to overstep its constitutional role.

The facts of *Furman* were not especially notable, and similar cases had been seen by courts across the US, yet it was the actions of the U.S. Supreme Court that set this case apart. *Furman* was the first time that the Court had been faced with the question of whether the death penalty was unconstitutional, and the Justices struggled under the weight of such a question. Whilst the issues and arguments raised by each of the Justices in their opinions were of great significance and deserved attention, the result was that the Court created more questions than it answered, including questions regarding what factors influenced the Court's decision. By failing to provide a clear answer, rationale, or majority in *Furman* the Court created a debate but gave little indication as to how to resolve it, thus resulting in a debate that was to rage for decades to come. Indeed, much of the attention directed at *Furman* has been critical of the Court's approach to this case and the lack of consensus amongst the Justices. For example, Malcom Wheeler stated that the decision, "beclouds more than it clarifies," and Nicholas Scafidi stated that, "it remains unclear just what the

plurality has done."[7] Daniel Polsby argues that, "the way that the *Furman* majority presented itself to the world – five separate opinions with none commanding the concurrence of any Justice other than its author – seemed almost deliberately calculated to make this judgment of dubious value as a precedent… in terms of reasoned judgments, the majority Justices in *Furman* did not have one of their finest hours."[8] In addition, L.S. Tao wrote of the Court's ruling in *Furman* that, "not only was the core issue of the penalty's constitutionality left unresolved but, in addition, the *Furman* ruling seems unconvincing in its rationale."[9] The Court's Chief Justice, Warren Burger, was the first to articulate this criticism in his dissenting opinion in *Furman*. He opined, "The actual scope of the Court's ruling… is not entirely clear."[10] Indeed, "*Furman v. Georgia* presents a multitude of questions to the student of constitutional development."[11] The result of so many different viewpoints was that the exact rationale behind the decision, and implications of the *Furman* decision, were unclear, which posed a risk of the Court's image suffering under accusations of overstepping its role and of subjectivity. Furthermore, it is the role of the Supreme Court to provide guidance to lower courts on constitutional issues, but the *Furman* decision failed to do this. Thus, the Court not only failed to present a favourable public image of itself, it also failed to do its job. This meant that the Court had to revisit the issue, and its approach, four years later in *Gregg*. In revisiting this issue the Court became

[7] Malcolm E. Wheeler, "Toward a Theory of Limited Punishment II: The Eighth Amendment after *Furman v. Georgia,*" *Stanford Law Review*, Vol. 25, No. 1 (1972), pp. 62–83, p. 62, www.jstor.org/stable/1227832. Nicholas Scafidi, "Furman v. Georgia: A Postmortem on the Death Penalty," *Villanova Law Review,* Vol. 18, No. 4 (March 1973), p. 678-749, p. 716.

[8] Daniel D. Polsby, "The Death of Capital Punishment? *Furman v. Georgia*," *The Supreme Court Review*, (1972), pp. 1-40, p. 40 http://www.jstor.com/stable/3536960 1-40.

[9] L. S. Tao, "Beyond *Furman v. Georgia*: The Need for a Morally Based Decision on Capital Punishment," *Notre Dame Law Review*, Vol. 51, No.4 (1976), pp. 722-736 , p. 735. http://scholarship.law.nd.edu/ndlr/vol51/iss4/6 722-736

[10] *Furman v. Georgia,* 408 U.S. 238, 396 (1972) Justice Burger dissenting.

[11] "*Furman v. Georgia* - Deathknell for Capital Punishment?" *St. John's Law Review*, Vol. 47, No. 1, Article 5 (1972), pp. 107-147, p. 138, Available at: https://scholarship.law.stjohns.edu/lawreview/vol47/iss1/5

more coherent in its decision-making, and the factors which influenced its decisions, evolving standards of decency in particular became more entrenched in the hope that this would bolster its public image.

In 1973 Troy Leon Gregg was found guilty by a jury of armed robbery and murder and sentenced to death. Gregg appealed his sentence to the Georgia Supreme Court who upheld his death sentence for murder, but not for armed robbery. Gregg then challenged his sentence for murder on the grounds that capital punishment constituted a "cruel and unusual" punishment in violation of the Eighth Amendment. Thus in 1976 *Gregg v. Georgia* came before the Court.

In *Gregg*, in addition to affirming the constitutionality of the death penalty, the Court used this case to right the wrongs made in *Furman* and established its focus on objectivity – in the form of evolving standards – in order to make the institution, and its decision in this death penalty context, appear legitimate. It was here that the Court first began image crafting in a death penalty context. This aim was articulated by the Court itself in the plurality opinion which, in an implicit criticism of the personal opinions offered in *Furman*, stated, "the requirements of the Eighth Amendment must be applied with an awareness of the limited role to be played by the courts," and that, "while we have an obligation to ensure that constitutional bounds are not overreached, we may not act as judges as we might as legislators."[12]

[12] *Gregg v. Georgia,* 428 U.S. 153, 174 (1976).

Gregg was a natural consequence of and the corrective to *Furman* as the Court had to re-address the issue which *Furman* had thrown into question. This decision combined five cases reviewing death penalty statutes enacted in Georgia, Florida, Louisiana, North Carolina and Texas.[13] In *Gregg* the Court was tasked with reviewing the constitutionality of the newly enacted death penalty statutes and assessing whether, considering the constitutional standards outlined in *Furman,* these comported with the Eighth Amendment.

The Court in *Gregg* was more unified than in *Furman*, both in its rulings and in the factors which influenced them. *Gregg* succeeded where *Furman* did not; it affirmed the constitutionality of the death penalty and clearly laid out the permissible standards for its application. This helped to resolve some of the ambiguity created by *Furman*, provided the guidance needed by lower courts for consistency across the country, and began the process of the Court's image crafting in death penalty cases in earnest.

Gregg saw the re-emergence of the debates surrounding evolving standards, penological theory, and arbitrariness which the Court then clarified and expanded on. In contrast to *Furman*, in *Gregg* there were more attempts from the Justices to build consensus, as this served the image of the Court better. In a memo to Chief Justice Burger, in which he outlined holdings for *Gregg* and the other four death penalty cases (upholding *Gregg*, *Jurek* and *Proffitt*, but overturning *Woodson* and *Roberts*) for his joint opinions with Stevens and Powell, Justice Stewart wrote that, "It would be our hope that four other members of the Court will be able to join at least those parts of all five opinions."[14] The result in *Gregg*,

[13] *Gregg v. Georgia,* 428 U.S. 153 (1976), *Proffitt v. Florida,* 428 U.S. 242 (1976), *Jurek v. Texas,* 428 U.S. 262 (1976), *Woodson v. North Carolina,* 428 U.S. 280 (1976), and *Roberts v. Louisiana,* 428 U.S. 325 (1976).
[14] Blackmun Papers - Memo from Justice Stewart to Chief Justice Burger RE: Capital Cases, May 7th 1976, Box 135, 69 5003 *Furman v. Georgia*.

rather than the 9 separate opinions filed in *Furman*, was essentially a three-way split, with Justices Stewart, Powell and Stevens forming the plurality, Justices White, Burger, Rehnquist and Blackmun concurring, and Justices Brennan and Marshall dissenting. On this occasion the Court focused on a more limited selection of themes, and the ruling centred on a much narrower and empirically evidenced selection of issues than in *Furman*, which meant that that they were able to produce a clearer decision and one that appeared to be informed by more objective criteria.

In *Gregg*, *Jurek* and *Proffitt*, the Court found a workable framework for the application of the death penalty through the bifurcated trial system.[15] However, simply making the death penalty work was not the most important issue here. This case was most significantly about the per se constitutionality of the death penalty. Whilst the three cases that were affirmed in 1976 provided a workable framework that made sense to 7 Justices, there could be no workable framework without a constitutionally permissible death penalty, and thus this was the most significant strand of the 1976 rulings.

On this occasion Justices Stewart, Powell and Stevens, the so-called "troika," formed the middle ground and it was upon their plurality decision (henceforth referred to as the Stewart plurality) that *Gregg* and the other four cases rested. The Stewart plurality noted that the *Furman* decision did not find the death penalty unconstitutional per se, only its application holding that, "the punishment of death does not invariably violate the Constitution."[16] The Nixon appointees, joined by Byron White, formed the concurrence, joining the plurality in arguing in favour of upholding the Georgia statute, yet they went a

[15] A bifurcated trial system is a trial conducted in two stages. The first stage determines liability or guilt, and the second stage determines the damages or penalties.
[16] *Gregg v. Georgia,* 428 U.S. 153, 169 (1976).

step further, not only upholding the constitutionality of the death penalty but also upholding each of the five death penalty statutes before the Court. On the other hand, Brennan and Marshall were in the minority in *Gregg,* their dissents echoing the same line of argument presented in *Furman* that the death penalty is unconstitutional in all cases. The two Justices became completely isolated in holding this view.

Furman v. Georgia

Despite its lack of clarity, the *Furman* ruling was significant in the context of decision-making and image crafting. It was here that the issue of evolving standards of decency, and the extent to which the Court's opinions should be dictated by the views of society or whether the Court should remain detached from society first emerged in a death penalty context. Since its introduction in *Furman* and its increased support in *Gregg*, the Justices agreed on using evolving standards to inform their decision-making and this approach became a consistent feature and highly influential factor in subsequent death penalty cases. Where there has been continued division, however, has been on how to assess these standards.

The debate over evolving standards was not new, and thus it was a logical factor on which the Court could build its decisions and portray its legitimacy. The notion that the Eighth Amendment must draw its meaning from public opinion was first articulated by Justice McKenna in *Weems v. United States* (1910). Weems, a disbursing officer in the Philippines was convicted of falsifying public and official documents and sentenced to fifteen years of *cadena temporal*, hard, painful labour, enchainment, and loss of property rights. His

sentence was subsequently reversed by the Supreme Court.[17] Writing for the majority, McKenna argued that, "Time works changes, brings into existence new conditions and purposes. Therefore a principle to be vital must be capable of wider application than the mischief which gave it birth."[18] Yet it was not until 1958 in *Trop v. Dulles,* in which the Court ruled that the revocation of citizenship was an unconstitutional punishment, that Chief Justice Earl Warren argued that the Court must look to the, "evolving standards of decency that mark the progress of a maturing society," and this phrase first emerged.[19] From this point the evolving standards test became the applied standard across Eighth Amendment cases, and as Michael Dean notes, "transformed from passive dicta into constitutional bedrock by being applied to every death penalty decision handed down by the Supreme Court."[20]

This approach is noteworthy as it appeared to place the Court's decision-making on Eighth Amendment issues in the hands of contemporary American people and the societal standards of the time. It serves as an anti-originalist approach whereby the intentions of the Framers and societal standards at the time the Eighth Amendment was drafted and ratified played no role in assessing the constitutional permissibility of a punishment in the present day. This gave the impression that, rather than decisions being rooted in the views of those two hundred years ago, the Court's decisions fitted more with contemporary views. In reality, as subsequent cases demonstrated, the Justices would simply interpret evolving standards data in whichever way was needed in order to produce an outcome that

[17] *Weems v. United States*, 217 U.S. 349 (1910).
[18] *Weems v. United States,* 217 U.S. 349, 373 (1910).
[19] *Trop v. Dulles*, 356 U.S. 86, 101 (1958).
[20] Michael D. Dean, "State Legislation and the 'Evolving Standards of Decency': Flaws in the Constitutional Review of Death Penalty Statutes," *University of Dayton Law Review*, Vol. 35, No. 3 (2010), pp. 379-412, p. 389.

comported with their personal views. The Court's image crafting was exactly that – a mere image. The views of the American people could be used as a legitimate rationale for a decision which reflected the views of the Justices. Indeed, the Court's decision in *Furman* aligned with the de facto moratorium in place at this time so did not seem out of step with the American people, but most significantly it was in step with the views of a majority of Justices in this case. This focus on public opinion gave the impression that these decisions were rooted in and influenced by something outside of the Court – the American people – and so made them appear both more legitimate, as they did not appear to be the subjective views of the Justices, and more in keeping with contemporary standards and thus more palatable and reflected a better public image of the Court.

In *Furman,* the notion of evolving standards did not feature in the plurality opinion and did not garner widespread support or interest from the majority of the Justices. Evolving standards did receive support from Justices Marshall and Brennan in concurrence.[21] Justice Brennan placed a strong emphasis on the death penalty's inability to comport with contemporary standards. He refuted the idea that, as the death penalty was not proscribed by the Framers, it could never be found to violate the cruel and unusual punishments clause, and agreed that the Court was not bound to the original intent of the Framers. Brennan provided evidence for this in several forms, for example he cited statistics for death row populations and numbers of executions per year in recent history, in order to demonstrate how the lack of contemporary use of the death penalty represented American society turning its back on the practice. He concluded that, "The objective indicator of

[21] *Furman v. Georgia,* 408 U.S. 238, 316 (1972) Justice Marshall concurring. *Furman v. Georgia,* 408 U.S. 238, 269 (1972) Justice Brennan concurring. Justice Douglas also referenced evolving standards in relation to cruel and unusual punishment as outlined in *Tropp* and *Weems*, but did not comment on their relevance to the case in *Furman* or to death penalty decision-making more broadly: *Furman v. Georgia,* 408 U.S. 238, 241 (1972) Justice Douglas concurring.

society's view of an unusually severe punishment is what society does with it, and today society will inflict death upon only a small sample of the eligible criminals. Rejection could hardly be more complete without becoming absolute."[22] Justice Marshall placed more emphasis on the excessive nature of the death penalty as punishment as he believed that taking a life went beyond the constitutionally permissible methods of punishment. Marshall also provided statistical evidence of discrimination in death penalty sentencing as reasons for why the death penalty was unconstitutional.[23] This demonstrated where the death penalty had not and, he argued, could not be, conducted in a non-discriminatory way, which also rendered it unconstitutional. Most notably, he also held that past opinions from the Court or from individual Justices declaring the death penalty to be constitutionally permissible were, "not now binding on us," and that, "it is morally unacceptable to the people of the United States at this time in their history."[24]

The Attitudinal Model of decision-making best helps to explain the positions of Brennan and Marshall as, unlike with the Legal Model, neither felt constrained by previous Court decisions or by the intentions of the Framers and the conditions during which the Eighth Amendment was ratified. Brennan and Marshall were able to reach a conclusion in line with their view that the death penalty was unconstitutional by focusing on the notion that society had evolved to a point that it no longer found the death penalty acceptable. They followed their own assessment of what should inform the Court's decision – contemporary societal standards – and interpreted the evidence as standing for opposition to the death penalty. That Brennan's personal views permeated his decision-making was acknowledged

[22] *Furman v. Georgia,* 408 U.S. 238, 292 (1972) Justice Brennan concurring. *Furman v. Georgia,* 408 U.S. 238, 300 (1972) Justice Brennan concurring.
[23] *Furman v. Georgia,* 408 U.S. 238, 364 (1972) Justice Marshall concurring.
[24] *Furman v. Georgia,* 408 U.S. 238, 329 (1972) Justice Marshall concurring. *Furman v. Georgia,* 408 U.S. 238, 360 (1972) Justice Marshall concurring.

by members of the Court. In an April 1972 Court memo it was written that, "WJB's discussion of cruelty is as much based on the values of this court as on the values uncovered in contemporary or enlightened morality…"[25] In subsequent death penalty cases both Brennan and Marshall consistently voted to strike down the death penalty and objected to it in principle regardless of the details of the case and seemingly without strategic consideration. This further reinforces the notion that, for these two Justices and on this particular issue, the Attitudinal Model provides the best explanation for their decision-making.

Brennan and Marshall's views on evolving standards received criticism only from Justice Blackmun in his dissent. Blackmun's issue with Brennan and Marshall's position, however, was not to dismiss the relevance of societal standards, rather he disagreed with their assessment that societal standards had evolved to a point where the death penalty was deemed unconstitutional. He argued that the Court had not been presented with anything to demonstrate such a shift in support against the death penalty. Instead, he felt that, "The Court has just decided that it is time to strike down the death penalty."[26] This demonstrates where, by interpreting societal standards differently, Blackmun reached a different conclusion on the issue. Throughout subsequent cases, this was to be a common feature which the Justices could exploit for their own gains, thus crafting an image of legitimacy whilst reaching the preferred outcome.

From here evolving standards gradually became more influential as the approach was adopted in subsequent cases by other members of the Court and became regarded as a

[25] Brennan Papers - April 12th 1972 Death Cases memo, BOX I:272, 69-5003 *Furman v. Georgia.*
[26] *Furman v. Georgia,* 408 U.S. 238, 408 (1972) Justice Blackmun dissenting.

legitimate, indeed essential, factor for the Court to consider in its death penalty eligibility decisions. The use of evolving standards in informing the Court's decision-making was not however entirely straightforward as the Court had to be able to evidence this, and therein lay the issue about what constituted suitable evidence of societal standards. In *Furman* the Court discussed what form the objective factors evidencing societal standards should take. Public opinion polls were a seemingly obvious choice which were instead ruled out. Writing in concurrence Marshall noted that, "While a public opinion poll obviously is of some assistance in indicating public acceptance or rejection of a specific penalty, its utility cannot be very great," because a punishment's constitutionality was determined by whether people fully informed of the purposes of the punishment found it unacceptable, rather than its mere mention being a shock to the conscience of the people.[27] The Justices' papers also highlight some of these issues. For example, a death case memo in Brennan's collection stated that, "Given the split in public opinion polls the existence on the books of the penalty in many jurisdictions and the historic use of the penalty, resting a holding on the contemporary morality theory poses obvious difficulties."[28] This marked the first instance of the Court using objective indicators to inform its death penalty decisions, but it was not until several years later that the Court for the Court to formally adopt this approach for assessing societal standards.[29] *Furman* did not address nor resolve these issues and so, despite identifying the shortcomings of opinion polls in this case, the Court still wrangled with them in the death penalty cases that followed over the next few decades.

[27] *Furman v. Georgia,* 408 U.S. 238, 361 (1972) Justice Marshall concurring.
[28] Brennan Papers - April 12th 1972 Death Cases memo, BOX I:272, 69-5003 *Furman v. Georgia*.
[29] In *Coker v. Georgia,* 433 U.S. 584, 592 (1977) Justice White held that, "judgment should be informed by objective factors to the maximum possible extent." This will be discussed in greater length in the next chapter.

The Attitudinal Model does not appear to be applicable to the approaches from the more conservative members of the Court in *Furman*. This demonstrates the limitations of these theories of decision-making. Whilst they are a useful framework for helping us think about how and why the Court makes its decisions, they are simply too broad. In *Furman,* Brennan and Marshall's decisions appear to fit with a completely different model to that of the conservatives. Here the conservatives recognised the legislature as a constraint on the Court's decision-making and argued that the Court had overstepped its role and so this reliance on legitimate authorities is more evocative of the Legal or Strategic Models.

Among the dissenters in *Furman*, the main theme to emerge was concern that the Court had gone beyond its constitutionally permissible capabilities. Chief Justice Warren Burger felt that it was the legislature, not the Court, that was, "presumed to embody the basic standards of decency prevailing in the society," and because the legislatures at both state and federal level still largely upheld the death penalty, this demonstrated that society still believed it to be constitutional.[30] A critic of the Court's decision, Burger stated that this debate, "is an area where legislatures can act far more effectively than courts," and believed that the legislature was both the best representative of public opinion and the best to implement this.[31] Justice Blackmun also felt that, "this Court has overstepped," reasoning that public opinion had long stood in favour of the death penalty, and this had been reflected in the work of the legislatures.[32] Powell also shared this view, citing the, "shattering effect this collection of views has on the root principles of *stare decisis*, federalism, judicial restraint, and — most importantly — separation of powers."[33] Lastly,

[30] *Furman v. Georgia,* 408 U.S. 238, 403 (1972) Justice Burger dissenting.
[31] *Furman v. Georgia,* 408 U.S. 238*,* 403 (1972) Justice Burger dissenting.
[32] *Furman v. Georgia,* 408 U.S. 238, 414 (1972) Justice Blackmun dissenting.
[33] Stare decisis refers to the doctrine of precedent; *Furman v. Georgia,* 408 U.S. 238, 417 (1972) Justice Powell dissenting.

Rehnquist stressed the need for deference to the legislature, rather than an activist Court stating, "How can government by the elected representatives of the people coexist with the power of the federal judiciary, whose members are constitutionally insulated from responsiveness to the popular will, to declare invalid laws duly enacted by the popular branches of government?"[34] As will be discussed later in this thesis, the conservative members of the Court were later persuaded by the approach of assessing evolving standards in death penalty eligibility cases, and informing these assessments through looking at state legislation. This was because this approach allowed for a level of deference to the legislature which they were so keen on, as in applying this approach the Court was not creating any new laws, rather it simply reflected what elected representatives had legislated. This approach *appeared* to be a limit on judicial power which satisfied the conservatives' views on the role of the Court, and also presented an image of the Court as lawyers not legislators.

Behind the scenes of *Furman,* the Justices' papers shed further light on the factors which influenced their decisions. They also demonstrate how Justices are subject to the same influences and pressures as the American people and that as a result the Justices cannot, and do not, look at death penalty cases in a vacuum, and external factors such as society's views on the practice have influence on their decisions. Justice Blackmun and Douglas's papers indicate that the Court, or at least certain Justices, were more attuned to societal standards and to public opinion in a death penalty context than perhaps the Court as an institution would admit, certainly at the time *Furman* was decided. A memo from one of Justice Blackmun's clerks on 14th June 1972 advised Blackmun that, "you may want to add

[34] *Furman v. Georgia,* 408 U.S. 238, 466 (1972) Justice Rehnquist dissenting.

amphasis [sic] to your suggestion that the Congress too has the function of interpreting the constitution and, in this case, is in a much better position to ascertain the feelings of the country and make the subjective determination required."[35] This suggests that the Justices do look at the feelings of the country and societal standards, but in this case some, such as Blackmun, felt that the Court was not the appropriate branch of government to act on these feelings, and therefore the desire to demonstrate institutional restraint motivated his vote to uphold. It is noteworthy that amongst the papers of Justice Blackmun for *Furman* is significant correspondence from members of the public, professionals, academics, and lawyers offering their opinion on the death penalty more broadly, on specific cases, and on Blackmun's position in such cases. For example, responding to Mrs Richard L. Donze of Rochester, Minnesota on 11 July 1972 Blackmun noted that, "The mail, both before and after the decision, is about evenly divided, so it appears that the people as well as the courts are in general disagreement."[36] Indeed, the letters in Blackmun's files demonstrate views from citizens across the country and represent both sides of the issue. This letter makes clear that Blackmun was not only curious about the views and responses of the American people to the Court's death penalty cases, but that he examined them closely, weighing up levels of support. Justice Douglas's *Furman* papers contain similar correspondence from the public as well as from organisations and lawyers, they also contain reports, journal articles, studies, and even religious materials such as a leaflet titled 'God and Capital Punishment.'[37] All of these documents represented views from both sides of the death penalty debate. This demonstrates where Blackmun and Douglas paid

[35] Blackmun Papers - Memo from MAL to Justice Blackmun Re: Capital Cases, 14th June 1972, Box 135, 69 5003 *Furman v. Georgia*.
[36] Blackmun Papers - Justice Blackmun response to letter from Mrs Richard L. Donze of Rochester, Minnesota, 11 July 1972, Box 135, 69 5003 *Furman v. Georgia*.
[37] Douglas Papers - Part II: Subject File, 1856-1979, Box 526, *Capital Punishment, 1967-1973*.

attention to the views of the American people and attempted to gain an insight into both sides of the debate through these communications from the public and articles in the press.

The introduction of evolving standards in *Furman* demonstrated that some members of the Court believed that public opinion and standards should influence the constitutionality of the death penalty. This later became the accepted standard and approach by all members of the Court. It would help to provide the solution to the problem of the Court's own making – its public image – as it provided a route through which the Court could clearly convey that it was making its decisions based on objective and legitimate criteria, rather than on the whims of the Justices.

Gregg v. Georgia

Gregg cemented the influence of evolving standards of decency on Court decision-making, and also marked where the Court began to utilise this in its image crafting. Although evolving standards of decency had not been put forward by litigants in *Gregg*, likely because just two Justices - Brennan and Marshall - gave it any weight in *Furman*, the Court returned to this factor on its own accord. The Court as an institution began to come round to the relevance and influence of societal standards in death penalty cases and its relevance to death penalty decision-making, and its use in image crafting gained more institutional support. Yet, individually the Justices were still divided on how evolving standards were to be assessed and what the data they examined demonstrated. The individual perspectives on this were the kind of issue which the Court's image crafting was intended to mask.

In contrast to *Furman*, the *Gregg* decision did not face criticism based on a lack of clarity in the ruling. Media coverage of the two cases demonstrated where the Court had succeeded in *Gregg* in providing a clear decision which it had failed to produce in *Furman*. The *New York Times* noted that, "Although the issue was presented and addressed in *Furman*, it was not resolved by the Court."[38] Yet in *Gregg* it was much clearer what the Court's decision on the death penalty was, with an article stating that, "The Court found that it is a constitutionally acceptable form of punishment, at least for murder."[39] Whilst it is difficult to empirically measure a favourable public image, this is instead evidenced in the fact the Court had remedied issues of obscurity in its decisions. The Court had done its job here and offered clarity and explanations in its reasoning, thereby providing the guidance to lower courts which its decision in *Furman* failed to do. The ruling itself was not popular with everyone particularly those opposed to the death penalty, but the public and press at least knew what the Court had decided and that the death penalty had been deemed constitutional, such that it has not been revisited and is still relied upon decades later.

Evolving standards were again highlighted by Justices Brennan and Marshall, but also received a strong focus from the Stewart plurality which made this the basis for its ruling that the death penalty does not violate the Eighth Amendment in all cases. This demonstrates the emergence of recognition from members of the Court of its value for helping shape the Court's public image; it was slowly becoming a highly influential factor in the Court's decision-making. Stewart's decision to tie his reasoning to societal standards

[38] "Excerpts from Decisions by Supreme Court Justices on Death Penalty Cases," *The New York Times*, (3rd July 1976), https://www.nytimes.com/1976/07/03/archives/excerpts-from-decisions-by-supreme-court-justices-on-death-penalty.html

[39] Lesley Oelsner, "Decision is 7 to 2," *The New York Times*, (3rd July 1976), https://www.nytimes.com/1976/07/03/archives/decision-is-7-to-2-punishment-is-ruled-acceptable-at-least-in.html.

was significant as it marked the first time that the Court suggested that evolving standards of decency, in this case as enacted through the legislature, was an influential factor in deciding whether or not to uphold the death penalty. Dwight Aarons is correct in noting that from *Gregg* onwards the Court, "has slowly given further content to the phrase," and indeed it developed into a dominant factor in influencing subsequent death penalty eligibility cases.[40] Corinna Barrett Lain argues that, "the Supreme Court was under tremendous pressure to find a way to make the death penalty work as a matter of constitutional law-and the one thing the Justices in *Gregg* could say and still pass the laugh-out-loud test was that the ruling had society's "evolving standards of decency'' on its side," and so used this notion as a means to achieving this end.[41] More than this, the Court needed to form a legitimate basis for its decision after *Furman*, as Stewart himself recognised.[42] Clarification was needed and, as Edward Lazarus notes, in *Gregg*, "Stewart, Powell and Stevens seemed to be sending a message that they meant to bring moderation, order, and consistency to the Court's pinball ride through the law of death."[43] Indeed, the Stewart plurality reads as less of a 'free-for-all' than the opinion in *Furman*. As the third and fifth chapters of this thesis discuss in greater detail, in eligibility cases the Court was not motivated so much by the desire to make the death penalty work as it was in later methods cases (as eligibility cases already assume the constitutionality of the death penalty). On eligibility the Court was focused on the legitimacy of its decisions and removing accusations of subjectivity: evolving standards based on the seemingly objective

[40] Dwight Aarons, "The Abolitionist's Dilemma: Establishing the Standards for the Evolving Standards of Decency," *Pierce Law Review*, Vol. 6 (2008), pp. 441- 467 (2008), http://scholars.unh.edu/unh_lr/vol6/iss3/6.
[41] Corinna Barrett Lain, "Lessons Learned from the Evolution of Evolving Standards," *Charleston Law Review*, Vol. 4 (2010), pp. 661-678, p. 670, https://scholarship.richmond.edu/cgi/viewcontent.cgi?article=1277&context=law-faculty-publications.
[42] *Gregg v. Georgia,* 428 U.S. 153, 169 (1976).
[43] Edward Lazarus, *Closed Chambers: The Rise, Fall, and Future of the Modern Supreme Court*, p. 116.

criteria of state legislation enabled the Justices to rule how they desired, but with the outward appearance of objectivity.

It is notable in *Gregg* that the Stewart plurality applied the same approach – of focusing on evolving standards - yet argued the opposite of Marshall and Brennan's *Furman* holding arguing that, "a large portion of American society continues to regard it as an appropriate and necessary criminal sanction."[44] Stewart believed that prior to *Furman*, "Death statutes then were dead letters," however the public response to *Furman* had altered this dramatically as support for the death penalty continued its upward trajectory reaching 66% in 1976 compared to 50% in 1972, alongside 232 death sentences, up from 42 in 1973.[45] Stewart provided the example that at least 35 State legislatures had enacted new death penalty statutes as proof of this support, and argued that, "This establishes what evolving standards of decency are in 1976."[46] Furthermore, Stewart cited the example of California's state-wide referendum and constitutional amendment authorising capital punishment as another example of public support for the death penalty. This led him to argue that, "all of the post-*Furman* statutes make clear that capital punishment itself has not been rejected by the elected representatives of the people."[47] In short, the contexts in which Furman and Gregg took place differed greatly. With states redrafting their death penalty statutes, and a steep rise in death sentences in the interim, it was clear that there

[44] *Gregg v. Georgia,* 428 U.S. 153, 179 (1976).
[45] David M Oshinsky, *Capital Punishment on Trial: Furman v. Georgia and the Death Penalty in Modern America* (Lawrence, Kansas: University Press of Kansas, 2010), p. 69. "Death Penalty," *Gallup*, https://news.gallup.com/poll/1606/death-penalty.aspx. "Death Sentences in the United States Since 1977," *Death Penalty Information Center*, https://deathpenaltyinfo.org/facts-and-research/sentencing-data/death-sentences-in-the-united-states-from-1977-by-state-and-by-year.
[46] *Gregg v. Georgia,* 428 U.S. 153, 179 (1976). David M Oshinsky, *Capital Punishment on Trial,* p. 69.
[47] *Gregg v. Georgia,* 428 U.S. 153, 180 (1976).

was still an appetite for the death penalty amongst some states and Stewart recognised this.

Stewart's approach here once again appears to be most representative of the Strategic Model, as there was recognition of constraints on the Court's decision-making and the need to evidence societal standards. That he looked to state legislation rather than simply expressing his own view suggests that Stewart (and the plurality) felt under some constraints in his decision-making about how the ruling would reflect on the Court. He therefore was not entirely free to act unconstrained without explanation. Stewart went to lengths to evidence the societal standards he claimed existed, and to do so empirically so that the decision was based on statistical assessments rather than on theoretical discussions and on personal views. However, in his decision of how to assess this, Stewart exercised his own discretion. For example, he failed to acknowledge that only one of the 35 states which enacted new death penalty statutes had no death penalty statute prior to *Furman.* Douglas Kolly suggests that perhaps this legislative action reflected "a renewal and updating of penal codes rather than an overwhelming mandate from the public."[48] Furthermore, Stewart refuted the idea that the growing infrequency with which juries were sentencing individuals to death demonstrated a rejection of capital punishment. However, since *Furman,* juries had still sentenced more than 600 people to death.[49] This led Stewart to argue that, rather than a rejection of capital punishment, there was some reluctance amongst juries to impose it which instead reflected, "the humane feeling that this most

[48] Douglas Kolly, "*Gregg v. Georgia*: The Search for the Civilized Standard," p, 654.

[49] Edward Lazarus, *Closed Chambers: The Rise, Fall, and Future of the Modern Supreme Court*, p. 107. The exact number of death sentences is unclear, other scholars such as R. Schwed in Abolition and Capital Punishment, p. 145, have listed number as being as high as 611 people whereas others such as Jan Górecki, in *Capital Punishment: Criminal Law and Social Evolution* (New York: Columbia University Press, 1983), p. 17 put the number lower at 460.

irrevocable of sanctions should be reserved for a small number of extreme cases."[50] Stewart concluded that whilst the cases before the Court renewed the evolving standards debate, the developments since *Furman*, "have undercut substantially the assumptions upon which their argument rested."[51]

In his dissent, Justice Marshall took another view of evolving standards and again reached a differing view to the majority. He noted that this case required him to consider whether his conclusion in *Furman* had been undercut by subsequent developments and acknowledged the significance of the post-*Furman* legislative developments: "…I would be less than candid if I did not acknowledge that these developments have a significant bearing on a realistic assessment of the moral acceptability of the death penalty to the American people."[52]. Marshall sought to substantiate his view that societal values found the death penalty unacceptable and challenge the Stewart plurality's assertion that public opinion favoured the death penalty. Marshall cited a study conducted in the post-*Furman* period and argued, "the American people know little about the death penalty, and that the opinions of an informed public would differ significantly from those of a public unaware of the consequences and effects of the death penalty."[53] This did not necessarily challenge his views in Furman, but it distinguished his position from that of Brennan, who followed a more explicitly Attitudinal approach and refused to reiterate (and therefore to revisit) his reasoning. This created a stronger line of argument from Marshall as he felt able to defend it even in the post-*Furman* context which was hostile to his position. Once again, Marshall's decision was influenced by evolving standards of decency and looked to American society

[50] *Gregg v. Georgia,* 428 U.S. 153, 181 (1976).
[51] *Gregg v. Georgia,* 428 U.S. 153, 179 (1976).
[52] *Gregg v. Georgia,* 428 U.S. 153, 232 (1976) Justice Marshall dissenting.
[53] *Gregg v. Georgia,* 428 U.S. 153, 232 (1976) Justice Marshall dissenting.

to inform his decision. Yet in this case his conclusion was also based on his own belief that, "The death penalty, unnecessary to promote the goal of deterrence or to further any legitimate notion of retribution, is an excessive penalty forbidden by the Eighth and Fourteenth Amendments."[54] This personal interpretation of whether penological goals were met demonstrates an element of subjectivity in Marshall's decision-making which aligns this decision more with the Attitudinal Model as his own personal views on the excessiveness of the death penalty determined his decision. This demonstrates how the Justices could look to and be influenced by evolving standards, yet arrive at differing conclusions. This continued to happen in the Court's later death penalty eligibility cases as although there was increasing agreement about the relevance of evolving standards in death penalty decisions and this became increasingly influential, the patterns of disagreement that emerged in Gregg continued.

Brennan's dissent demonstrated that evolving standards could be interpreted and reasoned differently. Brennan found agreement with the Stewart plurality that the Eighth Amendment, "must draw its meaning from the *evolving standards of decency* that mark the progress of a maturing society," but disagreed with Stewart's assertion that these standards allowed for the death penalty in the present day.[55] Citing his argument in *Furman*, that the death penalty was a cruel and unusual punishment in all circumstances, Brennan argued that, "'moral concepts' require us to hold that the law has progressed to the point where we should declare that the punishment of death, like punishments on the rack, the screw, and the wheel, is no longer morally tolerable in our civilised

[54] *Gregg v. Georgia,* 428 U.S. 153, 241 (1976) Justice Marshall dissenting.
[55] *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

society."[56] Brennan refused to repeat his reasoning for this again. Instead, he emphasised, "the primary moral principle that the State, even as it punishes, must treat it citizens in a manner consistent with their intrinsic worth as human beings- a punishment must not be so severe as to be degrading to human dignity."[57] This demonstrated how Brennan's approach once again is best described by the Attitudinal Model.

Despite the disagreement on how to interpret societal standards at the time of *Gregg*, most significant to emerge from this decision was that societal standards became the chosen approach by the Court for deciding death penalty cases, and for its image crafting. Whereas *Furman* had produced a multitude of opinions and approaches, the Court was deliberately more focused in *Gregg* in order to create a clearer and more coherent opinion which would make the Court's ruling stronger and remove the ambiguity left by *Furman*. In this sense, the Court's image crafting here was successful, as there was no doubt what the ruling in *Gregg* was and the states responded accordingly. The ambiguity left by *Furman* was gone, and the Court this time had built its decision on a clear, evidenced and perceived to be legitimate foundation which bolstered the Court's public image as the ruling did not appear to be a hodgepodge of the Justices' various personal views as it had in *Furman*. However, as subsequent chapters of this thesis will outline in more detail, the image versus the reality were very different. Evolving standards acted as a mask of legitimacy, but underneath that the Justices were assessing this factor differently and reaching different conclusions based on their own interpretations and analysis of their chose data. And so, whilst outwardly in *Gregg* the Court began to project the appearance of a legitimate institution with an agreed

[56] *Gregg v. Georgia,* 428 U.S. 153, 229 (1976) Justice Brennan dissenting.
[57] *Gregg v. Georgia,* 428 U.S. 153, 229 (1976) Justice Brennan dissenting.

upon doctrine for its death penalty cases, in reality this was not the case, and this was to plague the Court's later decisions.

Evolving standards was not the only factor which the Court discussed in *Furman* and *Gregg* which made appearances in subsequent cases. The Court also included discussion of arbitrariness and penological theory in particular in its discussions. However, these factors were not influential in the Court's decision-making in the way that evolving standards were because, unlike evolving standards, the Court would have struggled to assess them empirically as they were highly subjective issues. There are no state laws that can be counted to quantify whether a punishment has served its penological purpose. With regards to arbitrariness, the body of research that exists today which highlights the discrepancies in death penalty sentencing was in its infancy at this time. On some issues there were studies demonstrating arbitrariness in sentencing, for example the LDF used stats and evidence demonstrating the arbitrariness of capital sentencing for rape cases in their assault on capital punishment during the 1960s. Furthermore, evidence from historical rape studies demonstrates evolution in views towards capital punishment and rape since Scottsboro in the 1930s.[58] However, a substantive body of research into arbitrariness in capital sentencing for homicide did not emerge until much later. Thus, there was not a body of data which the Court could rely upon to evidence this factor, certainly not as clearly or as easily as societal standards could be evidenced through state legislation. They did not gain traction in *Gregg* and throughout subsequent cases as factors upon which

[58] Vivien Miller, '"It doesn't take much evidence to convict a Negro": Capital punishment, race, and rape in mid-20th century Florida,' *Crime, Histoire et Sociétés/ Crime, History & Societies,* Special Issue: Reforming, Debating and Enforcing the Death Penalty in Mid-Twentieth Century Europe and North America Vol. 21, No.1 (Jan 2017), pp. 35-53.

to rest a decision because, unlike state legislation and evolving standards (albeit superficially), there was a lot more room for individual interpretation of these factors. They did not meet the level of objectivity for which the Court strived and thus were not conducive to crafting the image of legitimacy and objectivity which the Court wanted to create. By choosing not to build its decisions on these factors which were more philosophical than empirical, the Court sought to avoid the risk of ceaseless debate and discussion. However, in a much broader context, these factors are still of some significance as they formed components of the larger death penalty debate which ensued in the subsequent decades.

The issue of arbitrariness – in this context meaning the seemingly random way in which the death penalty was applied in terms of variants such as who was executed, for what, in which state - was influential in *Furman* insomuch as many of the factors discussed were. Which is to say that it was raised alongside many other points, was discussed by a couple of Justices, but was not an influential factor in any of the Court's subsequent death penalty eligibility or methods cases. However, it was picked up by the anti-death penalty campaign and so its relevance was seen in that sphere rather than in the Court's judicial sphere. Justice Brennan raised this factor in his concurrence in *Furman*, expressing concern that, "the probability of arbitrariness is sufficiently substantial that it can be relied upon, in combination with other principles, in reaching a judgment on the constitutionality of this punishment."[59] Furthermore, Brennan believed that, "the very words 'cruel and unusual punishments' imply the condemnation of the arbitrary infliction of severe punishments."[60] Justice Stewart expressed similar sentiment about the death penalty in this case stating

[59] *Furman v. Georgia,* 408 U.S. 238, 295 (1972) Justice Brennan concurring.
[60] *Furman v. Georgia,* 408 U.S. 238, 271 (1972) Justice Brennan concurring.

that, “These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual.”[61] This position didn’t gain any widespread support in the opinions from the other Justices on the Court, it is an example of the weakness of the *Furman* ruling which the Court later sought to remedy, where the ideas expressed and the opinions from each Justice were very individualised. The only other Justice who picked up on this issue was Chief Justice Burger in his dissent where he identified the main shortcoming of this factor, arguing that, “This claim of arbitrariness is not only lacking in empirical support, but also it manifestly fails to establish that the death penalty is a ‘cruel and unusual’ punishment.”[62] This highlights the importance of empirical data, and its link to the perception of a legitimate Court and its ruling.

On the other hand, a factor raised in *Furman* and *Gregg* which has been discussed at length in subsequent cases is penological theory.[63] Although it was not influential in the same way as evolving standards it nevertheless was touched upon by the Court in many cases in the decades that followed and was a key component of the debate. However, despite its recurring appearances in the Court’s death penalty decisions, this factor has never formed the basis for modern death penalty rulings and so is of less significance than evolving standards. As with the debate regarding evolving standards, the debate around the purpose of punishments and penological goals was not exclusive to *Furman* and *Gregg* nor to the death penalty debate.

As the next chapter will further reinforce, objective criteria which could be empirically assessed were the gold standard for the Court, particularly in an eligibility context, as this

[61] *Furman v. Georgia,* 408 U.S. 238, 309 (1972) Justice Stewart concurring.
[62] *Furman v. Georgia,* 408 U.S. 238, 399 (1972) Chief Justice Burger dissenting.
[63] *Furman v. Georgia,* 408 U.S. 238, 304 (1972) Justice Brennan concurring. *Gregg v. Georgia,* 428 U.S. 153, 183 (1976).

helped to create an image of a legitimate Court with legitimate decisions. Where arbitrariness and penological theory fall short is that, unlike evolving standards, they do not meet this standard. Arbitrariness, despite being a continuing issue in the death penalty today, did not gain the focus of the Court beyond its discussion in *Furman* for this reason. Penological theory, although re-emerging in *Gregg* and in later death penalty cases, presented difficulties for the Court as although they clearly believed it was important to show a theoretical underpinning, or at least some credence given to these theories, the Justices reached different subjective conclusions about what the penological goals of capital punishment were and whether it served these purposes which could not be masked with legislation and therein lies the issue with this factor. *Furman* and *Gregg* established penological theory as a recurrent theme, though not one which they utilised in image crafting.

Furman and *Gregg* mark the beginning not only of the modern death penalty, but of the Court's image crafting on this issue. In both *Furman* and *Gregg,* the Strategic Model and the Attitudinal Model have been interchangeably applicable, the recognition of the need for constraint and deference to the legislature and of appearing objective is suggestive of the Strategic Model. But despite this, the Justices have pursued their own preferences both in terms of their interpretations and the outcomes that these have produced, as seen with the nine opinions in *Furman*, which is more applicable to the Attitudinal Model. What this shows is that these models can provide frameworks for thinking about the Justices actions, but they don't take into account different justices or different cases. Beyond this they also fail to recognise different constitutional issues (not just limited to the Eighth Amendment

or the death penalty) and how these might vary. They attempt to cast a wide net covering all Justices and all issues which oversimplifies and generalises the intricate workings of the Court and its Justices.

As the subsequent chapters will show, *Furman* and *Gregg* established precedent that was influential for later death penalty cases. *Furman* was the first instance where evolving standards was discussed in a death penalty context, and this grew to be the most significant aspect of the Court's death penalty eligibility cases. *Gregg* guaranteed the constitutionality of the death penalty which later provided precedent which influenced the decision-making in the Court's methods cases. Although nowadays many lawyers consider *Furman* and *Gregg* as "more historical artefacts than cases of interest," their influence in shaping the later decades of death penalty jurisprudence cannot be understated.[64]

Furman was significant because it established many of the themes of the modern death penalty debate, the most notable being evolving standards. However, the decision itself has been heavily criticised because of its lack of clarity and clear standard. It is clear that when returning to this issue in *Gregg*, the Court was focused on handing down an opinion that left less room for ambiguity on this issue. This in turn helped to present the image of a more legitimate Court, where *Furman's* lack of clarity had cast doubts. The acceptance and adopting of evolving standards into the Court's decision is what makes *Gregg* significant as this was to dominate later death penalty cases and was a clear attempt by the Court to establish an approach to these cases which would reflect favourably upon the institution. *Gregg* marked the beginning of this being applied by the Court in a death penalty context, and in later years this was to really take hold and become a more explicit

[64] 'Ezra' Interview. Conducted by Catriona Bide, 9th September 2020.

aim of the Justices. *Gregg* established the approach of image crafting to be applied by the Court in subsequent eligibility and methods cases. The next chapters will deal with each of these in turn.

Chapter 3: Death Penalty Eligibility

From *Gregg* onwards, in death penalty eligibility cases the Court crafted its image through focusing on evolving standards of decency, as this chapter will discuss in more detail. It was here where the Court became more explicit that its decisions should be informed by evolving standards of decency, and that these standards should be assessed by examining what the Court deemed to be legitimate indicators of societal standards. The Court deemed state legislation to be the most legitimate indicator of societal standards, and thus focused primarily on this to inform its eligibility decisions. However, this was just an image and in reality the Justices' differing approaches to assessing state legislation meant that their personal views underpinned their decision-making. As Chapter 4 will later explore, the result of this was that the Court's eligibility decisions were influenced mostly by the various swing Justices as their interpretations of evolving standards data. The Court's focus on evolving standards demonstrated a desire to present a legitimate public image through its decision-making, but underneath this the decisions were instead influenced by personal views, interpretations, and how far these could garner support.

The decision to focus first on eligibility cases, rather than methods cases, was made because they occurred first in terms of chronology and also because they present one of the first questions of the death penalty – who is eligible. Eligibility cases, as defined in the context of this thesis, are cases in which the Court examined who the death penalty could be applied to. Death penalty eligibility cases have covered 3 issues: the category of capital crimes, the actions of the defendant, and questions of criminal capacity. Looking at the category of crimes, the Court has considered whether the death penalty is a

constitutionally permissible punishment for crimes other than murder. This question was first examined only in relation to the rape of an adult but was later revisited to consider cases of child rape. Secondly, the Court has considered whether the death penalty would be a constitutional punishment for those who did not themselves kill an individual during the commission of their crime, the so-called "non-trigger pullers." The third issue is perhaps the broadest, and addresses the culpability of the perpetrator, typically where there are questions about whether the defendant had the mental capacity to understand the consequences of their actions. Here the Court examined questions of age, IQ, and sanity, assessing where the parameters for death sentencing lay. Over 42 years, the Court ruled on more than a dozen eligibility cases, and gradually, though not always linearly, narrowed the application of the death penalty and, as this chapter will demonstrate, built on its reliance on evolving standards of decency to form the basis for its opinions on this issue.

Closer examination of the Court's death penalty eligibility cases reveals two main points around which this chapter is structured. First, in a continuation of *Gregg*, these cases demonstrate the significance of evolving standards of decency and the importance of this factor in influencing the Court's eligibility decisions due to the perception that it creates the image of a legitimate Court. Relying on this analytical tool, the Court attempted to avoid accusations that the Justices acted on their own views and demonstrated an awareness of the need to appear objective in these decisions to avoid undermining the Court's reputation and work more broadly. Eligibility cases reveal that this has been compounded by the Court applying strict standards for the sources that informed its assessment of societal standards and the need for these sources to be legitimate. Eligibility cases make clear that the Court's decisions are influenced by the importance it places on, and its reliance on, legitimate indicators of societal standards. Basing its decisions on evolving

standards was not enough to present the image of legitimacy, the Court had to be able to demonstrate that its assessments of societal standards were based upon firm evidence. This is closely linked to evolving standards as it too stems from a desire to place the Court's opinions upon firm foundations, to remove accusations of subjectivity in order to create legitimate Court decisions, to establish a strong jurisprudence on the issue of death penalty eligibility, and to craft a more favourable public image of the Court. As a result, the Court's assessments of societal standards have been informed predominantly by one factor – state legislation. However, as this chapter will present in more detail, this still did not remove the Justices' personal views and interpretations from decisions.

Secondly, in agreeing unanimously both institutionally and individually on the evolving standards approach, the Court and its Justices have, however, largely overlooked its flaws. The image that the Court has crafted is that of an agreed upon, objective assessment for societal standards through looking at state legislation. Yet, the reality is not so straightforward. The Court lacks a consistent standard for the scope of its evolving standards assessments. As such, the Justices can exercise their own discretion when deciding which states and legislation to include in assessments, or where to place an emphasis. The result of this has been that the Court's examination of evolving standards of decency has not fully achieved what it was intended to do. Whilst evolving standards, as informed by state legislation particularly, may appear to remove the personal predilections of Justices from the Court's decision-making and create an image of neutrality, this is not what is really taking place. Rather, these personal predilections instead come through in how the Court and individual Justices conduct their analysis of these standards. Thus, the image of neutral decision-making which the Court seeks to craft is exactly that, an image.

To consider these points in relation to the theories of judicial decision-making outlined in the introduction, the Legal Model is clearly not at play in these cases. The very notion of evolving standards directly contradicts this as the Legal Model assumes that the Justices rely on legitimate authorities such as the Constitution or statutes and precedents in their decision-making. Certainly, the Court relied on what it deemed to be legitimate *evidence* (in the form of state legislation), but this is to inform its assessment of *evolving* standards of decency, and it did not look to authorities such as the Constitution or precedent to inform these decisions. Rather, the Strategic and Attitudinal Models are perhaps more relevant in this context. The Justices were able to pursue their own preferences through the way in which they interpreted evolving standards data, as would be suggestive of the Attitudinal Model, but were constrained by the need to frame this around evolving standards of decency and with the Court's public image in mind, as would fit with the Strategic Model.

In death penalty eligibility cases the Court did not consistently narrow the application of the death penalty in every instance. Applying the evolving standards doctrine did not always lead the Court to find the death penalty unconstitutional in all eligibility cases before it during this period because a majority of Justices did not always view societal standards as moving towards abolition. Indeed, societal standards can evolve in either direction or they may not change at all. Whilst the Court has consistently narrowed the application of the death penalty in cases concerning the type of crime committed, in non-trigger puller cases and especially in identity and culpability cases this has not been the case.

On the issue of category of crime there were two cases the Court addressed which were similarly focused. In *Coker v. Georgia* (1977) the Court ruled that the death penalty was

unconstitutional for the crime of rape, and then later in *Kennedy v. Louisiana* (2008) the Court held that the Cruel and Unusual Punishments Clause prohibits imposing the death penalty for the rape of a child in cases where the victim did not die and death was not intended. Both of these cases narrowed the application of the death penalty, but *Coker* was perhaps most significant as it set the precedent for the decision in *Kennedy*. More broadly, it limited the death penalty only to the worst of the worst offenders, in cases where a life was taken. The approach in both these cases was the same as the Justices focused on evolving standards of decency as evidenced by state legislation, finding that legislation stood against the death penalty on both issues.

The Court also addressed non-trigger puller cases twice. Again, evolving standards of decency and state legislation were assessed by the Court. These two cases also focused on proportionality and deterrence as the Court deemed these factors to be of relevance in such a context, this demonstrating where themes raised in *Furman* re-emerged in subsequent cases. In *Enmund v. Florida* (1982) the Court held that death was an unconstitutionally excessive and disproportionate penalty under the Eighth and Fourteenth Amendments for one who did not take a life, attempt to take a life, nor intend to take a life. The Court then revisited this issue in *Tison v*. *Arizona* (1987) where it applied its ruling from *Enmund* to find that in this case the death penalty was an appropriate punishment for a felony murderer who was a major participant in the underlying felony and exhibited a reckless indifference to human life. *Enmund* was the key ruling on this issue not only because it narrowed the application of the death penalty, but because it established a proportionality standard going forward focused on intent to kill. *Tison* saw the application of this standard but the upholding of the death penalty due to petitioner's demonstrating "reckless indifference to human life."

Cases concerning culpability and the perpetrator composed the largest proportion of the Court's eligibility decisions. These cases addressed a range of issues. For example, *Ford v. Wainwright* (1986) looked at the death penalty for the insane and the Court upheld the common law rule that the insane cannot be executed. Age was another factor the Court engaged with and eventually on this issue the Court narrowed the application of the death penalty to reserve it only for offenders over the age of 18. In its first age case, *Thompson v. Oklahoma* (1988), the Court held the execution of a 15-year-old violated the Eighth Amendment's prohibition against cruel and unusual punishments. In *Stanford v. Kentucky* (1989) the Court then upheld the death penalty, finding that the imposition of the death sentence on convicted capital offenders aged 16- or 17-years old, did not violate the Eighth Amendment's protection against cruel and unusual punishment. However, the Court revisited this issue in *Roper v. Simmons* (2005), this time finding it to be unconstitutional to impose capital punishment for crimes committed while under the age of 18. In all of these cases the Court focused on counting state legislation, arguing that in the interim between *Thompson* and *Roper* this had changed and a majority of states no longer supported the death penalty for 16- and 17-year-olds. Lastly, the Court addressed the issue of death sentencing for the intellectually disabled. This followed a similar path to cases concerning age as the Court made a U-turn on this issue. In *Penry v. Lynaugh* (1989) the Court ruled that the execution of the "mentally retarded" did not violate the Eighth Amendment. However, when it revisited this issue in *Atkins v. Virginia* (2002) it then ruled that executing people with intellectual disabilities did violate the Eighth Amendment's ban on cruel and unusual punishments. Evolving standards of decency and state legislation formed the basis for these opinions. However, on this issue, rather than finding that a majority of states turned their back on the death penalty, the Court placed emphasis on

the consistent direction of change of states prohibiting the death penalty for 16- and 17-year-olds and that provided the justification for prohibiting it.

The Court's death penalty eligibility decisions reflected many of the changes seen in American society. As the number of death sentences and executions increased throughout the late 1980s and 1990s the Court handed down decisions upholding the death penalty for juveniles and offenders with intellectual disabilities. Later when public opinion began to turn against the death penalty and the number of sentences and executions declined the Court overturned these prior rulings and narrowed the application of the death penalty. The timings of these cases also fit with the changes in death sentencing. For example, the eligibility cases the Court addressed in the 1970s and 1980s emerged as the death penalty began to be reinstated by many states after *Gregg* as they sought clarification on what the constitutional limits were on their new death penalty statutes and these cases made their way through the lower courts before reaching the Supreme Court. That the Court did not address this issue at all in the 1990s despite executions being at their peak, is likely because as death sentences and executions peaked there was an increased number of appeals and litigation around these issues and thus these cases took years, indeed all of the 1990s, to make their way to the Supreme Court which they eventually did in the early 2000s, by which point the context and evidence available stood more clearly in favour of narrowing death penalty eligibility.

The Justices on the Court are also American citizens, as such they are exposed to the same news stories, anti or pro-death penalty campaigns, rhetoric, and debates as every other American. As highlighted in the previous chapter, evidence of this can be found in the

papers of some of the Justices.[1] From this, and other factors, they form their own views and make their own assessments of society's position on the death penalty. During this period many Justices' views on the death penalty evolved and changed just like those of wider American society. For example, Blackmun with his famous statement in *Callins* that he, "shall no longer tinker with the machinery of death," or O'Connor in her 2001 expression of doubt about whether states were taking sufficient care to make certain that innocent people were not sitting on death row.[2] The decisions of these Justices also changed. For example, in *Atkins* (2002) O'Connor voted to overturn her own ruling in *Penry* that the death penalty was constitutional for offenders with intellectual disabilities based on an assessment that societal standards had evolved since *Penry* and the death penalty was no longer tolerated in this context. Similarly, Justice Stevens' position changed as he, "became increasingly disenchanted with the operation of the death penalty."[3] Stevens shifted from upholding the death penalty in *Gregg* to voting to strike it down in subsequent cases, some of which, including *Thompson v. Oklahoma* (1989) and *Atkins* (2002) he authored. It is noteworthy that, just like public opinion, Justices such as these have moved against the death penalty, there are no such examples of those who have moved against public opinion to become more in favour of its application. This suggests that some of the same forces at work which have influenced and changed the views of the American people can also work to influence the views of the Justices.

[1] See letter responding to Mrs Richard L. Donze of Rochester, Minnesota on 11 July 1972 referenced in Chapter 2, Page 113 Footnote 36.
[2] Blackmun Papers - Draft Justice Blackmun dissenting, November 22, 1993, p. 2, Box 648, 93-7054, *Callins v. Collins*. Madhavi M. McCall, "Sandra Day O'Connor: Influence from the Middle of the Court," in Christopher E. Smith, et al., *The Rehnquist Court and Criminal Justice,* (Lexington Books, 2011), p. 155.
[3] Emily Bazelon, Why Justice Stevens Turned Against the Death Penalty," *The New York Times*, (17th July 2019), https://www.nytimes.com/2019/07/17/opinion/stevens-supreme-court.html.

However, the degree to which Justices are influenced by these same pressures varies. Originalists, such as Scalia might have been aware of shifting perspectives on the death penalty, some of these messages may even have resonated with them personally, but under an originalist interpretation of the Constitution they had absolutely no bearing and so did not influence the decision produced by them. On the other hand, a Justice such as Kennedy or Stevens who took in a very broad range of factors to inform their decisions appeared more open to the views not only of the American people but of those globally. They also appeared to be influenced by the same data and studies that have worked to shed light on the death penalty and its penological purposes, dispelling many previously held views about its utility and thus contributing to a shift in attitudes among the American people. The firm reliance from the Court and the Justices on state legislation to inform its decisions, however, means that even if the individuals or the institution are heavily influenced by public opinion neither will admit to it as public opinion can be very changeable. State legislation reflects the public's mood but removes this precarity and so is a way of encompassing societal standards more legitimately, this is why the Court relies on it so heavily.

The Court agreed that death penalty decisions should be, "informed by objective factors to the maximum possible extent," otherwise it risked appearing that the Court and the Justices were exceeding their role in the judicial branch of government and imposing their views on the American people, rather than applying the Constitution and rule of law.[4] The four factors the Court used to inform its eligibility decisions were: evolving standards of decency, proportionality, culpability, and penological theory. The recurrence of these four

[4] *Coker v. Georgia*, 433 U.S. 584, 592 (1977).

factors meant that the Court's opinions in eligibility cases were in many ways remarkably similar with regards to the factors discussed. Furthermore, the Court's primary focus on evolving standards meant that they were very similar with regards to what they were hinged on and thus the Court was able to craft a strong jurisprudence in this area, one that appeared to be based upon society's views on this issue rather than on those of the Justices, which further benefited its public image. The Court's image crafting here was a long game, spanning several decades and cementing itself more each time it decided another case using the evolving standards framework. A brief summary of the four recurring factors discussed in the Court's decisions would be helpful at this stage, before embarking on a more extended discussion below.

I. Evolving standards of decency

The most prominent factor in influencing the Court's rulings was evolving standards of decency. It formed part of the *Furman* and *Gregg* opinions, and was the factor upon which the Court found the most consensus regarding its relevance. The history of the use of this factor in the Court's jurisprudence and the way in which it was adopted into Eighth Amendment rhetoric was outlined in the previous chapter, but its significance here lies in the way the Court relied upon it in its image crafting and this chapter further demonstrates how evolving standards became entrenched in Eighth Amendment death penalty investigations and became the standard test in eligibility cases due to the image it created of the Court.

Following precedent set in *Gregg*, in its eligibility decisions the Court largely assessed societal standards and how these evolved by looking to state legislation. In *Coker v. Georgia* Justice White argued that, "attention must be given to the public attitudes concerning a

particular sentence history and precedent, legislative attitudes, and the response of juries reflected in their sentencing decisions are to be consulted."[5] Thus, a key factor first examined in *Coker*, and then in subsequent eligibility cases, was state legislation. In its most basic sense, this method involved counting the numbers of states which permitted or forbade the death penalty for the category in question, and this number served as an indicator of whether American societal standards supported the death penalty in this context or not.

One problem, however, with the Court's decision to look to state legislation to assess societal standards is that the Court established no standard or rules for how to assess state legislation. As will be discussed later in this chapter, it is here where the Court's image crafting approach is flawed. For example, there was no consistent stance on whether the Court should only count death penalty states, or only those that actively applied the punishment in question. This was entirely at the Justices' discretion and could drastically alter the conclusions they drew. The results that have emerged from the Court after assessing evolving standards of decency also varied. In some cases, the Court has followed a clear line of jurisprudence, and in others made complete U-turns. This lack of consistent application demonstrates where scratching the surface of these opinions reveals the power of the Justices to interpret data to pursue their desired result.

II. Proportionality

Although evolving standards has been the main influence on eligibility cases, other factors have also featured in the Court's decisions, in the discussions, and in majority and

[5] *Coker v. Georgia*, 433 U.S. 584, 592 (1977).

dissenting opinions. Proportionality is one such factor. Proportionality in this context refers to whether the death penalty is proportionate punishment for the crime committed or category of criminal in question. This question of proportionality is a factor that is used both by death penalty advocates and opponents. This is because both view the proportionality of the death penalty differently: for proponents as an eye for an eye and therefore proportional, and for opponents as excessive as society must be better than the perpetrator and therefore should not take a life. There exists within the Eighth Amendment, "a principle of proportionality which, commands that a criminal sentence be proportionate to the committed crime."[6] The Court established a framework for assessing the proportionality of punishments, but it was rarely applied in its entirety.[7] The Court has also linked proportionality to its investigation of societal standards through state legislation, believing that state legislation would reflect whether American citizens believed the death penalty to be proportional for particular crimes. Whilst the Justices' own views were still conveyed in the Court's discussion of proportionality, by linking proportionality to state legislation the Court went to further lengths to ensure that its decisions at the very least appeared to be grounded in objective empirical data, rather than the subjective views and interpretations of theories and proportionality of the Justices.

[6] Jency Megan Butler, "Shocking the Eighth Amendment's Conscience: Applying a Substantive Due Process Test to the Evolving Cruel and Unusual Punishments Clause", *Hastings Constitutional Law Quarterly*, Vol. 43, No. 4 (Summer 2016), pp. 861-884, p. 862, https://repository.uchastings.edu/hastings_constitutional_law_quaterly/vol43/iss4/4.

[7] In 1980 in *Rummel v. Estelle* 445 U.S. 263, a noncapital Eighth Amendment case, Justice Powell writing in dissent proposed a three-prong test for sentence proportionality in noncapital cases based on previous Court decisions such as *Weems*, *Gregg*, and *Coker*. This test was later adopted by the majority in *Solem v. Helm* 463 U.S. 277 (1983), another noncapital case: "(i) the nature of the offence; (ii) the sentence imposed for commission of the same crime in other jurisdictions; and (iii) the sentence imposed upon other criminals in the same jurisdiction." Points ii and iii bear great similarity to some of the test conducted by the Court in their evolving standards analysis, thus demonstrating that the Court saw some crossovers between the two factors and how they should be assessed, suggesting that they are closely linked. This test became the basic framework for assessing the proportionality of noncapital sentences.

However, as the Court recognised in many of its eligibility decisions, proportionality analysis provided some of the same problems as evolving standards, especially regarding subjectivity. There are no empirical or objective means by which to measure or assess whether a punishment is proportional and so this factor was left open to interpretation by the Justices. For this reason, whilst the Justices have discussed different perspectives of whether the punishment in question fits the crime, the Court has been less inclined to base its decisions upon this factor and to use it as the focus of its image crafting as it does not establish strong enough grounds for precedent and can be too case-specific.

III. Culpability

The culpability of the offender was also discussed in the Court's eligibility decisions. This factor of course featured in identity and culpability cases, but also in non-trigger puller cases when the Court considered whether an offender's degree of participation in a crime made them eligible for a death sentence. However, this factor was less relevant to cases concerning the type of crime committed. Culpability was often linked to and looked at as a means of assessing proportionality and the penological goal of retribution. For example, in *Atkins* the Court stated that, "With respect to retribution – the interest in seeing that the offender gets his "just deserts" – the severity of the appropriate punishment necessarily depends on the culpability of the offender."[8] As with proportionality, however, this factor cannot be objectively measured or assessed, it is open to the interpretation of the Justices and the Court, and the Court's discussion of culpability in its eligibility cases made this very clear. As a result, different Justices have held different views about the culpability of an offender across these eligibility cases. With the Court's strong focus on eliminating their

[8] *Atkins v. Virginia,* 536 U.S. 304, 319 (2002).

personal views from opinions and basing them on objective criteria, culpability and penology (to be discussed below) did not meet that standard. With this in mind it is likely that the Court chose to still engage with these factors due to their relevance to the death penalty debate, but did not base opinions on them as they stressed the need to rely on objective data.

IV. Penology

Recent decades have seen an increasing number of investigations into whether penological goals are achieved any better by capital punishment than they are by a lesser sentence, but the Court's eligibility decisions have not hinged on this factor.[9] As seen in *Furman* and *Gregg*, discussion of the penological goals of capital punishment and penological theory more broadly have been commonplace in death penalty decisions. However, the different interpretations and viewpoints regarding whether factors such as retribution or deterrence serve as a reasonable justification for capital punishment means that this factor was far removed from the objective indicia which the Court insisted it rely on in order to remove these personal views from its decision-making.

Although factors such as proportionality, culpability and penological theory appeared consistently throughout eligibility decisions, these factors were not as influential as

[9] See works such as: Brian Forst, "Capital Punishment and Deterrence: Conflicting Evidence," *Journal of Criminal Law and Criminology*, Vol. 74, No. 3 (Fall, 1983), pp. 927-942; "Deterrence. Studies Show no link between the presence or absence of the death penalty and murder rates," Death Penalty Information Center, https://deathpenaltyinfo.org/policy-issues/deterrence ; Carolyn Hoyle, "There's No Evidence that the Death Penalty Acts as a Deterrent," *Oxford University Centre for Criminology Blog*, 27th April 2015, https://www.law.ox.ac.uk/centres-institutes/centre-criminology/blog/2015/04/theres-no-evidence-death-penalty-acts-deterrent; Michael L. Radelet, and Ronald L. Akers, "Deterrence and the Death penalty: The Views of the Experts," *Journal of Criminal Law and Criminology*, Vol. 87, No. 1 (Fall,1996), pp. 1-16; George F. Kain, and Dale Recinella, "Retribution and Capital punishment," *Routledge Handbook on Capital Punishment, Routledge* (2018), pp. 153-169; Robert M. Bohm, "Retribution and Capital Punishment: Toward a better understanding of death penalty opinion," *Journal of Criminal Justice*, Volume 20, Issue 3 (1992), pp. 227-236; Anthony Walsh and Virginia L. Hatch, "Capital Punishment, Retribution, and Emotion: An Evolutionary Perspective," *New Criminal Law Review, Vol. 21, No. 2* (2018), pp. 267–290.

evolving standards because these factors could not be assessed using objective indicators. However, these factors still merited some discussion as their shortcomings helped to explain and demonstrate why the Court placed such a focus on evolving standards. The Court was concerned about how these opinions would be perceived, and there was a unanimous and deeply held view amongst the Justices that they should be (or at least appear to be) free from their various personal views. That these factors were so inherently subjective and could not be measured empirically stood in stark contrast to evolving standards which the Court argued could do both. Furthermore, these factors also demonstrate that, despite its strong focus on evolving standards, the Court did also engage with other factors and issues relevant to the death penalty debate, but these factors did not come to the forefront as they were not as conducive to image crafting. Whilst relevant to the death penalty debate, and important to discuss in order to show that the Court was engaging with all elements of this debate fully, issues of proportionality, culpability, and penology simply did not meet the standard of objectivity in the eyes of the Court. These factors were important to discuss within the decisions as they are key components of the issue of the death penalty more broadly, but a decision could not rest on them.

Legitimate Sources

From its emergence in *Furman* and its adoption in *Gregg*, evolving standards became the tool used by the Court not only to shape its death penalty decisions, but to craft its public image. In order to inform these assessments of societal standards the Court relied on what it deemed to be legitimate sources of evidence for societal standards to further build this image. Justice White's quote from *Coker* that Eighth Amendment decisions, "should not

be, or appear to be, merely the subjective views of individual Justices," and thus evolving standards should be measured "by objective factors to the maximum possible extent," demonstrated the concerns from the Court on how this approach should be handled in order to cast the most favourable light on the Court.[10] This demonstrates where the Court was making these decisions with its outward appearance in mind. Thus, not only evolving standards, but the perceived legitimacy of the evidence used to measure this, became crucial for the Court's decision-making and image crafting.

The Court's reliance on legitimate measures of societal standards suggests that the Strategic Model of decision-making applies in these cases as the Justices were (and likely still are) aware of a need for their decisions to at least *appear* to be grounded in objectivity rather than on the Justices' own views on the issue in order to reflect well on the Court institutionally and to maintain the Court's legitimacy. The Court's consistent and strong focus on state legislation as a legitimate indicator of societal standards suggests that the Justices felt constrained in death penalty eligibility cases by the need to appear objective and by the goal of projecting an image of legitimacy to the public. The Strategic Model accounts for the level of pragmatism which the individual Justices display in these cases, deeming certain indicators to be legitimate, allowing for developments and changes in American society to be reflected in the Court's decisions. Under the Legal Model, a focus on precedent or the Constitution would not allow for such change. However, as Stevens demonstrates, individual Justices exercised some discretion as to what they deemed legitimate: the reality was that the Justices could and did interpret state legislation however they wanted and did so in whichever way achieved their desired outcome. But

[10] *Coker v. Georgia,* 433 U.S. 584, 592 (1977).

the Justices were not entirely free to act on their personal preferences, they faced the constraint of presenting evidence from legitimate sources to support their opinions. This indicates that the Strategic Model, rather than the Attitudinal Model, is more appropriate here.

Chief Justice Burger argued in *Furman* that the legislature was, "presumed to embody the basic standards of decency prevailing in the society," making the connection between legislation and evolving standards.[11] Justice Antonin Scalia best summarised the role of evolving standards in the Court's death penalty jurisprudence in *Stanford v. Kentucky* (1989) when he stated that,

> When this Court cast loose from the historical moorings consisting of the original application of the Eighth Amendment, it did not embark rudderless upon a wide-open sea. Rather, it limited the Amendment's extension to those practices contrary to the 'evolving standards of decency that mark the progress of a maturing society.'[12]

The Court's reliance on state legislation was important as it was their way of helping the institution avoid accusations of the Justices imposing their personal views on their decision-making. By instead using empirical data which the Justices deemed to be objective, and a seemingly consistent standard to inform its decision, this helped to present a legitimate image of the Court. This was best articulated by Justice White in *Coker* when he stressed that objective factors should inform the Court's decisions on these issues so as to ensure that decisions were not, and did not appear to be, the subjective views of the Justices.

[11] *Furman v. Georgia,* 408 U.S. 238, 403 (1972), Justice Burger dissenting.
[12] *Stanford v. Kentucky*, 492 U.S. 361, 378 (1989).

White's phrase and similar have been echoed by Justices throughout death penalty eligibility decisions, "In these cases the Court has been guided by 'objective indicia of society's standards, as expressed in legislative enactments and state practice with respect to executions.'"[13]

The Court's approach of looking to evolving standards had a longer history. As far back as the late 1800s the Court advanced a theory of public opinion where it argued that the Court should strike down laws that do not comport with contemporary or evolving public opinion.[14] As shown in Chapter 2, evolving standards of decency was raised for the first time in a death penalty context by Justices Brennan and Marshall in *Furman*, yet this notion that a punishment could be deemed cruel and unusual solely because it had become unpopular failed to gain majority support at the time. Four years later in *Gregg* this doctrine formed a large component of the Court's holding, and state legislation first became significant in this context as the Court assessed societal standards by looking at the legislation enacted by the states in response to *Furman*. From this point the evolving standards of decency doctrine, and the use of state legislation to inform this, became commonplace in the Court's death penalty eligibility jurisprudence. Thomas Marshall notes that the Rehnquist Court, "relied on the theory of evolving or contemporary public opinion much more often than did earlier Courts."[15] But in fact the Rehnquist Court relied no more heavily on this theory than the Burger Court where the approach of looking to evolving standards in eligibility decisions was first adopted and applied.

[13] *Kennedy v. Louisiana*, 554 U.S. 407, 421 (2008).
[14] The first being an informed public opinion, and the second being judicial restraint. Thomas R. Marshall, *Public Opinion and the Rehnquist Court*, (State University of New York Press, 2008), p. 10 - 12.
[15] Thomas R. Marshall, *Public Opinion and the Rehnquist Court*, p. 8.

In its reliance on evolving standards as evidenced by state legislation, the Court overlooked certain issues. For example, how far state legislation is indicative of societal views as a whole, rather than the views of those who vote, or more narrowly of those whose views are in the majority and therefore win elected representation. However, in closely fought elections or in states which are more closely divided on the issue of death sentencing, state legislation alone might not paint the clearest picture of that state's population's views. Furthermore, as Ed Monahan noted, "state legislation can reflect societal standards but usually delayed from what the majority believe… It may eventually reflect society's view but along the way it is not accurate because legislatures are so very slow to respond to public opinion on particular issues."[16] Therefore state legislation might not represent societal standards exactly as they stand at the moment the Court decides a case, rather legislation tends to be slightly behind the curve.

Another indicator which the Court agreed served as a legitimate and objective measure of societal standards was jury decisions. Discussion of jury decisions as an indicator of societal standards occurred in *Enmund v. Florida* (1982) where Justice White held, "The evidence is overwhelming that American juries have repudiated imposition of the death penalty for crimes such as petitioner's."[17] Similarly, in *Thompson* Justice Stevens cited Department of Justice statistics which showed that of the 82,094 persons arrested for wilful homicide from 1982-1986, only 5 sentenced to death, including Thompson, were less than 16 years old at the time of their offence.[18] Stevens, referring to the Court's holding in *Furman,* argued that jury decisions statistics, "do suggest that these five young offenders have received

[16] Ed Monahan Interview. Conducted by Catriona Bide, 15th March 2021.
[17] *Enmund v. Florida*, 458 U.S. 782, 794 (1982).
[18] *Thompson v. Oklahoma*, 487 U.S. 815, 832 (1988).

sentences that are "cruel and unusual in the same way that being struck by lightning is cruel and unusual," demonstrating a departure from norms at the time.[19] Jury decisions served a similar goal to state legislation as relying on them appeared to take decision-making away from the Justices' views and place it with the American people. As with state legislation, jury decisions were a reflection of the views of a state's population and so provided a direct insight into the views of society, albeit a much smaller portion in comparison to state legislation. Furthermore, data on jury decisions did not easily lend itself to subjective interpretations and these data were harder to manipulate in order to serve a Justice's individual views, which again seemingly removed the Justices' views from the decision-making equation.[20]

However, the Justices themselves identified shortcomings with using jury decisions to assess societal standards. In *Enmund*, for example, writing for the dissent, Justice O'Connor described the petitioner's argument that judges and jurors had long resisted the death penalty in felony murder cases by acquitting defendants or convicting them for noncapital manslaughter as, "speculative at best."[21] Similarly, writing for the dissent in *Stanford*, Scalia contended that jury decisions failed to demonstrate that society viewed the execution of 16- and 17-year-old offenders as inappropriate.[22] The Court's death penalty eligibility decisions show that although jury decisions were afforded some analysis and weight in a few cases, the Court did not rely solely upon them as a legitimate insight into societal standards. Jury decisions offered a narrower picture of societal standards than state

[19] *Thompson v. Oklahoma*, 487 U.S. 815, 833 (1988).
[20] Michael D. Dean, "State Legislation and the 'Evolving Standards of Decency': Flaws in the Constitutional Review of Death Penalty Statutes," *University of Dayton Law Review*, Vol. 35, No. 3 (2010), pp. 379-412, p. 391.
[21] *Enmund v. Florida*, 458 U.S. 782, 817 (1982) Justice O'Connor dissenting.
[22] *Stanford v. Kentucky*, 492 U.S. 361, 373 (1989).

legislation as juries vote on a case-by-case basis, focusing only on the defendant and the victim, and are representative of the views of a far smaller number of people. Although these individual decisions can be looked at in conjunction, state legislation offered a broader insight into society's views as it considers the views of the state's population. The fact that jury decisions require a lot of context, caveats, and details to be analysed properly before any weight could be afforded to them made this process more complicated in comparison to assessing state legislation which was more straightforward and achieved the same result. Therefore, it was state legislation on which the Court primarily based its decisions, and its image crafting.

Where state legislation and jury decisions were considered legitimate objective indicators of societal standards which the Court felt presented the institution in a favourable light, there were some indicators whose use the Court rejected because they possessed shortcomings, identified by some of the Justices, which made them less robust grounds on which to base an opinion. The Court was selective in the sources of evidence it used as it had in mind image crafting and the implications that its selection of evidence would have for its public perception. The evidence had to both add to and support the image of legitimacy which the Court wanted to project.

One perhaps obvious indicator of societal standards which the Court chose not to base its decisions on was public opinion polls. Thomas Marshall was correct in his observation that, "Although the justices often discussed public opinion, they rarely referred to specific polls."[23] Even looking at Court decisions more broadly, Marshall's study reveals that only 15% of decisions mentioning public opinion directly cited any specific polls either during

[23] Thomas R. Marshall, *Public Opinion and the Rehnquist Court*, p. 6.

the Rehnquist Court or earlier, though he recognises that this was partly due to the fact that polls were not submitted as evidence in many cases which came before the Court. His assertion that whilst the Rehnquist Court was no less sensitive to public opinion than earlier Courts, "it was clearly not 'poll driven'" is a fair one.[24]

There is evidence that some of the Justices were influenced by polling data as an indicator of societal standards and believed them to be legitimate informers for the Court's decisions. This demonstrates where despite the image the Court attempted to portray, underneath this the Justices' subjective views dictated the evidence used to inform the Court's decisions. In a footnote in the majority opinion in *Atkins*, Justice Stevens cited polling data showing, "a widespread consensus among Americans, even those who support the death penalty, that executing the mentally retarded is wrong," as part of his assertion that a national consensus had developed against this.[25] This was an attempt by Stevens, who believed that other factors aside from state legislation could and should inform the Court's assessment of evolving standards, to include polling more formally amongst the factors deemed legitimate for the Court's enquiries in these cases. Polling data served to bolster some of the Justices' arguments and to provide empirical data to support them. Its use also marked somewhat of a departure from the Court's strong focus on evolving standards and showed that the Justices could and did exercise some discretion as to what constituted relevant material to inform their death penalty eligibility decisions.

Stevens' footnote in *Atkins* was met with strong backlash from Chief Justice Rehnquist in his dissent who believed that of the various sources Stevens cited, including polling data,

[24] Thomas R. Marshall, *Public Opinion and the Rehnquist Court*, p. 6, 10.
[25] *Atkins v. Virginia*, 536 U.S. 304, 317 (2002).

"none should be accorded any weight on the Eighth Amendment scale when the elected representatives of a State's populace have not deemed them persuasive enough to prompt legislative action."[26] Rehnquist cited various issues with polling data: the specificity of the question asked in polling and how most are categorical questions; that those who conduct the research rarely disclosed the targeted survey population or sampling techniques so it was unclear whether this was sufficient to inform about the views of the entire American population; and issues with the provenance of polls such as why a survey was conducted or by whom, which could have a bearing on the results.[27] Concerns regarding using public opinion polls as a foundation for decisions were also voiced in earlier cases, for example by Justice Scalia in *Stanford* who described them as "uncertain foundations."[28] In *Penry*, Justice O'Connor acknowledged that the polling data presented by Penry indicated strong public opposition to the execution of those with intellectual disabilities, but deferred to state legislation as the most reliable indicator of societal standards stating,

> The public sentiment expressed in these and other polls and resolutions may ultimately find expression in legislation, which is an objective indicator of contemporary values upon which we can rely. But at present, there is insufficient evidence of a national consensus against executing mentally retarded people convicted of capital offenses for us to conclude that it is categorically prohibited by the Eighth Amendment.[29]

This approach from O'Connor was significant as it was a clear example of evolving standards explicitly being given precedent over other indicators. O'Connor made it clear that whilst

[26] *Atkins v. Virginia*, 536 U.S. 304, 326 (2002), Chief Justice Rehnquist dissenting.
[27] *Atkins v. Virginia*, 536 U.S. 304, 327 (2002), Chief Justice Rehnquist dissenting.
[28] *Stanford v. Kentucky*, 492 U.S. 361, 377 (1989).
[29] *Penry v. Lynaugh*, 492 U.S. 302, 335 (1989).

the polling data presented in this case may put forward an argument, it was not as reliable an indicator as the Court required to rest a decision on, and that these data could only inform the Court's rulings when it had been legitimised by being reflected in state legislation. Indeed, whilst the anti-death penalty movement has made use of polling, this has been with a view to it helping influence state legislation. As Reverend Patrick Delahanty of the Kentucky Coalition to Abolish the Death Penalty noted, "What polling does for us is identify for us what may be possible and where we meet opposition, and that helps us determine what kind of legislation we would want to take up, because we want to take something up that we'll win on."[30] Therefore although of some use, polling has mainly been aimed at informing state legislatures and representatives as this is the best expression of public opinion.

Concerns regarding opinion polling are widely held For example, Carol and Jordan Steiker note the costly and time-consuming nature of collecting such data, which means often it can be very limited in scope and so inferences drawn from these may not be sufficiently broad as to support a nationwide abolition or a categorical ruling.[31] A further issue highlighted by Frank Baumgartner is that, "the questions posed in public opinion surveys are highly abstract, but when juries are faced with the decision… the question is anything but theoretical."[32] Similarly, lawyers have expressed concerns that, "some of the data on public opinion and the death penalty might not be the highest quality," because "there is so much advocacy polling out there," and raised issues such as the wording of the question

[30] Reverend Patrick Delahanty Interview. Conducted by Catriona Bide, 18th February 2021.
[31] Carol S. Steiker and Jordan M. Steiker, *Courting Death: The Supreme Court and Capital Punishment*, (The Belknap Press of Harvard University Press, 2016), p. 274.
[32] Frank R. Baumgartner, et al., *The Decline of the Death Penalty and the Discovery of Innocence*, (Cambridge University Press, 2008), p. 169.

and the timing of the polls, for example if it was conducted around the same time as a high profile case, leading them to state, "I don't know how firm it is."[33]

Thus, whereas public opinion polls might at face value appear to be the ideal indicator for societal standards, the Court applied a strict level of scrutiny when selecting which sources to use to inform its decisions and deemed that there were too many issues and complexities associated with relying on polling to indicate societal standards. The concerns about methodology and provenance of polling as indicators of societal standards simply did not apply to state legislation, which went through democratic processes before being adopted into law. Because of this longer process there is more permanence in state legislation, it is less changeable and considerably less likely to reflect the opposite in the short term. The variability of polling data leaves its long-term utility open to question. This is not to say that the Court is not influenced by or attuned to public opinion per se, but to base the Court's decisions on long-term indicators, and not something that is extremely changeable, builds them on more solid ground. The Justices were aware that the Court could not make sweeping constitutional rulings on death penalty eligibility based on evidence which often changes and fluctuates. If it was to craft an image of legitimacy then its opinions needed to be premised on something more stable. State legislation mitigated this issue as it still reflected public opinion but in a less transient way, and thus was primarily utilised by the Court in its eligibility decisions.

Research, studies, and the views of expert organisations also influenced some Justices' decision-making. However, once again there was disagreement about their relevance to the Court's death penalty eligibility enquiries and about whether it should form the basis

[33] 'Ezra' Interview. Conducted by Catriona Bide, 9th September 2020.

for the Court's decision on this issue. The use of studies and research is by no means exclusive to death penalty eligibility cases, for example in landmark cases such as *Roe v. Wade* (1973) and *Regents of the University of California v. Bakke* (1978) the Court looked to studies to inform its decisions.[34] There was for a long time, however, relatively little research into death penalty eligibility and the issues surrounding it. Yet as this body of research began to grow it also increasingly found its way into the Court's discussions. This demonstrates that the Court did not operate in a vacuum, it acknowledged and kept up to date with research and studies concerning sentencing, criminal justice, penology, and many more issues surrounding the death penalty, and so it was not so far removed from the knowledge, ideas, and arguments that were circulating amongst American society.

The approach of looking at such studies represented a much broader interpretation of what was relevant evidence in the Court's assessment of societal standards. Such a view was adopted by Justice Stevens. Stevens took a broad view of the evidence relevant to the Court's eligibility enquiries and was a proponent for widening the evidence used to inform the Court's decision-making, as seen by his consideration of both polling data and other studies . Writing for the dissent in *Stanford*, Stevens argued that the deterrent value of the death penalty was weakened for juveniles as they were significantly unlikely to sufficiently factor in execution in assessing the cost-benefit analysis of their actions. Stevens highlighted several studies which noted that juveniles were less likely to consider the consequences prior to action, and that they have little fear of death due to feelings of immortality.[35] Firm in his belief in the legitimacy of this indicator, he gained more traction

[34] See *Roe v. Wade*, 410 U.S. 113, 149 (1973), or *Regents of the University of California v. Bakke*, 438 U.S. 265, 288 (1978) for examples.
[35] *Stanford v. Kentucky*, 492 U.S. 361, 404 (1989) Justice Brennan dissenting.

here than with polling data. Stevens was later able to make this part of the majority holding in a footnote in *Atkins* which was the first major example of the Court looking to expert organisations, citing amicus briefs from the American Psychological Association, the American Association of Mental Retardation, and from representatives of religious communities in the United States, reflecting Christian, Jewish, Muslim, and Buddhist traditions.[36] Stevens pushed the boundaries as to what constituted legitimate indicators of societal standards to inform the Court's eligibility decisions which was significant as it impacted not only on the case at hand but on future cases as research, studies, and the views of expert organisations were later deemed relevant by some Justices. For example, in *Roper* Justice Kennedy, writing for the majority, looked to research from the National Center for Juvenile Justice and relied heavily on a 2003 psychological study from Steinberg and Scott.[37]

However, this broader view of legitimate indicators was not shared by many other Justices. Some identified shortcomings with this approach, shortcomings which prevented it from obtaining unanimous support as a factor on which the Court could build its decisions and craft its image. One such shortcoming which Justice Scalia identified in his dissent in *Roper* was that it can be relatively easy to find studies which contradict the Court's conclusions. Scalia cited the American Psychological Association's (APA) claim in *Roper* that there was evidence that individuals under 18 lack the ability to take moral responsibility for their decisions, yet the APA had previously argued the opposite.[38] Scalia went on to argue that, courts were, "ill equipped to determine which view of science is the right one," and the

[36] *Atkins v. Virginia*, 536 U.S. 304, 316 (2002).
[37] *Roper v. Simmons,* 543 U.S. 551, 566 (2005). *Roper v. Simmons,* 543 U.S. 551, 569 (2005).
[38] *Roper v. Simmons,* 543 U.S. 551, 617 (2005) Justice Scalia dissenting.

weighing and evaluation of such evidence was best left to legislatures.[39] This not to say that the Court completely neglects the views of expert organisations or results of research and studies in all of its work. The Court's frequent use of amicus briefs and the examples above of the Justices citing studies and experts across its cases more broadly show that these sources are valued by the Court and can play a role in forming decisions. Indeed, through the briefs which the Justices choose to utilise they are further able to exercise their personal discretion, which is demonstrative of the Attitudinal Model at play. Rather, what is clear is that because of some of the flaws identified, the Court believed that these sources alone did not meet the very high standard they set to base a decision of life and death on, or to use in crafting its image as a legitimate institution. To base an opinion on a factor where the Court had identified such issues would risk undermining both.

The Court was looking for strong, stable, and enduring evidence of societal standards to inform its eligibility decisions. This was done firstly with its focus on evolving standards, in order to remove accusations that decisions were merely the views of the Justices, and then through informing its evolving standards assessments by looking to (what the Court perceived to be) objective factors to the maximum possible extent to further bolster this. This was because of the Court's focus on how its decisions should appear to the public and how this would reflect on the institution. Basing its decisions on evolving standards, but having no standard for what evidence should inform its assessments would undermine this approach, and so the Court made a concerted effort to focus on legitimate indicators of societal standards. When considering what constituted legitimate evidence to inform

[39] *Roper v. Simmons,* 543 U.S. 551, 618 (2005) Justice Scalia dissenting. This position was formally adopted by the Court in *McCleskey v. Kemp* 481 U.S. 279 (1987), in which the Court argued that the evidence of racial disparity in death penalty sentencing in Georgia outlined in the Baldus study presented to the Court, aside from being evidence to merit the overturning of the petitioner's conviction, would have best been presented to legislative bodies and not to the courts.

assessments of evolving standards, sources such as polling data and studies simply did not reach the high standard set by the Court as the flaws associated with both approaches had the potential to undermine the Court's decisions and thus its public image. By placing emphasis on state legislation, the Court developed a consistent approach to its death penalty eligibility cases supported by all the Justices, which formed a strong jurisprudence, and which cast the Court in a favourable light. Other factors examined in relation to evolving standards were of use, but failed to match state legislation on these three criteria.

Evolving standards: Significance and Flaws

The main motivation for the Court to rely on evolving standards in eligibility cases was that it did everything that it needed to do: it allowed the Justices a means of (superficially) removing their personal views from decision-making, basing decisions instead on the standards of the American people, and these standards could be assessed by looking at what the Court deemed to be objective evidence i.e., state legislation. After its use in *Gregg*, this approach became more established as the Court continued to adopt it into its death penalty jurisprudence which further served an image of legitimacy. The high standard set by the Court for the evidence used to inform its assessments of societal standards was intended to provide the appearance that its decisions in death penalty eligibility cases were objective and therefore present an image of legitimacy. However, a closer look at the Court's examinations of state legislation reveals that instead the Justices were able to pursue their own objectives through the way they chose to interpret these data.

Initially, the Court's approach for assessing evolving standards was straight forward and fitting with the image that the Court desired. *Coker* marked the beginning of the Court narrowing the category of those eligible for the death penalty, it was the first time the Court applied the notion that 'death is different' and weighed the significance of taking a life in deciding a death sentence, and lastly it was the start of the Court's investigation into evolving standards of decency and assessing this through looking at state legislation. In *Coker* the Court was faced with the question of whether the Eighth Amendment barred the death penalty for the crime of rape. This was Court's first case addressing the death penalty following *Furman* and *Gregg*, and so the first instance of the Court applying the standards it set out in *Gregg*. Indeed, this case gives a comprehensive insight into the debates, principles, and holdings that were to follow over the next four decades and serves almost as a summary of what was to come.

In *Coker* a 7-2 ruling narrowed the application of the death penalty only to crimes in which a life was taken.[40] Thus the category of those eligible for the death penalty was narrowed drastically. This marked a notable departure from the previous application of the death penalty in the US and represented where much stricter standards would be introduced by the Court in the coming decades. Writing for the majority, Justice White shifted the burden of judgment largely to the public, stating that the Court must look to public attitudes in its decision-making.[41] In order to gauge public opinion, the Court sought, "guidance in history and from the objective evidence of the country's present judgment," on whether the death penalty was a fitting punishment for the rape of an adult woman.[42] White noted that, "At

[40] *Coker v. Georgia*, 433 U.S. 584, 592 (1977).
[41] *Coker v. Georgia*, 433 U.S. 584, 592 (1977).
[42] *Coker v. Georgia*, 433 U.S. 584, 593 (1977).

no time in the last 50 years have a majority of the states authorised death as a punishment for rape."[43] Upon examining state legislation on this issue, White noted that in 1925 only 18 states, the District of Columbia, and the Federal Government authorized capital punishment for the rape of an adult female, and by 1971 that had decreased to 16 states and the Federal Government.[44] Referring back to the Stewart plurality in *Gregg*, White argued that if the legislative response to *Furman* served as the best indicator of public opinion regarding the death penalty, then it was noteworthy that the statutes enacted showed that public opinion regarding the death penalty for rape was, "drastically different."[45] Looking at this state legislation in even more detail, White noted that of the 16 states in which rape had been a capital offense, only three provided the death penalty for rape of an adult in their revised statutes- Georgia, North Carolina, and Louisiana. When the latter two, North Carolina and Louisiana found their mandatory death penalty statutes invalidated by *Woodson* and *Roberts* (1976) they revised their death penalty laws to apply to murder and not for rape.[46] In some rape cases, Florida, Mississippi, and Tennessee authorised the death penalty, but only where the victim was a child and the rapist an adult.[47] Most crucial to White's argument, and the main takeaway from the majority's assessment of state legislation, however, was the fact that, "Georgia is the sole jurisdiction in the United States at the present time that authorizes a sentence of death when the rape

[43] *Coker v. Georgia*, 433 U.S. 584, 593 (1977).
[44] *Coker v. Georgia*, 433 U.S. 584, 593 (1977).
[45] *Coker v. Georgia*, 433 U.S. 584, 594 (1977).
[46] *Coker v. Georgia*, 433 U.S. 584, 594 (1977). Decided on the same day as *Gregg*, *Woodson v. North Carolina*, 428 U.S. 280 (1976) and *Roberts v. Louisiana*, 431 U.S. 633 (1977) addressed the constitutionality of mandatory sentencing schemes. In *Woodson* the Court invalidated a mandatory death penalty scheme for all convicted first-degree murderers, In *Roberts* the Court invalidated a mandatory death penalty scheme in cases where the jury found specific intent to kill or cause great bodily harm during the commission of one or more narrowly defined types of homicide.
[47] *Coker v. Georgia*, 433 U.S. 584, 595 (1977).

victim is an adult woman."[48] Conceding that the states were not unanimous in finding the death penalty unconstitutional for rape, White argued that the evidence of state legislation, "weighs very heavily on the side of rejecting capital punishment as a suitable penalty for raping an adult woman."[49] More broadly, this ruling suggested that the death penalty was only proportionate, and therefore only to be applied, in cases where the victim's life was taken, thus narrowing the category of those eligible for the death penalty to the most extreme crimes and 'worst' offenders.

This approach was applied similarly in subsequent cases, whereby the Justices counted the number of states that allowed or prohibited the death penalty in the context in question, and based their decision upon this. After emerging on the issue of the death penalty for crimes other than murder in *Coker*, the Court then applied the evolving standards doctrine in non-trigger puller cases and looked to state legislation to inform its assessment. *Enmund v. Florida* (1982) involved felony murders in which the petitioner did not directly kill any of the victims. In *Enmund* after examining state legislation a 5-4 majority found that the Eighth and Fourteenth Amendments prohibited the imposition of the death penalty on an individual who, although he aided and abetted, did not himself kill or intend to kill. When the Court examined this issue again in *Tison* evolving standards and state legislation once more featured in the Court's decision-making. Evolving standards became the focus of subsequent identity and culpability cases concerning issues of both age and IQ. On both of these issues the Court used evolving standards, as evidenced by state legislation, to

[48] *Coker v. Georgia*, 433 U.S. 584, 595 (1977).
[49] *Coker v. Georgia*, 433 U.S. 584, 595 (1977).

overturn prior rulings upholding the death penalty, arguing that societal standards had changed.

The Court's focus on evolving standards also kept the option open for it to overturn its rulings at a later stage. This element of flexibility in the Court's death penalty eligibility jurisprudence was influenced in part by the developments and changes in societal standards, but also by the motivation of image crafting and basing Court opinions on factors which would reflect a more legitimate public image of the Court, showing it to be in tune with society rather than simply pushing the Justices' views. By being open to reversing its decisions the Court could be seen to better align with changing societal standards and further remove accusations of an out of touch Court. It also meant that the Court was able to reverse decisions without being criticised for a lack of consistency or for being influenced by politics. For example, in *Penry v. Lynaugh*, Justice O'Connor, looking to state legislation on the issue of executing offenders with intellectual disabilities, held that, "there is insufficient evidence of a national consensus against executing mentally retarded people convicted of capital offenses for us to conclude that it is categorically prohibited by the Eighth Amendment."[50] Yet, when the Court revisited the issue in *Atkins v. Virginia* (2002), it overturned its prior ruling, arguing that, "Construing and applying the Eighth Amendment in the light of our evolving standards of decency, we therefore conclude that such punishment is excessive."[51] This was supported with the evidence of all the states which had passed legislation prohibiting the execution of the intellectually disabled.[52] The Court also noted in a footnote that, "Additional evidence makes it clear that this legislative

[50] *Penry v. Lynaugh*, 492 U.S. 302, 335 (1989).
[51] *Atkins v. Virginia,* 536 U.S. 304, 321 (2002).
[52] *Atkins v. Virginia,* 536 U.S. 304, 313 (2002): the Court gave the examples of Kentucky, Tennessee, New Mexico, Arkansas, Colorado, Washington, Indiana, Kansas, New York, Nebraska South Dakota, Arizona, Connecticut, Florida, Missouri, North Carolina and Texas.

judgment reflects a much broader social and professional consensus," citing the fact that many organisations with expertise on this issue now opposed the execution of intellectually disabled offenders.[53]

Evolving standards were so entrenched in the Court's decision-making that they could be effectively used in majority building as they commanded support and use across the Court. As Chapter 4 will demonstrate, majority building was a key way for some swing Justices to influence the direction of death penalty decision-making. However, it was also employed by non-swing votes as they could use evolving standards to appeal to others on the Court to bring them round to their point of view. In *Thompson v. Oklahoma* Justice Blackmun saw that the Stevens majority would have greater success in building consensus by placing emphasis on evolving standards than on other factors. In a memo to Justice Blackmun one of his clerks stated that he, "would have put more emphasis on 'children are different' and 'purposes of punishment,' and relied less on judgments of state legislatures," but conceded that, "I'm sure JPS knows better than I what approach will take SOC all the way."[54] This suggestion that O'Connor was more likely to be brought on side if Stevens focused primarily on state legislation emphasises how in eligibility enquiries the relevance of evolving standards had such consensus on the Court that to deviate from this to other factors could lose support from other Justices. This is an example of the Strategic Model at play as Stevens was constrained by the need to build a majority and thus had to be strategic in appealing to other members of the Court to bring them onside.

[53] *Atkins v. Virginia,* 536 U.S. 304, 315 (2002) footnote 21.
[54] Blackmun Papers - Memo 15th January 1988 RE No. 86-6169, Box 502, 86-6169, *Thompson v. Oklahoma*.

In *Ford v. Wainwright* (1986) the Court ruled that executing an insane inmate violated the Eighth Amendment. The Court had a long history of prohibition of the execution of the insane to base its decision-making on, dating back to the founding of America. Nevertheless, the Court still touched upon contemporary standards in its decision-making, stating that, "this Court takes into account objective evidence of contemporary values before determining whether a particular punishment comports with the fundamental human dignity that the Amendment protects."[55] This reinforced the importance of this factor in its decision-making as the Court chose to touch upon this in a decision which, based on historical practice, was very clear-cut. The Court noted that the historical objection to the execution of the insane, "has not outlived its time," and linking this to current state legislation noted that, "Today, no State in the Union permits the execution of the insane. It is clear that the ancient and humane limitation upon the State's ability to execute its sentences has as firm a hold upon the jurisprudence of today as it had centuries ago in England."[56] Through incorporating evolving standards into its decision-making here, the Court was able to further develop this line of jurisprudence and portray a legitimate public image.

The above demonstrates how highly regarded and entrenched evolving standards became in death penalty eligibility decision-making. However, this approach was flawed. Evolving standards of decency doctrine was responsible for producing some inconsistent results and the Justices assessed evolving standards quite differently. As a result, the Attitudinal Model comes to the fore here. This demonstrates where, upon closer examination, the mask of objectivity in the Court's death penalty decision-making slips. The image that it crafted does

[55] *Ford v. Wainwright,* 477 U.S. 399, 406 (1986).
[56] *Ford v. Wainwright,* 477 U.S. 399, 409 (1986).

not stand up to closer scrutiny of how the Justices assessed evolving standards and reached the conclusions that they did. The Justices disagreed on how broad or narrow the Court's examination of the states should be and which states and state legislation to include. Furthermore, there was disagreement on the scope of its evolving standards investigation, mostly with regards to time frame, of how far back the Court's examination of state legislation should look. Lastly, the Court has not settled on where it should place its emphasis and focus, whether examinations should only look at death penalty states or whether they should look at all states, even those which have abolished the death penalty. With regards to the link between the evolving standards doctrine and Court rulings, Corinna Barrett Lain argues that the Justices have just used this doctrine, "to get to where they want to go," but where the swing Justices especially want to go, "has been affected by a zeitgeist of larger social and political currents that have nothing to do with the law and can never be completely captured in doctrine."[57] The significance of swing Justices will be looked at in the next chapter, but Lain's broader point about the Justices using evolving standards to get to where they want to go rings true, especially when you consider the ways Justices utilised the same evolving standards data yet came to differing conclusions.

Many of those Justices who were firmer in their ideological position were usually decided on their ruling in death penalty eligibility cases practically from the start, and thus appeared to fit best with the Attitudinal Model of decision-making. There has been debate about how this divide manifested. As Christopher Smith saw it, even as the Rehnquist Court's composition changed, "the justices were consistently divided into wings composed of four justices who voted in favor of individuals in more than half of criminal justice cases and five

[57] Corinna Barrett Lain, "Lessons Learned from the Evolution of Evolving Standards," *Charleston Law Review*, Vol. 4 (2010), pp. 661- 678, p. 677.

justices who voted for the government in two-thirds or more of cases."[58] With regards to their position on death penalty specifically, Charles Lamb and Stephen Halpern saw the Justices as fitting into four subgroups: Marshall and Brennan, who found a constitutional barrier; Stevens and Blackmun, who did not, but at least found some constitutional barrier in half of capital punishment cases in which they voted; Powell, White, and O'Connor, who occasionally recognised a barrier; and Burger and Rehnquist, who practically never recognised an barrier.[59] Lamb and Halpern's assessment is more appropriate for understanding death penalty eligibility cases as it recognises that although there were those on both ideological extremes on this issue, there was also a significant middle ground and it was mostly here where the Court's decisions stemmed as it was predominantly these Justices who cast the deciding vote and authored these decisions. Justices such as Brennan and Marshall, or Scalia are perhaps the best examples of those Justices who reflect the Attitudinal Model. Justices Brennan and Marshall in particular were so steadfast in their opposition to the death penalty, voting to overturn or vacate every death sentence that came before the Court, that the same sentence, first used by Brennan in *Coker v. Georgia* was used across all death penalty decisions they addressed, whether in concurring or dissenting, in applications for stays, or in a cert.[60] Law clerks joked that, "the computers in the Brennan and Marshall chambers were programmed to call up this symbolic dissent on the press of a single key."[61]

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[58] Christopher E. Smith, Michael A. McCall, "Introduction: The Rehnquist Court," in Christopher E. Smith, et al., *The Rehnquist Court and Criminal Justice,* (Lexington Books, 2011), p. 10.

[59] Charles M. Lamb and Stephen C Halpern, *The Burger Court: Political and Judicial Profiles,* University of Illinois Press, 1991, p. 257.

[60] "Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments*…," Coker v. Georgia,* 433 U.S. 584, 600 (1977), Justice Brennan concurring.

[61] Edward Lazarus, *Closed Chambers: The Rise, Fall, and Future of the Modern Supreme Court*, (Penguin Books, 2005), p. 148.

The Justices on the Court said, and some might have perhaps even believed, that they were being objective in their assessments of evolving standards, and indeed this was the image they actively tried to present. However, it is no coincidence that the more liberal justices always interpreted evolving standards data in a way that narrowed the application of the death penalty, whereas the more conservative justices interpreted it in a way that advocated for upholding it. The personal views of the individual Justices played a role in how the data was interpreted. Antonin Scalia, for example, in an interview stated that whilst he was, "judicially and judiciously neutral" on the death penalty, he did not "find the death penalty immoral."[62] In 2015 he stated that, "I would not presume to tell parents whose life has been forever altered by the brutal murder of a child that life imprisonment is punishment enough."[63] In these Court decisions he went a step further, referring to Blackmun's declaration in *Callins v. Collins* (1994) that he would, "no longer tinker with the machinery of death," as "sanctimonious," and described Justice Breyer and Ginsburg's suggestion that the death penalty might be unconstitutional as "gobbledy gook."[64] Although he never stated that he supported the death penalty as a policy matter, Scalia consistently interpreted evolving standards data to find it in favour of upholding the death penalty. On the other end of the divide, Justice Brennan, believed that, "The calculated killing of a human being by the state involves, by its very nature, an absolute denial of the executed person's humanity," and that, "The most vile murder does not, in my view,

[62] "Justice Scalia on the Death Penalty," *PBS Religion and Ethics News Weekly*, 1st February 2002, https://www.pbs.org/wnet/religionandethics/2002/02/01/february-01-2002-justice-scalia-on-the-death-penalty/16044/.

[63] *Glossip v. Gross*, 576 U.S. 863, 897 (2015) Justice Scalia concurring.

[64] "Associate Justice Antonin Scalia (1937-2016)", Death Penalty Information Center, https://deathpenaltyinfo.org/stories/associate-justice-antonin-scalia-1937-2016. Antonin Scalia, "God's Justice and Ours," *First Things*, (May 2002), https://www.firstthings.com/article/2002/05/gods-justice-and-ours. *Glossip v. Gross,* 576 U.S. 863, 895 (2015) Justice Scalia concurring.

release the state from constitutional restraints on the destruction of human dignity."[65] He made no secret of his personal opposition to the death penalty in all circumstances and consistently interpreted evolving standards to find that the application of the death penalty should be narrowed and voted to strike down the death penalty. Indeed, Brennan dissented in every death sentence and execution from 1976 until the end of his Court tenure, stating that, "[I] adhere to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments."[66] Therefore, despite relying on these objective indicators to remove their personal predilections from decision-making, these still came through in how these data were interpreted and served as a means to an end in achieving the policy goals of the Justices. This is more significant than the Justices simply disagreeing; there was a motivation behind taking a different interpretation of evolving standards as it may produce a result more fitting with a Justice's policy preferences. These different views were taken in order to achieve a different result just as much as they were down to ideological differences. As a result, it is correct to assert that evolving standards of decency influenced the Court as an institution, but the individual Justices analysed, interpreted, and based their decisions on these in different ways and so, as with many things related to the Court, generalisations about how this relates to individual Justices cannot be made.

On the face of it, the Court's approach seemed very clear cut and simple: the Justices simply counted the number of states that allowed or forbade the punishment for the criteria in question, and this informed their assessment of evolving standards. However, this

[65] Philip Hager, "Brennan Defends Death Penalty Dissents: Justice Calls It Denial of Humanity, Vows to Continue Opposition," *Los Angeles Times*, (19th November 1985), https://www.latimes.com/archives/la-xpm-1985-11-19-mn-7560-story.html.
[66] *Tison v. Arizona*, 481 U.S. 137, 185 (1987).

approach was not quite so simple or uncontroversial and the exact method for assessing state legislation was a source of great contention amongst the Justices. Different approaches to assessing evolving standards data occurred across the various types of death penalty eligibility cases, and thus differing conclusions which coincided with the view of the majority and the author of the case were also reached. In *Enmund*, the Justices disagreed on which states and specific state legislation to include in its counts. Justice White compared the objective evidence from state legislation in this case with that of *Coker*, arguing that whilst the legislative judgment on the issue at hand in *Enmund* was not, "'wholly unanimous among state legislatures' nor as compelling as the legislative judgments in *Coker,* it nevertheless weighs on the side of rejecting capital punishment for the crime at issue."[67] In counting states in *Enmund*, White chose to focus on the eight jurisdictions which authorised the death penalty solely for participation in a robbery in which another robber takes a life, comparing this to the remaining majority of states' legislation which did not authorise it in these circumstances. He chose not to focus on the additional 15 states which permitted the death penalty in cases where the defendant neither intended to kill nor actually killed their victim from his analysis.[68] This interpretation of the data led to the conclusion that the death penalty should be narrowed on this issue, a holding which reflected White's personal concerns about limiting the death penalty only to the worst of the worst offenders. Justice O'Connor, writing for the dissent reached a different conclusion when looking at state legislation because she *included* these 15 states in her analysis, thus finding that 23 states – rather than the 8 focused on by White - permitted the death penalty even though the felony murderer neither killed nor intended

[67] *Enmund v. Florida*, 458 U.S. 782, 793 (1982).
[68] *Enmund v. Florida*, 458 U.S. 782, 789 (1982).

to kill the victim. This allowed O'Connor to place emphasis on something different: that that in nearly half of all the states, and in two-thirds of the states which permitted the death penalty for murder, a defendant who neither killed nor intended to kill the victim could be sentenced to death for their participation in the robbery-murder.[69] This led O'Connor to the conclusion which was more in line with her more supportive personal view of the death penalty at the time: "far from 'weighing heavily on the side of rejecting capital punishment for' felony murder, these legislative judgments indicate that our 'evolving standards of decency' still embrace capital punishment for this crime."[70] As a result of this, O'Connor concluded that, "the death penalty for felony murder does not fall short of our national 'standards of decency.'"[71] Whether these 15 states were included in the Court's counts or not resulted in very different pictures of societal standards. In subsequent eligibility cases the Court also disagreed on whether to include non-death penalty states in its assessments. Thus, by shifting her emphasis, O'Connor and White were able to arrive at a different conclusion and one which aligned more with their personal views on the issue.

Thompson saw a similar conflict of views amongst the Justices. Again, this resulted in conclusions which coincided with their views. Writing for the dissent in this case Justice Scalia looked to state legislation as evidence of how society viewed the death penalty as punishment for offenders under 16-years-old. Scalia took issue with Justice White's plurality's decision to only focus on the 18 states which established a minimum age for death penalty eligibility, stating that he could not understand why their analysis would not include the larger number of states - 19 - which held that there was no minimum age for

[69] *Enmund v. Florida*, 458 U.S. 782, 823 (1982) Justice O'Connor dissenting.
[70] *Enmund v. Florida*, 458 U.S. 782, 823 (1982) Justice O'Connor dissenting.
[71] *Enmund v. Florida*, 458 U.S. 782, 823 (1982) Justice O'Connor dissenting.

capital punishment and instead grouped this with their own individual rules for the age at which juveniles could be held criminally responsible.[72] Once again, where the emphasis on these data was placed aligned with the Justices' view on this issue. Scalia's emphasis on the 19 states with no minimum age led to a conclusion upholding the death penalty and coincided with his personal views whereas White's emphasis on the 18 states which established a minimum age led to a conclusion which would narrow the death penalty, which aligned with White's view on demonstrating more restraint.

A further area on which the Justices disagreed was on the scope of legislation for it to examine and how far back it should look. Some of the more conservative members of the Court looked to history to inform their decisions and assessment of societal standards. In these cases, doing so generally established an interpretation of societal standards more in line with upholding the death penalty, an interpretation which also coincided more closely with those of more conservative predilections on this issue. This originalist approach is in direct conflict with the evolving standards doctrine – which is a prime example of living constitutionalism. Justice Scalia was perhaps the prime example of this conflict in approach. In *Thompson v. Oklahoma* (1988) he cited the text of the Eighth Amendment as well as the historical practice in the US which did not explicitly forbid the execution of individuals under 16 years old.[73] Yet, he also turned to evolving standards to examine trends in the age for criminal liability.[74] Looking to more contemporary history, Scalia cited the federal 1984 Comprehensive Crime Control Act, which addressed this issue and lowered the age at which a juvenile could be transferred from juvenile court to Federal District Court "in the interest

[72] *Thompson v. Oklahoma*, 487 U.S. 815, 867 (1988), Justice Scalia dissenting.
[73] *Thompson v. Oklahoma*, 487 U.S. 815, 864 (1988), Justice Scalia dissenting.
[74] *Thompson v. Oklahoma*, 487 U.S. 815, 867 (1988), Justice Scalia dissenting.

of justice" from 16 to 15-years-old. Scalia noted that this Act could have resulted in the imposition of a death sentence upon a 15-year-old and this would have been permitted by federal law.[75] Thus, Scalia held, a majority of states for which this issue was applicable, and the Federal Government, did not feel that death is different where juvenile criminal responsibility is concerned.

However, as only a very small number of Justices applied this approach of considering the longer history of the death penalty or believed it should have any bearing on the contemporary decisions of the Court, arguments premised on this factor failed to gain much support on the Court more broadly. Furthermore, this approach has only been used to justify upholding the death penalty and never to overturn it, and it has only been applied by those Justices who were more sympathetic towards the death penalty. This was seen with Chief Justice Burger's dissent in *Coker*, Scalia in *Thompson*, and also Justice O'Connor's concurrence in *Thompson*, where she referenced the history of the death penalty to caution the Court against relying upon its subjective judgment in cases stating that, "the history of the death penalty instructs that there is danger in inferring a settled societal consensus from statistics like those relied on in this case."[76] The response from liberal Justices and those ideologically opposed to the death penalty to these arguments has not been to explicitly strike them down, but instead to remain focused on more contemporary developments in the death penalty. This disagreement in approach is not a contentious one per se, but it demonstrates where a broader scope for evolving standards investigations has only been used to serve the upholding of the death penalty and has only been used by those Justices who were more supportive of its practice. Therefore, there is a clear link

[75] *Thompson v. Oklahoma*, 487 U.S. 815, 865 (1988), Justice Scalia dissenting.
[76] *Thompson v. Oklahoma*, 487 U.S. 815, 854 (1988), Justice O'Connor concurring.

between the views of the individual Justice and how they conduct their evolving standards analysis.

Coker also demonstrated where, despite agreeing upon the relevance of state legislation as an objective indicator to inform the Court's assessment of societal standards, the Justices disagreed on the scope for its assessment as there was no agreed upon time frame for these assessments to be limited to. As a result, the discretion and views of the Justices permeated the Court's decisions here, and their conclusions varied widely. In *Coker* Justice White looked at state legislation as it stood at the time, as a snapshot of American society in 1977. The plurality decision held there was a clear majority of states for whom the execution of an individual for the crime of raping an adult woman was unconstitutional. Indeed, based on the plurality's method of assessing evolving standards, at that specific moment in time, this did indeed appear to be the case. Writing in dissent, Chief Justice Burger instead looked at a much broader time frame when assessing societal standards arguing that, "Far more representative of societal mores of the 20th century is the accepted practice in a substantial number of jurisdictions preceding the *Furman* decision."[77] Going as far back as the turn of the century, Burger noted that since then, "more than one third of American jurisdictions have consistently provided the death penalty for rape."[78] Burger argued that the plurality's focus on the more recent death penalty statutes was "truly disingenuous" and that "It is myopic to base sweeping constitutional principles upon the narrow experience of the past five years," as the Court's decision in *Furman* introduced "considerable uncertainty into this area of law."[79] *Coker* demonstrates where, whilst in

[77] *Coker v. Georgia*, 433 U.S. 584, 614 (1977), Chief Justice Burger dissenting.
[78] *Coker v. Georgia*, 433 U.S. 584, 614 (1977) Chief Justice Burger dissenting.
[79] *Coker v. Georgia*, 433 U.S. 584, 614 (1977) Chief Justice Burger dissenting.

agreement about the relevance of evolving standards, the Justices disagreed on the scope of the Court's evolving standards analysis. Therefore, the image of consistency and legitimacy that the Court's sought to project by its reliance on evolving standards was not in fact the reality.

However, for some of the most extreme originalists on the Court evolving standards would not always be their sole focus and they would switch between focusing on their personal opinions and their legal doctrine, but either way they would reach the same desired outcome. Scalia was willing make a broader assessment including historical standards where it lent itself to upholding the death penalty, but was also willing to abandon this approach in such cases where it was not needed as standards at the time provided this result. This suggests that Scalia conducted the evolving standards analysis as a formality, as it was so widely accepted amongst the Justices, but was still able to conduct this analysis in a way that yielded a result fitting with his views and legal ideology. This is significant as it demonstrates just how deep-rooted evolving standards became in the Court's death penalty eligibility decision-making that even staunch originalists such as Scalia looked to evolving standards, sometimes in place of the text of the Constitution, in order to help present a favourable public image of the Court. Scalia did not apply an originalist approach to all death penalty eligibility cases, rather, he was selective about where he applied it. For example, in *Stanford v. Kentucky* (1989) Scalia focused on evolving standards rather than on originalism. Writing for the majority, Scalia restated that the Court would examine evolving standards of decency and concluded that there was neither a historical nor modern societal consensus forbidding the imposition of capital punishment on someone under 18, but made no reference to the death penalty at the time the Eighth Amendment

was ratified, or to an originalist interpretation of the Eighth Amendment.[80] This also demonstrates where the personal predilections of the Justices come into play as Scalia looked to evolving standards to maintain the institutional appearance of legitimacy, but still landed on a conclusion that upheld the death penalty just as an originalist interpretation of the case would produce.

This all demonstrates that the Court found agreement in the use of evolving standards to inform its death penalty eligibility enquiries as this *appeared* to present the best public image of the Court and its decisions. What the Court disagreed upon, however, and where conflicts emerged was the methodology for assessing these objective factors, and it was here where the preferences and predilections of the Justices permeated its decisions and their differing views on these various death penalty issues came out in how they analysed the data and in their opinions. The Court looked at death penalty eligibility in terms of the data it analysed, but the way in which the Justices chose to interpret this data, and which data to include, is entirely subjective. This is suggestive of the Strategic Model of decision-making where the Justices were aware of the constraints upon them of needing to appear objective, and did not act freely on their own personal policy preferences but enacted their own views in terms of how they decided to interpret evolving standards data. This tells us that, through looking to evolving standards of decency to inform its decisions, the actions of the Court and of the individual Justices in eligibility cases, are best understood through the Strategic Model of decision-making.

This lack of agreed upon methodology meant that later down the line, the Justices could change their approach to death penalty eligibility cases, reaching the desired outcome but

[80] *Stanford v. Kentucky*, 492 U.S. 361, 380 (1989).

still under the guise of operating under evolving standards of decency. The result was that, these cases were decided completely differently to earlier ones because some Justices decided to switch approach as this better served their views. The conflicting approaches used by the Justices in *Atkins v. Virginia* (2002) and *Kennedy v. Louisiana* (2008) serve as examples of where the Justices opened themselves up to the most substantial accusations that they were casting objective indicia aside in favour of their own predilections. In *Atkins* the Court revisited the issue of executing those with intellectual disabilities, this time, in a 6-3 decision the Court overturned the decision in *Penry* and found that the execution of 'mentally retarded' individuals was prohibited by the Eighth Amendment. In *Kennedy*, over 30 years after *Coker*, the Court returned to the issue of whether the death penalty was a constitutionally permissible punishment for the crime of rape, this time for the rape of a child. In this case the Court further narrowed the application of the death penalty, finding that it was a disproportionate punishment not only for the rape of an adult, but of a child too.

Atkins was a significant case in the Court's discussion of death penalty eligibility because in this case the Justices changed where they placed emphasis when assessing state legislation and in doing so the outcome of the case was entirely different. The Court's approach previously had been a numbers game in which they relied on the number of states which permitted or forbade the death penalty in the context in question. However, in *Atkins* the Court switched to instead place emphasis on the "direction of change." Without this shift the Court would not have been able to rationalise narrowing the death penalty in this case based on the number of states which enacted legislation prohibiting the death penalty for the 'mentally retarded.'

Writing for the majority in *Atkins,* Justice Stevens started by following the Court's previous state-counting approach noting that since the Court's decision in *Penry* 16 states had enacted statutes barring the execution of the 'mentally retarded', and in several more states similar bills had passed in at least one house.[81] However, immediately after this Stevens departed from precedent and opted for a different way to approach and interpret this data in proclaiming that, "It is not so much the number of these states that is significant, but the consistency of the direction of change."[82] Highlighting the significance of states enacting legislation to prohibit the execution of the 'mentally retarded' rather than enacting typically more popular anti-crime legislation Stevens argued that this, "provides powerful evidence that today our society views mentally retarded offenders as categorically less culpable than the average criminal."[83] After highlighting the significance of the direction of change, Stevens immediately began to note how the fact that, with anti-crime legislation being far more popular than legislation providing protections for persons guilty of violent crime, the large number of states prohibiting the execution of individuals with intellectual disabilities, and the total absence of states passing legislation to reinstate this practice, provided powerful evidence that society viewed such offenders as categorically less culpable than the average criminal.[84]

On the surface, the Court was still presenting an image of legitimacy to the public as this decision was still informed by state legislation. However, Stevens's unprompted shift in approach here was a calculated step as the previous approach would not have justified narrowing the application of the death penalty in this case. In choosing instead to focus on

[81] *Atkins v. Virginia,* 536 U.S. 304, 315 (2002).
[82] *Atkins v. Virginia,* 536 U.S. 304, 315 (2002).
[83] *Atkins v. Virginia*, 536 U.S. 304, 316 (2002).
[84] *Atkins v. Virginia*, 536 U.S. 304, 316 (2002).

the direction of change, Stevens led the evolving standards data in the direction he wanted it to go (narrowing), rather than in the direction that previous approaches would have led to, (upholding). But by framing this decision under the now very broad umbrella of evolving standards analysis, Stevens was able to avoid accusations that he was merely following his own views on this issue and fitting the data to them. Stevens shift to place emphasis on the direction of change coincided with changes behind the scenes in his personal views on the death penalty, and also from an assessment of what the public and other branches of government would accept at that time. Stevens has been described as a Justice, "who looked at the facts on the ground rather than theories in law review articles, one who tended to regard doctrinal debates as a distraction from a judge's real work, which in his opinion was the application of judgment to the case at hand."[85] After voting with the majority to uphold the death penalty in *Gregg*, his first death penalty case on the Court, his views changed over time and he moved further to the left. Stevens pointed to wrongful convictions and death sentences as evidence that, "there must be serious flaws in our administration of criminal justice."[86] As Stevens's views on the death penalty changed, he became more forceful in pushing for broader indicators of societal standards – an approach which gained support from the more liberal justices, and also Justice Kennedy in the middle ground - especially those data which leant themselves more to arguments against the death penalty, and consistent in interpreting these data to find it stood against the death penalty. As noted in *The Appeal*, "By staying consistently open, he allowed the substance

[85] Linda Greenhouse, "Supreme Court Justice John Paul Stevens, Who Led Liberal Wing, Dies at 99," *The New York Times*, (19th July 2019), https://www.nytimes.com/2019/07/16/us/john-paul-stevens-dead.html.
[86] Linda Greenhouse, "Justice Weighs Desire v. Duty (Duty Prevails)," *The New York Times*, (25th August 2005), https://www.nytimes.com/2005/08/25/politics/justice-weighs-desire-v-duty-duty-prevails.html.

of his views to shift. Unlike Scalia, who calcified, Stevens grew."[87] Finally, in 2008 he publicly renounced the death penalty, stating that it was time to reconsider, "the justification for the death penalty itself."[88] Later in 2015 Stevens stated,

> Over the years I became more and more unhappy with the failure of the court to impose adequate procedures in capital litigation… I dissented in the ways we allowed for picking juries and on the permissible scope of evidence allowed in a death penalty hearing. I became increasingly disenchanted with the operation of the death penalty. I did conclude in my own mind that it was unconstitutional. Because it had some seriously harmful effects.[89]

Stevens's change of approach in *Atkins* coincided closely with his change in personal views and so certainly suggests that there was a link between his personal predilections and the way that he interpreted evolving standards data, because as he shifted further away from supporting the death penalty he took a broader view of what data to analyse in assessing societal standards and changed where he placed emphasis which led to him finding that societal standards stood against capital punishment.

The Court's decision in *Atkins* is significant not just for its change in approach to assessing evolving standards, but also because of the outcome of the case. In holding that the execution of the 'mentally retarded' was unconstitutional the Court overturned its decision

[87] "Stevens's views evolved over time. Scalia called it 'arrogance,' but it was the opposite," *The Appeal*, https://theappeal.org/stevenss-views-evolved-over-time-scalia-called-it-arrogance-but-it-was-the-opposite/.
[88] *Baze v. Rees,* 553 U.S. 35, 71 (2008), Justice Stevens concurring.
[89] Emily Bazelon, Why Justice Stevens Turned Against the Death Penalty," *The New York Times*, (17th July 2019), https://www.nytimes.com/2019/07/17/opinion/stevens-supreme-court.html.

in *Penry* which marked one of the more significant shifts in the Court's engagement with death penalty eligibility because it was a complete reversal of a prior holding. Further narrowing the application of the death penalty, it put the Court's jurisprudence on this issue more in line with other death penalty eligibility cases where the Court had narrowed its application. As Chief Justice Rehnquist noted in his dissent, 19 states besides Virginia left, "the question of proper punishment to the individuated consideration of sentencing judges or juries familiar with the particular offender and his or her crime."[90] These numbers did not therefore reflect the majority consensus which the Court under its previous approach would use to justify narrowing the death penalty, and so the Court looked to other options. The shift in approach changed the outcome of the case.

Why then did the Court choose this focus for *Atkins*? Because a simple counting of state legislation data alone would have made it hard for Stevens to utilise to rationalise narrowing the death penalty. State legislation at this time did not stand in favour of narrowing the death penalty, as although 18 states had passed laws prohibiting the death penalty for offenders with intellectual disabilities, as Rehnquist noted, there were still 19 states which permitted this.[91] Stevens did take a broader assessment of evolving standards, as indicated by his footnotes in which he examined the international community and the views of expert organisations, yet these points remained consigned to a footnote as only state legislation was an agreed upon indicator of societal standards at that time.[92] Therefore, Stevens had to do what he could within the parameters of state legislation data to find this in favour of narrowing the death penalty, and this meant changing where he

[90] *Atkins v. Virginia*, 536 U.S. 304, 322 (2002), Justice Rehnquist dissenting.
[91] *Atkins v. Virginia,* 536 U.S. 304, 313 (2002). *Atkins v. Virginia*, 536 U.S. 304, 322 (2002), Justice Rehnquist dissenting.
[92] *Atkins v. Virginia,* 536 U.S. 304, 315 (2002) footnote 21.

placed emphasis, instead focusing on direction of change rather than a simple count of states. Yet, because Stevens's decision was rooted in state legislation, this still meant that – at least on the face of it – the Court's decision was being informed and decided by objective indicators, even though the mechanisms for doing this and consequently the results achieved were in reality subjective. This means that initially it appears that the Strategic Model was most applicable due to the constraint of the need to base opinions on objective criteria i.e., evolving standards and state legislation. However, a closer look demonstrates that in fact the personal views of the Justices outweigh the objective criteria, and thus the Attitudinal Model is a better explanator for their actions here.

The different way in which the Court drew conclusions from evolving standards data was further highlighted in *Kennedy v. Louisiana*. This case is significant as the circumstances under which it was decided appeared to suggest the emergence of a similar 'direction of change' in legislation. However, on the issue in question in *Kennedy* – that of the death penalty for the rape of a child – state legislation appeared to be changing towards the expansion of the death penalty, rather than the narrowing with 6 states enacting such laws since 1995. But, like in *Atkins*, this broader shift this was not yet reflected by a majority of states' legislation. In *Kennedy*, however, the Court chose not to place emphasis on the "consistency of the direction of change" as it had in *Atkins*. Writing for the majority, Justice Kennedy acknowledged that in recent years 6 states had enacted death penalty statutes for the rape of a child, however he overlooked this direction of change, instead placing the focus on the 44 states which had not made child rape a capital offence, finding that, "The evidence of a national consensus with respect to the death penalty for child rapists, as with respect to juveniles, mentally retarded offenders, and vicarious felony murderers, shows

divided opinion but, on balance, an opinion against it."[93] Kennedy also rejected the claim that the 6 states to enact these death penalty statutes represented a consistent direction of change towards supporting the death penalty for the rape of a child, arguing that, "no showing of consistent change has been made in this case."[94] Comparing this to the state legislation enacted in *Atkins* and in *Roper v. Simmons*, Kennedy argued that the shift seen in child rape death penalty statutes was "not as significant" as the shifts evidenced in *Atkins.*[95]

Kennedy's argument demonstrated that within this seemingly legitimate and objective framework which the Court has established, there was room for manoeuvre in line with the Justices' policy preferences. That they could change approach in order to meet a particular outcome demonstrates where the image that the Court created using evolving standards was not the reality. Kennedy's interpretation of state legislation data here was subjective and influenced by his own desire to narrow the application of the death penalty. In *Kennedy*, it could be argued, as it was by the dissent, that there was a trend emerging though this time towards expanding the application of the death penalty. Writing for the dissent, Justice Alito argued that the evidence from state legislative developments in this area presented a very different message to that perceived by the Court. Alito noted that it was significant that in recent years, and despite the shadow cast by *Coker*, five states had enacted capital child rape laws. Alito argued that if society is in fact evolving towards higher standards of decency, "these enactments might represent the beginning of a new evolutionary line."[96] Were Kennedy to have simply applied Steven's approach of looking at

[93] *Kennedy v. Louisiana*, 554 U.S. 407, 423 (2008). *Kennedy v. Louisiana*, 554 U.S. 407, 426 (2008).
[94] *Kennedy v. Louisiana*, 554 U.S. 407, 431 (2008).
[95] *Kennedy v. Louisiana*, 554 U.S. 407, 432 (2008).
[96] *Kennedy v. Louisiana*, 554 U.S. 407, 455 (2008), Justice Alito dissenting.

direction of change, as Alito noted in his dissent, this could very easily have served as an argument to uphold the death penalty in this case rather than to narrow it. To concede that the direction of state legislation and thus the evolution of societal standards could be interpreted to point toward upholding the death penalty would completely undermine arguments for narrowing it in this case. Although Kennedy was correct in asserting that the shift in *Kennedy* compared to *Atkins* was not as dramatic, with no established threshold through which to pass a direction of change test, this and indeed any future assessments of direction of change can only appear as a subjective interpretation of the data. Kennedy's approach in *Kennedy* demonstrated that the Justices own personal predilections may influence how they interpreted data. Regarding evolving standards, one lawyer stated that, "Justice Kennedy loved it, it gave him a lot of flexibility," and indeed Kennedy was able to apply whichever approach was required to produce the desired result.[97] This is even further removed from the Court's initial approach of simply looking at state legislation and counting the number of states which permit or prohibit capital punishment in the context in question.

As things still stand, the criteria for whether there has been a consistent direction of change is completely at the discretion of whoever is authoring the opinion. Unless parameters of this nature are established, then this leaves opinions open to accusations of subjectivity, despite attempts from the Court to appear objective, and puts the Court's holdings on weaker foundations. This is significant because it demonstrates how the Court's perception of itself and its decisions and the image it tries to craft to the public versus the reality are quite far removed. It helps us understand that whilst members of the Court might believe

[97] 'Ezra' Interview. Conducted by Catriona Bide, 9th September 2020.

that it operates one way (i.e., objectively), this does not make it true. The Court's decisions, certainly in a death penalty eligibility context, are more influenced by the Justices personal preferences than they would admit. What is less clear is whether the Court is trying to mitigate this, or to hide this with, its insistence on the objectivity of the Justices and on looking to objective indicators to inform their decisions.

The result of this lack of an agreed upon methodology was that each of the Court's death penalty eligibility decisions were decided upon slightly different criteria. A completely different result in the same case could be found under a slightly different method of assessment. The Court insisted that these cases should be informed by objective indicators as far as possible, but set no standard for its methodological approach. With issues such as the scope of assessments, which states and legislation to include in assessments, and where to place an emphasis, it is clear that while evolving standards, as informed by state legislation particularly, may appear to remove the personal predilections of Justices from the Court's decision-making, this is not the case. Rather, as one lawyer who argued a death penalty case before the Court described, when interpreting state legislation data, "they probably do it in a way of what they want to accomplish."[98]

Evolving standards was the most influential and significant factor in death penalty eligibility cases. On a Court where disagreement is often to be expected, it is significant that this approach gained support and was applied across the spectrum of the Court and was done so for decades. It is engrained in the Court's death penalty eligibility jurisprudence. Evolving standards served as a mask under which the Court could operate more freely. Through paying such close attention to ensuring the legitimacy of the factors which informed the

[98] 'Ezra' Interview. Conducted by Catriona Bide, 9th September 2020.

societal standards assessments they used to image craft, the Justices could act under the guise of legitimacy whilst pursuing their own policy preferences. The contrast between such high standards for sources of information versus the lack of standard for how these data were to be assessed demonstrates a shortcoming in the Court's evolving standards doctrine which the Justices were able to exploit. The lack of an agreed upon and consistent scope and method for assessing evolving standards, meant that the Justices were largely able to exercise their own personal views, albeit under the constraint of fitting this within an assessment of evolving standards data. Evolving standards, as informed by state legislation particularly, allowed these views to come through in how the Court and individual Justices conducted their analysis of these standards and how they interpreted this data to reach the desired result.

At first glance, in its death penalty eligibility cases the Court demonstrated consistency and a strong jurisprudence based upon using evolving standards of decency to inform its decisions. There was indeed consistency in this area as evolving standards does primarily underpin all the Court's eligibility decisions. But here is where the consistency – and thus the image crafted by the Court – ends. Closer examination of the Court's eligibility decisions reveals that the Justices were able to operate under the mask of legitimacy which evolving standards provided, and instead these decisions were based upon individual interpretations of data which led to a desired outcome.

The belief that state legislation, as opposed to other indicators such as polling or studies and research, served as the most reliable indicator of societal standards meant that the Justices were able to interpret these data to meet their desired ends. There was also some

discretion exercised by the Justices as to what sources they deemed to be legitimate, particularly in the more recent cases, and this has further demonstrated where the Justices utilise data to produce the desired result. This focus on optics and legitimacy is not exclusive to death penalty cases, it goes far beyond that, but these death penalty eligibility cases serve as an effective case study or lens through which to view and examine the Court's work. The result is a death penalty eligibility jurisprudence that has been changeable but has not undermined previous decisions – these decisions were not necessarily 'wrong,' rather standards have just evolved. However, the consistency with which evolving standards features, however, does not guarantee consistency in its application. Rather, the Justices have been able to interpret so-called objective state legislation subjectively, placing emphasis or applying scope however was needed in order to make the argument or to achieve the result they desired. This is best demonstrated when Stevens and Kennedy departed from the previous approach which generally consisted of counting the number of states which applied the death penalty for the issue at hand (though issues of scope, breadth, and emphasis still applied), to instead focus on the consistency of direction of change in the face of data which, under the previous approach, would make it harder to justify the narrowing of the death penalty.

The discussion throughout this chapter, and indeed this thesis more broadly, has been sceptical of models of juridical decision-making, and these cases prove why this scepticism is justified. Across different cases, amongst differing Courts and Justices, and on different issues some models are more relevant than others. Whilst the Legal Model does not really apply in this context, elements of both the Strategic and the Attitudinal Models can be seen in different circumstances. The need to appear objective and rely upon legitimate indicators of societal standards is more suggestive of the Strategic Model, but the way that

Justices can and did interpret and emphasise data in a way that achieved a desired result suggests the Attitudinal Model was more at play, at least for some Justices. The different areas where one model may be more applicable than another supports the broader argument of this thesis that these theories are too broad. They serve as a useful framework for thinking about the actions of the Justices and the Court, but no one model effectively summarises and explains the actions of every Justice, on every Court, in every case, on every issue.

The Court's approach of looking to evolving standards in its decision-making in eligibility cases allowed it to create the appearance of objectivity, thus crafting an image that would bolster the legitimacy of the Court and of its decisions. Chapter 5 will look at a contrasting approach that characterised the 2008 to 2015 period where the Court abandoned its focus on evolving standards and opted for a different approach in its methods cases by focusing instead on precedent with the same goal of crafting a legitimate public image.

Chapter 4: Swing Justices

Whereas Chapters 2 and 3 demonstrates how the Court established and used evolving standards in its decision-making, this chapter examines what was going on underneath that, and so has a slightly different focus. The consequence of a lack of standard for assessing evolving standards of decency, and therefore Justices exercising their own discretion in how to conduct these assessments, was that the Court's swing votes became crucial for deciding death penalty eligibility cases. In this context, they were the most influential members of the Court, more so than ardent liberals and conservatives, and so this chapter closer examines the significance of swing Justices here. Their interpretations of evolving standards data largely commanded the most support from the other Justices, and therefore dictated the ruling. From their point in the middle-ground, and often as the deciding vote, they were able to garner more support for their approach to assessing, and their interpretation of, evolving standards and thus their view on the issue became the one adopted by the Court. For this reason, they are deserving of more attention in both Supreme Court and in death penalty discourse than often they are afforded. This chapter does exactly that, and emphasises where closer examination of the Court's opinions on the death penalty can be revealing of how the institution and these individuals operate. It demonstrates where some Justices impact more significantly on some issues than others, and provides greater insight into the role of the swing Justice. This is done by examining the three swing Justices who influenced death penalty eligibility decisions more broadly before then examining them and their decisions in specific cases individually, unpacking how and why they exerted influence over the Court's rulings here, and how they were able to image craft to disguise this.

As Nick Robinson notes, "especially in recent decades, the power center of the U.S. Supreme Court has typically resided with the swing justice, who decides whether either the liberal or conservative wing of the Court will prevail in close cases."[1] The Court's swing Justices have been the authors of, or the deciding vote for, the majority of death penalty eligibility cases, and, as these cases have a relatively high number of plurality decisions, this demonstrates how often the grounds for agreement in these decisions have been so narrow that a single Justice can determine the Court's entire ruling and influence the direction this area of law has gone.[2]

Death penalty eligibility cases demonstrate that there is not one 'typical' swing justice, rather they play different roles: what will be termed in this thesis as the influencer and the influenced. The influencer brings other Justices round to agreement on their position on the issue, no matter how narrow the grounds for agreement are. The influenced are persuaded by the arguments and ideas previously put forward by more ideological members of the Court, adopt these into their decisions and build support from the Justices on that 'side' of the Court based on this. In attempting to build alliances, both of these approaches are reflective of the Strategic Model of decision-making whereby the swing Justices can act in line with their views but are constrained by the need to build consensus. In this context the main three swing votes were Justices White and O'Connor (influencers) and Justice Anthony Kennedy (influenced). In death penalty eligibility cases often the swing vote was the decider on how evolving standards at the time were interpreted and the

[1] Nick Robinson, "Structure Matters: The Impact of Court Structure on the Indian and U.S. Supreme Courts," *The American Journal of Comparative Law*, Vol. 61, No. 1 (2013), pp. 173–208, p. 203, www.jstor.org/stable/41721718.

[2] See: *Enmund v. Florida*, 458 U.S. 782 (1982) opinion authored by Justice White. *Tison v. Arizona*, 481 U.S. 137 (1987), *Penry v Lynaugh*, 492 U.S. 302 (1989) opinions authored by Justice O'Connor. *Roper v Simmons*, 543 U.S. 304 (2005), *Panetti v. Quarterman*, 551 U.S. 930 (2007), *Kennedy v. Louisiana*, 554 U.S. 407 (2008) authored by Justice Kennedy.

Court's decision rested on this interpretation. The notion of the influencer Justice is of particular note as this thesis puts forward a fresh interpretation of the swing Justice: that influencer Justices became more important in this context as they were able to gain more support from the middle-ground, rather than simply casting the decisive vote between two blocs. They could use their position in the middle to bring others round to their view on an issue and so in fact held a lot more power than might be assumed.

This thesis breaks down several paradigms and concepts demonstrating where, under closer examination and a more nuanced approach, it is possible to gain a greater understanding of a particular topic. In this instance this is the two types of swing Justice, influencers or influenced. The two are distinct and different, and whilst this thesis only examines these roles in the context of death penalty eligibility cases, they have potential relevance and can lend themselves to a better understanding of the Court beyond this context. The argument that swing Justices were more important as they were able to gain support from the middle ground either as an influencer or influenced Justice is a fresh interpretation of this role. It dispels the conventional idea of the swing Justice as simply casting a decisive vote between two blocs. Rather, they were able to shape and steer these decisions in the direction of their choosing. Certainly, in a death penalty eligibility context the swing Justices were the most important individuals to understand and consider. Ardent liberals and conservatives have not directed and influenced decision-making here in the same way. Although some might influence swing Justices, for example as Justice Stevens influenced Justice Kennedy, it was those in the middle who decided the direction of the Court's rulings here and were the most significant factor in the Court's death penalty eligibility decision-making.

That the Court's decisions in eligibility cases came down to who could gain the most support for their interpretation of the data and their view on the issue demonstrates how the Court's image crafting was intended to mask the reality; that these decisions can and do hinge on the individual Justice. In these instances, this was often the swing Justice.

As the composition of the Court changed over time, so too did the swing Justice. In the 1972 – 2019 period there were four Justices who have been described as the swing vote: Justices White, Powell, O'Connor, and Kennedy. As Corinna Barrett Lain noted in 2010, the Court had been largely ideologically balanced for decades, with "the moderate swing Justices determining much of the Court's Cruel and Unusual Punishments Clause jurisprudence."[3] According to Peter Enns and Patrick Wohlfarth's article "The Swing Justice", White, Powell, O'Connor, and Kennedy cast the pivotal vote during their tenure on the Court among 5-4 decisions 23.8%, 23.3%, 23.7% and 23.8% of the time respectively, in contrast to more polarised Justices such as Marshall at 3.1% and Rehnquist at 3.4%.[4] As such influential individuals in the Court's decision-making, swing Justices are deserving of a particular focus. Although Justice Powell was widely, "praised as a nonideological moderate struggling to unify … two ideological extremes," and there was a belief that, "his influence as the 'swing' or decisive vote in the area of civil liberties... eased the conflict between the liberal and conservative justices," on the issue of death penalty eligibility, he was not so influential.[5] Powell never authored any majority nor plurality decisions on the issue of the death penalty and thus it was never on his viewpoint that decisions rested. For

[3] Corinna Barrett Lain, "Lessons Learned from the Evolution of Evolving Standards," *Charleston Law Review*, Vol. 4 (2010), pp. 661- 678, p. 676.
[4] Peter K. Enns and Patrick C. Wohlfarth, "The Swing Justice," *The Journal of Politics*, Vol. 75, No. 4 (2013), pp. 1089–1107, p. 1095, www.jstor.org/stable/10.1017/s0022381613001035.
[5] Janet L. Blasecki, "Justice Lewis F. Powell: Swing Voter or Staunch Conservative?" *The Journal of Politics,* Vol. 52, No. 2 (May, 1990), pp. 530-547, p. 545. Janet L. Blasecki, "Justice Lewis F. Powell: Swing Voter or Staunch Conservative?" p. 530.

this reason, he cannot be described as a swing vote on the issue of death penalty eligibility, and thus this chapter will only focus on the swing votes who were influential in this context: O'Connor and Kennedy, and to a lesser extent Justice White. Considering the role of the swing Justice within the Court more broadly demonstrates how a swing vote may not be the significant vote on every issue, rather, their influence is changeable and can vary from issue to issue, and on the issue of death penalty they were the main determinant of direction of the Court's rulings.

Justices O'Connor and Kennedy have been widely regarded as being of particular significance as swing justices more broadly, and this is also true for death penalty eligibility cases specifically. Their work has been the subject of focus from lawyers, however academics have often overlooked the outcome, influence, and nuances of swing Justices, instead grouping them into one category. But as this chapter explores there is more to it than that. The emphasis on swing Justices such as O'Connor, "takes into account their specific roles in preserving interpretations of the Constitution that are vigorously opposed by many political conservatives."[6] Swing voters such as O'Connor and Kennedy, "were typically regarded as the votes that were potentially 'in play' by attorneys who tailored their arguments to fit the interests of one or both of these justices," and were, "the target of counsels' most pointed arguments and the lobbying efforts of the other justices."[7] Kennedy was described by one lawyer who argued a death penalty case before the Court as "famously squishy on a number of issues," and so lawyers deliberately tried to tap into his sensitivity about cruelty.[8] Lain described O'Connor and Kennedy as being, "highly

[6] Christopher E. Smith, Michael A. McCall, "Introduction: The Rehnquist Court," in Christopher E. Smith, et al., *The Rehnquist Court and Criminal Justice,* (Lexington Books, 2011), p. 10.
[7] Nick Robinson, "Structure Matters: The Impact of Court Structure on the Indian and U.S. Supreme Courts," p. 203. Christopher E. Smith, Michael A. McCall, "Introduction: The Rehnquist Court," p. 10.
[8] 'Ezra' Interview. Conducted by Catriona Bide, 9th September 2020.

responsive to changes in public opinion on salient issues like the death penalty," and cites them both changing position on issues as evidence for this.[9] For example both supported the death penalty for both juvenile and 'mentally retarded' offenders in 1989 when public support for the execution of both categories of offenders was at 79%. They then later switched positions on these issues in *Atkins* in 2002 and in *Roper v. Simmons* in 2005 when support for the death penalty had dropped to a twenty-year low.[10] This appears more applicable certainly to Kennedy as he later switched positions on both issues and his reasoning for this increasingly looked to broader contextual factors. However, O'Connor only switched on one of these issues – intellectual disabilities – and she authored a dissenting opinion in *Roper* because it established a categorical ruling. This suggests that for O'Connor it was not as simple as just following trends; other factors such as her reluctance to make categorical exemptions to classes of defendants superseded this.

Peter Enns and Patrick Wohlfarth posit that, "the swing justice will typically rely less on attitudinal considerations and more on strategic and legal considerations than the other Justices on the Court."[11] This is a fair assessment as influencer swing Justices must be more strategic in order to bring other Justices round to their position. For example, in *Coker* Justice White brought other Justices onside by focusing on an extremely narrow holding. On the other hand, influenced Justices can align with those who already express the same viewpoint, where available, and so such considerations are not always as significant for them. They are closer to the Attitudinal Model than influencer swing Justices as they can pursue their own view and do so in the way that they want, for example by looking to the

[9] Corinna Barrett Lain, "Lessons Learned from the Evolution of Evolving Standards," p. 676.
[10] Corinna Barrett Lain, "Lessons Learned from the Evolution of Evolving Standards," p. 676.
[11] Peter K. Enns, and Patrick C. Wohlfarth, "The Swing Justice," p. 1089.

international community as Justice Kennedy did when considering the issue of executing juveniles, provided there is enough existing agreement on the Court. Despite this, the Justices are still under the constraints of so-called objective assessments of societal standards to inform their decisions. A blanket assertion of the unconstitutionality of the death penalty like that produced by Marshall and Brennan would never pass muster with the Court as the Court has established precedent of looking to evidence such as societal standards, and in order to effectively image craft this approach requires continued use. Therefore, it is through doing this that the swing Justices can pick up votes in the middle ground and thus exercise influence.

Enns and Wohlfarth's theory that, "the median swing justice may place more emphasis on strategic and case-specific considerations," certainly applies in the case of O'Connor.[12] In line with most of the other Justices on the Court, the restraints on O'Connor's decision-making stemmed from her awareness of the need to avoid appearing to impose the subjective views of the Justices on this issue and thus maintain a reliance on objective indicators to inform the Court's decisions here. O'Connor's decisions were crafted with the Court's public image in mind. Furthermore, bringing Justices on side on very narrow grounds enabled her to appeal to those who might have felt restricted by other authorities such as those on the Court who read a stricter interpretation of the Constitution. White was able to do similar in finding agreement that the death penalty was only proportional in cases where life was taken. Yet, within these constraints O'Connor was able to exercise her own views of focusing on case-specific considerations and avoiding making categorical rulings limiting the death penalty. However, in comparison to more polarised members of

[12] Peter K. Enns, and Patrick C. Wohlfarth, "The Swing Justice," p. 1091.

the Court, such as Brennan and Marshall, O'Connor appeared not to prioritise ideology or her moral position on the death penalty.

Enns and Wolfarth suggest that the swing Justices' votes, "reflect a broader set of considerations than ideologically extreme justices," and indeed Justice Kennedy did, "rely on more information sources," such as the international community and studies and expert groups, than the typically more conservative members of the Court.[13] Kennedy appeared less tied to the approach of relying on state legislation in decision-making and image crafting than O'Connor, and indeed his opinions strayed further away from the legislation-focused opinions of previous Justices. Yet, fitting with the rest of the Court, Kennedy still demonstrated some awareness of the constraints of image crafting and needing to appear objective as he also relied on indicators such as state legislation in his opinions. Kennedy appears to have been influenced by the same information and realisations as many other Americans regarding the death penalty and formed both his own decisions and the Court's opinions based on this. Kennedy demonstrated more of an ideological preference than O'Connor as he was happy to make sweeping rulings and focus less on the case specifics. He also appeared more attitudinal than O'Connor. As a consistent vote for upholding criminal rights, his 'squishiness' on Eighth Amendment issues demonstrates that his personal predilections came through in his rulings. He was more sympathetic on this issue and opinions show he felt far less constrained in how to inform his decisions. More generally throughout his career Justice Kennedy was, "most recognized for his Eighth

[13] Peter K. Enns, and Patrick C. Wohlfarth, "The Swing Justice," p. 1091.

Amendment sentencing decisions," and his votes were more in line with his more liberal counterparts on the Court as a result of this.[14]

Noted earlier is the fact that Supreme Court Justices do not operate in a vacuum. Not only are they subject to news, political pressures, and information, they also bring their previous life and legal experience to their role on the Court. As such, the views of the Justices on the Court on capital punishment are also framed in part by their pre-Supreme Court legal careers. For some Justices this experience may be more relevant or impactful on their views of some issues. For example, Justice Marshall was an NAACP-LDF lawyer and so had up close experience on this issue from representing defendants at trial as well as on appeal in death penalty cases. This demonstrates where for some Justices there was a very clear line between their career and experience before the Court and their later position on issues. However, for others this link is either less obvious or non-existent as some Justices did not have firsthand legal experience of the death penalty which shaped their views, instead they had more experience on other issues and areas of law such. This is the case with the swing Justices in these cases. Justice Kennedy practiced private law and worked as a law professor for over 20 years and was better versed in academic law. Justice O'Connor was elected to the Arizona State Senate after serving as Assistant Attorney General and so was experienced in legislation and law concerning one particular state. Justice White served as Deputy Attorney General in the early 1960s, and so had experience with representing the interests of the United States during the civil rights movement. Rather than a clear line between their previous experience and their stance on the death penalty, these Justices became the swing, and determinative, vote in death penalty cases for a variety of reasons.

[14] Esther, Hong, "Justice Kennedy's Justice for Juveniles: Roper's Reach," *Oxford Human Rights Hub,* (26th November, 2018), http://ohrh.law.ox.ac.uk/justice-kennedys-justice-for-juveniles-ropers-reach/.

For Kennedy, the death penalty tapped into his personal and more liberal views on crime and punishment more broadly, and thus the liberals on the Court were able to influence him with their arguments and evidence. O'Connor's views on the death penalty evolved over time, but primarily she favoured a narrow reading of the Eighth Amendment and, sat in the middle of two strong views on the death penalty, was able to leverage others to find consensus that achieved this. Similarly, White's views on the death penalty were in flux, but his priority was on narrower principles such as proportionality and was able to win support through this rather than focusing on his own view on the broader constitutionality of the death penalty.

Issues such as pre-Court careers link to a much larger question about the ways in which the background of a Justice - for example their race, ethnicity, gender, or class - frames their decision-making, not just in a death penalty context but beyond this, and whether Justices and their decision-making can ever be neutral. Whilst the position they hold is unique in its responsibility and stature, the Justices on the Supreme Court are still human. On death penalty eligibility, some Justices fall into conservative or liberal blocs on this issue because they approach the cases with a particular view in mind, be that a certain reading of the Constitution, or a view on the state's power to take a life. Swing justices do this also, whether through how they prefer to decide a case, or an openness to alternative information to inform assessments of societal standards. It is not that some Justices are more or less neutral than others, rather it is these personal predilections that determine their position and flexibility on death penalty eligibility. They do not live their lives removed from lived experiences and their own identity. For this reason, it is true that decision-making can never really be neutral in its most basic sense. The legal theory of decision-making would suggest that neutrality is possible as decisions are based on factors removed

from the experiences and views of the Justices. However, both the Attitudinal model and the Strategic model suggest that this is categorically not the case. Despite attempting to craft an image of neutrality, the Court's death penalty decisions were shaped by the Justices' desired outcome on the issue, and framed by how they choose to image craft this. Neutrality is desirable, and is a standard imposed on the Court and its Justices, but in reality total neutrality is unachievable.

Evidence suggests that swing voters are no more influenced than other Justices by public opinion. Certainly, in the late 1980s when the Court handed down decisions such as *Penry* and *Stanford* not only did polling data indicate that support for the death penalty was consistently over 70%, there were also large numbers of death sentences being handed down – 255 in 1989 – and the number executions being carried out was beginning to grow, with 16 executed in 1989.[15] Yet, as mentioned in the discussion of legitimate evidence, O'Connor herself said in *Penry* that the Court's decision was based on evolving standards as informed by state legislation, rather than on polling data, again emphasising that state legislation was what the Court deems to be a legitimate subsection of public opinion. However, in *Atkins* (2002) when the Court overturned both *Penry* and *Stanford* even O'Connor voted to overturn her majority holding in *Penry* on account of state legislation indicating that society no longer approved of the execution of offenders with intellectual disabilities, . At the time of *Atkins* and *Roper* (2005) support for the death penalty was still relatively high at 70% in 2002 and 64% in 2005, and executions numbers were not far off

[15] "Death Penalty," *Gallup*, https://news.gallup.com/poll/1606/Death-Penalty.aspx. "Executions by State and Region Since 1976," *Death Penalty Information Center*, https://deathpenaltyinfo.org/executions/executions-overview/number-of-executions-by-state-and-region-since-1976.

their peak in the late 1990s at 71 in 2002 and 60 in 2005.[16] Yet again these decisions were not based on opinion polls to inform an assessment of societal standards, but on state legislation. All this is to say that generally swing Justices are aligned with public opinion as reflected by state legislation, just as the more polarised Justices are.

Having considered the broader significance of these three swing Justices, closer examination of their specific rulings and decision-making further demonstrates where these Justices fell into the influencer or influenced category, how they shaped the Court's death penalty eligibility jurisprudence, and how they image crafted in their decisions.

Justice White: Influencer

Influencer Justices such as White and O'Connor were significant in the death penalty eligibility context as the lack of agreed upon approach for assessing evolving standards gave them the power in the middle of the Court to build consensus and rulings around their views and interpretations. This resulted in their views forming some of the most key aspects of the Court's death penalty jurisprudence. White and O'Connor did not necessarily bring other Justices on side based on their counting of states, rather they did so based on whatever factors might appeal to them personally or legally. This overall ruling could then be justified based on an interpretation of state legislation that lent itself to the desired outcome. In short, the Court's eligibility decision-making, rather than being structured and limited by evolving standards as informed by state legislation, was more of a free-for-all

[16] "Death Penalty," *Gallup*, https://news.gallup.com/poll/1606/Death-Penalty.aspx. "Executions by State and Region Since 1976," *Death Penalty Information Center*, https://deathpenaltyinfo.org/executions/executions-overview/number-of-executions-by-state-and-region-since-1976.

under the guise of legitimacy in which the swing Justices often prevailed. Given White was the Justice who outlined the Court's desire to remove the predilections of individual Justices from the Court's death penalty decision-making, this approach is particularly contradictory and further demonstrates that the Court was merely crafting an image of legitimacy and objectivity in this area.

White's influence as a swing vote was apparent on issues relating to proportionality, and he was able to gain support on the Court for decisions which aligned with his view that the death penalty should be reserved for only when life was taken. Despite White voting to uphold the death penalty on several occasions and being firm, "in his view that for the death penalty to be an effective deterrent, it should be imposed more frequently and more expeditiously," Charles Lamb rightly notes that, "White's backing of the death penalty was not unswerving."[17] White authored the plurality opinion in *Coker*, and he wrote the majority opinion in *Enmund,* both of which narrowed the application of the death penalty.

White's views on the death penalty initially appeared to take him in a different direction to that of the American people, but in a direction consistent with his own views, as both *Coker* and *Enmund*, were decided as support for the death penalty was on an upward trajectory, at 66% in the two closest Gallup polls in 1976 and 1982.[18] White was not per se against the imposition of the death penalty, as shown by his concurrence in *Gregg*. Rather, he felt that it should be limited only to, "the deliberate killer," and through authoring the opinions in

[17] Michael J. Graetz, and Linda Greenhouse, *The Burger Court and the Rise of the Judicial Right,* (Simon & Schuster Paperbacks, 2017), p. 30. Charles M. Lamb, and Stephen C Halpern, *The Burger Court: Political and Judicial Profiles,* (University of Illinois Press, 1991), p. 419.
[18] Death Penalty, *Gallup*, https://news.gallup.com/poll/1606/Death-Penalty.aspx.

Coker and *Enmund* he was able to interpret societal standards and steer the Court's decisions in a direction which reflected this view.[19]

White was of particular significance in *Coker* because, as noted earlier in Chapter 3, this was the first ruling in which the Court applied the notion articulated in *Gregg* that the death penalty, "is unique in its severity and irrevocability," and should therefore only be reserved for those offenders who take a human life.[20] This was also the first instance of the Court conducting its investigation into evolving standards of decency through looking at state legislation. Conceding that whilst the states were not unanimous in finding the death penalty unconstitutional for rape, White argued that the evidence of state legislation was weighted strongly against capital punishment as a penalty for raping an adult woman.[21] More broadly, this ruling put forward White's own view on proportionality in death sentencing and suggested that the death penalty was only proportionate, and therefore only to be applied, in cases where the victim's life was taken, thus narrowing the category of those eligible for the death penalty to the most extreme crimes and 'worst' offenders. In *Coker*, White was able to bring Justice Blackmun – who had voted to uphold the death penalty in both *Furman* and *Gregg* – to side with him in narrowing the application of the death penalty. He was also able to bring Powell to join in a separate concurrence, albeit on very narrow grounds on the core of the ruling, "that ordinarily death is disproportionate punishment for the crime of raping an adult woman."[22] White's role in this case was of most significance because he established a standard for the death penalty where it should only be applied where life is taken, and most significantly for cementing the method for

[19] *Coker v. Georgia* 433 U.S. 584, 600 (1977).
[20] *Gregg v. Georgia,* 428 U.S. 153, 187 (1976).
[21] *Coker v. Georgia*, 433 U.S. 584, 595 (1977).
[22] *Coker v. Georgia*, 433 U.S. 584, 601 (1977), Justice Powell concurring in part and dissenting in part.

assessing standards of decency – looking to state legislation - which was to be applied in subsequent cases. Here White put in place the mask of legitimacy and objectivity for the Court's eligibility decisions, where underneath his own views were influencing both how he examined evolving standards data and the opinion he gained support for and handed down.

White was able to continue this approach as author of the majority opinion in the Court's next death penalty eligibility case in *Enmund* five years later. Once again, by gaining consensus on his middle position, White was able to hand down an opinion that aligned with his views on this issue. White's majority opinion applied the same reasoning as in *Coker,* that whilst robbery was a serious crime, "It is not, however, a crime 'so grievous an affront to humanity that the only adequate response may be the penalty of death.'"[23] White reiterated the Court's prior holding in *Gregg* that the death penalty is unique because of its severity and irrevocability, thus it was an excessive punishment for a robber who did not take human life. In *Enmund*, White was able to capture the majority from O'Connor by appealing to Stevens, Marshall, Brennan, and Blackmun. In a memo to White, Justice Stevens stated that he hoped White could, "make changes sufficient to satisfy Harry's concerns, which might then enable us to have an opinion for the Court, assuming of course that Bill Brennan and Thurgood would be willing to join your opinion with a separate statement preserving their views."[24] White's narrowing the application of the death penalty here allowed for agreement between those who opposed the death penalty

[23] *Enmund v. Florida*, 458 U.S. 782, 797 (1982).
[24] Brennan Papers - Memo from Justice Stevens to Justice White, Re. 81-5321 *Enmund v. Florida*, 21st June 1982, Box I: 585 81-5321, *Enmund v. Florida*.

entirely, by removing a class from eligibility, and between those who accepted the death penalty but saw the need for limited application.

Justice O'Connor: Influencer

The significance of Justice O'Connor as a swing vote has been widely recognised by scholars, lawyers and in the media. As Andrew Martin noted, "Virtually all contemporary commentary stresses the critical role Justice O'Connor (and, to a lesser extent, Kennedy) plays on the current Court by casting key votes in many consequential cases."[25] O'Connor was particularly effective at shaping the law by keeping the Court's decisions very narrow and focused, and steering it away from rulings which would, "categorically include or exclude defendants from capital sentence consideration."[26] It was here that she was able to put her own views across in the Court's decision-making as she wrote and gained support for rulings which avoided this. On account of her many deciding votes in 5-4 decisions, Jeffrey Rosen dubbed O'Connor a "majority of one."[27] While Justice Kennedy had the reputation of being the significant vote in criminal rights cases, the influence of Justice O'Connor in death penalty eligibility cases is also of note. As Madhavi McCall notes, "Her ability to join, and frequently create the Court's minimal winning coalition, allowed Justice O'Connor to have the final say in the outcomes of several cases and the direction of the law," and death penalty eligibility cases were no different. Whilst O'Connor's votes and

[25] Andrew D. Martin, et al. "The Median Justice on the United States Supreme Court," *North Carolina Law Review,* Vol. 83, No. 5 (June 2005), pp. 1275-1322, p. 1305, https://heinonline.org/HOL/P?h=hein.journals/nclr83&i=1289.

[26] Madhavi M. McCall, "Sandra Day O'Connor: Influence from the Middle of the Court," in Christopher E. Smith, et al., *The Rehnquist Court and Criminal Justice,* (Lexington Books, 2011), p. 156.

[27] Jeffrey Rosen, "A Majority of One,'' *New York Times Magazine*, (3rd June 2001), https://www.nytimes.com/2001/06/03/magazine/a-majority-of-one.html.

opinions indicate that she supported the death penalty, similarly to Justice White she did not always vote to uphold the death penalty on issues of eligibility. McCall correctly notes that earlier in her tenure O'Connor, "strongly favoured letting death penalty decisions stand and believed death penalty decisions should be made following consideration of individual case facts."[28] Yet later in her career O'Connor became increasingly concerned with how the death penalty was being implemented at state level.[29] Speaking to a meeting of Minnesota Women Lawyers in Minneapolis in 2001, O'Connor said that "serious questions are being raised" about the death penalty and that "the system may well be allowing some innocent defendants to be executed."[30] Comments like this made outside of the Court, or comments made post-Court tenure serve as further evidence of image crafting. They demonstrate where Justices self-censor whilst on the Court in their opinions but can become more vocal outside of this as they are speaking as an individual, rather than as a Court, and so are less constrained by their requirement to represent the institution. Outside and post-Court comments suggest that Justices have views and concerns about issues addressed whilst on the Court which, for various reasons, they may not feel able to express explicitly at the time. Instead, they communicate these through their decisions, but image craft to mask this. When speaking individually or after leaving the Court they can be more explicit in communicating these views.

Within the context of the death penalty more broadly from the early 1980s to the mid-2000s O'Connor's (and later Kennedy's) decisions generally fitted with the death penalty

[28] Madhavi M. McCall, "Sandra Day O'Connor: Influence from the Middle of the Court," p. 156.
[29] Christopher E. Smith, Michael A. McCall, "Introduction: The Rehnquist Court," in Christopher E. Smith, et al., *The Rehnquist Court and Criminal Justice,* (Lexington Books, 2011), p. 156.
[30] Charles Lane, "O'Connor Expresses Death Penalty Doubt," *The Washington Post*, (3rd July 2001), https://www.washingtonpost.com/archive/politics/2001/07/04/oconnor-expresses-death-penalty-doubt/bcafbc53-43d0-4af5-9f5f-b124c6c66cd5/.

zeitgeist. O'Connor's decisions in *Tison* and *Penry* occurred at times when the death penalty was continuing its upward trajectory from the 1970s, when public support, the numbers of death sentences, and number of executions all began to increase. In 1987 there were 299 death sentences in the USA, and 296 in 1988.[31] Capital punishment was becoming so significant a political position that it was believed that Michael Dukakis's loss in the 1988 presidential election was in large part due to his opposition to the death penalty.[32] Therefore O'Connor's upholding of the death penalty in both *Tison* and *Penry* fitted with the wider views and context of American society at the time. Considering O'Connor was intently focused on the specific case at hand in her decisions, it would be speculative to say that she reached her conclusions based on these external factors, they were not her primary motivator. Rather, public opinion was reflected in the existing status of legislation which O'Connor employed.

O'Connor was like White in that she too was an influencer swing Justice and was also able to form majority holdings on very narrow grounds. O'Connor differed to White somewhat in that she was more procedurally focused whereas White placed more emphasis on proportionality, yet both placed a strong focus on the specifics of the case at hand. O'Connor's influence on the outcome of a case is perhaps most notable in non-trigger puller cases, *Enmund* and *Tison*, where she went from writing the dissenting opinion to writing the majority and in the latter was able to hand down an opinion which aligned with her personal view on not making sweeping restrictions on death penalty eligibility.

[31] Stuart Banner, *The Death Penalty: An American History,* (Cambridge, Massachusetts: Harvard University Press, 2002), p. 291.
[32] Stuart Banner, *The Death Penalty: An American History,* p. 276.

O'Connor came close to having a Court in *Enmund* but this was won by Justice White as Stevens and White felt unable to join O'Connor in her view that the death penalty was proportionate to the crime committed in this case. A memo from Justice Blackmun to Justice White, *Enmund*'s author, revealed, "Sandra's opinion now has been joined by the Chief, Lewis, and Bill Rehnquist, so she is close to having a Court. I find, however, that I cannot join Part II of her opinion."[33] Similarly, Stevens wrote in a memo to White that, "I also cannot accept the analysis in Part II of Sandra's opinion."[34] O'Connor was unable to reconcile the subjective proportionality analyses and conclusions from these Justices who instead sided with White's view on this issue.

Significantly, however, O'Connor was later able to influence Justice White's position and bring him on to her side in *Tison* on procedural grounds, thus securing a majority, by using his prior decisions. McCall suggests that, "it is possible that because O'Connor wrote an individual dissenting opinion in *Enmund*, she was tapped to write the majority opinion in *Tison*," and indeed although there had been no ideological shift on the Court between these two cases O'Connor was this time able to bring enough members of the Court to join her majority opinion.[35] O'Connor appealed to White in this case by referring back to the opinion he wrote in *Lockett v. Ohio* (1978) in which White stressed the need to distinguish intentional from reckless action when assessing culpability in felony-murder cases.[36] O'Connor also referred to White's discussion of intent to kill in *Lockett*, applying this to *Tison* to find that Tison did not show intent in this case. O'Connor took a broader definition

[33] Marshall Papers - Memo from Justice Stevens to Justice White, Re. 81-5321 *Enmund v. Florida*, 21st June 1982, Box 304 81-5321, *Enmund v. Florida*.
[34] Brennan Papers - Memo from Stevens to White, Re. 81-5321 *Enmund v. Florida*, 21st June 1982, Box I: 585 81-5321, *Enmund v. Florida*.
[35] Madhavi M. McCall, "Sandra Day O'Connor: Influence from the Middle of the Court," p. 154.
[36] *Tison v. Arizona*, 481 U.S. 137, 171 (1987).

of intent than was outlined by the Court in *Enmund,* holding that intent to kill included situations in which the defendant intended, contemplated, or anticipated that lethal force would or may be used or that another's life could be at risk when committing the felony. Emphasising the importance of the defendant's mental state during the commission of a crime, O'Connor reiterated the longstanding legal tradition that, "the more purposeful is the criminal conduct, the more serious is the offense, and, therefore, the more severely it ought to be punished."[37] Bringing White on side in *Tison* allowed O'Connor to form a majority opinion which fitted with her broader approach to the death penalty as it was heavily focused on the individual circumstances of the case at hand and thus avoided making a categorical ruling to exclude a category of defendant from the death penalty.[38]

Penry serves as a further example of O'Connor bringing fellow Justices to her position on an issue, only in this case it was on a much narrower holding as she was able to appeal to some Justices' pre-existing philosophical approaches. O'Connor's plurality opinion in this case rested on the holding that the jury instructions given at sentencing in Penry's case deprived him of his constitutional right to have a jury consider all mitigating evidence that he presented before sentencing him to death. O'Connor was able to bring Justices Brennan, Marshall, Blackmun and Stevens to agree on this issue, mostly on procedural grounds. The broader ruling fitted with Brennan and Marshall's position that the death penalty was unconstitutional in all circumstances and so appealed to them on that fundamental basis. Yet they also both agreed that the jury instructions given at sentencing deprived Penry of his right to have a jury consider all mitigating evidence before sentencing him to death.[39]

[37] *Tison v. Arizona*, 481 U.S. 137, 156 (1987).
[38] Madhavi M. McCall, "Sandra Day O'Connor: Influence from the Middle of the Court," p. 154.
[39] *Penry v. Lynaugh*, 492 U.S. 302, 341 (1989), Justice Brennan concurring in part and dissenting in part.

Stevens agreed with the rule that the Eighth Amendment's prohibition of the execution of a 'mentally retarded person' ought to apply retroactively.[40] Although all three disagreed with the execution of individuals with intellectual disabilities on moral grounds, O'Connor was able to bring them on side on procedural grounds to secure a majority.

However, in keeping with her reluctance to hand down categorical rulings, the remainder of O'Connor's plurality opinion upheld the constitutionality of the death penalty for individuals with intellectual disabilities, with O'Connor reasoning that, "I cannot conclude that all mentally retarded people of Penry's ability-by virtue of their mental retardation alone, and apart from any individualized consideration of their personal responsibility-inevitably lack the cognitive, volitional, and moral capacity to act with the degree of culpability associated with the death penalty.[41] On this point she was unable to bring the other four Justices on side, with Brennan and Marshall, and Stevens and Blackmun filing separate opinions concurring in part but departing from O'Connor on the issue of the constitutionality of executing those with intellectual disabilities. Justice Brennan noted that, "I would also hold, however, that the Eighth Amendment prohibits the execution of offenders who are mentally retarded and who thus lack the full degree of responsibility for their crimes that is a predicate for the constitutional imposition of the death penalty."[42] Similarly, Stevens argued that, "such executions are unconstitutional."[43] Despite fundamental ideological disagreements on the issue at hand, and agreement being found only on the narrowest of grounds, O'Connor was still able to exercise power and build

[40] *Penry v. Lynaugh*, 492 U.S. 302, 349 (1989), Justice Stevens concurring in part and dissenting in part.
[41] *Penry v. Lynaugh*, 492 U.S. 302, 338 (1989).
[42] *Penry v. Lynaugh*, 492 U.S. 302, 341 (1989), Justice Brennan concurring in part and dissenting in part.
[43] *Penry v. Lynaugh*, 492 U.S. 302, 350 (1989), Justice Stevens concurring in part and dissenting in part.

consensus on the narrowest of holding to pass the decision which fitted with *her* views. This demonstrates the power of the swing vote both in this context and more broadly.

Justice Kennedy: Influenced

In response to being asked what factors influence US Supreme Court decision-making in death penalty cases, one lawyer stated, "we had a good something close to twenty years when Justice Kennedy was really the pivot, and the answer to that question was Justice Kennedy's personal and moral predilections. For a long time… that's been the case."[44] After the retirement of Justice O'Connor in 2006, Justice Kennedy's influence as a swing vote became more pronounced, with Solicitor General Paul Clement stating, "The Court now is going to be just as conservative or just as liberal as Justice Kennedy."[45] On the issue of criminal rights, Justice Kennedy was a prominent deciding vote and author of the Court's decisions, and his significance on this issue is widely recognised by lawyers and campaigners alike. Indeed, the Court's contemporary Eighth Amendment jurisprudence would look completely different without Kennedy's input; he determined the direction the Court went. Kennedy's influence in death penalty eligibility cases is particularly of note, as for both of the 5-4 eligibility cases where he provided the deciding vote (*Roper v. Simmons*, and *Kennedy v. Louisiana*) Kennedy also authored the opinions.

In this context, Kennedy is what can be described as an influenced Justice, both in the sense that he was influenced by the views of others on the Court, and because he was influenced by a wide range of societal indicators to inform his decisions. Unlike White and O'Connor,

[44] 'Ezra' Interview. Conducted by Catriona Bide, 9th September 2020.
[45] Peter K. Enns, and Patrick C. Wohlfarth, "The Swing Justice," p. 1089.

neither of Kennedy's death penalty opinions were pluralities, rather he was joined by the liberal wing of the Court and his opinions hinged on less narrow grounds than some of those by O'Connor and White. Kennedy was more inclined to adopt arguments and views previously expressed by more liberal Court members, helping to craft a majority opinion which at least 4 other members joined. In Kennedy's case there are several examples of this, but three stand out as being of more significance: direction of change; international opinion; research and studies, and the view of expert organisations. As the same lawyer stated,

> Justice Kennedy had a lot of various strands of law that appealed to him and that he would pull through across a variety of different subjects. One of the features of his thinking was that in the United States we have 50 states and federalism is a matter of great importance to him. He believed that one of the obligations of the Supreme Court was to maintain the independence, the value of states having the ability to make independent judgments on important matters and thereby provide opportunities for experimentation and improvement.[46]

Kennedy's decisions narrowing the application of the death penalty coincided with the fall in public support for the death penalty as well as the fall in the number of death sentences and of executions carried out. Furthermore, state legislation (and indeed its consistent change in direction) also reflected society's views on the issue. Gallup polling showed support for the death penalty for murder had dropped from its high of 80% in 1994 to 64% in both 2005 and 2008 when *Roper* and *Kennedy* were decided respectively. These

[46] 'Ezra' Interview. Conducted by Catriona Bide, 9th September 2020.

decisions also occurred as an increasing number of studies and research were emerging concerning death penalty issues such as deterrence, homicides, the death penalty in individual states, polling data, the international community, and costs.[47] Kennedy cited these kinds of studies in his decisions, and as the US increasingly became an outlier in the international community through its perseverance with the death penalty Kennedy also picked up on this, as Justice Stevens had done before. Domestically, the anti-death penalty movement was gaining momentum and the groups established in the 1980s and 1990s had grown in influence and effectiveness. Many of the arguments put forward by Kennedy in *Roper* and *Kennedy* were the same as those echoed by anti-death penalty groups, and so reflected the growing concerns of these groups and that these views were becoming more widespread amongst the American people. Kennedy was also under less pressure than perhaps O'Connor and White faced to make the death penalty work: decades had passed since *Gregg* and support for it was already waning, there simply was not the same level of demand to legitimise and uphold it as the Justices in *Gregg* faced. Whereas O'Connor's decisions had reflected a death penalty on the up, Kennedy's decisions reflected its decline. This came, fundamentally, from looking to state legislation which did generally reflect the views of the American people.

[47] For examples see: "Studies: State Studies," *Death Penalty Information Center*, https://deathpenaltyinfo.org/resources/publications-and-testimony/studies. "Public Opinion Polls: National Polls and Studies," *Death Penalty Information Center*, https://deathpenaltyinfo.org/facts-and-research/public-opinion-polls/national-polls-and-studies. "Homicide Studies," *Death Penalty Information Center*, https://deathpenaltyinfo.org/stories/homicide-studies. "Studies: State Polls and Studies," *Death Penalty Information Center*, https://deathpenaltyinfo.org/facts-and-research/public-opinion-polls/state-polls-and-studies. "Deterrence: Studies on Deterrence, Debunked," *Death Penalty Information Center*, https://deathpenaltyinfo.org/policy-issues/deterrence/discussion-of-recent-deterrence-studies. "Public Opinion Polls: International Polls and Studies," *Death Penalty Information Center,* https://deathpenaltyinfo.org/facts-and-research/public-opinion-polls/international-polls-and-studies.

In *Atkins* Justice Stevens first expressed the notion that the consistency of the direction of change was more significant than the number of states which allowed or proscribed the death penalty, which was significant when assessing state legislation to inform assessments of societal standards.[48] Kennedy reiterated this and used this approach to justify the Court's U-turn in *Roper* where the Court found unconstitutional the application of the death penalty to 16 and 17-year-olds. Kennedy was influenced by Stevens to divert from precedent to a conclusion more in line with his own views on limiting capital punishment. Here state legislation appeared even less likely than in *Atkins* to provide a foundation for overturning the Court's prior ruling on this issue (in *Stanford v. Kentucky* in 1989).[49] Kennedy also chose to emphasise the "consistency of the direction of change," as being most revealing of society's views.[50] As with *Atkins*, this U-turn would have again been hard to justify based solely on state legislation which did not align with the conclusion Kennedy sought, and so he adopted the same approach used by Stevens in order to achieve the outcome he desired. This demonstrates how crucial this shift in focus was from the number of states to the direction of change in helping to overturn some of the Court's previous rulings. Under the broader umbrella of evolving standards, Kennedy was able to pick up on ideas first put forward by more liberal members of the Court and, through bringing in their lines of argument, appeal to the more liberal Justices of the Court and incorporate this into a majority holding which fitted with his views. Once again, evolving standards provided

[48] *Atkins v. Virginia,* 536 U.S. 304, 315 (2002).
[49] Only one state, through judicial action and five states through enacting legislation, barred the execution of juveniles in the interim between *Stanford* and *Roper*, in contrast to the sixteen states which abandoned their laws allowing for the execution of the intellectually disabled in the time between *Penry* and *Atkins.* See *Roper* page 565.
[50] *Roper v. Simmons*, 543 U.S. 551, 566 (2005).

flexibility for the Justices, in this case Kennedy, to reach the desired outcome but with an image of legitimacy.

More than perhaps any other Justice in this period, Kennedy was willing to depart from the intense focus on state legislation and focus on wider factors such as the international community and the views of expert organisations to inform an evolving standards enquiry. Although precedent suggested US state legislation was to be the primary indicator of such standards, Kennedy took a much more flexible approach to this. As Dwight Aarons notes, "The international law inquiry has not been as strong or consistently referenced," as other factors such as state legislation and jury decisions.[51] Looking to the international community to inform the Court's 8th Amendment decisions can be traced back to *Trop v. Dulles* (1958), in which the plurality noted the climate of international opinion in its decision concerning the acceptability of a particular punishment. It then appeared in some of the Court's other death penalty eligibility discussions.[52] This position gained support from the liberal Justices on the Court but it was Kennedy's position in the middle ground and as the

[51] Dwight Aarons, "The Abolitionist's Dilemma: Establishing the Standards for Evolving Standards of Decency," *Pierce Law Review*, Vol. 6, No. 3 (2008), pp. 441- 467, p. 445.

[52] In *Coker*, Justice White put a footnote in his plurality opinion noting that in light of *Trop*, "It is thus not irrelevant here that out of 60 major nations in the world surveyed in 1965, only 3 retained the death penalty for rape where death did not ensue."[52] Justice White in *Enmund* argued, "It is thus worth noting that the doctrine of felony murder has been abolished in England and India, severely restricted in Canada and a number of other Commonwealth countries, and is unknown in continental Europe."[52] In a footnote in *Atkins*, Justice Stevens looked to the international community noting that, "within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved."[52] After discussion and persuasion of the views of the international community was first introduced by more liberal justices, it made its way into the main body of the Court's majority opinions where it was discussed in more detail. *Thompson v. Oklahoma* (1988) marked the first instance where the international community was discussed in the main body of the Court's opinion. Writing for the plurality, Justice Stevens raised this topic noting that the conclusion that the execution of a juvenile under 16-years old did not comport to civilised standards of decency, "is consistent with the views that have been expressed by respected professional organizations, by other nations that share our Anglo-American heritage, and by the leading members of the Western European community."[52] A year later in *Stanford* (1989) such discussion was also put forward in the dissent by Justice Brennan who looked to the international community, stating that, "Within the world community, the imposition of the death penalty for juvenile crimes appears to be overwhelmingly disapproved."[52]

deciding vote that meant this view made it into the Court's opinion in his assessment of societal standards. Kennedy was able to incorporate the international community into his opinion in *Roper* (2005) because of the lack of standard for assessing evolving standards, and this was compounded by his position as the deciding vote. In *Roper* Kennedy looked to the international community to inform his majority decision. As Jane Marriot noted, "In *Roper* international norms played a much more significant part than they had in *Atkins*."[53] Kennedy noted the, "stark reality," that, "the United States now stands alone in a world that has turned its face against the juvenile death penalty."[54] Kennedy noted that this approach was valid as since *Trop* international opinion, "does provide respected and significant confirmation for our own conclusions."[55] Kennedy, perhaps in anticipation of the scathing dissent to follow, defended this approach arguing that, "It does not lessen our fidelity to the Constitution or our pride in its origins to acknowledge that the express affirmation of certain fundamental rights by other nations and peoples simply underscores the centrality of those same rights within our own heritage of freedom."[56]

Steven's approach of looking to expert organisations in *Atkins* also influenced Kennedy.[57] As one lawyer noted regarding expert views, "I think Justice Kennedy was moved by it quite a bit."[58] As the deciding vote in *Roper*, Kennedy took inspiration from Stevens in looking to experts, but went even further than just a footnote and expert research formed a large part

[53] Jane Marriott, "Walking the Eighth Amendment Tightrope: 'Time Served' in the United States Supreme Court," *Against the Death Penalty: International Initiatives and Implications,* edited by Jon Yorke, (Taylor & Francis Group, 2008), p. 172.
[54] *Roper v. Simmons*, 543 U.S. 551, 575 (2005). *Roper v. Simmons*, 543 U.S. 551, 577 (2005).
[55] *Roper v. Simmons*, 543 U.S. 551, 575 (2005). *Roper v. Simmons*, 543 U.S. 551, 578 (2005).
[56] *Roper v. Simmons*, 543 U.S. 551, 578 (2005).
[57] In a footnote in *Atkins* Stevens went beyond solely looking at state legislation and noted that, "several organizations with germane expertise have adopted official positions opposing the imposition of the death penalty upon a mentally retarded offender," and cited amicus briefs from the American Psychological Association and the AAMR, *Atkins v. Virginia*, 536 U.S. 304, 316 (2002).
[58] 'Ezra' Interview. Conducted by Catriona Bide, 9th September 2020.

of his majority opinion. He cited research such as that conducted by the American Psychiatric Association which discussed the difficulties in differentiating between immaturity and "irreparable corruption."[59] Indeed, section IV-B of the opinion was heavily reliant on a number of studies and research in issues ranging from penology to the psychology.[60] Similarly, in *Kennedy*, Kennedy referenced studies from experts in child sexual abuse and from organisations such as the National Association of Social Workers when noting the impact of rape on a child.[61] Kennedy was keen to build on White's approach of considering the views of experts in decision-making and as the deciding vote in *Roper* and *Kennedy* he was able to author opinions that considered such research, gained majority support, and reached his desired result.

Within the context of this thesis, these swing Justices were significant because of the great impact and influence they had on Court decision-making in death penalty eligibility cases, they were major determinants in the outcomes of these decisions. In these cases, Kennedy was perhaps more significant than O'Connor and White as he demonstrated how there is power in aligning with the shared views of one side of the Court to form majorities and thus deciding and steering the direction of the Court on death penalty eligibility. Indeed, Kennedy's pivotal role in Eighth Amendment cases is widely recognised. Often on the Court a swing Justice might be given the task of writing the majority opinion as a means of bringing them onside with a particular position, as allowing them to write the opinion as they view the issue in return for them joining at least four other Justices in agreement satisfies both the swing Justice and the members of the Court they side with. However,

[59] *Roper v. Simmons*, 543 U.S. 551, 573 (2005).
[60] *Kennedy v. Louisiana,* 554 U.S. 407, 441 (2008).
[61] *Kennedy v. Louisiana,* 554 U.S. 407, 445 (2008). *Kennedy v. Louisiana,* 554 U.S. 407, 445 (2008).

with Kennedy whilst this is possible, it does not appear to be the case. Many of Kennedy's main arguments such as those concerning direction of change, international opinion, and research and studies had already been articulated by members of the Court in the past, and so he was not using his position as swing vote to offer different reasoning to the liberal wing of the Court whilst still achieving the same result. Rather, Kennedy appeared genuinely convinced of the merits of the arguments he made, and so aligned himself with those who shared his views and used this to determine the direction of the Court's decisions. These decisions from the swing Justices were largely what the Court as an institution wanted to avoid; personal views dictating the Court's death penalty decisions. Indeed, the contradiction from Justice White being so fervent in his belief that the Court should attempt to remove these predilections from its opinions, yet acting in a way which enabled his views to form the Court's opinions demonstrates the separation of the Court's image crafting from reality.

Death penalty eligibility cases offer an insight into the workings of the Court more broadly by highlighting the roles of influenced and influencer swing Justices and providing examples of how they operate. These cases highlight how the swing Justice does not always simply join one side of the debate or the other, they can be active crafters of the decision and of the Court's jurisprudence. The influencer and the influenced typically produce different types of decision; influencers often form plurality opinions on very narrow grounds, whereas the influenced side with one wing of the Court to produce a majority and generally broader holding. Swing voters are important across a wide range of issues so it is perhaps less surprising that they are influential in death penalty eligibility cases. However, breaking

down the broader category of death penalty cases and looking more closely at eligibility cases has provided a more nuanced and detailed picture of the role and work of swing Justices and their impact on this issue and more broadly.

Chapter 5: Methods of Execution

The Court's modern death penalty involvement entered a new phase from 2008 when it handed down its first methods of execution decision. Various methods of execution, such as the electric chair, lethal gas, hanging and firing squad, have been employed in the US, but lethal injection was the only method to come before the Court in the modern death penalty era covered in this thesis. As Deborah Denno notes, "A notable oddity of the American death penalty is the Supreme Court's constitutional disregard for how inmates are executed."[1] The methods debate has centred on lethal injections, which is perhaps unsurprising as it has been the most widely used method of execution in recent decades with 1365 executions carried out by lethal injection since 1976.[2] In comparison to eligibility cases which covered a range of eligibility criteria and issues, by only examining lethal injection the scope of the Court's methods of execution investigations has been much more limited. This is where breaking down the broader category of 'death penalty cases' becomes useful as it allows for these different issues to be looked at in more detail, which in turn leads to a better understanding of what the Court is actually doing in these cases and how it is making these decisions.

High profile botched executions which outraged many Americans with the gruesome details that emerged made it hard for the Court to avoid the issue. Cases such as that of Angel Diaz in Florida who in 2006 spent 34 minutes writhing and gasping on a gurney before dying was one of several botched executions to make headlines.[3] The *Press-Register* of

[1] Deborah Denno, "The Lethal Injection Quandary: How Medicine Has Dismantled the Death Penalty," *Ford Law Review*, Vol 76, No. 1 (2007), pp. 49-128, p. 102.
[2] "Methods of Execution," *Death Penalty Information Center*, https://deathpenaltyinfo.org/executions/methods-of-execution.
[3] Eric Berger, "Lethal Injection and the Problem of Constitutional Remedies." *Yale Law & Policy Review*, Vol. 27, No. 2 (2009), pp. 259–334, p. 270 http://www.jstor.org/stable/40239714.

Mobile, Alabama, discussing Diaz's execution warned readers that, "Death penalty foes have warned for years of the possibility that an inmate being executed by lethal injection could remain conscious, experiencing severe pain as he slowly dies. That day may have arrived."[4] Austin Sarat estimates that the botched execution rate for lethal injections stands at 7.12%, a higher rate than for any other method.[5] The anti-death penalty movement worked to include botched executions as part of their campaigns and attempts to educate the American people as they were aware that, "The education, news that gets in the regular daily press… if we can draw attention to that… that has an impact on their opinions."[6] As such, it was here where the Court intervened.

There was some reluctance amongst some Justices to heavily involve the Court in issues of method, unlike with eligibility. Initially the Court looked at cases closely linked to methods of execution issues, but which were focused on procedure rather than on whether the method at hand violated the Eighth Amendment. For example, in *Nelson v. Campbell*, 541 U.S. 637, (2004) which examined whether the prisoner's appeal of his execution procedure was equivalent to a habeas corpus petition, and in *Hill v. McDonough*, 547 U.S. 573, (2006) where the Court held that challenging a method of execution was fundamentally different from challenging the lawfulness of a conviction or sentence. Some members of the Court expressed concern about methods cases and the broader goal of such challenges, but pressure was mounting for answers to the growing lethal injection discussion.

[4] Austin Sarat, et al., "Botched Executions and the Struggle to End Capital Punishment: A Twentieth-Century Story." Law & Social Inquiry, Vol. 38, No. 3 (Summer 2013), pp. 694-721, p. 716, citing Ron. Word**, "**Doctors, Death Penalty Foes Focus on Mistakes in Florida Execution," *Press-Register* (17th December 2006).
[5] Austin Sarat, *Gruesome Spectacles: Botched Executions and America's Death Penalty*, (Stanford Law Books, 2014), p. 177.
[6] Reverend Patrick Delahanty Interview. Conducted by Catriona Bide, 18th February 2021.

In contrast to its eligibility cases, in the Court's death penalty methods cases it abandoned its evolving standards focus, instead placing emphasis on precedent, under the rationale that this provided a legitimate basis for its decisions, again linking back to the Court's focus on crafting the image of a legitimate institution. By the time the Court began its involvement with methods of execution cases the climate was very different to when it began engaging with eligibility cases. During this shorter time frame (2008-2015) the Court had a very clear ideological divide and had, "become more conservative and less open to granting relief because of who is on the Court."[7] Furthermore, the US was turning its back on the death penalty and an examination of societal standards at the time the Court handed down its methods opinions would reflect this. As a result, it would have been practically impossible for the Justices on the Court to interpret evolving standards data to justify upholding the death penalty in a methods context. This meant that those on the Court who wished to uphold the death penalty had to look for another way to frame the Court's decisions, one which still presented an image of legitimacy, but which facilitated the upholding of the death penalty in methods cases. This led the Court to depart from its reliance on evolving standards to instead focus on precedent in its methods of execution cases.

Here we see the same approach of image crafting as demonstrated in Chapter 3 where the Justices acted in line with their own views but disguised this by building the opinion on a seemingly legitimate foundation. Although precedent is not neutral, as it leans in favour of one direction or another, focusing on precedent allowed the Court to create an image of legitimacy as this is a factor long used and widely accepted in the Court's decision-making.

[7] Ed Monahan Interview. Conducted by Catriona Bide, 15th March 2021.

More than this, it is the foundational principle of law, and so its use in this context was uncontroversial. Furthermore, it too gave the impression that the Justices were basing their opinions here on something separate from their own views, and so these did not appear to be merely subjective judgments. Equally important for the majority, relying on this factor also allowed the conservatives on the Court to reach their desired outcome of upholding the death penalty and protecting it from future challenges as precedent from previous cases could only result in an interpretation that would support upholding the death penalty. By relying on precedent, the Court strengthened the death penalty against future constitutional challenges as it incorporated its more recent decisions into a long line of jurisprudence that affirmed the constitutionality of the death penalty. As evolving standards was in eligibility cases, precedent in methods cases was a means to an end.

In order to understand how the Court used precedent in its image crafting, this chapter first outlines the broader rulings in *Baze* and *Glossip*, demonstrating where and on what grounds they upheld the death penalty and the standards they imposed. It then examines the cases that the Court relied on as precedent for its decisions here. Then it demonstrates where and how the Court used these cases in *Baze* and *Glossip* to form decisions that upheld the death penalty in both cases and to image craft as it did so. Lastly, it considers *Baze* and *Glossip* in relation to the models of judicial decision-making.

A closer examination of methods of execution cases is important for several reasons. Firstly, looking at methods cases separately to eligibility cases allows for a better understanding of the different approaches taken by the Court, and the different factors that influenced their decision-making in each. The differences and contrasts that can be drawn between the two in turn help to dispel the notion of a broader category of 'death penalty cases,' instead

offering a more detailed insight into what is in reality a far more complex body of law. Similarly, looking at methods cases on their own allows for better testing and application of theories of judicial decision-making as it demonstrates where one model can be more applicable in one context, and a different model more applicable in another. This therefore helps to demonstrate one of the broader arguments of this thesis: that these models can help frame the way we look at the Court and its decision-making, but they cannot explain it entirely. The cumulative result is that looking at methods cases in closer detail creates a greater and more detailed understanding of how the Court operates both in a death penalty methods context and more broadly, and from this we can see how the Court adapted its decision-making approaches to suit both the needs of the issue at hand and the result desired by the majority.

The Court has a long, yet relatively uninvolved relationship with methods cases, which is to say that it has addressed few cases over a long timeframe. Despite the long history of the death penalty in the United States, by 2019 the Supreme Court had only addressed cases concerning a method of execution on six occasions: *Wilkerson v. Utah* (1878), In *re Kemmler* (1890), *Louisiana ex rel. Francis v. Resweber* (1947), *Baze v. Rees* (2008), *Glossip v. Gross* (2015) and *Bucklew v. Precythe* (2019). The limited number of methods cases (in contrast to the many eligibility cases) makes it easier to see what the Court was doing, which in these cases was ensuring the constitutionality of the death penalty through upholding the method of execution in question, and attempting to quash methods of execution challenges as a route to the abolition of the death penalty. Only the latter four cases were decided on the basis of the Eighth Amendment as *Kemmler* and *Wilkerson* were decided before the Court had applied the protections of the Eighth Amendment to the states. *Kemmler*, for example, was looked at in relation to the privileges and immunities clause of

the Fifth Amendment. Therefore, the earliest cases in particular were slightly more removed from the Court's modern death penalty cases (from *Furman* onwards) which consider the issue at hand under an Eighth Amendment context. Only the last three cases fall within the time frame of this thesis and within the modern death penalty debate. Yet, all of these cases are similar in that in each one the Court upheld the method of execution in question.

It is not just the differing basis for the Court's decisions which separate and distinguish eligibility cases and methods cases, the two are also chronologically distinct. Whilst eligibility cases emerged immediately after *Gregg* and spanned the subsequent decades, the Court's death penalty methods cases are simultaneously the oldest and also the most contemporary death penalty issue the Court has dealt with. The Court first addressed a death penalty method case almost one hundred years before its decision in *Furman,* in *Wilkerson v. Utah* (1878). Here the petitioner contended that Utah's method for execution, public shooting, was unconstitutional under the Eighth Amendment. The Court, however, found that this method of execution was not cruel and unusual, stating that, "Difficulty would attend the effort to define with exactness the extent of the constitutional provision which provides that cruel and unusual punishments shall not be inflicted; but it is safe to affirm that punishments of torture . . . and all others in the same line of unnecessary cruelty, are forbidden by that amendment."[8] This marked the first instance of the Court upholding the constitutionality of the method of execution in question. The next methods of execution case came in 1890 *in re Kemmler* . Here the petitioner challenged the constitutionality of electrocution as a method of execution, but on this occasion before the

[8] *Wilkerson v. Utah*, 99 U.S. 130, 135 (1878).

method had ever been used in executions. Once again, the Court upheld the constitutionality of this method, reasoning that historically, "If the punishment prescribed for an offence against the laws of the State were manifestly cruel and unusual, as burning at the stake, crucifixion, breaking on the wheel, or the like, it would be the duty of the courts to adjudge such penalties to be within the constitutional prohibition."[9] And that as such, "Punishments are cruel when they involve torture or a lingering death... It implies there something inhuman and barbarous, something more than the mere extinguishment of life."[10] A third methods case came in 1947 in *Francis v. Resweber* where, after a failed first execution attempt, the petitioner argued that a second attempt would constitute a cruel and unusual punishment, an argument which the Court rejected. Through these three cases the Court established a jurisprudence which decades later proved significant for the Court's decision-making.

When the Court revisited methods issues in the 21st century, the context was very different; these were not simply issues of method, they also had the potential to throw the death penalty in its entirety into question. The shift in the death penalty debate from eligibility to methods demonstrated a recognition by lawyers and anti-death penalty campaigners that using eligibility cases to try to narrow the death penalty to the point of abolition had been exhausted. The categories of those eligible for death had by the early 21st century become so narrow that there was little else that could be chipped away at. As noted by one lawyer, "The shift to method is almost I think a direct consequence of the way the Supreme Court more or less resolved the eligibility sets of issues."[11] Methods of execution cases, however,

[9] *In re Kemmler*, 136 U.S. 436, 446 (1890).
[10] *In re Kemmler*, 136 U.S. 436, 447 (1890).
[11] 'Ezra' Interview. Conducted by Catriona Bide, 9th September 2020.

presented an alternative route through which they could chip away at the death penalty with a view to undermining it entirely. As one lawyer noted, "the Supreme Court more or less settled itself on that the death penalty was here to stay… the feeling is it's pointless to try the straight up eligibility argument and so the method arguments I think just became the only place, the only field on which to do battle."[12] This was also the approach of anti-death penalty groups. Reverend Patrick Delahanty of the Kentucky Coalition to Abolish the Death Penalty (KCADP) explained that, "we just keep chipping away at it, and carving out little areas where they can't use it… so that we can get to the point where they finally conclude we shouldn't be doing this at all."[13] Indeed, it was recognised that historically, "When one method of execution became problematic, such as hanging, for example, states would sense constitutional vulnerability and switch to another method," and so the tactic was to invalidate the most prominent method of execution at the time - lethal injection - which would by default render the death penalty unconstitutional too.[14] This was seen as the best, and in many ways the only, avenue to abolition at the time.

Where eligibility cases pre-suppose a death penalty, as there must be a death penalty for someone to be eligible for it, for methods of execution cases the notion of the death penalty itself and whether it could be conducted constitutionally hung in the balance. Institutionally and individually the Court and the Justices could see the potential for methods cases to undermine the death penalty entirely, after all, were it to be established that there was no constitutional means of executing an offender then the practice itself would by default be rendered unconstitutional. As such, "a critical mass of justices came to

[12] 'Ezra' Interview. Conducted by Catriona Bide, 9th September 2020.
[13] Reverend Patrick Delahanty Interview. Conducted by Catriona Bide, 18th February 2021.
[14] Deborah Denno, "The Lethal Injection Quandary," p. 116.

believe that method claims were really back door efforts at abolition," and the more conservative members of the Court wanted to avoid this.[15] These anxieties surrounding methods of execution cases are not unique to the Supreme Court. Eric Berger notes that on lower courts, "Judicial reluctance to strike down states' lethal injection procedures is closely tied to judges' anxieties about issuing an appropriate remedy should they find a constitutional flaw."[16] Despite some Justices being personally opposed to the death penalty, the more conservative leaning nature of the Court's majority at the time meant that the Justices' actions were motivated, for the most part, by the view that the Court had to shore up the death penalty against such attacks in the most effective way possible.

That the Court focused heavily on precedent in its methods decisions, rather than on evolving standards is initially suggestive of the Legal Model whereby the Court's decisions were informed by legal factors. However, the reason for this focus on precedent does not stem exclusively from a more conservative judicial philosophy (although for some Justices it does), rather, the overarching reason for this reliance on precedent has been - at least for the conservatives Justices who formed the majority on the Court - to uphold the death penalty and to do so whilst presenting a positive public image. Had the Court applied its previous approach of looking to evolving standards of decency, this would not have provided a position in support of the death penalty. So, the Court chose not to follow nearly 40 years' worth of death penalty jurisprudence, and instead favoured a new approach which secured the constitutionality of the death penalty more firmly, but which still presented the same image of legitimacy as evolving standards. As a result, while it appears on the face of it that the Legal Model was at play in these methods cases, when you

[15] 'Ezra' Interview. Conducted by Catriona Bide, 9th September 2020.
[16] Eric Berger, "Lethal Injection and the Problem of Constitutional Remedies," p. 260.

examine these cases more closely, they in fact fit more with the Attitudinal or Strategic Models.

The *Baze* and *Glossip* Rulings

An amicus brief in support of Ralph Baze from four inmates sentenced to death by the states of California, Missouri, Maryland, and Florida, stated that, "What is significant about the executions that have gone awry is that they can be traced back directly to the 'pervasive lack of professionalism' in the development and oversight of the lethal injection process in many jurisdictions. What gives the botched executions constitutional significance is that they were foreseeable and preventable."[17] Where lethal injection was touted as a remedy to the brutal methods of execution used in the past, it was itself problematic. In his book *Gruesome Spectacles: Botched Executions and America's Death Penalty*, Austin Sarat highlights the key executions of Velma Barfield (1984), Ricky Ray Rector (1992), Emmitt Foster (1995) and Romell Broom (2009), to conclude that, "the history of botched lethal injections proves that it is by no means a fool proof method of killing and that its use cannot guarantee that those subjected to it… will die quickly, quietly, and painlessly."[18] The various protocols used across different states presented different risks and results and the demand for clarity was growing. It was becoming clear that intervention from the Court was one of

[17] Brief for Amici Curiae Michael Morales, Michael Taylor, Vernon Evans, Jr., and John Gary Hardwick, Jr., in Support of Petitioners, 2007 WL 3407042 (U.S.) (Appellate Brief), Supreme Court of the United States, Ralph BAZE, et al., Petitioners, v. John D. REES, et al., Respondents, No. 07-5439, November 13, 2007, pp. 1-36, p. 29. https://www.westlaw.com/Document/I8e03c0a0944f11dcbd4c839f532b53c5/View/FullText.html?transitionType=Default&contextData=(sc.Default)&VR=3.0&RS=cblt1.0

[18] Austin Sarat, *Gruesome Spectacles* p. 123. Austin Sarat, *Gruesome Spectacles*, p. 145.

the few avenues available to put these challenges to rest, and so *Baze* came before the Court.

The first of the modern methods of execution cases, *Baze v. Rees* (2008), came to the Court after two inmates argued that Kentucky's lethal injection protocol violated the Eighth Amendment's prohibition of cruel and unusual punishment, "because of the risk that the protocol's terms might not be properly followed, resulting in significant pain."[19] Whilst both inmates recognised that, when administered properly, Kentucky's lethal injection procedure would result in a humane death, they contended that there was a risk that this protocol may not be properly followed, the result of which would be significant pain and in such a scenario this would constitute a cruel and unusual punishment. These risks and the concerns surrounding them were not baseless.

Deborah Denno argued that it was believed by some in the anti-death penalty movement that the Court chose to hear argument in *Baze*, "because they, 'regarded the challenge as insubstantial and wanted to dispose of it before many more state and federal courts could be tied up with similar cases.'"[20] Actually, the Court was more conscious of the potential of this case than Denno perhaps suggests. Keen to put the matter to bed and not risk opening the death penalty to further challenges through methods cases, instead of disregarding *Baze* as insubstantial the Court used it as an opportunity to try to squash method of execution challenges in order to protect the death penalty more broadly. In doing so it went to lengths to establish a new line of argument on this issue rather than relying on its longstanding evolving standards approach. Although the Court's attempt to squash the

[19] *Baze v. Rees,* 553 U.S. 35, 40 (2008).
[20] Deborah W. Denno, "Lethal Injection Chaos Post-*Baze*," *Georgetown Law Journal*, Vol. 102, No. 5 (June 2014), p. 1331-1382, p. 1334.

methods debate here did not succeed, by carving out a different approach to its previous death penalty decisions, it is clear that the Court was indeed keen to dispose of it, not because it was insubstantial, but rather because of its potential.

Once the Court granted *certiorari* in *Baze* a de facto moratorium again emerged. No executions were carried out in the US for seven months until after the case was decided after which executions resumed.[21] In a plurality decision, the Court upheld Kentucky's lethal injection protocol, and thus maintained their stance first established in *Wilkerson*, of upholding the constitutionality of any method of execution put to them. The case, however, resulted in seven different opinions (including five concurrences) which, as seen in *Furman*, left confusion surrounding the Court's exact ruling. Eric Berger noted that, "it is difficult to know what the law is… Even to the extent, though, that the three - Justice plurality's opinion may be viewed as the holding, it offers incomplete clarification."[22]

Most significantly, a majority of seven agreed that a mode of execution does not need to be entirely pain free, and that petitioners must demonstrate that a method of execution presents a substantial risk of pain when compared to a "known and available alternative" method of execution.[23] Chief Justice Roberts, writing for the plurality including Justices Samuel Alito and Kennedy, held that Kentucky's lethal injection protocol comported with the Eighth Amendment. There were three main points from Roberts' opinion. The first was where Roberts established the, "substantial risk of serious harm" test which held that a method of execution does not violate the Eighth Amendment unless such a risk was

[21] Deborah W. Denno, "Lethal Injection Chaos Post-*Baze*," p. 1344, citing Linda Greenhouse, "Justices Chilly to Bid to Alter Death Penalty," *The New York Times*, (8th January 2008), https://www.nytimes.com/2008/01/08/us/08scotus.html.
[22] Eric Berger, "Lethal Injection and the Problem of Constitutional Remedies," p. 279.
[23] *Baze v. Rees,* 553 U.S. 35, 47 (2008). *Baze v. Rees,* 553 U.S. 35, 61 (2008).

presented.[24] Under this standard, the burden was on the petitioners to prove that an execution method presented a, "substantial risk of serious harm."[25] This test was effective for upholding the death penalty in two ways. Firstly, it established a very high bar for mounting successful challenges in this area. This was a heavy burden to put on the petitioner as proving this could be very difficult. The difficulties in proving a substantial risk of severe harm came not least from the fact that it is hard to establish a permissible level of harm to an individual when the desired outcome of any method of execution is their death. There were also challenges with the inherent variations in protocols and of individuals' reactions to various lethal injection cocktails, rendering it difficult to anticipate the level of harm a particular protocol might have on a particular individual. Secondly, this test was suitably vague. As Glossip later demonstrated, it was unclear to petitioners what exactly was needed to prove this as it was unclear what was meant by both "substantial" and "severe" in a system designed to kill. This was Roberts's way of protecting death penalty methods from challenges, as it established a strict criterion for the circumstances where a method might be unconstitutional, and thus made it more difficult for abolitionists to render a method unconstitutional.

The second point of note from the Roberts plurality held that in order to qualify, alternative procedures for execution must be, "feasible, readily implemented, and in fact significantly reduce a substantial risk of severe pain."[26] This further complicated the process of mounting a successful challenge to a method of execution by putting further burden on the petitioner. In making this an even more insurmountable challenge to petitioners, the Court

[24] *Baze v. Rees,* 553 U.S. 35, 50 (2008).
[25] Michael T. Maerowitz, "The Insurmountable Burden of Proof in Eighth Amendment Method-of-Execution Claims," *Arizona State Law Journal*, Vol. 49, No. 1 (Spring 2017), pp. 279-306, p. 282.
[26] *Baze v. Rees,* 553 U.S. 35, 52 (2008).

effectively stymied the anti-death penalty movement's plan to use methods cases to attack capital punishment as a route to abolition. The chances of success in these challenges were greatly diminished, and so too were the anti-death penalty movement's broader goals for abolition. Most significantly, however, it assumes that the execution will be carried out, it is just a question of *how*. It does not offer any avenue for questioning *if* the sentence will be carried out. Combined, the serious harm test and alternative procedure requirement set a high bar for future method of execution challenges and helped to further bolster the death penalty against attacks from a methods standpoint.

As well as the concern for the future of the death penalty, in the third point from the plurality, Roberts expressed concern that judicial involvement in questions of execution methods, "threaten to transform courts into boards of inquiry charged with determining 'best practices' for executions."[27] Death penalty lawyers acknowledge that,

> Chief Justice Roberts is another one who's shown a limited interest and been moved only to a limited degree at all by that kind of information because he would prefer that the legislatures who decide on both whether to have the death penalty and the mechanisms for carrying it out, he thinks that that's appropriate information … and not Judges.[28]

Roberts's approach in *Baze* served this view as it affirmed the constitutionality of the death penalty, but tried to ensure that the smaller complexities and questions stayed out of the Court by creating broader, vaguer, and higher standards for the states to work with. In his plurality, Roberts was on the defensive. It is clear that a fervent effort was made to affirm

[27] *Baze v. Rees,* 553 U.S. 35, 51 (2008).
[28] 'Ezra' Interview. Conducted by Catriona Bide, 9th September 2020.

the constitutionality of the death penalty, to justify quashing method challenges by looking to precedent as discussed below, and also to establish standards and tests that made it harder for petitioners to successfully challenge their method of execution.[29]

Largely, the Court was in agreement on trying to put this issue to bed and to round off the Court's involvement in the death penalty methods debate as uncomplicatedly as possible. However, the disagreements came in how to do this. The contributions from the rest of the Court largely fed off Roberts's substantial risk and alternative method standards. Alito, Stevens, Scalia, Thomas and Breyer concurred in judgement but filed separate opinions. Alito wrote separately to explain his view of how the holding should be implemented and would have established a higher bar for evidence.[30] Thomas agreed with the holding but could not subscribe to the plurality's governing standard as it found no support in the original understanding of the Cruel and Unusual Punishments Clause or in previous methods cases.[31] Conversely, Stevens concurred but raised concerns that this case would only generate more debate both about methods and about the constitutionality of the death penalty more generally, i.e. that it would have the opposite effect to what Roberts intended.[32]

In many ways *Baze* and *Glossip* echoed the events of *Furman* and *Gregg*, where in seeking to resolve a debate, the Court actually fuelled it with a holding that was fractious and narrow. The ambiguity of the *Baze* decision, the continuing issues of botched lethal injections, and persistent pressure from death penalty opponents meant that the issue had to be revisited in *Glossip v. Gross* (2015). Prior to *Glossip*, the Court had rejected last minute

[29] More substantial discussion of precedent in methods decisions follows later in this chapter.
[30] *Baze v. Rees,* 553 U.S. 35, 63 (2008) Justice Alito concurring.
[31] *Baze v. Rees,* 553 U.S. 35, 94 (2008) Justice Thomas concurring.
[32] *Baze v. Rees,* 553 U.S. 35, 86 (2008) Justice Stevens concurring.

appeals on methods issues, such as that of Michael Taylor in 2014 whose lawyers claimed that the drugs used in his execution might subject him to a slow and torturous death.[33] A further series of high-profile botched executions meant that the Court had to once again intervene on this issue as *Baze* had not shut down this debate in the way that many on the Court had hoped.[34] For example, the case of Clayton Lockett in Oklahoma in 2014 where the drugs which should have put Lockett in an unconscious state and insensitive to pain failed and Lockett awoke and took 40 minutes to die. Lockett's case formed the basis for Richard Glossip, a fellow Oklahoma death row inmate, to petition the Supreme Court. In *Glossip*, 21 Oklahoma death row inmates contended that Oklahoma's lethal injection protocol violated the Eighth Amendment. They argued that the first drug - midazolam - in Oklahoma's three drug protocol, "fails to render a person insensate to pain," the result of which being that the lethal injection protocol, "creates an unacceptable risk of severe pain."[35] Petitioners claimed that midazolam had a ceiling effect where after a certain dosage the drug is no more effective at rendering an individual insensitive to pain than it is at a lower dosage.

In *Glossip* the Court once more ruled to uphold the lethal injection protocol in question, and justified its holding based on precedent. The conservative Justices on the Court again used this as an opportunity to try to reduce future death penalty challenges as some, such as Thomas, had expressed concerns about this in *Baze*. On the other hand, some of the more liberal wing of the Court – specifically Justice Breyer joined by Justice Ruth Bader

[33] "Missouri executes Michael Taylor for 1989 murder of girl", *BBC News*, (26th February 2014), https://www.bbc.co.uk/news/world-us-canada-26355935.
[34] *Glossip v. Gross*, 576 U.S. 863, 872 (2015).
[35] *Glossip v. Gross*, 576 U.S. 863, 867 (2015).

Ginsburg - saw *Glossip* as an opportunity to discuss his view that, for many reasons, the death penalty was unconstitutional.[36]

In *Glossip* the Court built on the precedent set by *Baze* and demonstrated how the conservatives were making a firm attempt to craft a strong methods of execution jurisprudence in order to present an image of legitimacy in its decision-making and in order to continue to protect the death penalty. The conservatives were still working to shore up this approach so as to meet the desired result, but to present a favourable image of the Court whilst doing so.[37] Writing for the majority, Justice Alito appeared to apportion blame here, arguing that the only reason why this issue returned to the Court was because of the work of anti-death penalty campaigners. He stated that, "*Baze* cleared any legal obstacle to use of the most common three-drug protocol that had enabled States to carry out the death penalty in a quick and painless fashion. However, a practical obstacle soon emerged, as anti-death-penalty advocates pressured pharmaceutical companies to refuse to supply the drugs used to carry out death sentences."[38] Thus as lethal injection protocols had to be revisited by the states, so the Court had to revisit this issue. Alito recognised the potential threat to the constitutionality of the death penalty here, and so reaffirmed *Baze* and used this as precedent in order to uphold the death penalty in *Glossip*.

This issue at hand in *Glossip* was directly related to the Court's holding in *Baze*, that a punishment with a substantial risk of pain could not be deemed constitutional especially if applied when known and available alternatives were at hand. The Court applied the plurality holding from *Baze* to this case, including the substantial risk test and the

[36] *Glossip v. Gross*, 576 U.S. 864, 908 (2015) Justice Breyer dissenting.
[37] More substantial discussion of image crafting in methods decisions follows later in this chapter.
[38] *Glossip v. Gross*, 576 U.S. 863, 870 (2015).

opportunity to present an alternative method of execution, and thus the Court's line of precedent on this issue was further built upon. In a 5-4 decision the Court held that the use of midazolam in Oklahoma's lethal injection protocol did not violate the Eighth Amendment's prohibition against cruel and unusual punishment.[39] The divide this time, unlike in *Baze*, was straight down ideological lines, with the conservative members of the Court dominating and voting to uphold the protocol in question, and the liberals voting to overturn.

The Court also ruled that the prisoners had not produced a "known and available alternative" method of execution that would result in less suffering as *Baze* had required.[40] As Maerowitz noted, the result was that the Court, "reaffirmed and strengthened its prior decisions, which placed the burden of proof on the prisoner bringing the action to prove a better alternative to the method of execution used by the state."[41] This demonstrates the high bar set by *Baze* for a method of execution challenge to be successful.

The result of *Baze* and *Glossip,* and of the Court's more recent interventions in death penalty methods cases, was that, in the words of one lawyer, "The chances of getting significant death penalty decisions under the current majority of the Supreme Court is just low," and until this changes, "the door is not and will not be open, even as much as Justice Breyer would like it to be, it is just not open for the argument at all."[42] Through these decisions, the conservatives on the Court achieved what they wanted: the protection of

[39] In 2019 the Court applied its ruling in *Glossip* in *Bucklew v. Precythe* 587 U.S. ___, an as-applied challenge regarding Bucklew's medical condition that he claimed would render Missouri's lethal injection protocol unconstitutional in his case as it would cause pain and suffering. Here the Court applied its ruling in *Glossip* that the prisoner must produce a "known and available alternative" method of execution which would cause less suffering and held that this test had not been passed.

[40] *Glossip v. Gross*, 576 U.S. 863, 878 (2015).

[41] Michael T. Maerowitz, "The Insurmountable Burden of Proof in Eighth Amendment Method-of-Execution Claims," p. 282.

[42] 'Ezra' Interview. Conducted by Catriona Bide, 9th September 2020.

the death penalty. After over 100 years the Court's approach had not changed and the Justices continued the longstanding practice of upholding any method of execution put before them. The Court also went beyond this, establishing and applying a standard which made it very hard to mount successful method of execution challenges. Where the Supreme Court is concerned, this avenue to abolition is, for now, closed. As such, both lethal injections and executions more broadly proceeded, with any restrictions or limitations coming not from the Court but from other factors.[43] The Court built on its image crafting approach from eligibility cases to apply this to methods cases. Through relying on precedent, the Court was able to reach the desired outcome under the guise of legitimacy and whilst presenting a favourable image of the institution to the public.

***Wilkerson*, *Kemmler* and *Gregg* as Precedent**

In the Court's methods cases, precedent was the decisive factor. Precedent came from earlier cases such as *Wilkerson* (1879) and *Kemmler* (1890), and from more recently in *Gregg*. Despite *Baze* being decided 129 years after *Wilkerson*, 118 years after *Kemmler,* and 61 years after *Resweber*; these cases still carried weight in the Court's decision-making, particularly in *Baze*. These decisions not only affirmed the constitutionality of the method of execution in question, but also argued that only methods of execution which were deliberately torturous were barred by the Eighth Amendment. As noted earlier, the Court's previous approach of looking to evolving standards of decency was abandoned here in favour of precedent. Precedent presented a firm basis for the Court to base its methods

[43] For example, pharmaceutical companies refusing to supply drugs for executions, changes at state level in execution protocols, or state-level abolition of the death penalty.

decisions as it was a longstanding approach used by the Court, it also demonstrated continuity in approach and the seemingly impartial application of the law and thus was beneficial for the Court's image crafting. More than this, however, for the conservatives on the Court it offered a legitimate means of achieving their desired outcome of upholding the death penalty, but gave the impression that this was not premised on their personal views. On the face of it, this approach was fairly standard for the Court and relatively uncontroversial. However, it was the shift from focusing on evolving standards to focusing on precedent which once again demonstrated the Court image crafting. The Justices chose to change the basis for its methods decisions in order to achieve the desired outcome and doing so under the appearance of legitimacy. It is notable that when the liberals on the Court, who dissented in either or both *Baze* and *Glossip*, looked to evolving standards they found that, "Those circumstances are sufficient to warrant our reconsideration of the death penalty's constitutionality."[44] The distinction is clear: the conservatives on the Court saw method challenges as a route to abolition and therefore shifted approach to base their decisions on a factor which would uncontestably uphold the death penalty whilst also upholding the Court's image. On the other hand, where liberal Justices applied the Court's former approach of assessing evolving standards, they found that the method at hand – and sometimes even the death penalty as a whole – was unconstitutional. Like evolving standards, precedent offered a basis for the Court's decisions which achieved the desired outcome whilst presenting a legitimate public image.

This approach, to simply reiterate the holding of *Wilkerson* and *Kemmler*, has come under scrutiny. Denno argues that *Kemmler* offers weak precedential value and cites three

[44] *Glossip v. Gross*, 576 U.S. 864, 944 (2015) Justice Breyer dissenting.

reasons for this: that *Kemmler* didn't employ the Eighth Amendment's Cruel and Unusual Punishments clause; that the Court adopted a very high burden of proof standard that hasn't been applied subsequently; and because *Kemmler* was decided before any executions by electrocution had been conducted the Court's conclusion rested on limited evidence of the law, science and politics at that time.[45] That the Court would overlook such shortcomings can be explained by the fact that they still felt it had precedential value simply because it upheld the method of execution in question whilst seemingly removing the Justices personal views from the process. Garret Epps of *The Atlantic* noted that the Court's decisions regarding punishment have for the last 60 years held that the Eighth Amendment's ban on cruel unusual punishments is not just limited to those punishments used when the Amendment was ratified, rather, as the Court held in *Trop*, the Eighth Amendment, "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[46] As the previous chapter highlights, the Court invoked this many times throughout its death penalty decisions, that is until it began to examine issues of method, and despite the vast societal changes that had occurred in this area in the 130 years since *Wilkerson*. As Epps notes, in *Bucklew*, "the majority opinion pretended that *Trop* did not exist."[47] To abandon this well-established approach which had been deemed a suitable, even essential, basis for the Court's death penalty decisions in favour of hinging decisions on cases from which modern American society had very much

[45] Deborah W. Denno, "When Legislatures Delegate Death: The Troubling Paradox Behind State Uses of Electrocution and Lethal Injection and What It Says about Us," *Ohio State Law Journal*, Vol. 63 (2002), pp. 63 – 261, p. 72 http://ir.lawnet.fordham.edu/faculty_scholarship/118

[46] Garrett Epps, "Unusual Cruelty at the Supreme Court Justice Neil *Gorsuch* warmly embraces state killing—even if the state knowingly inflicts agony in the process," *The Atlantic*, 4th April 2019, https://www.theatlantic.com/ideas/archive/2019/04/bucklew-v-precythe-supreme-court-turns-cruelty/586471/?msclkid=8d11512cac4311ecaee228eb4f5526ef. *Trop v. Dulles* 356 U.S. 86, 101 (1958).

[47] Garrett Epps, "Unusual Cruelty at the Supreme Court Justice Neil *Gorsuch* warmly embraces state killing—even if the state knowingly inflicts agony in the process." *Trop v. Dulles* 356 U.S. 86, 101 (1958).

departed suggests that in these methods cases the Court had selectively chosen the cases to establish precedent on this issue, focusing on those which served arguments in favour of upholding not only the method in question, but the death penalty as a whole.

Gregg v. Georgia in particular was relied on by the Court in its methods decisions because it affirmed the per se constitutionality of the death penalty and thus helped to mitigate the broader threat that methods cases posed of undermining the constitutionality of the death penalty in its entirety. *Gregg* was crucial in informing the Court's decision in *Baze* and it underpinned modern death penalty cases as it created a guarantee of application of death sentences. By starting from the point of accepting that the death penalty was constitutional the Justices could then therefore assume that there must be a method to carry it out. All future methods cases would be premised on the assumption that there *is* a death penalty which would protect it against future constitutional challenges.

Baze and *Glossip* were also later relied upon by the Court as precedent in subsequent methods decisions. In *Bucklew* Justice Gorsuch referenced both to make clear the Court's most basic holding that, "The Constitution allows capital punishment."[48] Furthermore, Gorsuch referenced *Baze* and *Glossip* in reaffirming principles such as the Eighth Amendment not guaranteeing a painless death, only one that is not torturous, and the substantial risk test established in *Baze*.[49] This demonstrates where the Court is continuing to apply this approach of looking to precedent in methods cases and also building on it to incorporate its modern methods cases, rather than just those of 130 years ago, into its jurisprudence. *Baze* and *Glossip* underpin the Court's methods decisions and are

[48] *Bucklew v. Precythe*, 587 U.S. ___, 8 (2019).
[49] *Bucklew v. Precythe*, 587 U.S. ___, 12 (2019).

embedded in the Court's methods jurisprudence. The result is that the Court has created a strong line of death penalty methods jurisprudence, which in turn bolstered the appearance of legitimacy in its methods decision-making.

Precedent in *Baze* and *Glossip*

Closer examination of *Baze* and *Glossip* reveals how the Court used precedent in its decision-making in order to uphold the death penalty on a seemingly legitimate basis. Writing for the plurality in *Baze*, Chief Justice Roberts made strong use of the precedent set over 100 years ago in *Wilkerson* and *Kemmler*, and tried to make clear how these cases still had a bearing on contemporary methods issues. He noted that, "This Court has never invalidated a State's chosen procedure for carrying out a sentence of death as the infliction of cruel and unusual punishment."[50] This immediately indicated that Roberts did not intend to stray from the precedent set by the Court 130 years before in *Wilkerson*. Roberts also utilised precedent to note that questions surrounding methods of execution were complex due to the "difficulty of 'defining with exactness the extent of the constitutional provision which provides that cruel and unusual punishments shall not be inflicted.'"[51] This made it clear that in such cases the Court did not intend to go into fine details about the exactitudes of lethal injection protocols to create extremely narrow holdings and precise definitions, its rulings would be somewhat broader and thus would allow for some element of pain in execution. Roberts's approach in *Baze,* where he referenced the fact that the Court had never invalidated a method of execution, immediately indicated that he did not intend to

[50] *Baze v. Rees,* 553 U.S. 35, 48 (2008).
[51] *Baze v. Rees,* 553 U.S. 35, 48 (2008).

stray from *Wilkerson*. In *Glossip*, Alito was also a proponent for the relevance of *Wilkerson* and *Kemmler,* stating that, "We decline to effectively overrule these decisions."[52] He then built on this line of precedent further as he incorporated *Baze* into the Court's methods jurisprudence to stress that, "we have time and again reaffirmed that capital punishment is not per se unconstitutional."[53] More recently in *Bucklew* Justice Gorsuch made similar reference to *Wilkerson* and *Kemmler*, again emphasising their relevance in a contemporary context, noting that the Court had observed that the Eighth Amendment forbade gruesome methods of execution outlined in the ruling in *Wilkerson*, and thus a strong line of argument linking it to precedent was maintained.[54]

The Justices also incorporated precedent from their more recent encounter in *Gregg* into the contemporary methods debate in order to further build on the precedent set over a century ago. In *Baze* Roberts referenced *Gregg* for the precedent it set affirming the constitutionality of the death penalty, thus further building this into the Court's methods jurisprudence. After briefly outlining the protocols for lethal injection in the US and Kentucky, Roberts immediately reiterated, "the principle, settled by *Gregg*, that capital punishment is constitutional."[55] With this clearly articulated, Justice Roberts reasoned therefore, "there must be a means of carrying it out."[56] This showed that Roberts saw through some of the motivations behind this case as a potential back door route to the total abolition of the death penalty and so stopped it immediately in its tracks, using and building upon precedent as justification and suggested that any attempts at using methods of execution cases as a route to total abolition of the death penalty would be futile and

[52] *Glossip v. Gross*, 576 U.S. 863, 881 (2015).
[53] *Glossip v. Gross*, 576 U.S. 863, 16 (2015).
[54] *Bucklew v. Precythe*, 587 U.S. ___, 10 (2019).
[55] *Baze v. Rees,* 553 U.S. 35, 47 (2008).
[56] *Baze v. Rees,* 553 U.S. 35, 47 (2008).

unsuccessful. It was a clear line in the sand to those who saw this case as an opportunity for abolition. Writing in concurrence, in *Baze* Justice Alito, went one step further stating, "lethal injection is a constitutional means of execution," and so he explicitly upheld not only the constitutionality of the death penalty, but lethal injection as a method of execution specifically.[57] These arguments by Roberts and Alito demonstrate the fervour amongst the nominal majority to ensure that lethal injection challenges would in no way lead to broader questions about the constitutionality of the death penalty, and *Gregg* provided useful precedent to help make this argument and craft the desired image of legitimacy.

The concurring Justices in *Baze* also examined the precedent set by *Wilkerson* and *Kemmler* and used this to form their opinion. Justice Thomas, joined by Justice Scalia, took a much stricter view of the Constitution and of precedent than Roberts. Thomas relied upon *Wilkerson* and *Kemmler*, and on historical precedent to make the argument that only methods of death intended to inflict torture, such as burning at the stake or disembowelling, were prohibited by the Eighth Amendment, which effectively meant that all modern methods – of which none were *intended* to inflict torture – were constitutional.[58] Thomas demonstrated an unwillingness to look outside of the law into the real-world practice of the death penalty. Similar to Roberts this allowed for some pain to be permitted in executions, but it also went beyond this as Thomas argued that because Kentucky adopted its lethal injection protocol in an effort to make capital punishment more humane then the petitioner's challenge must fail.[59]

[57] *Baze v. Rees,* 553 U.S. 35, 63 (2008), Justice Alito concurring.
[58] *Baze v. Rees,* 553 U.S. 35, 94 (2008), Justice Thomas concurring.
[59] *Baze v. Rees,* 553 U.S. 35, 107 (2008), Justice Thomas concurring.

Alito's concurrence in *Baze* was premised on the fact that he did not feel that Roberts' substantial risk standard did enough to mitigate against future attempts to undermine the constitutionality of the death penalty through methods cases. Alito argued that, "This vague and malleable standard would open the gates for a flood of litigation that would go a long way toward bringing about the end of the death penalty as a practical matter. While I certainly do not suggest that this is the intent of the Justices who favor this test, the likely consequences are predictable."[60] Alito further attempted to protect the death penalty from being undermined by methods challenges by arguing that, "the constitutionality of a method of execution… should be kept separate from the controversial issue of the death penalty itself."[61] This approach would have closed off methods cases as an avenue to abolition and so demonstrated that Alito was aware that these were the newly adopted tactics by death penalty abolitionists and sought to defend against them. Later in the oral arguments in *Glossip*, Alito expressed concern that the Court was being faced with a "guerrilla war against the death penalty" from the abolitionist movement.[62] Similarly, it is clear from his concurrence that Thomas was also aware of the potential posed for methods of execution cases as a route to abolition and was explicit in recognising this and knocking it down. He stated that,

> It is obvious that, for some who oppose capital punishment on policy grounds, the only acceptable end point of the evolution is for this Court, in an exercise of raw judicial power unsupported by the text or history of the Constitution, or even by a contemporary moral consensus, to strike

[60] *Baze v. Rees,* 553 U.S. 35, 70 (2008), Justice Alito concurring.
[61] *Baze v. Rees,* 553 U.S. 35, 70 (2008), Justice Alito concurring.
[62] Oral Argument *Glossip v. Gross*, 29th April 2015, at 13:12 https://www.oyez.org/cases/2014/14-7955.

> down the death penalty as cruel and unusual in all circumstances. In the meantime, though, the next best option for those seeking to abolish the death penalty is to embroil the States in never-ending litigation concerning the adequacy of their execution procedures.[63]

Thomas's reference to the text and history of the Constitution shows that whilst he agreed with the emphasis Roberts and Alito placed on precedent, his position varied slightly from them, and thus he wrote separately, joined by Justice Scalia. He believed that Roberts's substantial risk test and other standards put forward by the dissent and the petitioners, "finds no support in the original understanding of the Cruel and Unusual Punishments Clause," nor in the Court's previous methods cases.[64] Thomas wrote separately because he was not convinced that precedent alone was the deciding factor in this case, he saw original understanding and textualism as significant too. Although Thomas took a more originalist and textualist approach in his decision-making, this was not the only factor that led him to his conclusion. Thomas concurred in judgment in part because he agreed with the Roberts plurality that the Court's previous methods cases supported upholding the death penalty, and it is also clear that Thomas wanted to put a stop to these backdoor attempts at abolition through methods challenges.

Whilst the assessments from both Thomas and the majority were not inaccurate, they did overlook the genuine constitutional question and public need for answers that botched executions were creating. This case offered as much potential to death penalty proponents who wanted to put the issue to bed and to uphold the death penalty as it did for

[63] *Baze v. Rees,* 553 U.S. 35, 104 (2008), Justice Thomas concurring.
[64] *Baze v. Rees,* 553 U.S. 35, 94 (2008), Justice Thomas concurring.

abolitionists who saw this as an opportunity to undermine the death penalty. In making statements such as the above Thomas perhaps focused too much on the latter, when the ruling in this case in fact served the former. In seeking to protect the death penalty from this line of attack, the approach adopted by Thomas and Roberts was to utilise precedent (and the original meaning of the Constitution for Thomas) to help argue that some risk of pain was inherent in execution and that the Court had never yet found a method of execution unconstitutional nor demanded that it be completely pain free. Using precedent here marked the continuation of the Court's image crafting on death penalty issues, but a change in approach. Precedent provided a legitimate basis for the Court to uphold the death penalty as it was further building on a long-established line of jurisprudence, which demonstrated continuity and consistency. This presented an image of legitimacy in the Court's decision-making as precedent was a legitimate rationale for the majority holding. However, this image of legitimacy is thrown into question when considering that the Court completely abandoned its previous evolving standards approach and switched to focus on precedent which was practically the only outwardly legitimate factor which lent itself to a conclusion in support of upholding the death penalty – the goal for the conservative majority - in this context. The Court was still image crafting, just in a different way.

When the Court revisited this issue in *Glossip*, at the forefront of the majority's minds was still preventing this case becoming the first domino to abolition whilst appearing legitimate in their decision-making. Writing for the majority in *Glossip*, Justice Alito, like Roberts, saw through these renewed attempts at abolition through challenges such as *Glossip*, noting that, "If States cannot return to any of the "more primitive" methods used in the past and if no drug that meets with the principal dissent's approval is available for use in carrying out

a death sentence, the logical conclusion is clear."[65] As shown above, Alito applied the same approach as Roberts in relying on precedent in order to shore up the constitutionality of the death penalty, and to shut down method of execution challenges as a route to abolition. Alito agreed with Roberts's argument that capital punishment was constitutional and settled law, stating that the Court will, "proceed on the assumption that the death penalty is constitutional," and that as a result of this, "there must be a constitutional means of carrying out a death sentence."[66]

In dissent, Justice Breyer challenged the fundamental underpinning of *Baze* and *Glossip*: that the death penalty was constitutional. Referring back to *Gregg*, Breyer noted that at the time the Court believed the states had imposed sufficient safeguards to prevent the death penalty being applied arbitrarily. However, he argued that despite the Court's efforts, "Almost 40 years of studies, surveys, and experience strongly indicate, however, that this effort has failed."[67] This echoed sentiment from anti-death penalty lawyers and activists who argued that since Gregg, "decades of litigation that have occurred since then has proven we cannot figure out a way to administer it fairly without disproportionality, racial discrimination, regional differences… how much more evidence does the court need that it can't be done?"[68] Breyer identified three constitutional defects in the current administration of the death penalty: "(1) Serious unreliability, (2) arbitrariness in application, and (3) unconscionably long delays that undermine the death penalty's penological purpose. Perhaps as a result, (4) most places within the United States have abandoned its use."[69] He concluded these issues were what made the death penalty a cruel

[65] *Glossip v. Gross*, 576 U.S. 863, 881 (2015).
[66] *Baze v. Rees,* 553 U.S. 35, 63 (2008), (Justice Alito concurring).
[67] *Glossip v. Gross*, 576 U.S. 863, 909 (2015) Justice Breyer dissenting.
[68] Ed Monahan Interview. Conducted by Catriona Bide, 15th March 2021.
[69] *Glossip v. Gross*, 576 U.S. 863, 909 (2015) Justice Breyer dissenting.

and unusual punishment and that despite the Court and states' efforts since *Gregg*, "considerable evidence has accumulated that those responses have not worked."[70] Breyer's reliance on *Gregg*, and questioning of the majority's interpretation of precedent here, once again demonstrates where precedent was an influential factor in decision-making. Breyer felt that he had to challenge the majority's view that *Gregg* provided precedent and justification for its ruling, and so had to pick it apart. The majority took a narrow approach, whereas Breyer used *Gregg* as a platform to reconsider the whole area of death penalty jurisprudence. Breyer would have overturned the death penalty in this case, and more broadly, and *Gregg* helped to provide a framework through which he could make this argument.

Writing in a concurrence primarily focused on responding to Justice Breyer's plea to abolish the death penalty, Justice Scalia made clear that precedent made Breyer's position untenable, writing, "The response is also familiar: A vocal minority of the Court, waving over their heads a ream of the most recent abolitionist studies (a superabundant genre) as though they have discovered the lost folios of Shakespeare, insist that *now,* at long last, the death penalty must be abolished for good. Mind you, not once in the history of the American Republic has this Court ever."[71] In the face of all the evidence Breyer presented as to why the death penalty was unconstitutional, precedent gave Scalia a firm basis to dispute all of this and thus was relied upon by conservative members of the Court as a rationale for upholding the death penalty in the face of attacks.

[70] *Glossip v. Gross*, 576 U.S. 863, 945 (2015) Justice Breyer dissenting.
[71] *Glossip v. Gross*, 576 U.S. 863, 894 (2015) Justice Scalia concurring.

The dissenters in *Baze* and *Glossip* dismissed this interpretation of precedent in these cases and instead continued to adhere to evolving standards, stating, "Whatever little light our prior method-of-execution cases might shed is thus dimmed by the passage of time."[72] They placed their focus differently and subsequently reached different conclusions which aligned more with their views on the issue. The weight attributed to *Wilkerson* and *Kemmler* was questioned by Justice Ginsburg in *Baze* who argued that, "No clear standard for determining the constitutionality of a method of execution emerges from these decisions," and in addition to this, the long period of time since these decisions, "limits their utility" in resolving the case at hand. In placing less weight on precedent Ginsburg reached a different conclusion to Roberts and would instead have sent the case back to the lower courts with instructions to reconsider. This demonstrates the significance of the majority focussing on precedent: had they dismissed it as Ginsburg did, then they may not have reached the same conclusion and upheld the death penalty in this case. However, in choosing to focus on precedent, this led to a conclusion upholding the death penalty, which coincided with the views of the more conservative members of the Court.

In *Glossip* the dissent attempted to utilise precedent, but this time to argue a different point of view. This was perhaps an attempt by the dissent to disrupt the majority's reliance on precedent to uphold the death penalty in methods cases and to undermine this factor as the basis for the Court's opinions. However, it had limited success. Rather than dismissing *Wilkerson* and *Kemmler* as historical artefacts as Justice Ginsburg did, Justice Sonia Sotomayor attempted to use them to argue the other way. Sotomayor was particularly critical of the Baze ruling, and argued that the majority's holding imposed, "a

[72] *Baze v. Rees,* 553 U.S. 35, 115 (2008) Justice Ginsburg dissenting. *Baze v. Rees,* 553 U.S. 35, 116 (2008) Justice Ginsburg dissenting.

wholly unprecedented obligation on the condemned inmate."[73] This meant that a method of execution that is, "intolerably painful—even to the point of being the chemical equivalent of burning alive," will be found constitutional only if there is a known and available alternative method of execution, and that, "It deems *Baze* to foreclose any argument to the contrary."[74] Sotomayor noted that as none of the concurring Justices applied the second part of Roberts's standard in *Baze* nor did they assess the demonstration of available alternative methods of execution and thus, "none of the Members of the Court whose concurrences were necessary to sustain the *Baze* Court's judgment articulated a similar view."[75] Indeed, Professor Jon Yorke expressed this view, writing that, "The *Baze* holding on the 'known-and-available-alternative requirement' was based on a weak constitutional foundation of a plurality opinion, which did not create a solid precedent value."[76] Sotomayor utilised *Wilkerson* and *Kemmler* to demonstrate that the Court had always found torturous methods of punishment to be forbidden by the Constitution.[77] She did not, however, find that an incredibly painful method of execution – the chemical equivalent to torture – was only unconstitutional if there was a "known and available alternative" method of execution.[78] For Sotomayor, torturous punishment was the key factor in this issue, irrespective of whether an alternative was available or not. Sotomayor interpreted the precedent set by *Baze* differently to the majority and this impacted her assessment in *Glossip*. She saw that the majority was using *Baze* to set an extremely high standard for methods of execution claims and used her dissent to dispute

[73] *Glossip v. Gross*, 576 U.S. 863, 978 (2015) Justice Sotomayor dissenting.
[74] *Glossip v. Gross*, 576 U.S. 863, 971 (2015) Justice Sotomayor dissenting.
[75] *Glossip v. Gross*, 576 U.S. 863, 971 (2015) Justice Sotomayor dissenting.
[76] Jon Yorke, "Comity, Finality, and Oklahoma's Lethal Injection Protocol," *Oklahoma Law Review*, Vol. 69, No. 4 (Summer 2017), pp. 545-621, p. 608.
[77] *Glossip v. Gross*, 576 U.S. 863, 969 (2015), Justice Sotomayor dissenting.
[78] *Glossip v. Gross*, 576 U.S. 863, 970 (2015), Justice Sotomayor dissenting.

this. It also demonstrated her perceived significance of precedent as she sought to question the majority's interpretation of this factor, in order to undermine their position entirely.

Justice Ginsburg's examination of evolving standards in her *Baze* dissent further highlights how the plurality used precedent to image craft and uphold the death penalty. Ginsburg considered evolving standards of decency in her dissent, arguing that, "The Eighth Amendment, we have held, 'must draw its meaning from the evolving standards of decency…'"[79] Had the plurality also applied an evolving standards approach in methods cases it would have struggled to square societal standards with a conclusion upholding the death penalty. As such, they had to adapt their approach and the factors which influenced their decisions in order to uphold it. The Court reflected the same broad pattern demonstrated in its eligibility cases whereby the more liberal Justices typically voted to strike down the death penalty in these methods cases, and the more conservatives typically voted to uphold it. In eligibility cases this was achieved through interpreting the evolving standards data in a particular way to fit the desired outcome, and in methods cases the conservative members of the Court achieved their desired outcome by focusing on an entirely different factor altogether. These decisions all came down to where the Justices chose to place emphasis, yet they were deemed acceptable as they were premised on factors which seemingly removed these individual interpretations.

Similarly, in *Glossip* Justice Breyer writing in dissent looked to factors other than precedent and similarly reached a different conclusion to the majority regarding the per se constitutionality of the death penalty, again demonstrating where the desire to uphold the death penalty outweighed the Court's previous approach to death penalty cases. On

[79] *Baze v. Rees,* 553 U.S. 35, 115 (2008) Justice Ginsburg dissenting.

Breyer's position on the death penalty more broadly and in *Glossip* specifically, he was described as being, "clearly out on his own."[80] He examined factors such as exoneration data and data on wrongful executions, data to indicate arbitrariness in sentencing, excessive delays in executing offenders, and the decline in the use of the death penalty both domestically and internationally, and utilised these factors to argue that, "I believe it highly likely that the death penalty violates the Eighth Amendment."[81] These factors more closely resembled the evolving standards investigations carried out in the Court's eligibility cases, as they examine more contemporary developments in the death penalty debate and in its use. As Breyer demonstrated, they all suggested that the death penalty was unconstitutional. Given previous death penalty eligibility cases focused on evolving standards, Breyer's approach here would have been the expected approach in a methods context and most fitting with the Court's jurisprudence. He applied the long-standing approach which the Court had used thus far, and with the Court's insistence on its relevance and importance it was significant that the majority chose not only to deviate from this, but to abandon it entirely.

Models of Decision-Making

In contrast to eligibility cases, where the Attitudinal and Strategic Models were most applicable to the Court, in methods of execution cases the Legal Model *appears* to be most applicable. The Legal Model assumes that the Justices' decision-making is influenced by a reliance on legitimate authorities such as statutes and – most relevant to this chapter –

[80] 'Ezra' Interview. Conducted by Catriona Bide, 9th September 2020.
[81] See *Glossip v. Gross*, 576 U.S. 863, 908-948 (2015), Justice Breyer dissenting. *Glossip v. Gross*, 576 U.S. 863, 946 (2015), Justice Breyer dissenting.

precedent and the Constitution. As shown above, in these methods cases, the Court relied primarily on precedent to form a basis for its jurisprudence. Whereas eligibility cases were very much focused on the modern death penalty debate and precedent established in *Gregg* and afterwards, the Court's modern methods cases relied on precedent from cases as far back as 130 years ago. The Legal Model's applicability here can be seen as a result of the Justices choosing to place emphasis on precedent and on the Constitution.

However, as the above shows, the Court's examination of precedent was not conducted with the sole purpose of getting a clear line to its decision. Rather, the main reason why the conservative majority on the Court relied on precedent was that it offered a strong argument in favour of upholding any method of execution and thus could be used to prevent death penalty abolitionists using methods cases as a route to abolition, all whilst maintaining a legitimate public image of the Court. With this in mind, there are actually more similarities between methods and eligibility cases than perhaps first meet the eye. In both the Justices relied on certain factors in their decision-making as a cover where in reality they decide cases based on their own personal preferences.

Relying on precedent, and for some members of the Court on a strict reading of the Constitution, lent itself towards the upholding of the death penalty and thus mitigated some of the methods of execution challenges which had the potential to render the death penalty unconstitutional in its entirety. The conservatives on the Court wanted to put an end to these methods of execution challenges as a potential route to abolition and through precedent they did so under the guise of legitimacy. In his concurrence in *Glossip*, Scalia made this desire clear stating, "Time and again, the People have voted to exact the death penalty as punishment for the most serious of crimes. Time and again, this Court has upheld

that decision."[82] Similarly, in his concurrence Justice Thomas stated, "it seems to me that the best solution is for the Court to stop making up Eighth Amendment claims in its ceaseless quest to end the death penalty through undemocratic means."[83] Relying on precedent and the Constitution the Court was able to make a very broad ruling in *Baze*, affirming the constitutionality of the death penalty and that the Eighth Amendment does not guarantee an entirely painless execution, and then create a very high standard – the substantial risk of serious harm test– which made it incredibly difficult to overturn the death penalty through the avenue of methods challenges. It was able to meet the desired outcomes of the conservatives on the Court, whilst maintaining a public image of legitimacy and objectivity throughout. This is not to say that the Court did not look at individual details of the case at hand, as in both *Baze* and *Glossip* the Court examined closely the individual circumstances of the case. Rather, precedent was used early on to underpin the holdings of the case and to establish early on that the Court was not going to stray from it, which is why it was so influential in the Court's decision-making.

Similar to the way in which the Court could interpret evolving standards data differently to achieve a means to an end, this could also be done to some degree with precedent. Therefore, the Court's use of precedent highlights flaws with the Legal Model. Justice Sotomayor's approach of looking to precedent yet coming to a different conclusion to the majority in *Baze,* or Ginsburg's dismissal of precedent as irrelevant suggests that rather than being a clear line to the answer, in some instances precedent can be interpreted or used in different ways. Therefore, the Legal Model does not fully explain how the Court decides cases in these instances. Moreover, had the Court taken a more expansive

[82] *Glossip v. Gross*, 576 U.S. 863, 899 (2015) Justice Scalia concurring.
[83] *Glossip v. Gross*, 576 U.S. 863, 908 (2015) Justice Thomas concurring.

approach to examining precedent, it may have reached a different conclusion to the one it made based on a very narrow set of cases. For example, in seeking to uphold the death penalty the Court chose to focus only on methods cases rather than on the more contemporary and broader category of death penalty cases that had come before the Court. Although this focus could be justified on the basis that earlier cases like *Wilkerson* and *Kemmler* focused on methods, whereas the contemporary cases were more eligibility or procedurally focused, it could also be questioned as by focusing on cases some 100 years ago the Court overlooked the more contemporary evolution in the death penalty debate, its practice, and the Court's own more recent jurisprudence in this area. However, looking to more recent death penalty cases for precedent would not have served the argument for upholding the death penalty as the majority of eligibility cases in particular trended towards narrowing its application. The fact that these modern cases were eligibility rather than methods cases made it easy for the Court to dismiss them and instead focus solely on methods precedent which better served its aims. In short, precedent could be interpreted and used subjectively because the Justices could exercise discretion in terms of which cases to examine and utilise as precedent. The Justices could have taken a broader approach and looked at all of the more recent death penalty cases, but chose to focus on a much narrower and much older set of cases as this better served their aim to uphold the death penalty.

What distinguishes methods and eligibility cases is that the Court chose to apply different approaches to them both. Whilst the Court did not create the different types of cases of methods or eligibility – as these are fundamentally different issues – the Court made these distinctions starker through the different ways it chose to address them, and thus many of the differences within the various types of death penalty cases were largely of the Court's own making. The Court deliberately chose to take a different approach in its methods cases

and focus on precedent in order to allow the death penalty to continue against challenges from abolitionists. Whereas in eligibility cases the Court looked to evolving standards which led to the narrowing of the death penalty. This choice to emphasise precedent over the previously adopted approach of evolving standards demonstrates a deliberate Attitudinal choice to protect the existence of the death penalty at the expense of following the Court's more recently established jurisprudence.

Indeed, as with eligibility cases, the Strategic or Attitudinal Models go further in explaining the Court's decision-making in methods cases. This position has support from scholars such as Deborah Denno whose interpretation of *Baze* is also suggestive of the Attitudinal or Strategic Models. As established above, the conservatives on the Court saw the risk that methods challenges posed to the constitutionality of the death penalty, they wanted to uphold the death penalty, whether because they personally approved of its use or because it was permissible under a strict reading of the Constitution, and so sought to protect it.

The majority opinions in both *Baze* and *Glossip* were dictated by the personal desire amongst the conservatives to uphold the death penalty, which is indicative of the Attitudinal Model. However, as with eligibility cases, there still existed the constraint of the need to image craft, which fits closer with the Strategic Model. The Court needed a way to square its decision in light of societal standards that did not lend themselves to these holdings, and in light of highly publicised botched executions. As evolving standards were not conducive to the result that the conservatives desired, they instead focused on precedent, using this as a superficial constraint on, and rationale for, their decision-making but which allowed for the desired outcome whilst maintaining an image of legitimacy.

This further cements one of the overarching arguments of this thesis that these decision-making theories provide a useful framework to think about what the Court is doing, but that blanket assertions about the Court's work cannot be made using one single model. Normally, focusing on precedent would be considered a Legal Model of decision-making, however the conservatives' use of precedent here as a means to achieve their own objectives suggests that in reality precedent is not so rigid that it cannot be used in different ways and to serve as cover for the Justice's personal predilections. For this reason, the Court's decision-making in *Baze* and *Glossip* is actually more suggestive of the Strategic or Attitudinal Model because of the way the Justices pursued their own policy preferences, but mostly of the Strategic Model because the Court using precedent as cover for their own predilections was a *strategic* decision to avoid criticism and ensure the legitimacy of the institution and its decisions.

The Court's methods opinions were focused on tackling a very tangible threat to the constitutionality of the death penalty. After all, it would be hard for the Court to justify the constitutionality of a punishment that itself could not be carried out through constitutionally permissible means. Precedent in the Court's methods of execution cases is what evolving standards were to the Court's eligibility cases: a means to a desired end. That end was to reach the outcome desired by the majority but to do so in a way that still upheld the public image of the Court where decisions were not made based solely on the personal views of whoever sat on the Court, thus presenting a neutral and legitimate public image. In its methods cases the conservative majority on the Court deliberately employed precedent as a tool in order to achieve their aim of upholding the death penalty in the cases

before them, and ensuring its constitutionality beyond this. The political and societal developments that preceded *Baze* and *Glossip* created a genuine threat – or opportunity – for the abolition of the death penalty. Methods of execution cases presented a new avenue for anti-death penalty advocates to pursue in their quest to abolish the death penalty and the conservatives wanted to quash this. The Court achieved what it set out to do in *Baze*, *Glossip* and *Bucklew*, as today the Court is no longer seen as a potential route to death penalty abolition so long as there is a conservative majority that will look for ways to uphold the death penalty. As one lawyer described it, "my sense is that the battle is going to shift out of the courtroom … because, at least until the Court changes, legal challenges are unlikely to get anywhere."[84]

The Court spent decades establishing a modern death penalty jurisprudence in its eligibility cases only to abandon it when it began to examine methods cases. It could not rely on evolving standards and state legislation here as it had in its previous death penalty cases as the developments that had occurred in recent decades surrounding methods of execution and societal standards would made it hard to justify upholding the death penalty. As a result, the Court looked to build its methods decisions on firmer foundations using precedent. Precedent allowed the Court not only to affirm the constitutionality of the death penalty, but it also enabled the Court in *Baze* to develop the substantial risk test which then set a very high bar for future methods of execution challenges. Furthermore, the Court's emphasis on precedent was influenced primarily with the aim to produce decisions in methods cases which cast the Court in a favourable light where decisions are led by something more than simply the personal views of the individuals on the Court.

[84] Ezra' Interview. Conducted by Catriona Bide, 9th September 2020.

Indeed, the Court appeared to be acting in the exact way that the Court should operate: objectively, and establishing a clear and firm line of jurisprudence. Though the reality was that the conservatives relied on precedent as it was practically the only basis for its opinions that was both legitimate and upheld the death penalty in this context. Although the use of precedent would be suggestive of the Legal Model of decision-making here, this is evidently not the case and the Attitudinal Model in particular provides a better rationale for the Court's actions in methods cases.

Despite many differences, the similarities between method and eligibility cases come through where the Court still followed the predilections of the Justices in its decision-making. In methods cases this followed the views of the conservative majority who sought to protect the death penalty against challenges. In eligibility this focused more on the swing votes who could command the middle ground on an issue. Having now also examined methods cases it becomes clear that the Court was image crafting and that its decision-making was premised on more than what it claimed. This is most evident in the decision to abandon the approach of examining evolving standards to focus instead on precedent. For both method and eligibility cases, the Court used what are typically seen as legitimate rationales for their decisions – precedent and evolving standards of decency – and again on the face of it they appear to be a valid basis for their rulings. However, when you examine these cases more closely and draw comparisons between the two issues, it is clear that this area of law is steeped in the personal views of the Justices on the Court at any given time, whether that is at the more basic level of how to interpret data or – more apparently – about their views on the death penalty fundamentally.

This helps build a better understanding of the Court as an institution more broadly. Where the Court and the Justices individually claim to be objective in the way that its decisions are made, this has demonstrated that the reality is not to the extent that the Justices would contend. The Justices pick their approach based on the desired outcome and work backwards from there, fitting and interpreting any data and reasoning to go along with this in order to create the appearance of a legitimate institution handing down legitimate decisions. Yet, decade's worth of jurisprudence can be, and has been, easily dismissed if it does not comport with the desired outcome. This is not to say that the Court is completely rogue, it is limited by its need to image craft, the need to *appear* objective and constrained, but the Justices on the Court have tried to work around this and keep up appearances of objectivity, if only superficially. The Court's emphasis on precedent was influenced primarily with the aim to produce decisions in methods cases which cast the Court in a favourable light. A closer investigation of the Court's decisions demonstrates that the Justices and their decisions are not as objective as the Court's image crafting would have us believe.

Conclusion

The Justices on the United States Supreme Court have long been adamant that the Court's opinions and decisions are separate from their personal views. When questioned on this in confirmation hearings, in the media, and among legal and academic circles, a consistent line is taken by the Justices that Court opinions are not subjective personal judgments.[1] Using the death penalty as a case study to more closely examine this, it is possible to gain a better insight into the extent to which this is the truth, and to better understand the Court's actions and decision-making.

In its death penalty eligibility and methods decision-making, the Court has gone to great lengths to craft an image of legitimacy to the public. Legitimacy here meaning adherence to the law and the US Constitution above all else, and not simply deciding cases based on personal policy preferences. Through focusing on evolving standards of decency and later on precedent, the Court attempted to distance the personal views of the Justices from their decisions. However, as this thesis has demonstrated, closer examination of these decisions will quickly dispel this image that the Court has attempted to craft.

The image that the Court presented to the public was important to the Justices. Initially, it is curious that the unelected branch of the US government should care so much about their public image. Yet this lack of electoral accountability is precisely why this is of concern to those who sit on the Court – as the unelected branch the Court cannot be seen to be

[1] See, for example: "Reading the Constitution: A Book Talk with Justice Stephen Breyer," *National Constitution Center*, https://constitutioncenter.org/news-debate/americas-town-hall-programs/reading-the-constitution-a-book-talk-with-justice-stephen-breyer. "Bell Ringer: The Role of the Supreme Court," *C-SPAN Classrooms*, https://www.c-span.org/classroom/document/?6733. "Justice Breyer: are Supreme Court appointments political?" *The Nexus Institute*, https://www.youtube.com/watch?v=DwmGonca23Q.

overstepping its role, to be legislating, or to be completely out of touch with the American people.[2] Image crafting is a way of protecting the institution from attacks which could undermine its work and integrity. As well as crafting its own image, the Court also needs to protect it.

The Court's decision-making in methods and eligibility cases are not as straightforward as the institution or the Justices would have us believe. Closer examination of these types of death penalty case individually reveals that there is a lot more behind the Court's decisions on these issues and one such predominant feature is image crafting. Image crafting has been an important and consistent feature in the Court's eligibility and methods cases in a period spanning some fifty years. The Justices on the Court are American citizens and are influenced by the same factors that influence the average American citizen. In a death penalty context this means the same legal, moral, and political conundrums, and external factors such as the media, also feature in the Justices' assessment of this issue. They are not oblivious or immune to the context in which they operate.[3] Yet, somehow the Justices are expected to remove this from their work or else risk the legitimacy of their decisions and of the Court as an institution. Image crafting in a death penalty context is therefore clearly important to the Court and the Justices. They went to great lengths to present an

[2] See for examples: "Reading the Constitution: A Book Talk with Justice Stephen Breyer," *National Constitution Center*, https://constitutioncenter.org/news-debate/americas-town-hall-programs/reading-the-constitution-a-book-talk-with-justice-stephen-breyer. The Federalist Papers No. 78 states that: "The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments," Alexander, Hamilton et al., editors. *The Federalist Papers*, No. 78, October 1787-May 1788, https://avalon.law.yale.edu/18th_century/fed78.asp.

[3] In her book *'The Majesty of the Law*, Justice O'Connor stated that "courts, in particular, are mainly reactive institutions…change comes principally from attitudinal shifts in the population at large… rare indeed is the legal victory -- in court or legislature that is not a careful byproduct of an emerging social consensus," Sandra Day O'Connor, *The Majesty of the Law: Reflections of a Supreme Court Justice*, (Random House USA Inc, 2003), p. 166.

image of legitimacy, particularly in the way they looked to (seemingly) legitimate sources to inform their decisions.

The Court and the various Justices approached opinions in death penalty cases with a view to settle the issue at hand as these were contentious issues which, as the Court had learned in *Furman*, needed clear resolutions in order to reflect a better image of the institution and for the Court to fulfil its function of providing guidance to the lower courts. More than this, the Justices tried to settle these issues in a way which aligned with their views. However, the Court sought to achieve their desired outcomes in a way which masked this, and so relied on evolving standards and later switched to precedent as a legitimate basis to achieve their own preferred outcomes. The Court steered its decisions and its jurisprudence on this issue in line with the predilections of the Justices. Using the death penalty as a lens to closer examine the workings of the Court casts light on the Court's image crafting tactics. It demonstrates where the Justices operate under the guise of legitimacy but seek to reach their preferred result.

The Court placed high standards on what was to inform its assessments of societal standards. The Justices deemed state legislation to be legitimate and thus prioritised it above other factors on the basis that it could be measured empirically. It was deemed by the Justices to be objective and appeared to remove the views of the Justices from decision-making. This would then help to present the image that the public expected of the Court, one of a neutral and apolitical judiciary. However, underneath this, the lack of standard for how to assess state legislation left the Justices free to interpret this however they wanted. The result was that the Court was outwardly appearing legitimate, but underneath this was

deciding decisions in line with the predilections of the Justices. This impression of legitimacy was image crafting in action.

As a result, several swing Justices became highly influential in death penalty eligibility decision-making. White and O'Connor as influencer Justices brought other Justices on side to their interpretation of evolving standards to achieve their desired outcome for the issue at hand. Justice Kennedy, as an influenced Justice, aligned with other Justices whose interpretation of evolving standards persuaded him or comported with his own views as a means to reaching his desired outcome. These Justices were able to steer the Court's decisions in the direction of their choosing, but cover this through image crafting.

Image crafting was further evidenced in methods cases when the Court altogether abandoned its approach of looking to evolving standards and state legislation, as this would not allow the conservatives on the Court to reach a conclusion that upheld the death penalty. Instead, they switched focus to another outwardly legitimate basis for decision-making and premised their decisions in method cases on the Court's long line of precedent that upheld any and all methods of execution. This change in approach allowed the conservatives to bolster the death penalty against back door attempts at abolition, but once again to do so under the guise of legitimacy.

The application of theories of judicial decision making in a death penalty context has highlighted their strengths and weaknesses. The strengths of these theories lie in the fact that they provide a helpful framework to think about the actions of the Justices. They help us to identify and label behaviours and to think about how the Court operates in broader terms. However, as this thesis has demonstrated, broader pictures are not always useful. These theories are of limited value more often than not as the generalisations which they

make are simply too broad. One model cannot possibly explain the decision-making process for every Justice on every Court and in every case. Furthermore, in some circumstances models of decision-making can actually be misleading and can cause us to think about the Court and its decisions in a way that is in fact incorrect.

This is seen across eligibility cases where in some instances closer examination suggests both the Strategic and the Attitudinal model are apparent or have relevance. Generally speaking – as generalities are the only useful way to assess these models - in eligibility cases the Strategic Model appears to be most at play, as we saw discussed in Chapter 3 with Justice Stevens shifting tactics in *Atkins*. This is because of the constraints that the Court imposes on itself in needing to present a legitimate public image. This constraint of image crafting is one which the Justices place on themselves, so differs slightly from the constraints outlined in the Strategic Model, nevertheless this still impacts on the Court's decision-making. Swing voters are also constrained in another way as influencer swing voters have their decision-making constrained by the need to bring other Justices on side, and so their approach or view can be inhibited by needing to gain support from other Justices on their position.

The Attitudinal Model has some relevance in this context, as indeed the Justices do pursue their own preferences in their decision-making in eligibility cases. This is best demonstrated by Justices Marshall and Brennan who had a clear stance against the death penalty and this drove how they rationalised their decision-making. However, this model overlooks the Court's image crafting, the need for this, and how this acts as a constraint (albeit often a small one, but a constraint nevertheless) on their actions as their freedom to act as they choose is limited by how they can mask this as legitimate impartial decision-making.

Methods cases also demonstrate where one model might initially appear to be applicable, but closer examination reveals this is not in fact the case. The Court's reliance on precedent here suggests the Legal Model is at play, however when this is examined more closely it is clear that this is only a mask for the Justices ruling in line with their own views, and thus the Strategic Model is more applicable. Whilst the Court's use of precedent initially appears to be demonstrative of the Legal Model, Justice Roberts's departure in *Baze* from the Court's established approach of looking at evolving standards demonstrates that strategic considerations were in fact at play. The fact that, superficially, the Legal Model appears very prominent due to the Court's focus on precedent, suggests that these models can be used to quickly label behaviours and decisions, but not always correctly.

Closer analysis of individual decisions is needed in order to ascertain whether they fit with a model as clearly as an initial assessment might suggest. As was the case on the issue of methods, closer examination reveals that the Legal Model was not the most fitting model in this context, despite initial appearances. These theories can provide a convenient label and summary for the Court's actions, and can help us to think about how and why Justices act in the ways that they do. However, they can often be wrong. They are broad labels, but when considering actions and decisions with more nuance this can highlight how it is difficult to define decision-making so clearly and simply.

Despite some lawyers seeing *Furman* and *Gregg* as "historical artefacts," both have some use to legal scholars and historians.[4] These cases may no longer be relevant in the practical application of the law or in bringing forward contemporary death penalty litigation, but both are essential for developing an understanding of how the Court has got to where it is

[4] 'Ezra' Interview. Conducted by Catriona Bide, 9th September 2020.

today on the issue of the death penalty. The *Furman* ruling was fractious and the nine separate opinions highly individualised. The varying topics touched upon by the Justices were to reappear throughout the decades that followed, the most significant of which were evolving standards. *Gregg* on the other hand was more focused and it was here where evolving standards, informed by state legislation, became formally adopted as the Court's approach in death penalty cases and in image crafting. When looking to understand the Court's relationship with the death penalty and the debates and opinions that followed, *Furman* and *Gregg* mark the starting point for the modern debate. The *Furman* decision demonstrated that the Court needed to offer clearer rationales for their decisions which led to attempts to find grounds on which Justices could agree, no matter how superficially. *Furman* and *Gregg* saw the introduction of themes which still resonate today, and the Court's image crafting in a death penalty context.

This thesis has dispelled the notion of a single category of 'death penalty case' and demonstrated that such broad terms can be reductive for our understanding of the Court, how it operates, and of issues such as the death penalty. Looking at these cases through two of the three categories (eligibility and methods) allows for comparisons between the two and it is here where the Court's change in approach, and therefore its image crafting tactics, are most apparent. Despite these different approaches, across both of these types of case the Justices are image crafting. Furthermore, it has dispelled the notion of a single category of 'swing Justice,' instead demonstrating the role of the influencer and the influenced in this context. Both types of swing Justice engage in image crafting, but do so in slightly different ways through the way they build majorities or pluralities.

The differences between eligibility and methods cases, however, are what is of most interest. Whilst both demonstrate that the Court is image crafting, it is when one considers the different approaches applied that this is truly apparent. The differing rationales for the Court's decisions in these cases – evolving standards and then precedent – make these cases even more distinct from each other. Not only do they address fundamentally different facets of the broader death penalty debate, but the two are decided and handled completely differently, and so the Court's approach to crafting an image of legitimacy is different in each. In eligibility cases the Court crafted an image of legitimacy by looking to American society's views on each issue to decide these cases. In methods cases the Court did this by following precedent and building a strong line of jurisprudence. These differences in approach are completely of the Justices' making and are the result of them following their own views and having to change tack to cover this up. This further demonstrates where one singular category of 'death penalty case' is reductive. As a result of these different approaches, different groups on the Court are influential. In eligibility cases where the focus is on evolving standards, the swing vote was most influential as from the middle ground they could either influence others or be influenced to take a certain stand on an issue. Whereas in methods cases the power has been with the conservative majority who have dictated the direction of the Court. Indeed, there are more differences between these two types of cases than there are similarities.

The Court's superficial impression of impartiality has been somewhat successful. The Justices are not plagued by accusations of personal bias in a death penalty context any more so than they are on any other issue. With deciding an issue of such high stakes and controversy the Court had a fine line to tread, and whilst the Court's holdings might be subject to controversy, the Justices' ability and integrity in deciding them has not come

under fire. In terms of middle ground swing voters, Justice Kennedy was generally viewed favourably by Democrats and came out well from his opinions eligibility certainly in the eyes of liberals and death penalty abolitionists, but this was more because of his stance on the issue as he was a strong proponent for narrowing the application of the death penalty.[5]

The fact that the predilections of the Justices are framed and masked by legitimate factors such as precedent and societal standards has meant that much of the work that has gone on underneath this has gone by unnoticed: certainly, in the American media the focus has been more on the ruling rather than on how the Justices got there. The highly emotive and philosophical elements inherent in the death penalty debate, the often shocking and brutal details of the crime committed, or the details of the individual on death row have overshadowed the intricacies of the Court's rulings, and they are certainly of more interest to the American people. In cases of life and death this preoccupation with the outcome rather than with the process is understandable, but it has meant that the Court's image crafting has largely gone at best unchallenged or at worst unnoticed. Popular media and discussion usually focus the attention of the American people on different facets of the death penalty debate such as the outcome of the case, the perpetrator, the crime committed, rather than *how* the Court decides these cases.[6] On an issue as contentious as life and death critical as this, it is the outcome rather than the process that makes headlines and fuels debates. Scholars on the other hand who have a particular interest in how the Court works and why it acts the way it does are more likely to delve into this.[7] It is simply a

[5] Jeffrey M. Jones, "Democrats View U.S. Justices Kennedy, Roberts Favorably," *Gallup* (17th July 2015), https://news.gallup.com/poll/184190/democrats-view-justices-kennedy-roberts-favorably.aspx.
[6] See sites such as CNN Death Row Stories https://edition.cnn.com/shows/death-row-stories, or AP: Capital Punishment: https://apnews.com/hub/capital-punishment.
[7] For example, Corinna Barrett Lain, Edward Lazarus, B. Woodward and S. Armstrong are just some of the scholars cited in this thesis whose work has examined how the Court operates and why.

matter of different focuses and interests. That the Court persists with this approach despite this suggests that their focus is on convincing the broader public of their legitimacy, rather than those whose job is to critique and analyse their work, and likely a level of assumption that the average American will not read nor care about this scholarship. Furthermore, there is perhaps an element of the Justices trying to convince themselves of the institutional legitimacy which they profess so much in public, so as to protect the standing of the Court. If the Court were to widely be viewed as nine individuals pursuing their own subjective views, rather than as a legitimate and impartial judiciary, then this would undermine this branch of government entirely.

On closer inspection, however, the Court's image crafting in these cases has not proved wholly successful. Scholars have examined the Court's decision-making with many concluding that there is more at play than the Justices would admit, as argued by those who are proponents of the Strategic or Attitudinal Models.[8] This lack of success in image crafting is because the Court has not been entirely subtle about it, and when considering the cases in more detail – as this thesis does and as lawyers or historians might be particularly interested in doing - it is clear that this insistent rhetoric from the Justices about impartiality does not stand up to closer scrutiny. The Justices clearly expressed that they did not want their opinions in these cases to appear to be premised on their individual views, and thus they have demonstrated that they are concerned with how their opinions are received. Indeed, if you take the opinions at face value, look at them in a vacuum and

[8] See Segal and Spaeth, *The Supreme Court and the Attitudinal Model,* (Cambridge: Cambridge University Press, 1993), as the most prominent piece of work on this.

not in relation to other eligibility or methods opinions, or even compare them to concurrences or dissents in the same case, then the image crafting works.

The Court's agreement in the relevance of evolving standards superficially suggests that the Court's decisions were based on the same, legitimate, factor. However, closer inspection undermines this image and reveals that Justices took advantage of the lack of standards for this approach and interpreted state legislation in whichever way was needed to reach the outcome they desired. Swing Justices did this particularly well, influencing or aligning themselves with others on the Court and steering decisions in the direction of their choosing. What is most revealing of the Court's image crafting is the change in approach from eligibility to methods cases. Whilst the Court sought to protect its image through this change of approach, in fact it exposed its image-crafting tactics even more clearly. Were there not something more at play (i.e. a desire to steer the case in a particular direction) then, fitting with its long-established jurisprudence, the Court should have applied the same tried, tested, seemingly effective, and deemed legitimate method of looking to evolving standards to decide methods cases too. Instead, the conservatives on the Court changed their focus to precedent in order to uphold the death penalty. Again, this demonstrates where breaking down the broader category of death penalty cases provides a better picture of what the Court is actually doing. Closer inspection of these decisions reveals the disparity in the actions of the Justices versus what they pertain. This is made most clear in the Court's decision to so brazenly abandon a long established and practiced approach of looking to evolving standards in favour of focusing on precedent. The Court's image crafting and its success is superficial.

Considering image crafting and how the Court uses it in this context helps us understand and think about the Court more broadly. Assessing image crafting as an approach used by the Court in its decision-making has broader applicability. This thesis raises questions and presents a theory that can be applied in relation to other issues (for example voting rights or abortion rights) and so could be used to assess just how widespread image crafting is in the Court's jurisprudence.

When considering what this all tells us about the Court institutionally and the Justices individually, this demonstrates that the Court does not simply decide cases. Rather, the Justices utilise cases as an opportunity to craft a favourable public image. This thesis helps us to think about how we see the Court and Justices: as active crafters of their own public image and legitimacy. Moreover, the Court and the Justices are something very different from what the Justices claim (and perhaps believe). As much as the Justices argue otherwise, they are not immune to the forces that influence the American people, and the Court does not operate in a vacuum away from this. As a result, the Court's decisions are steeped in the personal views of the Justices - something which the Justices claim is not the case.

What is perhaps most notable when thinking about image crafting and the Court is that although there is often great disagreement on the issue at hand, the Court has been largely unanimous in working as a collective to image craft. Evolving standards is perhaps the best example of this as it was applied across different issues, by various Justices and liberals and conservatives alike, and at different times: its use was accepted by all on the Court.

Throughout the last five decades of death penalty decision-making, the Court has gone to great lengths to tackle the issues before it and to do so in a way that crafts the image of a

legitimate Court. However, a closer examination of the Court's decisions in eligibility and methods cases shows that, despite the efforts of the Justices in image crafting, the Court cannot fully mask the inherent personal predilections which come through in its decision-making.

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