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The Long Wait for an Improbable Death: A Look at Delays in Executions in Kansas and Possible Reforms to Capital Punishment

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Abstract

This article uses Kansas as a case study to show how in Kansas, as in many other states in the United States, the execution of a death sentence is so improbable, and the delays that precede it so extraordinary, that any arguable deterrent or retributive effect capital punishment might once have had has been severely diminished. This article considers possible reforms to the capital punishment system aimed at reducing the delay between sentencing and execution, and the risks that would accompany those reforms. This article also considers whether capital punishment should still be considered a viable option for states in this position.

Keywords: capital punishment, death penalty, Eighth Amendment, deterrence, retribution, delay

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In the United States, the average length of time a convicted individual can expect to spend awaiting execution is between 15 to 16 years.[1] In Kansas, only 15 executions have been carried out since 1930,[2] and the last execution carried out in Kansas was in 1965.[3] Currently, ten inmates are sitting on Kansas' death row awaiting their appeals, and in four out of those ten cases, the Kansas Supreme Court has remanded the case back for either a new trial or a new sentencing phase hearing.[4] The oldest capital case pending with the Kansas appellate courts resulted from a crime that was committed in 1996, and it would seem that the State is far from an execution date in any of the ten cases.[5]

As the State of Kansas struggles to make its budget each year and seems to always fall short, the possibility of abolishing capital punishment has often been proposed and debated by state legislators. However, the state continues to spend millions of dollars to ensure that its citizens have the option of handing out a death sentence to individuals convicted of capital murder.[6] The millions of dollars are spent even though, if recent history is any indication, it is unlikely the State of Kansas will actually carry out an execution. Rather, an inmate convicted of capital murder and sentenced to death will likely spend the next 10 to 20 years sitting on death

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[1] U.S. Dep't of Justice, Bureau of Justice Statistics, Capital Punishment, 2012-Statistical Tables, Table 10 (2014), available at https://deathpenaltyinfo.org/documents/cp12st.pdf.
[2] U.S. Dep't of Justice, supra note 1, at Table 14.
[3] Death Penalty Information Center (DPIC), History of the Death Penalty in Kansas (2018), https://deathpenaltyinfo.org/kansas-1#history.
[4] NAACP Legal Defense and Educational Fund, Inc., Death Row U.S.A. – Fall 2014, p. 49 (2014), http://www.deathpenaltyinfo.org/documents/DRUSAFall2014.pdf.
[5] *See State v. Kleypas*, 305 Kan. 224, 233, 382 P.3d 373, 389 (2016).
[6] Kansas Judicial Council, Report of the Judicial Council Death Penalty Advisory Committee (2014), http://www.deathpenaltyinfo.org/documents/KSCost2014.pdf.

row while the inmate's case circles through the appellate courts, perhaps is given a new trial or a new sentencing phase hearing, and might even eventually be pled down to a lesser charge.

Both proponents and opponents of capital punishment agree that this delay is excessive. However, those on each respective side of the issue have strongly differing opinions on what reform, if any, is necessary. This article uses Kansas as a case study to examine the delay caused by attempts to comply with the additional procedural safeguards required after *Furman v. Georgia*.[7] This article, then uses that case study as a lens from which to view the discussions of proposed reform on a national level, potential side effects of each option, and whether the death penalty remains a viable option for the punishment of those individuals accused of capital murder under the current circumstances.

I. Brief Review of the History of Capital Punishment

The United States Supreme Court created a moratorium on capital punishment in 1972, in the case of *Furman v. Georgia*,[8] in which it held that the state's capital punishment statute was unconstitutional, as it was written, because it gave the jury complete discretion to decide whether to impose the death penalty or a lesser punishment in capital cases. The majority opinion concluded that Georgia's capital punishment statute provided for a cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments because the death penalty had been imposed so arbitrarily, infrequently, and often selectively against minorities.[9] In fact, Justice Stewart, in his concurring opinion, actually compared the randomness of the possibility of being given a death sentence to being struck by lightning.[10] As a result of the *Furman* decision, capital

[7] *Furman v. Georgia*, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972).
[8] *Furman*, 408 U.S. 238.
[9] *Furman*, 408 U.S. at 257.
[10] *Furman*, 408 U.S. at 309-10.

punishment statutes in 40 states were voided, as were the sentences of more than 600 death row inmates in 32 different states.[11]

In the following four years, states began drafting and enacting new capital punishment statutes aimed at overcoming the Court's objections in *Furman*. Many states did so by mandating bifurcated trials, where the defendant would have separate guilt and sentencing phases, and imposing standards to guide the discretion of juries and judges in imposing capital sentences, often considering mitigating and aggravating circumstances.[12] Many of these revised statutes also provided that on a capital defendant's automatic appeal to the state supreme court, the court would conduct a proportionality review to determine whether the sentence was consistent with those handed down in other comparable cases.[13] By 1976, thirty-five states had adopted revised capital punishment statutes intended to provide guided discretion and eliminate the arbitrariness of the death sentence.[14] The United States Supreme Court upheld these new capital procedures in Georgia, in 1976, in the case of *Gregg v. Georgia.*[15]

After the *Gregg* decision, states were again able to move forward with capital cases. But while these attempts to "fix" a broken system were intended to reduce the arbitrary nature of a death sentence, they may have had an unintended consequence, as well: delay in the judicial process. Prior to the *Furman* decision, an individual convicted of capital murder would not have expected to spend more than a few months on death row before his or her sentence was carried

[11] Robert M. Bohm, DeathQuest: An Introduction to the Theory and Practice of Capital Punishment in the United States 52 (4th ed. 2012).
[12] Bohm, supra note 11, at 52-58.
[13] Bohm, supra note 11, at 57.
[14] Virginia L. Hatch & Anthony Walsh, Capital Punishment: Theory and Practice of the Ultimate Penalty 47 (2016).
[15] *Gregg v. Georgia*, 428 U.S. 153, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976).

out.[16] Even in the most complicated cases, the convicted individual might only experience up to a two-year delay.[17] However, after capital punishment was reintroduced in 1976, the revisions adding procedural safeguards, such as automatic appeals to the state Supreme Court, brought inherent and extensive delays to the process.[18]

A. Delay in Kansas

By looking at the examples of how capital cases in Kansas made it through this revised judicial process, we can better understand the nature of this problem. Following the *Furman* decision, Kansas did not reinstate capital punishment until 1994. Since then, 12 defendants have been convicted of capital murder and sentenced to death.[19] Yet, in the more than 20 years since reinstatement of capital punishment in Kansas, not one individual has been executed.[20]

B. The *Marsh* and *Kleypas* Cases

In order to see how capital cases are progressing through the judicial system in Kansas, one must consider the effect of the Court's decision in *State v. Marsh.*[21] Michael Marsh was convicted of shooting and killing Marry Ane Pusch in her Wichita home on June 17, 1997, and setting a fire in that home that killed Marry's 19-month-old daughter. On appeal, the Kansas Supreme Court overturned Marsh's conviction and death sentence, finding the weighing equation in the Kansas death penalty statute, K.S.A. 21-4624(e), was unconstitutional as written because it

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[16] Diana Peel, Clutching at Life, Waiting to Die: the Experience of Death Row Incarceration, 14(3) Western Criminology Rev. 61, 63 (2013), available at http://www.westerncriminology.org/documents/WCR/v14n3/Peel.pdf.
[17] Peel, supra note 16, at 63.
[18] See Bohm, supra note 11, at 62.
[19] DPIC, available at https://deathpenaltyinfo.org/kansas-1#sent.
[20] DPIC, available at https://deathpenaltyinfo.org/kansas-1#sent.
[21] 278 Kan. 520, 102 P.3d 445 (2004), *rev'd and remanded* 548 U.S. 163, 126 S. Ct. 2516, 165 L. Ed. 2d 429 (2006), and *vacated in part by State v. Marsh,* 282 Kan. 38, 144 P.3d 48 (2006) ("Marsh II").

demanded death if the aggravating and mitigating circumstances were found by the jury to be in equipoise.[22] Specifically, K.S.A. 21-4624(e) stated:

> "If, by unanimous vote, the jury finds beyond a reasonable doubt that one or more of the aggravating circumstances enumerated in K.S.A. 21–4625 and amendments thereto exist and, further, that the existence of such aggravating circumstances is not outweighed by any mitigating circumstances which are found to exist, the defendant shall be sentenced to death; otherwise, the defendant shall be sentenced as provided by law."[23]

The State petitioned for writ of certiorari and the United States Supreme Court granted certiorari and decided to review the case.[24]

While the *Marsh* case was pending with the U.S. Supreme Court, the practical effect was as if someone pressed the pause button on the capital appeals in the state of Kansas. Most likely, and perhaps understandably so, the state supreme court did not want to consider capital appeals until it knew how the U.S. Supreme Court was going to rule in the *Marsh* case. If the U.S. Supreme Court determined, in *Marsh*, that the Kansas capital punishment statute was unconstitutional, as written, all of those capital convictions pending on appeal would be reversed. Consequently, the delay continued to build in Kansas.

The U.S. Supreme Court issued an opinion in *Kansas v. Marsh* on June 26, 2006.[25] However, the U.S. Supreme Court, in *Kansas v. Marsh*, said that the Kansas capital punishment statute was not unconstitutional. The Court found that the statute complied with the requirements set out in *Furman* and the U.S. Constitution.[26] Essentially, the U.S. Supreme Court said that if

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[22] *Marsh*, 278 Kan. at 534.
[23] K.S.A. 21-4624(e) (2003).
[24] *Marsh*, 544 U.S. 1060, 125 S. Ct. 2517, 161 L. Ed. 2d 1109 (2005).
[25] *Marsh*, 548 U.S. 163.
[26] *Marsh*, 548 U.S. at 173.

the State of Kansas did not like the effect of the precise language in its statute with respect to the weighing equation, it could amend it; but it was not unconstitutional as written.

To this date, however, the Kansas death penalty statute has not been amended to appease the Kansas Supreme Court's concerns about the weighing equation. Instead, the *Marsh* case was remanded to the Kansas Supreme Court, which issued a supplemental opinion in the case recognizing the U.S. Supreme Court's decision and vacating the portion of its earlier opinion that found the statute unconstitutional on its face.[27] However, in that supplemental opinion, the Kansas Supreme Court still reversed Marsh's conviction and death sentence and remanded the case back to the district court for a new trial for different reasons. Specifically, in the original appeal in *Marsh*, the Kansas Supreme Court had also reversed Marsh's convictions for capital murder and aggravated arson, holding the trial court committed reversible error by excluding circumstantial evidence connecting a third party, the victim's husband, to the crimes.[28] Once this decision was final, the wheels of justice in Kansas' death cases began to slowly trudge forward again. However, the effects of the delay in the *Marsh* case were apparent.

Finally, in 2009, before moving forward with a whole new capital trial for Marsh, the State offered a plea agreement that allowed Marsh to enter a plea of guilty to reduced charges of felony murder and aggravated arson, rather than capital punishment and arson. Marsh received two life sentences for the crimes he committed in 1997.[29]

Another stark example of the current delays in the process can be evidenced by examining the case of Gary Kleypas. Kleypas was convicted in 1997 of stalking and killing a

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[27] *Marsh II*, 282 Kan. at 38.
[28] *Marsh*, 278 Kan. at 529-533.
[29] Amy R. Leiker, *Who's on Death Row in Kansas*, The Wichita Eagle, October 29, 2016, available at http://www.kansas.com/news/local/crime/article111384532.html (last visited June 2, 2018).

20-year-old Pittsburg State University student on March 30, 1996.[30] He stabbed her to death in her apartment two houses from where he lived. The evidence against him was considerable.[31] Yet, almost 20 years after the commission of the crime, Kleypas' execution date has not been set.

Kleypas was the first person in Kansas to receive the death penalty and to challenge the death sentence after the Kansas Legislature reinstated capital punishment in 1994. His death sentence was first overturned in 2001 because of a jury instruction that the Kansas Supreme Court found to be clearly erroneous.[32] On remand, the State filed an interlocutory appeal challenging the district court's ruling on a motion *in limine* that evidence that Kleypas had been stalking the victim was not admissible in the new penalty phase trial. The district court had held that stalking was not relevant as a matter of law and, thus, did not determine whether the testimony proffered by each specific witness was otherwise relevant and admissible.[33]

On appeal, the Kansas Supreme Court disagreed and remanded the case to the district court with directions to consider whether the particular stalking evidence which is sought to be admitted by the State is in fact relevant to the question of whether the victim suffered "serious physical abuse or mental anguish" prior to death.[34] The district court made such specific findings and Kleypas' second penalty phase hearing went forward. At the conclusion of this hearing, in September of 2008, a death sentence was again handed out. Finally, in 2016, the Kansas Supreme Court affirmed Kleypas' capital murder conviction and the death sentence.[35] However,

[30] *State v. Kleypas*, 272 Kan. 894, 915, 40 P.3d 139, 174 (2001).
[31] *Kleypas*, 272 Kan. at 909-15.
[32] *Kleypas*, 272 Kan. at 908.
[33] *State v. Kleypas*, 282 Kan. 560, 562, 147 P.3d 1058, 1061 (2006).
[34] *Kleypas*, 282 Kan. at 571.
[35] *State v. Kleypas*, 305 Kan. 224, 348, 382 P.3d 373, 454 (2016).

to date, no execution date has been set for Kleypas, as his case will still undergo years of post-conviction motions at both the state and federal level.

While there are similar examples of delay in almost every current capital case in Kansas, these two cases provide a glimpse at the type of delay caused by a defendant asserting his right to take advantage of the procedural safeguards afforded to him before accepting his death sentence as final. However, these two cases also present perfect examples of the types of cases causing frustration and public outcry over what may seem like excessive delay.

II. The Questions Resulting from Delay

Even if we assume the delays for all of these appellate issues to be sorted out were necessary, and there is a strong argument that they were, the questions began to surface: at what point is enough enough? Should there be a limit to these kinds of delay? What is the point of spending all this time and money on capital cases if we can't seem to ever get one of these cases through the appellate process? Are we accomplishing the goals we set out to accomplish by having capital punishment in the face of this kind of delay? Is it cruel and unusual punishment to hold death over someone's head for this many years while we assure that they were given a fair trial? The state of Kansas was not alone in raising these questions. Rather, similar procedural histories of capital punishment in states across the nation were causing these questions to surface. As such, Part II of this article will discuss some of the challenges not only Kansas, but other similar states with capital punishment are facing on a national level.

A. Cruel and Unusual

While the United States Supreme Court has not yet accepted a case challenging the constitutionality of executing inmates after prolonged periods of time spent on death row, they

have at least discussed this question, so we will begin our analysis there. The strong commentary of three justices in the Court's decision to decline review in *Thompson v. McNeil*,[36] seems to indicate that at least two members of the Court then believed the issue of delay in capital cases was an important issue and may present a valid constitutional challenge. However, two votes is a far cry from a majority of the Court.

At the time the Court denied review in *Thompson*, 32 years had passed since he was first sentenced to death in Florida. For 32 years, while waiting for countless appeals and post-conviction proceedings, Thompson spent 23 hours a day in isolation in a 6 x 9 foot cell. During that time, two death warrants have been signed against him and stayed only shortly before he was scheduled to be put to death.[37] Currently, Thompson is still spending his time waiting in isolation for his execution to be carried out after more than 40 years on death row.[38]

The argument being made by the defense and Justices Stevens and Breyer is that the decades these individuals spend in solitary confinement, awaiting an uncertain death, inflicts another layer of cruelty to their punishment that rises to the level of cruel and unusual punishment. Justice Stevens noted that the conditions of confinement Thompson had endured over 32 years in solitary confinement, facing multiple execution dates, and at least two near executions, was "dehumanizing" and that neither retribution nor deterrence would be served by carrying out an execution after such a significant delay. In fact, he stated that carrying out an

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[36] *Thompson v. McNeil*, 556 U.S. 1114, 129 S. Ct. 1299, 173 L. Ed. 2d 693 (2009).
[37] Human Rights Watch, 32 Years on Death Row (2009), available at http://www.hrw.org/news/2009/03/16/32-years-death-row.
[38] Florida Department of Corrections, Corrections Offender Network: Inmate Population Information Detail (2018), available at http://www.dc.state.fl.us/offenderSearch/detail.aspx?Page=Detail&DCNumber=053779&TypeSearch=AI (last visited June 2, 2018).

execution after such a delay is "so totally without penological justification that it results in the gratuitous infliction of suffering."[39]

Indeed, numerous empirical studies have found that long-term solitary confinement has negative impacts on mental health and the range of deleterious resulting symptoms include, at the more serious end, conditions similar to those experienced by victims of torture or trauma.[40] Furthermore, the practice of long-term solitary confinement on death row is out of step with international human rights norms, as reflected in the United Nations Standard Minimum Rules for the Treatment of Prisoners which prohibit prolonged solitary confinement.[41] Recently, another justice weighed in on the ills of solitary confinement. In his concurring opinion in *Davis v. Ayala*,[42] Justice Kennedy raised grave concerns about the lack of public and court attention to the impact of long-term solitary confinement on prisoners' mental health.[43]

The issue of whether excessive delays render the death penalty a cruel and unusual punishment continues to be raised by a vocal minority of justices serving on the Court. In *Glossip v. Gross*,[44] Justice Breyer's dissent, which was joined by Justice Ginsburg, asserted that it is time for the Court to reconsider whether capital punishment is unconstitutional per se since it is likely the death penalty constitutes cruel and unusual punishment due to, among other troubling aspects of capital punishment: (1) excessive delays which undermine its purposes of deterrence and retribution while exacerbating the punishment's cruelty with prolonged solitary

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[39] *Thompson*, 129 S. Ct. at 1300 (quoting *Gregg v. Georgia*, 428 U.S. 153, 183, 96 S. Ct. 2909, 49 L. Ed. 2d 859 [1976]).
[40] Craig Haney, Mental Health Issues in Long-Term Solitary and "Supermax" Confinement, 49 Crime & Delinq. 124, 130-32 (2003).
[41] Aylin Manduric, UN's "Mandela Rules" to Set New International Limits on Solitary Confinement, Solitary Watch, July 17, 2015, available at http://solitarywatch.com/2015/07/17/uns-mandela-rules-to-set-new-international-standards-for-treatment-of-prisoners-including-limits-on-solitary-confinement/ (last visited May 28, 2018).
[42] *Davis v.* Ayala, 135 S. Ct. 2187, 192 L. Ed. 2d 323 (2015).
[43] *Davis*, 135 S. Ct. at 2208-10 (Kennedy, J., concurring).
[44] *Glossip v. Gross*, 135 S. Ct. 2726, 192 L. Ed. 2d 761 (2015).

confinement combined with uncertainty as to when the inmate will be put to death; and (2) the rareness of carrying out executions.[45] Although it remains to be seen whether or when the Court will agree to hear a case challenging the constitutionality of the death penalty based on a claim that execution following excessive delay constitutes cruel and unusual punishment, there appear to be at least two current justices who are skeptical of the constitutionality of putting condemned inmates to death after decades of the uncertainty of awaiting death while in solitary confinement.

On the other hand, proponents of capital punishment, and the majority of the Court, continue to respond to this argument by noting that in many cases the delay is the prisoner's own fault, as he or she is the one filing numerous appeals to prevent the execution from moving forward.[46] This argument has some instant appeal, as it allows the Court to ask how a defendant can file numerous appeals that delay the process and then complain of the very delay he, at least in part, caused.[47] And, while it might be interesting to calculate the specific delay attributable to the state and that attributable to the defendant in such cases, it seems unlikely that such statistics would help us answer the Court's question. Rather, the answer stems from the unique finality of the death sentence.[48] The Court recognized this distinction in *Furman*, where it noted that capital punishment differs "from all other forms of criminal punishment, not in degree but in kind. It is unique in its severity and irrevocability."[49] Therefore, as states began reinstating capital punishment statutes, they were sure to articulate procedural safeguards aimed at increasing

[45] *Glossip*, 135 S. Ct. at 2755-77 (Breyer, J., dissenting).
[46] *Lackey v. Texas*, 514 U.S. 1045, 1047, 115. S.Ct. 1421, 131 L.Ed.2d 304 (1995) (Stevens, J., memorandum respecting the denial of certiorari); Chad Flanders, Time, Death, and Retribution, 19 U. Pa. J. Const. L. 431, 445 (2016).
[47] Peter Baumann, Waiting on Death: Nathan Dunlap and the Cruel Effect of Uncertainty, 106 Geo. L. J. 871, 890 (2018).
[48] Baumann, supra note 47, at 890.
[49] *Furman*, 408 U.S. at 306 (Stewart, J., concurring).

confidence in capital convictions prior to the executions being carried out.[50] Accordingly, the majority's emphasis on the fact that the defendant may have caused the complained of delay through numerous appeals may carry weight if the appeals are entirely frivolous. However, when, as is often the case with a direct appeal, the appeal is mandatory, legitimate, or the delay is caused by the appellant's success on appeal with a lower court, as was the case for Michael Marsh[51] and Gary Kleypas,[52] in Kansas, this argument tends to lose some of its initial appeal.[53]

Essentially, numerous levels of review were put in place as procedural necessities to ensure certainty in the sentence. However, the lengthy delay those procedural protections have caused seems to have now increased the uncertainty as to whether the delay itself can make a sentence unconstitutional and, even, whether the sentence will ever be carried out. In light of this looming uncertainty, we must examine whether capital punishment, as it now exists, is actually accomplishing the goals set out for it by those in support of the death penalty.

B. Accomplishing our Goals?

Consistently, when state legislatures consider whether or not to abolish capital punishment, the debate turns to the goals of capital punishment, whether they are being accomplished, and at what cost. The most common reason stated by those in support of capital punishment tends to be some form of retribution.[54] Sometimes this rationale is described as a sense of justice – that these individuals deserve this punishment or that the punishment fits the crime. Other times, it is described as a desire to see closure for the victim's family members, and

[50] See Baumann, supra note 47, at 890.
[51] *Marsh*, 278 Kan. 520.
[52] *Kleypas*, 272 Kan. 894..
[53] See Flanders, supra note 46, at 446.
[54] Bohm, supra note 11, at 303.

to ensure that the offender is incapacitated and not able to commit similar crimes in the future.[55] Occasionally, we still see an argument being made for deterrence. However, in recent years the deterrent theory has been largely disregarded as a strong argument for capital punishment, as results from studies have consistently found no real deterrent effect for states and nations that have capital punishment.[56] In fact, current research indicates that capital punishment does not have an effect on decreasing crime rates, most likely because the death sentences are too infrequent to have a measurable impact on crime rates or to deter potential offenders.[57]

With empirical research showing that capital punishment fails to deter crime[58] and, even in some studies, that it actually increases crime rates through the "brutalization effect,"[59] the U.S. Supreme Court holds retribution out as the primary justification for capital punishment.[60] However, even if we consider both retribution and deterrence, it would still seem that both of these goals depend on the sentence actually being carried out and being carried out quickly.[61] The longer the delay, the more remote the connection between the crime and the punishment. Additionally, the delay makes the punishment uncertain. This is especially true given that a large portion of the delay is the product of numerous appeals by the defendant, which could actually be successful and prevent the sentence from proceeding.[62]

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[55] Bohm, supra note 11, at 303-311.
[56] DPIC, Facts about Deterrence and the Death Penalty, available at https://deathpenaltyinfo.org/facts-about-deterrence-and-death-penalty.
[57] Mark J. MacDougall & Karen D. Williams, The Federal Death Penalty Scheme Is Not a Model for State Reform of Capital Punishment Laws, 67 Am. U. L. Rev. 1647, 1668 (2018).
[58] See, e.g., William C. Bailey & Ruth D. Peterson, *Murder, Capital Punishment, and Deterrence: A Review of the Literature, in* THE DEATH PENALTY IN AMERICA 135, 155 (Hugo Adam Bedau ed., 1997).
[59] See, e.g., Joanna M. Shepherd, Deterrence Versus Brutalization: Capital Punishment's Differing Impacts Among States, 104 Mich. L. Rev. 203, 240 (2005).
[60] See *Baze v. Rees,* 553 U.S. 35, 79-80, 128 S. Ct. 1520, 170 L.Ed.2d 420 (2008)(Stevens, J. concurring); Russell L. Christopher, Death Delayed is Retribution Denied, 99 Minn. L. rev. 421, 427-28 (2014).
[61] Flanders, supra note 46 at 443.
[62] Flanders, supra note 46 at 443.

If the goal is to have the punishment be swift and certain, capital punishment is not currently meeting that goal. In reality, a large number of states are not carrying out many executions at all. And the average time spent on death row prior to the death sentence being carried out is 16 years.[63] Currently, in the United States, 31 states and the federal government and military have capital punishment.[64] However, in looking at the number of executions actually being carried out across each of those states, the improbability of the death sentence being carried out in many of those states becomes apparent. For instance, of the 36 states that have had capital punishment statutes in place since 1976, 17 states have carried out 7 or fewer executions since 1976.[65] In fact, 13 of those 17 states have carried out 3 or fewer executions since 1976.[66] And, even further, 2 of those states – Kansas and New Hampshire – have not carried out a single execution since 1976.[67]

With a large number of states carrying out so few executions, or none at all, it is difficult to see the argument for this punishment effectively serving as a deterrent or as retribution. In the capital punishment arena, retribution has several different meanings; however, most of the theories on retribution seem to be based on the concept that committing an act that has been defined as a capital offense inherently merits the punishment of death.[68] If the goal of retribution necessarily requires a death sentence to be carried out, it is difficult to see how capital

[63] Bureau of Justice Statistics, supra note 1, Table 10.
[64] DPIC, States With and Without the Death Penalty (2016), available at https://deathpenaltyinfo.org/states-and-without-death-penalty (last visited June 2, 2018).
[65] DPIC, Number of Executions by State and Region Since 1976, available at https://deathpenaltyinfo.org/number-executions-state-and-region-1976 (last visited June 2, 2018). It should be noted that this database only shows 34 states, but does not include Kansas and New Hampshire that also have had capital punishment statutes in effect, but have not carried out any executions since 1976. See infra note 67.
[66] DPIC, supra note 65.
[67] DPIC, Executions by State and Year, available at https://deathpenaltyinfo.org/node/5741 (last visited June 2, 2018).
[68] Bohm, supra note 11, at 304-06.

punishment is effectively being used for retributive purposes when a large number of states rarely carry out an execution.

Similar problems can be found with the arguments surrounding the deterrence theory. Deterrence treats the death sentence as a tool of social control and protection, allowing the sentence to serve as a threat to dissuade potential offenders from committing capital offenses (general deterrence), or in preventing a particular offender from reoffending (specific deterrence).[69] General deterrence allows the government to make an example out of an offender to put others on notice and, hopefully, prevent others from committing similar acts. However, if the death sentence is not consistently carried out, the example, or threat, becomes less effective. Likewise, if a death sentence never results in an actual execution, that sentence is no more effective as a specific deterrent than a sentence of life without parole, as with either sentence the inmate is prevented from reoffending outside of prison walls but there remains a possibility of reoffending within the prison.

The amount of delay between the sentence and the execution creates additional challenges to the arguments for retribution and deterrence. The most obvious example of these challenges can be seen with current recommendations for disciplining children. Scholars in child development seem to agree that whatever form of discipline is used by a parent, it needs to be consistent and carried out immediately after the behavior occurs.[70] For example, if one child hits another child, they need to know that a punishment will be handed down and the punishment needs to be carried out immediately. It is not as effective to punish the child hours or days after the incident. And we, certainly, would not come back to that child 20 years after the incident to enforce a

[69] Bohm, supra note 11, at 153.
[70] American Academy of Pediatrics, Guidance for Effective Discipline, 101 Pediatrics 723 (Issue No. 4, April 1998), available at http://pediatrics.aappublications.org/content/101/4/723.

punishment and expect to see the goals of retribution or deterrence accomplished. Yet, that is precisely what ends up happening in capital cases where offenders spend an average of 16 years on death row waiting to see if their punishment will ever be carried out.

These are just a few of the numerous problems with the goals of retribution and/or deterrence under the current state of capital punishment. But, even these noted challenges ought to be enough to make us question whether capital punishment is currently accomplishing the intended goals of each state. Because it seems that the answer is a resounding no, it then becomes necessary to explore possible reform.

III. Possible Reform

Whether individuals are for or against capital punishment, most people agree that the current delay in the process is too long. Unfortunately, that same harmonious agreement does not exist when proposing what, if anything, to do about it. In order to analyze the potential effects of possible reform, it is necessary to consider a variety of proposed solutions, both from within Kansas and from other jurisdictions on a national level.

A. Set an Outside Limit on Delay

One commonly suggested reform is to establish a maximum cap on the delay in capital cases. Under this reform, the law would set an outside limit, such as five years, for the appellate process to be carried out. The thought is that this limitation still allows for the procedural safeguards of the convicted individual to be carried out, but places the responsibility on "the state to ensure that the appeals process is carried out in a reasonable time. If the state fails to do this, then the sentence becomes unlawful."[71]

[71] Peel, supra note 16, at 69.

However, the beauty of the legal system is that it generally allows for the fact and acknowledges that each case is distinguishable from cases that came before it. Thus, based on the complexity of the case, size of the record, unique circumstance of the case, and number of issues raised on appeal, each appeal requires a different amount of time. Therefore, placing an outside time limit on the appellate process, can lead to some unintended and undesirable results.

i. Arbitrary Nature of Such Limitations

In 1995, the average length of time between the imposition of a capital sentence and execution was a little over 11 years (134 months).[72] In an effort to reduce the delay between sentencing and execution, Congress passed the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). The AEDPA contains provisions that streamline the appeals process in an effort to minimize delay. The provisions include creating a one-year statute of limitations for habeas corpus petitions and placing "extremely stringent restrictions" on a petitioner's ability to file more than one habeas corpus petition.[73] The AEDPA also contains an "opt-in option" for states. In order to qualify for the "opt-in option," (1) the Attorney General of the United States must certify that a "State has established a mechanism for providing counsel in postconviction proceedings," (2) this mechanism "must offer counsel to all State prisoners under capital sentence," and (3) "counsel was appointed pursuant to that mechanism, petitioner validly waived counsel, petitioner retained counsel, or petitioner was found not to be indigent."[74]

If a state meets the minimum qualifications for the opt-in option, defendants have only 180 days to file a habeas corpus petition and federal courts are prohibited from reviewing claims

[72] DPIC, Time on Death Row, available at https://deathpenaltyinfo.org/time-death-row.
[73] John H. Blume, AEDPA: The "Hype" and the "Bite", 91 Cornell L. Rev. 259, 272 (2006).
[74] The Anititerrorism and Effective Death Penalty Act of 1996, 28 U.S.C.A. § 2261 (b) (West 2006).

of procedural error occurring in state court. Additionally, under Section 2254 of the AEDPA, federal courts are prohibited from granting a writ of habeas corpus for:

> any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.[75]

The AEDPA provides that once a habeas petition is filed, the federal district court must rule on the petition within 180 days and the circuit court must decide the appeal within 120 days of the briefs being filed.[76]

Although the AEDPA does not set out a specific time limit on appeals in death penalty cases, the AEDPA functionally limits the length of time a defendant has to appeal a capital sentence. Additionally, in an effort to speed up the review process, the AEDPA dispenses with due process protections for defendants in opt-in states. From limiting the length of time to file an appeal to limiting what arguments federal courts can hear, opt-in states would provide defendants in capital cases less federal due process protection than defendants in states that do not opt-in to the AEDPA. And there are concerns that the right to counsel protections provided by the opt-in requirements are not sufficient to justify the loss of due process rights.[77]Although no state has been granted opt-in status since the AEDPA was passed in 1996, interest in gaining opt-in status

[75] The Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C.A. §2254 (West 1996).
[76] Blume, supra note 73, at 272 (quoting 28 U.S.C.A. § 2254[d]).
[77] ACLU, Slamming the Courthouse Doors: Denial of Access to Justice and Remedy in America, at 10 (2010), available at https://www.aclu.org/files/assets/HRP_UPRsubmission_annex.pdf.

has been renewed with Texas and Arizona indicating they would be interested in moving forward with opt-in certification.[78]

More recently, California voters acted to impose a specific time limitation on capital appeals. On November 8, 2016, California voters passed Proposition 66, which contains a provision requiring the California Supreme Court to resolve all death penalty appeals within five years.[79] The California Supreme Court reviewed the constitutionality of Proposition 66 and upheld all provisions though the Court did determine that the five year limitation on appeals was directive rather than mandatory.[80] Implementation of Proposition 66 was stayed while the federal courts reviewed the constitutionality of the measure.

Although Proposition 66 has yet to go into effect, the measure raises interesting questions regarding the implementation of a hard deadline for the resolution of capital appeals. It is not clear why proponents of Proposition 66 chose to set a five-year deadline for capital appeals, and it appears that the deadline was arbitrarily set. A review of capital cases demonstrates that these types of arbitrary deadlines can have dire consequences.

The Death Penalty Information Center keeps a running list of death penalty exonerees.[81] Since 1973, there have been 162 defendants who were sentenced to death and either were acquitted of all charges placing them on death row, had all charges placing them on death row

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[78] See Lacey Stover Gard, Chief Counsel Capital Litigation Section Office of the Arizona Attorney General, November 27, 2017 Letter to Stephen E. Boyd Assistant Attorney General Office of Legislative Affairs United States Department of Justice, available at https://www.justice.gov/olp/page/file/1019741/download (last visited June 6, 2018); Paul Venema, Texas Seeks to Fast-Track Executions, April 13, 2018, KSAT, available at https://www.ksat.com/news/texas-seeks-to-fast-track-executions (last visited June 6, 2018).

[79] Maura Dolan, *Executions Could Resume After California Supreme Court Leaves Most of Proposition 66 Intact*, Los Angeles Times, Aug. 24, 2017, available at http://www.latimes.com/local/lanow/la-me-ln-death-penalty-decision-prop-66-20170824-story.html (last visited June 3, 2018).

[80] *Briggs v. Brown*, 400 P.3d 29 (Cal. 2017).

[81] DPIC, Innocence: List of Those Freed from Death Row, available at https://deathpenaltyinfo.org/innocence-list-those-freed-death-row.

dismissed, or were granted a complete pardon based on evidence of innocence.[82] The average length exonerees served on death row was 11.3 years.[83] While the average length on death row is telling, an examination of the number of defendants who were exonerated after serving five or more years on death row further brings into question the validity of arbitrarily imposed time limitations on appeals.

Of the 162 exonerees since 1973, 75% (122) were on death row for five years or longer before exoneration and roughly 52% (84) had been on death row for 10 or more years.[84] Thus, under California's five-year appeals limitation, 75% of exonerees might not have had the opportunity to be exonerated. Granted, California's five-year limitation is on state appellate proceedings and does not take into account the time it takes to resolve the federal direct appeal or the federal habeas corpus proceedings. But for states who opt-in under AEDPA, the federal timeframe is relatively short. Under AEDPA, if a state is an opt-in jurisdiction, the habeas corpus timeframe is approximately 16 months plus any extensions granted by the courts (180 days to file habeas corpus petition, 180 days for federal district court to rule on habeas petition, and 120 days for circuit court to issue appellate ruling). Because a cap on the number of years a court has to resolve a death penalty appeal would only address court delays, more research should be conducted to see if the exonerations that took more than five or ten years were due to delay in court proceedings or were due to other reasons such as newly discovered evidence or advances in forensic science. For example, Henry McCollum, a man on death row for over 30 years, was only exonerated due to advances in forensic science that occurred after his conviction.[85]

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[82] DPIC, Innocence: List of Those Freed from Death Row, supra note 81.
[83] DPIC, Innocence: List of Those Freed from Death Row, supra note 81.
[84] DPIC, Innocence: List of Those Freed from Death Row, supra note 81.
[85] See Joseph Neff, *They did 30 Years for Someone Else's Crime. Then Paid for It.,* NY Times, Aug. 24, 2017, available at https://www.nytimes.com/2018/04/07/us/mccollum-brown-exoneration.html (last visited June 5, 2018).

In 1983, an 11-year-old girl was raped and murdered in Red Spring, North Carolina. Nineteen-year-old Henry McCollum confessed to raping and killing the girl. McCollum, who has an IQ in the 60s, subsequently tried to recant his confession, maintaining that he did not rape and murder the girl. A jury convicted McCollum and sentenced him to death.[86] While on death row, Justice Antonin Scalia used McCollum as the poster boy for the death penalty in *Callins v. Collins*, stating "[h]ow enviable a quiet death by lethal injection" was compared to the suffering the 11-year-old girl experienced.[87] After 30 years on death row, McCollum was pardoned after DNA evidence collected from the scene was tested and linked back to a man already serving a life sentence for a similar rape and murder.[88] If a hard five or ten year deadline had been in place when McCollum was originally sentenced, he most assuredly would not have lived to see the day when he was exonerated.

DNA evidence was able to lead to McCollum's exoneration, but advances in DNA evidence may not necessarily result in less wrongful convictions because, according to the Death Penalty Information Center, "the most overwhelmingly prevalent causes of wrongful convictions in death penalty cases" are (1) official misconduct or perjury and (2) false confessions.[89] According to the Death Penalty Information Center, "as of May 31, 2017, official misconduct was a contributing factor in 571 of 836 homicide exonerations 68.3%"; mistaken identification was present in 24% of wrongful convictions while false or misleading forensic evidence was a factor in 24% of homicide exonerations.[90] DNA evidence cannot guarantee the right person is

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[86] Neff, supra note 85.
[87] *Callins v. Collins*, 510 U.S. 1141, 1143, 114 S. Ct. 1127, 1128, 127 L. Ed. 2d 435 (1994).
[88] Christine Mai-Duc, *2 N.C. Men Wrongly Convicted of Murder Freed after Decades in Prison*, Los Angeles Times, available at http://www.latimes.com/nation/nationnow/la-na-nn-death-row-inmates-released-mccollum-brown-20140903-story.htm.
[89] DPIC, Most Common Causes of Wrongful Death Penalty Convictions, available at https://deathpenaltyinfo.org/causes-wrongful-convictions.
[90] DPIC, Most Common Causes of Wrongful Death Penalty Convictions, supra note 89.

convicted of the crime, especially when there is official misconduct relating to the DNA evidence or the DNA evidence is false or misleading as in the case of Rickey Dale Newman.

In February 2001, a woman was killed in Van Buren, Arkansas, and Rickey Dale Newman was charged with murder. At trial, the prosecution's expert witness falsely testified that the victim's hair was found on Newman's clothing. Subsequent DNA testing excluded Newman from DNA evidence found on the victim's blanket, and the hair found on Newman's clothing was tested and did not match the victim. It was also determined that prosecutors withheld exculpatory evidence which contradicted Newman's confession and that the state mental health doctor made significant testing errors when determining whether Newman was competent to stand trial.[91] As Newman's case demonstrates, the reliability of forensic evidence is dependent on those who collect and process the evidence not committing misconduct.

Serving years on death row due to a wrongful conviction is a miscarriage of justice, even when a defendant is eventually exonerated. A wrongful execution is an irreversible miscarriage of justice. In McCollum's and Newman's cases, the system was able to correct the error before the men were actually executed. The criminal justice system, however, does not always act in time, as in the case of Texas inmate Robert Pruett.

Robert Pruett was sentenced to death for the 1999 death of a correctional officer. DNA evidence found on the murder weapon did not match Pruett or the correctional officer, and forensic testimony presented at trial has been debunked. A state investigator's notes disclosed that a key prison witness had been promised a transfer closer to his family if he testified against Pruett, and four correctional officers were indicted for bribery on the same day Pruett allegedly

[91] DPIC, Former Arkansas Death-Row Prisoner Rickey Dale Newman Exonerated after Nearly 17 Years in Prison, available at https://deathpenaltyinfo.org/node/6896.

killed the officer.[92] Despite a lack of evidence linking Pruett to the crime and despite claims of corruption at the correctional facility, Pruett was executed on October 13, 2017.[93]

Setting an arbitrary time limit is likely to produce undesirable results. Given the resource constraints of the criminal justice system and the complexity of capital cases, a reform which would render a death sentence unlawful if the execution is not carried out within a set number of years is likely to result in public outrage when large numbers of death sentences become invalid due to the system's inability to process appeals within the set time frame. State correctional departments' recent difficulties in obtaining lethal injection drugs due to abolitionists' largely successful campaign to dry up the supply of commonly used lethal injection drugs[94] poses an additional practical complication which may make it difficult for states to execute condemned inmates within an arbitrary time limit set by such a reform. On the other hand, a reform which simply bars further direct appeals once a set number of years since imposition of sentence has passed, rather than rendering the death sentence unlawful, may result in the execution of innocent persons and raises the specter of posthumous discovery of innocence, which undermines the legitimacy of the criminal justice system and is likely to further erode public support for the death penalty. The AEDPA already places severe limits on collateral attacks on death sentences. Imposing an arbitrary time limit which bars appeals after a set number of years following sentencing would only serve to compromise due process and increase the risk of irreversible miscarriages of justice.

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[92] DPIC, Texas Set to Execute Robert Pruett for Prison Murder Despite Corruption and Lack of Physical Evidence, available at https://deathpenaltyinfo.org/node/6893.

[93] Samantha Schmidt, *Texas Executes Inmate Convicted of Fatally Stabbing a Prison Guard*, The Washington Post, October 13, 2017, available at https://www.washingtonpost.com/news/morning-mix/wp/2017/10/12/texas-inmate-robert-pruett-executed-in-connection-with-prison-guards-death/?noredirect=on&utm_term=.ca4f15121c7a (last visited June 3, 2018).

[94] Brenda I. Rowe, How Would You Like to Die? Glossip v. Gross Deals Blow to Abolitionists, 98 Prison J. 83, 88-89 (2018).

ii. Increased Likelihood of Errors

As individuals, it is likely we can all agree that the faster we work, the more likely it is that we will make mistakes. Research has found that the same correlation exists between the high rate of use of capital punishment and a high rate of errors.[95] There is no solid evidence to support any theory that the rate of violent crime would decrease if we set an outside time limitation on capital cases and appeals. However, it seems logical that if we were to enforce such a limit, the result could leave states trying to push capital cases through the system faster, which could actually result in an inevitable increase in the amount of reversible error eventually found in these cases.

While increasing the speed of capital cases in a given jurisdiction would not necessarily mean that jurisdiction would have an increased number of capital cases each year, at least temporarily, it would likely force states to consider a higher number of capital cases at once in order to comply with any outside time limitations and eliminate any backlog of cases currently pending in that state. Additionally, there is at least the possibility that reducing delay in the process would make capital punishment more attractive for prosecutors, which could result in a higher number of capital cases. Because these cases are life and death matters for each defendant, it is necessary to consider any collateral consequences that could result from enforcing an outside time limitation on these cases, even if it is only a temporary or possible risk.

The impact of pushing capital cases through the judicial system of a given jurisdiction in a shortened time-frame can be seen by examining studies analyzing the rate of errors in capital cases in comparison to the rate of capital cases for each jurisdiction. Contrary to public

[95] Richard C. Dieter, The 2% Death Penalty: How a Minority of Counties Produce Most Death Cases at Enormous Costs to All, at. 19, available at https://deathpenaltyinfo.org/documents/TwoPercentReport.pdf.

perception that the death penalty is widely practiced by states across the U.S., studies have pointed out that it is actually a small percentage of counties in a small number of states that actually carry out the majority of executions. In fact, one study found that "[o]nly 2% of the counties in the U.S. have been responsible for the majority of cases leading to executions since 1976."[96] In that study, Dieter analyzes comprehensive results from an earlier study of every U.S. death sentence at the time, conducted by James S. Liebman, in which the researcher analyzed data and found that "[c]apital error rates more than *triple* when the death-sentencing rate increases from a quarter of the national average to the national average, holding other factors constant."[97] Liebman went on to state that "[w]hen death sentencing increases from a quarter of the national average to the highest rate for a state in [this] study, the predicted increase in reversal rates is six-fold – to about 80%."[98] If states were forced to comply with an outside time limitation on capital cases, they would likely – even if just temporarily – have to consider a higher number of cases in a shorter amount of time. The results from these studies give support to the theory that by attempting to limit delay by setting such outside time limits on capital cases, we would also be risking an increase in the rate of error in those cases.

Additionally, this method of reform would likely have the unintended consequence of increasing the cost of capital cases even further. While there is no exact national figure for the cost associated with death penalty cases, as each state study is dependent on the laws, pay scale, and use of the death penalty in that particular state, it is clear that the death penalty system costs

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[96] Dieter, supra note 95, at Executive Summary, ii.
[97] Dieter, supra note 95, at 19; See also James S. Liebman, et. al., A Broken System, Part II: Why There is so Much Error in Capital Cases, and What Can be Done About it, Executive Summary, ii (2002), available at http://www2.law.columbia.edu/brokensystem2/report.pdf.
[98] Liebman, supra note 97, at Executive Summary, ii.

far more than the alternative of a life sentence without the possibility of parole.[99] In fact, a recent study in Nebraska conducted a meta-analysis of cost studies conducted across the nation and estimated that capital cases cost states with the death penalty an average of $23.2 million more per year than alternative sentences.[100] For example, a study conducted in Oklahoma found that capital cases in that state cost 3.2 times more that non-capital cases.[101] Similarly, a study by the Kansas Judicial Council found that defending a death penalty case costs the state about four times as much as defending a case where a death sentence was not sought.[102]

Under this policy proposal, the average delay in capital cases in the United States would decrease from just over 15 years to a maximum of 5 years.[103] Unless all attorneys, judges, and court employees involved in the case are able to complete the same amount of work three times as fast as they are currently, it would seem likely that this policy proposal would require additional staff for the judicial system in each state, which would further increase the overall cost of these capital cases. While the costs associated with capital punishment as it exists now are staggering, especially in times of economic crisis, the proposed policy change of setting an outside time limitation on the length of capital appeals in order to cut down on delay could require additional funding for the added burden it would place on the judicial system. The

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[99] Richard C. Dieter, Testimony Submitted to the Nebraska Legislature, Judiciary Committee Hearings on the Death Penalty, March 13, 2013, Lincoln, Nebraska, at 4, available at https://deathpenaltyinfo.org/documents/NebraskaTestimony.pdf.

[100] Ernest Goss, et. al, The Economic Impact of the Death Penalty on the State of Nebraska: A Taxpayer Burden?, Goss & Associates Economic Solutions (2016), available at https://deathpenaltyinfo.org/files/pdf/The-Economic-Impact-of-the-Death-Penalty-on-the-State-of-Nebraska.pdf.

[101] Peter A. Collins, et. al., An Analysis of the Economic Costs of Capital Punishment in Oklahoma, Appendix 1B to "The Report of the Oklahoma Death Penalty Review Commission," (2017), available at https://drive.google.com/file/d/0B-Vtm7xVJVWONmdNMmM5bzk3Qnc/view.

[102] Judicial Council, Kansas Legislature, Report of the Judicial Council Death Penalty Advisory Committee, Feb. 13, 2004, available at https://kansasjudicialcouncil.org/Documents/Studies%20and%20Reports/2015%20Reports/death%20penalty%20cost%20report%20final.pdf

[103] U.S. Dep't of Justice, supra note 1, at Table 10.

likelihood that all states with capital punishment will be able or willing to devote millions of more dollars to cover the additional costs associated with any set timeframe is slim. Yet, without such funding, this type of time limitation under the current number of attorneys and justices, would spread court officers too thin and further increase the likelihood of errors.

So, while it might seem like an obvious solution to cut down the amount of delay in these cases by setting an outside time limitation on the length of these appeals, by doing so we risk arbitrarily cutting an appeal too short and preventing a condemned individual from being able to adequately appeal their sentence. On the one hand, there is the argument that the delay itself causes a sentence to be cruel and unusual where the inmate can spend more than twenty years in solitary confinement awaiting a possible execution; but on the other hand, that very delay may be necessary in order to allow the condemned to explore every possible avenue of relief through appeals before we execute them.

B. Overhaul of Makeup of Supreme Court

Perhaps out of frustration from trying to balance what seems like irreconcilable goals of ensuring due process protections and eliminating excessive delay, another suggested policy reform for the current capital punishment system surfaced in the form of advocacy groups demanding an overhaul in the members of the state supreme courts. The frustration with appellate courts is somewhat understandable in that the public sees the capital conviction and sentence, and then, in many cases sees the Supreme Court justices authoring opinions that reverse the conviction or sentence and send the case back, years later, for a new guilt or penalty phase trial. This frustration has, in some instances, led advocacy groups to lobby for justices not to be retained on the court. For example, the members of the Kansas Supreme Court came under attack prior to the November 2014 elections, after overturning the death sentences of the Carr

brothers, before the U.S. Supreme Court reversed the decision.[104] An advocacy group with ties to the victims' families pushed for Kansas voters to vote against retention for all of the justices, except one who had been appointed after the Carr brothers decision.[105] The campaigns against the justices were not successful, but the frustration is worth exploring.

For purposes of this argument, we again looked at Kansas as an example. However, this is a proposal that could be, and in some cases has been, put forward in any state in the United States. For example, in 1986, three state supreme court justices in California were denied retention and removed from the bench based on their record of overturning death sentences.[106] Similarly, Iowa voters removed three state supreme court justices in 2010, after a unanimous decision that legalized same-sex marriage in the state.[107]

i. Misplaced Frustration?

The frustration with the appellate delay in capital cases is understandable. And the frustration with the appellate courts is, by extension, somewhat understandable because the justices are the ones actually authoring the opinions on appeal that end up reversing these convictions and/or sentences. However, it is possible that this frustration is misplaced.

ii. Heightened Standard of Review Still in Place

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[104] See *State v. Carr*, 300 Kan. 1, 331 P.3d 544 (2014).
[105] Jonathan Shorman, *Group Linked to Carr Brothers' Victims Pushes to Oust Kansas Supreme Court Justices*, The Garden City Telegram, Aug. 10, 2016, available at http://www.gctelegram.com/caa6e685-61ab-5f1d-99e7-54898e655fc0.html.
[106] Robert Lindsey, *Defeated Justice Fearful of Attacks on Judiciary*, The New York Times, Nov. 8, 1986, available at https://www.nytimes.com/1986/11/08/us/defeated-justice-fearful-of-attacks-on-judiciary.html?scp=7&sq=grodin%20bird%20reynoso&st=cse
[107] A.G. Sulzberger, *Ouster of Iowa Judges Sends Signal to Bench*, The New York Times, Nov. 3, 2010, available at https://www.nytimes.com/2010/11/04/us/politics/04judges.html#addenda

Even if the voters in the state of Kansas, or any other state, succeeded in replacing every supreme court justice, the heightened standard of review applied in capital cases could still cause the court to reverse convictions and/or sentences. Again, underlying the Court's death penalty jurisprudence is the idea that "death is different" due to its finality and severity, thus requiring a heightened standard for reliability.[108] Due to the need for heightened reliability in death penalty cases, the Court has ruled that the procedures in capital cases are subject to constitutional restraints not applicable to non-capital cases, including requirements pertaining to individualization of sentencing decisions,[109] admission and consideration of mitigating evidence,[110] jury instructions regarding lesser included offenses,[111] and voir dire,[112] as well as other aspects of trial procedure.[113] Thus, the courts reverse death penalty cases on appeal for things which would not result in reversal in non-capital cases due to concerns regarding the need to ensure heightened reliability when such a severe, irreversible punishment is imposed.

When an appellate court finds on direct review that nonstructural federal constitutional error was committed in a capital case, it will reverse the conviction unless it finds beyond a reasonable doubt that the error was harmless in that it did not contribute to the outcome of the trial.[114] This harmless error standard has also been extended to errors committed in the penalty

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[108] Jeffrey Abramson, Death-is-Different Jurisprudence and the Role of the Capital Jury, 2 Ohio St. J. Crim. L. 117, 117 (2002); *See, e.g.*, *Ford v. Wainwright*, 477 U.S. 399, 411, 106 S. Ct. 2595, 91 L. Ed. 2d 335 (1986); *Gardner v. Florida*, 430 U.S. 349, 357-58, 97 S. Ct. 1197, 1204, 51 L. Ed. 2d 393, 357 (1977); *Woodson v. North Carolina*, 428 U.S. 280, 305, 96 S. Ct. 2978, 2991, 49 L. Ed. 2d 944 (1976).
[109] *Woodson*, 428 U.S. at 304.
[110] *Lockett v. Ohio*, 438 U.S. 586, 603-05, 98 S. Ct. 2954, 2965, 57 L. Ed. 2d 973 (1978); *Green v. Georgia*, 442 U.S. 95, 99 S. Ct. 2150, 60 L.Ed. 2d 738 (1979).
[111] *Beck v. Alabama*, 447 U.S. 625, 100 S. Ct. 2382, 65 L. Ed. 2d 392 (1980).
[112] *Turner v. Murray*, 476 U.S. 28, 106 S. Ct. 1683, 90 L. Ed. 2d 27 (1986).
[113] Habeas Assistance and Training, Heightened Reliability, available at https://hat.capdefnet.org/8th-amendment/heightened-reliability (last visited May 28, 2018).
[114] Linda Carter, Harmless Error in the Penalty Phase of a Capital Case: A Doctrine Misunderstood and Misapplied, 28 Ga. L. Rev. 125, 128-30 (1993); *See Chapman v. California*, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967); *Arizona v. Fulminante*, 499 U.S. 279, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991).

phase of capital cases.[115] This is a very difficult standard. While there is no crystal ball to predict the future and tell for certain that a court comprised of different justices would not be more willing to overlook some error and affirm convictions and sentences, is that a court that we, as a society should desire? Even if voters succeed in packing state supreme courts with conservative justices who may be willing to apply the harmless error standard in a manner which upholds more death sentences, the federal courts, which have justices who are appointed for life and thus do not answer to the voters, may act as a check by reversing a higher proportion of death penalty cases from those states if the federal justices differ in their view of what constitutes harmless error, as has been the case in California death penalty cases.[116]

When error has been found to exist in the trial, it is a difficult standard indeed to determine whether the defendant was prejudiced by the error(s). The difficulty of this task is amplified by the fact that the defendant's life is on the line. Where do we draw the line and/or how do we expect an appellate court to draw the line on which errors could cause prejudice and which could not.

While another possible reform related to this issue would be to revise the standard of review the appellate courts are made to apply when considering capital appeals, any revised standard that decreases the possibility of a court finding prejudice in errors that were found to exist would increase the likelihood of executing an innocent person, and deprive even those who may be guilty of a fair trial, which is guaranteed by the constitution. So, while replacing certain

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[115] Carter, *supra* note 114, at 131-34; *See Clemons v. Mississippi*, 494 U.S. 738, 110 S. Ct. 1441, 108 L. Ed. 2d 725 (1990).

[116] *See* Howard Mintz, Death Sentence Reversals Cast Doubt on System: Courtroom Mistakes Put Executions on Hold, Death Penalty Information Center, April 13, 2002, available at https://deathpenaltyinfo.org/node/534 (last visited May 28, 2018); Howard Mintz, State, U.S. Courts at Odds on Death Penalty Sentences: Different Standards Lead to Reversals, Death Penalty Information Center, April 14, 2002, available at https://deathpenaltyinfo.org/node/534 (last visited May 28, 2018).

individual justices on a court could certainly influence the outcome of some cases, given the heightened standard of review in capital cases, this form of reform does not appear to be a promising change in policy that would realistically help resolve the overall problems with delay in capital cases.

IV. Conclusion

The exorbitant delays in carrying out executions of those sentenced to death within the United States, as well as the improbability of executing death sentences in many states, call into question the viability of states continuing to include capital punishment as a punishment option. The excessive delays, combined with the likelihood that in many states condemned inmates will die from either natural causes or other causes long before an execution can take place,[117] undermine any possibility that capital punishment will serve its oft-stated purposes of deterrence or retribution. Such delays also raise questions about whether prolonged solitary confinement on death row, with repeated close calls with death warrants stayed on the brink of execution dates, constitutes cruel and unusual punishment.[118] For many states, capital punishment may arguably no longer be a viable option, particularly in light of the fiscal implications of such a costly punishment for one of the many states with budgetary woes. Spending millions of dollars to maintain the façade of having capital punishment makes little sense from a cost-benefit analysis perspective for those states who have put no, or relatively few, inmates to death over the last five decades.[119] While the political risks of appearing soft on crime may make state legislators

[117] Russell L. Christopher, Death Delayed is Retribution Denied, 99 Minn. L. Rev. 421, 421 (2014).
[118] *Glossip*, 135 S. Ct. at 2755-77 (Breyer, J., dissenting); *See generally* Russell L. Christopher, Inconsistent Rationales for Capital Punishment Plus, 2017 U. Ill. L. Rev. 1363 (2017) (arguing that rationales courts have used to deny *Lackey* claims are inconsistent and thus suspect).
[119] See DPIC, supra note 3; Kansas Judicial Council, supra note 6.

hesitant to abolish capital punishment,[120] the reality is that in many states few people are sentenced to death and the small number of death sentences are rarely carried out,[121] thus rendering capital punishment largely symbolic. Given the failure of capital punishment to serve its penological goals and the impact of preserving this punishment option on state budgets, it may be time to draw the curtain on this macabre political theater and acknowledge that capital punishment is no longer viable.

While death penalty proponents agree that excessive delays in executions are problematic,[122] they believe the answer is making changes to reduce those delays rather than abolishing the death penalty. Proposed reforms include setting an outside limit on delay in carrying out an execution and changing the composition of state supreme courts. Establishing a cap on the delay between imposition of a death sentence and putting the inmate to death would impose an arbitrary limit on appeals, which may compromise due process by allowing inadequate time for appeals of more complex cases, result in executions of innocent condemned inmates before they can be exonerated, increase error rates in capital cases, and inflate costs due to the personnel costs associated with expedited appeals. Packing state supreme courts with pro-death penalty justices may not reduce the number of reversals of capital convictions and sentences given the heightened standard of review in capital cases and, even if it does, this may only result in an increase in federal courts reversing state supreme courts' rulings.[123] Thus, the proposed reforms do not appear to hold much promise of rendering capital punishment viable

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[120] *See* Stephen B. Bright & Patrick J. Keenan, Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases, 75 B.U. L. Rev. 759, 769-76 (1995).
[121] David Von Drehle, The Death of the Death Penalty: Why the Era of Capital Punishment is Ending, Time, June 8, 2015, available at http://time.com/deathpenalty/ (last visited May 28, 2018).
[122] Christopher, Death Delayed, *supra* note 117, at 425.
[123] *See* Mintz, Death Sentence Reversals, *supra* note 116; Mintz, State, U.S. Courts, *supra* note 116.

while providing the due process necessary to prevent arbitrariness, ensure fairness, and avoid irreversible grave miscarriages of justice.

Ultimately, the goals of due process and timely executions may be irreconcilable. Without a significant allocation of new resources, shortening time served on death row seems nearly impossible without shortchanging the appellate process and thus compromising due process and increasing the likelihood of errors. In a time of strained state budgets, it is extremely unlikely that states will greatly increase funding for capital cases, which already consume vast amounts of public funds. Reforms which seek to greatly reduce the delay between sentencing and execution inevitably involve a tradeoff that we should not be willing to make, as neither increasing the risk of executing an innocent person nor denying due process to anyone, regardless of apparent guilt, before taking their life is consistent with the values embodied in our Constitution.

While Lady Justice is supposed to be blind, justice should not remain blind to a dysfunctional system which imposes a penalty of death that fails to serve its penological purposes of deterrence and retribution and subjects the condemned to repeatedly preparing to die as execution dates approach, and then pass due to stays of execution, during the course of multiple decades of solitary confinement. At some point in the future, the Court may find that standards of decency have evolved to the point that imposing a punishment of death which fails to serve any penological purpose due to excessive delays constitutes cruel and unusual punishment in violation of the Eighth Amendment. However, such a ruling may be a long way off and is only likely to occur following a change in the composition of the Court. Legislative action may be a quicker route to abolition of capital punishment, particularly in states which

have strained budgets and very rarely execute condemned inmates,[124] but such action is far more likely if the voting public mobilizes to let their legislators know that spending vast amounts of scarce public funds to impose death sentences which are largely symbolic and may never be carried out is unacceptable. Until state legislators acknowledge that capital punishment, as it currently exists, is no longer viable, condemned inmates will continue to endure the long wait for an improbable death and in many states taxpayers will keep footing the bill for death sentences which are unlikely to ever be carried out.

[124] *See generally* Valeria Elizabeth Beety, The Death Penalty: Ethics and Economics in Mississippi, 6 Miss. L.J. 1437 (2012) (arguing that state budgetary concerns are a potential motivator for legislative abolition of capital punishment).