

6-1-2019

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### Recommended Citation

Young, Harold A. J.D./LLb, PhD (2019) "The Death Penalty: The Law Lords Alter Course in the Commonwealth Caribbean," *Journal of International and Global Studies*: Vol. 10: No. 2, Article 4.  
DOI: 10.62608/2158-0669.1475  
Available at: <https://digitalcommons.lindenwood.edu/jigs/vol10/iss2/4>

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# The Death Penalty: The Law Lords Alter Course in the Commonwealth Caribbean

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## Abstract

This article is a critical examination of the decisions of the Judicial Council of the Privy Council (JCPC) in death penalty appeals from the Commonwealth Caribbean from 1966 to 2008. It contributes to our understanding of how court rulings may be influenced by specific aspects of the judicial environment, which is shaped by the majority party in parliament, whose prime minister selects judges and which may make substantive changes in the law. In a quantitative examination of death penalty appeals, I find an increased likelihood that the court will set aside the death penalty when the judicial environment changes.

**Keywords** Death penalty, Judicial Council of the Privy Council, Commonwealth Caribbean countries

## Introduction

Constitutional provisions for the death penalty in the Commonwealth Caribbean were retained in all Caribbean states after they gained independence from Great Britain. The last execution carried out in a Caribbean state was in St. Kitts & Nevis in 2008 (Hirsh, 2008, December 22). Over the last three decades, however, the death penalty decisions of the Law Lords (justices) of the Judicial Council of the Privy Council (JCPC), hearing cases brought by Caribbean states, have shifted discernably in favor those on death row. Why might this be? It is my assertion that the JCPC is making decisions in a judicial environment that defies the traditional legal model, which assumes that courts merely follow the law. The legal model asserts that judges' personal or political preferences do not factor into their legal opinions and that "the rule of law *stare decisis* is the key determinant" in the court's rulings (George & Epstein, 1992, p. 323). Arvind and Stirton (2016) point out that even if British justices are not as political as other branches of the government or as the federal judiciary in the U.S., the degree to which they are political cannot be ignored. The attitudinal model asserts that justices possess ideological preferences that inform and influence their judicial rulings. I assert, therefore, that the both legal and attitudinal models act in tandem with explanatory power for the decisions of the JCPC. There are three specific aspects of the legal environment that account for the diverse death penalty decisions. First, Law Lords reflect the ideology of the majority political party in parliament, led by the prime minister, who recommends each judge to the monarch for elevation to the JCPC. The second factor is the adoption of the Human Rights Act 1998 by the U.K. Finally, the third factor is the status of the death penalty in U.K., as there is a divergence in law on the death penalty between Great Britain and its former colonies in the Caribbean.

The eleven Commonwealth Caribbean states<sup>2</sup> gained independence between 1962 and 1983, and all states retained the JCPC. This uniformity is partly explained by the long periods of colonial rule by the U.K. and by the fact the governing elite of the new states did not see a divergence of legal interests with the JCPC (Young, 2016). This research examines 262 JCPC rulings on the death penalty, fundamental rights, and other criminal appeals from these eleven countries, from 1966 to 2008. These three categories are employed for comparative purposes. The aim is to contribute to our understanding of how specific aspects of the judicial environment may influence the court's rulings and serve to deepen our understanding of the serious implications for those individuals who appeal to the JCPC (based on the perceived likelihood of success) and the ways in which the Law Lords' rulings ultimately affect the course of regional jurisprudence. I find an increased likelihood that the court will set aside the death penalty when the judicial environment changes.

## Judicial Committee of the Privy Council (JCPC)

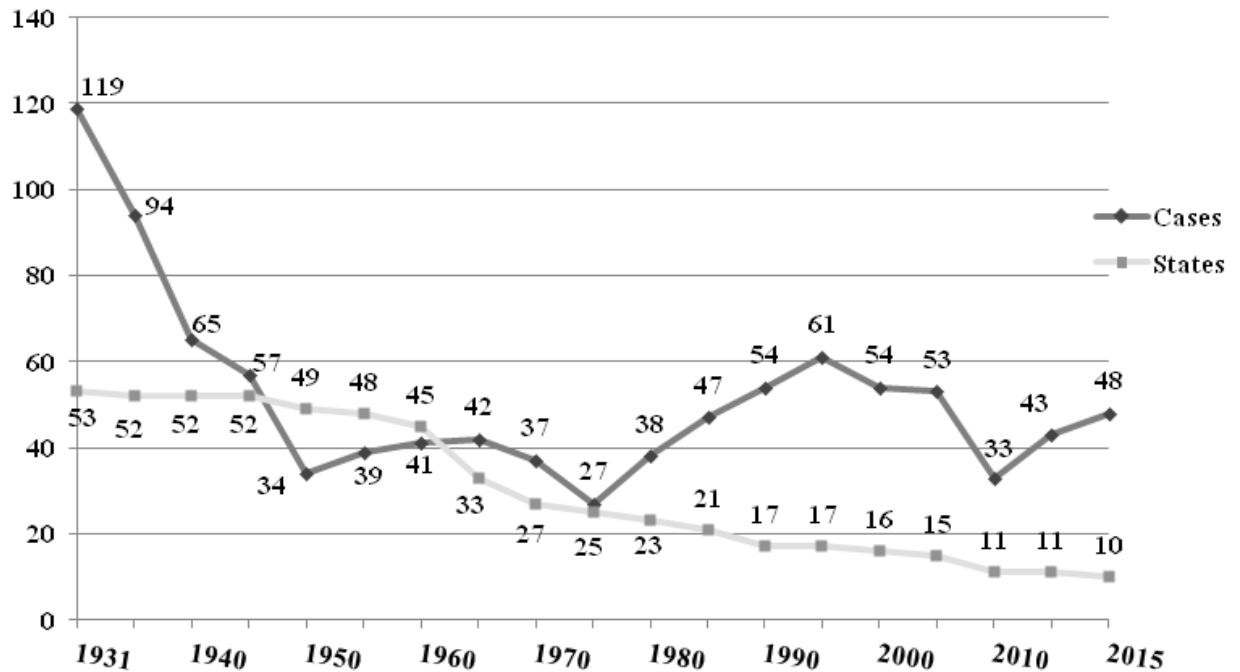
While its historical roots date back to the 12<sup>th</sup> century, the modern JCPC is a largely a product of the Judicial Committee Act 1833, introduced by Lord Chancellor Brougham (Howell, 1979), which established the modern configuration of the JCPC as a committee of the Privy Council. The branches of law on appeal are broad and diverse, with fundamental principles being adjudicated (Robert-Wray, 1966). Examples of this diversity include extradition requests; constitutional challenges to the death penalty; libel cases involving politicians; eminent domain; personal injury; and issues involving provincial versus federal power. Further, the cases originate from jurisdictions with diverse legal histories and systems:

Over the years, [the JCPC] has been asked for final rulings and interpretations of many different kinds of law, from Roman Dutch law in appeals from South Africa to pre-revolutionary French law from Quebec, and Muslim, Buddhist, and Hindu law from India. (Judicial Committee of the Privy Council 2015, para. 2)

This rich and diverse history contributes to the positive reputation and the continuing role and influence of the JCPC in the common law legal system shared throughout the British Commonwealth. Under the Appellate Jurisdiction Act 1876, the Law Lords became permanent judges of the court, adjudicating in panels of three, five, or seven. Today, all Privy Counselors under 75 years old who hold or have held high judicial office in the United Kingdom or have been judges of superior courts of certain Commonwealth countries are eligible to sit on the JCPC. The lord chancellor controls the selection process, and the prime minister is solely responsible for making recommendations to the monarch, on the advice of lord chancellor (Malleon, 1999). The Law Lords are virtually unknown outside of legal circles and share few cultural ties with the former colonies outside the legal legacy of colonialism. Further, the JCPC has been made up totally of White men, with the exceptions of three White women currently on the court. While the appellants came from around the world, the commonwealth Caribbean's population is over 95 percent people of color (CARCOM Regional Statistics, 2018). Based on this, I assume that identity politics does not play a role in the decision making of the JCPC.

Law and order issues facing the Caribbean nations have no impact on the Law Lords or the citizens of the U.K. (unless they visit these states as tourists) and reside exclusively in that jurisdiction, 4,000 miles away. While each respective Caribbean jurisdiction can remove the JCPC as the court of final appeal through a constitutional amendment, during the de-colonization process, 30 of Britain's 50 former colonies chose to adopt the JCPC as their final appellate court. As more states emerged from colonial rule, the number of states served by the JCPC declined, as did the number of cases tried by the JCPC, initially, followed by a rise in the number of cases brought to the JCPC by the remaining states. With a peak of 119 cases in 1931, the JCPC adjudicated an average of 52 appeals per year from 1932 to 2014. Figure 1 displays the trends over time as the number of states decline and the corresponding change in the number of decisions from 1931 (Act of Westminster) to 2014. The steep drop in the annual number of cases from 119 in 1931 to 34 in 1950 occurred when Canada and India replaced the JCPC with their own courts in 1948 and 1950, respectively.

Figure 1: Number of JCPC Cases from 1931 to 2015 and Number of States.



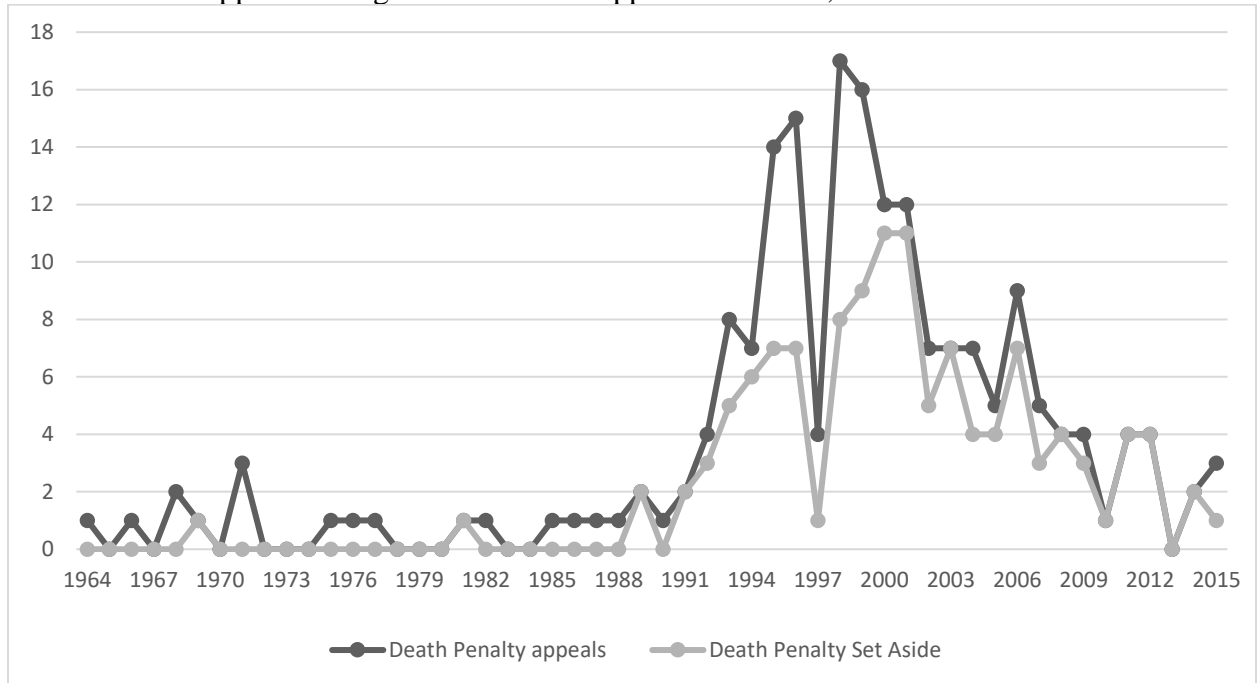
The number of countries (plus colonies and dependencies) using the JCPC declined from 48 in 1955 to 10 in 2015. With a high point in 1995 of 61 cases, the total number of cases brought to the JCPC per annum increased from 39 in 1955 to 48 cases in 2015. Figure 1 illustrates that despite the decline in the overall number of states using the JCPC, the states remaining began to bring cases to the JCPC more frequently, which can be attributed to growing economies spawning more high staked litigation, increasing levels of crime, and domestic adjudication.<sup>3</sup>

### Commonwealth Caribbean and the Death Penalty

Worldwide, the Commonwealth Caribbean countries (Antigua & Barbuda, Bahamas, Barbados, Belize, Dominica, Grenada, Guyana, Jamaica, St. Kitts & Nevis, St. Lucia, St. Vincent & the Grenadines, and Trinidad & Tobago) are among only 58 countries that retain the death sentence, while 140 others abolished it by law or *de facto* by refraining to carry out the sentence (Amnesty International, 2016). Along with Guatemala, Cuba, and the United States (U.S.), the Commonwealth Caribbean states are the only nations in the Americas to retain the death penalty as a form of legal sanction. Caribbean courts have continued to sentence people to death, and appeals continue to the JCPC. Figure 2 presents the number of appeals and the comparative numbers when the death penalty was set aside by the court from 1964 to 2014. This review of appeals shows an uptick in death penalty appeals to the JCPC from 1992 to 2002 and an accompanying increase in the number of appeals in which the death penalty was set aside, followed by a declining number of appeals starting in 2002. Despite this decline, the comparative numbers of appeals in which the death penalty is set aside remains high (BBC World News, 2007 June 20; Caribbean News Now, 2004). This activity is explained by the involvement of the

Death Penalty Project, based in London, an organization that reviews cases and provides free legal counsel for appeals to the JCPC.

Figure 2: Numbers of Appeals Brought to JCPC and Appeals Set Aside, 1964 to 2015



The possibility of a panel of British judges thousands of miles away setting aside a death sentence handed down by a local court in a Caribbean state is a sensitive political issue. While some observers argue that it should be up to the individual countries' parliaments to decide whether the death sentence should be abolished or whether it should be part of the law (Caribbean News Now, 2004), Caribbean governments consider the death penalty to be popular with the electorate. Although public polling on the issue is not a viable source of information, much is gleaned from the opinions expressed in newspaper articles and statements from various public officials, who view it as a deterrent to violent crime.

In 2008, St. Kitts and Nevis, Prime Minister Denzil Douglas announced an execution by saying, "We have to be certain that there is a deterrent among our people in taking another man's life." No doubt this was in response to an increase in the homicide rate in St. Kitts and Nevis; in the year 2000, there were only 10 murders, but the rate had tripled to 33.6 per 1000,000 by 2012. St. Kitts also has the distinction of being the Caribbean country to carry out the death penalty most recently, in 2008 (Hassanali, 2015). While Jamaica has not carried out an execution in more than 20 years, lawmakers in Jamaica voted in 2008 to affirm the death penalty amid a stubbornly high homicide rate of 40 per 1,000,000 on the island in that year; the homicide rate was 39.8 in 2000 (Associated Press, 2008). With seven people currently on death row in Trinidad, the current attorney general has signaled the intent to resume executions after a 17-year hiatus (Hassanali, 2015). In 2008, Prime Minister Patrick Manning of Trinidad and Tobago said: What we are talking about is enshrining in law the conditions under which the death penalty can be carried out and therefore it is not left to the judgment of others. There have been a number of Privy Council decisions that have acted as constraints to the carrying out of the death penalty. (United Nations Office on Drugs and Crime, 2013)

A former president of The Bahamian Bar Association, Ruth Bowe Darville, is particularly illustrative of the tension in the Caribbean: "I think the question of the death penalty

needs to be addressed. I think the country is torn by it because we're in the throes of this crime epidemic, as people have labeled it" (McCartney, 2001). In 2008, Antigua and Barbuda proposed expanding the number of crimes potentially punishable by death to include any that involved weapons and lead to serious injury or death. This discourse about the death penalty among Caribbean political leaders underscores the importance of this issue to the region and provides the relevant backdrop for examining the decisions of the JCPC.

### **The Judicial Environment**

The judicial environment in the context of this research is delineated as the selection of Law Lords by the prime minister and any substantive changes in the law expected to influence the court's rulings. I posit that the JCPC makes decisions in a judicial environment that does not clearly conform to the traditional legal decision-making models in the British literature. Keeping in mind that the justices on U.K.'s Supreme Court of Judicature are the same as the those on the JCPC, I posit that over time, the changing British legal environment, operationalized by the ideology of the prime minister party and the changes in British law (particularly vis-à-vis death penalty and human rights) influences the Law Lords' decisions on appeals from Caribbean jurisdictions against the death penalty. In a quantitative examination of death penalty appeals, I find an increased likelihood that the court will set aside the death penalty when the judicial environment changes. I propose to test the theory that changes in the wider legal and political environment do have discernable effects on the judiciary.

There are three specific aspects of the legal environment that account for the diverse death penalty decisions. First, Law Lords reflect the ideology of the majority political party in parliament, led by the prime minister, who recommends each judge to the monarch for elevation to the JCPC. The second factor is the adoption of the Human Rights Act 1998 by the U.K. Parliament. The Human Rights Act 1998 has arguably transformed the human rights culture of the U.K. and the understanding of basic human rights and freedoms (Hunt, 1999; Wade, 1998). As Arvind and Stirton (2016) point out:

In the new approach introduced by the Human Rights Act, judges review policy decisions using a conceptual apparatus and framework—a dimension of salience—that is far more closely connected with political ideology than its predecessors were. Rather than focusing simply on whether a particular action falls within the powers given to the state body, approaches grounded in human rights require judges to consider whether the action concerned was normatively justifiable—for example because it was proportionate to achieving some acceptable purpose. (pp.18, 19)

Finally, the status of the death penalty in U.K. law is important because there is a divergence in law on the death penalty between Great Britain and its former colonies in the Caribbean. This means that the Law Lords hear appeals from Caribbean jurisdictions in British courts, where the death penalty is not available. It is reasonable to attribute the same effect of the "conceptual apparatus and framework" as Arvind and Stirton (2016, p. 18) link to the U.K. Parliament adopting the Human Rights Act. In other words, Law Lords selected by the political executive (as opposed to the monarch) for the British courts, adjudicating British law are then asked to "change hats" and hear appeals from jurisdictions with different laws. It is likely, however, that the Law Lords cannot separate themselves completely from the judicial environment in which they are selected and work. Shah and Poole (2009) characterize the Privy Council's decisions as an example of judicial overreach and suggest that death penalty case law

from the 1990s shows the Privy Council acting as a “transmission belt” for the incorporation of human rights standards drawn from other sources.

Building on the work of Llewellyn (1930), Frank (1936), and Schubert (1965), the power of the attitudinal model in accounting for the ideological preferences of individual judges is widely accepted in American jurisprudence. In the seminal work of Segal and Spaeth (2002), *The Supreme Court and the Attitudinal Model Revisited*, they state, “The purpose of this book is to scientifically analyze and explain the Supreme Court, its processes, and its decisions from an attitudinal perspective” (xv). Further, Scott (2006) points out that “the division between the ideological and legal factors” that influence a U.S. president’s selection of a Supreme Court judge “is well-developed in the literature on the American federal judiciary” (p. 171). Ideological factors refer to the judge’s place on in the liberal-conservative continuum. Legal factors refer the influence of statute law that underpins the decisions of the court. Appointments to the U.S. Supreme Court are not made by chance or luck, nor are they based solely on judges’ qualifications or experience; rather, they reflect a deliberate ideology choice by the president. The presidential considerations vary based on political and institutional constraints, such as recommendations by senators, indications of candidates’ political ideology (Nemacheck, 2007), and whether the senate majority is from the same party as the president. Presidents, therefore, “must act strategically within political and institutional constraints” (Nemacheck, p.35). This is no easy process and one that has become more politically acrimonious with senate confirmations failing at higher rates and time from nomination to confirmation lengthening (Binder & Maltzman, 2009).

Research on the process of seating judges and the notion of judicial institutions as political actors reflecting ideological preference in the U.K. is not as robust. The post-World War II period did usher in a more direct dialogue in British legal circles, but it remains a neglected area of study in comparison to the U.S. The general attitude of jurist, practitioner, politicians, and social scientists in the U.K. is that the judiciary is not a political institution and that as such, these institutions are shielded from influences outside the law. The myth of the pure legal model is upheld, and what goes into selecting nominees remains obscure. Robertson (1982) confirms that until recently, there was no serious research into the judges and courts in the United Kingdom; nonetheless, he asserts, “An individual judge’s voting will be influenced by his beliefs and attitudes inside a specifically legal and professional ideology. This ideology will vary from judge to judge and whether conservative or not...” (p. 4).

The attitudinal model, which posits that the decision of judges is underpinned by the personal preference of judges, is rejected in the U.K. as being unable to capture the “subtlety and complexity” of the difficult cases that do not lend themselves to direct linkages to judicial ideology (Robertson 1998, 35). As far back as 1941 in *United Australia, Ltd. v. Barclays Bank, Ltd.*, Lord Simonds notes the court is principally there to provide justice for the parties using law and procedure. Stevens (1978) describes Lord Simonds as a strict formalist, whose judicial technique resulted in a “freezing of the status quo.”<sup>4</sup> Despite the persistence the legal model, the influence of the personal preferences of judges has been noted over time. This recognition that judges are influenced by personal ideology is captured by Stevens (1978) in his work on Lord Diplock. In 1968, the Labor Party’s Prime Minister Harold Wilson nominated Lord Diplock to sit in the JCPC, and Lord Diplock served for 17 years as a legal force in his own right. Stevens (1978) characterizes him as “analytically outstanding, iconoclastic, and outspoken” (p. 562) and “certainly the most interesting and possibly the most important English judge of the twentieth century” (p. 488). When the opportunity arose, and when Lord Diplock felt it was morally right,



he did not hesitate to expand the scope of a doctrine or overrule an earlier decision (Stevens, 1978). Devlin (1976), a former Law Lord, suggests that a free society is in fact better served by a “dynamic, or at least an activist judiciary, ready and willing to develop that law to fit the changing society” (p. 1). In acknowledging that the judiciary is a political institution, Devlin states:

“My question is not about dynamic lawmaking but whether the judiciary should be employed in it... Nevertheless, there are demands for a creative judiciary to operate upon subjects that governments shirk.” (p. 2)

Most recently, Arvind and Stirton (2016) acknowledge the lack of formal research on the U.K. judiciary in comparison to the extensive literature in the U.S. and even in comparison to the study of the executive and legislative branches in the U.K. They test a ‘doctrinal scale’ that combines the party-political ideology of the Law Lords (more pro-state vs less pro-state) and the laws (which have expanded over time) that the court seeks to apply. Arvind and Stirton examine cases in which decisions of state bodies are challenged. Their findings strongly suggest that while Law Lords cannot be reduced to pure ideology (the attitudinal model), the traditionally accepted legal model also falls short in providing insight into judicial behavior. They find that justices are influenced by changes in the judicial environment; such changes are reflected not only in the laws themselves but also in the proclivities of the justices serving at the time that the laws are changed. Arvind and Stirton (2016) conclude that their research supports a hybrid doctrinal model based on the “red and green light” theory of Harlow and Rawlins (2009) in their work in administrative law and public bodies. This approach accommodates both variations in the law and the ideology of judges.

The research undertaken in this study mirrors the approach of Arvind and Stirton in the context of the Law Lords who hear appeals from British courts and from each jurisdiction that accesses the JCPC. Note that the role of the JCPC as the final appellate court is provided for in the constitution of each state. When the JCPC adjudicates an appeal from a particular state, it acts, technically, as a constitutionally recognized court in the judicial hierarchy of that state. The Constitution of Jamaica, for example, Chapter VIII, Part III (1) states the following, “An appeal shall lie from decisions of the Court of Appeal to Her Majesty in Council [JCPC] as of right in the following cases...” (The Constitution of Jamaica, 1962). There is similar language in all state constitutions that allow appeals to the JCPC. There are no examples of any government that does not agree with a decision defying the ruling of the JCPC.

### **The JCPC’s Window of Change**

The process of appointment affords the executive branch (represented by the prime minister and lord chancellor) the opportunity to reflect their ideological preferences in judicial appointments. Until 2008, the Law Lords were members of the House of Lords, which is the upper chamber of the British Parliament. In their capacity as members of the House of Lords, Law Lords were participants in debates and the passage of statutes. Former Prime Minister Margaret Thatcher nominated twelve Law Lords, and Maleson (1999) reports that Thatcher on occasion rejected the recommendations of the lord chancellor. This suggests discernable political influence. Maleson (1999) underscores this, pointing out, “It is hard to imagine how future prime ministers, faced with the selection of key policy-makers in the Court of Appeal and the House of Lords will be disinterested in the political persuasion of their appointment” (p. 86). Segal and Spaeth (2002) echo this sentiment, saying it would be “mind boggling” that given the

importance of the nomination of a justice to the U.S. Supreme Court, a president would not consider the party or ideological preferences of the potential appointees. Because there is no ready made analysis for the Law Lords of the JCPC, I have linked the ideological preference of the Law Lord to that of the prime minister at the time of appointment. I assert that the approach to the death penalty is likely to change, reflecting the ideology of the political party making the judicial appointment.

The first major change in political environment was the 1979 reviewing of death penalty provisions in the Commonwealth Caribbean jurisdiction. In *Abbott v. Attorney General of Trinidad and Tobago* (1979), the JCPC dismissed an appeal based on an undue delay in disposing of the petitioner's appeal of the death sentence before Trinidad and Tobago's Mercy Committee. In writing for the JCPC, Lord Diplock declines to specify the measure to assess undue delay. Based on Lord Diplock's statements, his opinion made clear that the court should adjudicate the matter later. The opportunity to do just that presented itself in 1982, with the Jamaican case of *Riley and Other v. Attorney General of Jamaica and Another* (1982). The majority found that they could not allow the appeal on the grounds of delay and set aside the death penalty in this case. They did point out, however, that their decision did not usurp the authority of the Governor General<sup>5</sup> of Jamaica to exercise the prerogative of mercy and vary the death sentence on those grounds. The minority opinion reflects an alternative interpretation of Jamaican statute. The dissenting decision refers to the statement of the majority in the *Abbot* case, leaving little doubt that undue delay would render the death penalty illegal (Ghany, 2000). Ghany (2000) asserts that this minority opinion is the turning point in the debate about the death penalty.

Between 1982 and 1993, the JCPC allowed eight appeals against the death penalty on various other points of law. In 1993, with Lord Diplock no longer on the bench, the door he left ajar in *Abbot* opened in the Jamaican case of *Pratt and Morgan v. Attorney General and Another* (1993). The majority overruled the decision in *Abbot* and accepted the minority opinion. They also incorporated Lord Diplock's dictum in the *Riley* case as part of their ruling, which found a way to get the powers of the Governor General to effectively prevent the execution on the grounds of undue delay measured in years (Ghany, 2000). The court concluded that this delay constituted cruel and unusual punishment and commuted the death sentence to life imprisonment.

This case is significant in Caribbean jurisprudence, as it is the first time the court explicitly adopted a standard for cruel and unusual punishment based on delays in carrying out the death penalty. The court goes further by setting a threshold of five years on death row, after which execution could be cruel and unusual punishment. The JCPC's preferences are made abundantly clear in the Belizean case *Reyes v. The Queen* (2002). Lord Bingham of Cornwall, in delivering the decision states, "A generous and purposive interpretation is to be given to constitutional provisions protecting human rights. The court has no license to read its own predilections and moral values into the Constitution, but it is required to consider the substance of the fundamental right at issue and ensure contemporary protection of that right in the light of evolving standards of decency that mark the progress of a maturing society" (p. 26). This implies that while the justices must follow the constitution of the country, they are "required" to interpret it in the context of the times. Ghany (2000) points out that in three subsequent cases (*Guerra v. Baptiste and Others*, 1996; *Henfield v. Attorney General of the Commonwealth of the Bahamas*, 1997; *Farrington v. Minister of Public Safety and Immigration and Others*, 1997), the court was inconsistent in applying the advised time limits. This inconsistency resulted in the commutation

of the death sentence in each case but for reasons other than inordinate periods of delay set in *Pratt and Morgan v. Attorney General and Another* (1993).

The second major change in political environment occurred in 1998, when the British Parliament ratified the Sixth Protocol of the European Convention on Human Rights, prohibiting capital punishment except “in time of war or imminent threat of war.” The Human Rights Act (HRA) came into effect in 2000. While not everyone agreed on the effect the HRA would have on the function of the judiciary, there was little debate that the passage of the HRA would affect death penalty cases. Malleon (1999) quotes Lord Irving as acknowledging that judges would be called upon to judge whether U.K. statutes meet the standards of the Convention on Human Rights and that the incorporation of the Convention would involve “a very significant transfer of power to the judges” (p. 240).

The effect of the HRA on British jurisprudence has received considerable attention from constitutional scholars, but Shah and Poole (2009) describe the efforts as lacking “a sufficiently rigorous empirical dimension.” Shah and Poole analyze a database of petitions for leave to appeal to the House of Lords between January 1, 1994, and December 31, 2007. This dataset, therefore, includes the six-year period before the HRA came into force as well as the seven years following the HRA. The basis for allowing a petition is the presence of “an arguable point of law of general public importance which ought to be considered by the House at this time” (Shah & Poole 2009, p. 11). The data reveal a general increase in the number of appeals allowed or “wins” in the period following the HRA compared to the period before. Based on their analysis, one conclusion drawn by Shah and Poole is that the justices are interested in human rights cases. The sequence of post-HRA rulings by the JCPC resulting in successful appeals against the death penalty supports Ghany’s (2000) contention that the JCPC, using only criteria based on human rights, makes it difficult to carry out the death penalty in the Commonwealth Caribbean. In the 2002 case *Thakur Persad Jaroo v. Attorney-General* (2002), Lord Hope of Craighead followed the precedent established by Lord Diplock in 1979. Lord Hope of Craighead quotes Lord Diplock’s ruling in *Kemrajh Harrikissoon v. Attorney-General* (1979):

The notion that whenever there is a failure by an organ of government or a public authority or public officer to comply with the law this necessarily entails the contravention of some human right or fundamental freedom guaranteed to individuals by Chapter I of the Constitution is fallacious. (p. 3)

Lord Diplock repeats his warning against abuse of the constitutional motion in the context of criminal cases where there was a parallel remedy in *Chokolingo v. Attorney-General* (1980). Lord Bingham of Cornhill makes the same point in *Hinds v Attorney-General* (No 2, 2001) by noting that Lord Diplock’s salutary warning remained pertinent. This is pointed language from a court declaring that the state will not be allowed to violate human rights norms that are entrenched in the constitutions of the country. I assert that the JCPC, operating in a legal environment without the death penalty as a part of U.K. law, increases the likelihood of a successful appeal against the death penalty in the Commonwealth Caribbean.

In this study, I make three assumptions about the JCPC. First, the autonomy and absolute separation of the JCPC from the Commonwealth Caribbean jurisdictions is unquestioned. Neither the governments nor the people of those nations have any direct or indirect control, or authority over seating of Law Lords, staffing, or funding. Second, I assume that the JCPC is unmoved by public opinion in the Caribbean or statements about the death penalty by Caribbean political and civic leaders. This runs contrary to the findings of some researchers in the U.S.; for example, while asserting the law matters to the courts, Roch and Howard (2008) find that the

institutional framework and the policy environment do act to constrain courts. Finally, I assume that except for domestic law, the country in which the case originated is not a factor for JCPC (See Table 2). These three assumptions point to the independence of the court from local jurisdictions. The court sits in London and have only ever physically ventured to the region once, when it convened in The Bahamas in 2017. Attorney General Allyson Maynard-Gibson states, “Today citizens throughout the Commonwealth and beyond know that their fundamental rights depend on a uniform application of the law by a judiciary that is guided by precedent and the rule of law, rather than politics or public opinion” (Jones Bahamas, February 21, 2017, para. 7).

Further, the Court of Appeal President Dame Anita Allen notes:

The ability of litigants in The Bahamas to appeal to the Privy Council affords them the opportunity to have their decisions reviewed and any errors corrected by a third level of experienced judges... This maintains the trust and confidence of the public in the justice system and meets the demand for the rule of law for fair and just results in every case. (para. 3)

## Data and Methodology

The dataset was compiled based on a review of 262 cases (N=262) on appeal to the JCPC from eleven Commonwealth Caribbean countries between 1966 and 2008 (cases from current British colonies in the Caribbean<sup>6</sup> are not included). As an appellate court, the JCPC is a court of law. Cases are adjudicated based on the laws of the state of origin. The facts of the cases are not at issue and, therefore, there is no need to control for case-specific factors. The sample period incorporates the 44-year span during which the majority of the Caribbean nations gained their independence from the U.K. (Only Jamaica and Trinidad and Tobago were independent before 1964; the remaining eight Caribbean states gained independence on or before 1983.) The dataset ends in 2008 because Barbados and Guyana replaced the JCPC with the Caribbean Court of Justice (CCJ) in that year. The period between 1966 and 2008, therefore, is the optimum period over which to examine appeals to the JCPC originating in Caribbean Commonwealth states.

My dataset is divided into three classes of appeals: capital punishment cases, fundamental rights and freedoms cases, and criminal procedure cases. All appeals are a constitutional or statutory challenge in which the government is a party as petitioner or respondent. This sample allows my analyses to uncover any variation in the distribution of outcomes among the three classes of cases. The unit of analysis is the ruling of the JCPC on each appeal. The dependent variable is whether the JCPC panel allows or dismisses (dichotomous) the appeal. The broad definitions of the terms allowed or dismissed are based on the ruling of the Law Lords on this substantive issue. In death penalty cases, the appeal is “allowed” if the sentence is set aside. In those cases, the JCPC may either remand the case to the lower court for resentencing or substitute the death penalty with life in prison.

I test the likely impact of the legal environment of the Law Lords of the JCPC on the likelihood of outcomes of appeals where the state is a party based on the following model:  

$$\ln(p/(1-p)) = \beta_0 + \beta_1 \text{ Political Ideology} + \beta_2 \text{ Human Rights Act} + \beta_3 \text{ Death Penalty Law} + \beta_4 \text{ Type of Case} + \epsilon$$

Here, I explicate the measure for ideology. In the U.S., the justices of the Supreme Court are evaluated by behaviorists and scored to identify ideological preferences and any shifts in the liberal, conservative, ideological spectrum—both individually and on the court as a whole. Epstein, Martin, Segal, and Westerland’s (2007) Judicial Common Space scores exemplify this measure. The scores are based on the ideology of the president who appointed the justice, along

with the speeches, written decisions, and other judicial writing of the justice. By contrast, measuring the ideology which underpins the policy preferences of the Law Lords is extremely difficult to do with any precision. Without a British equivalent of Judicial Common Space scores, I have operationalized this variable by using the ideological policy positions commonly identified with a prime minister from the majority political party. The Conservative Party is generally associated with the more traditional and conservative law and order approach to crime, and the Labor Party with traditionally the more liberal positions, including opposition to the death penalty. Several factors ground this assertion. First, the law suspending the death penalty was passed during a Labor Party administration. I begin in 1962, the year then Prime Minister Harold MacMillan made appointments of justices who were still on the JCPC in 1966 when the appeals in my sample were heard. Second, when the parliament voted in 1969 to ban the death penalty permanently, half of the Conservative members but only three Labor members voted against the measure (BBC Home, n.d.). Third, subsequent efforts to reinstate the death penalty have come from the Conservative Party (Willis, 1983; Rollnick, 1988; Watts, 2013). For this research, I choose to use the party identification of the appointing prime minister as the proxy for the ideology of the Law Lord indicating the more likely approach to the death penalty. This is justifiable on two grounds. First, the Executive is solely responsible for the nomination without parliament as a veto point, with ceremonial confirmation being given by the monarch (so far this has never been withheld). Second, until 2008, Law Lords were also members of the House of Lords, which involved them in the legislative process. Thus, it is not unreasonable to assume that the executive would want a member who shares its ideological preferences. In the American system, the importance of the appointments of Supreme Court justices cannot be overstated, as Segal and Spaeth (2002) point out: “Given the Supreme Court’s role as a national policy maker, it would boggle the mind if presidents did not pay careful attention to the ideology and partisanship of the potential nominees” (p. 180). A major distinction between the two courts is tenure. While justices on the U.S. Supreme Court have life tenure (unless they die, are removed for cause by the Senate, or step down), Law Lords have life tenure until they reach the mandatory retirement age of 75 years old (or die or step down).

In this study, the variable of party identification is operationalized by assigning the Law Lord the ideological marker of the majority party in parliament (Conservative, “0” or Labor, “1”) at the time of appointment. Table 1 displays a comparison of the number of JCPC appeals compared to the number of states from 1931 to 2015 and the balance of the court in 2016.

Table 1: Majority Party Appointments to the JCPC, 1962 to 2008 and JCPC in 2016

Number of Appointees	Conservative PM	Labor PM	Total
1962-2008	35	23	58
1962-1997	32	14	46
1998-2008	0	12	12
JCPC in 2016	10	3	13

The U.K. Parliament voted in 1998 to ratify the Sixth Protocol of the European Convention on Human Rights prohibiting capital punishment except “in time of war or imminent threat of war.” The Human Rights Act (HRA) came into effect in 2000. I operationalize this using the year the U.K. ratified the European Protocol on Human Rights (1998) and the passage of the Human Rights Act (2000). Starting in 1966, the dichotomous variable has a value “0” for the years preceding the passage of the Act in 2000, and “1” for the subsequent years, until 2008.

While the Caribbean nations retained the death penalty as law, Great Britain adjusted its laws pertaining to capital punishment. The Murder (Abolition of Death Penalty) Act of 1965 suspended the death penalty for murder in England, Wales, and Scotland (but not in Northern Ireland) for five years and substituted a mandatory sentence of life imprisonment. Each subsequent parliament was required to pass a resolution to make the effect of the Act permanent. In 1969, Home Secretary James Callaghan's motion to make the Act permanent was approved by both houses of parliament by the end of that year. The death penalty for murder was abolished in Northern Ireland in 1973. Although the death penalty was abolished permanently for murder in 1969, it was still in effect for other crimes. For example, it was not until 1971 that the death penalty was abolished for setting a fire in a dockyard, followed by the abolition for espionage in 1981, and piracy with violence and treason in 1998.

In this study, this independent variable is operationalized through the phased abolition of the death penalty in the U.K. The first phase is pre-1965, when British law did provide for the use of the death penalty, and is assigned the value "-1." The second phase is the period from 1965 to 1998, when the use was restricted as described herein, and is assigned the value "0." Finally, the third phase is post-1998, when the death penalty was removed for all crimes, and the British Parliament ratified the 6th Protocol of the European Convention on Human Rights. This phase is assigned a value "1."

I control for the case type adjudicated by the court. My sample includes three classes of cases, which provides the opportunity to analyze whether there is variation in the distribution of appeals that are allowed or dismissed. All cases were coded based on three broad categories of constitutional issues: death penalty/murder conviction, fundamental rights and freedoms, and criminal procedure. The absence of the death penalty is constant in the U.K. and European Union law. This contributes to internal validity and focuses on the death penalty cases. To analyze how the ideology of the justices and the presence (or absence) of human rights and death penalty statutes influence the decisions of the JCPC, I employ logistic regression models best suited to regress a dichotomous dependent variable (whether the court allows or dismisses an appeal) on the series of independent variables operationalized herein.

## **Analysis and Results**

Before analyzing and reporting the results of the statistical tests, some summary statistics are provided with interesting details about the cases in the sample and a more developed background against which to assess the statistical analysis. There are 262 appeals originating in the eleven nations that retain the JCPC as the final appellate court. The data in Table 2 shows the distribution of appeals among the eleven states.

Table 2: Commonwealth State, Year of Independence, and Number of Appeals from Each State

Country	Year of Independence	Number of Cases	Death Penalty Cases
Jamaica	1962	91 (34.6%)	63 (69%)
Trinidad & Tobago	1962	84 (31.9%)	51 (61%)
Barbados	1966	7 (2.7%)	7 (100%)
The Bahamas	1973	25 (9.5%)	12 (48%)
Grenada	1974	9 (3.4%)	5 (56%)
Dominica	1978	5 (2.3%)	2 (40%)
St. Lucia	1979	1 (1.1%)	1 (100%)
St. Vincent & the Grenadines	1979	7 (2.6%)	6 (86%)
Belize	1981	12 (4.6%)	12 (100%)
Antigua & Barbuda	1981	7 (2.6%)	4 (57%)
St. Kitts & Nevis	1983	8 (3%)	3 (38%)

Of the cases analyzed, 166 or 63.1 percent are death penalty cases; 41 or 15.97 percent are cases involving fundamental rights and freedoms, and 43 or 16.35 percent are criminal procedures involving serious crimes other than murder. Table 3 presents the decisions of the court by case type. The rulings result in the court allowing or dismissing the appeal. We can see that death penalty appeals are allowed most often (60.1%) when compared to criminal procedure appeal cases (46.5%) and fundamental rights and freedom appeals (40.5%). A closer look at these numbers using the passage of the Human Rights Act in the U.K. in 1998 as the cut point reveals that of the 133 appeals in the sample during the period 1966-2008 (42 years), 56 or 42.1 percent of the appeals were allowed. From 1999 to 2008 (9 years), of the 130 appeals, 88 or 67.7 percent of the appeals were allowed. This demonstrates a sharp increase in the number of appeals allowed after the U.K. passed the Human Rights Act in 1998.

Table 3: Rulings of the JCPC by Types of Appeal, 1966 to 2008

Ruling	Death Penalty	Fundamental Right & Freedoms	Criminal Procedure	Total
Overtaken	106 (60.1%)	17 (40.5%)	21 (46.5%)	144 (54.7%)
Upheld	70 (39.9%)	25 (49.5%)	23 (53.5%)	118 (45.3%)
Overtaken	106 (60.1%)	17 (40.5%)	21 (46.5%)	144 (54.7%)

Results of the analyses and the predicted probabilities are presented in models in Table 4. As hypothesized, the results show that there are influential factors in the court not connected to Caribbean nations but directly linked to the U.K.'s legal environment in which the JCPC operates. The first factor is the possible influence of the absence of a death penalty statute in the U.K. The results reveal that the statute is not a significant (0.226) influence on the court. The findings do not support my assertion that whether the death penalty is part of U.K. law is significant in the rulings of the JCPC.

Table 4: Predicted Probabilities Factors Influencing the JCPC

Court Decision	Model 1	Model 2
Death Penalty Cases	2.733913 (0.001)	2.835418 (0.000)
Court Ideology	0.6486733 (0.257)	-----
Death Penalty Law	2.007602 (0.226)	-----
Human Rights Act	2.591988 (0.087)	3.809193 (0.000)
LR chi2	32.39	30.41
Prob > chi2	0.0000	0.0000
R <sup>2</sup>	0.0894	0.0840
N	262	262

Note: Table entries are odd ratios with p-values in parentheses;  $p \leq 0.1$ ,  $p \leq 0.05$ ,  $p \leq 0.01$ . The second model drops the covariates “Court Ideology” and “Death Penalty Law.”

The U.K. adopted the Human Rights Act in 2000 and, as concluded by Shah and Poole (2009), British justices are more interested in human rights. I assert that this change in U.K. law increases the likelihood of the JCPC allowing an appeal against the death penalty. This variable approaches a level of significance (0.087), and when removed, the model strength depreciated significantly. When examining the cases before the Act was passed compared to those adjudicated after, the chances of the appeal being allowed are 3.8 times more likely than in cases where the death penalty was not involved. In other words, in comparing the three classes of cases (death penalty, rights and freedoms, and criminal procedure) in the sample, an appeal is 3.8 times (2.173988 to 6.674346) more likely to be granted in death penalty cases. Also, it is interesting to note that the rate at which appeals were heard by the court increased significantly after the passage of the Act in 1998. The rate increases from 2.8 cases per year from 1964 to 1998 to a rate of 9 per year for the subsequent nine years (from 1999 to 2008). This can be attributed to an increasing focus on death penalty appeals by non-government organization such as Human Rights Watch, Amnesty International, the International Commission Against the Death Penalty (launched by Spanish government), and the Death Penalty Project, based in London. The mission of the Death Penalty Project is to provide free quality legal services to those on death row.

I assert that the ideological preferences that Law Lords have on the court will affect their opinions. As discussed previously, courts that are viewed as more conservative tend to look more favorably on the death penalty, while courts that are more liberal tend to be less likely to support it. In the case of the JCPC, however, this expectation is not borne out by the results. The courts’ ideology is not a significant (0.257) factor.

Compared to the other two classes of cases included in the sample, death penalty cases have been particularly controversial. The results show that the type of case is highly significant (0.001), and death penalty appeal cases are 2.83 times (1.578607 to 5.089616) more likely to be successful than other cases. This provides strong support for the assertion that death penalty appeals are more likely to be allowed depending on the legal environment.

I use the best subset method to find the best model, which is referred to in the second column of Table 4. The co-variants “death penalty cases” and the “Human Rights Act” are both approaching the 0.000 level of significance. The explanatory power (Pseudo R<sup>2</sup>) of the models is not significantly different from Model 1 at 0.0894 and Model 2 at 0.085, and the likelihood ratio



(LR chi2) are 32.39 and 30.41, respectively, indicating that the predictive power of the models remains consistent. The removal of the co-variants “court ideology” and “death penalty law” do not significantly affect the model. The Human Rights Act has a significant effect on the odds of a successful appeal as opposed to those appeals heard before the Act was in place. The type of case also determines an increase in the odds ratio. The variable “Human Rights Act” boosts the odds of a successful appeal by 280 percent (95% CI: 2.173988 to 6.674346). The odds of a successful appeal case involving the death penalty is 183 percent (95% CI: 1.579607 to 5.089616) higher than the other classes of cases in the sample. In Table 5, Model 2 can correctly predict outcomes of appeals above the cutoff of 0.5 at 64.64%. Model 2 also shows a significant proportional reduction of error of almost 12 percent.

Table 5: Decision Classification Based on Model 2

Predicted Values Court Decisions	Actual Values of DP		Total
	0	1	
0	48	22	70
1	70	122	192
Total	118	144	262
Percentages and Calculations			
Percent Correctly Predicted = 64.64%			
Percent in Modal Category = 54.75%			
Proportional Reduction in Error = 11.78%			

Note: The cutoff score is 0.5

Further analysis of JCPC rulings from 2009 to 2016 confirms the trend. While the number of death penalty appeals decreases during this period, the likelihood of a successful appeal remains high (See Figure 2). The decrease may be attributed, in part, to a change in an earlier law requiring the death penalty in capital cases; while the death penalty remains a sentencing option, life in prison is now an alternative. This is in line with the trend around the world, which has seen a decline in mandatory death sentences as a result of judicial challenges (Cornell Law School, 2012).

In 2003, Caribbean leaders met in Jamaica to ratify the Agreement Establishing the Caribbean Court of Justice (CCJ). The decline in appeals is also partially attributable, therefore, to the fact that five states—Barbados, Belize, Dominica, Guyana, and St. Lucia—have replaced the JCPC with the CCJ. These states abolished appeals to the JCPC by 2016 but did not each establish a domestic final appellate court. Instead, these states acceded to the Caribbean Court of Justice (CCJ), established in in Trinidad and Tobago in 2001 as part of the deepening regional integration of the Caribbean Community (Caribbean Court of Justice, 2012). Saunders (2010) of the CCJ suggests that the question Caribbean states must consider before replacing the JCPC with the CCJ is whether, and if so to what extent, judicial accountability is compromised by the existence of a final municipal court that functions thousands of miles across the seas, whose judges do not live and have never lived in the municipality they serve and therefore whose experience of the consequences of the decisions they make is not shared by the people of the municipality? (p. 7)<sup>7</sup>

The Human Rights Act of the U.K. governs the Law Lords when they adjudicate as the Supreme Court of Judicature for the U.K. The discernable shift in the rulings of the same Law Lords sitting as the JCPC proximate to the time of the introduction and adoption of the Human

Rights Act is important. These findings suggest that the JCPC is concerned with the death penalty as a human rights issue and is willing to apply these standards to the death penalty laws of the Caribbean states. These results offer some empirical evidence of factors influencing the court to set aside the death penalty decisions appealed from the Commonwealth Caribbean, which has caused the controversy in those states. There is clear evidence that a petitioner in a death penalty case before the JCPC faces favorable odds that his appeal will be allowed (death penalty set aside), which goes against the decisions of the Courts of Appeal in the respective countries.

## Conclusion

When the Law Lords engage in constitutional interpretation, their rulings significantly influence the jurisprudence of the Commonwealth Caribbean states. With the use of the death penalty in the spotlight of human rights advocates, the debate about the legality regarding international law and usefulness in deterring crime continues. As their rulings are not subject to review by any other court, it raises the specter of policy making by the court (Stone Sweet, 2000). Where the court's rulings go against public policy and public sentiment, it forces states to adhere to or change their constitutions and laws to counter the court's rulings. The motivations and calculations of the court, albeit in good faith, depend on the legal environment in which the court operates (Roch & Howard, 2008). In the case of the JCPC, they are divorced from the population affected by their decisions.

Gillman (2001) points out that the entire legal system of the U.S. is grounded in the assumption that law matters in some fashion. Segal and Spaeth (2002) and other behaviorists are convinced that "the Supreme Court decides disputes in the light of the facts of the case vis-à-vis the ideological attitudes and values of the justices" (p. 86). I suggest that it is not unreasonable to extend this assumption to the U.K. This quantitative analysis offers another approach to improving our understanding of the motivating influences of the JCPC in death penalty appeals. The results demonstrate that there is support for my theory that legal environment influences the odds in favor of the petitioner for relief from the death penalty.

In the future, as more Caribbean states join the CCJ, the questions will persist about the court's decision-making process. Despite their shared colonial and legal history, the countries of the Caribbean are not a monolith. Leaders must ease the fears of death penalty opponents that the CCJ will not amount to anything more than a "hangman's court," allowing for regional states to carry out the death penalty (Richards, 2006). Will the court be sensitive to the whims and desires of the population? What will be the ideological approach of the CCJ, and how will that influence their decisions? How the CCJ rules on death penalty appeals will be important for further research. Currently, however, with only three countries using the court, the number of cases is too small for meaningful comparisons.

I have referenced the tensions in the literature on theories of decision-making. This research makes a modest contribution to understanding some of the factors influencing the JCPC on death penalty appeals from Commonwealth Caribbean states. In jurisprudential development, few developments are more important than the establishment of a new court and breaking with centuries of legal tradition. We are pressed to develop a better understanding of our legal systems—beyond death penalty cases—and examine both the policy implications of their composition and the legal environments that influence them.

### Notes

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<sup>1</sup> **Acknowledgements:** I wish to thank Amy Steigerwalt, Ph.D. at Georgia State University, Karla Heusner, doctoral student at the University of Miami, and the reviewers of this journal for their comments on earlier versions of the manuscript. My discussions with many other people greatly helped to improve earlier versions of this manuscript. Any errors are my own and should not tarnish the reputations of these esteemed persons.

<sup>2</sup> Antigua & Barbuda, Bahamas, Barbados, Belize, Dominica, Grenada, Jamaica, St. Lucia, St. Christopher & Nevis, St. Vincent & Grenadines, and Trinidad & Tobago.

<sup>3</sup> A contributing factor to the increased number of appeals since 2008 may be the increasing homicide rates in the region (United Nations Office on Drugs and Crime, 2013). Further, the literature indicates an increase in support and funding by international human rights organizations, facilitating appeals to the JCPC (Death Penalty Project, 2000). This requires further research.

<sup>4</sup> Stevens's discussion of the conflicting positions of the British Law Lords illustrates the tension between the formalist legal tradition (e.g., legal model) and behaviorist theory (e.g., attitudinal model).

<sup>5</sup> A Governor General is the Queen's representative and the constitutional head of state in a Commonwealth country.

<sup>6</sup> Anguilla, British Virgin Islands, Bermuda, Cayman Islands, Monserrat, and Turks and Caicos.

<sup>7</sup> The domestic decision of an individual state to trade one extraterritorial court in London for another located in Trinidad & Tobago is an important question in and of itself, but it is outside the scope of this project.

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