THE LONG ROW: EXAMINING THE CONTEMPORARY, CRUEL, AND UNUSUAL DEATH PENALTY

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Abstract

Over the past four decades, judicial proceedings surrounding implementation of the death penalty have expanded in requirements and resources in order to give a death sentence the scrutiny and gravity it is due. One result of such heightened scrutiny is that the time between imposition and execution of a death sentence has grown into decades of appellate review, stalled proceedings, and litigation of legal claims, and trial error, all whilst the prisoner resides on death row, awaiting possible execution. An issue that has been the subject of much scholarly debate for the past twenty years is whether extended incarceration on death row can itself transpire into a constitutional claim against imposing the death sentence.

Using the most current statistics and cases, this article adds to death penalty legal scholarship by offering an updated view of the present-day American death penalty. Surveying the current framework of Eighth Amendment claims, this article seeks to expand upon the much-debated legal issue of whether decades on death row, awaiting execution, is a cruel and unusual punishment subject to Eighth Amendment scrutiny.

Furthermore, data collected for this article will illustrate that decades spent on death row is no longer a novel or rare occurrence, but rather is now characteristic of the American death penalty and deserving of further judicial examination.

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TABLE OF CONTENTS

I. INTRODUCTION

Vernon Madison was a 69-year-old death row inmate living with vascular dementia—the result of a series of near fatal strokes. His condition left him legally blind, incontinent, unable to walk independently or recite the alphabet past the letter "G.," and disoriented as to place and time.[1] Madison was sentenced to death for killing a police officer in 1985, though due to his permanent brain damage, he retained no memory of the murder.[2] After three trials, two overturned convictions, and a judicial override to impose a third death sentence, he remained on Alabama's death row until his natural death in February 2020.[3]

Madison was one among a growing number of aging prisoners who reside on death row for decades, essentially carrying out a life sentence while awaiting execution.[4] The result is not just an increasingly geriatric death row, but also the legal, practical, and ethical issues surrounding the executions, if and when they actually occur. In 2018, the attempted executions of Doyle Hamm and Alva Campbell garnered attention when, due to their age and infirmities, prison medical staff had to halt procedures because they could not

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[1] Corinna Barrett Lain, *Madison and the Mentally Ill: The Death Penalty for the Weak, Not the Worst*, 31 REGENT U.L. REV. 209, 210-11 (2018-2019).

[2] Brief of Petitioner at 10, Madison v. Alabama, No. 17-7505, 2018 WL 2383228 (Filed May 10, 2018) (As a result of multiple strokes, Madison suffered from retrograde amnesia; his examining physician testified that "Mr. Madison cannot independently recall the facts of the offense; the sequence of events from the offense, to his arrest, to his trial or previous legal proceedings in his case; or the name of the victim.")

[3] Ivana Hrynkiw, *Vernon Madison, one of the longest-serving Alabama Death Row inmates, dies*, www.al.com (Feb. 24, 2020). https://www.al.com/news/mobile/2020/02/vernon-madison-one-of-the-longest-serving-alabama-death-row-inmate-dies.html. *See also* Barrett Lain *supra* note 1, at 210-11. Madison's case was before the Supreme Court as a competency-to-be-executed case; the Court ruled in favor of Madison, extending Eighth Amendment protections to people with dementia; *see* Madison v. Alabama, 138 S. Ct. 718 (2019).

[4] *See e.g.*, Death Penalty Information Center [hereinafter "DPIC"]: https://deathpenaltyinfo.org/death-row/death-row-time-on-death-row/examples-of-prisoners-with-extraordinarily-long-stays-on-death-row

find suitable veins for administering lethal injection.[5] Hamm's attempted execution lasted over two hours as medical personnel attempted to place an IV and left him with more than a dozen puncture wounds. Hamm's execution was stayed, and Campbell died of natural causes before his rescheduled execution could take place.[6]

In the public and legal discourse surrounding the death penalty, the issues that currently arise in debates and in courtrooms go beyond the questions of guilt or innocence and involve the broader issue of the general constitutionality of the execution. On America's death row, delays between sentencing and execution have grown from years to decades; however, the Supreme Court has consistently declined to consider the Eighth Amendment[7] implications of a life on death row awaiting execution. Given these trends, we may expect fewer executions, but also more botched efforts to execute, more claims of incompetency to be executed,[8] and images of elderly prisoners assisted to the execution chamber after decades of growing old in death row confinement.[9]

This article will discuss how a present-day death sentence has transformed into a sentence of life on death row with the possibility of execution,[10] and as such, has become unconstitutional

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[5] Mary Kate DeLucco, *How old is too old, how sick is too sick to be executed?* Death Penalty Focus, Apr. 13, 2018. https://deathpenalty.org/blog/old-old-sick-sick-executed/.

[6] *Id.*; *see also* DPIC: https://deathpenaltyinfo.org/news/alva-campbell-terminally-ill-prisoner-who-survived-botched-execution-attempt-dies-on-ohio-death-row

[7] U.S. CONST. AMEND. VIII: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

[8] See *Madison supra* note 3*; see also Hubbard v. Campbell*, 379 F.3d 1245, 1246 (11th Cir. 2004) (74-year old James Hubbard argued that due to his "dementia and advanced age" he was no longer competent to be executed); petition for cert denied *Hubbard v. Campbell*, 542 U.S. 958 (2004).

[9] Elizabeth Rapaport, *A Modest Proposal: The Aged of Death Row Should Be Deemed Too Old to Execute*, 77 BROOKLYN L. REV. 1089 (2012) (describing 76-year old death row inmate Clarence Ray Allen who, prior to his execution, suffered both a heart attack and stroke and was physically assisted to his execution by four "burly" prison guards).

[10] Jeffrey Omar Usman, *The Twenty-First Century Death Penalty and Paths Forward*, 37 MISS. C. L. REV. 80, 83-85 (2019) (noting that, while in 2018

under the Eighth Amendment. Part II of this article summarizes the modern principles that guide the Court in analysing whether a punishment is cruel and unusual. Part III describes the substance of the *Lackey* claim, which contends that decades of delay prior to execution amounts to cruel and unusual punishment. Part IV summarizes the one successful delay claim, in which a California district court held that the state's post-conviction process had become so plagued by "systemic delay and dysfunction" that it violated the Eighth Amendment.[11] However, the Ninth Circuit subsequently reversed this decision. Part V examines how, based on the Court's current interpretation of the Cruel and Unusual Punishments Clause, decades on death row, ending in an execution, is a cruel, unusual, excessive, and arbitrarily inflicted punishment. Following the oft-quoted motto "justice delayed is justice denied," Part VI discusses how such lengthy delays undermine, and possibly undo, the primary justification for the death penalty: retribution. And lastly, in recognizing that the Court is unlikely to soon consider the validity of unconstitutional delay (*Lackey)* claims, this article concludes with alternative solutions to addressing the ever-increasing time spent on death row, awaiting execution, and the unconstitutional executions that occur as a result.

II. A MODERN INTERPRETATION OF "CRUEL AND UNUSUAL."

In 1958's *Trop v. Dulles,* the Supreme Court held that the Cruel and Unusual Punishments Clause while hardly self-defining, "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[12] This "evolving standards" approach is based on the theory that as society's

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there were approximately 2,800 persons living on death row, the number of nationwide executions on an annual basis had fallen to 20 persons per year, and some active death penalty states have not executed anyone within the last 5 years).

[11] Jones v. Chappell, 31 F. Supp. 3d 1050 (C.D. Cal. 2014) (vacating defendant's death sentence because California's death penalty system had become plagued by excessive delays, making a death sentence "life in prison with the possibility of execution"); *rev'd sub nom,* Jones v. Davis, 806 F.3d 539 (9th Cir. 2015).

[12] Trop v. Dulles, 356 U.S. 86 (1958) (holding that denationalization for the crime of desertion violates the Eighth Amendment)

standards change, so too do the limitations of the Eighth Amendment. Though born out of a desire to outlaw tortious methods of punishment,[13] a modern application of the clause "was articulated in 1972's *Furman v. Georgia*.[14] In a concurring opinion, Justice Brennan articulated four principles integral to determining whether a particular punishment is "cruel and unusual:" a punishment must not be (1) degrading to human dignity;[15] (2) arbitrarily inflicted;[16] (3) unacceptable to contemporary society;[17] and (4) excessive.[18]

Since that time, capital punishment has continued to reform in order to adhere to this evolving standard by not only paring back the types of crimes and criminals eligible for the death penalty,[19] but also by creating a system of capital litigation that strives to ensure due process and accuracy to those facing execution.[20]

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[13] Gregg v. Georgia, 428 U.S. 153, 169-71 (1976) (describing the history and application of the Cruel and Unusual Punishment Clause, focusing on particular methods of execution).

[14] Furman v. Georgia, 408 U.S. 238 (1972) (holding that various states' death penalty procedures were being imposed arbitrarily and discriminatorily, resulting in a four-year moratorium on capital punishment).

[15] *Id*. at 273. ("Even the vilest criminal remains a human being possessed of common human dignity.")

[16] *Id*. at 274; *see also Gregg*, 428 U.S. at 198 (Punishment is arbitrary if it is imposed "capriciously," or "under the influence of passion or prejudice.")

[17] *Id*. at 277; *see also Gregg*, 428 U.S. at 173. ("[A]n assessment of contemporary values concerning the infliction of a challenged sanction is relevant to the application of the Eighth Amendment.")

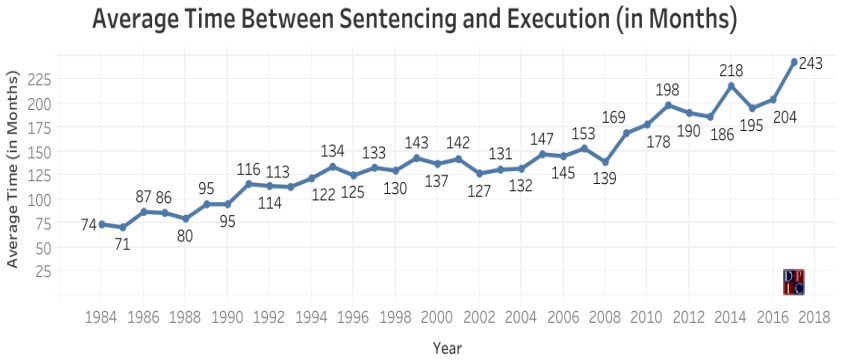
[18] *Id*. at 279; *see also Gregg*, 428 U.S. at 173. (A punishment is excessive if it "involves unnecessary and wanton infliction of pain").

[19] Coker v. Georgia, 433 U.S. 584 (1977) (holding that the death penalty is a disproportionate penalty for the crime of rape of an adult woman); Enmund v. Florida, 458 U.S. 782 (1982) (felony murder); Ford v. Wainwright, 477 U.S. 399 (1986) (persons who are insane at the time of execution); Atkins v. Virginia, 536 U.S. 304 (2002) (intellectually disabled, formerly "mentally retarded"); Roper v. Simmons, 543 U.S. 551 (2005) (juveniles).

[20] Brent Newton, *Furman at Forty: The Slow Wheels of Furman's Machinery of Death*, 13 J. APP. PRAC. & PROCESS 41, 47-48 (2012) (describing the post-*Furman* bifurcated death-penalty system which requires separate guilt and punishment phases, the weighing of aggravating and mitigating circumstances, and "meaningful appellate review" following every death sentence).

A. Time on Death Row

One effect of this enhanced due process for death cases is that on America's death row, delays between sentencing and execution now average just over twenty years,[21] with some delays surpassing forty years awaiting execution.[22] And the time between sentence and execution has steadily increased over the past three decades, as illustrated by the chart below.[23]



According to a 2017 Bureau of Justice Statistics report, of the twenty-three prisoners executed in 2017, sixteen had been sentenced in 1999 or earlier, and out of the 105 prisoners "removed from death row" by means other than execution, twenty-one died

[21] Bureau of Justice Statistics, U.S. Dep't. of Justice [hereinafter "Bureau"], 2017 – Table 3 (In 2017, the average time between sentencing and execution was 20.25 years). Available at: https://www.bjs.gov/content/pub/pdf/cp17sf.pdf. Note: the BJS calculations likely underestimate the actual number of years, as data is "calculated from the most recent sentencing date." *See also* Newton *supra* note 20, at 42 (confirming how length of delay is calculated).

[22] *See* DPIC *supra* note 4; *see also* Bureau 2013 – Table 12, available at: https://www.bjs.gov/content/pub/pdf/cp13st.pdf (Noting that 16 percent of those sentenced to death between 1977-2013 were executed, 46 percent were removed from death row either by appeal, commutation, or "death by other than execution," and the remainder are still there. Also noting that 4 persons included in this calculation were sentenced to death prior to 1977).

[23] Chart created by and available at DPIC: https://deathpenaltyinfo.org/death-row/death-row-time-on-death-row.

from natural causes.[24] Further evidence of the growing elderly population is seen in previous BJS reports which show that ten years ago, only 2.6 percent of death row prisoners were 65 or older.[25] By 2016, prisoners over 65 made up 8 percent of the death row population.[26] This increase is not due to a surge in capital crimes by the elderly,[27] but rather is the result of present-day capital punishment procedures.[28]

III. THE *LACKEY* ARGUMENT

In 1995, Clarence Lackey petitioned the Supreme Court to consider the constitutionality of his pending execution after living on Texas's death row for seventeen years.[29] His "important and novel" question was whether, after spending almost two decades on death row, his execution would now constitute cruel and unusual punishment.[30] Counsel for Lackey and engineer of the *Lackey* claim, Brent Newton, described the claim's two components: first, the state's administration of the execution, after keeping a prisoner under extreme death row conditions for such a lengthy period of time, was excessive and "more punishment than the state was entitled to under the Eighth Amendment;" and second, neither of the two principle purposes of the death penalty (retribution and deterrence of future crimes) would be meaningfully served after such a long delay between sentencing and execution.[31] The Supreme Court denied certiorari review, but Justice Stevens issued a

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[24] Bureau *supra* note 21, 2017 – Table 2.

[25] Bureau 2009 – Table 5: https://www.bjs.gov/content/pub/pdf/cp09st.pdf

[26] Bureau 2016 – Table 4: https://www.bjs.gov/content/pub/pdf/cp16sb.pdf

[27] *Id*. This table shows that while 8 percent of prisoners on death row were over 65, these prisoners represent 0.0 additions to death row in 2016.

[28] *See* Newton *supra* note 20, at 46-54 (describing how the underlying cause of lengthy delays is the "protracted appellate process.")

[29] Petition for Writ of Certiorari, Lackey v. Texas, No. 94-8262, 1995 WL 17904041 (Filed Feb. 27, 1995); claim brought pursuant to 28 U.S.C. § 1257.

[30] Lackey v. Texas, 514 U.S. 1045 (1995).

[31] *See* Newton *supra* note 20, at 55.

memorandum citing concern that such a delay "defeated the purposes of the death penalty."[32] However, he concluded that while Lackey's claim, with "its legal complexity and its potential for far-reaching consequences" was ideal for examination, lower courts, "serv[ing] as laboratories," should study the issue before it may be addressed by the Court.[33]

Subsequently, *Lackey* petitions were submitted by numerous death row prisoners in state and federal courts, arguing that execution following a lengthy stay on death row violates the Eighth Amendment's ban on cruel and unusual punishment. The Supreme Court has denied certiorari review to every *Lackey* petition (with a recurring trend of Justice Breyer dissenting and Justice Thomas often concurring),[34] and to date, only one case arguing unconstitutional delay has succeeded in lower courts.[35] Despite its almost complete lack of success, the components of the *Lackey* claim have remained "important" and powerful enough to sustain the attention of a Supreme Court Justice for over two decades, while simultaneously remaining either too procedurally difficult or too unpersuasive to find merit in lower courts.

IV. THE *LACKEY* EXPERIMENT

A few years after Clarence Lackey's petition was denied, the Supreme Court was presented with an almost identical argument from petitioner Thomas Knight, arguing that his twenty-five years on Florida's death row had rendered his pending execution unconstitutional.[36] Justice Thomas issued a separate concurring opinion to express a lack of constitutional support and Court precedent "for the proposition that a defendant can avail

[32] *Lackey*, 514 U.S. at 1045.

[33] *Id.* at 1045, 47.

[34] Knight v. Florida, 528 U.S. 990 (1999); Foster v. Florida, 537 U.S. 990 (2002); Valle v. Florida, 564 U.S. 1067 (2011); Thompson v. McNeil, 556 U.S. 1114 (2009), Johnson v. Bredesen, 558 U.S. 1067 (2009); Sireci v. Florida, 137 S. Ct. 470 (2016); Ruiz v. Texas, 137 S. Ct. 1246 (2017); Jordan v. Mississippi, 138 S. Ct. 2567 (2018) (Non-exhaustive list).

[35] *See supra* note 11.

[36] Petition for Writ of Certiorari, Knight v. Florida, No. 98-9741, 1999 WL 34997004 (Filed June 9, 1999); claim brought pursuant to 28 U.S.C. § 1257.

himself…of collateral procedure and then complain when his execution is delayed."[37] Upon considering the uniform rejection of *Lackey* claims in lower courts, Justice Thomas determined that "the Court should consider the [*Lackey*] experiment concluded."[38]

Every *Lackey* claim hits one of two walls when it lands before the judges of state and federal courts. One, any delay is due to the prisoner choosing to pursue all avenues of review and is, therefore, self-inflicted and cannot violate the Eighth Amendment.[39] And two, even if the Eighth Amendment does forbid excessively delayed executions, lower courts presented with *Lackey* claims consistently find them barred on procedural grounds, either as successive habeas petitions under the Anti-Terrorism and Death Penalty Act of 1996 ("AEDPA"),[40] or as new constitutional law under *Teague v. Lane*.[41] The procedural bars have been scrutinized by judges and legal scholars, and each, while arguing in favour of some interpretive loopholes, seem to have decided that even if it could be done, the odds are slim.[42]

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[37] *Knight,* 528 U.S. at 990 (Thomas, J., concurring).

[38] *Id*. at 992.

[39] *See e.g.*, Smith v. State, 280 Mont. 158, 185 (Mont. 1996) ("Smith has benefited from the appellate and federal review process of which he has availed himself and which has resulted in the delay."); McKenzie v. Day, 57 F. 3d 1461, n. 21 (9th Cir. 1995) ("[T]o the extent petitioners choose to delay execution in the hope of obtaining relief, that is a choice they make for themselves.")

[40] 110 STAT. 1214 (1996) (codified in sections of 28 U.S.C.) ("AEPDA" created a statute of limitations for filing initial habeas petitions and imposed restrictions on bringing second or successive federal habeas petitions)

[41] Teague v. Lane, 489 U.S. 288 (1989) (holding that federal habeas petitioners cannot retroactively apply new constitutional law). *See e.g.,* Allen v. Ornoski, 435 F.3d 946 (9th Cir. 2006) (*Lackey* claim barred as successive habeas petition under AEDPA); Ceja v. Stewart, 134 F.3d 1368 (9th Cir. 1998) (barred as successive habeas petition); Smith v. Mahoney, 611 F.3d 978 (9th Cir. 2010) (rejecting *Lackey* claim on *Teague* grounds).

[42] Bryan A. Stevenson, *The Politics of Fear and Death: Successive Problems in Capital Federal Habeas Corpus Cases*, 77 N.Y.U.L. REV. 699, 762-63 (2002) (describing the Catch-22 created by AEDPA as *Lackey* claims are not ripe to bring in an initial habeas petition but also barred as a successive habeas petition); *see also* J. Richard Broughton, *Jones, Lackey, Teague*, 48 J. MARSHALL L. REV. 961 (2015) (discussing how *Lackey* claims, if found to violate the Eighth Amendment, are barred as new constitutional law).

While delay has become an important strategy in avoiding execution, delays are due in substantial part to the structure and complexity of the procedures at play.[43] Considering who or what is at fault evolves into a choice between seeing the petitioner as a "manipulator" making strategic choices to avoid execution, or a "condemned human being" compelled by human nature to fight for their life.[44] Nearly every *Lackey* opinion, no matter the issuing court, exhibits a trend of the majority attributing delay to either deliberate manoeuvring[45] or to the normal and necessary review process;[46] while the dissent often attributes delay to the faulty (or worse) conduct by the state.[47]

One problem with the prisoner's-choice argument is it assumes all claims seeking review are frivolous, strategic tactics to prolong execution, when more often than not, additional litigation is

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[43] *See* Usman *supra* note 10, at 89-90; *see also* Newton *supra* note 20, at 53 *(*Delay is unavoidable due to "multiple layers of direct and collateral appeals" and the "substantive and procedural complexity" of the appellate process).

[44] *See* Rapaport *supra* note 9, at 1099-1100 (2012); *see also* Stevenson *supra* note 42, at 723-34 (discussing the history and myth of the criminal offender and lawyer systemically abusing the system); *see also Valle*, 564 U.S. at 1068 (Breyer, J., dissenting) (stating that courts cannot expect a defendant not to fight for their life when the procedures allow them to).

[45] Knight v. Florida, 528 U.S. 990, 991 (1999) (Thomas, J., concurring) (delay due to petitioner taking advantage of "[the Court's] Byzantine death penalty jurisprudence"); *Thompson*, 556 U.S. at 1117 (Thomas, J., concurring) (delay due to petitioner's "litigation strategy"); McKenzie v. Day, 57 F. 3d 1461, 1466 (9th Cir. 1995) (delay due to appellant availing himself of all review procedures available to him. "It would be a mockery of justice" to allow delay to accrue into a constitutional claim).

[46] *Knight*, 528 U.S. at 992 (Thomas, J., concurring) ("[T]hose who accept our death penalty jurisprudence as a given also accept the lengthy delay between sentencing and execution as a necessary consequence."); Chambers v. Bowersox*,* 157 F.3d 560, 570 (8th Cir. 1998) ("[D]elay, in large part, is a function of the desire of our courts, state and federal, to get it right").

[47] *Elledge*, 525 U.S. at 945 (Breyer, J., dissenting) (23-year delay due to state's "faulty procedures"); *Foster,* 537 U.S. at 991 (Breyer, J., dissenting) (33-year delay due to "constitutionally defective" trial); *Thompson*, 556 U.S. at 1114 (Stevens., J) (32-year delay due to trial error and ineffective assistance of counsel); *McKenzie,* 57 F.3d at 1471 (Norris, J., dissenting) (delay due to trial judge's erroneous jury instruction and ex parte meeting with prosecutor).

necessary to address reversible error at trial.[48] Additionally, some judges and scholars suggest that fault is irrelevant when assessing the Eighth Amendment implications of a life on death row.[49] One basis for this reasoning is that recognizing the waiver of a constitutional right presumes the existence of the very right that courts, when they reject *Lackey* claims, continuously deny: an Eighth Amendment right against excessively delayed execution.[50] Another proffered reason for finding fault irrelevant is that, while constitutional rights are generally susceptible to waiver, relinquishing the right to be free of cruel and unusual punishment does not transform an unconstitutional punishment into a constitutional one.[51]

Additionally, judges and justices have expressed concern that granting a *Lackey* claim would encourage courts to sacrifice accuracy in order to speed up the process and avoid an Eighth

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[48] *See* Barrett Lain *supra* note 1, at 210 and fn. 24 (Noting the top two reasons for reversal in capital cases are (1) prosecutorial misconduct and (2) ineffective assistance of counsel). In Vernon Madison's case, his first conviction was overturned because of Batson violations; the second was overturned because the prosecutor put on inadmissible expert testimony. At Madison's third trial, the jury imposed a life sentence and the trial judge overrode the jury's decision).

[49] *Thompson*, 556 U.S. at 1120 (Breyer, J., dissenting) ("I do not believe that petitioner's decision to exercise his right to seek appellate review of his death sentence automatically waives a claim that the Eighth Amendment proscribes a delay of more than 30 years.") (citing Gregg v. Georgia, 428 U.S. 153, 198 (1976); s*ee also* Russell L. Christopher, *The Irrelevance of Prisoner Fault for Excessively Delayed Execution*, 72 WASH & LEE L. REV 1, 12-14 (2015) ("Prisoner fault lacks an underlying rationale related to the concerns of the Eighth Amendment and thus should be irrelevant in assessing the constitutionality of excessively delayed executions."); s*ee also* Carol S. Steiker & Jordan M. Steiker, *Capital Punishment: A Century of Discontinuous Debate*, 100 J. CRIM L. & CRIMINOLOGY 643 (2010) (rejecting the view that "seeking enforcement of constitutional guarantees forfeits the right against excessively prolonged death-row incarceration").

[50] *See* Christopher *supra* note 49, at 56; *see also* Johnson v. Bredesen, 558 U.S. 1067,1072 (2009) (Thomas, J., concurring) (stating that the *Lackey* claim "has no constitutional foundation.")

[51] *Id*. at 62 (noting that such a waiver would render any punishment, such as torture, constitutional "when reformed through the power of choice.")

Amendment claim.[52] The finality and irrevocability of death requires that every protection be afforded a capital defendant and, as such, some delay is inevitable and needed to ensure these protections. Efforts to accelerate the process, such as AEDPA, have been unsuccessful in decreasing delays or in expediting the habeas review process.[53] In the year before AEDPA, the average time between sentencing and execution was just over eleven years; two decades later, it is over twenty years.[54] And other legislative efforts to expeditiously resolve post-conviction actions, such as Florida's Timely Justice Act, have met with considerable controversy[55] for fear they "will exacerbate existing problems in a system already plagued by error and a lack of funding and resources."[56] The criticism is that such legislative action is merely a band-aid on

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[52] Knight v. Florida, 528 U.S. 990, 992 (1999) (Thomas, J., concurring) ("The claim might…provide reviewing courts a perverse incentive to give short shrift to a capital defendant's legitimate claims so as to avoid violating the Eighth Amendment."); McKenzie v. Day, 57 F. 3d 1461, 1467 (9th Cir. 1995) ("Sustaining [McKenzie's claim] would, we fear, wreak havoc with the orderly administration of the death penalty…by placing a substantial premium on speed rather than accuracy.")

[53] *See* Newton *supra* note 20, at 53 (stating, with regards to AEDPA, "[a]ttempts to expedite capital appeals during recent decades have failed").

[54] Bureau 1996 – Table 11 (Dec. 1996): https://www.bjs.gov/content/pub/pdf/cp96.pdf.

[55] FLA. STAT. ANN. § 924.055 (West Supp. 2016); Susanna Bagdasarova, *Florida Accelerates Death Penalty Process with "Timely Justice Act*," AM. BAR ASS'N DEATH PENALTY REPRESENTATION PROJECT (June 1, 2013) (While the Act seeks to provide capital defendants with effective trial counsel, it doubles qualified attorneys' capital caseload and does not provide relief for those defendants who previously received ineffective representation. Most controversially, the Act requires the governor to sign an execution warrant within thirty days of the clemency process's conclusion and to schedule an execution within 180 days. As most delays accrue during the appellate process, this expedited clemency review does nothing to alleviate delay): https://www.americanbar.org/groups/committees/death_penalty_representation/project_press/2013/summer/florida-accelerates-death-penalty-process-with-timely-justice-ac/

[56] *Id*; *see also* Krista MacKay, *The Rise of Systemic Pre-Execution Delay: Proposing a Solution to Decades on Death Row*, 68 FLA. L. REV. 1163, 1184 (2016) (noting that Florida has the highest number of exonerations in the country and the Timely Justice Act does nothing to address or protect against wrongful convictions)

systemic failures, rather than an adequate and effective solution. The result is that legitimate constitutional questions are barred from review.

A. Jones v. Chappell

Jones v. Chappell is the first and only case in which a court granted relief under a theory that protracted pre-execution delay violates the Eighth Amendment.[57] The *Jones'* court focused on the systemic delays inherent in California's death penalty system rather than on the individual pain and suffering of Jones himself.[58] This is distinguished from other *Lackey* claims where the focus has been on the single petitioner rather than on a given state's death penalty procedures.[59] The district court held that delays in the California capital punishment scheme made an inmate's execution so unlikely that a death sentence had been "quietly transformed into one no rational jury or legislature could ever impose: life in prison, with the remote possibility of death."[60]

The court also considered the mental anguish inflicted on prisoners, stating that "[a]llowing this system to continue to threaten Mr. Jones with the slight possibility of death violates the Eighth Amendment's prohibition against cruel and unusual punishment."[61] This acknowledgment of the merits of a prolonged delay claim (the cruelty of the mental suffering and the Eighth Amendment implications) suggests that claims of unconstitutional delay warrant a more meritorious examination as the years on death row continue to increase.

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[57] *See supra* note 11; *rev'd sub nom,* Jones v. Davis, 806 F.3d 539 (9th Cir. 2015) (holding that Jones' claim was barred as novel constitutional law under *Teague v. Lane*).

[58] Jones v. Chappell, 31 F. Supp. 3d 1050, 1062 (C.D. Cal. 2014) (holding that the California death penalty had essentially become a lottery system in which whoever was selected for execution depended on how much time it took them to proceed through California's "dysfunctional post-conviction review process.")

[59] *See* Broughton *supra* note 42, at fn. 17 (citing a brief submitted in opposition to Texas petitioner relying on *Jones* for support of his *Lackey* claim, stating, "Texas is not California.")

[60] *Jones*, 31 F.Supp.3d at 1053.

[61] *Id*.

While delay is attributed to the legal process, these heightened procedures are the result of society's interest in giving defendants a trial untainted by constitutional error. The delays may simultaneously be evidence of both a well-intentioned system—striving to ensure reliability and accuracy—and one riddled with error,[62] racial bias,[63] politically-motivated prosecutors,[64] and incompetent criminal defense lawyers.[65] In either view, the concern that a *Lackey* claim would result in "a rush to the gallows" is unlikely.[66]

V. DECADES ON DEATH ROW ENDING IN EXECUTION IS CRUEL, UNUSUAL, EXCESSIVE, AND ARBITRARILY INFLICTED

Because procedural obstacles have generally hindered an addressing court from discussing the substantive merits of a *Lackey* claim,[67] it is important to clarify what the claim is not intending to

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[62] *See* DPIC database of exonerations since 1973: https://deathpenaltyinfo.org/policy-issues/innocence

[63] Flowers v. Mississippi, 139 S. Ct. 2228 (2019) (six convictions overturned due to prosecutor unconstitutionally excluding black jurors from trial). *See e.g.,* Bryan A. Stevenson & Ruth E. Friedman*, Deliberate Indifference: Judicial Toleration of Racial Bias in Criminal Justice*, 51 WASH. & LEE. L. REV. 509 (1994) (discussing how racial discrimination is tolerated by the courts, particularly in its peremptory challenge jurisprudence)

[64] *See e.g.,* Jeffrey L. Kirchmeier, et al., *Vigilante Justice: Prosecutor Misconduct in Capital Cases*, 55 WAYNE L. REV. 1327 (2009). *See also* DPIC: https://deathpenaltyinfo.org/news/nevada-man-convicted-by-prosecutorial-misconduct-and-woefully-inadequate-defense-counsel-released-after-33-years-on-death-row.

[65] *See* Newton *supra* note 20, at fn. 47 (quoting Justice Ginsberg, "I have yet to see a death case, among the dozens coming to the Supreme Court on the eve of execution petitions, in which the defendant was well represented at trial.") *See e.g.,* Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime But for the Worst Lawyer*, 103 YALE L.J. 1835 (1994).

[66] *See* Rapaport *supra* note 9, at 116 (Professor Rapaport bases this conclusion on the "sluggishness" of the death penalty system in other countries with similar strict due process standards, such as Jamaica, and also on "the history of protracted multitiered litigation in death cases necessary to satisfy contemporary due process and human rights standards.")

[67] *See e.g.*, McKenzie *supra* note 39, at 1488 (Norris, J., dissenting) ("The majority focuses on the petitioner's failure to bring his *Lackey* claim

assert. The *Lackey* claim is not asserting that either the death penalty or a sentence of life in prison is unconstitutional, nor that a long delay between sentencing and execution is per se unconstitutional. A *Lackey* claim is stating (1) that decades of living in the harsh conditions of death row, under the anxiety of a pending execution,[68] is cruel and unusual and exceeds the State's authorized punishment; and (2) that such lengthy delays greatly weaken, or even eliminate, the punishment's goal of retribution.[69] If there is merit to Lackey's arguments (and numerous judges and scholars cited here firmly believe there is) then the result is that states are executing individuals in violation of the Eighth Amendment.

A. Cruel

The *Furman* court's interpretation of "cruel" requires that punishments be consistent with the fundamental principle behind the Cruel and Unusual Punishments Clause: "that even the vilest criminal remains a human being possessed of common human dignity."[70] Punishments are cruel when they involve torture or a "lingering death," and the word "cruel" implies something that is

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sooner…Delay is only one component of the claim; the other essential component is ignored by the majority – the act of execution following the delay.")

[68] Affidavit of Clarence Lackey *supra* note 29, at 6. ("Preparing for death is a draining experience, both emotionally and spiritually. It should be something that a person has to do only once in a lifetime. I have had to do that many times [due to five separate execution dates]"); *see also* Amy Smith, *Not Waiving but Drowning: The Anatomy of Death Row Syndrome and Volunteering for Execution*, 17 B.U. PUB. INT. L.J. 237, 250 (2008) (discussing the physical confinement and psychological responses of death row prisoners, referred to as Death Row Syndrome, and the unique anxiety of "waiting for capital punishment well before" actual death.)

[69] Johnson v. Bredesen, 558 U.S. 1067, 1114 (2009) (Stevens, J.) ("[D]elaying an execution … diminishes whatever possible benefit society might receive from petitioner's death. It would therefore be appropriate to conclude that a punishment of death after significant delay is 'so totally without penological justification that it results in the gratuitous infliction of suffering.'" (citing Gregg v. Georgia, 428 U.S. 153, 183 (1976)).

[70] Furman v. Georgia, 408 U.S. 238, 273 (1972) (The significance of "cruel" punishments is that "they treat members of the human race as nonhumans, as objects to be toyed with and discarded.")

"more than the extinguishing of life."[71] In more recent cases, the Court has limited its analysis of "cruel" punishments to those concerning a states' method-of-execution protocol, and whether any physical pain is likely to be inflicted or felt at the time of execution.[72]

Recent research has examined the compatibility of the *Furman* court's subjective "evolving standards" approach with the original meaning of "cruel" punishments, which are presumably based on the cruel intent of the punisher.[73] Professor John Stinneford contends that the original intention behind the word "cruel" was to prohibit punishments that had a "cruel effect" on the prisoner versus those inflicted with cruel intent.[74] A punishment is cruel if its effects are "unjustly harsh in light of longstanding prior punishment practice."[75] Meaning, a modern punishment may be cruel if its effects are "unjustly harsh;" it need not be motivated by cruel intent.

Decades of pre-execution delay in death row (usually solitary) confinement is a relatively current feature of capital punishment, but the *Lackey* question of whether such delay may be considered "cruel" is not a completely novel question. Towards the end of the 19th Century, the Court recognized that, for prisoners sentenced to death, solitary confinement was "one of the most horrible feelings to which [the prisoner] can be subjected," and bears "a further terror and peculiar mark of infamy."[76] Though solitary

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[71] *Id.* at 265 (quoting *In re Kemmler*, 136 U.S. 436, 447 (1890) (holding that electrocution as a method of execution does not constitute cruel punishment).

[72] Baze v. Rees, 553 U.S. 35, 52 (2008) (holding that a state's method of execution violates the Eighth Amendment if an inmate can show the method creates a "substantial risk of severe pain"); *see also* Bucklew v. Precythe, 139 S. Ct. 1112, 1117 (2019) (holding that whether a punishment is cruel depends on whether the punishment "superadds pain well beyond what's needed to effectuate a death sentence").

[73] *Baze,* 553 U.S. at 102 (2008) (Thomas, J., concurring) ("[W]hat each of the forbidden punishments had in common was the deliberate infliction of pain for the sake of pain.")

[74] John Stinneford, *The Original Meaning of Cruel*, 105 GEO L.J. 441, 464 (2017).

[75] *Id*.

[76] In re Medley, 134 U.S. 160, 170-72 (1890) (The time spent in solitary confinement prior to execution was four weeks.)

confinement is a form of punishment subject to Eighth Amendment scrutiny,[77] the subsequent mental suffering caused by death row conditions, or from awaiting execution, is not, thus far, incompatible with Eighth Amendment standards.[78]

Death row confinement, in and of itself, may not be considered cruel, but the cruelty of living decades on death row is at the heart of every *Lackey* claim. And the result (the "cruel effect") is often gratuitous punishment that robs a person of their Eighth Amendment-protected human dignity.[79] While death row conditions vary from state to state, more than ninety percent of America's death rows are characterized by: isolating confinement in solitary cells for twenty to twenty-three hours a day; extremely limited recreation; rare or no physical contact with anyone other than prison officials; and the majority of medical or mental health care being administered from behind glass or closed doors.[80] Though such harsh confinement may be considered part of the penalty that offenders should pay for their crimes, the consequential effects of such deprivation may exceed the Eighth Amendment's limitations on cruel punishments.[81]

a. Death Row History and Syndrome

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[77] Hutto v. Finney, 437 U.S. 678 (1978).

[78] Furman v. Georgia, 408 U.S. 238, 271 (1972) ("[S]evere mental pain may be inherent in the infliction of a particular punishment.")

[79] Robert Johnson, *Solitary Confinement Until Death by State-Sponsored Homicide: An Eighth Amendment Assessment of the Modern Execution Process*, 73 WASH. & LEE L. REV. 1213, 1223-26 (2016) (describing death row as cruel and "dehumanizing")

[80] *Id*. at 1216; *see also* AM. CIVIL LIBERTIES UNION, *A Death Before Dying: Solitary Confinement on Death Row* 5 (July 2013): https://www.aclu.org/report/death-dying-solitary-confinement-death-row?redirect=death-dying-solitary-confinement-death-row-report; *see also* Dave Mann, *Solitary Men*, OBSERVER (Nov. 10, 2010) (Describing Texas death row conditions which include no contact visits, no television, 22-23 hours a day in solitary confinement, a limit of 10 hours a week outside the cell): https://www.texasobserver.org/solitary-men/

[81] Albert Woodfox, SOLITARY 293 (2019) (Regarding Woodfox's three decades of solitary confinement in Louisiana's Angola Prison, U.S. Magistrate Judge Docia Dalby stated that it is "common sense" that "extreme isolation and enforced inactivity in a space smaller than a typical walk-in closet present the antithesis of what is necessary to meet basic human needs" and "may violate the Constitution when imposed for going on three decades.")

Death row is intended to be harsh, but it was never a place meant to house prisoners for decades.[82] It functions under a theory that the inmates are more prone to violence and require additional disciplinary and security measures,[83] but "it is not consistent with our notions of human decency and dignity to simply warehouse [prisoners] in an isolated cell for the rest of their lives."[84] The treatment of death row prisoners has not kept pace with the development of capital litigation, and what was formerly "a brief but debilitating experience has now become a seemingly endless and agonizing one."[85] Though some may argue that prisoners who have committed the worst crimes should be held in the worst conditions,[86] there is no analysis conducted of who is truly deserving of death row and who is not.[87] Needlessly keeping a prisoner in severe death row conditions as a default method of confinement, without any provocation from the prisoner, may be considered cruel punishment because it inflicts unnecessary suffering on all sentenced to reside there.

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[82] Marah S. McLeod, *Does the Death Penalty Require Death Row? The Harm of Legislative Silence*, 77 OHIO ST. LJ. 525, 536 (2016) (discussing the history of death row as an administrative arrangement created by prison officials, with no specific legal authority); *see also* Kara Sharkey, *Delay in Considering the Constitutionality of Inordinate Delay: The Death Row Phenomenon and the Eighth Amendment*, 161 U. PA. L. REV. 861, 872) ("These facilities and procedures were not designed and should not be used to maintain prisoners for years and years.")

[83] *Id*. at 531 (arguing that the presumed need for additional security is misguided, as evidenced by Missouri prisons which abolished death row solitary confinement over twenty years ago).

[84] Jules Lobel, *Prolonged Solitary Confinement and the Constitution*, 11 U. Pa. J. Const. L. 115, 132 (2008).

[85] *See* Sharkey *supra* note 82, at 891; *see also* Carl Raffa, *Defining Dignity by What Preserves Dignity*, 12 ALB. GOV'T L. REV. 86 (discussing how punishments are cruel when they strip a person of their inherent dignity and that abolishment of solitary confinement is the only way to preserve the death penalty).

[86] Davis v. Ayala, 135 S. Ct. 2187, 2210 (Thomas, J., concurring) ("[T]he accommodations in which Ayala is housed are a far sight more spacious than those in which his victims…now rest.")

[87] Ruiz v. Texas, 137 S. Ct. 1246 (2017) (Breyer, J., dissenting) ("Mr. Ruiz's 20 years of solitary confinement [are not] attributable to any special penological problem or need. They arise simply from the fact that he is a prisoner awaiting execution.")

The cruelty of death row confinement, frequently addressed in *Lackey* claims, does not go unnoticed by judges who acknowledge the "dehumanizing effects"[88] of living in "isolated, squalid conditions."[89] Numerous studies of prolonged solitary confinement detail the serious psychological harm to prisoners (commonly referred to as Death Row Syndrome)[90] and examine how such confinement may verge on psychological abuse, as it can leave prisoners in a state of psychosis or lead to claims of incompetence.[91] Dissenting from a denied habeas petition, a Ninth Circuit judge acknowledged the cruelty of twenty-three years of death row confinement and the psychological anxiety of having five previous execution dates.[92] Judge Fletcher also noted that the original sentencing judge now "unequivocally states that executing Jose Ceja after 23 years of incarceration on death row is too harsh a punishment for his crimes," and the reasons for imposing the death sentence are no longer served by his execution.[93]

Similarly, in a case before the Supreme Court of Illinois, the Chief Justice dissented to denying defendant a stay of execution (defendant had been on death row for fifteen years, his death sentence vacated and reinstated three times).[94]

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[88] Thompson v. McNeil, 556 U.S. 1114, 1300 (2009) (Stevens, J., respecting denial of certiorari) ("As he awaits execution, petitioner has endured especially severe conditions of confinement, spending up to 23 hours per day in isolation in a 6-by 9-foot cell.")

[89] Jordan v. Mississippi, 138 S. Ct. 2567, 2568(2018); *see also Davis,* 135 S. Ct. at 2209 (2015) (Kennedy, J., concurring) (A terrible "human toll" is "wrought by extended terms of isolation," and "[y]ears on end of near-total isolation exact a terrible price.")

[90] *See* Smith *supra* note 68, at 242 and 252 (explaining how Death Row Phenomenon refers to the unique experience of confinement in harsh conditions, and Death Row Syndrome refers to the resulting psychological harms)

[91] *See* Lobel *supra* note 84, at 117-18 (Solitary confinement may cause "insomnia, hallucinations and outright insanity"); *see also* Johnson *supra* note 79, at 1233 (discussing "psychological maltreatment" of death row prisoners).

[92] Ceja v. Stewart, 134 F.3d 1368, 1376 (9th Cir. 1998) (Fletcher, J., dissenting) ("[H]aving a death sentence hanging over one's head subjects one to extraordinary psychological duress.")

[93] *Id*. at 1369.

[94] People v. Simms*,* 192 Ill. 2d 348, 432 (Ill. 2000) (Harrison, J., dissenting).

> There must be a point…at which the court steps in and says enough is enough. Beyond a certain number of years and a certain number of failed attempts by the State to secure a constitutionally valid sentence of death, the litigation becomes a form of torture in and of itself. It is as if the State were holding a defective pistol to the defendant's head day and night for years on end and the weapon kept misfiring. It may eventually go off, but then again, it may not, and the defendant has no way to be sure.[95]

Despite the "cruel effects," courts have not held psychological suffering to reach the level of what is considered "cruel" punishment. And even under a method-of-execution analysis, where the possibility of physical pain is considered, it seems unlikely that courts will find the mental suffering caused by death row to be unconstitutionally cruel. However, it is not just the delay nor just the conditions, but also the uncertainty of the looming execution stacked on top of the harsh confinement that warrants a closer examination by the courts. The fear of the Damocles sword hanging overhead is unavoidable with a sentence of death.[96] But living with it over one's head for decades, while isolated on death row, could be considered cruel punishment if the courts were to ever address it. Because decades on death row is an unintentional by-product of the system, a discussion of whether it is "cruel" is not unwarranted and may become increasingly necessary.

B. Unusual

When a sentence of death is issued in a United States court, every actor in the capital punishment system, from judges, to attorneys, to court clerks, to the inmates themselves, knows it is a sentence of years of waiting and appealing, with the remote possibility that it will ultimately end in death.[97] It is an unusual

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[95] *Id*.

[96] The "Sword of Damocles" comes from an ancient Greek parable and refers to being under a looming threat or harm that could strike at any time.

[97] *See* Bureau 2017 *supra* note 21 —Table 2 (Of the 2,797 prisoners on death row in 2017, 23 were executed, 21 died of natural causes and 2 from

sentence in the sense that, unbeknownst to jurors or families of victims, a sentence of death is in actuality a sentence of life on death row with the possibility of execution. No state legislature has ever expressly approved of such a sentence of punishment.[98] In a 2015 case challenging an execution, Justice Kennedy discussed the Eighth Amendment implications of decades on death row, noting that "[e]ven if the law were to condone or permit this added punishment, so stark an outcome ought not to be the result of society's simple unawareness or indifference."[99] This sentiment of prolonged delay as an "unlegislated punishment"[100] is expressed frequently in *Lackey* petitions.[101] However, the death penalty still stays actively in effect, suggesting acceptance of the current regime and its delays, even if not expressly sanctioned by legislation.

a. Intent behind "unusual"

A lack of legislative acknowledgment is neither the historical nor modern interpretation of what is considered "unusual" punishment. An understanding of the Framers' intent is that a punishment is "unusual" if it is "contrary to our longstanding

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suicide); s*ee also* Bureau 2016 *supra* note 26 – Table 3 (noting that in 2016, of the 90 prisoners "removed from under sentence of death," 20 were executed and 19 died of natural causes).

[98] *See* Rapaport *supra* note 9, at 1096.

[99] Davis v. Ayala, 135 S. Ct. 2187, 2209 (Kennedy, J., concurring) (upholding a death sentence for a Hispanic defendant despite all Hispanic and African American jurors being struck from the jury pool)

[100] Angela April Sun, "*Killing Time" In the Valley of the Shadow of Death: Why Systematic Preexecution Delays on Death Row are Cruel and Unusual*, 113 Colum. L. Rev. 1585, 1621 (2013); *see also* Dwight Aarons, *Can Inordinate Delay Between a Death Sentence and Execution Constitute Cruel and Unusual Punishment?*, 29 SETON HALL L. REV. 148, 211 (1998) (arguing that there is no statutory authority that specifically authorizes executions after a capital defendant has spent decades on death row).

[101] Smith v. State, 280 Mont. 158, (Mont. 190) ("Assume that a trial court imposed the following sentence: 'I hereby sentence you to death…you may be executed tomorrow, in six months…or perhaps not for thirteen years.' I have little doubt that such a sentence would be considered cruel and unusual punishment under the Eighth Amendment."); Ceja v. Stewart, 134 F.3d 1368 (9th Cir. 1998) ("[Ceja's] de facto sentence will be 23 years of solitary confinement in the most horrible portion of the prison…followed by execution. There has never been such a sentence imposed in this country or any other.")

traditions."[102] In his *Lackey* opinion, Justice Stevens noted that "a [seventeen-year] delay, if it ever occurred, certainly would have been rare in 1789, and thus the practice of the Framers would not justify a denial of petitioner's claim."[103]

Then, in 1972, the *Furman* court held that a punishment is "unusual" if it is administered in a selective and arbitrary manner.[104] This approach is unsupported by the Court's Originalist Justices who argue that the "defining characteristic" of a cruel and unusual punishment is that it is "designed to inflict pain and suffering beyond that necessary to cause death."[105] In his *Baze v. Rees* dissent, Justice Thomas argued that tortuous methods of punishment, "deliberately designed to inflict pain," constituted "unusual" punishments.[106] Long delays are now characteristic of the current capital punishment scheme and are knowingly handed down with each death sentence. As such, the sentences may be "unusual" under an originalist interpretation because they are administered with deliberate design to inflict the unnecessary pain of decades on death row. The legislatures could clarify whether such a punishment is unusual, and such clarifications would show that extensively delayed executions "were products of deliberate legislative judgment" rather than the unintended, unusual consequences of the system.[107]

b. International precedent

When Lackey originally petitioned the Supreme Court to hear his claim, he cited international precedent for finding his sentence unusual.[108] Subsequent petitioners have followed suit, citing to outside courts which hold that lengthy delays render

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[102] John Stinneford, "*Original Meaning of Unusual:" The Eighth Amendment as a Bar to Cruel Innovation*, 102 NW U. L. REV. 1739, 1815 (2008).

[103] Lackey v. Texas, 514 U.S. 1045 (1995).

[104] Furman v. Georgia, 408 U.S. 238, 242 (1972).

[105] Baze v. Rees, 553 U.S. 35, 96 (2008).

[106] *Id*. at 94.

[107] See Aarons *supra* note 100, at 186.

[108] *Lackey*, 514 U.S. at 1046-47.

execution inhumane or "unusually cruel."[109] In considering extradition of a criminal defendant to the United States, foreign courts have expressed concern that lengthy death row confinement would violate principles of "fundamental justice."[110]

Though foreign opinion is not binding,[111] in two relatively recent and momentous decisions in death penalty jurisprudence, international courts "provide[d] respected and significant confirmation" that the execution of intellectually disabled and juvenile offenders violates the Eighth Amendment.[112] Foreign precedent influenced both decisions: first, by finding the execution of intellectually disabled persons was "overwhelmingly" rejected "in the world community;"[113] and second, that executing juveniles placed the United States "alone in a world that has turned its face against the juvenile death penalty."[114]

This acknowledgment of international ideals suggests that lengthy death row incarceration implicates "evolving standards of decency," and there remains potential for considering the constitutionality of a pre-execution delay claim. While years of

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[109] Knight v. Florida, 528 U.S. 990, 995 (1999) (citing to *Pratt v. Attorney General of Jamaica*, holding that "lengthy delay in administering a lawful death penalty renders ultimate execution inhuman, degrading, or unusually cruel.")

[110] Foster v. Florida, 537 U.S. 990, 992 (2002) (citing to a decision from the Supreme Court of Canada which held that lengthy pre-execution incarceration is "a relevant consideration" when considering extradition); *see also* Elledge v. Florida, 525 U.S. 994, 945 (1998) (citing to *Soering v. United Kingdom*, holding that extradition of a capital defendant to American would be a violation of Article 3 of the European Convention of Human Rights, primarily because of the risk of "being subjected to torture or to inhuman or degrading treatment" due to the long delay spent on death row and "the ever present and mounting anguish of awaiting execution.")

[111] *Knight*, 528 U.S. at 997 (The Court has looked to international precedent for guidance "insofar as those opinions reflect a legal tradition that also underlies our own Eighth Amendment.")

[112] Roper v. Simmons, 543 U.S. 551, 554 (2005); Atkins v. Virginia, 536 U.S. 304 (2002).

[113] *Atkins*, 536 U.S. at 316, n. 21.

[114] *Roper*, 543 U.S. at 577. (Justice O'Connor, dissenting from the majority, agreed that foreign and international law are influential resources in evaluating Eighth Amendment standards because the Amendment's purpose is to measure "the maturing values of civilized society.")

lengthy appeals and collateral review may be the present norm, decades on death row is unusual "whether one takes as a measuring rod current practice or the practice in this country and in England at the time our Constitution was written."[115] Justice Breyer, in a recent dissent to consider another *Lackey* claim, noted that defendant's almost forty-year tenure on death row meant that, "[w]hen he was first sentenced to death, the Berlin Wall stood firmly in place. Saigon had just fallen. Few Americans knew of the personal computer or the Internet. And over half of all Americans now alive had not yet been born."[116] Such a punishment, he contended, was neither foreseen nor intended by the Founders and is, as such, a cruel and unusual punishment.

C. Excessive

A punishment is excessive under the Eighth Amendment if it involves wanton, unnecessary infliction of pain, and is "grossly out of proportion to the severity of the crime."[117] In Manuel Valle's petition to the Supreme Court of Florida, he asserted that his execution, after thirty-three years on death row, was unconstitutional because it "added to his death sentence the morbid additional sentence of being taunted with death for three decades."[118] Charles Foster said his twenty-seven years on death row resulted in excessive punishment because he would be punished by death, and also, by "more than a generation spent in death row's twilight."[119]

a. Double Punishment

Execution after long-term solitary confinement may be deemed "excessive" because it inflicts "a double punishment" of

[115] *Elledge*, 525 U.S. at 944 (Breyer, J., dissenting).

[116] Sireci v. Florida, 137 S. Ct. 470 (2016) (Breyer, J., dissenting).

[117] Gregg v. Georgia, 428 U.S. 153, 154 (1976).

[118] Initial Brief of Appellant at 64-65, Valle v. State, 70 So. 3d 530 (Fla. 2011) (No. SC11-1387), 2011 WL 3319905 (cited in Sharkey *supra* note 82, at 863 and fn. 7)

[119] *Foster v. Florida,* 537 U.S. 990, 992 (2002).

decades on death row combined with an execution.[120] Prolonged death row confinement has the ability to undermine the penalty by making it not necessarily pointless, but excessively disproportionate to the original court-determined sentence.[121] In considering a sentence of life without parole ("LWOP"), which has the same ending as many modern death sentences, both inmates are essentially waiting for death. Envisioning the time and manner of one's execution, and the uncertainty of its imposition, is something the death row, not the LWOP, prisoner experiences (and purposefully so). But this difference in the waiting, particularly when it amasses to decades, has been described by judges and mental health experts as "psychological torture" that is both unnecessary and unauthorized.[122]

Quantifying the difference between the LWOP prisoner's mental suffering and that of the death row inmate is difficult, but witnesses to both argue there are distinctions. One attorney noted the difference is in the "psychological deterioration and dysfunctional adaptations" that permanently alter a death row prisoner's ability to function, leading to extreme inertia, mental illness, hallucinations, or suicidal tendencies.[123] Over the past forty years, "volunteers" account for about ten percent of executions,[124] and there is roughly one death-row suicide for every ten

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[120] *See* Raffa *supra* note 85, at 111; *see also* ACLU *supra* note 80 (describing death row confinement plus execution as two separate punishments)

[121] *Id*.

[122] People v. Anderson, 439 P.2d 880, 894 (Cal. 1972); *superseded by statute* (holding that capital punishment (in California) was unconstitutional because the process of carrying out a death sentence was "degrading and brutalizing" and "constitute[d] psychological torture"); *see also* Norman L. Greene, et.al, *Symposium, Dying Twice: Incarceration on Death Row*, 31 CAP. U.L. REV. 853 (2003) (discussing the psychological effects of decades on death row and the need for reformations in confinement conditions). S*ee e.g., Designed to Break You*, A Report from the Human Rights Clinic at the University of Texas School of Law (April 2017) (examining the experience of inmates living on Texas's death row and the "psychological stress of preparing to die"): https://law.utexas.edu/wp-content/uploads/sites/11/2017/04/2017-HRC-DesignedToBreakYou-Report.pdf.

[123] *See* Green *supra* note 122, at 868-70

[124] *See* DPIC: https://deathpenaltyinfo.org/executions/executions-overview/execution-volunteers (Volunteers are those prisoners who forgo appeals or terminate available proceedings in order to hasten their execution).

executions.[125] In *Ceja v. Stewart*, Judge Fletcher acknowledged the excessiveness of Ceja's punishment, which included twenty-three years on Arizona's death row, five execution dates, and twenty-three hours a day "in a 7' x 10' windowless concrete box."[126] If Ceja's execution ensued, she argued "his de facto sentence will be 23 years of solitary confinement in the most horrible portion of the Prison—death row—followed by execution . . . Neither Arizona nor any other state would ever enact a law calling for such a punishment."[127]

By some views, long-term solitary confinement prior to execution is par for the course and a justifiable punishment.[128] And while for some prisoners delay may be a preferable alternative to death, it does not mean that decades of delay may not be subject to Eighth Amendment review.[129] Though the Court has long held that mental pain is "an inseparable part of our [death penalty] practice,"[130] the Eighth Amendment imposes limitations on punishments that involve prolonged or needless suffering, or something more than "the mere extinguishment of life."[131] While quantifying the bounds of the Eighth Amendment may not be easily determined or agreed upon, "disagreement does not relieve the Supreme Court of the duty to set limits, which the longest serving death row inmates have surely exceeded."[132]

D. Arbitrary Infliction

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[125] *See* Greene *supra* note 122, at 864.

[126] Ceja v. Stewart, 134 F.3d 1368, 1369 (9th Cir. 1998) (Fletcher, J., dissenting).

[127] *Id*.

[128] Thompson v. McNeil, 556 U.S. 1114, 1302 (Thomas, J., concurring) (describing the "gruesome" and "heinous murder" that led the jury to impose petitioner's death sentence). *But see also Id*. at 1303 (Breyer, J., dissenting) (noting that Thompson's defense counsel was ineffective and failed to present mitigating evidence "that suggested that [Thompson] may be significantly less culpable than his codefendant, who did not receive the death penalty").

[129] McKenzie v. Day, 57 F.3d 1461, 1487 (9th Cir. 1995) (Norris, J., dissenting) (discussing the lengthy incarceration of prisoners in extreme conditions of confinement and how foreign courts express a need to address the "added dimension of punishment" in capital cases)

[130] Furman v. Georgia*,* 408 U.S. 238, 288 (1972).

[131] Baze v. Rees, 553 U.S. 35, 49 (2008).

[132] *See* Rapaport *supra* note 9, at 1128.

A death sentence is unconstitutional if it is based on passion, prejudice, or otherwise inflicted in an "arbitrary and capricious" manner.[133] The *Furman* Court defined arbitrariness as "the selective or irregular application" of the death penalty, and held that when a punishment is inflicted in a trivial number of cases for the same or similar crime, "it smacks of little more than a lottery system," and is thus unconstitutional.[134]

The current national average delay is approximately twenty years and three months between the most recent sentencing date and the execution,[135] but pre-execution delays vary from state to state, and in some places, significantly so.[136] Delay is not due to different states implementing different procedures; all capital cases follow the same process of trial, direct appeal, post-conviction appeals, culminating in federal habeas petitions.[137] Delay usually varies because of a given state's dysfunctional administration of pretrial and post-trial procedures.[138] And some states, such as California, have imposed a moratorium on administering the death penalty due primarily to its arbitrary enforcement.[139]

Additionally, often the only difference between a sentence of death and life without parole is not in the crime, but only in the punishment.[140] In a 2018 dissent to a Mississippi petitioner's delay claim, Justice Breyer noted that variance in sentencing was based upon geographic location, with a given defendant's chance of having the death penalty "sought, retracted, or imposed depend[ing] upon

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[133] Gregg v. Georgia, 428 U.S. 153, 188 (1976).

[134] *Furman*, 408 U.S. at 242.

[135] Note: at the time of publication, 2017 is the most recent census.

[136] *See*: https://www.tdcj.texas.gov/death_row/dr_facts.html (Texas Dep't of Corrections noting that the average time between sentence and execution is 10.87 years); https://corrections.az.gov/public-resources/death-row/death-row-information-and-frequently-asked-questions (Arizona Dep't of Corrections noting the average time is 17.44 years)

[137] *See* Sun *supra* note 100, at 1590.

[138] *Id*. at 1591-92.

[139] *See* Usman *supra* note 10, at 83; *see also Jones*, 31 F.Supp.3d at 1053 (holding that whoever is ultimately executed depends not on the severity of the crime but on who moves through the post-conviction process the fastest).

[140] *See* Raffa *supra* note 85, at 116.

where that defendant is prosecuted and tried."[141] This geographic arbitrariness is aggravated by the fact that definitions of who is eligible for the death penalty vary depending on the state.[142] For instance, Mississippi is one of a small number of states where a person may be sentenced to death for felony robbery murder, without any finding of intent to kill.[143] Texas, similarly, can implement the death penalty to an accomplice under the "law of parties" if a jury finds the individual caused or intended to cause the death of another.[144]

As executions nationwide continue to decline, their imposition has become increasingly unpredictable and arbitrary.[145] A true sentence of death is irregularly applied; the state does not and cannot tell inmates they will sit in wait for execution for five or up to forty years. It puts inmates in "purgatory" between life imprisonment and death.[146] They cannot be certain when or if their sentence will be imposed, "much like [they] cannot be certain when or whether lightning will strike."[147] By implementing reforms to capital punishment, in efforts to preserve fairness and eliminate arbitrariness, the sentence has become arbitrary in another sense.

"Cruel and unusual" are ambiguous terms to describe what punishments the constitution intended to proscribe. As such, the Court has struggled to determine the meaning and applicability of the Eighth Amendment. Perhaps evidence of society's "evolving standards of decency" is not only useful, but necessary in giving the clause any manageable examination. Continuing increases in delay, and decreases in actual executions, could demonstrate either society's disapproval of the death penalty or their general

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[141] Jordan v. Mississippi, 138 S. Ct. 2567 (2018) (Breyer, J., dissenting).

[142] *Id*.

[143] *Id*.

[144] DPIC, available at https://deathpenaltyinfo.org/news/texas-case-raises-questions-of-fairness-of-executing-accomplices

[145] *See* Usman *supra* note 10, at 84-85 (noting that some states have imposed a moratorium on the death penalty (CA, PN), and in others (NC) an inmate is more likely to die of natural causes while awaiting execution).

[146] *See* Sun *supra* note 100, at 1621-22.

[147] *Id*. (Referring to Justice Stewart's *Furman* concurrence, in which he argued that present death sentences were imposed so infrequently and arbitrarily, they had become cruel and unusual in "the same way that being struck by lightning is cruel and unusual." *Furman*, 408 U.S. at 309).

ambivalence about its administration.[148] The evolution of the death penalty evidences "not that it is an inevitable part of the American scene, but that it has proved progressively more troublesome to the national conscience."[149] The truth of this statement forced the Court to make drastic changes in 1972. If this truth is still apparent, then perhaps drastic changes are both presently needed and unavoidable.

VI. PROLONGED DELAY AND RETRIBUTION

The death penalty is thought to serve two principle purposes: retribution for society and deterrence of future capital crimes by prospective offenders.[150] At the moment that an execution ceases to realistically further these purposes, its reason would diminish to "gratuitous infliction of suffering."[151] A penalty with such "negligible returns" would be patently excessive, cruel and unusual, and violate the Eighth Amendment.[152] Because the penalty's deterrent effect has been either questionable or inconclusive as a proven method of lowering the nation's murder rate,[153] it is believed that retribution is the primary remaining justification for enforcing the death penalty.[154]

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[148] *See* Rapaport *supra* note 9, at 1115 ("[T]he political will to execute has not been sufficient to result in spending public money and court resources on death cases to reverse the trend toward more time to produce fewer executions.")

[149] Furman v. Georgia, 408 U.S. 238, 299 (1972).

[150] Gregg v. Georgia, 428 U.S. 153, 183 (1976).

[151] *Id*.

[152] *Furman,* 408 U.S. at 312-13.

[153] *See e.g.*, *Deterrence studies should not influence death penalty policy*, DPIC: https://deathpenaltyinfo.org/news/deterrence-national-research-council-concludes-deterrence-studies-should-not-influence-death-penalty-policy; *see also* Lupe S. Salinas, *Is It Time to Kill the Death Penalty? A View from the Bench and Bar*, 34 AM. J. CRIM. L. 39, 42 (2007) ("[W]e would not be having this discussion in 2007 if the ultimate penalty of death deterred aggravated or capital murders.")

[154] Russell L. Christopher, *Death Delayed Is Retribution Denied*, 99 MINN. L. REV. 421, 427-28 (Citing *Baze,* 553 U.S. at 79 (Stevens, J., concurring)). As such, this article will only discuss retribution. For additional discussion of the deterrent effect of the death penalty see Michael L. Radelet & Ronald L. Akers, *Deterrence and the Death Penalty: The Views of the Experts*, 87 J. CRIM. L. & CRIMINOLOGY 1 (1996).

Retributivism imposes a duty on the state to channel "society's moral outrage"[155] and punish a person who has committed a moral wrong, with the Court conceptualizing the punishment as seeing the offender get their "just desserts."[156] Retribution is a constitutionally permissible reason for imposing the death penalty, and while it may not be universally shared, it is considered essential to a society that relies on legal processes for atonement, rather than resorting to vigilante justice.[157] The instinct for retribution is human nature, but at the moment the punishment ceases to serve its intended purpose, "[i]t's imposition would then be the pointless and needless extinction of life with only marginal contributions" to society.[158]

The second component of a *Lackey* claim is not proposing that a person does not deserve to die for the crime of cruelly taking life; it is arguing that the state's interest in retribution would not be meaningfully served after a person has lived a "second lifetime" on death row.[159] Prior to *Lackey*, the question of delays' effect on retribution was addressed by Justice Rehnquist in *Coleman v. Balkcom*, when he noted that "[t]here can be little doubt that delay in the enforcement of capital punishment frustrates the purpose of retribution."[160] Though delay may not eliminate retribution, judges and *Lackey* proponents find its diminished value persuasive enough to warrant further consideration of the penalty's remaining benefit to society.[161]

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[155] *Gregg*, 428 U.S. at 173.

[156] Atkins v. Virginia, 536 U.S. 304, 313 (2002). *See also* Christopher *supra* note 154, at 435-36 (discussing the history and philosophy of retribution as "an eye for an eye" and "whatever undeserved evil you inflict upon another you inflict upon yourself").

[157] *Gregg*, 428 U.S. at 183

[158] Furman v. Georgia, 408 U.S. 238, 312 (1972).

[159] *See* Christopher *supra* note 154, at 446-47 and fn. 178.

[160] Coleman v. Balkcom, 451 U.S. 949, 960 (1981) (Rehnquist, J., dissenting) (stating that denial of petition will only result in continued litigation and delay. Justice Rehnquist would have granted review in order to decide petitioner's claims and avoid any further delay).

[161] *See e.g.*, State v. Azania, 865 N.E.2d 994, 1013 (Ind. 2007) (Boehm, J., dissenting) ("I…find the reasoning of Justices Stevens and Breyer [that delay frustrates retribution] to be persuasive and therefore would hold that the Indiana

Because retribution is a nonphysical and expressive concept, it does not have a set shelf-life, and the passage of time does not mean that retribution cannot be achieved by some means.[162] While there may be "ample room for debate and discussion about whether . . . the death penalty brings closure to families"[163] after any length of time, whatever purposes the death sentence was intended to serve when it was given, these purposes do not appear to be served by the system as it now operates.[164]

A. Theories of Retribution

Professor Chad Flanders discussed two versions of retribution to consider when deciding to what extent delay diminishes or eliminates the execution's penological purpose: (1) retribution as an expression of "community outrage" or (2) retribution as "intrinsic justice"(people who have killed other people

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Constitution prevents further pursuit of the death penalty in this case."); Smith v. Mahoney, 611 F.3d 978, 1006 (9th Cir. 2010)at ("Executing Smith [after 27 years on death row] would not advance the purposes underlying the death penalty, and thus would violate the Eighth Amendment.")

[162] *See* Raffa *supra* note 85, at 94-97 ("Long term solitary confinement before execution may deny victims the retribution they seek by giving them retribution of a lesser value.")

[163] *See* Usman *supra* note 10, at 98.; *see e.g*., Marilyn Peterson Armour & Mark S. Umbreit, *Assessing the Impact of the Ultimate Penal Sanction on Homicide Survivors: A Two State Comparison*, 96 MARQ. L. REV. 1 (2012). *See also* Michael L. Radelet, *The Incremental Retributive Impact of a Death Sentence Over Life Without Parole*, 49 U. MICH. J.L. REFORM 795 (2016) (comparing the retributive effects of the death penalty to the effects of Life Without Parole and the impact of the death penalty on families of death row inmates).

[164] Knight v. Florida, 528 U.S. 990, 995 (1999) (Breyer, J., dissenting) ("[T]he longer the delay, the weaker the justification for imposing the death penalty"); Valle v. Florida, 564 U.S. 1067, 1068 (2011) (Breyer, J., dissenting) ("I would ask how often [a] community's sense of retribution would insist upon a death that comes several decades after the crime was committed"); *Smith,* 611 F.3d at (Fletcher, J., dissenting) ("Executing Smith [after 27 years] would go far beyond what is necessary to satisfy society's moral outrage over his horrible crimes."). *See also* Usman *supra* note 10, at 98-101 (discussing the added pain that prolonged delays inflict on victims' families).

have to die for justice to be served; the passage of time cannot change this).[165]

Under "community outrage," the death penalty seeks to secure some form of emotional closure to the community and to families of victims.[166] But if the state operates under this theory and performs an execution, then the state must defend its position that executing the defendant will still serve justice or appease outrage, despite the length of time that has passed since the crime.[167] The unanswered (and possibly unanswerable) question is, does outrage, after decades, dissipate to the point where the execution is pointless? Or rather, is it possible to be passed the point of serving justice? In considering these questions, "[i]t is important to ask whether society cares about the issue because the appropriateness of the death penalty, as measured by the evolving standards of decency, is premised on both society's general acceptance of capital punishment and its approval of the death sentence."[168] Because the punishment is meant to channel the grief and outrage of a community into justice served, the state has to recognize when or if this outrage has waned, making the punishment nothing but an "empty ritual—a promise we made a long time ago."[169]

The other theory of retribution, "intrinsic justice," says that no passage of time can change the fact that the prisoner must be executed for justice to be served.[170] This view of justice was clear in Vernon Madison's case when, during oral argument, the state of Alabama stated that despite Madison's age and infirmities, "[t]he state would still have a strong interest in seeking retribution for a horrible crime . . . . nothing in his condition impacts the state's interest in seeking retribution."[171] Consider also California inmate Clarence Ray Allen, who suffered a heart attack prior to execution

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[165] Chad Flanders, *Time, Death, and Retribution*, 16 U. PA. J. CONST. L. 431, 455 (2016).

[166] *Id*. at 457.

[167] Ceja v. Stewart, 134 F.3d 1368, 1373. (9th Cir. 1998). ("[T]he exaction of blood vengeance is not a legitimate basis for the imposition of the death penalty.")

[168] *See* Aarons *supra* note 100, at 198.

[169] *See* Flanders *supra* note 165, at 458-59.

[170] *Id*. at 437.

[171] *See* Barrett Lain *supra* note 1, at 229.

and recovered. He sought a do-not-resuscitate order, in the event that he went into cardiac arrest before his scheduled execution.[172] Prison officials refused the request, stating, "At no point are we not going to value the sanctity of life. We would resuscitate him, then execute him."[173] Retribution says it is not enough that Allen die naturally; he must die on the state's terms.

Flanders' argument against executing under this version of retribution is that, while justice demands it, the execution would serve an "illegitimate state purpose," motivated by passion and animus, and one that does not consider the benefits to society.[174] The Court has maintained that the death penalty is justified to the extent that it serves its vital and justifiable penological goals. But "a bare desire to exact vengeance . . . harboured and nursed along over the course of years and decades, cannot satisfy that requirement."[175]

Additionally, each time the Supreme Court has created a categorical exemption from the death penalty, it has considered whether the punishment is retributively justified. In *Atkins v. Virginia* and *Roper v. Simmons*, the Court held that, due to their mental deficiencies and immaturity, intellectually disabled and juvenile offenders were less culpable than the worst murders, "mak[ing] it less defensible to impose the death penalty as retribution."[176] And earlier, in *Ford v. Wainwright*, the Court (in barring the execution of "insane" prisoners) stated, "we may seriously question the retributive value of executing a person who has no comprehension of why he has been singled out and stripped

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[172] *See* Salinas *supra* note 153, at 43 (citing. (Don Thompson, *Second Shot Needed to Execute Elderly Inmate in California*, HOUS. CHRON., (Jan. 18, 2006):),): https://www.chron.com/news/nation-world/article/Second-shot-needed-to-execute-elderly-Calif-1907384.php

[173] *Id*.

[174] *See* Flanders *supra* note 165, at 474-480 (Citing Romer v. Evans, 517 U.S. 620, 632 (1996) (holding that a "bare desire to harm a politically unpopular group" or a law which is "inexplicable by anything but animus toward the class it affects…cannot constitute a legitimate governmental interest").

[175] Ceja v. Stewart, 134 F.3d 1368, 1375 (9th Cir. 1998) (Fletcher, J., dissenting).

[176] Roper v. Simmons, 543 U.S. 551, 552 (2005); *Atkins* v. Virginia, 536 U.S. 304, 321 (2002).

of his fundamental right to life."[177] In a *Lackey* argument, this analysis of retribution fails because delay does not affect the prisoner's culpability at the time of their crime. And, unless they have become unable to comprehend their pending execution (such as Vernon Madison), then the "retributive value" still exists. However, in *Lackey*, Justice Stevens posed the argument that retribution no longer "retain[ed] any force" after seventeen years on death row, and the "state interest in retribution has arguably been satisfied by the severe punishment already inflicted."[178] In *Atkins*, *Roper*, and *Ford*, the argument was not that the retributive value was erased, but that it may be so seriously compromised as to render the execution unjust.

A delay claim is seeking consideration of the remaining retributive value, and the theoretical nature of any version of retribution makes it difficult to truly measure, for it involves delving into the minds and hearts of victims, families, and the community at large. For some, retribution may have been satisfied by the punishment of decades on death row. And for others, nothing short of the execution, or perhaps not even the execution itself, can serve justice. But, "that the families are injured by the delay and cannot achieve closure awaiting executions is clear. Processes that drag out for decades before the killers are executed appear to cause further injury to the defendants on death row and to the families of their victims."[179]

At its core, the battle over the death penalty has been "waged on moral grounds," and the questions in place during *Furman* remain today: Can a society that values the dignity of the individual align such values with putting people to death?[180] Certainly there are those individuals whose crimes are so horrible that even the most adamant death penalty opponent may want to see them permanently removed from the world. But one tangential question arises when considering the present administration of the death penalty, and it is

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[177] Ford v. Wainwright, 477 U.S. 399, 409 (1986).

[178] Lackey v. Texas, 514 U.S. 1045, 1045 (1995).

[179] *See* Usman *supra* note 10, at 101.

[180] Furman v. Georgia, 408 U.S. 238, 296 (1972) ("The struggle about this punishment has been one between ancient and deeply rooted beliefs in retribution, atonement or vengeance … and beliefs in the personal value and dignity of the common man.")

not whether certain people deserve to die. It is, are courts and societies able to fairly and accurately decide who deserves it and who does not?[181] And should they have the power to do so?

VII. PROPOSED SOLUTIONS FROM LEGAL SCHOLARS

For an argument that has failed almost across the board, *Lackey* claims are extensively attempted and analyzed. Several scholars have offered proposals for appeasing judges' concerns, usually by implementing clear rules and threshold conditions for the length of delay, as well as the need for ensuring penological justifications. Professor Dwight Aarons proposed analyzing the *Lackey* claim under a Sixth Amendment Speedy Trial Analysis,[182] creating a bright-line rule that treats certain long delays as presumptively unreasonable or excessive.[183] His proposal would hold a delay which is twice the national average as presumptively prejudicial, which, at the time of his article (1998), would have been about twenty-five years.[184] Today, that presumptive delay would not kick in until a prisoner had spent over forty years on death row.

Kara Sharkey also proposed a delay of twice the national average to trigger automatic review of the defendant's time on death row, but the claim could only be successful if the leading cause of delay was state negligence or misconduct.[185] Professor Elizabeth Rapaport proposed a Lackey-for-the-Elderly claim, suggesting a categorical exemption (similar to a ban on executing intellectually disabled) for elderly, ill inmates pending execution.[186] And Angela April Sun argued that imposing the death penalty, with knowledge of inordinate delay and arbitrary infliction, is systemically imposing

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[181] *See* Stevenson *supra* note 42, at 732-33.

[182] Barker v. Wingo, 407 U.S. 514 (1972) (establishing a balancing test for determining whether an individual's Sixth Amendment right to a speedy trial has been violated)

[183] *See* Aarons *supra* note 100, at 207-208 ("Courts are to consider the length and reason for the delay, the defendant's assertion of the right, and the prejudice suffered by the defendant.")

[184] *Id*. at 182.

[185] *See* Sharkey *supra* note 82, at 877.

[186] *See* Rapaport *supra* note 9, at 1110-12.

a cruel and unusual punishment.[187] Her proposal would involve reforming the systemic practices that cause lengthy delay, essentially amounting to a moratorium on implementing the death penalty until states can create procedures to reduce either reversible errors at trial or the amount of time it takes to go through the appellate process.[188]

Two decades after he petitioned the Supreme Court to hear Clarence Lackey's claim, attorney Brent Newton proposed a "systemic" *Lackey* claim that would ask judges to consider a hypothetical statute requiring capital defendants to wait fifteen or more years on death row before being executed.[189] He argued that such a "cruel and unusual psychological superaddition" would be struck down as an Eighth Amendment violation.[190] The logic of this hypothetical sentence could extend to the current situation of systemic delays that have become an inherent part of the capital appeals process, showing the state's "deliberate indifference" to the ever-growing delays between sentence and execution.[191]

"The chilly reception of the *Lackey* claim by the Supreme Court is best explained not by its lack of merit, but rather by the devastating impact its recognition would have on capital punishment."[192] Just as *Furman* nullified every existing death sentence at the time, the logic of the *Lackey* claim proposes that all existing death sentences are rendered invalid by systemic delays and a lack of remaining penological purpose.[193] Though courts have never invalidated a death sentence because of excessive delay, in the twenty years since Newton first brought Lackey's claim before the Court, the average delay has continued to steadily increase, and more individual cases are approaching four decades of life on death row. It is a growing problem, and as Justice Stevens later remarked,

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[187] *See* Sun *supra* note 100, at 1613-1625.

[188] *Id*. at 1629-1630 and fn. 257 (States could create an administrative agency to look for "weak cases" on death row by reviewing the inmate's procedural history (e.g. whether there was constitutional error at trial) and, if so, seek to commute the sentence to Life Without Parole).

[189] *See* Newton *supra* note 20, at 65-66.

[190] *Id*.

[191] *Id*.

[192] *See* Rapaport *supra* note 9, at 1090.

[193] *See* Newton *supra* note 20, at 65.

when he originally issued his memorandum in *Lackey,* he "did not envision such procedural obstacles" would bar "consideration of a claim that nearly three decades of delay on death row . . . has deprived a person of his Eighth Amendment right to avoid cruel and unusual punishment."[194]

VIII. ALTERNATIVES TO *LACKEY*

Decades of delay appear to be a fixture of capital litigation, and concerted attempts by lawmakers to expedite the process, while making appeals and habeas petitions stricter and more challenging, have not streamlined or sped up the process.[195] And, considering the number of exonerations and documented innocence claims,[196] it is a system replete with mistakes, showing that if something closer to certainty is impossible, then speed is likely not the solution. Regarding the practicality of speeding up capital cases, Justice Breyer has deduced that "we can have a death penalty that at least arguably serves legitimate penological purposes or we can have a procedural system that at least arguably seeks reliability and fairness in the death penalty's application. We cannot have both."[197] But this view suggests that reliability and constitutional punishments cannot coexist and does not leave much in the way of paths forward.

If hastening executions is illusive or ill-advised, then other solutions should present themselves for consideration. To begin, more humane death row conditions, while not eliminating the psychological effects of a looming execution, could alleviate the cruel and unusual nature of a contemporary death sentence.[198] Because the Court often looks to what states and legislatures are

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[194] Johnson v. Bredesen, 558 U.S. 1067, 1070 (2009).

[195] *See e.g.*, Stevenson *supra* note 42 (discussing how the unintended consequences of AEDPA's restrictions on successive habeas petitions forecloses review of legitimate constitutional claims and undermines the fairness and reliability of the penal system.)

[196] *See Innocence by the Numbers,* DPIC, (last visited April 17, 2020), https://deathpenaltyinfo.org/policy-issues/innocence/innocence-by-the-numbers

[197] Glossip v. Gross, 135 S. Ct. 2726, 2772 (Breyer, J., dissenting).

[198] *See* Raffa *supra* note 85, at 119 (This "would eliminate the damage to an inmate's dignity by taking him out of the conditions that cause damage.")

doing when it refines or amends capital punishment, [199] it should be noted that several states have eliminated solitary confinement as the default method of housing death row inmates.[200] An argument for improving death row conditions may be supported by even the staunchest of death penalty supporters, for it proposes solutions to preserving the justifications for the death penalty.[201]

But the primary problem with considering a delay claim is the courts' reluctance to grapple with the concept of bright-line rules involving a particular age (how old is too old?) or length of delay (how long is too long?). If Justice Breyer is correct in believing there is no way to ensure fairness, and also avoid decades of delay, then the current practice will continue, resulting in delays of fifty or more years and executions that are arguably unconstitutional. But if he is wrong, then states must find the will to address the current capital

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[199] Roper v. Simmons, 543 U.S. at551, 594. (2005); ("In determining whether the juvenile death penalty comports with contemporary standards of decency, our inquiry begins with the 'clearest and most reliable objective evidence of contemporary values'—the actions of the Nation's legislatures.")

[200] *See* Raffa *supra* note 85, at 119-20 (Missouri, North Carolina, Colorado)

[201] *Glossip*, 135 S. Ct., at 2748 (Scalia, J., concurring) ("If the objection is that death row is a more confining environment, the solution should be modifying the environment rather than abolishing the death penalty."). Note: Recent cases out VA, OK, AZ, and CN have successfully argued that prolonged solitary confinement for death row inmates is cruel and unusual and, as a result, are implementing reformations to death row conditions. *See e.g*., Debra Cassens Weiss*, Solitary confinement conditions violated inmates' Eighth Amendment rights, 4th Circuit rules*, ABA JOURNAL (May 6, 2019).),). http://www.abajournal.com/news/article/solitary-confinement-conditions-violated-death-row-inmates-constitutional-rights-appeals-court-rules; Michael Kiefer, *Arizona death-row inmates come out of solitary*, AZCENTRAL.COM (Dec. 2017)),) (https://www.azcentral.com/story/news/local/arizona-investigations/2017/12/19/arizona-death-row-inmates-moved-giving-more-human-contact-socialization/951808001/); Elizabeth Weill-Greenberg, *Oklahoma Department of Corrections agrees to move 'qualifying' death row prisoners out of tomblike unit*, THE APPEAL (Sept. 28, 2019)),) https://theappeal.org/oklahoma-department-of-corrections-agrees-to-move-qualifying-death-row-prisoners-out-of-tomb-like-unit/; Edmund H. Mahony, *U.S. Judge rules former Connecticut death row inmate's incarceration amounts to cruel and unusual punishment*, HARTFORD COURANT (Aug. 28, 2019)),) https://www.courant.com/news/connecticut/hc-news-death-row-conditions-20190828-20190829-loshwmk4v5elnkt3qzawjbkmjq-story.html).)

punishment process and focus on reform, which starts at the trial.[202] States must ensure the capital defendant has a fair trial, receives effective and competent representation, and they must implement more accountability for the actions of all involved attorneys. States could invest in adequate financial resources for the capital defense bar,[203] limit the imposition of the death penalty to only those who received effective assistance of counsel, and seek to impose the death penalty on only those deemed to be "the worst of the worst."[204]

Law professor, and former judge and attorney, Lupe S. Salinas has argued that the burden of proof during the capital sentencing should be more than the guilt-innocence standard of reasonable doubt, but rather, seek to establish proof that is closer to "near certainty" that the convicted defendant not only committed the murder, but is also "a person who constitutes a continuing threat to society."[205] Additionally, attorneys and advocates have called for a need to re-examine pre-trial actions and investigations by reforming those procedures consistently at fault for wrongful convictions, such as official misconduct, eye-witness misidentification, or false confessions.[206]

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[202] State v. Azania, 865 N.E.2d 994, 1011 (Ind. 2007*)* (Boehm, J., dissenting) ("[I]f the State seeks to kill a human being, it has to get it right. That means it provides a fair trial…free of reversible error by the trial court. It also means the prosecution plays by the rules and does not create reversible error by withholding exculpatory evidence, misleading the jury, or otherwise. And…it means that the trial court has appointed defense counsel who provide the adequate representation guaranteed by the Sixth Amendment.")

[203] AM. BAR ASS'N, *The State of the Modern Death Penalty in America* 8 (2013) (Most examined jurisdictions "lack rigorous qualification standards for and monitoring of counsel appointed to capital cases" and "inadequately compensate [defense] counsel."): https://www.americanbar.org/content/dam/aba/administrative/death_penalty_moratorium/aba_state_of_modern_death_penalty_web_file.authcheckdam.pdf

[204] *Id*. ("[T]here is no mechanism in place to guide prosecutors in their charging decisions to support the even-handed, non-discriminatory application of the death penalty."); *see also* Salinas *supra* note 154153154, at 98.

[205] *See* Salinas *supra* note 153, at 102.

[206] *Id.* at 102 (citing United States v. Wade, 388 U.S. 218, 228 (1967) ("The vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification."); *see also* DPIC: https://deathpenaltyinfo.org/stories/dpic-analysis-causes-of-wrongful-

> With each day under the status quo, the variance between those who are executed on death row and those who are not looks more and more like the arbitrariness that *Furman* condemned…Even if state legislators care not for the death-row inmates, each passing day inflicts further injury on the families of the victims and further undermines the penological interests of the states. States are approaching another moment of choice.[207]

IX. CONCLUSION

The *Lackey* claimant is not disputing the constitutionality of a death sentence as retribution for their crimes. It is arguing that the Eighth Amendment imposes limits on punishments, even on those most deserving.[208] When denying a claim of unconstitutional delay, judges and justices must address an argument that "decades-plus-death" is neither excessive, cruel, nor unusual punishment for the worst murderers in light of evolving standards of decency; they have not.[209]

Left unresolved, the possibility of tenures of fifty or sixty years on death row seems inevitable and addressing the constitutionality of a current death sentence may be increasingly necessary. "The real power of the *Lackey* claim is that it sheds light on the dysfunctional character of our capital system…it is a window into the failure of the American death penalty to satisfy the minimal conditions for its continued use."[210] But at oral argument before the Supreme Court, Vernon Madison's attorney suggested that a system that fails to adhere to an evolving standard of decency implicates more than just the system's failure to serve justice: "The Eighth

convictions; *see e.g.,* Steven A. Drizin and Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891 (2004).

[207] *See* Usman *supra* note 10, at 105-6.

[208] *See* Rapaport *supra* note 9, at 1126.

[209] *Id*. at 1126-28 ("It is difficult to resist, once it is acknowledged, that the Eighth Amendment's cruel and unusual punishment clause is a doctrine of limitation, that a limit beyond which retribution is excessive has been reached at some number of years under sentence of death.")

[210] *See* Christopher *supra* note 154, at fn. 307 (citing Steiker & Steiker *supra* note 49, at 682-83).

Amendment isn't just a window. It's a mirror. And what the Court has said is that our norms, our values are implicated, when we do things to really fragile, really vulnerable people."[211]

When it comes to the death penalty, it seems the present system cannot find nor enforce the procedural protections necessary to prevent unconstitutional executions without causing prisoners, and families, the additional harm of decades-long waits for their punishments to be implemented. The process cannot speed up so long as capital cases are plagued by error, overzealous prosecutors, bad defense lawyers, racial bias, wrongful convictions, and the over-punishment of persons with severe mental illnesses and other impairments or trauma.[212] For these reasons, it may be tempting to avoid trying to repair a system that appears so beyond repair. But "evolving standards of decency" implies movement, and there are presently almost 2,800 men and women sitting on death rows across the country, relying on that movement. It would be easy to ignore the most hated people in America's prisons, but "it is really for the millions in whose name executions are carried out that we should struggle against hopeless acceptance of the flawed procedures that ultimately blur the line between rational justice and irrational vengeance."[213] It would not be hyperbole to acknowledge that it truly is a matter of life or death.

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[211] Transcript of Oral Argument, Madison v. Alabama, 586 U.S. ___ (2019) (No.17-7505), https://eji.org/files/vernon-madison-scotus-oa-10-02-18.pdf

[212] *See* Barrett Lain *supra* note 1, at 232 (quoting Henry Schwarzchild, *In Opposition to Death Penalty Legislation*, The Death Penalty in America 364, 366-67 (Hugo Adam Bedau 3d ed. 1982): "[W]e have always picked quite arbitrarily a tiny handful of people among those convicted of murder to be executed, not those who have committed the most heinous…murders, but always the poor, the black, the friendless, the life's losers…the lower status elements of American society."… "The reality of the death penalty is that it is not for the worst of the worst. It is for the weak among the worst.")

[213] *See* Stevenson *supra* note 42, at 795.