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**JUSTICES BLIND:  
HOW THE REHNQUIST COURT'S  
REFUSAL TO HEAR A CLAIM FOR  
INORDINATE DELAY OF EXECUTION  
UNDERMINES ITS DEATH PENALTY  
JURISPRUDENCE**

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*Petitioner's claim, with its legal complexity and its potential for far-reaching consequences, seems an ideal example of one which would benefit from . . . further study.*<sup>1</sup>

*If Americans insist on the death penalty, they must accept the moral consequences of their choice.*

*. . . What if we cannot tolerate all the stays and appeals and retrials that a decent respect for human life requires without making the law seem foolish and without subverting the point of a death sentence . . . ? Then we must abandon capital punishment, even if we think it right in principle, because then we cannot have it, even if it is right, without cheating.*<sup>2</sup>

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\* Class of 2001, University of Southern California Law School; B.S. Northwestern University, 1993. This Note won the Law School's *Warren J. Ferguson Social Justice Writing Award* for 2000. Thanks to Michael Brennan, Carrie Hempel and USC's Post-Conviction Justice Project, and Professor Erwin Chemerinsky for inspiration and guidance. Special thanks to Bill, Susan, Erin, Betty, and Louise for love and support.

1. *Lackey v. Texas*, 514 U.S. 1045, 1047 (1995) (Stevens, J., respecting denial of certiorari to a claim for inordinate delay of execution).

2. Ronald Dworkin, Editorial, *The Court's Impatience to Execute*, L.A. TIMES, July 11, 1999, at M1.

## INTRODUCTION

In mid-1999, the United States Supreme Court received petitions for writ of certiorari from two death row inmates, Carey Moore of Nebraska and Thomas Knight of Florida.<sup>3</sup> Having spent nearly twenty and twenty-five years on death row respectively,<sup>4</sup> these petitioners asked the Court to consider, apart from all other arguments concerning the death penalty, whether inordinate delay of execution itself violates the Eighth Amendment as “cruel and unusual punishment.”<sup>5</sup> While the narrow issue is not a new one, the Court once again denied certiorari, declining to rule on the merits of the claim.<sup>6</sup>

Although lower courts addressed the issue as early as 1959,<sup>7</sup> the Supreme Court did not acknowledge the claim until 1995 in *Lackey v. Texas*.<sup>8</sup> Clarence Lackey, who had served seventeen years on death row, would see his name become legal shorthand for the Eighth Amendment claim he raised in his application for a stay of execution. In a memorandum respecting the denial of certiorari to Mr. Lackey’s petition, Justice Stevens acknowledged the novelty of the *Lackey* claim, its legal complexity, and “its potential for far-reaching consequences.”<sup>9</sup> He suggested that the two social purposes served by the death penalty, retribution and deterrence, may not be furthered in the instance of “prisoners who have spent some seventeen years under a sentence of death.”<sup>10</sup> He also noted that penal and medical experts agree that the dehumanizing effects of a prolonged wait for execution amount to “psychological torture.”<sup>11</sup> Finally, Justice Stevens recognized that the highest courts in other countries have found such arguments persuasive;<sup>12</sup>

3. See *Knight v. Florida*, 528 U.S. 990 (1999); *Moore v. Nebraska*, 528 U.S. 990 (1999).

4. When the Court considered granting certiorari (November 8, 1999), Mr. Moore had spent 19 years, 4 months and 19 days on death row and Mr. Knight had spent 24 years, 4 months and 18 days on death row. See *id.* at 993–94 (Breyer, J., dissenting from denial of certiorari).

5. U.S. CONST. amend. VIII. The Eighth Amendment reads in full: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”

6. See *Knight*, 528 U.S. at 990. See also *Elledge v. Florida*, 525 U.S. 944, 944 (1998); *Lackey*, 514 U.S. at 1045.

7. See *People v. Chessman*, 341 P.2d 679 (Cal. 1959). See also *Chessman v. Dickson*, 275 F.2d 604 (9th Cir. 1960).

8. 514 U.S. 1045 (1995).

9. *Id.* at 1047.

10. *Id.* at 1045 (referring to the legal and social justifications for the death penalty set out in *Gregg v. Georgia*, 428 U.S. 153 (1976)).

11. *Id.* at 1046 (quoting *People v. Anderson*, 493 P.2d 880, 894 (Cal. 1972)).

12. See *id.* at 1047 (citing *Pratt v. Attorney Gen. of Jamaica*, [1994] 2 A.C. 1 (P.C. 1993) (en banc)).

these courts have responded by commuting death sentences.<sup>13</sup> The Court granted Mr. Lackey a stay of execution, pending review of an application for writ of habeas corpus by the district court, but postponed addressing the Eighth Amendment issue, calling instead for further study in the “laboratories” of lower federal and state courts.<sup>14</sup>

As Justice Thomas noted, concurring in denial of certiorari to Petitioners Moore and Knight in 1999, the laboratories have “resoundingly rejected the [*Lackey*] claim as meritless.”<sup>15</sup> True to form, Justice Thomas argued that inordinate delay of execution stems from “this Court’s Byzantine death penalty jurisprudence,” finding it “incongruous to arm capital defendants with an arsenal of ‘constitutional’ claims” only to allow them to complain when executions are inevitably delayed.<sup>16</sup> More practically, he noted that allowing such a claim would only further prolong collateral review by “giving virtually every capital prisoner yet another ground on which to challenge and delay execution” and might provide reviewing courts with a “perverse incentive to give short shrift to a capital defendant’s legitimate claims” in order to avoid potential violation of the Eighth Amendment.<sup>17</sup>

Justice Breyer, having dissented from denial of certiorari to a similar petition the year before,<sup>18</sup> dissented again from the denial of certiorari to the 1999 petitions. Restating many of Justice Stevens’ observations from *Lackey*, he expanded the argument by noting that the delays in the cases of both Moore and Knight “flow[] in significant part from constitutionally defective death penalty procedures.”<sup>19</sup> Choosing not to call into question

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13. See, e.g., *Pratt*, 2 A.C. at 36.

14. *Lackey*, 514 U.S. at 1047 (citation omitted). On remand, the district court granted Mr. Lackey a stay of execution and ordered a hearing on the merits. See *Lackey v. Scott*, 885 F. Supp. 958 (W.D. Tex. 1995). The Fifth Circuit, ruling that Mr. Lackey’s claim was barred by the nonretroactivity doctrine of *Teague v. Lane*, 489 U.S. 288, 310 (1989), subsequently vacated the stay and the Supreme Court denied certiorari. See *Lackey v. Scott*, 52 F.3d 98, 100–01 (5th Cir. 1995); *Lackey v. Scott*, 514 U.S. 1093 (1995). A second federal habeas petition failed, and Mr. Lackey, after more than nineteen years on death row, was executed on May 20, 1997. See TEX. DEP’T OF CRIMINAL JUSTICE, DEATH ROW STATISTICS, at <http://www.tdcj.state.tx.us/stat/executedoffenders.htm> (last modified Jan. 19, 2001).

15. *Knight v. Florida*, 528 U.S. 990, 992 (1999) (Thomas, J., concurring in denial of certiorari).

16. *Id.* at 991–92.

17. *Id.* at 992. The question begged, of course, is what Justice Thomas would consider a “legitimate claim.”

18. See *Elledge v. Florida*, 525 U.S. 944, 944 (1998) (Breyer, J., dissenting from denial of certiorari).

19. *Knight*, 528 U.S. at 993 (Breyer, J., dissenting from denial of certiorari). Petitioner Moore challenged the constitutionality of Nebraska’s death sentencing procedure on vagueness grounds and prevailed. He was granted a writ of habeas corpus that was affirmed by the Eighth Circuit; the Supreme

the constitutional basis for the Court's death penalty jurisprudence, he argued that when a state fails to comply with the Constitution's demands, "the claim that time has rendered the execution inhuman is a particularly strong one."<sup>20</sup> With 125 prisoners at that time having served twenty or more years on death row across the United States, Justice Breyer believed it was time for the Court to address the issue.<sup>21</sup> The Court, however, once again put off deciding the merits of the *Lackey* claim, leaving in place and implicitly supporting "a system under which the length of time a person spends on death row is free of constitutional scrutiny."<sup>22</sup>

What justifies this head-in-the-sand approach? Most likely it is the "far-reaching consequences" that would be generated by scrutinizing the length of time it takes to inflict death under current constitutional standards. While the framers of the Constitution, the Bill of Rights, and the Fourteenth Amendment may have supported capital punishment, it is clear that they also required equal protection and due process of law and did not support infliction of cruel and unusual punishments. The dilemma: Corresponding bodies of rich constitutional jurisprudence have developed symbiotically with more than two hundred years of "evolving standards of decency"<sup>23</sup> and are presently at odds. Allowing prisoners to languish on death row is cruel and unusual punishment; executing prisoners at optimal levels of "efficiency" is at best an infringement upon their due process rights and at worst an arbitrary infliction of a punishment that cannot be undone. Notwithstanding these tensions, a *Lackey* petitioner might bring a meritorious claim for cruel and unusual punishment under the Eighth Amendment. This Note therefore argues that social and legal consequences, no matter how far-reaching, may not provide the Supreme Court with a basis by which to deprive an individual habeas petitioner, facing society's most severe form of punishment, the right to have his prayer for relief heard and decided on its merits.<sup>24</sup>

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Court denied certiorari. Nebraska then modified its sentencing statute and resentenced Mr. Moore to death, fifteen years after his first sentencing proceeding. *Id.* at 993-94.

Petitioner Knight was granted a new sentencing hearing by the Eleventh Circuit when it determined that Florida's death penalty sentencing procedure was constitutionally defective because it did not require a jury to consider an abusive childhood as a mitigating factor. Eight years later, and twenty-one years after imposition of his initial death sentence, Florida held a new sentencing proceeding and resentenced him to death. *Id.* at 994.

20. *Id.* at 993.

21. *See id.* at 999.

22. Linda Greenhouse, *Court's Refusal to Hear Cases Preserves Delays on Death Row*, N.Y. TIMES, Nov. 9, 1999, at A1.

23. *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

24. Death row is not gender neutral. Because 98.6% of inmates under sentence of death in the United States are male (3,477 out of 3,527), TRACY L. SNELL, U.S. DEP'T OF JUSTICE, CAPITAL

Part I contrasts the historical, legal, and societal justifications for capital punishment with the reality of the modern process of execution to expose the tensions of practice and policy that are necessarily implicated in a *Lackey* claim. Part II examines the cautious approach to execution and the various causes of delay. This part concludes that delay of execution, regardless of who is responsible and whether it is intentional or inadvertent, subjects the capital defendant to psychological torture and frustrates goals of punishment, giving rise to a claim for cruel and unusual punishment under the Eighth Amendment. Part III substantively analyzes the two possible Eighth Amendment claims. First, because inordinate delay of execution may be viewed as a form of psychological torture that would have been held cruel and unusual by the framers of the Bill of Rights, and because the punishment contradicts evolving standards of decency, it is unconstitutional under the Eighth Amendment. Second, because an inordinately delayed execution eviscerates the accepted social and penological goals of capital punishment, such an execution amounts to needlessly excessive punishment under the Eighth Amendment. In both instances, this part concludes that the appropriate remedy is commuting the death sentence to life imprisonment. Part IV shows that the reasoning used by the Rehnquist Court in the landmark case *Ford v. Wainright* (formally recognizing the common law rule barring execution of the insane) closely relates to an analysis of the merits of a *Lackey* claim. This part concludes that the Court, by continually refusing to grant certiorari to the *Lackey* claim, implicitly attaches the morally unacceptable jurisdictional requirement of insanity to a petition for relief from inordinate delay of execution. Such a requirement undermines the legitimacy of the Court's own death penalty jurisprudence and of the American criminal justice system generally. The Note concludes that the *Lackey* petitioner may present a valid claim for habeas relief under the Eighth Amendment and that far-reaching legal and social consequences do not provide the Court with a legitimate basis for its continued refusal to hear the claim and make a reasoned decision on the merits.

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PUNISHMENT 1999, at 8 (2000) [hereinafter DOJ STATISTICS], this Note uses the masculine form when referring to the hypothetical capital defendant or habeas petitioner.

## I. BASES FOR CAPITAL PUNISHMENT AND THE DEATH ROW PHENOMENON

### A. LEGISLATIVE BASES FOR CAPITAL PUNISHMENT

Capital punishment has existed in what is now the United States since the first criminal laws were brought from England and written into existence in the colonies.<sup>25</sup> While the capital laws themselves varied, all the colonies authorized public execution by hanging as mandatory punishment for various crimes.<sup>26</sup> The founding of the United States and the ratification of the Constitution and Bill of Rights seemingly rendered capital punishment an intractable component of criminal justice in this country. The Fifth and Eighth Amendments, and later the Fourteenth Amendment, thus pose the “first obstacle to [any] argument that capital punishment is *per se* unconstitutional.”<sup>27</sup> The Fifth Amendment refers to “capital, or otherwise infamous crime” as well as “depriv[ation] of life . . . without due process of law.”<sup>28</sup> The meaning of the cruel and unusual punishments clause of the Eighth Amendment, generally “interpreted in a flexible and dynamic manner,”<sup>29</sup> has generated a healthy body of jurisprudence on its own. But because it was adopted at the same time as the Fifth Amendment, many authorities believe that “whatever punishments the Framers of the Constitution may have intended to prohibit under the ‘cruel and unusual’ language, there cannot be the slightest doubt that they intended no absolute bar on the Government’s authority to impose the death penalty.”<sup>30</sup> Three-quarters of a century later, passage of the Fourteenth Amendment imposed the due process limitation of the Fifth Amendment, in its exact wording, upon the States. This again presumably recognized and legitimized “depriv[ation] . . . of life”<sup>31</sup> by the government in at least some circumstances.

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25. See HUGO ADAM BEDAU, *THE DEATH PENALTY IN AMERICA* 3–4 (1997).

26. See *id.* Laws were not enacted to end public executions in the various states until 1835; public execution endured in Missouri until 1937. See *id.* at 5.

27. *Furman v. Georgia*, 408 U.S. 238, 418–19 (1972) (Powell, J., dissenting). See also *Gregg v. Georgia*, 428 U.S. 153, 169 (1976) (holding “that the punishment of death does not invariably violate the Constitution”).

28. U.S. CONST. amend. V. The Fifth Amendment reads in pertinent part: “No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . nor be deprived of life, liberty, or property, without due process of law . . . .”

29. *Gregg*, 428 U.S. at 171.

30. *Furman*, 408 U.S. at 419 (Powell, J., dissenting). See also *Gregg*, 428 U.S. at 169.

31. U.S. CONST. amend. XIV, § 1. The first section of the Fourteenth Amendment reads in pertinent part:

The choice of whether or not to impose capital punishment has thus generally been left to the states, and the legislative history is checkered.<sup>32</sup> Some states, like Texas and Virginia, have never wavered in their use of capital punishment.<sup>33</sup> Others, like Rhode Island and Wisconsin, abolished early and held steadfast to that policy.<sup>34</sup> Still others like Colorado and Missouri abolished only to restore the death penalty in a few short years.<sup>35</sup> And others like Maine and Iowa abolished, reinstated, and then finally abolished capital sentencing once and for all.<sup>36</sup> The political struggle presently continues in some states, with Kansas re-restoring and New York restoring the death penalty in 1994 and 1995 respectively.<sup>37</sup>

### B. JUDICIAL BASES FOR CAPITAL PUNISHMENT

The political nature of imposing the death penalty has been a source of consternation for Supreme Court Justices, inspiring some of the most impassioned judicial rhetoric ever written.<sup>38</sup> However, regardless of an

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No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

*Id.*

32. See BEDAU, *supra* note 25, at 8–9. The federal government reinstated the death penalty in 1988 with the so-called Drug Kingpin Statute, Pub. L. No. 100-690, 102 Stat. 4382, 4387 (codified as amended at 21 U.S.C. § 848(e), (g)–(r) (1994)), and greatly expanded its reach in 1994 with the Federal Death Penalty Act, Pub. L. No. 103-322, 108 Stat. 1959 (codified at 18 U.S.C. §§ 3591–3598 (1994)). See Death Penalty Information Center, at <http://www.deathpenaltyinfo.org/feddp.html#statutes> (last modified Nov. 27, 2000); BEDAU, *supra* note 25, at 7. As of 2000, twenty-two federal capital defendants have been sentenced to death; the federal government has yet to execute any of them. See DOJ STATISTICS, *supra* note 24, at 15. At the end of 2000, President Clinton stayed for six months the execution of Juan Raul Garza, concluding that “the examination of possible racial and regional bias should be completed before the United States goes forward with an execution.” Marc Lacey & David Johnston, *Clinton Again Delays Execution of a Murderer*, N.Y. TIMES, Dec. 7, 2000, at A24. With this second delay of Mr. Garza’s execution, President Clinton left the ultimate decision on Mr. Garza’s fate in the hands of his successor, George W. Bush.

33. See BEDAU, *supra* note 25, at 9 tbl.1-2.

34. See *id.*

35. See *id.*

36. See *id.*

37. See *id.*

38. The examples are many; following are a few:

These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual. . . . I simply conclude that the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and freakishly imposed.

*Furman v. Georgia*, 408 U.S. 238, 309–10 (1972) (Stewart, J., concurring).

In striking down capital punishment, this Court does not malign our system of government. On the contrary, it pays homage to it. Only in a free society could right triumph in difficult times, and could civilization record its magnificent advancement. In recognizing the humanity of our fellow beings, we pay ourselves the highest tribute. We achieve “a major

individual Justice's opinion, because of the textual "obstacle" and the pillars of federalism, separation of powers, and judicial restraint, the Court has never held capital punishment unconstitutional *per se*.<sup>39</sup> The Court has instead applied a case-by-case and statute-by-statute analysis in determining the constitutionality of capital punishment as it is practiced.<sup>40</sup>

Whether attacks on the constitutionality of a death sentence challenge due process or the method of execution, the Court tends to review them under the Eighth Amendment.<sup>41</sup> While there have been a few instances where the Court has found methods of execution "inhuman and barbarous,"<sup>42</sup> and even though the Court recognizes that this standard is progressive and constantly evolving,<sup>43</sup> attacks on a death sentence have been most successful when challenging the discretion of the sentencing authority. Thus, statutes that provide for mandatory death sentences or too little discretion in sentencing have been rejected by the Court because they do not take into account the uniqueness and potentially mitigating circumstances of each case.<sup>44</sup> In *Lockett v. Ohio*, the Court expressly held that because of the "nonavailability of corrective or modifying mechanisms

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milestone in the long road up from barbarism" and join the approximately 70 other jurisdictions in the world which celebrate their regard for civilization and humanity by shunning capital punishment.

*Id.* at 371 (Marshall, J., concurring) (citation and footnotes omitted).

From this day forward, I no longer shall tinker with the machinery of death. For more than 20 years I have endeavored—indeed, I have struggled—along with a majority of this Court, to develop procedural and substantive rules that would lend more than the mere appearance of fairness to the death penalty endeavor. Rather than continue to coddle the Court's delusion that the desired level of fairness has been achieved and the need for regulation eviscerated, I feel morally and intellectually obligated simply to concede that the death penalty experiment has failed.

*Callins v. Collins*, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting from denial of certiorari) (footnote omitted).

[D]eath-by-injection . . . looks even better next to some of the other cases currently before us which JUSTICE BLACKMUN did not select as the vehicle for his announcement that the death penalty is always unconstitutional—for example, the case of the 11-year-old girl raped by four men and then killed by stuffing her panties down her throat. How enviable a quiet death by lethal injection compared with that! If the people conclude that such more brutal deaths may be deterred by capital punishment; indeed, if they merely conclude that justice requires such brutal deaths to be avenged by capital punishment; the creation of false, untextual, and unhistorical contradictions within "the Court's Eighth Amendment jurisprudence" should not prevent them.

*Id.* at 1142–43 (Scalia, J., concurring in denial of certiorari) (citation omitted).

39. See *supra* notes 27–31 and accompanying text.

40. See *Furman*, 408 U.S. at 420–21 (Powell, J., dissenting).

41. See *id.* See also ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 448 (1997).

42. *In re Kemmler*, 136 U.S. 436, 447 (1890).

43. See *Trop v. Dulles*, 356 U.S. 86, 101 (1958); *Weems v. United States*, 217 U.S. 349, 378 (1910).

44. See *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (holding that because "the penalty of death is qualitatively different," mandatory death sentences violate the Eighth and Fourteenth Amendments).

with respect to an executed capital sentence,” the sentencer in a capital case shall “not be precluded from considering, *as a mitigating factor*, any aspect of a defendant’s character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.”<sup>45</sup>

On the other hand, statutes that provide judges and juries with too much discretion have been struck down on the belief that they lead to arbitrary results.<sup>46</sup> These due process concerns were the primary motivation in *Furman v. Georgia*, causing the Court to invalidate Georgia’s death sentencing statute and introduce a de facto judicially imposed national moratorium on executions and death sentencing. Justice Douglas noted, “[i]t would seem to be incontestable that the death penalty inflicted on one defendant is ‘unusual’ if it discriminates against him by reason of his race, religion, wealth, social position, or class, or if it is imposed under a procedure that gives room for the play of such prejudices.”<sup>47</sup> The states responded with statutes that provided for adequate guidance and information to the sentencing authority, required juries to find an aggravating circumstance considering the circumstances of the crime and the character of the defendant, and utilized a bifurcated sentencing proceeding.<sup>48</sup> Four years later, in *Gregg v. Georgia*, the Court upheld these new statutes and has yet to return a decision with the sweeping abolitionist implications of *Furman*.

In the years since *Gregg*, the Court has attempted to police more than three dozen different death penalty systems. The result is described as “the most complex and cumbersome system for administering the death penalty the world has ever seen”<sup>49</sup> or alternately as “Byzantine.”<sup>50</sup> During this period, two competing bodies of death penalty jurisprudence have developed: 1) the Constitution requires a “greater degree of equality and rationality in the administration of death;”<sup>51</sup> and 2) the Constitution also

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45. 438 U.S. 586, 604–05 (1978).

46. See *Green v. Georgia*, 442 U.S. 95, 97 (1979) (holding a mechanical application of Georgia’s hearsay rule may not be used to exclude relevant evidence from capital sentencing proceeding).

47. *Furman*, 408 U.S. at 242 (Douglas, J., concurring).

48. See *Gregg v. Georgia*, 428 U.S. 153, 162–68 (1976).

49. BEDAU, *supra* note 25, at 242.

50. *Knight v. Florida*, 528 U.S. 990, 991 (1999) (Thomas, J., concurring in denial of certiorari) (citations omitted).

51. *Callins v. Collins*, 510 U.S. 1141, 1151 (1994) (Blackmun, J., dissenting from denial of certiorari). See also *Furman*, 408 U.S. at 313 (White, J., concurring) (“[A]s the statutes before us now are administered, the penalty is so infrequently imposed that the threat of execution is too attenuated to be of substantial service to criminal justice.”).

requires a “heightened degree of fairness to the individual.”<sup>52</sup> A current majority of the Court believes these commands are incompatible and irreconcilable, favoring general consistency of sentencing over mitigation of individual sentence.<sup>53</sup>

While the Rehnquist Court has claimed to favor deferring to the states’ authority over death sentencing practices,<sup>54</sup> it has ruled on practically every facet of the capital sentencing process. Some notable holdings include the following: Execution of the insane is unconstitutional,<sup>55</sup> but execution of the mentally retarded is not;<sup>56</sup> execution of a person at least sixteen years old at the time of the crime is not cruel and unusual;<sup>57</sup> racial disparities in death sentences do not warrant federal intervention without evidence of intentional racial discrimination against the particular defendant;<sup>58</sup> states are not required to provide counsel to indigent death row prisoners seeking post-conviction relief in state courts,<sup>59</sup> but federal courts must provide such counsel in federal litigation;<sup>60</sup> and new evidence showing defendant’s actual innocence may not be introduced in federal court after the state’s statute of limitations has run without a showing by clear and convincing evidence that, given the new evidence, no reasonable juror would have found the defendant eligible for death.<sup>61</sup> More recently, the severe limitations on filing second or successive habeas corpus petitions contained in the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) have been upheld.<sup>62</sup> Even given the Rehnquist Court’s generally recognized core motivations of constraint on federal interference with state prerogatives and judicial restraint when evaluating legislative acts, the

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52. *Callins*, 510 U.S. at 1151 (Blackmun, J., dissenting from denial of certiorari). *See also* *Woodson v. North Carolina*, 428 U.S. 280, 301 (1976); *Lockett v. Ohio*, 438 U.S. 586, 605 (1978).

53. *See Callins*, 510 U.S. at 1156 (Blackmun, J., dissenting from denial of certiorari). *Cf. id.* at 1142–43 (Scalia, J., concurring in denial of certiorari).

54. *See, e.g., Herrera v. Collins*, 506 U.S. 390, 416–17 (1993) (opinion by Rehnquist, C.J.) (holding that state criminal trial proceedings are “the paramount event for determining the guilt or innocence of the defendant,” and significantly raising the bar for admissibility of new evidence in support of a federal habeas petition claiming actual innocence).

55. *Ford v. Wainwright*, 477 U.S. 399, 401 (1986).

56. *Penry v. Lynaugh*, 492 U.S. 302, 340 (1989).

57. *Stanford v. Kentucky*, 492 U.S. 361, 380 (1989).

58. *McCleskey v. Kemp*, 481 U.S. 279, 292 (1987).

59. *See Murray v. Giarratano*, 492 U.S. 1, 10 (1989).

60. *McFarland v. Scott*, 512 U.S. 849, 859 (1994).

61. *See Herrera v. Collins*, 506 U.S. 390, 417–19 (1993).

62. *See Stewart v. Martinez-Villareal*, 523 U.S. 637, 645–46 (1998) (holding that as long as a habeas petitioner includes all possible claims for relief in his first habeas petition, he will not be precluded by the AEDPA from a future hearing on claims formerly adjudged factually premature); *Felker v. Turpin*, 518 U.S. 651, 658 (1996) (holding that the AEDPA does not deprive the Supreme Court of jurisdiction to entertain habeas petitions filed as original matters).

Court's proactive death penalty jurisprudence is at best unpredictable, at worst arbitrary.<sup>63</sup> Acting against the stern admonition of one of its brethren, the Court appears to have no problem "tinker[ing] with the machinery of death."<sup>64</sup>

### C. SOCIETAL/PENOLOGICAL BASES FOR CAPITAL PUNISHMENT

In upholding the death penalty as practiced in *Gregg v. Georgia*, the Supreme Court recognized two societal/penological purposes served by capital punishment: retribution and deterrence of capital crimes by prospective offenders.<sup>65</sup> Later, Justice Stevens recognized these purposes in his memorandum respecting denial of certiorari in *Lackey*.<sup>66</sup> Retribution, while "no longer the dominant objective of the criminal law,"<sup>67</sup> is neither a "forbidden objective nor one inconsistent with our respect for the dignity of men."<sup>68</sup> Because retribution is instinctual in man and is a justifiable expression of society's moral outrage, the Court stressed that it is better to channel such reaction through the administration of criminal justice and legal process rather than "self-help, vigilante justice, and lynch law."<sup>69</sup> Deterrence, while the subject of much debate and scientific study, is a "complex factual issue" without any "convincing empirical evidence either supporting or refuting" the view that it is furthered by capital punishment.<sup>70</sup> The Court thus held that the resolution of the debate "properly rests with the legislatures, which can evaluate the results of statistical studies in terms of their own local conditions and with a flexibility of approach that is not available to the courts."<sup>71</sup> In recognizing the moral consensus of its constituents as well as the social

63. See BEDAU, *supra* note 25, at 241–42.

64. *Callins v. Collins*, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting from denial of certiorari).

65. *Gregg*, 428 U.S. at 183–86. The Court also identifies, but gives short shrift to, incapacitation as a social purpose served by capital punishment. See *id.* at 183 n.28.

66. *Lackey*, 514 U.S. at 1045.

67. *Gregg*, 428 U.S. at 183 (quoting *Williams v. New York*, 337 U.S. 241, 248 (1949)).

68. *Id.* (quoting *Furman v. Georgia*, 408 U.S. 238, 394–95 (1972) (Burger, C.J., dissenting)).

69. *Id.* (quoting *Furman*, 408 U.S. at 308 (Stewart, J., concurring)).

70. *Id.* at 185–86.

71. *Id.* at 186. One recent statistical survey conducted by the *New York Times* suggests that deterrence and capital punishment in fact may be related *inversely*. The study found that over the last twenty years, "the homicide rate in states with the death penalty has been 48 percent to 101 percent higher than in states without the death penalty" and that "homicide rates had risen and fallen along roughly symmetrical paths in the states with and without the death penalty." Raymond Bonner & Ford Fessenden, *Absence of Executions: A Special Report, States with No Death Penalty Share Lower Homicide Rates*, N.Y. TIMES, Sept. 22, 2000, at A1.

utility of the sanction, a state legislature could, the Court reasoned, possess a constitutionally sound basis for imposing capital punishment.

#### D. THE DEATH ROW PHENOMENON

At the end of the twentieth century, popular support for capital sentencing arguably has never been stronger.<sup>72</sup> Politicians, both Democrat and Republican, are elected at least in part because of their “tough” stance on crime, championing platforms that necessarily embrace capital punishment.<sup>73</sup> The result is a record number of inmates on death row and indication that this number will continue to swell.<sup>74</sup> Concurrently, a variety of factors stretch the length of time prisoners spend on death row awaiting execution ever longer;<sup>75</sup> presently, the national average is nearly twelve years.<sup>76</sup> This dilemma, a record number of prisoners indefinitely trapped in a situation described as “so degrading and brutalizing to the human spirit as

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72. See BEDAU, *supra* note 25, at 17 (citing a 1994 Gallup Poll which found that over 80% of Americans favored the death penalty). See also Venise Wagner, *Crime Measures Rack Up Big Wins*, S.F. EXAMINER, Mar. 8, 2000, at A23 (explaining that California’s Proposition 18, which expands crimes punishable by death to include arson and kidnapping, passed in 2000 with 72% of the vote); Jim Yardley, *Texas’ Busy Death Chamber Helps Define Bush’s Tenure*, N.Y. TIMES, Jan. 7, 2000, at A1 (“[C]onventional political wisdom holds that a politician cannot be too supportive of the death penalty, when polls say nearly 3 out of 4 Americans favor it.”). But see Ken Armstrong & Steve Mills, *Death Penalty Support Erodes*, CHI. TRIB., Mar. 7, 2000, at 1 (citing a 2000 Gallup Poll finding that 66% of Americans now favor the death penalty and a Tribune Poll finding that only 58% of registered voters in Illinois support the death penalty); *Most Californians Support Halting Executions Pending Study*, Poll Says, L.A. TIMES, June 23, 2000, at A10 (citing a 2000 Field Poll that showed support for the death penalty in California at 63%—the lowest level in nearly thirty years).

73. See BEDAU, *supra* note 25, at 17–18 (“For several years it has been virtually impossible for any candidate for high elective office in the states . . . to appear hesitant over (much less opposed to) the death penalty.”). In the 1998 campaign for governor of California, Republican Dan Lungren questioned Democrat Gray Davis’ commitment to the death penalty. Davis responded that California should consider adopting the repressive criminal justice system of Singapore; he was subsequently elected. See Bill Ainsworth, *Davis Takes Tough Stance Against Crime*, SAN DIEGO UNION-TRIB., Nov. 1, 1999, at A3. Republican George W. Bush ran his campaign for the Texas governor’s office as a “law-and-order” conservative, calling the death penalty a deterrent to crime. He was elected and presided over a record number of executions. See Yardley, *supra* note 72. While campaigning for the presidency, then governor of Arkansas Bill Clinton pointedly interrupted his campaign to return to Arkansas for an execution. He was never questioned thereafter on his commitment to the death penalty; he was elected and later signed into law a massive expansion of the federal death penalty. BEDAU, *supra* note 25, at 18.

74. See DOJ STATISTICS, *supra* note 24, at 7–9.

75. See discussion *infra* Part II.

76. See DOJ STATISTICS, *supra* note 24, at 12. The precise figure (eleven years and eleven months) is based on the *most recent* sentencing date only, and thus does not account fully for the delay of execution endured by inmates like Mr. Knight and Mr. Moore who have been sentenced and resented to death. See *id.* tbl.12.

to constitute psychological torture,”<sup>77</sup> is known as the death row phenomenon.

The death row phenomenon may be viewed as a natural, some would say inherent, component of a legalistic society. Justice Stevens himself described the inevitability of delay in execution:

[E]xecution normally does not take place until after the conclusion of post-trial proceedings in the trial court, direct and collateral review in the state judicial system, collateral review in the federal judicial system, and clemency review by the executive department of the State. However critical one may be of these protracted post-trial procedures, it seems inevitable that there must be a significant period of incarceration on death row during the interval between sentencing and execution.<sup>78</sup>

Delay, whether attributable to the prisoner or the state, is arguably necessary in order to avoid society’s “ultimate nightmare”—execution of an innocent man or woman.<sup>79</sup>

But what is the price? “[T]he prospect of pending execution exacts a frightful toll during the inevitable long wait between the imposition of sentence and the actual infliction of death,”<sup>80</sup> and “the onset of insanity while awaiting execution of a death sentence is not a rare phenomenon.”<sup>81</sup> Whether the state or the prisoner is responsible for the delay “does not render the lengthy period of impending execution any less torturous.”<sup>82</sup> Furthermore, reprieves may only make matters worse. By the time a death sentence is finally carried out, it often follows “one or more agonizing stays of execution.”<sup>83</sup> “Lengthy delays, especially if punctuated by a series of last minute reprieves, intensify the prisoner’s suffering.”<sup>84</sup> Moreover, and ironically, measures such as moratoria, which are normally implemented “in order to permit politicians and jurists to debate whether to abolish the

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77. *People v. Anderson*, 493 P.2d 880, 894 (Cal. 1972) (citations omitted). For a more detailed analysis of this psychological torture, see discussion *infra* Part III.A.2.

78. *Coleman v. Balkcom*, 451 U.S. 949, 952 (1981) (Stevens, J., concurring in denial of certiorari).

79. Ken Armstrong & Steve Mills, *Ryan: ‘Until I Can Be Sure’, Illinois is First State to Suspend Death Penalty*, CHI. TRIB., Feb. 1, 2000, at 1 (quoting Governor George Ryan as he declared a moratorium on executions in Illinois).

80. *Furman v. Georgia*, 408 U.S. 238, 288 (1972) (Brennan, J., concurring).

81. *Solesbee v. Balkcom*, 339 U.S. 9, 14 (1950) (Frankfurter, J., dissenting).

82. *Anderson*, 493 P.2d at 895. See also *Furman*, 408 U.S. at 289 n.37 (Brennan, J., concurring).

83. *Lenhard v. Wolff*, 444 U.S. 807, 811 n.2 (1979) (Marshall, J., dissenting from denial of application for stay of execution).

84. *Dist. Attorney for the Suffolk Dist. v. Watson*, 411 N.E.2d 1274, 1291 n.5 (Mass. 1980) (Liacos, J., concurring) (citation omitted).

death penalty,"<sup>85</sup> further exacerbate the problem, placing prisoners in the ultimate state of uncertainty.<sup>86</sup>

Focus on the death row phenomenon thus exposes several tensions in the system of punishment by death as it is practiced in the United States today. The population explosion on death rows demonstrates that prosecutors win capital convictions much more frequently than states carry out executions. Since capital punishment is justified by the social goals of retribution and deterrence, a delay in execution necessarily undermines the validity of capital punishment and the criminal justice system in general. An attempt to speed up the appeals process risks infringing upon the capital defendant's due process rights. An attempt to slow down this process exposes him to cruel and unusual punishment. Moreover, the potential solution of efficient execution, as well as any inquiry into the abolition of the death penalty, has constitutional implications. These are the far-reaching consequences that are necessarily entangled when scrutinizing a *Lackey* claim.

## II. CAUSES OF DELAY BETWEEN SENTENCING AND EXECUTION

Although some significant period of delay between sentence and execution may be inevitable, some states execute at a rate far below the national average, either with the best of intentions (thoroughly protecting the rights of capital defendants) or inadvertently (through inadequate and/or unconstitutional post-conviction processing). In either case, and regardless of who may be responsible for the delay, the average time death row inmates in these states spend awaiting execution stretches ever longer, subjecting them to psychological torture and driving some of them to insanity or even suicide.<sup>87</sup> These circumstances offend any reasonable interpretation of the Eighth Amendment's Cruel and Unusual Punishment Clause and leave no hope for achieving any socially acceptable goal of punishment.<sup>88</sup>

Some of the delay in the eventual execution of a capital defendant may be traced all the way back to trial.<sup>89</sup> Overburdened prosecutors and defense attorneys may seek extensions on filings, and courts may take time

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85. WILLIAM A. SCHABAS, *THE DEATH PENALTY AS CRUEL TREATMENT AND TORTURE* 98 (1996).

86. See discussion *infra* Part II.C.

87. See discussion *infra* Part III.A.2.

88. See discussion *infra* Part III.

89. See Dwight Aarons, *Getting Out of This Mess: Steps Toward Addressing and Avoiding Inordinate Delay in Capital Cases*, 89 J. CRIM. L. & CRIMINOLOGY 1, 20-21 (1998).

in ruling on issues that are collateral to the defendant's guilt, such as a state's motion to disqualify a defense attorney.<sup>90</sup> Thus, for some capital defendants the shadow of death may start to stretch longer even as it looms on the horizon.

#### A. DIRECT APPEAL

Direct appeal is the first major source of delay for most capital defendants. One such defendant, Duncan McKenzie, watched as the Montana Supreme Court and the United States Supreme Court twice tangled over the validity of his conviction because of potentially unconstitutional defects in the trial court's instructions to the jury.<sup>91</sup> In its fourth review of his case on direct appeal, the Montana Supreme Court ruled that any error in the instructions to the jury was harmless.<sup>92</sup> On the one hand, this delay shows that the system of direct appeal vigorously defends a capital defendant's constitutional rights. Another view is that the delay is intolerable because it is entirely attributable to the government, from questionable jury instructions at the trial level to constitutional tinkering at the highest appellate level. Either way, Mr. McKenzie had served five years on death row before filing his first state habeas petition.

The fact that Mr. McKenzie had his conviction immediately and directly reviewed four times in five years alone may brand his case a relic. States are presently experiencing a severe shortage of qualified attorneys who are willing to take on death penalty appeals.<sup>93</sup> California is perhaps the paradigmatic example of the crisis, where zealous prosecutors win capital convictions faster than the courts can find lawyers to handle existing appeals.<sup>94</sup> Like almost all death penalty states, California has an automatic and mandatory direct appeal.<sup>95</sup> Capital defendants are entitled to appointed counsel for these appeals. However, presently one-fourth of the condemned in California are without legal representation;<sup>96</sup> some sources currently estimate that the wait for appellate counsel can take up to four

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90. *Id.*

91. See *McKenzie v. Montana*, 443 U.S. 903 (1979); *McKenzie v. Montana*, 433 U.S. 905 (1977). Constitutional issues on appeal included the (il)legality of presuming intent and the burden of proof for state of mind, respectively.

92. See *State v. McKenzie*, 608 P.2d 428, 455-57, 459 (Mont. 1980).

93. See Aarons, *supra* note 89, at 13-22.

94. *Id.* at 13.

95. See DOJ STATISTICS, *supra* note 24, at 3.

96. *Few Inmates Executed in California, 8 Since 1978: Death-Row Inmates Are More Likely to Die of Old Age or Illness*, TELEGRAPH HERALD (Dubuque, Iowa), Nov. 23, 2000, at C11.

years.<sup>97</sup> State requirements may be the main cause of the shortage: To be eligible for appointment in California, attorneys must have practiced for four years, completed state-approved training programs, and handled at least seven appellate cases, including one homicide.<sup>98</sup> But many attorneys who meet these strict standards do not take the work because of the limited payment of fees and expenses California authorizes for appointed appellate attorneys.<sup>99</sup> On top of this shortage, the trial court reporter, clerk, judge, and trial attorneys often take years to certify trial transcripts for appellate review.<sup>100</sup> Thus, in California, a capital defendant may sit on death row for up to nine years before his first direct appeal is perfected.<sup>101</sup> In 2000, the Ninth Circuit ruled that this situation precluded California from opting into the accelerated review of federal habeas petitions provided by the AEDPA.<sup>102</sup> The Supreme Court denied certiorari unanimously and without comment.<sup>103</sup>

## B. COLLATERAL REVIEW

Collateral review of a capital defendant's conviction in state and federal courts is the other major, and historically the most egregious, source of delay in execution. Before a writ of habeas corpus may be filed in federal court, the capital defendant must "exhaust [his] state remedies."<sup>104</sup> A defendant meets the exhaustion requirement by presenting each of his

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97. See Charles D. Weisselberg, Comment, *Death and Deliberation*, RECORDER (S.F.), Dec. 29, 1999, at 6.

98. Mack Reed, *An Even Longer Wait on Death Row*, L.A. TIMES, Apr. 3, 1996, at A1. On January 22, 2001, the Supreme Court of Illinois announced new rules governing the manner in which death penalty cases are handled in that state. Jo Thomas, *New Death Penalty Rules Are Issued in Illinois*, N.Y. TIMES, Jan. 24, 2001, at A17. Under the new rules, two lawyers will be appointed to every poor defendant in a death penalty case. Both lawyers must be certified by the Illinois Supreme Court, and the requirements for certification are even more demanding than those of California: the lead attorney must have practiced for five years, handling at least eight felony jury trials including two murder trials; co-counsel must have three years of experience and at least five felony jury trials. *Id.*

99. See Reed, *supra* note 98. California only recently raised available funds for initial investigation and preparation of a state habeas petition from \$3,000 to \$25,000. See Paul Elias & Rinat Fried, *A Failure to Execute*, RECORDER (S.F.), Dec. 15, 1999, at 1.

100. Reed, *supra* note 98.

101. Aarons, *supra* note 89, at 14.

102. See *Ashmus v. Woodford*, 202 F.3d 1160, 1170 (9th Cir. 2000). The panel held that prior to January 1, 1998, "California's unitary review scheme did not comply with the eligibility requirements of Chapter 154 of the AEDPA." *Id.* at 1165. It expressly avoided the question of whether California's 1998 amendments to the scheme would render California eligible to opt into Chapter 154. *Id.* at 1165 n.7. To date, no state has qualified for the "fast-track provisions" of the AEDPA. Elias & Fried, *supra* note 99.

103. See *Woodford v. Ashmus*, 121 S. Ct. 274 (2000). See also Tony Mauro, *Politics on the Doorstep As Court Returns*, RECORDER (S.F.), Oct. 3, 2000, at 1.

104. 28 U.S.C. § 2254(b)(1)(A) (1994).

constitutional claims to the state court at least once.<sup>105</sup> These state proceedings alone can stretch out for years.<sup>106</sup> While it may be obvious that capital defendants have little incentive expediently to push these claims through the judicial process, it is also apparent that those who defend the state in these proceedings also lack such incentive.<sup>107</sup> The fact that the office of the state's Attorney General ordinarily handles such matters exposes the first factor of delay: the practical matter of obtaining the complete files, records, and transcripts of the case from the prosecutor's office.<sup>108</sup> Tactical decisions also account for substantial delay. In practice, the California Attorney General's Office, for instance, insists on having state courts review new claims of error that first arise in federal court, and often appeals them all the way to the California Supreme Court.<sup>109</sup> Finally, delay can be attributed to the mere fact that the Attorney General's Office is a political actor. Death penalty cases generate a tremendous amount of public attention at their beginning (trial) and at their end (execution). In the middle, even the most notorious capital defendants fade from the public eye, and the developments and legal maneuverings of their cases garner little attention. Thus, there is little pressure from the public to hurry along habeas proceedings. State governors who are squeamish about execution can therefore delay signing death warrants and still be perceived as being tough on crime because of their conviction rates.<sup>110</sup> Since the actors on both sides of the post-conviction process generally have little reason to act efficiently, exhaustion of state remedies can take years.

Federal habeas corpus review, long the basis for protracted death penalty challenges as well as the source of the Supreme Court's Byzantine death penalty jurisprudence, is currently being streamlined severely through legislative and judicial efforts.<sup>111</sup> Although it will continue to generate at least some delay for newly sentenced capital defendants, federal habeas review remains one of the major components of the delay endured

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105. *Brown v. Allen*, 344 U.S. 443, 447 (1953). If there is no state process by which to raise the claim, exhaustion is waived and the defendant may proceed to federal court. *Id.* at 458.

106. Weisberg, *supra* note 97.

107. See Aarons, *supra* note 89, at 20–23; Elias & Fried, *supra* note 99.

108. See Aarons, *supra* note 89, at 20–21.

109. Elias & Fried, *supra* note 99. Deputy Attorney General William Pahl, head of the Sacramento death penalty unit, says the Attorney General's office is "'reconsidering' its insistence on exhaustion [of constitutional claims first raised in federal court] and has, in a few cases, allowed a federal judge to hear a habeas petition that contained claims the California Supreme Court had not considered." *Id.*

110. See Aarons, *supra* note 89, at 21–22.

111. See discussion *infra* Part III.A.1.

by those who presently have served inordinate amounts of time on death row. A brief history is therefore in order.

By the early 1960s, the federal habeas petition had become the “chief device for attacking a state court death sentence.”<sup>112</sup> Historically, there was no statute of limitations governing a prisoner’s filing of a federal writ, nor did a failed writ preclude a prisoner from filing a subsequent application on a new constitutional claim.<sup>113</sup> Prior to 1976, the Court interpreted habeas laws such that a prisoner had broad access to the writ, “virtually eliminat[ing] most procedural impediments to the relitigation of the manner by which state prisoners were prosecuted.”<sup>114</sup> Thus, by the time the Supreme Court ruled in *Gregg v. Georgia* that the death penalty was not unconstitutional per se, successive habeas petitions were “a hallmark of post-conviction capital litigation.”<sup>115</sup> But beginning in 1977, the Court shifted to an approach that was more deferential to state court rulings and less willing to address the merits of claims asserted in second or successive (“SOS”) petitions.<sup>116</sup> The Court, however, was not willing to overrule its habeas precedents at the time.<sup>117</sup> The confused legal state that followed laid the foundation for the current maze of death penalty jurisprudence. While Congress and the Supreme Court are presently making efforts to clear this tangled thicket, it is unclear how effective, and constitutional, these efforts will be deemed.<sup>118</sup> In the meantime, 125 inmates across the country have reached or surpassed a twenty-year tenure on death row;<sup>119</sup> in California, 109 inmates have spent fifteen years or longer on death row.<sup>120</sup>

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112. BEDAU, *supra* note 25, at 243.

113. *Id.*

114. Aarons, *supra* note 89, at 25.

115. BEDAU, *supra* note 25, at 243.

116. Aarons, *supra* note 89, at 26. For a thorough analysis of the cases in chronological order, see *id.* at 26 n.111.

117. *Id.*

118. Elias & Fried, *supra* note 99. (“[The AEDPA] doesn’t affect cases already filed in federal court. What’s more, no appellate court has defined the scope and reach of the law—and no state as yet has qualified for the law’s fast-track provisions.”)

119. See *Knight v. Florida*, 528 U.S. 990, 999 (1999) (Breyer, J., dissenting from denial of certiorari).

120. Elias & Fried, *supra* note 99.

## C. MORATORIA

One other significant source of delay in execution may be “gaining resonance around the nation.”<sup>121</sup> In 1997, the American Bar Association called for a national moratorium on executions in order to develop a system of capital punishment that ensures adequate legal representation and eliminates unfairness. The call generated an initially muted response.<sup>122</sup> But since then, legislatures in sixteen of the thirty-eight states with death penalty provisions have considered or are presently considering instituting a moratorium.<sup>123</sup> No state officially imposed a moratorium until this year when Illinois Governor George Ryan used his executive power to do so.<sup>124</sup> Since reinstating the death penalty in 1977, half of the 260 capital convictions in Illinois have been reversed, or remanded for a new trial or sentencing hearing on appeal. In that same period of time, Illinois executed twelve inmates and had just recently, after a series of highly publicized exonerations, released from custody its thirteenth death row inmate.<sup>125</sup> Decrying the state’s “shameful record of convicting innocent people and putting them on Death Row,” Ryan declared that no inmate would be executed “until [there is] moral certainty that no innocent man or woman is facing a lethal injection.”<sup>126</sup> While Illinois may be a current focus of the national death penalty debate, most agree that convicting the innocent “should not be seen as an Illinois problem.”<sup>127</sup>

Surely no one would question the merits of measures that purport to guarantee judicial fairness and protect against the state taking an innocent life. But it would be shortsighted to view a moratorium as wholly just. Governor Ryan announced his intention to appoint an unbiased panel to study the flaws in the Illinois capital sentencing system and to wait for their

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121. Dirk Johnson, *Illinois, Citing Faulty Verdicts, Bars Executions*, N.Y. TIMES, Feb. 1, 2000, at A1. See also Richard Carelli, *Call for Ban on Death Penalty Grows at ABA*, L.A. TIMES, Feb. 13, 2000, at A15 (ABA President William Paul reporting “growing momentum” for the moratorium issue).

122. See Carelli, *supra* note 121.

123. *Id.*

124. Armstrong & Mills, *supra* note 79. Nebraska’s legislature passed a moratorium in 1999, but the governor vetoed it. Johnson, *supra* note 121.

125. See Armstrong & Mills, *supra* note 79; Ken Armstrong & Christi Parsons, *Half of State’s Death-Penalty Cases Reversed, A Variety of Errors Found in 130 Trials*, CHI. TRIB., Jan. 22, 2000, at 1. Under the guidance of Northwestern University law professor Lawrence Marshall, journalism and law students were instrumental in three of the recent exonerations. *The Failure of the Death Penalty in Illinois*, a five-part investigative series in the *Chicago Tribune*, further detailed a system of prosecutor and police misconduct, inadequate appointed counsel, and jailhouse informants. Ken Armstrong & Steve Mills, *The Failure of the Death Penalty in Illinois*, CHI. TRIB., Nov. 14–18, 1999.

126. Armstrong & Mills, *supra* note 79.

127. Johnson, *supra* note 121 (quoting Professor Marshall).

recommendation before proceeding with executions.<sup>128</sup> In doing so, however, he set no timetable for completion of the study and indicated that he will allow prosecutors to continue to pursue the death penalty in pending and new cases.<sup>129</sup> The moratorium thus inflicts a capricious punishment not only upon those presently convicted of a capital offense, but also upon those who will later be convicted of such an offense. For those who already reside on death row, the moratorium is at best a temporary postponement of the inevitable—a cruel glimmer of hope. At worst, it is yet another factor lengthening a prisoner’s stay in psychological purgatory. For those yet to be tried, the moratorium represents a more Camusian absurdity: society’s willingness to prosecute and convict a defendant for a crime that carries a punishment it is unwilling to inflict. Moreover, a moratorium is inefficient because it allows the state to increase the number of prisoners on death row while eliminating one of its primary methods for removing prisoners from death row. Thus, some measures that are aimed at appeasing the “growing national crisis in the administration of capital punishment,”<sup>130</sup> and are arguably viewed as beneficial to the abolitionist movement, even themselves may contribute to a prisoner’s unreasonably long stay on death row.<sup>131</sup> This outcome only enhances the Supreme Court’s obligation to hear and decide the *Lackey* problem on its merits.

### III. INORDINATELY DELAYED EXECUTION AS CRUEL AND UNUSUAL PUNISHMENT: A SUBSTANTIVE ANALYSIS

The *Lackey* petitioner may make two distinct Eighth Amendment claims. The first is that an inordinate amount of time spent on death row constitutes “psychological torture” and is itself cruel and unusual punishment.<sup>132</sup> In this analysis, the time a capital defendant serves in the shadow of death is scrutinized separately and apart from the death sentence itself. Such punishment cannot survive modern Eighth Amendment analysis and the appropriate remedy is commuting the sentence to life imprisonment. The second claim argues that executing an individual after inordinate delay retains no penological justification. In *Gregg v. Georgia*, the Court determined that capital punishment could be justified by the

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128. See *Armstrong & Mills*, *supra* note 79.

129. See *id.* Five weeks after declaring the moratorium, Governor Ryan announced his selections for the panel, including former U.S. Senator Paul Simon, best-selling novelist and lawyer Scott Turow, and various prosecuting and defense attorneys. See Steve Mills & Ken Armstrong, *Ryan Sets Up Panel to Study Death Penalty*, CHI. TRIB., Mar. 9, 2000, at 1 (Metro).

130. Carelli, *supra* note 121 (quoting Senator Patrick J. Leahy (D-Vt.)).

131. SCHABAS, *supra* note 85, at 98.

132. See, e.g., *People v. Anderson*, 493 P.2d 880, 894 (Cal. 1972).

social and penological purposes of retribution and deterrence.<sup>133</sup> Both of these justifications are frustrated by an inordinate delay between sentencing and execution; at some point, the frustration becomes so severe that executing the prisoner furthers neither purpose. Under *Furman v. Georgia*, when a punishment serves no penological purpose more effectively than a less severe punishment, it is unreasonably excessive and thus prohibited by the Eighth Amendment.<sup>134</sup> The appropriate remedy in this instance is also commutation to life imprisonment.

#### A. CLAIM: DELAY OF EXECUTION IS PSYCHOLOGICAL TORTURE

##### 1. *Ripening the Claim and Finding Jurisdiction*

Since the very basis of this claim (inordinate delay of execution is akin to psychological torture) requires the passage of time, the first step for this type of *Lackey* claimant may be his most difficult. In order to receive a hearing on the merits, this petitioner must convince a court that his claim is sufficiently ripe and must further persuade it to find jurisdiction. Although it is unclear at what precise point an inmate may make a colorable claim for inordinate delay, it is generally accepted that such a claim is not ripe until at least a second habeas petition.<sup>135</sup>

Prior to the AEDPA, and its state-law equivalents,<sup>136</sup> courts used the “abuse of the writ” doctrine to dispose of *Lackey* claimants.<sup>137</sup> In order to overcome this doctrine, a successive habeas petitioner had to show cause for failure to raise the new claim in a previous petition and prejudice therefrom;<sup>138</sup> courts were unwilling to allow the *Lackey* claim to clear this hurdle on two general grounds. First, courts found that this particular Eighth Amendment claim “lacks persuasive value” because either the

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133. *Gregg*, 428 U.S. at 155. *Accord* *Lackey v. Texas*, 514 U.S. 1045, 1045 (1995) (Stevens, J., respecting denial of certiorari).

134. *Furman*, 408 U.S. at 280 (Brennan, J., concurring).

135. *See* *Turner v. Jabe*, 58 F.3d 924, 931 (4th Cir. 1995) (holding legal and factual predicates for claim were available in a third federal habeas petition); *McKenzie v. Day*, 57 F.3d 1461, 1465 (9th Cir. 1995) (holding that the claim could have been brought in a second federal habeas petition if not amended to the first). Although it is possible that direct appeals alone could color a *Lackey* claim in time for inclusion in an initial habeas petition, it is unlikely.

136. The subtleties of the various state statutes relating to a second or successive habeas petition are beyond the scope of this Note. Therefore, this section conducts an analysis of habeas procedure based on the AEDPA and the federal system. The reader should be aware that “habeas petition,” as referred to in this analysis, may refer to a state or federal petition, or both.

137. *See, e.g.,* *White v. Johnson*, 79 F.3d 432, 439 (5th Cir. 1996); *Turner*, 58 F.3d at 932; *McKenzie*, 57 F.3d at 1465.

138. *McCleskey v. Zant*, 499 U.S. 467, 493 (1991).

petitioner was responsible for the delay or the claim was not based on a legally recognized position.<sup>139</sup> Second, courts argued that a claimant could not show cause because he could have raised a sufficiently ripe claim in an earlier habeas petition.<sup>140</sup>

The first position is plainly untenable. A prisoner holds the right to pursue due process of law separate and apart from his right not to be subjected to inhuman treatment; these rights may not be “played off against” each other.<sup>141</sup> Death row inmates suffer severe mental anxiety regardless of the source of delay; “[t]he fact that the delay may be due to the defendant’s insistence on exercising his appellate rights does not mitigate the severity of the impact on the condemned individual.”<sup>142</sup> Furthermore, petitioners are not required to claim a position that has been previously recognized by law. The petitioners in *Brown v. Board of Education* did not have legal precedent to support their position—this fact, of course, ultimately was judged irrelevant.<sup>143</sup>

The second argument is (un)constitutional Catch-22. In *Turner v. Jabe*, the Fourth Circuit explained that petitioner’s claim constituted abuse of the writ because he could have raised an equally ripe *Lackey* claim in his third habeas petition filed four years earlier.<sup>144</sup> At that point, he had served twelve years on death row.<sup>145</sup> By bringing his claim four years later, the court reasoned that Mr. Turner at best offered additional evidence to make his claim stronger and therefore did not demonstrate an appropriate cause of delay.<sup>146</sup> For Mr. Turner, this outcome is unfair because he had no way of knowing when this ostensibly legitimate constitutional claim became meritorious. From a larger view, because the argument gives only an indirect indication as to the length of time required to ripen a *Lackey* claim, it is disingenuous, offering no real guidance to future petitioners. Denying a petitioner’s show of cause in this manner thus offends justice both to the individual and to society.

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139. See, e.g., *White*, 79 F.3d at 439; *McKenzie*, 57 F.3d at 1466–67. Cf. *Knight v. Florida*, 528 U.S. 990, 990 (1999) (Thomas, J., concurring in denial of certiorari).

140. See, e.g., *Turner*, 58 F.3d at 932; *McKenzie*, 57 F.3d at 1465–66.

141. *Furman v. Georgia*, 408 U.S. 238, 289 n.37 (1972) (Brennan, J., concurring).

142. *Dist. Attorney for the Suffolk Dist. v. Watson*, 411 N.E.2d 1274, 1283 (Mass. 1980) (Liacos, J., concurring).

143. 347 U.S. 483, 488 (1954). In each of the four cases before the Court in *Brown*, lower courts had relied upon the “so-called ‘separate but equal’ doctrine announced by [the] Court in *Plessy v. Ferguson*.” *Id.* (citation omitted). The petitioners’ then novel equal protection argument was based on the claim that “segregated public schools are not ‘equal’ and cannot be made ‘equal’.” *Id.*

144. *Turner*, 58 F.3d at 932.

145. See *id.* at 931.

146. *Id.* (citing *McCleskey v. Zant*, 499 U.S. 467, 498 (1991)).

The AEDPA and its state-law counterparts severely limit a habeas petitioner's ability to bring an SOS petition.<sup>147</sup> The "thrust of the Act is that a prisoner who seeks to take advantage of the Great Writ must enumerate all the grounds on which he believes himself deserving of such relief in his first petition in federal court."<sup>148</sup> In order to file an SOS petition in district court, a claimant must first ask the appeals court for authorization.<sup>149</sup> The authorization panel must dismiss any claim that was presented previously in a federal habeas petition;<sup>150</sup> it must also dismiss a claim not presented previously unless it relies either on a new ruling of constitutional law or a showing of actual innocence.<sup>151</sup> This one-two punch seems to sound the death knell for a *Lackey* claim asserting that inordinate time on death row itself violates the Eighth Amendment; the Ninth Circuit, for example, "has uniformly held that [*Lackey*] claims do not come within the terms of § 2244(b)(2) authorizing SOS petitions."<sup>152</sup>

This interpretation of the AEDPA, however, would seem to bar any claim for habeas relief that does not factually ripen until after the filing of an initial habeas petition. This would effectively "suspend the Writ" for these types of claims in violation of the Suspension Clause of Article I of the Constitution.<sup>153</sup> The Ninth Circuit recognized this problem in *Martinez-Villareal v. Stewart*, where petitioner Ramon Martinez-Villareal claimed, in his first habeas petition, that he was not competent to be executed.<sup>154</sup> The district court, at the urging of the state of Arizona, dismissed the claim as unripe because the state had yet to issue a warrant

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147. The AEDPA provides in pertinent part:

(2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless—

(A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and

(ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

Antiterrorism and Effective Death Penalty Administration Act, 28 U.S.C. § 2244(b)(2) (1996).

148. *Ceja v. Stewart*, 134 F.3d 1368, 1370 (9th Cir. 1998) (Fletcher, J., dissenting).

149. 28 U.S.C. § 2244(b)(3).

150. § 2244(b)(1).

151. § 2244(b)(2).

152. *LaGrand v. Stewart*, 170 F.3d 1158, 1160 (9th Cir. 1999). See also *Gerlaugh v. Stewart*, 167 F.3d 1222, 1223 (9th Cir. 1999); *Ceja*, 134 F.3d at 1369.

153. See U.S. CONST. art I, § 9, cl. 2. The clause reads in full: "The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."

154. 118 F.3d 628, 629–30 (9th Cir. 1997).

for petitioner's execution.<sup>155</sup> Mr. Martinez-Villareal then attempted to reassert the unadjudicated claim of incompetence in a second habeas petition and faced a seemingly insurmountable hurdle; the district court claimed that it was barred from hearing this second habeas petition by § 2244.<sup>156</sup> In order to prevent a potential constitutional conflict, the Ninth Circuit "concluded that the AEDPA's restrictions should be read not to apply to claims . . . which, by definition, could not be resolved in a first habeas petition."<sup>157</sup> Such a claim, like a claim for a state court remedy not yet exhausted, should be dismissed without prejudice such that § 2244 would not preclude a subsequent refiling. The Ninth Circuit found this reading "consistent with Congress' intent to secure to prisoners an opportunity (if only a single opportunity) to have their federal claims for relief adjudicated in federal court."<sup>158</sup>

Although the Ninth Circuit argues to the contrary, this reading of the AEDPA necessarily applies to a *Lackey* claim for inordinate delay of execution as cruel and unusual punishment even before a death warrant is issued.<sup>159</sup> This type of claim does not seek relief from the physical conditions of death row, nor does it claim that any amount of time spent on death row is cruel and unusual per se. The claim is founded on an inordinate length of time between sentence and execution. Because courts refuse to rule specifically on the amount of time it takes to ripen factually a *Lackey* claim, it is impossible for a potential claimant to know whether he should include the claim in his first habeas petition. Moreover, in a state with a rubber-stamp system of direct appeal, it is not inconceivable that a capital defendant might file his first habeas petition as early as his third or fourth year after conviction. Justice Stevens, who believes the *Lackey* claim is arguably colorable, would himself probably view this length of delay as unavoidable.<sup>160</sup> For this hypothetical capital defendant, a *Lackey* claim would only ripen factually in an SOS petition. Like Mr. Martinez-

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155. *Id.* at 630 n.1 (quoting State of Arizona's Reply to Response to Motion for Summary Judgment, Dec. 17, 1993, at 45-46).

156. *Id.* at 630.

157. *Ceja*, 134 F.3d at 1372 (Fletcher, J., dissenting) (explaining the holding in *Martinez-Villareal*).

158. *Id.* The Supreme Court "has not yet articulated a rule for determining what might constitute a violation of the Suspension Clause." *Id.* at 1371 n.2.

159. In her dissent in *Ceja*, Judge Fletcher suggests the "small class of claims" implicated in the Suspension Clause problem pertains only to the circumstances of a prisoner's execution; these claims thus ripen only after a death warrant is issued. *Id.* See also discussion *infra* Part III.B.1.

160. See *Coleman v. Balkcom*, 451 U.S. 949, 952 (Stevens, J., concurring in denial of certiorari). Cf. *Ceja*, 134 F.3d at 1372 (Fletcher, J., dissenting) (noting that eight and a half years on death row is "a long but hardly remarkable tenure and certainly not enough to raise a colorable *Lackey* claim").

Villareal's incompetence claim, and in order to prevent an unconstitutional interpretation of the AEDPA, the *Lackey* claim for inordinate delay as cruel and unusual punishment should not be dismissed out of hand by an SOS authorizing panel. The claim deserves its "single opportunity" to be heard in court.<sup>161</sup>

## 2. *The Merits of the Claim*

In *People v. Anderson*, the Supreme Court of California abolished capital punishment on the grounds that it was cruel and unusual punishment, and determined:

The cruelty of capital punishment lies not only in the execution itself and the pain incident thereto, but also in the dehumanizing effects of the lengthy imprisonment prior to execution during which the judicial and administrative procedures essential to due process of law are carried out. Penologists and medical experts agree that the process of carrying out a verdict of death is often so degrading and brutalizing to the human spirit as to constitute psychological torture.<sup>162</sup>

Other jurists have acknowledged the infliction of psychological torture upon death row inmates. Justice Frankfurter noted that the onset of insanity while awaiting execution is not uncommon.<sup>163</sup> The Massachusetts Supreme Court noted that the "violence done the prisoner's mind" is "inherent and inevitable in any system that informs the condemned person of his sentence and provides for a gap between sentence and execution," amounting to "torture in the guise of civilized business in an advanced and humane polity."<sup>164</sup> Justice Brennan recognized mental suffering in *Furman*

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161. The AEDPA, of course, does not preclude the Supreme Court from hearing a habeas petition presented to it as an original matter. *Felker v. Turpin*, 518 U.S. 651, 658 (1996). In order to justify the granting of such a writ, a petitioner must show "exceptional circumstances warranting the exercise of the Court's discretionary powers and must show that adequate relief cannot be obtained in any other form or from any other court." SUP. CT. R. 20.4(a). Precise records detailing the number and disposition of such petitions are not kept. See Dallin H. Oaks, *The "Original" Writ of Habeas Corpus in the Supreme Court*, 1962 SUP. CT. REV. 153 app. at 211 n.\*. One study, however, estimated that the Court received 2,000 motions for leave to file a petition for writ of habeas corpus from 1929–1961 and denied them all. *Id.* app. at 209–11. Of those 2,000 motions, 1,961 were denied without argument; 1,686 were denied without opinion. *See id.* app. at 211. These statistics are striking support for the Court's own view that "[t]hese writs are rarely granted." SUP. CT. R. 20.4(a). The Court, in fact, has not granted such a writ since 1925. ERWIN CHERMERINSKY, *FEDERAL JURISDICTION* 182 (3d ed. 1999); Oaks, *supra* at 153–54.

162. 493 P.2d 880, 894 (Cal. 1972) (citations omitted).

163. *Solesbee v. Balkcom*, 339 U.S. 9, 14 (1950) (Frankfurter, J., dissenting).

164. *Dist. Attorney for the Suffolk Dist. v. Watson*, 411 N.E.2d 1274, 1290–91 (Mass. 1980) (Liacos, J., concurring).

*v. Georgia*;<sup>165</sup> Justice Stevens referred to the phenomenon in his *Lackey* memorandum;<sup>166</sup> and finally, Justice Breyer noted that it is a “matter which courts and individual judges have long recognized.”<sup>167</sup>

Psychiatrists and penologists have argued that delay of execution inflicts mental stress that pushes the limits of endurance.<sup>168</sup> Dr. Louis J. West described death row as the “grim caricature of a laboratory, [where] the condemned prisoner’s personality is subjected to incredible stress for prolonged periods of time.”<sup>169</sup> This stress is especially exacerbated when “breath-taking” reprieves punctuate the delay.<sup>170</sup> And more than thirty-five years ago, when the average stay on death row was considerably shorter in duration than it is today, Clinton Duffy, former warden at California’s San Quentin Prison, put it this way: “One night on death row is too long, and the length of time spent there by [some] constitutes cruelty that defies the imagination. It has always been a source of wonder to me that they didn’t all go stark, raving mad.”<sup>171</sup> Legal commentators<sup>172</sup> and social workers<sup>173</sup> echo these opinions.

Finally, capital defendants themselves describe firsthand the surreal form of punishment that an extended stay on death row represents:

I would like for [the Supreme Court] to rule, not on [execution] itself, but the mental agony that one has to go through while he’s [sic] waiting to be executed.

165. *Furman*, 408 U.S. at 288 (citing *Anderson*, 493 P.2d at 894).

166. *Lackey*, 514 U.S. at 1046.

167. *Knight v. Florida*, 528 U.S. 990, 994 (1999) (Breyer, J., dissenting from denial of certiorari) (citations omitted).

168. For a thorough summary, see, for example, Kathleen Flynn, Note, *The “Agony of Suspense”: How Protracted Death Row Confinement Gives Rise to an Eighth Amendment Claim of Cruel and Unusual Punishment*, 54 WASH. & LEE L. REV. 291, 294–98 (1997).

169. Louis J. West, *Psychiatric Reflections on the Death Penalty*, in VOICES AGAINST DEATH 290, 291 (Philip English Mackey ed., 1976).

170. *Id.*

171. CLINTON T. DUFFY WITH AL HIRSHBERG, 88 MEN AND 2 WOMEN, at 254 (1962).

172. See, e.g., William Schabas, *Execution Delayed, Execution Denied*, 5 CRIM. L.F. 180, 184 (1994) (“Combine a hospital ward for the terminally ill, an institution for the criminally insane, and an ultramaximum security wing in a penitentiary, and one begins to approach the horror of death row.”).

173. See, e.g., Vicki Quade, *The Voice of Dead Men: Interview with Sister Helen Prejean*, HUM. RTS., Summer 1996, at 12, 14:

Torture is intrinsic to the death penalty.

... [P]eople [die] a thousand times mentally before they’ve died physically. You can’t condemn a person to death and not have them anticipate their [sic] death, imagine their death, and vicariously experience their death many, many times before they die.

Every one of the men I’ve accompanied have all had the same nightmare.

... [H]ow long will it take us to acknowledge that sentencing conscious human beings to their death is a form of torture[?]

You sit around and it's day in, day out. You got no idea what's going to happen to you. . . .

There's no help for it, but it works on you day by day.

. . . .

I go into bouts of depression periodically when I get to thinking about it. . . . It's hard to put that mental agony into words.<sup>174</sup>

Other prisoners describe the harrowing time as a “fight[] to maintain . . . sanity . . . in an environment maintained specifically for the purpose of bombarding the senses with hopelessness.”<sup>175</sup> Some inmates are even driven to suicide.<sup>176</sup>

Psychological torture of inmates is thus an immutable characteristic of the death row phenomenon and of the *Lackey* claimant. This torment is properly viewed as its own form of punishment, added to the claimant's death sentence; Justices Stevens and Breyer have acknowledged that it is necessarily implicated in a *Lackey* claim. Psychological torture thus provides a basis for a *Lackey* claim of inordinate delay of execution as cruel and unusual punishment.

Although the Supreme Court has never specifically addressed such a claim, as early as 1890, in *In re Medley*, the Court recognized that holding a condemned prisoner in solitary confinement without informing him of his execution date caused mental suffering and thus increased his level of punishment.<sup>177</sup> This additional form of punishment therefore may be viewed as being inflicted separately and apart from the prisoner's original sentence of execution. Although the Court ultimately decided *In re Medley* on ex post facto grounds, the Court was careful to point out that it

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174. BRUCE JACKSON & DIANE CHRISTIAN, *DEATH ROW 277* (1980) (quoting interview with anonymous inmate on death row in Texas).

175. Joseph M. Giarratano, *The Pains of Life*, in *FACING THE DEATH PENALTY* 193, 193 (Michael L. Radelet ed., 1989).

176. A study of Florida death row inmates showed that 35% attempted suicide and that 42% seriously considered it. See *Knight v. Florida*, 528 U.S. 990, 995 (1999) (Breyer, J., dissenting from denial of certiorari) (citing G. Richard Strafer, *Volunteering for Execution*, 74 J. CRIM. L. & CRIMINOLOGY 860, 872 n.44 (1983)). See also DOJ STATISTICS, *supra* note 24, at 6 tbl.5 (reporting one death row suicide in Alabama and one in Florida in 1999); TRACY L. SNELL, U.S. DEP'T OF JUSTICE, *CAPITAL PUNISHMENT 1998*, at 9 (documenting two suicides on North Carolina's death row in 1998). The annual federal report does not record attempted suicides.

177. 134 U.S. 160, 172 (1890) (“[W]hen a prisoner sentenced by a court to death is confined in the penitentiary awaiting the execution of the sentence, one of the most horrible feelings to which he can be subjected during that time is the uncertainty . . . as to the precise time when his execution shall take place.”).

disapproved of the psychological consequences of four weeks in limbo.<sup>178</sup> As Justice Stevens noted much later in *Lackey*, when applied to a delay of many years, the cruelty of this form of punishment carries even greater force.<sup>179</sup>

The Eighth Amendment's ban on cruel and unusual punishment "embraces, at a minimum, those modes or acts of punishment that had been considered cruel and unusual at the time that the Bill of Rights was adopted."<sup>180</sup> The provision was included in the Bill of Rights as a restraint on the legislative power—a "'constitutional check' that would ensure that 'when we come to punishments, no latitude ought to be left, nor dependence put on the virtue of representatives.'"<sup>181</sup> In *Estelle v. Gamble*, Justice Marshall summarized: The "primary concern of the drafters was to proscribe 'torture[s]' and other 'barbar[ous] methods of punishment.'"<sup>182</sup>

Historical evidence confirms that lengthy delay between conviction and execution did not exist in early America.<sup>183</sup> Courts and legislatures advocated swift execution upon conviction in order to further penological goals, but these authorities were also interested in preventing unnecessary suffering by the condemned.<sup>184</sup> Thus, exposing a condemned prisoner to delay before his execution would have been deemed cruel and unusual at the time the Bill of Rights was passed. Moreover, since it is acknowledged generally that the Eighth Amendment was meant to prohibit torture,<sup>185</sup> a determination that an extended stay on death row itself constitutes torture would also support a finding that the framers of the Eighth Amendment prohibited this form of punishment.

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178. *Id.* at 161–62.

179. *Lackey*, 514 U.S. at 1046.

180. *Ford v. Wainright*, 477 U.S. 399, 405 (1986). *Accord* *Stanford v. Kentucky*, 492 U.S. 361, 368 (1989).

181. *Furman v. Georgia*, 408 U.S. 238, 261 (1972) (Brennan, J., concurring) (quoting 3 J. ELLIOT'S DEBATES 451 (2d ed. 1876)).

182. 429 U.S. 97, 102 (1976) (quoting Anthony F. Granucci, *Nor Cruel and Unusual Punishment Inflicted: The Original Meaning*, 57 CAL. L. REV. 839, 842 (1969)).

183. *See* *Knight v. Florida*, 528 U.S. 990, 994–95 (1999) (Breyer, J., dissenting from denial of certiorari) ("[O]ur Constitution was written at a time when delay between sentencing and execution could be measured in days or weeks, not decades."); *Lackey*, 514 U.S. at 1045 (Stevens, J., respecting denial of certiorari) ("Such a delay, if it ever occurred, certainly would have been rare in 1789 . . .").

184. *See* EDGAR J. MCMANUS, *LAW AND LIBERTY IN EARLY NEW ENGLAND* 182 (1993) (asserting that prisoners "were put to death without moral qualms, but they were dispatched swiftly without unnecessary suffering."); BARRETT PRETTYMAN, JR., *DEATH AND THE SUPREME COURT* 307 (1961) ("Before the beginning of the twentieth century, substantial . . . delay between trial and execution was almost unthinkable . . .").

185. *See* Granucci, *supra* note 182, at 841–42.

In 1958, the Supreme Court initiated modern Eighth Amendment analysis. In *Trop v. Dulles*, the Court held that the words of the Eighth Amendment are neither precise nor static; they draw their meaning “from the evolving standards of decency that mark the progress of a maturing society.”<sup>186</sup> By recognizing that punishment that undermines “the dignity of man” or is incompatible with society’s “evolving standards of decency” is prohibited by the Eighth Amendment,<sup>187</sup> the Court presented a dynamic standard of review that is not limited to the “sparing humanitarian concessions of our forebears.”<sup>188</sup> The standard was later expanded by Justice Brennan in *Furman v. Georgia* to forbid both the State’s arbitrary infliction of a severe punishment (death) and the State’s infliction of a severe punishment when a less severe punishment may adequately achieve the recognized penological purposes.<sup>189</sup>

Applying the *Trop/Furman* standard to the death row phenomenon demonstrates that this practice of punishment is clearly unconstitutional. “‘First’ among the ‘objective indicia that reflect the public attitude toward a given sanction’ are statutes passed by society’s elected representatives.”<sup>190</sup> Surely the passage of the AEDPA by Congress qualifies as an objective indicator of the national consensus to shorten the length of time a prisoner spends on death row. Second, there can be little doubt that torture of any kind “undermines human dignity” and is thus forbidden by the Eighth Amendment *per se*.<sup>191</sup> Finally, since it seems particularly apparent that “psychological torture,” as discussed above, would have offended standards of decency in society at the time the Bill of Rights was passed, this form of punishment thus continues to violate whatever “evolved” standards of decency society presently holds.

In *McKenzie v. Day*, the Ninth Circuit dismissed the petitioner’s claim for inordinate delay of execution by applying the abuse-of-the-writ doctrine.<sup>192</sup> But before doing so, it granted “preliminary consideration” to the merits of the *Lackey* claim.<sup>193</sup> Invoking *Richmond v. Lewis*, an opinion vacated three years earlier by the Supreme Court,<sup>194</sup> the *McKenzie* panel

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186. 356 U.S. 86, 100 (1958).

187. *Id.* at 100–01.

188. *Ford v. Wainright*, 477 U.S. 399, 406 (1986).

189. *Furman*, 408 U.S. at 274, 279 (Brennan, J., concurring).

190. *Stanford v. Kentucky*, 492 U.S. 361, 370 (1989) (citing *McCleskey v. Kemp*, 481 U.S. 279, 300 (1987) (quoting *Gregg v. Georgia*, 428 U.S. 153, 173 (1976))).

191. *Estelle v. Gamble*, 429 U.S. 97, 102 (1976) (quoting *Granucci*, *supra* note 182, at 842).

192. 57 F.3d 1461, 1470 (1995).

193. *Estelle*, 57 F.3d at 1466.

194. 948 F.2d 1473 (9th Cir. 1990), *rev’d on other grounds*, 506 U.S. 40 (1992).

decried that it would amount to a “mockery of justice if the delay incurred during the prosecution of claims that fail on the merits could itself accrue into a substantive claim to the very relief that had been sought and properly denied in the first place.”<sup>195</sup> The panel argued that the delay was caused by the fact that Mr. McKenzie merely “availed himself of procedures our law provides to ensure that executions are carried out only in appropriate circumstances” and held that “delays caused by satisfying the Eighth Amendment themselves cannot violate it.”<sup>196</sup> Finally, the court argued that sustaining the claim was undesirable because it would “dramatically alter the calculus in granting stays of execution in the hundreds of death penalty cases now pending.”<sup>197</sup>

Simply put, this preliminary consideration of the merits of the *Lackey* claim amounts to no consideration at all. As one of the dissenting judges in *McKenzie* noted, “the majority evaluates the merits of McKenzie’s Eighth Amendment claim without engaging in any legal analysis whatsoever . . . [,] abus[ing] its judicial power by engaging in raw appellate fact-finding that has no basis in the record.”<sup>198</sup> The argument that the delay of Mr. McKenzie’s execution was largely attributable to his own availing of constitutional procedures designed to protect the innocent from being executed is irrelevant to the merits of his claim of cruel and unusual punishment. The policy argument concerning the havoc that might be inflicted upon the “calculus of execution” is similarly misguided. As Justice Brennan plainly explained in *Furman v. Georgia*, “[i]t is no answer to assert that long delays [in execution] exist only because condemned criminals avail themselves of their full panoply of legal rights.”<sup>199</sup> Finally, in light of the fact that it took the state of Montana four tries to sentence Mr. McKenzie to death in a manner that the Supreme Court found constitutionally adequate,<sup>200</sup> attributing responsibility to him for at least this significant portion of delay is untenable. As a Ninth Circuit judge noted later, the *McKenzie* panel’s decision on the merits of the claim amounts to “nothing more than obiter dictum”,<sup>201</sup> as such, it should not

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195. *McKenzie*, 57 F.3d at 1466 (quoting *Richmond*, 948 F.2d at 1491). The “mockery of justice” rhetoric is routinely quoted by courts throughout the nation. See, e.g., *Illinois v. Simms*, 736 N.E.2d 1092, 1141 (Ill. 2000); *McKinney v. Idaho*, 992 P.2d 144, 151 (Idaho 1999).

196. *McKenzie*, 57 F.3d at 1467.

197. *Id.*

198. *Id.* at 1489 (Norris, J., dissenting).

199. *Furman*, 408 U.S. at 289 n.37 (Brennan, J., concurring).

200. See *supra* notes 91–92 and accompanying text.

201. *Ceja v. Stewart*, 134 F.3d 1368, 1377 n.3 (9th Cir. 1998) (Fletcher, J., dissenting).

provide the basis by which a future court refrains from engaging in a substantive analysis of a *Lackey* claim.

### 3. *Remedy*

Consistent with its superficial review of the merits of the *Lackey* claim, the *McKenzie* panel gave similarly cursory review to an appropriate remedy for the claim. Analogizing the case to a prison-conditions hypothetical, the panel held that amelioration of conditions, not commutation, would be the fitting judicial response.<sup>202</sup> While the physical conditions surely exacerbate mental suffering on death row, however, it is the inherent delay in carrying out an execution itself that gives rise to conditions akin to psychological torture and thus an Eighth Amendment claim. Therefore, it is the mental anguish that must be remedied. Since commutation may not relieve *Lackey* claimants of “the pain they have already suffered,” the panel suggested that there might be other more appropriate remedies.<sup>203</sup> It offered none.

As the dissenting judge in *McKenzie* recognized, the appropriate remedy for the *Lackey* claimant is indeed commutation of the death sentence.<sup>204</sup> The *Lackey* claimant argues that protracted delay of execution is cruel and unusual punishment; implicit in this claim is the fact that the prisoner is receiving excessive punishment above and beyond his sentence.<sup>205</sup> Although commutation may not directly address the harm suffered in the past, it would eliminate ongoing and future torturous punishment. Moreover, while exposing a capital defendant to cruel and unusual punishment, inordinate delay of execution contemporaneously defeats the penological justifications of capital punishment.<sup>206</sup> For these reasons, commuting a *Lackey* claimant’s sentence to life imprisonment is the appropriate remedy.

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202. *McKenzie*, 57 F.3d at 1467.

203. *Id.*

204. *Id.* at 1488 n.22 (Norris, J., dissenting).

205. See discussion *supra* Part III.A.2.

206. See discussion *infra* Part III.B.2.

B. CLAIM: DELAY OF EXECUTION SEVERELY UNDERMINES THE SOCIAL  
AND PENOLOGICAL JUSTIFICATIONS FOR CAPITAL PUNISHMENT

1. *Ripening the Claim and Finding Jurisdiction*

The basis for this type of *Lackey* claim is that imposing an inordinately delayed execution amounts to the “pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes.”<sup>207</sup> Such a claim differs from the psychological torture claim in that it does not become ripe for adjudication until the state issues a death warrant.<sup>208</sup> “[W]hen the inmate ‘does not currently face any risk of execution [under the contested circumstances, he] will face no hardship or immediate or certain danger if [the courts] do not review his Eighth Amendment claim.’”<sup>209</sup> The timing of this claim places it squarely in the “small class of claims for which the AEDPA, at least on its face, appears not to leave open even [a] small window of opportunity.”<sup>210</sup> Unless the capital defendant chooses not to seek federal collateral review at all, no state will issue a death warrant prior to completion of federal review of the first habeas petition. Because this appears to foreclose the claim from being heard at all, the potential for violation of the Suspension Clause is once again in play.<sup>211</sup>

This type of *Lackey* claim, however, allows a cleaner application of the rule that the AEDPA limitations on SOS petitions should not be read to apply to claims that could not be resolved in the first habeas petition. Although there is still no bright line as to how long it takes to color a *Lackey* claim, the penological-justification claim possesses the benefit of a procedural hook. While the claim for psychological torture could theoretically be brought in an initial habeas petition, the penological-justification claim absolutely cannot; the threat of execution is required, and no state will issue a death warrant until federal habeas review is complete. Thus, in order to remain consistent with congressional intent and the Constitution, an authorizing panel should grant a *Lackey* petitioner his one allowable bite at the apple by construing the AEDPA to allow SOS review of a claim that inordinate delay divests the scheduled execution of penological purpose.

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207. *Furman v. Georgia*, 408 U.S. 238, 312–13 (1972) (White, J., concurring).

208. *See Ceja v. Stewart*, 134 F.3d 1368, 1371 (9th Cir. 1998) (Fletcher, J., dissenting).

209. *Id.* (alterations in original) (quoting *Poland v. Stewart*, 117 F.3d 1094 (9th Cir. 1997)).

210. *Id.*

211. *See supra* notes 153–58 and accompanying text.

## 2. *The Merits of the Claim*

Inflicting the punishment of death is unallowably excessive when it does not serve “some legitimate penological end that could not otherwise be accomplished” by a less severe punishment.<sup>212</sup> These penological justifications were defined by the Court in *Gregg v. Georgia* as “retribution and deterrence of capital crimes by prospective offenders.”<sup>213</sup> If an individual’s execution does not further these purposes, it violates the Eighth Amendment as “patently excessive” punishment amounting to the “pointless and needless extinction of life.”<sup>214</sup> With respect to a *Lackey* claimant, the analysis turns on whether these purposes of punishment are served more effectively by execution as opposed to continued imprisonment.

In identifying retribution as a legitimate basis for imposing capital punishment, Justice Stewart explained that a community’s rightful moral outrage at certain conduct is better expressed systematically through state sanction rather than by “self-help vigilante justice and lynch law.”<sup>215</sup> But the Court has also noted that an execution violates the Eighth Amendment when it is not a legitimate expression of society’s moral outrage in protection of its values and norms—when it is more accurately described as “naked vengeance.”<sup>216</sup> Thus, “it is not enough . . . to point to the details of a terrible crime and assert a desire for retribution.”<sup>217</sup> Because it risks imposing the most severe form of punishment in an arbitrary manner, an eye-for-an-eye notion of justice does not comport with the Eighth Amendment.

An inordinate delay of execution greatly muffles society’s legitimate cry of moral outrage. As the dissenting judge in *Ceja v. Stewart* noted, “the ability of an execution to provide moral and emotional closure to a shocked community diminishe[s] as the connection between crime and punishment [becomes] more attenuated.”<sup>218</sup> Indeed, it is not clear what healing or stabilizing effect, if any, an execution may produce when carried out as many as twenty-five years after sentencing. In *Furman v. Georgia*, Justice

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212. *Ceja*, 134 F.3d at 1373 (Fletcher, J., dissenting) (citing *Furman*, 408 U.S. at 280 (Brennan, J., concurring)).

213. 428 U.S. 159, 183 (1976) (White, J., plurality opinion).

214. *Furman v. Georgia*, 408 U.S. 238, 312–13 (1972) (Stewart, J., concurring).

215. *Gregg*, 428 U.S. at 183 (Stewart, J., plurality opinion).

216. *Furman*, 408 U.S. at 304 (Brennan, J., concurring) (quoting *Trop v. Dulles*, 356 U.S. 86, 112 (1958) (Brennan, J., concurring)). Cf. *Ceja*, 134 F.3d at 1373 (Fletcher, J., dissenting).

217. *Ceja*, 134 F.3d at 1374 (Fletcher, J., dissenting).

218. *Id.*

Brennan made clear that capital punishment as a “reinforcement for the basic values of the community” is severely undermined when it is sporadically imposed upon criminals sentenced to death.<sup>219</sup> After a delay of decades, an assumption that the community interests that justified the *Lackey* claimant’s sentence of death still retain full force simply defies logic.<sup>220</sup> Moreover, “the acceptable state interest in retribution has arguably been satisfied by the severe punishment already inflicted.”<sup>221</sup> Therefore, in opposing the *Lackey* petitioner’s claim for relief, the State must somehow demonstrate that the goal of retribution is still furthered by an inordinately delayed execution.

The Court has been explicit in its deference to state legislative findings on the deterrent value of inflicting death.<sup>222</sup> But the Court ambivalently bases this deference on the view that there is “no convincing empirical evidence either supporting or refuting” the claim that capital punishment is a greater deterrent than lesser penalties.<sup>223</sup> It further recognizes that “[t]he deterrent value of any punishment is . . . related to the promptness with which it is inflicted.”<sup>224</sup> Thus, “[f]or capital punishment to deter anybody it . . . must . . . follow swiftly upon completion of the offense.”<sup>225</sup> As Justice Stevens noted in his *Lackey* memorandum, the additional deterrent effect of executing a capital defendant after a delay that is measured in decades “seems minimal.”<sup>226</sup>

### 3. *Remedy*

If both of the recognized justifications for capital punishment are irreparably frustrated by inordinate delay, then inflicting this most severe

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219. *Furman*, 408 U.S. at 303 (Brennan, J., concurring).

220. As one commentator, describing an execution pending this year at Huntsville, Texas, recently suggested:

Twelve years after the murders, to suggest that this satisfies anybody’s thirst for justice is to lie, but it’s the lie the state tells itself. All of the mourners—the condemned himself, the ones who loved the victims, the ones who love the killer—are delivered by tragedy into the small hands of bureaucrats.

Denis Johnson, *Five Executions and a Barbecue*, ROLLING STONE, Aug. 17, 2000, at 52, 61. One man interviewed for the article, the older brother of another Texan awaiting his scheduled execution, offers another perspective: “If they could get the guy and try him, . . . and then execute him inside of three months, it might make sense. But they wait and appeal and delay and everything else. Fifteen years later, the guy they’re executing isn’t the same one who did the crime.” *Id.* at 57.

221. *Lackey*, 514 U.S. at 1045 (Stevens, J., respecting denial of certiorari).

222. See *supra* notes 70–71 and accompanying text.

223. *Gregg v. Georgia*, 428 U.S. 153, 185 (1976) (Stewart, J., plurality opinion).

224. *Coleman v. Balkcom*, 451 U.S. 949, 952 (1981) (Stevens, J., concurring in denial of certiorari).

225. *Furman v. Georgia*, 408 U.S. 238, 354 n.124 (1972) (Marshall, J., concurring).

226. *Lackey*, 514 U.S. at 1046 (Stevens, J., respecting denial of certiorari).

punishment after such delay serves no additional social purpose. The execution amounts to the “pointless and needless extinction of life,”<sup>227</sup> clearly violating *Gregg v. Georgia* and the Eighth Amendment. At this stage of punishment, commuting the death sentence to life imprisonment maintains penal equilibrium: No unnecessary additional punishment is inflicted and no justifications for punishment are undermined. Therefore, commutation is also the proper remedy for a *Lackey* claimant who asserts that his execution retains no penological purpose.

#### IV. *FORD AND LACKEY*: INCOMPETENCE AS A JURISDICTIONAL REQUIREMENT FOR HABEAS RELIEF FROM INORDINATE DELAY OF EXECUTION?

In *Ford v. Wainwright*, the Supreme Court “explicitly recognized in our law a principle that has long resided there”: that execution of the insane is unconstitutional under the Eighth Amendment.<sup>228</sup> A brief look at the facts and the analysis in this landmark case casts troubling doubt on the Court’s denial of certiorari to both types of *Lackey* claims.

In *Ford*, the Court held that execution of the insane violates the Eighth Amendment.<sup>229</sup> In so holding, the Court recognized that the execution of a prisoner who has lost his sanity has questionable retributive value because the prisoner is no longer able to comprehend “why he has been singled out and stripped of his fundamental right to life.”<sup>230</sup> The Court also held that executing an insane person “provides no example to others and thus contributes nothing to whatever deterrence value is intended to be served by capital punishment.”<sup>231</sup> Finally, the Court supported the intuition that such an execution “simply offends humanity”<sup>232</sup> with evidence that, at the time of the ruling, “no State in the Union permit[ted] the execution of the insane.”<sup>233</sup>

Alvin Ford was convicted of murder and sentenced to death in 1974 without any suggestion, at trial or during sentencing, that he was incompetent.<sup>234</sup> But by 1982, after eight years on Florida’s death row, he began exhibiting “an occasional peculiar idea or confused perception . . .

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227. *Furman*, 408 U.S. at 312 (Stewart, J., concurring).

228. 477 U.S. 399, 417 (1986).

229. *Id.* at 401.

230. *Id.* at 409.

231. *Id.* at 407 (citing EDWARD COKE, 3 INSTITUTES 6 (6th ed. 1680)).

232. *Id.*

233. *Id.* at 408.

234. *Id.* at 401–02.

[that] became more serious over time.”<sup>235</sup> In 1983, Mr. Ford wrote a letter to Florida’s Attorney General claiming that he had ended a year-long hostage crisis, organized by the guards at his prison, in which 135 of his friends and family members, as well as several United States senators and other leaders, had been held captive.<sup>236</sup> Subsequently, Mr. Ford referred to himself as “Pope John Paul, III” and claimed to have appointed nine new justices to the Florida Supreme Court.<sup>237</sup> At this time, a psychiatrist diagnosed him as suffering from “a severe, uncontrollable, mental disease which closely resembles ‘Paranoid Schizophrenia With Suicide Potential.’”<sup>238</sup> In other psychiatric interviews, Mr. Ford exhibited no understanding of why he was facing execution and “indeed sincerely believed that he would not be executed because he owned the prisons and could control the Governor through mind waves.”<sup>239</sup> Although the case ultimately raised a procedural issue,<sup>240</sup> the Court, in remanding the case for further findings, took the opportunity to rule execution of the insane unconstitutional.

The Court supported its holding in *Ford* with powerful rhetoric from the common law;<sup>241</sup> a remarkable factual record no doubt further bolstered its decision. But conspicuously absent from the Court’s analysis, as well as from the findings of the Eleventh Circuit, was any mention of the cause of Mr. Ford’s acute mental illness.<sup>242</sup> In 1986, the national average elapsed time from sentence to execution was just over seven years.<sup>243</sup> Thus, Mr. Ford did not begin to show signs of mental deterioration until his incarceration on death row reached an inordinate length. Given the findings of jurists, psychiatrists, and other commentators,<sup>244</sup> it is not unreasonable to attribute Mr. Ford’s mental incapacity to the length of time he spent under the extreme psychological duress of death row.

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235. *Id.* at 402.

236. *Id.*

237. *Id.*

238. *Id.* at 402–03.

239. *Id.* at 403.

240. A three-person commission, appointed by the Governor, determined that Mr. Ford was sane. In accordance with Florida statute, this panel made its decision in secret after a thirty-minute interview with the prisoner. Mr. Ford received no opportunity to put on his own evidence or to impeach the opinions of the panel members. Thus, the precise question before the Supreme Court was whether the District Court was required to hold an evidentiary hearing on Mr. Ford’s sanity. *See id.* at 410.

241. Writing for the majority, Justice Marshall invoked Blackstone, Coke, Hale, and Hawkins among others. *See id.* at 406–08.

242. *See id.*; *Ford v. Wainwright*, 752 F.2d 526 (11th Cir. 1985).

243. *See* DOJ STATISTICS, *supra* note 24, at 12 tbl.12.

244. *See* discussion *supra* Part III.A.2.

The Rehnquist Court's position on the *Lackey* claim (refusing to hear and decide the merits of an Eighth Amendment claim for inordinate delay of execution), is troubling in light of its holding in *Ford* (executing the insane violates the Eighth Amendment). Since 1986, the Court has upheld its holding in *Ford* while refusing to recognize any legal recourse for an inmate who spends a comparable amount of time on death row, endures similar psychological brutality, but somehow manages to stay sane. This disconcerting Catch-22 exposes a thorny set of questions: Why must a prisoner lose the torturous death row battle against insanity before the Court will hear his claim? Why is the Court willing to recognize the end result but not the means by which it may arise? On what legal basis does the Court justify this jurisdictional requirement for habeas relief of inordinate delay in execution? On what moral basis can society tolerate it? Such an aberration undermines the legitimacy of the Rehnquist Court's death penalty jurisprudence. Moreover, since "the behavior of the Supreme Court in capital cases . . . becomes a leading indicator for moral regression in criminal justice generally,"<sup>245</sup> the Court's denial of certiorari to the *Lackey* claim, in light of its holding in *Ford*, casts sweeping doubt on the ethics of criminal justice in the United States.

#### CONCLUSION

By continuing to deny certiorari to the *Lackey* claim, the Rehnquist Court implicitly endorses a system under which the length of time a state takes to execute is free from constitutional scrutiny. Thus, states like California may convict capital defendants faster than they can appoint appellate counsel, and the average length of time spent on death row stretches ever longer.<sup>246</sup> A state like Illinois may enact a moratorium on executions but still allow prosecutors to pursue capital convictions, impermissibly lengthening sentences, driving death row population numbers ever higher, and imposing a punishment upon new defendants that the state is unwilling to inflict.<sup>247</sup> When these systems produce a delay of decades between imposition of sentence and execution, they violate the Eighth Amendment by inflicting cruel and unusual punishment.<sup>248</sup> Meaningful judicial scrutiny of the length of such delay, however, necessarily encompasses the tension between the penological demand of

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245. Franklin E. Zimring, *The Executioner's Dissonant Song*, in *THE KILLING STATE* 147 (Austin Sarat ed., 1999).

246. See *supra* Part II.A.

247. See *supra* Part II.C.

248. See *supra* Parts III.A, III.B.

swiftly imposed punishment and the due process rights of a capital defendant. From a broader perspective, such an analysis questions whether execution generally may be carried out in a manner that comports with society's evolved standards of moral decency.<sup>249</sup> This is the quandary that the *Lackey* claimant presents to the Court; this quandary is probably the reason why the Court thus far has declined to rule on the merits of the claim.

The hypothesis is supported by the fact that Justices who generally favor the death penalty support denial of certiorari to this claim. This is curious, since these Justices usually support hearing a novel collateral attack on a capital conviction as a means of foreclosing it to future petitioners and promoting the enforcement of "constitutionally valid" death penalty statutes.<sup>250</sup> Chief Justice Rehnquist has explained:

I do not believe it is a responsible exercise of our certiorari jurisdiction to blithely deny petitions for certiorari in cases where petitioners have been sentenced to death and present for review claims which seem on their face to have little merit . . . . If capital punishment is indeed constitutional when imposed . . . we cannot responsibly discharge our duty by pristinely denying a petition such as this, realizing full well that our action will simply further protract the litigation.<sup>251</sup>

On this view, refusing to hear a *Lackey* claim is at best disingenuous, since it leaves the door open to future claims in lower courts.

A decision on the merits of the *Lackey* claim would force the Court into a debate over the seemingly incompatible constitutional commands of *Furman v. Georgia* (the sentencer's discretion to impose death must be closely confined) and *Lockett v. Ohio* (the sentencer's discretion to extend mercy must be unlimited); the struggle was glimpsed briefly in *Callins v. Collins*.<sup>252</sup> In his concurrence to the denial of certiorari, Justice Scalia argued that since both commands are "judicially announced" explanations of what the text of the Constitution permits, one must be wrong.<sup>253</sup> Up to that point, and continuing since, a majority of the Justices have held that the *Lockett* line of cases guaranteeing unlimited mitigation is "wrong."<sup>254</sup> But Justice Blackmun made a more compelling point in dissent. He

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249. See DAVID PANNICK, JUDICIAL REVIEW OF THE DEATH PENALTY 84 (1982) ("A legalistic society will be unable to impose the death penalty without an unconstitutionally cruel delay, and hence it will be unable lawfully to impose the death penalty at all.")

250. *Coleman v. Balkcom*, 451 U.S. 949, 956 (1981) (Rehnquist, J., dissenting).

251. *Id.* at 963.

252. 510 U.S. 1141 (1994).

253. *Id.* at 1142 (Scalia, J., concurring in denial of certiorari).

254. See *supra* Part I.B.

explained that the proper course is not “to ignore one [constitutional command] or the other, *nor pretend that the dilemma does not exist*, but to admit the futility of the effort to harmonize them. This means accepting the fact that the death penalty cannot be administered in accord with our Constitution.”<sup>255</sup> Surely this is the more logical result; if Justice Scalia and the majority believe that one line of constitutional jurisprudence may be discarded so easily, what legal basis does any line of constitutional jurisprudence maintain? And, perhaps more importantly, which of them is the next to go?

A *Lackey* petitioner may present a valid claim for habeas relief from cruel and unusual punishment regardless of the claim’s implications for current death penalty administration. Maintaining denial of certiorari with a decree that “the [*Lackey*] experiment [has] concluded”<sup>256</sup> is not enough. Moreover, far-reaching social and legal consequences are simply not a justifiable basis for refusing to hear an individual capital defendant’s claim. Finally, a *Lackey* claimant should not be required to be found incompetent in order to obtain habeas relief. Such a position undermines the legitimacy of the Court’s death penalty jurisprudence and the moral validity of criminal justice in general. For these reasons, the Supreme Court should grant certiorari to the *Lackey* claim and make a reasoned decision on the merits.

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255. *Callins*, 510 U.S. at 1157 (Blackmun, J., dissenting from denial of certiorari) (emphasis added).

256. *Knight v. Florida*, 528 U.S. 990, 993 (1999) (Thomas, J., concurring in denial of certiorari).

