"KILLING TIME" IN THE VALLEY OF THE SHADOW OF DEATH: WHY SYSTEMATIC PREEXECUTION DELAYS ON DEATH ROW ARE CRUEL AND UNUSUAL

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In the nearly four decades since the U.S. Supreme Court reinstated the death penalty in 1976, the average time between sentencing and execution in the United States has steadily increased to 16.5 years as of the end of 2011. In states like California, the total lapsed time from sentencing to execution exceeded two decades as of 2008. In response to these lengthening delays, scores of death row inmates have been raising Lackey *claims over the last few decades—claims that inordinate preexecution delays on death row constitute cruel and unusual punishment under the Eighth Amendment. These claims have universally failed in the lower courts, even though two Supreme Court Justices have staunchly supported these claims and repeatedly noted that these claims have merit.*

This Note examines the two existing formulations of the Lackey *claim and argues that the reason that* Lackey *claims have been unsuccessful is that their focus on individual inmates' delays has been misplaced. These claims' case-by-case method of Eighth Amendment argumentation is inadequate to challenge the larger phenomenon of systemic delay that plagues states like California, delay that is due primarily to the state's advertently flawed administration of the death penalty rather than to the state's or defendant's post-trial course of conduct in a particular case. Drawing from empirical findings on several states' administration of the death penalty and from the fact that lengthy passages of time on death row are not unique to certain inmates but rather endemic in certain states, this Note concludes that the Eighth Amendment violation inherent in systemic preexecution delay is that the state is systematically implementing a torturous punishment distinct from death—that is, life in the "shadow of death." This new punishment is categorically cruel and unusual under the Eighth Amendment. As with other constitutional violations, the state can and should be held responsible for imposing this punishment, even—and especially—when the state's policy of doing so is not underwritten by legislation.*

INTRODUCTION

Imagine a judge rendering the following verdict in a capital case: "Mr. Smith, I hereby sentence you to death, subject to the following conditions: Although you will immediately be remanded to death row, I cannot tell you when you will be executed. In fact, I cannot even tell you *if*

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you will be executed. What I can tell you is that only sixteen percent of the inmates sentenced to death since executions resumed in 1977[1] have been executed.[2] The thousands who are still waiting for execution have waited nearly fourteen years, on average.[3] Many, if not most, die instead from natural causes or suicide.[4] If you befriend an inmate who is then executed while you continue to live, don't expect to know why. *C'est la mort*."

This is the sentence that most capital inmates in the United States endure, and every player in the capital punishment system knows it—legislators, judges, court clerks, prosecutors, defense lawyers, inmates, prison wardens and guards, and news reporters. The only exceptions are the jurors, who believe they have imposed death;[5] the victims' families, who believe they will soon see justice done;[6] and some members of the general public, which bankrolls the state actors that perpetuate pre-execution delays and their grave costs to society.[7]

According to the Bureau of Justice Statistics's most recent statistics on capital punishment in the United States, current to the end of 2011,

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1. See Tracy L. Snell, Bureau of Justice Statistics, U.S. Dep't of Justice, Capital Punishment, 2011—Statistical Tables 2 n.1 (2013) [hereinafter BJS Statistics 2011], available at http://www.bjs.gov/content/pub/pdf/cp11st.pdf (on file with the *Columbia Law Review*) (noting executions of death row inmates resumed after U.S. Supreme Court approved of revised capital punishment statutes in some states in Gregg v. Georgia, 428 U.S. 153 (1976) (plurality opinion)).

2. See id. at 2 (stating only 1,277 out of 7,958 inmates sentenced to death between 1977 and 2011 have been executed).

3. See id. at 18 tbl.15 (finding average number of years current inmates have spent under sentence of death to be 13.7 years as of end of 2011).

4. Forty-three inmates died by execution in 2011; twenty-four died of natural causes or suicide. Id. at 8 tbl.4 & n.a.

5. Cf., e.g., Michael E. Antonio, Stress and the Capital Jury: How Male and Female Jurors React to Serving on a Murder Trial, 29 Just. Sys. J. 397 (2008) (citing study showing jurors who imposed death sentence sustained more severe post-traumatic stress disorder symptoms than did jurors who imposed life sentence). The seriousness with which jurors in capital trials view their task—life or death—may not be reflected in the actual administration of the death penalty, but it is certainly reflected in the way in which the Supreme Court has reviewed the validity of death sentences. See Caldwell v. Mississippi, 472 U.S. 320, 329 (1985) ("In evaluating the various procedures developed by States to determine the appropriateness of death, this Court's Eighth Amendment jurisprudence has taken as a given that capital sentencers would view their task as the serious one of determining whether a specific human being should *die* at the hands of the State." (emphasis added)).

6. See, e.g., James S. Liebman, Opting for Real Death Penalty Reform, 63 Ohio St. L.J. 315, 318 n.19 (2002) [hereinafter Liebman, Real Reform] (describing how prosecutors and courts often fail to inform, and even misinform, victims' families about preexecution delays); Quotes by Families of Homicide Victims, Equal Justice USA, http://ejusa.org/learn/quotes/victims (on file with the *Columbia Law Review*) (last visited Sept. 28, 2013) (compiling quotes from victims' family members expressing how delays in execution subvert expectations of relief).

7. See infra note 17–21 and accompanying text (noting exorbitant costs of death penalty and its lack of finality and efficacy).

the average amount of time that elapses from sentencing to execution has risen from six years in 1984 to 16.5 years.[8] The average number of years that current death row inmates have spent under their death sentences is 13.7 years.[9] As Professors James Liebman and Peter Clarke state, "[T]he *death penalty* is not the punishment for murder . . . ; the penalty instead is *life without the possibility of parole, but with a small chance of execution a decade [or more] later*."[10] No statute on the books has authorized such a penalty,[11] yet it has proliferated across the United States,[12] a twilight zone between life and death as recognized by its enablers[13] as it is unavoidable for its sufferers. Protracted lingering on death row converts every second of the inmates' often lengthy lives into a reflexive death watch, and has been associated with disproportionate rates of mental illness.[14] The psychological impact of delayed execution is internationally

8. BJS Statistics 2011, supra note 1, at 14 tbl.10.

9. Id. at 18 tbl.15.

10. James S. Liebman & Peter Clarke, Minority Practice, Majority's Burden: The Death Penalty Today, 9 Ohio St. J. Crim. L. 255, 319 (2011); see also Scott W. Howe, Can California Save Its Death Sentences? Will Californians Save the Expense?, 33 Cardozo L. Rev. 1451, 1452 (2012) ("A death sentence in California is . . . a very expensive form of life imprisonment without parole.").

11. See Ceja v. Stewart, 134 F.3d 1368, 1369 (9th Cir. 1998) (Fletcher, J., dissenting) (noting petitioner's de facto sentence of twenty-three years on death row "has never been . . . imposed in this country"); Elizabeth Rapaport, A Modest Proposal: The Aged of Death Row Should Be Deemed Too Old to Execute, 77 Brook. L. Rev. 1089, 1129 (2012) ("No American legislature has ever authorized [the decades-plus-death sentence]."); see also Barry Latzer & James N.G. Cauthen, Justice Delayed? Time Consumption in Capital Appeals: A Multistate Study 13 (2007) [hereinafter Latzer & Cauthen, Justice Delayed], available at http://www.cjlf.org/files/LatzerTechnicalReport.pdf (on file with the *Columbia Law Review*) ("[N]o other penological sanction takes twelve years to implement . . . .").

12. In at least 23 out of 36 death penalty jurisdictions in the United States, death row inmates have spent, on average, over a decade under sentence of death. BJS Statistics 2011, supra note 1, at 18 tbl.15.

13. See, e.g., Arthur L. Alarcón & Paula M. Mitchell, Executing the Will of the Voters?: A Roadmap to Mend or End the California Legislature's Multi-Billion-Dollar Death Penalty Debacle, 44 Loy. L.A. L. Rev. (Special Issue) S41, S46 (2011) ("Despite numerous warnings of the deterioration of California's death penalty system over the last 25 years . . . the Legislature and the Governor's office have failed to respond to this developing crisis.").

14. See, e.g., Rebecca A. Miller-Rice, Comment, The "Insane" Contradiction of *Singleton v. Norris*: Forced Medication in a Death Row Inmate's Medical Interest Which Happens to Facilitate His Execution, 22 U. Ark. Little Rock L. Rev. 659, 661 (2000) (noting many inmates become mentally ill due to stressors of death row); Amir Vonsover, Comment, No Reason for Exemption: *Singleton v. Norris* and Involuntary Medication of Mentally Ill Capital Murderers for the Purpose of Execution, 7 U. Pa. J. Const. L. 311, 313–14 (2004) (same); see also Celina Fang, Manny Fernandez, Amy Padnani & Ashwin Seshagiri, Last Words of the Condemned, N.Y. Times (June 29, 2013), http://www.nytimes.com/interactive/2013/06/16/us/execution-last-statements-copy.html (on file with the *Columbia Law Review*) (quoting executed Texas inmate's last words as being that "[his] death began on [date of murder he had committed], and continued when [he] began to see the beautiful and innocent life that [he] had taken"); Jennifer Fulwiler, Life on Death

condemned as a human-rights-defying "death row syndrome" or "death row phenomenon," and judicially denounced in countries around the world as a reason to forbear executing prisoners[15] or extraditing individuals to the United States.[16] In addition to their psychological toll, pre-execution delays exacerbate public expenditures on incarcerating death row inmates, leaching millions of taxpayer dollars each year[17] and undermining some citizens' confidence in capital punishment altogether.[18] Meanwhile, victims' families suffer from a perennial lack of closure,[19] and

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Row, Conversion Diary (Feb. 2, 2009), http://www.conversiondiary.com/2009/02/life-on-death-row.html (on file with the *Columbia Law Review*) (quoting inmate with commuted death sentence as saying being on death row is "like you're already dead" (internal quotation marks omitted)).

15. See Pratt v. Att'y-Gen. for Jam., [1994] 2 A.C. 1 (P.C.) 35 (appeal taken from Jam.) (en banc) (holding execution delay in excess of five years constitutes "inhuman or degrading punishment" in violation of Jamaican constitution (internal quotation marks omitted)); Catholic Comm'n for Justice & Peace in Zim. v. Att'y-Gen., [1993] 1 Zim. L.R. 242, 282 (Zim.) (holding prolonged death row incarceration is "inhuman treatment" in violation of Zimbabwean constitution).

16. See United States v. Burns, [2001] 1 S.C.R. 283, 336 (Can.) (citing death row syndrome as one reason extraditing person to United States would violate Canadian constitution); Soering v. United Kingdom, 161 Eur. Ct. H.R. (ser. A) at 39–45 (1989) (holding extraditing person to country where he risks exposure to death row syndrome would violate international human rights treaty). The principle that waiting for one's execution constitutes psychological torture can even be found in ancient religious texts like the Talmud. See Rachel Biale, Judaism Casts Doubt on Lethal Injection, JWeekly.com (Jan. 18, 2008), http://www.jweekly.com/includes/print/34163/article/judaism-casts-doubt-on-lethal-injection/ (on file with the *Columbia Law Review*) (interpreting passage in Talmud stating pregnant prisoner should be executed before giving birth as stemming from rabbis' view that making her await execution would cause unnecessary pain).

17. In California alone, incarcerating death row inmates has cost state and federal taxpayers $4 billion since 1978. Alarcón & Mitchell, supra note 13, at S51; see also id. at S46 (calling California government's failure to act in face of deterioration of capital punishment system "perpetration of a multibillion-dollar fraud on . . . taxpayers"). In many states, the costs of capital cases exceed those of comparable noncapital cases in the millions, due in large part to incarceration costs. See, e.g., Death Penalty Info. Ctr., Facts About the Death Penalty 3 (2013), available at http://www.deathpenaltyinfo.org/Fact Sheet.pdf (on file with the *Columbia Law Review*) (citing studies and reports revealing higher costs of death penalty relative to life imprisonment). A statistic that brings this into startling relief is that "[e]xecuting all of the people currently on death row or waiting for them to die naturally . . . will cost California an estimated $4 billion more than if all of the people on death row were sentenced to die of disease, injury or old age." ACLU of N. Cal., The Hidden Death Tax: The Secret Costs of Seeking Execution in California 1 (2008), available at https://www.aclunc.org/docs/criminal_justice/death_penalty/the_hidden_death_tax.pdf (on file with the *Columbia Law Review*).

18. See, e.g., Latzer & Cauthen, Justice Delayed, supra note 11, at 14–15 (commenting delays cause lack of finality and create impression that "justice is not being served"); Press Release, Death Penalty Info. Ctr., Death Penalty Facing Crisis of Confidence with American Public, New Poll Finds (June 9, 2007), available at http://www.deathpenaltyinfo.org/CoCPressRelease.pdf (on file with the *Columbia Law Review*) (reporting loss of public faith in death penalty due to "lack of efficacy").

19. See, e.g., Alex Kozinski & Sean Gallagher, Death: The Ultimate Run-On Sentence, 46 Case W. Res. L. Rev. 1, 17–18 (1995) (arguing lack of finality in death penalty

jurors who thought they had secured justice for these families become increasingly frustrated on their behalf.[20] Studies have found that, in several jurisdictions, delay is primarily responsible for the disparity between the number of death sentences and the number of actual executions.[21]

To add to their egregiousness, preexecution delays are markedly uneven across different states. In California, the total lapsed time from sentencing to execution exceeded two decades as of 2008.[22] With 739 inmates awaiting their chances at successive levels of review[23] and only thirteen executions carried out in the state since 1978,[24] this interval will

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cases takes toll on victims' families); Sam Quinones, Execution Delay Has Caused "Profound and Unfathomable" Distress to Victim's Family, L.A. Times: L.A. Now (Oct. 1, 2010, 7:59 AM), http://latimesblogs.latimes.com/lanow/2010/10/execution-delay-has-caused-profound-and-unfathomable-distress-to-victims-family.html (on file with the *Columbia Law Review*) (recounting distress delay caused victim's family); see also Amanda Lamb, Death Row Inmate Unhappy About Delayed Execution, WRAL.com (Mar. 8, 2007), http://www.wral.com/news/local/story/1227924/ (on file with the *Columbia Law Review*) (quoting inmate as saying he "want[s] closure for the victim's family" (internal quotation marks omitted)). But cf. Marilyn Peterson Armour & Mark S. Umbreit, Assessing the Impact of the Ultimate Penal Sanction on Homicide Survivors: A Two State Comparison, 96 Marq. L. Rev. 1, 98 (2012) (concluding from empirical study that "ultimate justice" for homicide survivors may not be imposition of death or life without parole on murderer, but rather "control survivors [feel] . . . over the process of getting to the end"); David Montgomery, For Murder Victims' Families, Witnessing Executions Offers Hollow Satisfaction, Wash. Post (Nov. 10, 2009), http://www.washingtonpost.com/wp-dyn/content/article/2009/11/09/AR2009110903493.html (on file with the *Columbia Law Review*) (noting limited sense of closure victim's families felt after witnessing execution).

20. See, e.g., Execution Delay Stuns Victim's Friends, Family, WRAL.com (Jan. 26, 2007), http://www.wral.com/news/local/story/1180265/ (on file with the *Columbia Law Review*) (discussing how juror scoured newspapers for sixteen years awaiting news of execution).

21. See, e.g., Marianne Wesson, Living Death: Ambivalence, Delay, and Capital Punishment 46 (Univ. of Colo., Legal Studies Research Paper Series, Working Paper No. 13-4, 2013), available at http://papers.ssrn.com/abstractsol=2221597 (on file with the *Columbia Law Review*) (finding delay was primary source of disparity in Ohio, Nevada, and Arizona).

22. Cal. Comm'n on the Fair Admin. of Justice, Final Report 123 (Gerald Uelman & Chris Boscia eds., 2008) [hereinafter CCFAJ Final Report], available at http://www.ccfaj.org/documents/CCFAJFinalReport.pdf (on file with the *Columbia Law Review*). While California is the most populous state in the country, this does not fully account for its outlier delays. Texas has sentenced more people to death than California has, yet its death row wait times are significantly shorter. Compare BJS Statistics 2011, supra note 1, at 20 tbl.17 (showing California has sentenced 962 people to death from 1973 to 2011 while Texas has sentenced 1,057 to death), with id. at 18 tbl.15 (showing inmates in Texas have spent average of twelve years on death row while inmates in California have spent average of 15.3 years on death row as of 2011).

23. Cal. Dep't of Corr. & Rehab., Condemned Inmate Summary List 4 (2013), available at http://www.cdcr.ca.gov/Capital_Punishment/docs/CondemnedInmateSummary.pdf (on file with the *Columbia Law Review*).

24. Capital Punishment: Number of Executions, 1893 to Present, Cal. Dep't of Corr. & Rehab., http://www.cdcr.ca.gov/Capital_Punishment/Number_Executions.html (on file with the *Columbia Law Review*) (last visited Sept. 28, 2013). In fact, "the backlog [in California] is now so severe that [the state] would have to execute five prisoners per

only continue to widen.[25] In contrast, the average wait on death row prior to execution is seven years in Virginia;[26] no one has been on Virginia's death row for longer than ten years.[27] Other states, such as Pennsylvania, Idaho, Oregon, and New Mexico,[28] have a history of only executing volunteers,[29] leaving hundreds to suffer indefinitely in solitary confinement or other tortuous conditions,[30] resting solely in the knowledge that their fate lies with the state bureaucracy.[31]

Whatever other factors may be at play, the unevenness in pre-execution delays across states is decidedly not due to differing state interpretations of the constitutional requirement that capital defendants be afforded fair chances to attack their convictions,[32] because the appeals processes available to capital defendants are fairly uniform nationwide: mandatory direct appeal,[33] state collateral review,[34] and federal habeas

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month for the next twelve years just to carry out the sentences of those currently on death row." CCFAJ Final Report, supra note 22, at 121.

25. Cf., e.g., CCFAJ Final Report, supra note 22, at 125 (on file with the *Columbia Law Review*) ("As the population of California's death row has grown, the length of the delay between sentence and disposition of appellate reviews has grown as well.").

26. Va. Dep't of Corr., Va. Death Row/Execution Facts, WAVY.com (Nov. 5, 2009), http://www.wavy.com/dpp/search/va._death_row_execution_facts (on file with the *Columbia Law Review*).

27. CCFAJ Final Report, supra note 22, at 124 n.32.

28. Although New Mexico repealed its death penalty in 2009, two people remain on the state's death row. Two Remain on New Mexico's Death Row, KRQE.com (Jan. 20, 2011), http://www.krqe.com/dpp/news/local/central/two-remain-on-new-mexico's-death-row (on file with the *Columbia Law Review*).

29. J.C. Oleson, Swilling Hemlock: The Legal Ethics of Defending a Client Who Wishes to Volunteer for Execution, 63 Wash. & Lee L. Rev. 147, 158 n.53 (2006). Volunteers are those who waive their appeals and permit their death sentence to be carried out. John H. Blume, Killing the Willing: "Volunteers," Suicide and Competency, 103 Mich. L. Rev. 939, 940 (2005).

30. See, e.g., Riley Yates, Pennsylvania Execution Delays Have Created New Form of Punishment, Morning Call (Aug. 4, 2012), http://articles.mcall.com/2012-08-04/news/mc-pennsylvania-death-row-cruel-unusual-20120804_1_death-row-inmates-critics-of-capital-punishment-death-row (on file with the *Columbia Law Review*) (describing how Pennsylvania keeps condemned prisoners in solitary confinement for years awaiting execution).

31. In fact, Pennsylvania recently scheduled its first nonvolunteer execution in fifty years, but the Pennsylvania Supreme Court upheld a stay of execution granted by a lower court. Jon Hurdle, Pennsylvania Justices Back Stay of Murderer's Execution, N.Y. Times (Oct. 3, 2012), http://www.nytimes.com/2012/10/04/us/pennsylvania-justices-block-an-execution.html?_r=0 (on file with the *Columbia Law Review*).

32. Cf. infra notes 75–77 and accompanying text (discussing Justice Clarence Thomas's view that this is reason for delays).

33. The Supreme Court has suggested that all death sentences must be reviewed on direct appeal. See Gregg v. Georgia, 428 U.S. 153, 204–06 (1976) (plurality opinion) (approving "provision for appellate review in the Georgia capital-sentencing system"); see also Furman v. Georgia, 408 U.S. 238, 367–68 (1972) (Marshall, J., concurring) (discussing risk of executing innocent persons when defendants are sentenced to death by jury). Therefore, virtually all capital sentences are automatically appealed. James S. Liebman et al., A Broken System: Error Rates in Capital Cases, 1973–1995, at 19 (2000) [hereinafter

corpus.[35] The wide discrepancy between states like California and states like Virginia[36] suggests that inmates in the former experience greater agony for reasons other than the necessity of providing appellate procedures.[37] These reasons vary from state to state and from case to case, but they very often stem from the state's dysfunctional administration of the death penalty, whether at the pretrial and trial levels[38] or at the post-trial

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Liebman et al., Broken System I], available at http://www2.law.columbia.edu/instructionalservices/liebman/liebman_final.pdf (on file with the *Columbia Law Review*). The great majority of death penalty states also have mandatory appeals, which means that the defendant cannot elect to dismiss the appeal, at least on the first round of direct review. See State v. Brewer, 826 P.2d 783, 789 n.3 (Ariz. 1992) (en banc) ("We note that at least 22 states' 'statutes or rules employ language indicating that their appellate courts must review at least the sentence in every capital case.'" (quoting Whitmore v. Arkansas, 495 U.S. 149, 174 n.1 (1990) (Marshall, J., dissenting))).

34. While states are not constitutionally required to provide state collateral review, all states do so because "the Supreme Court has suggested that states are constitutionally required to provide adequate state post-conviction remedies for federal constitutional claims that cannot properly be pursued at trial and on direct appeal." Liebman et al., Broken System I, supra note 33, at 20 (citing Case v. Nebraska, 381 U.S. 336 (1965) (per curiam)).

35. See 28 U.S.C. §§ 2241–2254 (2006) (outlining rules for filing and adjudicating federal habeas corpus petitions).

36. See supra notes 22–31 and accompanying text (explaining wide variance in waiting periods across states).

37. Excessive delays in a given state may stem from delays associated with appellate procedures, such as bottlenecks in the state courts or dearth of appellate counsel. See, e.g., CCFAJ Final Report, supra note 22, at 122–23 (tracking critical factors contributing to California's preexecution delays, including delay in appointing appellate and habeas counsel and backlog of appeals and habeas petitions in California Supreme Court). The state, however, cannot simply duck under constitutional cover under these circumstances because cross-state analysis shows that it is possible for the state to provide procedural safeguards within significantly shorter time frames, even keeping the number sentenced to death constant. See, e.g., supra note 22 (explaining Texas has sentenced more people to death but has much shorter wait times than California).

38. Delays in appellate procedures are often the result of pretrial and trial-level deficiencies. See, e.g., Liebman et al., Broken System I, supra note 33, at 4–5, 32 (finding 68% of capital judgments were reversed from 1973 to 1995); Liebman, Real Reform, supra note 6, at 321 (asserting capital procedures and incentives cause trial actors to shift cost of mistakes to appellate actors); James S. Liebman, The Overproduction of Death, 100 Colum. L. Rev. 2030, 2032 (2000) ("Trial-level actors drastically overproduce death sentences (two to six or more for every one the system means to carry out), foisting on post-trial courts the prodigiously expensive task . . . of winnowing out the excess sentences."); Sara Colón, Comment, Capital Crime: How California's Administration of the Death Penalty Violates the Eighth Amendment, 97 Calif. L. Rev. 1377, 1391 (2009) ("Pretrial problems are a principal cause [of preexecution delays]—particularly the search for qualified trial counsel."); see also CCFAJ Final Report, supra note 22, at 125 ("Federal courts are granting relief in 70% of the California death judgments they review, most often because of ineffective assistance of counsel at the trial level."); Editorial, Prosecutors: Ky. Capital Punishment Unfair, Kentucky.com (Mar. 7, 2012), http://www.kentucky.com/2012/03/07/2098691/prosecutors-ky-capital-punishment.html (on file with the *Columbia Law Review*) (stating many cases are prosecuted as capital cases when likelihood of death sentence is very low).

level.[39] In addition, the passage of the Antiterrorism and Effective Death Penalty Act of 1996[40] (AEDPA) has severely limited death row inmates' ability to file habeas corpus petitions in federal court, particularly successive petitions.[41] Delays due to the purely procedural aspect of the death penalty appeals process are thus likely to have decreased significantly for habeas petitions filed in federal court post-1996,[42] though for many death row inmates, it is not clear that their excessive delays were ever primarily due to procedure per se.[43]

In response to these delays, death row inmates have been raising *Lackey* claims for the last two decades. These claims, which assert that prolonged preexecution stays on death row are unconstitutional under the Eighth Amendment's Cruel and Unusual Punishment Clause,[44] are named after Clarence Lackey, whose challenge to his own preexecution

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39. Professor Dwight Aarons presents a litany of sources of post-trial delay in capital cases at the state level, including

> delays in appointing counsel; delays from less than adequate competence of counsel; delays in processing state transcripts and records; delays from reviewing records that are ordinarily longer than in noncapital cases; delays from state policies and procedures; delays from uncertainty concerning the substantive criminal law and eighth amendment law; delays from the application of, and uncertainty about the interpretation of, threshold inquiries for federal habeas corpus review; delays from discovery of new facts; delays from developments in the law; and delays from the understandable inclination of both litigants and their attorneys to postpone the ultimate sanction.

Dwight Aarons, Getting Out of This Mess: Steps Toward Addressing and Avoiding Inordinate Delay in Capital Cases, 89 J. Crim. L. & Criminology 1, 48 (1998) (quoting Ira Robbins, Toward a More Just and Effective System of Review in State Death Penalty Cases: A Report Containing the American Bar Association's Recommendations Concerning Death Penalty Habeas Corpus and Related Materials from the American Bar Association Criminal Justice Section's Project on Death Penalty Habeas Corpus, 1990 A.B.A. Crim. Just. Sec. Rep. 137–38). In California, delays are due to the following specific factors: delay in appointments of counsel for direct appeals and habeas corpus proceedings, a severe backlog of appeals and habeas petitions awaiting review by the California Supreme Court, and delay in deciding federal habeas petitions, much of which is attributable to the absence of a published opinion from or evidentiary hearing in state habeas proceedings. CCFAJ Final Report, supra note 22, at 122–23.

40. Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified as amended in scattered sections of 8 and 18 U.S.C. (2012)).

41. See infra notes 100–102 and accompanying text (discussing how AEDPA has exacerbated claim's procedural difficulties).

42. The Supreme Court has held that AEDPA does not apply to cases that were pending when AEDPA went into effect in 1996. Lindh v. Murphy, 521 U.S. 320, 326–27 (1997).

43. See Email from Joanne Diamond, Special Consultant, Habeas Corpus Research Ctr., to Angela Sun, Editor-in-Chief, Columbia Law Review (Aug. 12, 2013, 12:31 PM) (on file with the *Columbia Law Review*) (noting longest-serving inmates in several states have never moved beyond direct appeal).

44. See, e.g., Lackey v. Texas, 514 U.S. 1045, 1045 (1995) (Stevens, J., respecting denial of certiorari) ("Petitioner raises the question whether executing a prisoner who has already spent some 17 years on death row violates the Eighth Amendment's prohibition against cruel and unusual punishment.").

delay first brought the claim to prominence[45] after then-Supreme Court Justice John Paul Stevens argued that such delays could be unconstitutional in a memorandum opinion respecting the Court's denial of certiorari in Lackey's case.[46] Since then, hundreds of *Lackey* claims have been raised by death row inmates asserting that their individual periods of delay are unconstitutional.[47] Although lower courts have universally rejected the claim or found ways to avoid adjudicating it,[48] and the Court has continued to deny certiorari on the issue,[49] Justice Stevens and Justice Stephen Breyer have repeatedly asserted that the claim has merit,[50] and an extensive literature has arisen on the topic.[51]

This Note explains why individualized, case-by-case efforts to define the constitutional violation inherent in lengthy preexecution delays have failed, and proposes a sounder, categorical framework for resolving *Lackey* claims that is based instead on systematic state action. Part I discusses the *Lackey* claim's history and frigid reception in the lower courts, the two theories currently advanced in support of the claim, and the claim's procedural complications. Part II critiques the two theories underlying the claim, exploring reasons courts have rejected these theories and revealing that these theories' case-by-case formulations of the problem are inadequate to challenge systemic delays in states like California. Part III introduces this Note's understanding of the Eighth Amendment violation as the state's systematic implementation of a torturous punishment distinct from death—that is, life in the "*shadow* of death."[52] Part III argues that this punishment is unconstitutional under Eighth Amendment doctrine, shows how courts can determine that it has become the policy of the state to impose this punishment absent formal

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45. See id. (noting "novelty" of petitioner Clarence Lackey's claim). A precursor of the *Lackey* claim was raised in People v. Chessman, 341 P.2d 679, 699 (Cal. 1959) (en banc) (rejecting similar argument but acknowledging "[it] is . . . unusual [to] be detained for more than 11 years pending execution . . . and we have no doubt that mental suffering attends such detention"), overruled in part on other grounds by People v. Morse, 388 P.2d 33 (Cal. 1964).

46. See *Lackey*, 514 U.S. at 1045 (Stevens, J., respecting denial of certiorari) ("Though novel, petitioner's claim is not without foundation."). Clarence Lackey was executed two years after the Supreme Court denied certiorari on the issue he raised. Clarence Lackey, Death Penalty Info. Ctr., http://www.deathpenaltyinfo.org/clarence-lackey (on file with the *Columbia Law Review*) (last visited Sept. 28, 2013).

47. For a smattering of these cases, see infra note 70.

48. See infra Part II.A (discussing reasons for lower courts' dismissal of *Lackey* claims).

49. See, e.g., infra note 71 (listing cases).

50. See, e.g., infra note 80 (listing Justices' memorandum opinions).

51. See, e.g., infra Part II.B (refuting previous scholarly attempts to domesticate or resuscitate *Lackey* claim).

52. Cf. Psalm 23:4 (King James) ("Yea, though I walke through the valley of the shadowe of death, I will fear no evil: for thou *art* with me; thy rod and thy staffe they comfort me.").

legislation, and proposes remedies for this ongoing constitutional violation.

I. A BRIEF HISTORY OF THE *LACKEY* CLAIM

A. *Justice Stevens's Memorandum Opinion in* Lackey v. Texas

The claim that prolonged preexecution delay is unconstitutional, typically raised in state and federal habeas corpus petitions,[53] first reached the Supreme Court in the 1995 case *Lackey v. Texas*.[54] In his petition for certiorari to the Texas Court of Criminal Appeals, which had denied his first and second state habeas applications,[55] Lackey argued that executing him after eighteen years on death row would be cruel and unusual punishment under the Eighth Amendment.[56] As support for his claim, Lackey primarily cited death row syndrome[57] and a landmark British Privy Council case, *Pratt v. Attorney-General of Jamaica*, which had recently held that delay in excess of five years was "inhuman or degrading punishment."[58] In a separate case that the Fifth Circuit had recently decided, Lackey, appealing from denial of his federal habeas petition,[59] had also claimed that execution after a lengthy period of delay was un-

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53. See Johnson v. Bredesen, 130 S. Ct. 541, 542 (2009) (Stevens, J., respecting denial of certiorari) ("More typically, [*Lackey*] claims have been brought in habeas corpus."). In *Johnson*, the petitioner brought his *Lackey* claim under 42 U.S.C. § 1983 (2006). The Sixth Circuit denied the claim, concluding it was "the 'functional equivalent' of a habeas corpus challenge." *Johnson*, 130 S. Ct. at 542–43; see also Email from Bruce Cohen, Att'y, Cal. Appellate Project, to Angela Sun, Staff Member, Columbia Law Review (Aug. 18, 2012, 6:50 PM) (on file with the *Columbia Law Review*) (stating *Lackey* claim is not § 1983 claim because "it's largely case-specific and it challenges imposition of the sentence on this . . . and only this petitioner"). The question of whether *Lackey* claims should be cognizable under § 1983 is outside the scope of this Note. The author observes that the petitioner in *Johnson* had a unique case, in that the state's malfeasance clearly contributed to delay. See *Johnson*, 130 S. Ct. at 542 (noting state had withheld exculpatory evidence). In the bulk of *Lackey* cases, it is more difficult to trace delay to deliberate state action. Thus, § 1983 challenges do not appear to be the best vehicle for *Lackey* claims.

54. 514 U.S. 1045 (1995) (Stevens, J., respecting denial of certiorari).

55. Respondent's Brief in Opposition and Opposition to Motion for Stay of Execution at 4–5, *Lackey*, 514 U.S. 1045 (No. 94-8262), 1995 WL 17904099, at *3–*5.

56. Petition for Writ of Certiorari to the Texas Court of Criminal Appeals at 2, 7, 22–23, *Lackey*, 514 U.S. 1045, 1995 WL 17904041, at *4, *7, *22–*23. In the certiorari petition, the specific phrasing of the question presented was "[w]hether the execution of a death sentence constitutes cruel and unusual punishment under the Eighth Amendment . . . if, as a result of inordinate delay not attributable to his own conduct, the condemned is forced to endure nearly two decades on death row." Id. at ii.

57. Id. at 15–18, 1995 WL 17904041, at *10–*14; see also supra notes 14–16 and accompanying text (detailing death row syndrome and cases that have recognized effects of said syndrome).

58. Pratt v. Att'y-Gen. for Jam., [1993] 2 A.C. 1 (P.C.) 35 (appeal taken from Jam.) (en banc) (internal quotation marks omitted).

59. Brief of Appellant Clarence Lackey at 1, Lackey v. Collins (No. 93-8529) (W.D. Tex. June 11, 1993), 1993 WL 13098978, at *1.

constitutional, but on the different theory that doing so made no "'measurable contribution to accepted goals of punishment.'"[60] The Fifth Circuit had not reached the merits of this argument, however, rejecting the claim on purely procedural grounds.[61]

The Supreme Court denied certiorari, but Justice Stevens, in a memorandum opinion, asserted that, "[t]hough novel, petitioner's claim is not without foundation."[62] Such delays, Stevens opined, engendered "horrible feelings" of uncertainty,[63] and execution following such delays served neither of the death penalty's two principal purposes, retribution and deterrence.[64] Justice Stevens found that the state's interest in retribution was satisfied by the "severe punishment already inflicted,"[65] and "the additional deterrent effect from an actual execution now . . . seems minimal."[66] Emphasizing the claim's "legal complexity" and "potential for far-reaching consequences,"[67] Stevens proposed that state and lower federal courts "'serve as laboratories'" and study the issue further.[68] Justice Breyer agreed with Justice Stevens that the issue was an important, undecided one.[69] Since 1995, lower courts have uniformly denied Justice Stevens's invitation and rejected similar claims,[70] and the Supreme Court

60. Id. at 41–42.

61. See Lackey v. Scott, 28 F.3d 486, 492 (5th Cir. 1994) ("We will not address the merits of these arguments for two reasons. First, Appellant raises these arguments for the first time on appeal. Second, granting Lackey the relief he seeks would require us to create a new rule." (citation omitted)).

62. Lackey v. Texas, 514 U.S. 1045, 1045 (Stevens, J., respecting denial of certiorari).

63. Id. (quoting In re Medley, 134 U.S. 160, 172 (1890)) (internal quotation marks omitted). The case that Justice Stevens quoted for this proposition involved only four weeks of preexecution delay, causing him to remark that this "description should apply with even greater force in the case of delays that last for many years." Id. at 1046.

64. See Gregg v. Georgia, 428 U.S. 153, 183 (1976) (plurality opinion) ("The death penalty is said to serve two principal social purposes: retribution and deterrence of capital crimes by prospective offenders.").

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

66. Id. at 1046–47. Justice Stevens also drew support from *Pratt* and suggested that arguments by English jurists should be persuasive because the Cruel and Unusual Punishment Clause may be traced back to the English Bill of Rights of 1689. Id.

67. Id. at 1047.

68. Id. (quoting McCray v. New York, 461 U.S. 961, 963 (1983)).

69. Id. at 1047.

70. E.g., Thompson v. Sec'y for Dep't of Corr., 517 F.3d 1279, 1284 (11th Cir. 2008); Chambers v. Bowersox, 157 F.3d 560, 570 (8th Cir. 1998); White v. Johnson, 79 F.3d 432, 439 (5th Cir. 1996); Stafford v. Ward, 59 F.3d 1025, 1028–29 (10th Cir. 1995); Turner v. Jabe, 58 F.3d 924, 926–32 (4th Cir. 1995); McKenzie v. Day, 57 F.3d 1461, 1470 (9th Cir.), aff'd on reh'g en banc, 57 F.3d 1493 (9th Cir. 1995); Williams v. Chrans, 50 F.3d 1363, 1365 (7th Cir. 1995); Bemore v. Cullen, No. 08cv0311 LAB (WVG), 2011 WL 1044633 (S.D. Cal. Mar. 22, 2011); McKinney v. Fisher, No. CV–96–177–S–BLW, 2007 WL 2572126 (D. Idaho Sept. 5, 2007); Ex parte Bush, 695 So. 2d 138, 140 (Ala. 1997); State v. Murdaugh, 97 P.3d 844, 851 (Ariz. 2004); People v. Frye, 959 P.2d 183, 263 (Cal. 1998), overruled on other grounds by People v. Doolin, 198 P.3d 11 (Cal. 2009); Knight v. State, 746 So. 2d 423, 437 (Fla. 1998); Bieghler v. State, 839 N.E.2d 691, 698 (Ind. 2005); State v.

has repeatedly denied certiorari.[71] Courts often avoid the claim by imposing procedural obstacles,[72] or reject it based on precedent that itself provides little explanation.[73] Four years after *Lackey*, Justice Thomas wrote an opinion supporting the Court's denial of certiorari on the issue in *Knight v. Florida*.[74] Attributing the delays to the Court's "Byzantine" death penalty jurisprudence,[75] Justice Thomas opined that a defendant could not "avail himself of the panoply of appellate and collateral procedures and then complain when his execution is delayed," while the Court could not "arm capital defendants with an arsenal of 'constitutional' claims with which they may delay their executions, and simultaneously . . . complain when executions are inevitably delayed."[76] In Justice Thomas's view, the "neoteric" *Lackey* claim "would further prolong collateral review by giving virtually every capital prisoner yet another ground on which to challenge and delay his execution."[77]

Despite scant judicial engagement with the claim since *Lackey v. Texas*, Justice Thomas ended with the declaration that "[lower] courts have resoundingly rejected the claim," and thus "the experiment [has]

Sparks, 68 So. 3d 435, 492 (La. 2011); State v. Smith, 931 P.2d 1272, 1288 (Mont. 1996); State v. Moore, 591 N.W.2d 86, 95 (Neb. 1999); Gardner v. State, 234 P.3d 1115, 1144 (Utah 2010).

71. See, e.g., Valle v. Florida, 132 S. Ct. 1, 1 (2011) (denying certiorari on issue of thirty-three-year delay); Johnson v. Bredesen, 130 S. Ct. 541, 541 (2009) (eleven-year delay); Thompson v. McNeil, 129 S. Ct. 1299, 1299 (2009) (thirty-two-year delay); Foster v. Florida, 537 U.S. 990, 990 (2002) (twenty-seven-year delay); Knight v. Florida, 528 U.S. 990, 990 (1999) (nineteen-year and twenty-five-year delays); Elledge v. Florida, 525 U.S. 944, 944 (1998) (twenty-three-year delay).

72. See infra Part I.C (summarizing procedural and remedial difficulties that cause courts to reject *Lackey* claims without addressing their merits).

73. See, e.g., *Smith*, 931 P.2d at 1288 (resting denial of *Lackey* claim solely on statement that "Justice Stevens' memorandum . . . has not been regarded favorably in the federal courts").

74. 528 U.S. at 990–93 (Thomas, J., concurring in denial of certiorari).

75. Id. at 991.

76. Id. at 992 (Thomas, J., concurring in denial of certiorari). Note that Justice Thomas's tale of irony, when taken on its terms, rests on the assumption that delay is due to constitutional procedures and rights that defendants can invoke—an assumption that is debunked not only by the variance in preexecution delays across states, see supra notes 22–31 and accompanying text (noting differences in waiting periods across various states), but also by logic. Even if the necessity of certain safeguards may have slowed the rate of execution as a preliminary matter, theoretically "one would expect . . . the rate of execution [to] catch up with the rate of [the] sentence." Wesson, supra note 21, at 22. Other things equal, the addition of due process should have reduced the rate of executions for only a fixed period of time. Id. at 22 n.73. While all things have not remained equal and the rate of death sentencing has slowed considerably in the last decade, see, e.g., Death Penalty Info. Ctr., The Death Penalty in 2012: Year End Report 4–5 (2012), available at http://deathpenaltyinfo.org/documents/2012YearEnd.pdf (showing number of death sentences has steadily declined since 1998), this only further diminishes the role of due process in contributing to the current delays. Wesson, supra note 21, at 22–23.

77. *Knight*, 528 U.S. at 992.

concluded."[78] Justice Breyer countered that most courts had rejected *Lackey* claims for procedural reasons, so the Court should not yet consider the experiment "concluded."[79] Since Justice Thomas's ominous pronouncement in *Knight*, Justices Stevens and Breyer have continued to urge the Court to address the issue,[80] while Justice Thomas has continued to concur in denials of certiorari and dismiss *Lackey* claims as unsupported by the Constitution or precedent.[81]

Because the Court has failed to resolve the *Lackey* issue in a binding decision, inmates continue raising the claim,[82] particularly in states with longer delays. Courts, however, continue to resist the claim, exploiting its procedural complexity to avoid reaching the substantive issues.[83] Despite two decades of litigation, the *Lackey* issue thus remains one of first impression in many state and federal courts.[84]

B. *The Two Theories Underlying* Lackey *Claims*

Lackey claims assume two forms. The first type alleges that delayed executions serve no penological justification, and the second alleges that they inflict excruciating psychological trauma.[85]

1. *Delayed Executions Serve No Penological Justification.* — The first kind of *Lackey* claim alleges that executing an inmate after inordinate delay contributes to neither retribution nor deterrence, the two penological justifications the Supreme Court gave when it reinstated the death

78. 528 U.S. at 992–93 (Thomas, J., concurring in denial of certiorari).

79. Id. at 998–99 (Breyer, J., dissenting from denial of certiorari).

80. E.g., Valle v. Florida, 132 S. Ct. 1, 2 (Breyer, J., dissenting from denial of stay); Johnson v. Bredesen, 130 S. Ct. 541, 542 (2009) (Stevens, J., respecting denial of certiorari); Thompson v. McNeil, 129 S. Ct. 1299, 1299 (2009) (Stevens, J., respecting denial of certiorari); Allen v. Ornoski, 546 U.S. 1136, 1136 (2006) (Breyer, J., dissenting from denial of certiorari); Foster v. Florida, 537 U.S. 990, 990 (2002) (Stevens, J., respecting denial of certiorari); id. at 993 (Breyer, J., dissenting from denial of certiorari).

81. *Johnson*, 130 S. Ct. at 544–46 (Thomas, J., concurring in denial of certiorari); *Thompson*, 129 S. Ct. at 1301–03 (Thomas, J., concurring in denial of certiorari); *Foster*, 537 U.S. at 990–91 (Thomas, J., concurring in denial of certiorari).

82. For recently reported cases that have adjudicated *Lackey* claims, see, for example, Bemore v. Cullen, No. 08cv0311 LAB (WVG), 2011 WL 1044633, at *57–*60 (S.D. Cal. Mar. 22, 2011); State v. Sparks, 68 So. 3d 435, 492–93 (La. 2011).

83. See infra Part I.C (discussing procedural issues); see also Smith v. Mahoney, 611 F.3d 978, 1005 (9th Cir. 2010) (Fletcher, J., dissenting) (asserting Ninth Circuit has "always found a way to avoid addressing *Lackey* claims on the merits, usually by invoking [a procedural bar]").

84. Kate McMahon, Dead Man Waiting: Death Row Delays, the Eighth Amendment, and What Courts and Legislatures Can Do, 25 Buff. Pub. Int. L.J. 43, 62 (2007).

85. For a more in-depth study of these two forms, see Ryan S. Hedges, Note, Justices Blind: How the Rehnquist Court's Refusal to Hear a Claim for Inordinate Delay of Execution Undermines Its Death Penalty Jurisprudence, 74 S. Cal. L. Rev. 577, 596–611 (2001) (outlining each type of *Lackey* claim and discussing how underlying theory affects questions of procedural viability, merits, and remedy).

penalty and affirmed its constitutionality in *Gregg v. Georgia* in 1976.[86] Building on Justice Stevens's reservations about a delayed execution's retributive value,[87] Ninth Circuit Judge William Fletcher argues that an execution's ability to "provide . . . closure to a shocked community diminishe[s] as the connection between crime and punishment [attenuates]."[88] Advocates for this form of *Lackey* claim draw on Justice William Brennan's argument that "[the idea of] capital punishment as a 'reinforcement for the basic values of the community' is severely undermined when it is sporadically imposed."[89] As for deterrence, Justice Thurgood Marshall's statement in *Furman v. Georgia* that execution must "follow swiftly upon . . . the offense" for it "to deter anybody"[90] demonstrates that Justice Stevens's view that delays render minimal the death penalty's deterrent value is rooted in earlier Supreme Court jurisprudence. One scholar, the first to empirically study the relationship between deterrence and preexecution delay, has found that shorter waits on death row actually increase deterrence.[91]

2. *Delay is Psychological Torture.* — Judge Fletcher encapsulates the other theory of *Lackey* claims: Preexecution delay is cruel and unusual because it "subjects one to extraordinary psychological duress . . . for a period of decades."[92] As noted by Justice Stevens in *Lackey*, the link

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86. See Gregg v. Georgia, 428 U.S. 153, 183–86 (1976) (plurality opinion) ("The death penalty is said to serve two principal social purposes: retribution and deterrence of capital crimes by prospective offenders.").

87. See supra notes 63–66 and accompanying text (citing Justice Stevens's criticism of delayed execution in *Lackey*).

88. Ceja v. Stewart, 134 F.3d 1368, 1374 (9th Cir. 1998) (Fletcher, J., dissenting) (dissenting from order denying stay of execution); see also Valle v. Florida, 132 S. Ct. 1, 2 (Breyer, J., dissenting from denial of stay) (asking rhetorically "how often [the] community's sense of retribution would forcefully insist upon a death that comes only several decades after the crime was committed").

89. Hedges, supra note 85, at 610 (quoting Furman v. Georgia, 408 U.S. 238, 303 (1972) (Brennan, J., concurring)). Even Justice Rehnquist has stated that "[t]here can be little doubt that delay in the enforcement of capital punishment frustrates the purpose of retribution." Coleman v. Balkcom, 451 U.S. 949, 960 (1981) (Rehnquist, J., dissenting from denial of certiorari). Justice Rehnquist's concern about preexecution delays did not stem from his sympathy for *Lackey* claims, however; he was instead frustrated with the constitutional "stalemate" caused by "endlessly drawn out legal proceedings." Id. at 957–58. In his dissent from the Supreme Court's denial of certiorari in *Coleman*, a capital case that appeared on its face to have little merit, Rehnquist opined that the Court should grant certiorari in all such cases so that "the jurisdiction of the federal courts over [these death sentences] would be at an end," and "the decision would then be in the hands of the State which had initially imposed the death penalty." Id. at 964.

90. *Furman*, 408 U.S. at 354 n.124 (Marshall, J., concurring).

91. Joanna M. Shepherd, Murders of Passion, Execution Delays, and the Deterrence of Capital Punishment, 33 J. Legal Stud. 283, 284 (2004) (finding one extra murder is deterred for every 2.75-year reduction of time spent waiting on death row).

92. *Ceja*, 134 F.3d at 1376 (Fletcher, J., dissenting). Such claims are essentially rehashes of claims in foreign courts that death row syndrome violates human rights. One strange aspect of the *Lackey* claim is the use of length as a proxy for psychological torture,

between delay and psychological torture in Eighth Amendment law goes back to the Supreme Court's statement in 1890 that "one of the most horrible feelings to which [an inmate] can be subjected . . . is the uncertainty . . . as to the precise time [of] his execution."[93] Scholars and *Lackey* petitioners have drawn on the traction that this widely observed death row syndrome has gained in international courts and scholarly literature[94] to characterize preexecution delay as torture.[95]

C. *Procedural Complexity and Doubts About Relief*

This section summarizes the procedural and remedial difficulties that cause courts to reject *Lackey* claims out of hand and fail to address their merits.[96] Because the "no penological justification for execution"

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such that length of delay becomes proportional to the amount of psychological torture suffered. See, e.g., Petition for Writ of Certiorari to the Texas Court of Criminal Appeals at 5–6, Lackey v. Texas, 514 U.S. 1045 (1995) (No. 94-8262), 1995 WL 17904041, at *5–*6 ("[T]he sheer length of time Clarence Lackey has spent on Texas' death row . . . [has] caused him a tremendous amount of psychological anguish and pain."). This is strange because, as one scholar has theorized, death row syndrome really encompasses three component conditions: (1) lengthy or unpredictable temporal conditions, (2) harsh physical conditions, and (3) psychologically agonizing conditions. Amy Smith, Not "Waiving" but Drowning: The Anatomy of Death Row Syndrome and Volunteering for Execution, 17 B.U. Pub. Int. L.J. 237, 240 (2008). These conditions may be associated, but they do not necessarily vary directly with each other. But cf. Wilson v. Seiter, 501 U.S. 294, 305 (1991) ("Nothing so amorphous as 'overall conditions' can rise to the level of cruel and unusual punishment when no specific deprivation of a single human need exists.").

93. In re Medley, 134 U.S. 160, 172 (1890); see also *Lackey*, 514 U.S. at 1045 (Stevens, J., respecting denial of certiorari) (quoting *In re Medley* to underscore Court's historic recognition of psychological trauma resulting from prolonged death row tenure).

94. See supra notes 14–16 and accompanying text (discussing recognition of death row syndrome in international courts and scholarly work); see also Dwight Aarons, Can Inordinate Delay Between a Death Sentence and Execution Constitute Cruel and Unusual Punishment?, 29 Seton Hall L. Rev. 147, 201–05 (1998) [hereinafter Aarons, Inordinate Delay] (surveying treatment of *Lackey*-style claims internationally).

95. See, e.g., Kathleen M. Flynn, 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) (supporting "psychological torture" claim); Hedges, supra note 85, at 588–90 (same); cf. Coleman v. Balkcom, 451 U.S. 949, 952 (1981) (Stevens, J., concurring in denial of certiorari) (calling imprisonment before execution punishment in and of itself); Dist. Att'y v. Watson, 411 N.E.2d 1274, 1290 (Mass. 1980) (Liacos, J., concurring) (describing how inmate who "lived on death row feeling as if [his death sentence] were slowly being carried out" was unable to sleep or eat for weeks leading up to execution (internal quotation marks omitted)); Hopkinson v. State, 632 P.2d 79, 209–11 (Wyo. 1981) (Rose, J., dissenting in part and concurring in part) (noting "dehumanizing effects of long imprisonment pending execution").

96. See Knight v. Florida, 528 U.S. 990, 998–99 (1999) (Breyer, J., dissenting from denial of certiorari) (opining most *Lackey* claims have been rejected because of procedural barriers and thus Court should not consider experiment "concluded"); see also Johnson v. Bredesen, 130 S. Ct. 541, 544 (2009) (Stevens, J., respecting denial of certiorari) (expressing dismay about extent of procedural obstacles).

basis for *Lackey* claims prevents them from ripening[97] until an execution date is set,[98] such claims usually only appear in second or successive state or federal habeas corpus petitions.[99] But *Lackey* petitioners submitting successive habeas petitions find themselves caught in a catch-22, because, in 1996, AEDPA[100] and congruent state and federal case law limited successive postconviction relief to those petitioners who can show either that they are factually innocent or that the claim relies on a new, previously unavailable constitutional principle that the Supreme Court has recognized and made retroactive.[101] Because *Lackey* petitioners are asking not to be executed for their now-acknowledged crimes, and because the Supreme Court has steadfastly refused to address the *Lackey* claim—much less validate it and require its retroactive consideration—successive relief is automatically barred.[102]

Although the "psychological torture" version of the claim sometimes avoids this procedural complication because it can ripen with the passage of time whether or not a death warrant has issued,[103] the catch-22 applies when the *Lackey* petitioner requests a remedy, typically reduction of the sentence to life imprisonment[104] or a permanent stay of execution.[105] As

97. In order for a claim to be "ripe," it must be fit for judicial decision, and there must be hardship to the parties resulting from withholding court consideration. Abbott Labs. v. Gardner, 387 U.S. 136, 148–49 (1967).

98. This typically occurs only after a first round of appeals and state and federal postconviction review has already occurred. See Sarah A. Sulkowski, Comment, The AEDPA and the Incompetent Death-Row Prisoner: Why *Ford* Claims Should Be Exempt from the One-Year and One-Bite Rules, 6 Loy. J. Pub. Int. L. 57, 73 (2004) (stating state courts seldom set execution dates until after first round of appeals and habeas).

99. Richard E. Shugrue, "A Fate Worse Than Death"—An Essay on Whether Long Times on Death Row Are Cruel Times, 29 Creighton L. Rev. 1, 20–21 (1995).

100. 28 U.S.C. § 2244(b)(2) (2006).

101. Id. ("A claim presented in a . . . successive habeas corpus application . . . that was not presented in a prior application shall be dismissed unless— (A) . . . the claim relies on a new rule of constitutional law . . . ; or . . . [(B)ii] . . . no reasonable factfinder would have found the applicant guilty of the underlying offense."). Before AEDPA was enacted, *Lackey* claims were rejected based on the "abuse of the writ" doctrine (a petitioner cannot raise a claim for the first time in a successive petition) and the nonretroactivity doctrine (a petitioner cannot exploit a new rule of law after the conviction is final). See Bryan A. Stevenson, The Politics of Fear and Death: Successive Problems in Capital Federal Habeas Corpus Cases, 77 N.Y.U. L. Rev. 699, 735–40 & n.164 (2002) (explaining two doctrines and tracing how AEDPA has incorporated these rules). For more on how AEDPA's enactment has drastically limited the prospect of federal habeas relief, see generally Charles Doyle, Cong. Research Serv., RL33391, Federal Habeas Corpus: A Brief Legal Overview CRS-10 to -21 (2006).

102. See Stevenson, supra note 102, at 763–64 (showing *Lackey* claims do not fall within exceptions).

103. But see In re Reno on Habeas Corpus, 283 P.3d 1181, 1209 n.17 (Cal. 2012) (finding *Lackey* claim premature where petitioner had been on death row for thirty-two years).

104. See, e.g., Ceja v. Stewart, 134 F.3d 1368, 1377 (9th Cir. 1998) (Fletcher, J., dissenting) (stating commutation is appropriate remedy for "no penological justification" claim).

the Ninth Circuit has noted, these remedies do not match the violation, because "whatever anguish [the prisoner] has suffered is in the past and cannot be undone."[106] In other words, the moment the "psychological torture" claim ripens, the viability of a remedy evaporates.

As discussed in Part II, these procedural and remedial issues often intertwine with the "substantive" reasons that courts have rejected *Lackey* claims, suggesting that current articulations of the claim suffer from deficiencies in form as well as content.

II. REEXAMINING THE THEORIES UNDERLYING THE *LACKEY* CLAIM

This Part addresses why lower courts have rejected *Lackey* claims, notwithstanding the strong endorsement by Justices Stevens and Breyer (Part II.A), and why scholarly efforts to domesticate or resuscitate the claim are unlikely to prove more appealing (Part II.B). The sections below emphasize that *Lackey* petitioners' individualized, case-by-case focus on post-trial delays have caused courts to overlook the systematic reasons for delay in some states' capital punishment systems, which include deficiencies in underlying pretrial and trial as well as post-trial processes.[107] The misplaced focus of *Lackey* claims as currently formulated must be urgently addressed, not only because courts have yielded an underdeveloped response to the claim,[108] but also because preexecution delays are increasing steadily in duration nationwide.[109] It is especially important to preserve the *Lackey* claim's viability in states where systematic state practices perennially multiply cases on death row, lengthening the line for execution and causing delays to snowball.[110]

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105. See, e.g., Allen v. Ornoski, 435 F.3d 946, 949 (9th Cir. 2006) (denying request for stay of execution).

106. McKenzie v. Day, 57 F.3d 1461, 1467 (9th Cir.), aff'd on reh'g en banc, 57 F.3d 1493 (9th Cir. 1995).

107. See supra notes 38–39 (linking deficiencies at all levels of litigation to preexecution delay).

108. See, e.g., McMahon, supra note 84, at 59–62 (asserting *Lackey* claim is issue of first impression because "[o]nly a handful of states actually heard this kind of claim before *Knight* virtually precluded it, and . . . very few [of these states] have actually written extensively on its merits").

109. See BJS Statistics 2011, supra note 1, at 14 tbl.10 (showing average time between sentencing and execution has increased steadily since 1977).

110. The more cases there are on death row, the less resources each individual case will receive, and the longer inmates on death row will have to wait for appointment of appellate counsel and for judgments on their appeals and collateral attacks. See, e.g., Colón, supra note 38, at 1379–80 (noting backlog of death penalty cases in California is so severe that California Supreme Court Justice Ronald George recently proposed constitutional amendment to move some state capital cases directly to appellate courts).

A. *Reasons the Lower Courts Have Rejected Both Types of* Lackey *Claims*

1. *Necessary Procedures.* — While acknowledging that delays in particular cases have been excessive, courts have justified them based on both the inmate's and the state's interest in appellate procedures that enhance accuracy and protect due process,[111] riffing on Justice Thomas's argument in *Knight* that a defendant cannot "avail himself of the panoply of appellate and collateral procedures and then complain when his execution is delayed."[112] Since *Gregg*, every state with the death penalty has established heightened death sentence review procedures.[113] Courts reason that such procedures benefit capital inmates by "allowing them to extend their lives, obtain commutation or reversal[,] . . . [or] secure complete exoneration."[114]

The "psychological torture" and "no penological justification" arguments provide no response to this "delay is different" counterargument.[115] The counterargument essentially contends that delay is either *self*-inflicted, because the inmate could have waived all appeals after the mandatory appeal, forgone meritorious claims on appeal, or found other ways to expedite the appellate process,[116] or *inexorably*

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111. See, e.g., Chambers v. Bowersox, 157 F.3d 560, 570 (8th Cir. 1998) ("[D]elay . . . is a function of the desire of our courts . . . to get it right . . . ."); White v. Johnson, 79 F.3d 432, 439 (5th Cir. 1996) ("The state's interest in deterrence and swift punishment must compete with its interest in insuring that those who are executed receive fair trials with constitutionally mandated safeguards."); *McKenzie*, 57 F.3d at 1466–67 (attributing delay to "fact that [petitioner] has availed himself of procedures our law provides to ensure that executions are carried out only in appropriate circumstances").

112. Knight v. Florida, 528 U.S. 990, 990 (1999) (Thomas, J., concurring in denial of certiorari); see also, e.g., *McKenzie*, 57 F.3d at 1466 ("'A defendant . . . should not be able to benefit from [unsuccessfully pursuing his constitutional] rights.'" (quoting Richmond v. Lewis, 948 F.2d 1473, 1491–92 (9th Cir. 1990), vacated on other grounds, 986 F.2d 1583 (9th Cir. 1993))).

113. See supra notes 33–35 and accompanying text (discussing procedures).

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

115. This counterargument is important to address because Justice Thomas articulated it in *Knight*, see supra notes 75–77, 112 and accompanying text. Lower courts have thus found this rejoinder to *Lackey* claims particularly persuasive, see, e.g., State v. Lafferty, 20 P.3d 342, 378 (Utah 2001) (citing Thomas's *Knight* concurrence in its denial of *Lackey* claim), even though Justice Stevens has emphasized that the Court's denial of certiorari does not constitute a ruling on the merits, *Knight*, 528 U.S. at 990 (Stevens, J., respecting denial of certiorari).

116. See Fearance v. Scott, 56 F.3d 633, 639 (5th Cir. 1995) ("Fearance was not the unwilling victim of a *Bleak House*-like procedural system hopelessly bogged down; at every turn, he . . . sought extensions of time, hearings and reconsiderations."). But see People v. Stanworth, 457 P.2d 889, 899 (Cal. 1969) (en banc) ("It is not entirely '[defendant's] appeal,' since the state, too, has an indisputable interest in it which the [defendant] cannot extinguish."); cf. Barker v. Wingo, 407 U.S. 514, 527 (1972) ("[T]he State has [the] duty [to bring the defendant to a speedy trial] as well as the duty of insuring that the trial is consistent with due process."); United States v. Toombs, 574 F.3d 1262, 1273 (10th Cir. 2009) ("[T]he district court and government are no less responsible [for ensuring a speedy trial] merely because it is a defendant who requests a continuance.").

inflicted, because the state must assure the validity of executions.[117] Arguments about penological purpose or psychological torture are moot,[118] because the alternative is a system of death penalty administration that is highly likely to be unconstitutional per se under *Gregg*.[119]

Notably, the "delay is different" counterargument does not address the fact that significant differences in delays from one death penalty state to another exist even though these states have the same "panoply" of appellate and collateral procedures.[120] However, because the "psychological torture" and "no penological justification" forms of the *Lackey* claim focus courts' attention on the specific causes of delay in each inmate's case, courts have not looked beyond the post-trial review processes in individual cases to assess whether the time required to alleviate trial errors is built into local pretrial and trial deficiencies, such as prosecutorial overuse of the death penalty in marginal cases.[121] Nor have courts closely scrutinized systemically weak links in the ever-elongating chain from death sentence to execution, which are often due to enduring deficiencies in the state's administration of post-trial processes. Such deficiencies may include lengthy waits for the appointment of appellate and habeas counsel,[122] severe judicial backlogs,[123] and state-imposed moratoria on the death penalty due to inhumane methods of execution.[124] Courts that justify inordinate delays based on the necessity of appellate review may thus be little different from cities that celebrate

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117. See supra note 111 and accompanying text (describing cases in which courts have justified delays by reference to necessity of appeals to ensuring due process). But see supra note 76 (describing how necessity of appeals alone cannot logically account fully for delays).

118. Cf. Meghan J. Ryan, Judging Cruelty, 44 U.C. Davis L. Rev. 81, 131–32 (2010) ("In turning to [penological purposes], the [Supreme] Court seems to indirectly examine *motive*, because punishments that do not serve . . . legitimate purpose[s] must then be inflicted for some [other] reason . . . ." (emphasis added)). If penological justifications are a proxy for motive and delay is merely the inevitable collateral consequence of due process, then the state has implicitly rebutted any presumption of improper motive.

119. See Gregg v. Georgia, 428 U.S. 153, 206 (1976) (plurality opinion) (noting Georgia's appellate review provision "[checked] against the random or arbitrary imposition of the death penalty").

120. See supra notes 33–35 and accompanying text (discussing procedures).

121. See James S. Liebman et al., A Broken System, Part II: Why There Is So Much Error in Capital Cases, and What Can Be Done About It 243 (2002) [hereinafter Liebman et al., Broken System II], available at http://www2.law.columbia.edu/brokensystem2/report.pdf (on file with the *Columbia Law Review*) ("[S]tates that more often give in to pressures to use the death penalty and extend it to marginal cases have . . . more delay in processing appeals . . . .").

122. CCFAJ Final Report, supra note 22, at 122 (noting "[d]elays of 8–10 years after sentence in appointing habeas counsel" in some cases).

123. See id. (noting delays at several steps in appellate process, including scheduling hearings and deciding state and federal habeas corpus petitions).

124. See, e.g., Morales v. Cate, 623 F.3d 828, 831 (9th Cir. 2010) (upholding four-year moratorium on death penalty by lethal injection and requiring that California's new three-drug lethal injection protocol meet certain qualifications before implementation).

their firefighters' suppression of a rash of blazes actually set by arsonists in the public housing department.

2. *No "Deliberate" State Action.* — Even when delay is due mainly to demonstrated errors on the state's part, courts have still been unwilling to sustain *Lackey* claims. In *Chambers v. Bowersox*, the Eighth Circuit refused to penalize the state for a *Lackey* petitioner's twice-reversed conviction because there was no evidence that the state "*deliberately* sought to convict [him] invalidly in order to prolong" his preexecution delay.[125] Also focusing on the post-trial circumstances of particular cases, other courts have denied *Lackey* claims based on a lack of evidence that the state "set up a scheme to prolong the period of incarceration, or rescheduled the execution repeatedly in order to torture [the inmate]."[126]

While courts have not explicitly justified their requirement of deliberate state action in *Lackey* cases,[127] this Note argues that the requirement

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125. 157 F.3d 560, 570 (8th Cir. 1998) (emphasis added). Courts also seem to be concerned about holding the state responsible due to their impression that the state is not on notice that delay is detrimental to death row inmates. See, e.g., White v. Johnson, 79 F.3d 432, 439 (5th Cir. 1996) ("[Petitioner] made no effort to inform the [state] courts that their delay was detrimental to him or to ask for expedited review of his petition . . . .").

126. McKenzie v. Day, 57 F.3d 1461, 1466 (9th Cir.), aff'd on reh'g en banc, 57 F.3d 1493 (9th Cir. 1995); see also Johns v. Bowersox, 203 F.3d 538, 547 (8th Cir. 2000) ("[Petitioner] does not claim that the delay in this case was caused intentionally by the State."); *White*, 79 F.3d at 439 ("[Petitioner] fails to allege that the delay in his case is due to anything other than court backlog and does not offer any evidence that [the state's] delay . . . was intentional or even negligent.").

127. Suits alleging unconstitutional conditions of confinement, which may be comparable to *Lackey* claims as currently formulated, have traditionally required a showing of deliberate indifference. This is a subjective standard requiring that "the defendant was aware of a substantial risk to the prisoner's health and disregarded that risk." Joel H. Thompson, Today's Deliberate Indifference: Providing Attention Without Providing Treatment to Prisoners with Serious Medical Needs, 45 Harv. C.R.-C.L. L. Rev. 635, 637–38 (2010). However, the Supreme Court does not require a showing of deliberate state action in all Eighth Amendment cases. See, e.g., Brown v. Plata, 131 S. Ct. 1910, 1923 (2011) (upholding remedial order requiring release of 46,000 prisoners after finding overcrowded California prison had failed to provide adequate healthcare to prisoners). The Court in *Plata* relied on objective symptoms of systemic dysfunction rather than evidence of deliberate indifference in holding that the release order must be affirmed. See id. at 1924–26 (listing facts and statistics about California's correctional health care system). Notably, *Plata* arose from two class action suits filed by California inmates alleging that a *systemic* problem—prison overcrowding—was causing them to receive inadequate mental health care. Id. at 1922. The systemwide nature of the alleged violation in *Plata* may therefore have affected the Court's conclusion that the Eighth Amendment violation required a drastic remedy even though deliberate state action was lacking. Cf. id. at 1940 ("Prisoners who are not sick or mentally ill do not yet have a[n] [Eighth Amendment] claim . . . but . . . [t]hey are that *system*'s next potential victims." (emphasis added)). Although *Plata* was mainly about remedies, the case still has large implications for as yet unrecognized Eighth Amendment violations, such as preexecution delay, that manifest in a similarly systemic mode.

is triggered by the following problems arising from the case-by-case formulation of *Lackey* claims: (1) potential opportunistic behavior by future petitioners (Part II.A.2.a), (2) the impracticability of analyzing proportionality in each case involving "psychological torture" (Part II.A.2.b), and (3) the similarity of "no penological justification" claims to individual prisoners' conditions of confinement claims (Part II.A.2.c).

a. *Fear of Perverting Incentives.* — Courts have argued that recognizing the validity of *Lackey* claims without some deliberate state action requirement would encourage inmates to delay review proceedings purposely.[128] The courts' fear of creating this incentive is heightened by the fact that "no penological justification" claims usually do not ripen until an execution date is set,[129] making it difficult for courts to winnow out claims that are in fact last-ditch attempts to avoid or further delay execution.[130] Courts also worry that sustaining *Lackey* claims would distort judicial behavior.[131] Justice Thomas has written that, under a *Lackey* regime, reviewing courts would "give short shrift to a capital defendant's legitimate claims so as to avoid violating the Eighth Amendment."[132] This

128. See, e.g., *McKenzie*, 57 F.3d at 1466 (expressing fear "death-row inmates would be able to avoid their sentences simply by delaying proceedings . . . while [those inmates] less successful in their attempts to delay . . . would be forced to face their sentences" (quoting Richmond v. Lewis, 948 F.2d 1473, 1492 (9th Cir. 1990), vacated on other grounds, 986 F.2d 1583 (9th Cir. 1993)) (internal quotation marks omitted)); Bell v. State, 938 S.W.2d 35, 53 (Tex. Crim. App. 1996) (en banc) (per curiam) (asserting sustaining *Lackey* claim would "encourage inmates to delay their appeals as much as possible"); cf. Fearance v. Scott, 56 F.3d 633, 639 (5th Cir. 1995) (citing petitioner's motion for extension and failure to file motions for expedited review or objections to delay as support for conclusion that delay was due to petitioner's own conduct).

129. See supra notes 97–98 and accompanying text (explaining why these claims do not ripen until execution date is set).

130. Cf. Turner v. Jabe, 58 F.3d 924, 933 (4th Cir. 1995) (Luttig, J., concurring) (branding *Lackey* claim "politic[al]," "frivolous," and "sophistic," and alleging delay was "direct consequence of [petitioner's] own litigation strategy").

131. See, e.g., *McKenzie*, 57 F.3d at 1467 (predicting sustaining *Lackey* claim would "wreak havoc with the orderly administration of the death penalty . . . by [privileging] speed [over] accuracy").

132. Knight v. Florida, 528 U.S. 990, 992 (1999) (Thomas, J., concurring in denial of certiorari). Note that some courts and legislatures have established or are in the process of establishing procedures that speed the litigation of capital appeals and habeas petitions. See, e.g., In re Reno on Habeas Corpus, 283 P.3d. 1181, 1195–96 (Cal. 2012) (establishing "ground rules for exhaustion petitions in capital cases that will speed [the California Supreme Court's] consideration of them"); Timely Justice Act of 2013 § 16, S.B. 1750, 2013 Leg., Reg. Sess. (Fla. 2013), available at http://www.flsenate.gov/Session/Bill/2013/1750/BillText/c1/PDF (on file with the *Columbia Law Review*) (indicating legislative intent to make sure appeals are resolved "as soon as possible"); James N.G. Cauthen & Barry Latzer, Why So Long? Explaining Processing Time in Capital Appeals, 29 Just. Sys. J. 298, 306 (2008) [hereinafter Cauthen & Latzer, Why So Long?] (noting Virginia Supreme Court gives docket preference to reviews of death sentences and Nevada requires that state supreme court resolve reviews of death sentences within 150 days after receiving record). Such rules should reduce the capability of inmates to delay their capital appeals and

is a fear that lower courts have echoed, speculating that judges would grant fewer stays of execution and require hasty litigation of habeas petitions.[133]

b. *Unwillingness to Differentiate Psychological Pain.* — Although "psychological torture" claims often draw on the broader phenomenon of death row syndrome for support, they ultimately are premised on the psychological pain experienced by an individual inmate.[134] This personalized harm requires individualized adjudication, which the Supreme Court has declined to do in the Eighth Amendment context absent some easily identifiable, discrete, *knowing* state action that has caused a particular inmate pain.[135] The psychological nature of the harm asserted by *Lackey* petitioners aggravates the problem, as courts have long understood psychological pain to be an inevitable corollary of capital punishment, rather than an additional harm inflicted on the death row inmate. Justice Brennan has called "mental pain . . . an *inseparable* part of [the death penalty], for the prospect of pending execution exacts a frightful toll during the *inevitable* long wait."[136] Given this and parallel assertions in lower courts construing psychological pain as an innate feature of the death penalty,[137] if psychological pain on death row were unconstitutional, the death penalty would be as well.

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habeas petitions and thereby weaken this particular argument against recognizing claims of undue delay.

133. See, e.g., *McKenzie*, 57 F.3d at 1467 (arguing sustaining *Lackey* claims would undermine courts' willingness to freely grant stays because state could be pushed "permanently out of bounds if the execution is too long deferred by the process of adjudication").

134. See, e.g., Petition for Writ of Certiorari to the Texas Court of Criminal Appeals at 5–6, Lackey v. Texas, 514 U.S. 1045 (1995) (No. 94-8262), 1995 WL 17904041, at *5–*6 ("[T]he sheer length of time . . . [has] caused *him* a tremendous amount of psychological anguish and pain." (emphasis added)).

135. See infra note 143 (providing examples of § 1983 prison suits).

136. Furman v. Georgia, 408 U.S. 238, 288 (1972) (Brennan, J., concurring) (emphases added); see also id. at 287 ("No other existing punishment is comparable to death in terms of physical *and mental* suffering." (emphasis added)). Twentieth-century philosophers have found the death penalty astoundingly cruel by very reason of the existential despair that delayed execution engenders. Albert Camus, for instance, who famously characterized the death penalty as publicly premeditated murder, believed that execution was actually worse than murder because the time that the condemned has to reflect upon his impending death reduces him to "a thing waiting to be handled by the executioners." Albert Camus, Reflections on the Guillotine, *in* Resistance, Rebellion, and Death 173, 199–201 (Justin O'Brien trans., 1961). In *The Idiot*, by Fyodor Dostoyevsky, the protagonist, Prince Myshkin, describes another man's five-minute experience of waiting to be shot for a political crime as the "uncertainty and feeling of aversion for that new thing which would be and was just coming." Fyodor Dostoyevsky, The Idiot 56 (Constance Garnett trans., Elina Yuffa rev., 2004) (1869).

137. See, e.g., People v. Anderson, 493 P.2d 880, 894 (Cal. 1972) (en banc) ("The cruelty of capital punishment lies not only in the execution itself . . . 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."

There are, of course, gradations of psychological harm, and the "psychological torture" type of *Lackey* claim implicitly argues that the psychological harm is proportionally greater when an inmate has spent a particularly long time on death row. But even if psychological harm were directly proportional to duration of imprisonment, the Supreme Court has carefully avoided drawing Eighth Amendment distinctions based on varying gradations of psychological harm accompanying different prison terms or prison environments.[138] Differences in psychological harm are likely to be affected by many factors specific to the individual other than length of incarceration.[139] Appellate courts will almost certainly resist claims that threaten to make such myriad factors constitutionally relevant,[140] particularly in light of Justice Thomas's statement in *Knight* that the *Lackey* claim "would further prolong collateral review by giving virtually every capital prisoner yet another ground on which to challenge and delay his execution."[141] The "psychological harm" claim thus devolves into either an attack on the death penalty per se or an invitation to wide-open, case-by-case analysis of individual incarceration that the Supreme Court has never been willing to undertake in Eighth Amendment review.

c. *Failed Analogy to Prison Suits.* — Courts may also have derived the deliberate state action requirement by analogizing the "no penological justification" version of the *Lackey* claim, with its focus on the excessiveness arising from particularized harm, to § 1983 excessive force and conditions of confinement suits brought by individual inmates against prison officials. While the "no penological justification" claim is founded on the Supreme Court's holding in *Gregg* that "the sanction imposed cannot be so totally without penological justification that it results in the

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(footnote omitted)), superseded by constitutional amendment, Cal. Const. art. I, § 27, as recognized in Strauss v. Horton, 207 P.3d 48, 90 (Cal. 2009); Commonwealth v. O'Neal, 339 N.E.2d 676, 680 (Mass. 1975) (Tauro, C.J., concurring) ("The convicted felon suffers extreme anguish in anticipation of the extinction of his existence.").

138. See Craig Haney, Psychology and the Limits to Prison Pain: Confronting the Coming Crisis in Eighth Amendment Law, 3 Psychol. Pub. Pol'y & L. 499, 567 (1997) ("Our prevailing Eighth Amendment jurisprudence is so psychologically stunted that the interplay between sentence length and the nature of the prison environment . . . was absent from the Court's analysis in [various] proportionality cases."). But see Hudson v. McMillian, 503 U.S. 1, 17 (1992) (Blackmun, J., concurring in the judgment) (asserting psychological pain "may be clinically diagnosed and quantified through well-established methods").

139. See Haney, supra note 138, at 539, 542, 544–45, 575 (suggesting other factors contribute to psychological harm, such as preexisting conditions, idleness, and susceptibility to trauma).

140. Cf. Christine Rebman, Comment, The Eighth Amendment and Solitary Confinement: The Gap in Protection from Psychological Consequences, 49 DePaul L. Rev. 567, 603 (1999) ("Courts, generally, have feared entering into an evaluation of the psychological effects resulting from solitary confinement.").

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

gratuitous infliction of suffering,"[142] it is difficult to show that there *is* a "sanction imposed" in *Lackey* cases, because inordinate delay is not a punishment written into law.

This may have led the courts to treat *Lackey* claims as akin to § 1983 prison suits.[143] In these latter cases, where the prisoner is also not challenging a formal sanction, the courts have applied a standard derived from another *Gregg* prohibition: the prohibition against punishments involving "unnecessary and wanton infliction of pain,"[144] which the Supreme Court has read to encompass punishments that are "'totally without penological justification.'"[145] Because injuries that the prisoner suffered may have been accidentally or negligently imposed, the Court requires proof that prison officials acted with "deliberate indifference" to the prisoner's health or safety in these cases[146]—just like the "deliberate prolongation of delay" standard that courts have used to reject *Lackey* claims.[147] Again, the decisive reason for the courts' crabbed approach to *Lackey* claims is the claims' focus on individual harms, which fall short of punishments that the state as a whole has formally adopted, and which can only be "inflicted" through discrete actions by prison officials. The "wanton infliction of pain" standard is entirely different from courts' approach under the Eighth Amendment to punishments sanctioned by the state as a governmental entity, which are reviewed for their consistency in preserving the dignity that the state must accord human beings in its jurisdiction.[148]

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142. Gregg v. Georgia, 428 U.S. 153, 183 (1976) (plurality opinion).

143. For examples of § 1983 prison suits, see Hope v. Pelzer, 536 U.S. 730, 745 (2002) (holding handcuffing inmate to hitching post may be cruel and unusual); Farmer v. Brennan, 511 U.S. 825, 828–29 (1994) (holding there may be Eighth Amendment violation where prison official acts with "deliberate indifference" to inmate health, but only if official knows inmate faces substantial risk of serious harm and fails to take reasonable measures to abate risk); *Hudson*, 503 U.S. at 9–10 (holding use of excessive physical force against prisoner may be cruel and unusual even if prisoner does not sustain serious injury); Rhodes v. Chapman, 452 U.S. 337, 352 (1981) (holding putting two inmates in one cell is not cruel and unusual); Estelle v. Gamble, 429 U.S. 97, 104 (1976) (holding "deliberate indifference to serious medical needs" could violate Eighth Amendment).

144. *Gregg*, 428 U.S. at 173 (citing Furman v. Georgia, 408 U.S. 238, 392–93 (1972) (Burger, C.J., dissenting)) (noting penalty for criminal sanction must not be excessive, one indicator of which is whether it involves "unnecessary and wanton infliction of pain").

145. *Rhodes*, 452 U.S. at 346 (quoting *Gregg*, 428 U.S. at 183).

146. See, e.g., *Estelle*, 429 U.S. at 106 ("In order to state a cognizable claim, a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs.").

147. See supra notes 125–126 and accompanying text (discussing cases in which court rejected *Lackey* claim due to lack of deliberate state action).

148. Compare *Furman*, 408 U.S. at 271 (Brennan, J., concurring) (stating "punishment must not be so severe as to be degrading to the dignity of human beings"), and Trop v. Dulles, 356 U.S. 86, 100 (1958) (plurality opinion) ("The basic concept underlying the Eighth Amendment is nothing less than the dignity of man."), with

B. *Why Proposed Adjudicatory Frameworks Do Not Resuscitate the* Lackey *Claim*

Recognizing the courts' concerns, three scholars have proposed ways to mollify judges by adopting a clearer, more sharply limited definition of the threshold condition for both "psychological torture" and "no penological justification" *Lackey* claims. A fourth observer has suggested that the problem instead is that the claim as traditionally understood has been too narrow. The following subsections show that none of these approaches solves the problems with individualized *Lackey* claims articulated in Part II.A, supra.

1. *Aggravating the Claim's Case-Specific Approach.* — To domesticate the "psychological torture" claim, Karl Myers would limit relief to cases in which "the facts and circumstances" shock the "collective consciences" of reviewing judges—that is, cases involving intentional or grossly negligent delays.[149] Hoping instead to cabin the "no penological justification" approach, Jessica Feldman would treat the average time *nationally* that inmates spend on death row as a constitutional threshold, beyond which an inmate has a right to a life sentence if, after considering several factors, he can show that the delay was primarily caused by nonfrivolous appeals and negligent or deliberate state actions, rather than, for example, his own frivolous filings.[150] Professor Dwight Aarons would treat *Lackey* claims as ripe and meritorious "only after the inmate has been under a sentence of death for *twice* as long as the national average," regardless of which party is responsible for the delays.[151] Kara Sharkey has proposed that courts undertake a delay-attribution calculus similar to Feldman's, except that instead of using the national average as the threshold for determining whether a constitutional violation has occurred, she would use Aarons's timeframe of twice the national average as a *ripeness* threshold.[152] The claim would then only be successful

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Kennedy v. Louisiana, 554 U.S. 407, 420–21 (citing dignity principle in its holding that death sentence for defendant who raped but did not kill child is unconstitutional), modified on denial of reh'g, 129 S. Ct. 1 (2008). For additional analysis of the dignity principle in Eighth Amendment jurisprudence, see Susan Raeker-Jordan, Kennedy, *Kennedy*, and the Eighth Amendment: "Still in Search of a Unifying Principle"?, 73 U. Pitt. L. Rev. 107, 149–59 (2011).

149. Karl S. Myers, Comment, Practical *Lackey*: The Impact of Holding Execution After a Long Stay on Death Row Unconstitutional Under *Lackey v. Texas*, 106 Dick. L. Rev. 647, 673–74 (2002). Myers does advocate a presumption of gross negligence in cases where the delays are "exceedingly long." Id. at 674.

150. Jessica Feldman, Comment, A Death Row Incarceration Calculus: When Prolonged Death Row Imprisonment Becomes Unconstitutional, 40 Santa Clara L. Rev. 187, 213–17 (1999).

151. Aarons, Inordinate Delay, supra note 94, at 207 (emphasis added). The reasons that Aarons chooses twice the national average are: (1) it "is excessive, in the commonly accepted legal usage of the term," and (2) this time period delays the onset of the claim long enough to permit error correction in imperfect convictions. Id. at 207–09.

152. Kara Sharkey, Comment, Delay in Considering the Constitutionality of Inordinate Delay: The Death Row Phenomenon and the Eighth Amendment, 161 U. Pa.

if the leading cause of delay was the state's misconduct or negligence.[153] Importantly, Sharkey would not count delay caused by the process of judicial review against the state, but would rather carve these "neutral" periods out of the equation.[154]

These proposals aggravate the problems with the *Lackey* claim's individualized approaches to the Eighth Amendment harm. Myers's "shocks the conscience" approach would require painstakingly individualized review of claims that courts have not even been willing to review on the merits.[155] Feldman, Aarons, and Sharkey see the need for a larger, systemic framework within which to adjudicate *Lackey* claims. However, Feldman's national average threshold lops off a large chunk of cases in which petitioners may have suffered acute pain relative to other inmates in a particular state.[156] Her fault-attribution "calculus" aggravates existing difficulties that inmates experience in attempting to show deliberate state conduct[157] on habeas[158] and proving to judges that their successive petitions are not frivolous but necessary due to the nature of the claim.[159] Moreover, an individual petitioner's record will often not be able to bear out evidence of the policies and practices of the state which are, in most cases, the underlying reasons for the delay, but whose effects are only visible in the context of the capital punishment system as a whole.[160] The focus of Aarons's "twice the national average" solution, meanwhile, appears to be on finding a bright line rule by which courts can easily dispose of some *Lackey* claims while never even reaching other, possibly

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L. Rev. 861, 892–96 (2013) ("Incarceration for twice the national average . . . should trigger an automatic review of the inmate's time on death row by the state supreme court." (footnote omitted)).

153. Id. at 895.

154. Id. at 894–95.

155. See supra Part II.A.2.b (showing courts are unlikely to want to consider totality of circumstances in each individual petitioner's case); cf. Erik Savas, Comment, Hot Pursuit: When Police Pursuits Run Over Constitutional Lines, 1998 Detroit C.L. Mich. St. U. L. Rev. 857, 890 (noting in qualified immunity cases "shocks the conscience" requires inquiry into totality of circumstances).

156. Given the unevenness of delays across the country, this would privilege petitioners in some states over others and fail to account for those who are outliers in their own states.

157. See supra Part II.A.2 (describing courts' view of "deliberate" state action).

158. Because habeas petitions are filed after direct appeals, presumably any errors that are clear from the record will be raised on appeal, and the case will be reversed or remanded if the court finds evidence of bad faith. Habeas attorneys also have limited investigation resources, and certain states have policies that have the effect of discouraging habeas investigation, making it difficult for defendants to investigate state conduct. Cf., e.g., In re Clark, 855 P.2d 729, 751 (Cal. 1993) (holding appointed appellate defense counsel has no duty to uncover factual bases for collateral attack).

159. See supra Part II.A.2.a (showing courts are already afraid of perverted inmate incentives).

160. See, e.g., supra notes 38–39 (listing various reasons for systemic delay).

meritorious ones.[161] Aarons's framework is thus a systemic proxy for what he still views to be an individualized violation; he reasons that a test that is narrow enough may miss some people who have been mistreated but will at least not be overinclusive. The problem is that, if the courts doubt that either of the types of individualized *Lackey* claims validly makes out an Eighth Amendment violation, then providing a proxy for such a violation solves nothing at all. Sharkey's solution suffers from the same flaws as those of Feldman and Aarons, and would in practice make it as difficult to adjudicate (not to mention prevail on) a *Lackey* claim as would a "shocks the conscience" standard. Not only is Sharkey's ripeness threshold extremely high (thirty-three years under current statistics), but inmates are not guaranteed success unless they can make the difficult duple showing that (a) the state was negligent and engaged in misconduct, and (b) this was primarily responsible for the delay.

2. *Using the Wrong Logic to Tackle the Wrong Penalty.* — Writing two decades after he first represented Clarence Lackey in *Lackey v. Texas* and challenged Lackey's delayed tenure on death row as cruel and unusual punishment,[162] Brent Newton recently proposed a "systemic" *Lackey* claim and offered two alternative methods to attack inordinate delay under a systemic rubric.[163] The first approach is to claim that "every death sentence in America is invalid because systemic delays have undermined the legitimate purposes of capital punishment."[164] This strategy could advance on either a nationwide or statewide[165] basis. The second approach is to challenge systemic delays by asking judges to consider a hypothetical statute that requires capital defendants to wait fifteen years or more[166] on death row before being executed.[167] Newton declares that the Supreme Court would either invalidate the whole statute or sever the wait requirement as a "cruel and unusual psychological superaddition."[168] He then contends that the logic of this ruling should apply to systemic

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161. This bright line rule, moreover, is arbitrary, since "unusual" does not necessitate a multiplier of two, particularly as average death row delays continue to increase in length. Since Aarons's article, the national average preexecution delay has already risen by 5.67 years. BJS Statistics 2011, supra note 1, at 14 tbl.10.

162. Brent E. Newton, The Slow Wheels of *Furman*'s Machinery of Death, 13 J. App. Prac. & Process 41, 54–66 (2012).

163. Id. at 64–66 (arguing "ineluctable logic of *Lackey* claim" would provide this forceful argument, but only if "embraced by a majority of the Court").

164. Id. at 65.

165. See id. at 65 n.100 ("[S]ystems in [states like California] . . . appear to be good candidates for being declared per se unconstitutional.").

166. Fifteen years is slightly higher than the national average wait for current death row inmates. See supra note 3 and accompanying text (stating 13.7 years is average wait for current inmates).

167. Newton, supra note 162, at 65.

168. Id. (citing Baze v. Rees, 553 U.S. 35, 96 n.* (2008) (Thomas, J., concurring in the judgment)) (citing Justice Thomas's concurrence in *Baze* for proposition that Framers believed gratuitous forms of torture added to executions were cruel and unusual).

delays as well, because the existence of these delays shows the state's "deliberate indifference" to these delays.[169] Again, the remedy "would be a declaration that the entire system of capital punishment . . . is unconstitutional."[170]

Newton's instinct that systemic delay provides an avenue out of *Lackey* conundrums is correct. So is his idea, under the second approach, that *Lackey* petitioners should take, as a starting point, the hypothetical enactment of a statute that prescribes a period of preexecution delay on death row.[171] However, both of Newton's approaches use systemic patterns only for the purpose of extrapolating the individualized "psychological torture" and "no penological justification" theories onto the entire capital punishment system. The first type of systemic claim is an enhanced version of the "no penological justification" claim in that it assumes that delayed executions are unconstitutional because they serve no retributive or deterrent purpose.[172] However, courts have already rejected this underlying theory and are less likely to credit it when doing so would force them to render an entire capital punishment system unconstitutional.

The second systemic claim is just as unavailing. First, Newton assumes that the Supreme Court would invalidate at least part of the hypothetical statute as a "cruel and unusual psychological superaddition" without stating why such a superaddition is cruel and unusual. Newton thus retains the theory of the "psychological torture" claim in his new framework, but is now presenting it as psychological torture writ large. If the Court is unlikely to recognize psychological torture in the individual case,[173] it is unlikely to recognize it in hundreds of cases. Second, Newton reasons that systemic delays that have the same effect as the implementation of the statute would be unconstitutional, by way of the same deliberate indifference standard that has been used only in individualized conditions of confinement cases.[174] Even assuming that courts would find deliberate indifference to psychological pain unconstitutional—which they have not, to date—they are unlikely to apply the deliberate indifference test to systematic state action as well as to acts of individual prison officials, given the Supreme Court's continual narrowing of the test.[175]

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169. Id. at 66.

170. Id.

171. See infra note 178 (explaining how this Note uses same starting point to very different effect).

172. Newton, supra note 162, at 65.

173. See supra Part II.A.2.b (explaining why courts are unwilling to recognize and differentiate psychological pain in Eighth Amendment cases).

174. See supra Part II.A.2.c (describing cases).

175. See, e.g., Farmer v. Brennan, 511 U.S. 825, 828–29 (1994) (holding to show "deliberate indifference" prisoner must show prison official was "subjectively aware of the risk"); Wilson v. Seiter, 501 U.S. 294, 305 (1991) ("[A]morphous . . . 'overall conditions'

What is ironic about the systemic *Lackey* claim is that Newton wants to make use of systemic delay, but his myopic focus on the old theories of the claim causes him to miss the implications of systemic delay for the formulation of the *Lackey* claim. One implication is that, in states with systemic delays, the unconstitutional punishment is no longer the death penalty—thus, there is no need to invalidate the entire capital punishment system. The unconstitutional punishment, rather, may be found within the hypothetical that Newton poses: Certain states are sentencing capital defendants to a different sentence altogether. Part III of this Note picks up where Newton left off, elaborating on what this new sentence is and why it is cruel and unusual, and formulating a standard which courts can use to determine whether states are imposing this penalty as a categorical matter even without an explicit penal statute.

III. A SYSTEMATIC APPROACH TO *LACKEY* CLAIMS

Given the failure of individualized *Lackey* claims to develop a viable definition of excessive preexecution delay, courts should use a "systematic" approach to find these delays categorically[176] unconstitutional.[177] This approach would work well in states where excessive delay is advertently systematic and where the sentence imposed is inevitably life in perpetual fear of state-implemented death, whose timing is impossible to predict (i.e., life in the "shadow of death"). This approach locates the Eighth Amendment violation not in the delay itself, or in its psychological or penological effects, but in the delay's status as a self-consciously administered penalty *beyond* capital punishment that a given state has publicly adopted and systematically implements. This may start to sound like Newton's approach, since, as with Newton's systemic *Lackey* claim, an

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[cannot] rise to the level of cruel and unusual punishment when no specific deprivation of a single human need exists.").

176. For examples of the Supreme Court's categorical approach to barring punishments, see Miller v. Alabama, 132 S. Ct. 2455, 2460 (2012) (banning mandatory life without parole for juveniles); Graham v. Florida, 130 S. Ct. 2011, 2030 (2010) (banning life without parole for juveniles who have not committed homicide); Kennedy v. Louisiana, 554 U.S. 407, 413 (2008) (banning death penalty for defendants who rape but do not kill children); Roper v. Simmons, 543 U.S. 551, 568 (2005) (banning death penalty for juveniles); Atkins v. Virginia, 536 U.S. 304, 321 (2002) (banning death penalty for intellectually disabled defendants); Coker v. Georgia, 433 U.S. 584, 592 (1977) (banning death penalty for rape of adult women).

177. This Note's approach is "systematic" rather than "systemic" because it does not purport to show that delays are unconstitutional solely by virtue of the fact that delays are a systemic problem stretching over a critical mass of cases. Rather, a systematic approach regards systemic delay as a symptom of systematic state action. See infra Part III.B.2 (offering new standard by which systemic delay can be traced to systematic state action). Compare Webster's Third New International Dictionary of the English Language Unabridged 2322 (Philip Babcock Gove ed., 1981) (defining "systematic" as "marked by or manifesting system, method, or orderly procedure"), with id. at 2323 (defining "systemic" as "of, relating to, or common to a system").

inmate raising a systematic *Lackey* claim would be asking the court to adjudicate the claim based on the circumstances under which the state imposes the death penalty in all cases. Unlike Newton's approach, however, the systematic approach purports to show not that the death penalty is unconstitutional, but that the state, in administering the death penalty with full knowledge of inordinate delays and their systemic causes, can be characterized as systematically imposing a *different* punishment which is cruel and unusual on its own terms.

This Part develops a gradual, multistep approach that *Lackey* petitioners and courts can use to show that (a) the punishment of life in the shadow of death is cruel and unusual and (b) a given state is imposing this punishment qua punishment upon its death row inmates. Part III.A.1–4 show that if a state legislated this punishment, courts would invalidate it because it is cruel and unusual.[178] Part III.A.5 shows that if a state resolved to impose life in the shadow of death without adopting formal legislation, the punishment would remain cruel and unusual. Part III.B argues that, when a state self-consciously operates a system such that courts have no choice but to conclude that the state is imposing one penalty rather than another, the former penalty becomes a formally sanctioned punishment of the state. Finally, Part III.C discusses the systematic approach's practical advantages, and Part III.D proposes a remedy.

A. *Why Systematically Imposed Preexecution Delay Is "Cruel and Unusual"*

Imagine that state X enacts a law authorizing "life imprisonment without the possibility of parole, but with the possibility of death,"[179] which this Note calls life in the "shadow of death."[180] Based on existing Eighth Amendment standards and a minibranch of torture jurisprudence produced by state courts, this section argues that such punishment is unconstitutional.

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178. While this Note also takes a (slightly different) hypothetical statute as the starting point for the development of a new type of *Lackey* claim, this hypothetical statute does not become a vehicle to extrapolate case-by-case Eighth Amendment reasoning to an entire capital punishment system, as does Newton's, see supra notes 173–175 and accompanying text (showing how Newton's use of hypothetical statute fails to enable systemic application of *Lackey* claim). On the contrary, this Note takes the approach of (1) showing that the punishment that a hypothetical statute (slightly different from Newton's) endorses would be cruel and unusual under categorical Eighth Amendment jurisprudence, and then (2) bringing in legal standards from other quadrants of constitutional law to show how courts can find that the state is imposing this punishment even in the absence of such a statute.

179. Cf. Liebman & Clarke, supra note 10, at 319 (recharacterizing death penalty as "life without the possibility of parole, but with a small chance of execution a decade later" (emphasis omitted)); supra note 8 and accompanying text (describing increase in duration between sentencing and execution from 1984 to end of 2011).

180. Cf. Ceja v. Stewart, 134 F.3d 1368, 1369 (9th Cir. 1998) (Fletcher, J., dissenting) (opining no state would ever enact such law).

1. *"Cruel" by Analogy to Aggravating Circumstances.* — Life in the shadow of death is "cruel" in the same way that certain aggravating circumstances which elevate the defendant's possible punishment to death in many states are understood to be "especially heinous, atrocious or cruel"[181] or "outrageously or wantonly vile, horrible, or inhuman."[182] In *Banks v. State*, the Georgia Supreme Court found that killing a victim with two shots, using a shotgun that required time to reload between each shot, warranted the jury's application of Georgia's statutory aggravator for "outrageously and wantonly vile, horrible, and inhuman" crimes.[183] In holding that the evidence supported the jury's finding, the court honed in on the fact that each victim was killed only after two shots and the single-barrel shotgun "requir[ed] time for the reloading after each shot."[184] Taken together, these facts "authoriz[ed] the jury's finding of torture."[185] The Missouri Supreme Court similarly upheld a jury's finding of an "outrageously or wantonly vile" aggravating circumstance where, by shooting the victim twice, the defendant gave her "'a substantial period of time before death to anticipate and reflect upon it.'"[186] The Alabama Supreme Court found a murder "especially heinous, atrocious or cruel" where the victim "suffered psychological torture"—that is, "[was] in intense fear and [was] aware of, but helpless to prevent, impending death"—for an "appreciable lapse of time."[187] In Arizona, the supreme court recently offered a more expansive definition of "cruelty" for purposes of its aggravating factor, holding that "[n]o set period of suffering is required" for a jury to find the existence of aggravating cruelty: "Our cases make clear that [the cruelty aggravator] instruction is sufficient if it requires the state to establish that 'the victim consciously experienced physical or mental pain and the defendant knew or should have known that' the victim would suffer."[188] In North Carolina, one of

181. E.g., Ala. Code § 13A-5-49(8) (1975 & Supp. 1985).

182. E.g., Ga. Code Ann. § 17-10-30(b)(7) (1982); see also Richard A. Rosen, The "Especially Heinous" Aggravating Circumstance in Capital Cases—The Standardless Standard, 64 N.C. L. Rev. 941, 943 n.7 (1986) (providing overview of state statutes authorizing finding of "especially heinous, atrocious, or cruel" or similar aggravating circumstance).

183. 227 S.E.2d 380, 382 (Ga. 1976).

184. Id.

185. Id. For other similar instances in which the Georgia Supreme Court found psychological torture warranting the finding of an "outrageously vile" aggravating circumstance, see, for example, Rivers v. State, 298 S.E.2d 1, 8–9 (Ga. 1982), which found circumstance where the victim watched others killed outrageously vile, and Brooks v. State, 271 S.E.2d 172, 173 (Ga. 1980), which found a circumstance where the victim was taunted before her murder outrageously vile.

186. Rosen, supra note 182, at 985–86 (quoting State v. Preston, 673 S.W.2d 1, 11 (Mo. 1984) (en banc)).

187. Ex parte Key, 891 So. 2d 384, 390 (Ala. 2004) (citing Norris v. State, 793 So. 2d 847, 861 (Ala. Crim. App. 1999)).

188. State v. Cropper, 225 P.3d 579, 583–84 (Ariz. 2010) (en banc) (quoting State v. Tucker, 160 P.3d 177, 189–90 (Ariz. 2007)) (internal quotation marks omitted).

two types of statutorily "cruel" killings "consists of those killings which . . . involve infliction of psychological torture by leaving the victim in his last moments aware of but helpless to prevent impending death."[189] In Florida, a finding of a "heinous, atrocious, or cruel" aggravating circumstance "can be sustained on the basis of the mental anguish inflicted on the victims as they waited for their 'executions' to be carried out."[190]

These interpretations are judicial judgments about which actions, superadded to murder itself, are cruel and unusual. The cruelty and unusualness of these actions do not depend on direct testimonial proof of psychological torture—the victim, of course, has died—or on documented or widely observed psychological phenomena such as death row syndrome. Rather, these actions are deemed cruel and unusual based on these respective state court judges' judgments about what kinds of conduct *beyond* murder constitute psychological torture. Thus, a law that authorizes the infliction of life in the shadow of death as punishment is "cruel" in the same way that a murderer's delayed infliction of an otherwise instantaneous death is cruel. One need look no further than the opinions of the myriad state courts above stating that forcing a human being to wait for a deliberately inflicted death would be outrageously vile, heinous, atrocious, and cruel.[191] The only difference is that this hypothetical law subjects more people to this kind of treatment for a longer period of time.

2. *"Unusual" by Comparison to Punishments in Other States.* — States have historically gauged the "unusualness" of their own punishments by comparing them to the practices of other states,[192] and many continue to do so, to varying degrees.[193] If a court compares state X's new punishment of life in the shadow of death to the regular death sentence imposed in other states, it will certainly find life in the shadow of death

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189. State v. Hamlet, 321 S.E.2d 837, 846 (N.C. 1984).

190. Francois v. State, 407 So. 2d 885, 890 (Fla. 1981) (per curiam) (citing White v. State, 403 So. 2d 331, 338–39 (Fla. 1981), abrogated on other grounds by Elledge v. State, 706 So. 2d 1340 (Fla. 1997)).

191. It is not just cruel in the sense of inmates having time to reflect on their impending death. It is also cruel in the way that it strips inmates of the power to control their *ability* to reflect on their own death. Consider, for instance, the manner in which death row inmates are executed in Japan: "Prisoners are typically given a few hours' notice, but some may be given no warning at all." Amnesty Int'l, Urgent Action: High Risk of Executions in Japan (2012), available at http://www.amnestyusa.org/sites/default/files/uaa21112.pdf (on file with the *Columbia Law Review*).

192. See Alexander A. Reinert, Eighth Amendment Gaps: Can Conditions of Confinement Litigation Benefit from Proportionality Theory?, 36 Fordham Urb. L.J. 53, 59 (2009) (stating in nineteenth century most states gauged whether punishment was unusual by comparing it to practices of other states).

193. Compare 2 Glenn C. Gillespie, Michigan Criminal Law and Procedure § 22.9, at 71 (2d ed. 2009) (stating punishment is cruel and unusual if it is "significantly different from that imposed in other states"), with 22 California Jurisprudence 3d § 207 (2009) (stating punishment is cruel and unusual only when "grossly excessive" compared to other states).

"unusual," even if the regular death sentences in other states are moderately delayed, such that they are not "perfect" death sentences. The reason for this is that life in the shadow of death does not just inflict a different amount of pain, it inflicts a different measure of pain by squarely placing inmates in a constant state of uncertainty about not only the duration but also the character of their punishment. Inmates enduring a sentence of life in the shadow of death must face the classic "to be, or not to be" question—except, in their case, the question is not for them to decide.[194] Further, if the state does decide this question in favor of death for a particular inmate, that inmate has no way of knowing or questioning why, ultimately, the state wants him or her to die.

3. *Strikingly Disproportionate.* — Life in the shadow of death is cruel and unusual under the proportionality test that the Supreme Court announced in *Solem v. Helm*.[195] In *Solem*, the Court acknowledged that the Eighth Amendment contains a "principle of proportionality"[196] and handed down a proportionality test guided by (1) "the gravity of the offense and the harshness of the penalty"; (2) "the sentences imposed on other criminals in the same jurisdiction"; and (3) "the sentences imposed for commission of the same crime in other jurisdictions."[197] Justice Kennedy later modified this test in *Harmelin v. Michigan*, dispensing with the intrajurisdictional and interjurisdictional factors except when analysis of the first factor "leads to an inference of gross disproportionality."[198] Because life in the shadow of death can be broken down into *life without parole + possibility of death* (though it is, like death, still different in kind from life and term-of-years sentences), it is close enough in temporal terms to the life-without-parole sentence the Court reviewed in *Solem*[199] for courts to review state X's new punishment under this standard, rather than under the more amorphous standards used to review the proportionality of capital sentences.[200]

a. *Threshold Comparison of Gravity of Offense and Harshness of Penalty.* — Since it is likely that the statute only imposes life in the shadow of death

194. While prisoners can "volunteer" to be executed by waiving their appeals, it bears noting that making the choice to die is not the same as making the choice to continue living in expectation of execution, particularly when the possibility of execution becomes slighter and slighter by the day. Such a choice is akin to giving someone a gun and telling him that he can either shoot himself now or wait to be shot sometime in the next decade or so.

195. 463 U.S. 277 (1983).

196. Id. at 285–86 ("When the Framers of the Eighth Amendment adopted the language of the English Bill of Rights, they also adopted the English principle of proportionality." (footnote omitted)).

197. Id. at 292.

198. 501 U.S. at 1005 (Kennedy, J., concurring in part and concurring in the judgment).

199. *Solem*, 463 U.S. at 296.

200. See supra note 176 (listing cases in which Supreme Court has reviewed proportionality of capital punishment for various categories of offenders).

for capital crimes, the inmate's offense is likely to be extremely grave. However, this does not preclude courts from drawing an inference of gross disproportionality. While life in the shadow of death can be evaluated on a temporal dimension for purposes of *Solem*'s interjurisdictional comparison,[201] for purposes of the threshold comparison, it must be recalled that life in the shadow of death is different in kind from life imprisonment and even from death, and therefore its harshness may still be grossly disproportionate to the offense. Death, as the Supreme Court has declared, is the "ultimate punishment."[202] Justice Brennan has stated that death is "unusual in its pain, in its finality, and in its enormity,"[203] and "[n]o other existing punishment is comparable to death in terms of physical *and* mental suffering."[204] To inflict anything beyond death (or the expectation of death) is to inflict gratuitous mental suffering. Whether or not this suffering approximates the kind of suffering that the defendant inflicted on his or her victim, it is clear that many state courts find this treatment so shocking[205] that life in the shadow of death will lead to at least an inference of gross disproportionality, no matter how grave the offense.

b. *Intrajurisdictional Comparison.* — The Supreme Court envisioned that courts would compare the sentence imposed for the defendant's crime to the sentence imposed for a more serious crime in that particular jurisdiction: "If more serious crimes are subject to the same penalty, or to less serious penalties, that is some indication that the punishment at issue may be excessive."[206] However, because life in the shadow of death is imposed solely for the most serious crimes, courts can only compare this sentence with the sentences imposed for other capital crimes in state X, such as life without parole or the death penalty simpliciter.[207] Such a comparison shows that life in the shadow of death is

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201. See infra Part III.A.3.c (conducting comparison).

202. Woodson v. North Carolina, 428 U.S. 280, 304 (1976).

203. Gregg v. Georgia, 428 U.S. 227, 230 (1976) (Brennan, J., dissenting).

204. Furman v. Georgia, 408 U.S. 238, 287 (1972) (Brennan, J., concurring) (emphasis added); see also id. at 306 (Stewart, J., concurring) ("The penalty of death differs . . . in kind. It is unique in its total irrevocability. It is unique in its rejection of rehabilitation of the convict as a basic purpose of criminal justice. And it is unique . . . in its . . . renunciation of all that is embodied in our concept of humanity.").

205. See supra Part III.A.1 (discussing state courts' interpretation of their "especially heinous, atrocious, and cruel" statutory aggravating factor).

206. Solem v. Helm, 463 U.S. 277, 291 (1983).

207. One might object that there may not truly be parity between offenses leading to life without parole, for example, and those leading to life in the shadow of death. Presumably the latter sentence would only be imposed on those whose offenses had been found by a jury to contain aggravating circumstances, elevating the penalty for the crime. Cf. Ring v. Arizona, 536 U.S. 584, 609 (2002) ("Because Arizona's enumerated aggravating factors operate as 'the functional equivalent of an element of a greater offense,' the Sixth Amendment requires that they be found by a jury." (citation omitted) (quoting Apprendi v. New Jersey, 530 U.S. 466, 494 n.19 (2000))). However, such a potential objection is undermined by the fact that Justice Breyer has made a distinction between "offense

excessive because it is a much more serious sentence than either of these sentences.[208] Life-without-parole inmates are assured that they will not be executed and therefore the term of their sentence is definitively bounded by their own natural death (assuming that they do not commit suicide). Death is a more severe punishment than life without parole, but it also is definitively bounded—by execution. In contrast, inmates sentenced to life in the shadow of death may endure similar *lengths* of time on death row (depending on how great the unstated "possibility of death" is and how long the "shadow" of death is[209]), but they will predictably pass this time in a different mental state—the mental state of not knowing when or whether they will be executed—regardless of duration. In contrast to proving the torture enumerated in the "psychological torture" version of the *Lackey* claim, showing that life in the shadow of death is torturous does not require studying the particular characteristics of the inmate, his prison environment, or even the death row syndrome as a psychological phenomenon; it merely requires a working knowledge of the American ethos regarding psychological torture, as evinced by state court interpretations of statutory aggravating circumstances.[210] For these reasons, life in the shadow of death is disproportionately more severe than life without parole and the death penalty simpliciter.

c. *Interjurisdictional Comparison.* — Suppose that state X is unique among all states in imposing the punishment of life in the shadow of death. Comparing this sentence to sentences imposed for similar crimes in other jurisdictions entails then the same analysis explained above, and life in the shadow of death is thus excessive. If life in the shadow of death is not unique to state X, then courts can compare the way that this sentence is administered in state X to the way that life in the shadow of death is administered in other states. They can compare the average time prisoners in state X spend on "shadow" row to the average time prisoners

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conduct" and "offender characteristics" for purposes of applying the *Solem* proportionality test. See Ewing v. California, 538 U.S. 11, 47 (2003) (Breyer, J., dissenting) ("Outside the California three strikes context, Ewing's recidivist sentence is virtually unique in its harshness *for his offense of conviction* . . . ." (emphasis added)). Statutory aggravating factors may go either to the offense itself or to characteristics of the defendant. See Bruce T. Cunningham et al., *Ring v. Arizona* and Capital Proceedings: Brave New World or a Reversion to the Old World?, 30 N.C. Cent. L. Rev. 107, 109 (2008) (noting North Carolina's aggravating factors can be divided into factors related to circumstances of crime or victim and those related to circumstances of defendant, and proposing that these types of circumstances be treated differently for purposes of applying *Ring*). Thus, in many cases the death penalty and life without parole may be imposed interchangeably when "offender characteristics" are taken out of the equation.

208. Cf. supra text accompanying note 194 (explaining life in shadow of death is more severe measure of punishment than other forms of punishment for similar crimes).

209. The inherent arbitrariness of life in the shadow of death also shows that it is cruel and unusual. See infra Part III.A.4 (asserting life in the shadow of death is "arbitrary and capricious" under *Furman*).

210. See supra Part III.A.1 (explaining several state courts have found intentionally creating fear of impending death qualifies as psychological torture).

in other states spend on shadow row. Courts can also compare the percentage likelihood that a prisoner will be executed in state X to this likelihood in other states. If state X subjects shadow row inmates to a comparatively longer waiting period or a greater risk of arbitrary execution, then its punishment is excessive in comparison to other states.

Taken together, the *Solem* factors' application to life in the shadow of death reveals that this punishment is disproportionate to the offense, to other sentences imposed for capital crimes, and (potentially) to sentences imposed in other states. The punishment is therefore cruel and unusual under the *Solem* proportionality test.

4. *Inherently Arbitrary and Capricious.* — Life in the shadow of death is also cruel and unusual under the "arbitrary and capricious" standard enunciated by the Supreme Court in *Furman v. Georgia*.[211] *Furman* held that punishments "could not be . . . inflicted in an arbitrary and capricious manner."[212] In *Furman*, Justice White articulated arbitrariness in terms of a lack of ratiocination, as when there "is *no meaningful basis* for distinguishing the few cases in which [a punishment] is imposed from the many cases in which it is not."[213] Justice Douglas defined arbitrariness in terms of "selective or irregular application of harsh penalties."[214] Justice Brennan similarly condemned "arbitrary infliction of severe punishments."[215] Justice Stewart drew on the different notion of caprice to condemn punishments that are "cruel and unusual in the same way that being struck by lightning is cruel and unusual."[216]

Under Justice Douglas's and Justice Brennan's definitions of arbitrariness, life in the shadow of death is almost certainly cruel and unusual. Life in the shadow of death is "irregularly" applied by design. The state does not tell inmates whether they will suffer the specter of execution for five years or thirty. Under Justice White's and Justice Stewart's respective definitions of "arbitrary" and "capricious," life in the shadow of death is cruel and unusual. As the ultimate in-between punishment between life imprisonment and the death penalty, life in the shadow of death puts the death row inmate in purgatory. He cannot be certain when or even whether a death sentence will "in fact [be] imposed," much like he cannot be certain when or whether lightning will strike.[217] Because he is most likely untrained in the law, he will also not

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211. 408 U.S. 238, 239–40 (1972) (per curiam).

212. Gregg v. Georgia, 428 U.S. 153, 188 (1976) (plurality opinion) (citing *Furman*, 408 U.S. at 313 (White, J., concurring)) (describing *Furman*'s holding).

213. *Furman*, 408 U.S. at 313 (White, J., concurring) (emphasis added).

214. Id. at 242 (Douglas, J., concurring).

215. Id. at 274 (Brennan, J., concurring).

216. Id. at 309 (Stewart, J., concurring).

217. See, e.g., Liebman & Clarke, supra note 10, at 291 ("The defining paradox of the American system of capital punishment is the stark discrepancy between the number of people sentenced to die and the number actually executed."); Editorial, End the Death Penalty in California, N.Y. Times (Nov. 5, 2012), http://www.nytimes.com/2012/11/06/

be able to determine the basis for the state's decision to execute him rather than his neighbor, if this comes to pass.[218] The state may have some justification for whatever action it chooses to take in the end, but the fact that this justification will remain largely unknown to the inmate is part and parcel of the punishment's cruelty.

5. *Unlegislated Punishment.* — What if the state resolves to impose life in the shadow of death *without* adopting it through formal legislation (e.g., by way of a secret decree from the governor to the prison warden ordering her to substitute this penalty for death whenever she receives a death row inmate)? Supreme Court precedent supports the argument that such punishment is cruel and unusual per se. In *Harmelin v. Michigan*, Justice Scalia, writing for a plurality, read the Cruel and Unusual Punishment Clause as "the principle . . . that a punishment is 'cruel and unusual' if it is illegal because *not sanctioned by common law or statute*."[219] Although only four Justices endorsed Justice Scalia's reading as the *only* condition to which the Clause applies—Justice Kennedy's concurrence defended the principle of proportionality review against Justice Scalia's attack[220]—no Justice rejected Justice Scalia's interpretation as a condition that the Clause forbids.

In *Harmelin*, Justice Scalia makes the historical argument that the Clause descends from a parallel provision in the English Declaration of Rights of 1689.[221] The contemporaneous understanding of that provision was that "cruel and unusual" referred to the illegality of sentences that judges were discretionarily imposing upon defendants.[222] Many punishments at that time were determined by common law, and departures

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opinion/end-the-death-penalty-in-california.html (on file with the *Columbia Law Review*) (noting eighty-four capital inmates in California have died without being executed, compared to thirteen executions).

218. The state may argue that there *is* at least one legitimate basis for distinguishing those on whom death is ultimately imposed and those who remain alive. Those whom the state has decided to execute have exhausted their appeals without success and have thus had their guilt confirmed; those who have not yet been executed may not yet have exhausted their appeals and had their guilt confirmed. From the inmate's point of view, however, this distinction may not be clear, particularly since capital appeals and habeas actions involve complicated issues of law. Whether the inmate lives or does not live thus depends on judgments that the inmate has no way of understanding.

219. 501 U.S. 957, 984 n.10 (plurality opinion) (emphasis added).

220. Id. at 996 (Kennedy, J., concurring in part and concurring in the judgment).

221. Id. at 966 (plurality opinion) ("In fact, the entire text of the Eighth Amendment is taken almost verbatim from the English Declaration of Rights, which provided '[t]hat excessive Baile ought not to be required nor excessive Fines imposed nor cruell and unusuall Punishments inflicted.'" (quoting Bill of Rights, 1 W. & M., c. 2 (1689) (Eng.))).

222. Id. at 965–75. Justice Douglas's concurrence in *Furman* made the same original intent argument when arguing that the death penalty in 1972 was unconstitutional. See Furman v. Georgia, 408 U.S. 238, 242 (1972) (Douglas, J., concurring) ("[T]he [aim of the] provision of the English Bill of Rights of 1689, from which the language of the Eighth Amendment was taken, was . . . to forbid arbitrary and discriminatory penalties of a severe nature . . . .").

from the common law were only lawful if authorized by statute, making "'illegall' and 'unusuall'" identical for all intents and purposes.[223] In his opinion, Justice Scalia cites the early American cases of *State v. Driver* and *State ex rel. Garvey v. Whitaker* as examples of his view.[224] In *Driver*, the lower court had imposed a substantial county jail sentence for a common law offense for which no statutory penalty had been set.[225] The North Carolina Supreme Court held that this sentence violated the state's cruel and unusual punishment clause because "no prisoner had *ever* 'been imprisoned for five years in a County jail for *any* crime however aggravated.'"[226] In *Garvey*, the Louisiana Supreme Court held that a six-year sentence for which the statutory sentence was only thirty days violated the state's cruel and unusual provision.[227] Justice Scalia interprets these cases to mean that "when the legislature has prescribed a penalty of a traditional mode, the penalty's severity for the offense in question cannot violate the State's 'cruel or unusual punishment' clause."[228] The punishments in *Driver* and *Garvey*, Justice Scalia concludes, were "cruel and unusual because [they were] illegal."[229]

Extending Justice Scalia's reasoning to the scenario of a prison warden substituting life in the shadow of death for the death sentence in every case, this punishment is even more cruel and unusual than the legislated version analyzed in Part III.A.1–4 because it is imposed by state fiat, bypassing legislative determinations. Some of the same fears that Justice Scalia believes motivated the drafters of the original cruel and unusual punishments provision, namely the risk of judges wielding arbitrary sentencing power,[230] apply with equal force in the case of the executive branch making its own substitutions for legislatively prescribed sentences. In the absence of a statute prescribing and graduating the punishment that is being administered, the variability and harshness of the punishment to which an inmate is subjected is not democratically monitored in the way that formal legislation would otherwise assure.[231]

In fact, the lack of formal legislation is exactly what may cause petitioners to personalize their *Lackey* claims. In certain states, all inmates

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223. *Harmelin*, 501 U.S. at 974 (plurality opinion).

224. Id. at 984 n.10.

225. Id. (citing State v. Driver, 78 N.C. 423, 425 (1878)).

226. Id. (quoting *Driver*, 78 N.C. at 425).

227. Id. (citing State ex rel. Garvey v. Whitaker, 19 So. 457, 459 (La. 1896)).

228. Id.

229. Id.

230. Id. at 967–68 ("Most historians agree that the 'cruell and unusuall Punishments' provision of the English Declaration of Rights was prompted by [judicial sentencing abuses].").

231. Cf. id. at 998 (Kennedy, J., concurring in part and concurring in the judgment) ("[T]he fixing of prison terms for specific crimes involves a substantive penological judgment that . . . is 'properly within the province of legislatures, not courts.'" (quoting Rummel v. Estelle, 445 U.S. 263, 275–76 (1980))).

may suffer from lengthy preexecution delay, but because there is no law presiding over this imposition, inmates suffer to varying degrees without any official oversight. It thus seems counterintuitive to raise the claim as a systematic violation. However, the absence of formal legislation does not make the punishment any less systematic, and may in fact render it even more cruel and unusual.

B. *How to Show Advertent Imposition of Systematic Punishment*

If a state, with the recognition of all three branches of government, administers the death penalty in a way that leaves courts no choice but to draw the conclusion that the state is actually imposing life in the shadow of death on all death row inmates, then, this Note argues, this penalty becomes the formal punishment of the state. The fact that this systematic punishment is not written into law is not its saving grace, but one more nail in its coffin of unconstitutionality.[232] Because Eighth Amendment challenges are usually directed at statutory penalties or clear and obvious state acts, no standard addresses the question of how stark a pattern of state-inflicted pain must be for courts to find that the state is advertently inflicting a new form of punishment. This section discusses three standards outside of Eighth Amendment law that could inform the formulation of such a test.

1. *(Past) the Point of Official Recognition.* — Three Supreme Court cases articulate helpful standards for courts considering whether a punishment bears the state's imprimatur. In *Gomillion v. Lightfoot*, the Court held that an act that changed the shape of a city from a square to "an uncouth twenty-eight-sided figure," removing almost all black voters, was unconstitutional under the Fourteenth and Fifteenth Amendments because the "inevitable effect" of this act was to deprive blacks citizens of their right to vote.[233] In *Yick Wo v. Hopkins*, which involved facially race-neutral city ordinances that were being administered in a discriminatory manner, the Court held that these ordinances violated the Fourteenth Amendment because they were "directed so exclusively against a particular class of persons as to . . . *require the conclusion* [that] . . . they are applied by the public authorities charged with their administration, and thus representing the state itself, with a mind so unequal and oppressive as to [deny] equal protection of the laws."[234] In *Lynch v. Donnelly*, Justice Sandra Day O'Connor articulated a test, later adopted by a majority of the Court,[235] to determine when a state has violated the Establishment

232. See supra Part III.A.5 (discussing why unlegislated punishments are cruel and unusual).

233. 364 U.S. 339, 340–41 (1960).

234. 118 U.S. 356, 373 (1886) (emphasis added).

235. See Cnty. of Allegheny v. ACLU, Greater Pittsburgh Chapter, 492 U.S. 573, 593–94 (1989) ("The Establishment Clause, at the very least, prohibits government from appearing to take a position on questions of religious belief or from 'making adherence to

Clause of the First Amendment by establishing or tending to establish a religion.[236] This test asks whether a government practice has the effect of "communicating a message of government endorsement or disapproval of religion."[237] If it does, then the practice violates the Establishment Clause, regardless of the government's intentions[238] and regardless of whether that practice is enshrined in legislation.[239]

These cases show the Court's willingness to consider certain public actions, absent (or even despite) formal legislative declaration, to represent the "true" policy of the jurisdiction as a whole, and to subject that policy to constitutional review.[240] This may occur when the "inevitable effect" of a similar series of actions is to bring about a result that would be unconstitutional if that effect were explicitly mandated by law (*Gomillion*); when a formal mandate that seemingly points in one direction is applied by public authorities across many instances in a way that nearly always points in a different direction (*Yick Wo*); or when the Court finds that the state's actions convey, to the relevant individuals, unequivocal endorsement of a particular institutional practice (*Donnelly*).

2. *Creating a Test for Advertent Infliction of Life in the Shadow of Death.* — The above principles may be subsumed into a three-part standard for discerning whether it has become the policy of the state to impose life in the shadow of death as a punishment.[241] First, applying *Gomillion*'s "inevitable effect" test, are inmates who are sent to a state's death row *inevitably* subjected to the cruel and unusual punishment of life in the

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a religion relevant in any way to a person's standing in the political community.'" (quoting Lynch v. Donnelly, 465 U.S. 668, 687 (1984) (O'Connor, J., concurring))); see also Jesse H. Choper, The Endorsement Test: Its Status and Desirability, 18 J.L. & Pol. 499, 504 (2002) (stating endorsement test "has succeeded in gaining the support of a majority of the Court").

236. *Donnelly*, 465 U.S. at 692 (O'Connor, J., concurring); see also U.S. Const. amend. I ("Congress shall make no law respecting an establishment of religion . . . .").

237. *Donnelly*, 465 U.S. at 692 (O'Connor, J., concurring).

238. Id.

239. See id. at 678 (majority opinion) ("[T]he Court has scrutinized challenged legislation *or official conduct* to determine whether . . . it establishes a religion or religious faith, or tends to do so." (emphasis added)).

240. Section 1983 civil rights litigation is another area that offers fruitful analogies for how to attack unofficial state policies or customs that violate constitutional rights. See generally 4 Howard Friedman & Charles J. DiMare, Litigating Tort Cases § 50:45 (Roxanne Barton Conlin & Gregory S. Cusimano eds., 2012) (detailing how to prove deliberate indifference to constitutional rights for purposes of § 1983 claims).

241. One reason that courts may not have yet adopted such a standard in the Eighth Amendment context is that, in the United States, no other punishment is systematically imposed by the state without legislative authorization. The only other context in which the state has consistently imposed extralegal punishment over a period of time is the state-sponsored vigilantism that occurred during our nation's early history. See generally James W. Ely, Jr., Strain of Violence: Historical Studies of American Violence and Vigilantism, 76 Colum. L. Rev. 361, 363 (1976) (book review) ("[L]ocal officials frequently operated with the vigilantes and failed to protest extralegal punishments").

shadow of death? Second, importing *Yick Wo*'s unreasonable application standard, have those delays enveloped such a large number of cases that it is the well-understood expectation of not only every inmate on death row, but also every legislative, judicial, and executive official, that death row inmates will not undergo a torture-free penalty? Third, drawing from *Donnelly*'s endorsement test, is the length of the delays in a given state so disproportionate to delays in other states that the state cannot justify its delays by reference to the need for procedural safeguards?[242] If inordinate delays in a state are ineluctable, officially accepted, and disproportionately excessive, the state is advertently imposing life in the shadow of death as punishment. As outlined in Part III.A, this punishment violates the Eighth Amendment.

C. *Advantages of the Systematic Approach*

A systematic *Lackey* claim has several advantages over individualized approaches to the claim. First, it renders moot the counterargument that delays are inevitable and beneficial, as section 1 will explain. It also eases procedural and stare decisis difficulties that have precluded adjudication on the merits, as section 2 lays out.

1. *Accounts for Constitutional Requirements.* — A systematic approach to the *Lackey* claim squarely addresses Justice Thomas's counterargument in *Knight* that delays result from death row inmates' invocation of constitutional rights.[243] Under a systematic approach, the state will not be held responsible for delays attributable solely to the necessity of adhering to constitutional requirements or providing procedural safeguards. Rather, a systematic *Lackey* claim only prevails where the difference between delays in the petitioner's state and delays in all states is so large that it obviates any possible argument that the delays are due solely to procedure or other constitutional requirements, since other states with the

242. Another way to phrase this standard so that it sounds more like an Eighth Amendment standard is: Is the length of delay greater than reasonably calculated to assure due process? Cf. Stack v. Boyle, 342 U.S. 1, 5 (1951) (holding bail set at figure higher than amount reasonably calculated to assure defendant's presence is excessive under Eighth Amendment). Although not strictly necessary, one way to expose this difference is by using the *t*-test, which compares the means of two groups to gauge whether they are statistically different from each other. If the *t*-test shows that a state's average preexecution delay is statistically greater than that of the nation, this provides courts with an easy way to conclude that the state's delay is grossly excessive. Statistical analysis has already become par for the course in other types of cases, particularly employment discrimination cases. See Daniel L. Rubinfeld, Econometrics in the Courtroom, 85 Colum. L. Rev. 1048, 1048–49 (1985) (arguing use of statistical methods "has found increasing acceptance within the adversary system," most frequently in sex and race discrimination cases).

243. See supra notes 75–77, 115–117 and accompanying text (describing counterargument).

same procedures and obligation to follow the Constitution have proceeded without similar delays.[244]

2. *Eases Procedural Difficulties.* — Since the core violation targeted by the systematic *Lackey* claim is not a delayed sentence, but the substituted sentence of life in the shadow of death (which may in many cases be aggravated by delay as the sentence unfolds), the systematic claim becomes ripe immediately after a defendant is sent to a death row with systemic delays.[245] Prospective death row inmates can thus raise the claim in their first habeas petitions rather than in successive petitions, minimizing the risk of procedural default[246] and making it more likely that judges will view the claim as more than a last-ditch effort to avoid execution.

3. *Overcomes Problems of Stare Decisis.* — Courts can sustain the systematic *Lackey* claim notwithstanding stare decisis, because this reformulation of the claim offers a radically different theory of the Eighth Amendment violation and stare decisis "does not preclude a new argument based on a different theory."[247] The Supreme Court has previously rejected one of its prior holdings on the rationale that it was adopting a different reasoning for its decision than that which had been presented by the parties in the overruled case.[248] Because stare decisis is one reason that courts have not adjudicated the *Lackey* claim on the merits,[249] a systematic approach

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244. See supra notes 22–31 and accompanying text (highlighting varying preexecution delays across different states). This is not to suggest that death penalty states should compete in a race to the bottom. States with excessive delay should not look to states that use truncated procedures for inspiration, such as Virginia. See generally ACLU of Va. et al., Broken Justice: The Death Penalty in Virginia 17–30 (2003), available at http://www.aclu.org/FilesPDFs/broken_justice.pdf (on file with the *Columbia Law Review*) (discussing factors that lower preexecution delay in Virginia but heighten injustice). Such practices may expedite executions, but speed and efficiency are only virtues insofar as they comport with due process. Concerns about systemic delay should not constrain due process, but motivate states to fix those delay-perpetuating practices that do not further justice, such as the excessive delays in appointing appellate and habeas counsel for capital inmates in California. See CCFAJ Final Report, supra note 22, at 122 (identifying delays in appointment of appellate and habeas counsel as critically contributing to preexecution delays in California).

245. Under the *Abbott Laboratories* ripeness test, see supra note 97 (explaining test), the claim is ripe because (1) it is fit for judicial decision, as the defendant has already been sentenced to what is arguably life in the shadow of death, and (2) if the court withheld consideration, the inmate would suffer the hardship of undergoing an arguably unconstitutional and judicially unvetted punishment.

246. See supra Part I.C (summarizing procedural barriers to *Lackey* claims).

247. Rebecca L. Rausch, Reframing *Roe*: Property over Privacy, 27 Berkeley J. Gender L. & Just. 28, 58 (2012).

248. E.g., United States v. Ross, 456 U.S. 798, 824 (1982).

249. See, e.g., People v. Massie, 967 P.2d 29, 45 (Cal. 1998) (citing People v. Hill, 839 P.2d 984 (Cal. 1992) (en banc) (rejecting *Lackey* claim), overruled on other grounds by Price v. Superior Court, 25 P.3d 618 (Cal. 2001)) (noting *Hill* "compel[led]" rejection of claim in instant case). Notably, in *Massie*, the petitioner tried to claim that *Hill* was not binding because the petitioner in that case raised only the "psychological torture"

would revitalize the claim and show Justice Thomas that the *Lackey* experiment is far from "concluded."[250]

D. *A New Remedy for a Reconceptualized* Lackey *Claim*

Scholars have suggested that the appropriate remedy for *Lackey* violations is commutation of the petitioner's death sentence to life imprisonment,[251] as this would "remedy a prisoner's present and future suffering" and "immediately reduce[] punishment to constitutionally permissible levels."[252] The Supreme Court, however, has stated that "the nature of the violation determines the scope of the remedy,"[253] and "[t]he scope of the remedy must be proportional to the scope of the violation."[254] A systematic *Lackey* claim reconfigures the Eighth Amendment violation as a new, unconstitutional sentence—life in the shadow of death. Because this punishment is imposed on all death row inmates in states where life in the shadow of death is found, sporadically commuting sentences would neither cure the essential violation nor be proportional to its scope, which encompasses the fates of both current and future inmates.

This Note proposes a new remedy for *Lackey* violations, guided by a three-part Eighth Amendment remedial scheme: (1) invalidation of disproportionate sentences prior to their imposition, (2) cessation of ongoing, unconstitutional conditions of confinement, and (3) monetary damages for past harsh treatment.[255] Because *Lackey* claims are typically raised on habeas, after an inmate has already been admitted to death row, an inmate who raises a systematic *Lackey* claim will be challenging a unique Eighth Amendment violation that falls in between the first and second categories of the scheme above: a disproportionate *sentence* that is reflected not on his verdict sheet (or in any statute or jury instruction),

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argument and not the "lack of penological justification" argument. See id. However, the California Supreme Court rejected this argument. See id. (interpreting *Hill* as holding delay "is not a basis for finding that either *the death penalty itself* or the process leading to it is cruel and unusual punishment" (emphasis added by *Massie*) (quoting *Hill*, 839 P.2d at 1018) (internal quotation marks omitted)).

250. See Knight v. Florida, 528 U.S. 990, 990 (1999) (Thomas, J., concurring in denial of certiorari) (arguing for conclusion of *Lackey* "experiment").

251. See, e.g., McKenzie v. Day, 57 F.3d 1461, 1488 n.22 (9th Cir.) (Norris, J., dissenting) (stating commutation of death sentence would be appropriate remedy), aff'd on reh'g en banc, 57 F.3d 1493 (9th Cir. 1995); Flynn, supra note 95, at 332 (same).

252. Flynn, supra note 95, at 332.

253. Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 16 (1971).

254. Brown v. Plata, 131 S. Ct. 1910, 1940 (2011). Although the Court hedged this statement by adding that "the order must extend no further than necessary to remedy the violation," id., it proceeded to uphold a remarkable district court order potentially releasing 46,000 prisoners. Id. at 1950 (Scalia, J., dissenting).

255. See Alexander A. Reinert, Release as Remedy for Excessive Punishment, 53 Wm. & Mary L. Rev. 1575, 1593–602 (2012) (discussing different remedies courts have ordered for different categories of Eighth Amendment violations and citing cases that support this framework).

but in (and only in) his ongoing *conditions of confinement*. A remedy that is proportional to the scope of this violation, then, must invalidate the sentence by ceasing the conditions that have led to its effective imposition. In states where delayed executions are a systemic problem, this involves not only addressing each death row inmate's individual case of delay (a retrospective solution), but also reforming the systematic practices that caused the delays so that future death row inmates are not subjected to this unconstitutional sentence (a prospective solution).

1. *Retrospective Relief*. — To provide relief for current death row inmates suffering from life in the shadow of death, courts should order the states to cease imposing these sentences by addressing the immediate reasons for the delay. If the state's hands are tied with respect to judicial backlogs, for example, the state has several options. As a preliminary measure, the governor could order a blanket commutation of all the state's death sentences to life imprisonment without parole, until the state is able to free up enough judicial resources to evaluate capital appeals and habeas petitions in an expeditious timeframe. An alternative to blanket commutation is the creation of a special commission[256] to relieve court dockets, which would identify the strong and weak cases on death row. The state attorney general could ask the state supreme court to expedite review of the strong cases and recommend that the governor commute the sentence in weak cases. Alternatively, if a critical mass of weak cases has been identified, the state could create an agency to review these cases for error.[257] If the agency determined that a sentence could not stand, it could order that the defendant be taken off death row or recommend that the governor commute the defendant's sentence. The prosecutor could appeal this decision to the state supreme court. This

256. State-sponsored commissions that evaluate capital punishment systems already exist; states can avail themselves of the expertise of such bodies. See, e.g., Ariz. Office of the Att'y Gen., Capital Case Commission Final Report 2, 14 (2002), available at https://www.azag.gov/sites/default/files/sites/all/docs/Criminal/ccc/Capital%20Case%20Commission%20-%20Final%20Report.pdf (on file with the *Columbia Law Review*) (reviewing "capital punishment process . . . to ensure that it works in a fair, timely and orderly manner"); Governor's Comm'n on Capital Punishment, Report of the Governor's Commission on Capital Punishment, at i (2002), available at http://illinoismurderindictments.law.northwestern.edu/docs/Illinois_Moratorium_Commission_complete-report.pdf (on file with the *Columbia Law Review*) (describing governor-created commission that works to reform capital punishment); see also Innocence Commission for Virginia, http://www.icva.us/ (on file with the *Columbia Law Review*) (last visited Sept. 28, 2013) (describing nonprofit commission created to identify erroneous convictions).

257. The state could set certain eligibility requirements for administrative review to prevent strong capital cases from clogging the agency's review pipeline, since the agency would be created for the purpose of quickly disposing of marginal cases. Such requirements could take into account factors suggesting weakness, such as (1) the procedural history (how many times the case has been reversed and remanded), (2) the discovery of exculpatory evidence or findings of *Brady* violations, and (3) the case's origin in a district that has a record of erroneous prosecutions. For more on what factors are correlated with weak cases, see generally Liebman et al., Broken System II, supra note 121.

would allow courts to prioritize strong capital cases likely to lead to actual executions, while minimizing the risk that wrongly or improperly convicted defendants continue to wait on death row.

Another possibility, previously suggested by James Liebman, is that states could enact a law allowing death row inmates to apply for a recommendation from an existing or ad hoc state board that they receive a lesser sentence in return for waiving all future appeals.[258] The board would then identify a percentage of applicants for whom a plea arrangement would be appropriate based on likelihood of reversal or the marginality of the case for death, and prosecutors could then accept or reject a plea in these cases; if rejected pleas later resulted in overturned sentences, the prosecutor's district would pay half the state's litigation and adjudication costs.[259]

2. *Prospective Relief.* — To prevent future inmates from suffering life in the shadow of death, prosecutors' offices could make it their policy to seek only sentences of life without parole or to seek the death penalty only in a smaller, set percentage of the strongest cases. As Professor Andrew Gelman and his colleagues found in an empirical study of reversal rates in the United States between 1973 and 1995, high death-sentencing rates are associated with a higher risk of error and also prevent appellate courts from effectively reviewing capital verdicts for error.[260] This percentage should be determined in coordination with other prosecutors' offices in the state, as opposed to the current system, in which each local prosecutor decides whether or not to seek the death penalty in a given case.[261] The state could also take steps to reduce reversible errors at the trial level, which would in turn reduce the amount of time that it takes to screen capital cases through appellate processes.[262] Professor Liebman has suggested some reforms to this end, such as strengthening the defense bar to discourage prosecutors from charging marginal cases and reducing errors by incompetent defense counsel; taking steps to achieve parity between defense and prosecution resources; and even having defendants "trade" postconviction review in return for genuine trial and direct appeal protections and reforms.[263]

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258. Liebman, Real Reform, supra note 6, at 340–42.

259. Id.

260. Andrew Gelman et al., A Broken System: The Persistent Patterns of Reversals of Death Sentences in the United States, 1 J. Empirical Legal Stud. 209, 247–48 (2004).

261. Cf., e.g., Stewart F. Hancock, Jr. et al., Race, Unbridled Discretion, and the State Constitutional Validity of New York's Death Penalty Statute—Two Questions, 59 Alb. L. Rev. 1545, 1563–64 (1996) ("A result of the unguided discretion afforded to prosecutors . . . is that whether the death penalty is sought against a defendant for a given crime may depend on the happenstance of where (i.e., the county in which) the crime is committed.").

262. Cauthen & Latzer, Why So Long?, supra note 132, at 308 (finding reversal of lower court decision increased capital appeal processing time by about seven percent).

263. Liebman, Real Reform, supra note 6, at 326–41.

Lastly, the state could adopt the recommendations of commissions that have studied flaws or deficiencies in its administration of the death penalty.[264]

CONCLUSION

The death penalty may remain the "ultimate punishment" on the books, but it is the penultimate punishment, life in undying anticipation of death, that exacts the price for today's death row inmates. Highlighting the patterns of state action or inaction that underlie endemic delays in states like California by raising systematic *Lackey* claims will put courts on notice that lengthy preexecution delay is not simply a byproduct of heightened appellate review and stringent constitutional protections for capital defendants. It is an enormously costly symptom of a malfunctioning capital punishment system, and a separate, additional punishment that the state is levying under the cover of constitutional mandates.[265] Even though state actors may not be scheming these delays or deliberately playing God,[266] from an inmate's caged perspective, the opacity of the execution process simulates an arbitrarily timed execution, producing fear, anguish, and—for those who can simply wait no longer—suicide. *Lackey* claims are not simply another constitutional bullet in capital defendants' "arsenal" of claims. They are urgent calls to the courts to put an end to the constant, overhanging threat of an already formidable punishment. They are "neoteric" only because the punishment that they decry is neoteric.

Systematic delays on death row are unconstitutional under the Eighth Amendment. While Eighth Amendment jurisprudence can, at times, be amorphous and convoluted, the basic concept underlying the Eighth Amendment is, as the Supreme Court has stated, "nothing less than the dignity of man."[267] There is nothing dignified about having to wait for decades in order to be executed, housed in inhospitable conditions, hated by those who search the newspapers daily for news of one's execution, and constantly uncertain if one will die by the sword of the

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264. See generally, e.g., CCFAJ Final Report, supra note 22, at 124, 127–137 (offering recommendations to reduce California's total lapsed time from sentencing to execution to eleven to fourteen years, nearly half of what it is currently).

265. Cf. White v. Johnson, 79 F.3d 432, 439 (5th Cir. 1996) (rejecting *Lackey* claim on merits because "state's interest in deterrence and swift punishment must compete with its interest in insuring that those who are executed receive fair trials with constitutionally mandated safeguards").

266. In fact, a systematic approach to the *Lackey* claim is needed precisely because the phenomenon of delay in states with systemic delays is rarely straightforwardly attributable to discrete instances of state misconduct or negligence in an individual case. See, e.g., Wesson, supra note 21, at 46 ("[Preexecution] delay appears to be a machine of many parts, each controlled or managed by an individual. Just as a chain is only as strong as its weakest link, execution can only proceed as swiftly as its most reluctant actor acts . . . .").

267. Trop v. Dulles, 356 U.S. 86, 100 (1958).

state or the sickle of time. It is even less dignified to endure a superadded punishment that has not been authorized by any legislature to date, without even an acknowledgment by the courts of the psychological toll of doing so. In the final analysis, what is cruel and unusual about systematic preexecution delays is that states where such delays exist have made it clear that inmates on death row must die not only by the state's hand, but on the state's terms. By allowing delay to become an ingrained feature of their capital punishment systems, states have systematized a new species of punishment that should not escape constitutional scrutiny just because it has not been legislated. As the law recognizes, not all cruelty is premeditated.[268]

268. See, e.g., Tison v. Arizona, 481 U.S. 137, 158 (1987) (holding death penalty is appropriate punishment for felony murderers who were major participants in felony committed and showed reckless indifference to human life, even if they did not intend to kill).

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