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SMALL SCHOOL.
BIG VALUE.

A Modest Proposal

THE AGED OF DEATH ROW SHOULD BE DEEMED TOO OLD TO EXECUTE*

Elizabeth Rapaport[†]

INTRODUCTION

Clarence Ray Allen was seventy-six years old when he was executed in California in 2006.¹ The State of California disputed Allen's claims that he was handicapped and greatly diminished by the infirmities of age.² He used a wheelchair, had endured both a heart attack and a stroke, was diabetic, and claimed to be legally blind.³ The press coverage of his execution made prominent mention of the fact that Allen did indeed walk to the death chamber although supported by guards, inviting the inference that he was a malingerer and had exaggerated the toll of age and ill health.⁴ A deeper look into the record reveals that he was escorted to the death chamber by four burly guards, with whose support a paraplegic could also have covered the short distance without other aid.⁵

The United States has a growing elderly death row population; they are beginning to trickle into the execution chamber. The Supreme Court has several times rebuffed efforts

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¹ *Inmates Executed, 1978 to Present*, CAL. DEPARTMENT CORRECTIONS & REHABILITATION, http://www.cdcr.ca.gov/Capital_Punishment/Inmates_Executed.html (last visited Jan. 21, 2012).

² See *Allen v. Ornoski*, 435 F.3d 946, 955 (9th Cir. 2006).

³ Peter Fimrite, *Allen Is First of Many Sick, Aged in Line at Death Row*, S.F. CHRON., Jan. 15, 2006, at A1, available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2006/01/15/MNGBQGN0U31.DTL&ao=all>.

⁴ Kevin Fagan, *Allen Managed to Walk to Execution Gurney: In Final Moments, Killer Didn't Seem So Frail*, S.F. CHRON., Jan. 18, 2006, at A1, available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2006/01/18/MNG9IGP0I91.DTL&ao=all>.

⁵ *Id.*

to gain Eighth Amendment protection from execution for the long-serving condemned irrespective of their age, denying certiorari to the *Lackey* claim. The *Lackey* claim urges that the combination of long confinement in anticipation of death and execution constitutes cruel and unusual punishment prohibited by the Eighth Amendment. The chilly reception of the *Lackey* claim by the Supreme Court is best explained not by its lack of merit but rather by the devastating impact its recognition would have on capital punishment. Execution in the United States follows condemnation on average by more than a dozen years. Hundreds of death row inmates have not had their cases finally resolved twenty and thirty years after sentences were pronounced. The ranks of the long serving are steadily growing. Recognizing the *Lackey* claim would take the United States a long way down the road to abolition. The Supreme Court has been inhospitable to total abolition but willing to reform capital punishment by trimming back the types of crimes and criminals eligible for capital punishment. Unlike the general *Lackey* claim, *Lackey-for-the-Elderly* is another such modest reform. *Lackey-for-the-Elderly* is therefore more likely to succeed than the wider claim. Its adoption would bring an end to a practice that the Eighth Amendment ought not tolerate. It would spare us the spectacle of the elderly being carried or wheeled to the execution chamber after decades of growing old in death row confinement in the name of American justice.

My exploration of the case for an Eighth Amendment bar against executing the long-serving elderly will begin with a review of the representation of the elderly on America's death rows and a survey of the very limited avenues of relief currently available to them on the basis of age. I will then discuss the attribution problem by asking at whose door should "fault" for long delays between condemnation and consummation of a capital sentence be laid—the prisoner, the state, or the working through of due process? For many jurists, attribution of fault is critical to resolving the question of whether the long serving of any age should be permitted to exit death row alive. I will then argue that the long-serving elderly should be relieved of both death row confinement and the continuing threat of execution.

I. *LACKEY-FOR-THE-ELDERLY: A PROPOSAL FOR AN EIGHTH AMENDMENT BAR TAILORED FOR ELDERLY DEATH ROW INMATES*

A prohibition against execution of the long-serving elderly would amount to an age-specific version of the *Lackey* claim. The *Lackey* claim takes its name from the eponymous Clarence Lackey. In *Lackey v. Texas*, Lackey argued that after seventeen years on death row his execution would be cruel and unusual punishment forbidden by the Eighth Amendment.⁶ The Supreme Court denied his petition for certiorari in 1995. Justice Stevens wrote a memorandum to the denial of certiorari stating that the question Lackey raised warranted review, but should be allowed to percolate through the lower courts before certiorari was granted.⁷ Since *Lackey*, the Supreme Court has rebuffed a handful of similar petitions over dissents from Justice Breyer from the denial of certiorari and renewed statements by Justice Stevens that the Court should in due course grant a *Lackey* petition and consider the issue on its merits.⁸ The *Lackey* claim, although a staple in end-game capital litigation, has yet to prevail in any U.S. court under the Eighth Amendment or its analogs in the constitutions of the thirty-four states that retain capital punishment.⁹ The *Lackey* claim may well roil both abolitionists and retentionists. Abolitionists may fear a time limit would portend a rush to execute before the deadline. Retentionists may fear that a time limit would be so great a curb on executions as to amount to abolition, given a national average in excess of twelve years to accomplish execution. The apprehension of the two camps will be addressed in this article.

⁶ *Lackey v. Texas*, 514 U.S. 1045, 1045 (1995).

⁷ *Id.*

⁸ *See, e.g., id.*; *Johnson v. Bredesen*, 130 S. Ct. 541, 542 (2009); *Thompson v. McNeil*, 129 S. Ct. 1299, 1299, 1303 (2009); *Foster v. Florida*, 537 U.S. 990, 991 (2002); *Knight v. Florida*, 528 U.S. 990, 993 (1999); *Elledge v. Florida*, 525 U.S. 944, 944 (1998). In *Thompson v. McNeil*, Stevens broke with his practice of stating the issue deserved a future hearing on the merits and proclaimed his support for granting the petition. 129 S. Ct. at 1299. Petitioner Thompson had been on Florida's death row for thirty-two years. *Id.*

⁹ In *Knight v. Florida*, Justice Thomas notes that federal and state courts considering *Lackey* claims since *Lackey v. Texas* "have resoundingly rejected the claim." *Knight*, 528 U.S. at 992 (Thomas, J., concurring). *But see* *People v. Anderson*, 493 P.2d 880, 894-95 (Cal. 1972) (holding capital punishment to be unconstitutional under the California Constitution in part because of delays in carrying out sentences).

Lackey claims ripen when a prisoner confronts an execution date.¹⁰ The *Lackey* petitioner then argues that the imposition of execution on the heels of the long death row confinement constitutes excessive punishment prohibited by the Eighth Amendment. These petitions also urge that long-term death row confinement may itself constitute cruel punishment. Justice Stevens and Justice Breyer are clearly in sympathy with both theses.¹¹ Some international courts and the constitutional courts of some nations have held that a lengthy period awaiting execution constitutes cruelty and have required that prisoners be spared exposure to extended periods of time under sentence of death quite apart from the imminence of the threat of execution.¹² Because of their inevitable frailties, constitutional questions about long-term confinement and subsequent execution arise in an acute form when we focus on the aged of death row. No attempt will be made here to specify precisely the geriatric threshold that would trigger the protection of a *Lackey-for-the-Elderly* regime—whether chronological age or deterioration and vulnerability associated with aging processes. Such practical considerations can be left for the time at which the Eighth Amendment questions raised here have gained the ear of the American bench.

The question of whether the Eighth Amendment should afford shelter to the aged of death row can be parsed into two related inquiries. First, is it prohibited cruelty to confine persons beyond a certain chronological age, or those exhibiting the deterioration associated with old age, in *death row conditions*? And second, is it prohibited cruelty to *execute* aged condemned prisoners? Of these two issues, the first may perhaps be more readily acknowledged as raising a valid Eighth Amendment issue: whatever conclusion one might ultimately reach on the question, the proposition that death row conditions exact a greater toll on the physically and mentally frail or infirm does not appear controversial. I will argue that the Eighth Amendment should be construed to

¹⁰ *Ceja v. Stewart*, 134 F.3d 1368, 1371 (9th Cir. 1998) (Fletcher, J., dissenting).

¹¹ *Johnson*, 130 S. Ct. 541 (Stevens, J., joined by Breyer, J., mem. respecting denial of cert.); *Lackey v. Texas*, 514 U.S. 1045 (1995) (Stevens, J., mem. respecting denial of cert.).

¹² *Soering v. United Kingdom*, 11 Eur. Ct. H.R. (ser. A) at 44 (1989) (holding that extradition of a defendant to Virginia where he would face years on death row if capital sentenced constituted a violation of Article 3 of the European Convention on Human Rights); *Pratt v. Jamaica*, (1994) 2 AC 1 (P.C.) (appeal taken from Ct. App. Jam.) (holding that a delay of fourteen years before carrying out an execution violated section 17(1) of the Jamaican Constitution).

relieve the elderly condemned from both death row incarceration and the long-serving elderly condemned from the continued threat of execution—thus, *Lackey-for-the-Elderly*.

II. THE AGED OF DEATH ROW BY THE NUMBERS

It will be useful to begin by examining the facts and statistics that reveal the extent of the elderly population on death row and the reasons for its continuing growth. This exercise will demonstrate that there are good reasons to expect that courts and prison administrations will be confronting what to do with the aged condemned not as an occasional anomaly but as a recurrent issue in death-penalty law and practice.

Clarence Ray Allen was the fourth septuagenarian to be executed since 2004.¹³ A fifth was executed in 2010.¹⁴ Three men sixty-five or older have also been executed since 2002.¹⁵ Prior to 2002 only one person sixty-five or older, a sixty-six-year-old, had been executed in the entire history of the modern death-penalty era commencing with the reinstatement of capital punishment in 1976. That execution occurred in 1984.¹⁶

These executions of persons in their late sixties and seventies reflect the graying of death row. In 2000, only 2.3 percent of death row prisoners were sixty or older; 11.1 percent were fifty to fifty-nine.¹⁷ In 2009, 2.6 percent were sixty-five or older and 5.6 percent between sixty and sixty-four; 21.1 percent were age fifty to fifty-nine.¹⁸

¹³ The other over-seventy prisoners executed were James Hubbard, age seventy-four, executed August 5, 2004, in Alabama; John Nixon, age seventy-seven, executed December 14, 2005, in Mississippi; and John Boltz, age seventy-four, executed June 1, 2006, in Oklahoma. *Death Penalty Information Center, Execution Database*, DEATH PENALTY INFO. CENTER, <http://www.deathpenaltyinfo.org/executions> (last visited Apr. 16, 2011).

¹⁴ Gerald Holland, age seventy-two, was executed in Mississippi on May 20, 2010. *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ BUREAU OF JUSTICE STATISTICS, U.S. DEPT OF JUSTICE, CAPITAL PUNISHMENT 1999, at 9 tbl.8 (2000) [hereinafter CAPITAL PUNISHMENT 1999], available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/cp99.pdf>.

¹⁸ BUREAU OF JUSTICE STATISTICS, U.S. DEPT OF JUSTICE, CAPITAL PUNISHMENT, 2009—STATISTICAL TABLES 9 tbl.5 (2010) [hereinafter CAPITAL PUNISHMENT 2009], available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/cp09st.pdf>.

Table 1: Percentage of Death Row Prisoners over Age Fifty in the United States¹⁹

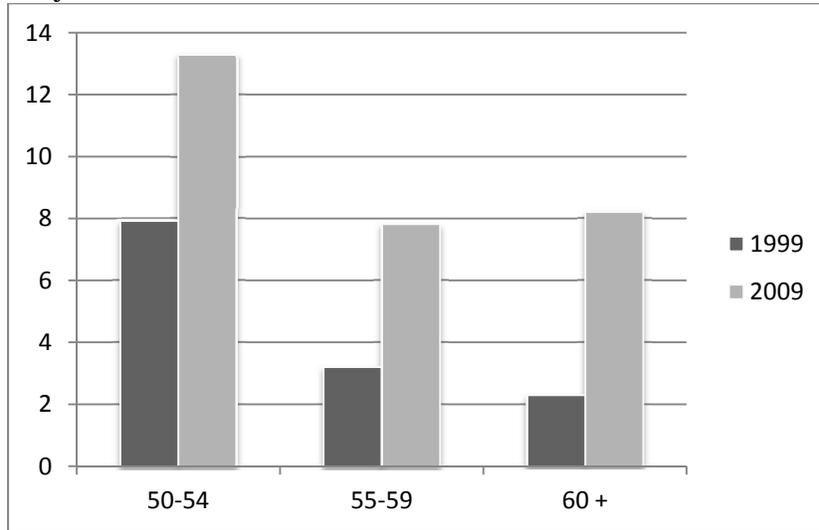
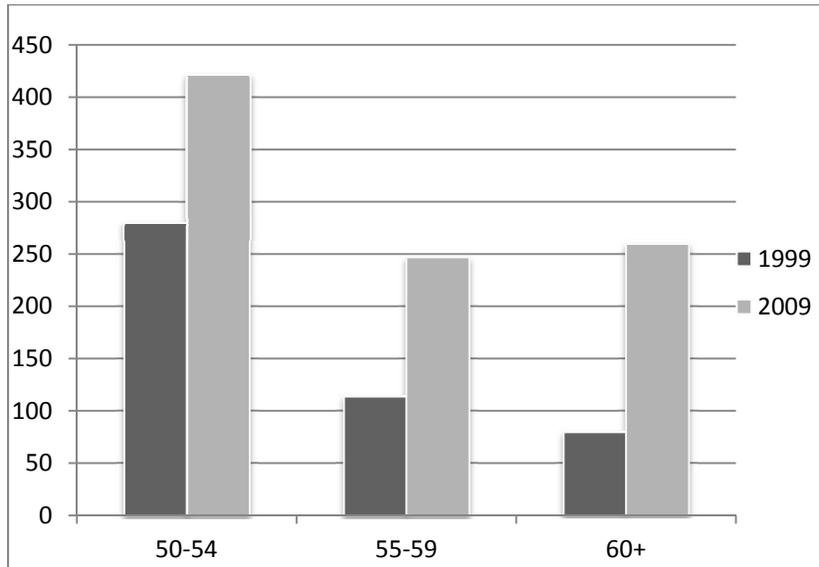


Table 2: Number of Death Row Prisoners over Age Fifty in the United States²⁰

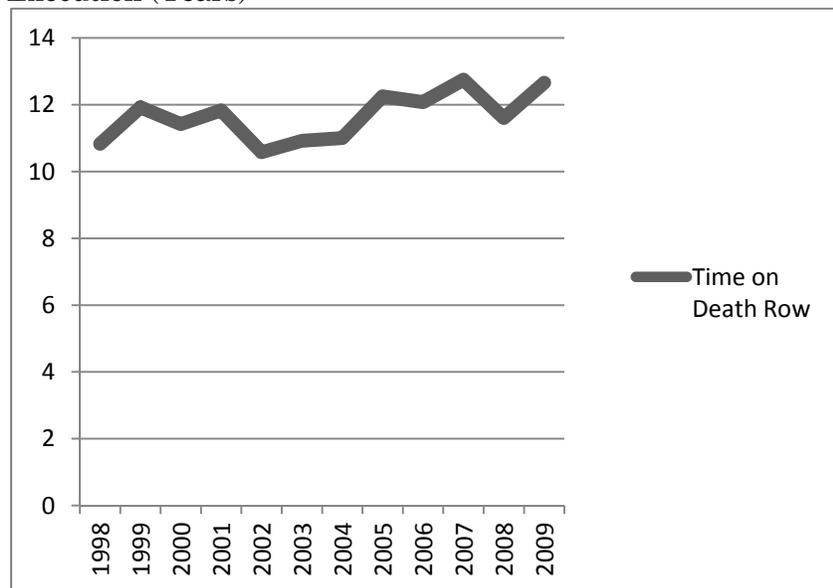


¹⁹ CAPITAL PUNISHMENT 1999, *supra* note 17; CAPITAL PUNISHMENT 2009, *supra* note 18.

²⁰ CAPITAL PUNISHMENT 2009, *supra* note 18, at 9 tbl.5.

The reason for this change is not a wave of capital crimes by the elderly.²¹ Rather, it is one awkward consequence of the contemporary capital punishment regime. A capital sentence marks the beginning of a potentially decades-long incarceration.²² Final resolution of capital cases—whether by execution or sentence reduction and removal to general prison population—can take decades, and for many long-serving inmates, resolution has not yet come. In this system, a modest 15 percent of persons sentenced to die since 1977 have been executed, while more than 40 percent of those sent to death row at any time from 1977 forward are still there and growing older.²³

Table 3: Average Elapsed Time from Sentence to Execution (Years)²⁴



²¹ *Id.* This table shows that while 29.3 percent of prisoners on death row in 2009 were over fifty, these prisoners represented only 14.4 percent of the additions to death row that year.

²² *Id.* at 12 tbl.9 & 14 tbl.12. Table 9 shows that in 2009, the average death row prisoner had been on death row for 152 months, or approximately 12.6 years. Table 12 shows that the average time between sentencing and execution in 2009 was 169 months, or 14.1 years.

²³ *Id.* at 16 tbl.14.

²⁴ BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CAPITAL PUNISHMENT, 2008—STATISTICAL TABLES (2009) [hereinafter CAPITAL PUNISHMENT 2008], available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/cp08st.pdf>; CAPITAL PUNISHMENT 2009, *supra* note 18.

Almost all the states that lead the country in number and frequency of executions as well as the less execution-prone death-penalty states have elderly death row inmates.²⁵ These inmates include people condemned in their fifties and sixties, but the majority of these older death row inmates have been on death rows for twenty, twenty-five, and thirty years.²⁶ Thus, state and federal courts and clemency authorities can expect to confront the issue of whether to proceed with the execution of aged inmates long incarcerated on death row with increasing frequency in the years to come.

Old age comes early to prison populations, because the population is unhealthy at entry and prison conditions are generally inimical to physical and mental health.²⁷ In an era when “sixty is the new forty” for free Americans, prison health experts treat the onset of old age in prison as commencing as early as fifty.²⁸ No legislature has enacted capital punishment as a sentence expressly to include decades spent ripening into old age on death row, but death sentences in almost every death-penalty jurisdiction now have that potential—and for a growing number of inmates, that reality.²⁹ Relative to the conditions of the general prison population, the more rigorous conditions of confinement on death row take a greater toll on

²⁵ Several of the most active death penalty states have prisoners over sixty. For example, as of February 2011, six of Georgia’s ninety-eight death row prisoners were over age sixty. GA. DEP’T CORR., INMATE STATISTICAL PROFILE: UNDER DEATH SENTENCE (2011), available at http://www.dcor.state.ga.us/Research/Monthly/Profile_death_row_2011_02.pdf. As of March 23, 2011, fifteen of Ohio’s 156 death row inmates are over sixty. *Death Row Inmates*, OHIO DEP’T REHABILITATION & CORRECTION, <http://www.drc.ohio.gov/public/deathrow.htm> (last visited Mar. 26, 2011). As of March 27, 2011, five of Alabama’s 203 death row inmates were over sixty. *Alabama Inmates Currently on Death Row*, ALA. DEP’T CORRECTIONS, <http://www.doc.state.al.us/deathrow.asp> (last visited Mar. 27, 2011). As of March 1, 2011, one of South Carolina’s fifty-five death row inmates was over sixty. S.C. DEP’T OF CORR., LIEBER CORRECTIONAL INSTITUTION: DEATH ROW ROSTER (2012), available at <http://www.doc.sc.gov/news/deathrowlist.pdf>. As of March 27, 2011, fifty of Florida’s 394 death row prisoners were over sixty. *Death Row Roster*, FLA. DEP’T CORRECTIONS, <http://www.dc.state.fl.us/activeinmates/deathrowroster.asp> (last visited Mar. 27, 2011).

²⁶ As of December 31, 2009, 196 of California’s 684 death row prisoners (or approximately 28.7 percent) had been under sentence of death for more than twenty years. In Florida, 117 out of 389 (or approximately 30 percent) death row prisoners had been on death row for more than twenty years. CAPITAL PUNISHMENT 2009, *supra* note 18, at 19 tbl.18.

²⁷ Ronald H. Aday, *Golden Years Behind Bars: Special Programs and Facilities for Elderly Inmates*, 58 FED. PROBATION 47 (1994).

²⁸ Timothy Curtin, *The Continuing Problem of America’s Aging Prison Population and the Search for a Cost-Effective and Socially Acceptable Means of Addressing It*, 15 ELDER L.J. 473 (2007).

²⁹ CAPITAL PUNISHMENT 2008, *supra* note 24, at 14 tbl.11; see also Richard Willing, *Death Row Population Is Graying*, USA TODAY (Feb. 11, 2005), http://www.usatoday.com/news/nation/2005-02-09-elder-death_x.htm.

the minds and bodies of these inmates and therefore exacerbate the decline and distress of older prisoners.³⁰ These conditions include severely limited opportunities for exercise or work, social isolation, lack of stimulation and contact with the world beyond prison gates, and, in particular, lack of contact with family and friends.³¹ To these conditions must be added the background condition of living with the prospect of execution.³²

III. CURRENTLY AVAILABLE RELIEF

An aged death row inmate has at the present time two potential avenues of relief that address his or her age. If he is far into senility, he can argue—in the parlance of the common law—that he is no longer of sound memory. *Ford v. Wainwright* constitutionalized this common law rule by holding that the execution of a person incapable of understanding that he is being executed for committing a heinous crime is forbidden by the Eighth Amendment.³³ *Ford* was argued in habeas petitions by two of the executed septuagenarians.³⁴ Although a *Ford* claim has yet to prevail, if States continue to execute persons of such advanced age, some *Ford* claims will eventually succeed. The Ninth Circuit Court of Appeals offers a second avenue of relief, available to death row prisoners befuddled by age but not lost in advanced senility. In *Rohan ex rel. Gates v. Woodford*, the court recognized a statutory right to be competent to assist counsel in capital habeas cases.³⁵ A death row inmate who cannot rationally communicate with habeas counsel may stay habeas proceedings and execution. The

³⁰ JEREMY L. WILLIAMS, THE AGING INMATE POPULATION: SOUTHERN STATES OUTLOOK (2006), available at http://www.slcatlanta.org/Publications/HSPS/aging_inmates_2006_lo.pdf; see also ANNUAL REPORT OF THE CMA, INCARCERATING ELDERLY AND AGING INMATES: MEDICAL AND MENTAL HEALTH IMPLICATIONS, available at <http://www.doh.state.fl.us/cma/reports/agingreport.pdf> (“Because of the impact of lifestyle, medical care, and environmental factors in the aging process, correctional agencies should adopt age 50 as the chronological starting point for defining elderly offenders.”).

³¹ Robert Johnson, *Under Sentence of Death: The Psychology of Death Row Confinement*, 5 LAW & PSYCHOL. REV. 141, 142-43 (1979) (discussing the physical and psychological effects of death row confinement).

³² 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 (2007) (discussing “death row phenomenon”).

³³ *Ford v. Wainwright*, 477 U.S. 399 (1986).

³⁴ Clarence Ray Allen and James Hubbard both presented this argument in their habeas corpus petitions. See *Allen v. Ornoski*, 435 F.3d 946 (9th Cir. 2006); *Hubbard v. Campbell*, 379 F.3d 1245 (11th Cir. 2004).

³⁵ *Rohan ex rel. Gates v. Woodford*, 334 F.3d 803 (9th Cir. 2003).

Rohan decision makes it possible to remove some elderly from death row before a *Ford* claim would be ripe and on a less demanding standard. In his opinion in *Rohan*, Judge Kozinski in effect reduced the standard on which a prisoner can stay execution from the very demanding *Ford* standard to the *Dusky* standard of incompetent to assist counsel.³⁶ The stay would necessarily be permanent in the case of a habeas petitioner with irreversible loss of mental function.³⁷ For example, Leroy Nash, the oldest inmate on death row at ninety-four years old until his death in 2010, won a stay when the court of appeals extended the right to be competent to assist counsel in capital habeas cases to appeals from denials of habeas.³⁸ In *Nash v. Ryan*, the Ninth Circuit Court of Appeals clarified the standard to be applied, namely, “whether rational communication with the petitioner is essential to counsel’s ability to meaningfully prosecute an appeal.”³⁹ Leroy Nash subsequently left death row and died in a medical facility.⁴⁰ Nash may be the first death row inmate to exit death row because he was too old to execute.

However, both *Ford* and *Rohan* can afford relief only to the elderly seriously compromised in their mental function. What of the more mentally fit elderly marking off the decades on death row? What are the prospects for a constitutional categorical exclusion of the elderly from execution after long incarcerations on death row?⁴¹

³⁶ *Id.* at 816-17.

³⁷ To date, no other federal circuit has either followed or rejected *Rohan*. However, in *Holmes v. Buss*, Judge Posner bolstered the *Rohan* analysis although he found it unnecessary to either accept or reject *Rohan* because its “validity has throughout these proceedings been assumed rather than litigated.” 506 F.3d 576, 578 (7th Cir. 2007). He elaborated Judge Kozinski’s defense of the standard of rational communication with counsel as appropriate in habeas, and discussed prosecutorial misconduct and ineffective assistance of counsel as examples of where a lay defendant’s recollections may well assist habeas counsel. *Id.* at 579-80.

³⁸ *Nash v. Ryan*, 581 F.3d 1048 (9th Cir. 2009).

³⁹ *Id.* at 1054.

⁴⁰ *Oldest U.S. Death Row Inmate Dies Aged 94*, BBC NEWS (Feb. 14, 2010, 10:10 PM), <http://news.bbc.co.uk/go/pr/fr/-/2/hi/americas/8515573.stm>.

⁴¹ The exclusion under discussion would not bar capital adjudication of persons who kill at an advanced age. Such a bar would be analogous to that recognized for youthful murderers in *Roper v. Simmons*. Rather, the nature of the exclusion explored in this article is analogous to that in *Ford v. Wainwright* prohibiting the execution of a prisoner convicted and capitally sentenced who *subsequently* becomes incompetent to execute by virtue of insanity. Unlike the *Ford* prohibition, there would be no possibility that the aged prisoner would be restored to fitness and executable, unless medical advances allow the processes of aging to be reversed.

IV. THE ATTRIBUTION PROBLEM: WHO IS RESPONSIBLE FOR DELAY IN CONSUMMATING EXECUTIONS?

A proponent of any type of *Lackey* claim must address the attribution problem that has bedeviled discussions of the issue (for death row prisoners of any age) in domestic, foreign, and international courts; for many readers attribution would be the essential starting point of a *Lackey* discussion, if not the heart of the matter. At whose door should responsibility for delay be placed? Should it be charged to legal maneuvering by the prisoner to delay execution of a sentence, the normal course-of-review processes, or dilatory (or worse) conduct by the state? Judges throughout the world have wrestled with the attribution question. They have differed sharply as to the proper attribution of responsibility for delay and the inferences to be drawn as to whether the human or constitutional rights of prisoners have been violated. Justice Stevens took the position on attribution in *Lackey*—to which he and Justice Breyer have subsequently adhered—that prisoners should not be held responsible for delays caused by state “negligence or deliberate action,”⁴² or “a petitioner’s legitimate exercise of his right of review.”⁴³ However, these justices would debit delay caused by “abuse of the judicial system by escape or repetitive, frivolous[] filings” in calculating time on death row that may require relief.

Justice Thomas rejected this analysis in his concurrences in the *Lackey* cases, in which a spirited serial debate has transpired between pro-*Lackey* Justices Stevens and Breyer and anti-*Lackey* Justice Thomas. Justice Thomas is among those judges who lose patience when asked to consider delay as cruelty visited on prisoners that may support an Eighth Amendment claim. Particularly when there has been a confession, Justice Thomas is disposed to argue that the prisoner could avoid delay by submitting to his sentence.⁴⁴ Perhaps the emphasis on conceded guilt relieves the justice of any acknowledged need to consider the weight of delay in supporting a petition when the *State* has been negligent or

⁴² *Lackey v. Texas*, 514 U.S. 1045, 1047 (1995).

⁴³ *Id.*

⁴⁴ *Thompson v. McNeil*, 129 S. Ct. 1299, 1301 (2009); *Foster v. Florida*, 537 U.S. 990, 991 (2002). Having noted that Foster was a confessed murderer who could have avoided delay by submitting to his sentence, Justice Thomas adds, “Moreover, this judgment [on Foster by the people of Florida] would not have been made had petitioner not slit Julian Lanier’s throat, dragged him into the bushes, and then, when petitioner realized he could hear Lanier breathing, cut his spine.” *Foster*, 123 S. Ct. at 471.

deliberately caused delay; at any rate, Justice Thomas did not address delay attributable to the state. He did, however, address delay caused by time for the judicial review available to a death row inmate to run its course: Thomas found a “mockery of our system of justice . . . for a convicted murderer”⁴⁵ to claim delay “renders his sentence unconstitutional”⁴⁶ when the postponement is a result of “his own interminable efforts of delay.”⁴⁷ He noted, “I remain ‘unaware of any support in the American constitutional tradition or in this Court’s precedent for the proposition that a defendant can avail himself of a panoply of appellate and collateral procedures and then complain when his execution is delayed.’”⁴⁸ There is little doubt that if the issue is to be resolved by Eighth Amendment precedent, Justice Thomas’s position prevails. Further, for those who like him see only the machinations of heinous criminals and abolitionists’ interminable ploys, the response to the suggestion that delay compromises the constitutional integrity of the sentence is moral outrage.⁴⁹

Justices Stevens and Breyer treat state-caused delay as building towards some number of years, which, if exceeded, ought to constitutionally prohibit execution. Justice Stevens points to the “staggering”⁵⁰ error rate in capital trials, more than “30 percent of death verdicts overturned.”⁵¹ Justice Breyer takes issue with Justice Thomas for failing to distinguish between delay caused by “constitutionally defective death-penalty procedures for which petitioner was not responsible”⁵² and delay that is petitioner’s “fault.”⁵³

Neither “delay” nor “fault” attributable to the actions of either state actors or the defendant and his abolitionist lawyers adequately explains the dozen and more years it takes on average to deliver the condemned to the execution chamber in the United States. The complexity of the system and the demands for legal and judicial resources to carry cases through

⁴⁵ *Thompson*, 129 S. Ct. at 1301 (Thomas, J., concurring in denial of certiorari) (quoting *Turner v. Jabe*, 58 F.3d 924, 933 (4th Cir. 1995) (Luttig, J., concurring)).

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.* (quoting *Knight v. Florida*, 528 U.S. 990 (1999)).

⁴⁹ *Turner*, 58 F.3d at 933 (Luttig, J., concurring) (quoted with approval by Thomas in *Thompson* and in *Knight*; has both criminals and abolitionists in his sights when he characterizes the defendant’s *Lackey* claim as “an affront to lawabiding citizens”).

⁵⁰ *Thompson*, 129 S. Ct. at 1300.

⁵¹ *Id.*

⁵² *Id.* at 1303 (Breyer, J., dissenting).

⁵³ *Id.* (Thomas, J., concurring).

the many appellate and postconviction stages are “responsible” for as much or more delay within the system taken as a whole than the machinations, misconduct, or errors of actors within the system.⁵⁴ “Delay” is not the most apt term for the years between sentence and execution in many retentionist countries across the globe; with the benefit of contemporary standards of due process in death cases, retentionist countries cannot execute in “days or weeks”⁵⁵ as our forbearers did, but many years or even decades after conviction and sentence. The most salient factor is unlikely to be delay attributed wholly to the defendant or the state but “delay” attributed to the complexity of, and resource limitations in, the death-penalty review system. Thus, the response of a judge to time consumed by the operation of the many tiered capital punishment regime is especially important in his or her analysis of the attribution problem.

Justice Thomas attributes what could be termed “systemic delay” to prisoners in their efforts to delay or prevent execution. It would be a “mockery of justice” from the perspective of many retentionists to allow prisoners who have failed again and again to persuade courts of errors in their convictions or sentences to then claim immunity from execution.⁵⁶ The logic of this position was captured by the Ninth Circuit in Judge O’Scannlain’s opinion in *McKenzie v. Ray*: “It would indeed be a mockery of justice if the delay incurred during the prosecution of claims that fail on the merits could itself accrue into a substantive claim to the very relief that had been sought and properly denied in the first place.”⁵⁷ Justice La Forest made the same point powerfully in *Kindler v. Canada*: “It would be ironic if delay caused by the appellant’s taking advantage of the full and generous avenue of the appeals available to him should be viewed as a violation of fundamental justice.”⁵⁸

⁵⁴ The delays in the appellate system have been discussed by many authors. In his 2007 law review article, Judge Arthur Alarcon points to twenty institutionally created delays in the postconviction process, including delays in appellate and habeas counsel, delays in reporter transcription, and delays in the issuance of orders and certifications. Arthur L. Alarcon, *Remedies for California’s Death Row Deadlock*, 80 S. CAL. L. REV. 697 (2007).

⁵⁵ *Knight v. Florida*, 528 U.S. 990, 995 (1999) (Breyer, J., dissenting). Other countries that retain the death penalty in the twenty-first century have elapsed times between sentence and execution comparable to those in the United States. See HOOD & HOYLE, *THE DEATH PENALTY: A WORLDWIDE PERSPECTIVE* 76, 173-74 (4th ed., Oxford 2008).

⁵⁶ *Knight*, 528 U.S. at 993 (Thomas, J., concurring).

⁵⁷ *McKenzie v. Day*, 57 F.3d 1493, 1494 (9th Cir. 1995).

⁵⁸ *Knight*, 528 U.S. at 998 (quoting *Kindler v. Minister of Justice*, [1991] 2 S.C.R. 779, 779, 838 (Can.)).

However, what some see as reprehensible maneuvering others see as legitimate appeals to test conviction and sentence. Thus, Justice Breyer explains, “I do not believe that a petitioner’s decision to exercise his right to seek appellate review of his death sentence automatically waives a claim that the Eighth Amendment proscribes a delay of more than 30 years.”⁵⁹

Judges who regard contemporary enhanced due process standards of review of capital cases favorably are also inclined to regard the efforts of prisoners to avail themselves of these processes as manifestations of human nature, the will to live. In *Soering v. United Kingdom*, the European Court of Human Rights opines that, “just as some lapse of time between sentence and execution is inevitable if appeal safeguards are to be provided to the condemned person, so it is equally part of human nature that the person will cling to life by exploiting those safeguards to the full.”⁶⁰ Mde. Christine Chanut quotes this passage from *Soering* to support her dissent in *Barrett and Sutcliffe v. Jamaica*, in which she wrote, “Without being at all cynical, I consider that the author cannot be expected to hurry up in making appeals so that he can be executed more rapidly.”⁶¹

Judges have observed that the very human desire to live renders a prolonged period in which a prisoner contests his sentence intolerably inhumane. Thus, Lord Scarman and Lord Brightman state in their *Riley v. Attorney General of Jamaica* dissent, “In truth, it is this ineradicable human desire which makes prolongation inhuman and degrading.”⁶²

Agreeing with the dissenters in *Riley* that it is human nature to fight to live, the Supreme Court of India repudiates the attribution question itself:

We think that the cause of delay is immaterial when the sentence is death. Be the cause for the delay, the time necessary for appeal and consideration of reprieve or some other cause for which the accused himself may be responsible, it would not alter the dehumanizing character of the delay.⁶³

At first blush, the presentation of the attribution issue by Justice Stevens in *Lackey* suggests that a calculus might be employed by judges to determine whether, in a given case, the period of death row incarceration had exceeded the humane

⁵⁹ *Thompson v. McNeil*, 129 S. Ct. 1299, 1303 (2009).

⁶⁰ *Soering v. United Kingdom*, 11 Eur. Ct. H.R. (ser. A) (1989).

⁶¹ *Sutcliffe v. Jamaica*, Communication No. 271/1988: Jamaica. 06/04/92.

⁶² *Riley v. Attorney General of Jamaica*, 1 A.C. 719 (1983).

⁶³ *Vatheeswaran v. State of Tamil Nadu*, 1983 A.I.R. 361 (India).

limit. However, because—like the rest of us—judges tend either to attribute systemic delay to prisoners or decline to do so, there is no neutral attribution calculus for deciding *Lackey* petitions. In the bulk of cases, the delay attributable to egregious conduct on the part of the state or the prisoner will be dwarfed by that attributable to the operation of the contemporary death-penalty system. The attribution question devolves into a choice between two views of the condemned in the toils of the contemporary death penalty with its robust due process protections: the manipulator, who showed no pity in taking life and now parades his own suffering; or the condemned human being compelled by human nature to fight off annihilation year on year, in degradation of the law and his own humanity. The choice between these two views must fall to the voting strength of their adherents on constitutional courts or in legislative chambers. The same fault lines of judicial orientation on this issue are observable among U.S. jurists and those serving on foreign and international courts. While the U.S. Supreme Court is famously divided on the question of whether foreign and international judicial opinions should have even persuasive force in U.S. constitutional law,⁶⁴ there are among these extranational sources opinions that resonate for both pro- and anti-*Lackey* justices, should they choose to pay heed to them.

As for the elderly of death row—the particular subject of this article—within the terms of the attribution debate, their circumstances are much like those of other long-serving death row prisoners. Whatever the quantity or quality of their distress—like their younger peers—some will see them as manipulators and others as suffering intolerably inhumane treatment. There is, however, one salient difference in that at least some of the elderly may no longer be capable of strategizing. Thus, if charged with any delay beyond that point, it would result from the fact that they are constructively accountable for the wiles of their attorneys.

⁶⁴ For example, in *Roper v. Simmons*, holding that murderers less than eighteen years of age when they killed are categorically exempt from capital punishment, Justice Kennedy, writing for himself and four other justices, relied extensively on the persuasive force of foreign and international opinions. 543 U.S. 551, 567-68, 575-79 (2005). Justice Scalia vehemently contested this reliance in a dissent joined by Chief Justice Rehnquist and Justice Thomas. *Id.* at 622-28 (Scalia, J., dissenting). Justice O'Connor, who dissented on separate grounds, made no objection to the majority's reliance on offshore law. *Id.* at 604 (O'Connor, J., dissenting).

V. THE EIGHTH AMENDMENT DOES NOT TOLERATE DEATH ROW CONFINEMENT FOR ELDERLY PRISONERS—OR WON'T SOON

Let us turn to the first question raised by the proposal for *Lackey-for-the-Elderly*: should the Eighth Amendment be understood to forbid death row incarceration of persons who reach the stipulated age or exhibit the infirmities and limitations of old age?

The long confinement of prisoners on death row is a historical novelty. Traditionally, a prisoner was sent to death row in transit to eternity; death row stays were measured in days, weeks, and months, not decades.⁶⁵ The prisoner who had no earthly future was to devote the death row interlude to making peace with his or her Maker as best he or she could. The justification for the bleak and barren nature of death row confinement⁶⁶ is therefore linked to the liminal status of the condemned; their needs resembled those dying in freedom more than prisoners serving terms of years. The transitory nature of death row is no longer available as a justification for confinement in death row conditions for persons of any age: the transition justification for imposing these conditions cannot be sustained for twenty or thirty years.

Contemporary prison administrators, however, like their predecessors in earlier periods, confront security challenges in managing death row populations: there are dangerous and desperate inmates among their charges. Death row conditions are justified as necessary to provide security dealing with dangerous prisoners with little to lose. The Eighth Amendment's cruel and unusual punishment ban has been consistently construed to afford prison officials wide discretion to achieve security, order, and discipline and to offer little relief

⁶⁵ By the mid-twentieth century, prior to the reforms initiated in 1976 in *Gregg v. Georgia*, executions took place within months or (a very few) years after condemnation. Of the 227 executions carried out in the United States from 1956 to 1959, almost half (107) occurred within one year of the sentence—thirty-eight within six months—and two-thirds occurred within two years of the sentence. Only fifteen executions occurred more than four years after the sentence. WILLIAM LUNDEN, BD. OF CONTROL OF STATE INSTS., *THE DEATH PENALTY, AN ANALYSIS OF CAPITAL PUNISHMENT AND FACTORS RELATED TO MURDER* 12 (1960).

⁶⁶ Many jurisdictions prohibit death row inmates from contact visits. They are not given access to educational or occupational training. Death row inmates spend between twenty-one and twenty-three hours a day in their cells (most of which have solid doors that impede human contact), and many are not given access to any group recreation time. See *Death Row Facts*, DEATH PENALTY INFO. CENTER, <http://www.deathpenaltyinfo.org/death-row> (follow "Death Row Conditions" hyperlink) (last visited Mar. 26, 2011).

to prisoners contesting prison conditions in light of these security considerations.⁶⁷ To be sure, the Eighth Amendment does protect prisoners from inhumane treatment and conditions.⁶⁸ However, in *Wilson v. Seiter*, the Court recognized that, while the Eighth Amendment forbade serious deprivation of prisoners' basic human needs, it did so only when prison personnel acted with deliberate indifference to those needs.⁶⁹ *Wilson* presents a severely circumscribed notion of what constitutes the basic needs of prisoners: "food, warmth or exercise"⁷⁰ and medical care.⁷¹

In addition to the narrowness of the conception of human need and the burden of establishing that prison personnel were at least reckless in contemplating the deprivation, the Court has rendered any prisoner's efforts to redress prison conditions more difficult by adopting a balancing test under which security interests weigh heavily against even the most basic needs of prisoners. Thus Justice O'Connor, in *Whitley v. Albers*—a case whose facts turned on a prisoner's being shot during the quelling of a prison disturbance—weighed the interest of a prisoner in his physical security against the broader security interests for which prison officials are responsible: when security interests are challenged, the "deliberate indifference standard" must give way to a simple good-faith standard.⁷² The following year, in *Turner v. Safley*, Justice O'Connor summarized and reinforced the holdings of previous prison conditions cases: "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests."⁷³ Security is a paramount interest of prison

⁶⁷ *Whitley v. Albers*, 475 U.S. 312, 312 (1986) (holding that infliction of pain in the course of prison security measures was an Eighth Amendment violation only if inflicted unnecessarily and wantonly, and finding that the shooting of a prisoner during a riot without prior verbal warning did not violate the Eighth Amendment); *Rhodes v. Chapman*, 452 U.S. 337, 349 (1981) (holding that the Constitution does not mandate comfortable prisons, and that prisons which house inmates convicted of serious crimes cannot be free of discomfort); *Estelle v. Gamble*, 429 U.S. 97, 97 (1976) (holding that while deliberate indifference to a prisoner's serious illness or injury constitutes cruel and unusual punishment in violation of Eighth Amendment, inadvertent failure to provide adequate medical care to prisoner would not violate the Eighth Amendment).

⁶⁸ *Rhodes*, 452 U.S. at 347 (holding that prison conditions that involved the wanton and unnecessary infliction of pain, or deprived inmates of basic needs or the minimal civilized measure of life's necessities, violated the Eighth Amendment).

⁶⁹ 501 U.S. 294 (1991).

⁷⁰ *Id.* at 304.

⁷¹ *Id.* at 300.

⁷² 475 U.S. 312, 320-21 (1986).

⁷³ 482 U.S. 78, 89 (1987).

administration, and administrators must be given wide discretion to determine how to provide it.⁷⁴

Once the fiction of transition gives way to the recognition of the reality of decades of confinement, the future of death-row-style confinement must depend uniquely on the security justification. Decades of idleness, isolation, and close confinement are unjustifiable as transitional for persons of any age. Potent as the security rationale may be in providing an Eighth Amendment blessing for death row conditions, security is an inapposite justification for death row confinement for the elderly. A prisoner who is dependent on the kindness of guards and fellow prisoners to comb his hair or walk to the shower does not require death row level security. The security rationale collapses when confronted with the realities of confining seventy- and eighty-year-old prisoners in death row conditions.

The needs of the condemned elderly, as well as prison security needs, suggest that these elderly should be housed and cared for much as the growing legions of geriatric general prison population inmates created by the current sentencing regime⁷⁵ are housed and cared for.⁷⁶ Increasingly, the general population's elderly are segregated for appropriate care for reasons of both efficiency and humanity.⁷⁷ The trend towards providing more age appropriate conditions for elderly prisoners implicates the Eighth Amendment prohibition of cruel and unusual punishment with respect to the aged of death row. Should age appropriate care advance to the status of a norm of prison administration, neither the crabbed conception of basic human needs expressed in *Rhodes* and *Wilson* nor the deliberate indifference standard enshrined in those cases would be a barrier to the recognition that the Eighth

⁷⁴ See also *Procunier v. Martinez*, 416 U.S. 396, 404-05 (1989) (supporting deference to security judgments of prison officials in recognition of institutional competence and also holding that federalism requires deference on the part of federal courts to state prison authorities).

⁷⁵ The era of long mandatory sentences and the curtailment of parole has produced a large and growing geriatric general population in prison. See Joann Brown Morton, *Implications for Corrections of an Aging Prison Population*, 5 CORRECTIONS MGMT. Q. 78, 78-88 (2001); see also Ronald H. Aday, *Golden Years Behind Bars: Special Programs and Facilities for Elderly Inmates*, 58 FED. PROBATION 47, 9-11 (1994).

⁷⁶ Bruce Gross, *Elderly Offenders: Implications for Correctional Personnel*, FORENSIC EXAMINER, Spring 2007, at 59-61 (describing prisons as designed for young offenders and as accelerating the deterioration in mental and physical fitness of the aged, and also their inability to walk fast enough, to see and hear well enough, to negotiate prison life, their susceptibility to being preyed upon by younger prisoners, their increased health care needs, and the challenges they present to prison administration).

⁷⁷ Aday, *supra* note 27, at 144-67.

Amendment commands appropriate geriatric care for the elderly of death row as well as general population elderly. A brief review of the constitutional standards imposed on prison conditions will facilitate the argument.

In *Rhodes v. Chapman*, the Court sought for the first time to establish the limits that the Eighth Amendment imposes on prison conditions that do not blatantly and unanswerably violate the commands of the Eighth Amendment. At issue in *Rhodes* was the practice of double celling.⁷⁸ Whatever the merits of this practice, double celling does not rise to the level of atrocious maltreatment that had been held to violate the Eighth Amendment's prohibition of cruelty in earlier cases (e.g., whipping prisoners⁷⁹ and intentionally or recklessly denying necessary medical care⁸⁰). What then of a more general nature applicable to prison conditions does the Eighth Amendment teach? To answer this question, Justice Powell returned in *Rhodes* to *Gregg v. Georgia*'s analysis of the history and development of the Court's Eighth Amendment jurisprudence⁸¹: Justice Powell relied upon the teaching of *Gregg* that the Eighth Amendment's requirements are not static; rather, evolving standards of decency prohibit not only the "physically barbarous"⁸² but also "the unnecessary and wanton infliction of pain."⁸³ Unnecessary and wanton pain includes inflictions of pain "totally without penological justification."⁸⁴ Contrasting the practice of double celling with deprivation of medical attention and the systematically brutal, life imperiling conditions held to violate the Eighth Amendment in *Hutto v. Finney*, Justice Powell concluded that, unlike those conditions, double celling does not "deprive inmates of the minimal civilized measures of life's necessities," such as "essential food, medical care, or sanitation."⁸⁵ Justice Powell also sounds the theme of deference to prison officials in matters of security⁸⁶

⁷⁸ *Rhodes v. Chapman*, 452 U.S. 337, 340 (1981).

⁷⁹ *Hutto v. Finney*, 437 U.S. 678, 682 (1978).

⁸⁰ *Estelle v. Gamble*, 429 U.S. 97, 104-05 (1976).

⁸¹ *Gregg v. Georgia*, 428 U.S. 153, 172-73 (1976).

⁸² *Rhodes*, 452 U.S. at 346.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.* at 347-48

⁸⁶ *Id.* at 349 n.14 ("Moreover, a prison's internal security is peculiarly a matter normally left to the discretion of prison administrators.").

and prison administration.⁸⁷ Justice Powell thus equated the apparently more liberal *Gregg* standard, unnecessary and wanton infliction of pain without penological justification, with the more stringent standard, life's minimal necessities. The bridge between these two apparently disparate standards is supplied by Justice Powell in *Rhodes* by deference to the institutional competence of prison administrators, who face resource limitations and are responsible for prison security. Such deference in effect means that Eighth Amendment review by courts must be limited to the most blatant and dire privations.

Wilson v. Seiter presented an Eighth Amendment challenge to a congeries of prison conditions that were alleged to be systematically inhumane.⁸⁸ Justice Scalia, writing for a majority of the Court, explained that even when alleging systematically inhumane conditions, the prisoner-petitioner must establish the deliberate indifference of prison officials.⁸⁹ Justice White offered a vigorous rebuttal in an opinion concurring in the judgment but protesting the imposition of the deliberate indifference standard in cases that do not involve "specific acts or omissions directed at individual prisoners."⁹⁰ He argued that the standard was virtually impossible to meet in a case involving a challenge to systemically inhumane conditions, and one that could leave prisoners in constitutionally unacceptable conditions without recourse.⁹¹ He expressed concern that lack of resources would become an excuse for both constitutionally unacceptable conditions and the failure of courts to intervene.⁹² Justice White relied upon the *Gregg* standard that prisoners were not to be subjected to unnecessary pain without penological justification; Justice Scalia's opinion for the Court was devoid of reference to that more demanding formulation, but rather relied solely on the basic needs, minimal necessities standard of *Rhodes*.

Let us suppose the day arrives when age appropriate conditions of confinement for geriatric prisoners advances from

⁸⁷ *Id.* at 351-52 n.16 ("For all of those reasons, courts are ill equipped to deal with the increasingly urgent problems of prison administration and reform. Judicial recognition of that fact reflects no more than a healthy sense of realism.").

⁸⁸ Prisoners were subjected to "overcrowding, excessive noise, insufficient locker storage space, inadequate heating and cooling, improper ventilation, unclean and inadequate restrooms, unsanitary dining facilities and food preparation, and housing with mentally and physically ill inmates." *Wilson v. Seiter*, 501 U.S. 294, 296 (1991).

⁸⁹ *Id.* at 303.

⁹⁰ *Id.* at 309.

⁹¹ *Id.* at 310.

⁹² *Id.* at 311.

a trend to a norm of prison management: *Rhodes* and *Wilson* will not stand in the way of recognizing that the Eighth Amendment requires relief from death row confinement and even substantial parity of treatment with the general population elderly, provided that security concerns are recognized to recede for an aged population. The “deliberate indifference” standard of *Rhodes* and *Wilson* would not protect prison officials who failed to conform to established norms for carceral care of elderly inmates. Prison administrators cannot claim ignorance of the standards and norms of their profession. The Eighth Amendment will command laggards to comply. Further, the reasons for the current trend toward providing geriatric care in prisons suggests that the gap between the minimalist basic needs standard of Justice Scalia in *Wilson* and that of avoidance of unnecessary pain in the older cases would not doom the claim under the more stringent standard. If, as some contemporary experts and practitioners maintain, age appropriate care is in fact more efficient, then resource scarcity does not provide a practical barrier to a conception of basic needs at least robust enough to avoid physical suffering. Collecting the elderly in facilities designed to meet the needs of the aged prisoner could prove both more humane and more efficient. Appropriate prison geriatric care would then find a home in the Eighth Amendment and the distinction between death row and general population in this regard would prove untenable.

The issue before the U.S. Supreme Court in the *Lackey* cases has not been long death row *confinement* but *execution* of prisoners long on death row. Let us now examine the case for an Eighth Amendment bar to the *execution* of the long incarcerated elderly.

VI. DOES THE EIGHTH AMENDMENT TOLERATE THE
EXECUTION OF THE CONDEMNED LONG-SERVING
ELDERLY?

There are two daunting hurdles confronting proponents of any type of *Lackey* claim. One hurdle is pragmatic, in that its recognition produces unacceptable consequences. For if the general *Lackey* claim were recognized, it could bring us perilously close to total abolition.

The second hurdle is the apparent inability of a *Lackey* claim to satisfy the demands of the methodology the Supreme Court employs in determining whether execution constitutes cruel and usual treatment. This is the doctrinal, or merits,

problem facing proponents of the proposition that the Eighth Amendment should recognize a *Lackey* claim. The difficulty in sum is that the Court requires evidence that contemporary standards of decency no longer tolerate execution. The Court's method has relied heavily on evidence that legislation in the states manifests the development of a consensus against the practice of executing the class in question. *Lackey* claims therefore face an apparently insuperable hurdle: no American legislation has endorsed the claim.

Whether or not the general *Lackey* claim must fall before these barriers, I will argue that *Lackey-for-the-Elderly* may have a less arduous course. Let us first examine the pragmatics and then the doctrinal Eighth Amendment support for barring the execution of the long-serving elderly.

A. *Pragmatics*

1. *Lackey-for-the-Elderly* Is Consonant with the Supreme Court's History of Limited, Piecemeal Abolition

Long imprisonment on death row is the norm—not the exception—for those eventually executed. The Supreme Court has gradually narrowed the reach of capital punishment but these reforms do not imply a willingness to trench so deeply as to challenge the retention of capital punishment as would the institution of a *Lackey* regime. A further pragmatic consideration is the fear that any *Lackey*-like restrictions on execution will spur a rush to execution.⁹³

Although the general *Lackey* claim may be a bridge too far for the Supreme Court at this juncture, *Lackey-for-the-Elderly* may be within the bounds of the achievable. Its modesty comports with the gradual, piecemeal reformist trajectory of the Supreme Court's Eighth Amendment capital jurisprudence since the 1976 *Gregg* decision that inaugurated the contemporary capital punishment regime. For while the numbers of the aged on death row are increasing, they will remain a relatively small segment of the long-serving condemned.⁹⁴ Their numbers will become large enough for the

⁹³ Justice Thomas observes, "The [*Lackey*] claim might . . . provide reviewing courts a perverse incentive to give short shrift to a capital defendant's legitimate claims so as to avoid violating the Eighth Amendment right . . ." *Knight v. Florida*, 528 U.S. 990, 992 (1999).

⁹⁴ At year end 2009, 2.6 percent of death row was sixty-five or older and 8.2 percent was sixty or older. CAPITAL PUNISHMENT 2009, *supra* note 18, at 9 tbl.5.

issue of their execution to be salient in the experience of courts and prisons, but not so large that sparing them will strike a mortal or near mortal blow to capital punishment.

In the 1970s the United States Supreme Court considered total abolition of the death penalty but opted instead for permitting retention provided novel constitutional strictures were respected. In lieu of total abolition, the Court embarked upon reform. It required enhanced or “super due process”⁹⁵ for death cases, and constricted the reach of capital punishment.⁹⁶ The Court gradually augmented a list of crimes and criminals that were ineligible for the capital sanction. Jurisdictions wishing to retain capital punishment were required to devise statutes that would reserve capital punishment for the worst of the worst murders and murderers. Only homicides—and among them only the most aggravated murders—remain eligible for capital punishment.⁹⁷ Nor are persons who “did not commit and had no intention of committing” homicides⁹⁸ any longer eligible for capital punishment, eliminating capital liability for persons who take part in a felony where murder was committed by an accomplice. Recently the mentally retarded⁹⁹ and persons less than eighteen when they killed¹⁰⁰ were categorically exempted. Previously those less than sixteen years of age when they killed had been exempted.¹⁰¹ All the while, abolitionists and retentionists vied for political support and for supremacy in the

⁹⁵ Margaret Jane Radin coined this apt phrase in her article, *Cruel Punishment and Respect for Persons: Super Due Process for Death*, 53 S. CAL. L. REV. 1143 (1980).

⁹⁶ See, e.g., *Kennedy v. Louisiana*, 554 U.S. 407 (2008) (holding that the Eighth Amendment prohibits the death penalty for the rape of a child); *Roper v. Simmons*, 543 U.S. 551 (2005) (holding that it is unconstitutional to execute any offender who is under eighteen at the time the crime was committed); *Atkins v. Virginia*, 536 U.S. 304, 311, 321 (2002) (holding that executions of mentally retarded criminals are “cruel and unusual punishments” prohibited by Eighth Amendment); *Thompson v. Oklahoma*, 487 U.S. 815 (1988) (holding that defendants who are less than sixteen at the time of their crime cannot be executed); *Ford v. Wainwright*, 477 U.S. 399 (1986) (holding that it is a violation of the Eighth Amendment to execute the insane); *Enmund v. Florida*, 458 U.S. 782 (1982) (holding that the death penalty for those who neither killed nor intended to kill in the course of a felony constitutes cruel and unusual punishment); *Coker v. Georgia*, 433 U.S. 584 (1977) (holding that the imposition of the death penalty for rape of an adult woman violates the Eighth Amendment).

⁹⁷ *Enmund*, 458 U.S. at 801.

⁹⁸ *Id.*

⁹⁹ *Atkins*, 536 U.S. at 304.

¹⁰⁰ *Roper*, 543 U.S. at 551.

¹⁰¹ *Thompson*, 487 U.S. 815.

courts.¹⁰² The product of these vectors has been partial abolition by attrition. An unintended consequence of the enhanced due process regime and the contestation of capital punishment is that the condemned await final resolution of their cases for historically unprecedented periods. This long gestation period gives rise to the *Lackey* issue—whether it is cruel and unusual punishment to convert a sentence of death into a sentence of decades on death row followed by execution.

Relief for the elderly condemned would be another exclusion of a limited and discrete class. Relief for the entire class of the long-serving condemned would be a far more consequential abolitionist step. Indeed, because our capital punishment regime takes so long to produce executions, a *Lackey* rule would be close to a mortal blow to capital punishment rather than one more in a series of modest exclusions. The trouble with the *Lackey* claim is that it breaks with the established practice of the Supreme Court's paring back and chipping away at capital punishment and instead trenches deeply. By the end of 2009, there were well over six hundred prisoners who had been on death row for twenty years or longer, comprising very nearly 20 percent of the total death row population.¹⁰³ More than two hundred had been on death row for twenty-five years or longer.¹⁰⁴ Almost 80 percent of long-serving inmates were admitted to death row in their twenties and thirties, with the balance divided almost equally between nineteen-year-olds and persons forty and older.¹⁰⁵ By comparison, the numbers of death row elderly are relatively modest. There were approximately eighty individuals sixty-five or older on death row at the end of 2009.¹⁰⁶ A *Lackey-for-the-Elderly* rule would be consonant with the scope and pace of gradual retrenchment that has thus far found acceptance in the Supreme Court. Further, *Lackey-for-the-Elderly* mimics the recent exclusion of those under eighteen years of age at the time they committed a capital crime and the mentally

¹⁰² See, e.g., AUSTIN SARAT, WHEN THE STATE KILLS, ch. 6 (Princeton 2001); Austin Sarat, *Capital Punishment as a Fact of Legal, Political and Cultural Life*, in THE KILLING STATE (Austin Sarat, ed., Oxford 1999).

¹⁰³ CAPITAL PUNISHMENT 2009, *supra* note 18, at 19 tbl.18.

¹⁰⁴ *Id.*

¹⁰⁵ Only 11.1 percent of death row prisoners were forty or older when arrested; 10.5 were nineteen or younger. CAPITAL PUNISHMENT 2008, *supra* note 24, at 10 tbl.7.

¹⁰⁶ On December 31, 2009, 2.6 percent of 3173 total prisoners on death row were over the age of sixty-five. CAPITAL PUNISHMENT 2009, *supra* note 18, at 9 tbl.5.

retarded¹⁰⁷ in that there is an essentially objective, even arithmetic, definition available for demarcating the class of the excluded, relieving concerns about manipulation and undeserving claims. *Lackey-for-the-Elderly* is therefore a more practical goal: it would, if embraced by the Supreme Court, be consistent with its inclinations to date and offer relief to a cohort whose continued life under the shadow of the gallows is acutely misaligned with Eighth Amendment values.

2. Would a *Lackey-for-the-Elderly* Regime Produce a Rush to Execution?

Would rules sparing the elderly—or, for that matter, all the long-incarcerated condemned—lead to accelerated rates of executions for either of these classes of prisoners? Would a *Lackey* regime result in “speed rather than accuracy”¹⁰⁸ in capital litigation, a consequence that would dismay defenders of due process whether or not they are of abolitionist sympathies?¹⁰⁹ Could the adoption of such protection reverse the trend of secular decline in executions or propel more elderly and long-serving prisoners into the ranks of those actually executed? I will argue that these fears are not well founded.

Most execution-prone states share with less active death-penalty states populations of long-serving and elderly prisoners. Among the ten most execution-prone states, only Virginia lacks prisoners who have been on death row at least twenty-five years.¹¹⁰ Texas has nineteen.¹¹¹ Florida is the leader in this class with more than sixty.¹¹² The most execution-prone states, with the exception of Virginia, do not outperform the less execution-prone death-penalty states dramatically in the

¹⁰⁷ To qualify for the protection of *Atkins*, an offender must have an IQ no higher than seventy to seventy-five. *Atkins v. Virginia*, 536 U.S. 304, 309 n.5 (2002).

¹⁰⁸ *McKenzie v. Day*, 57 F.3d 1461, 1467 (9th Cir. 1995).

¹⁰⁹ Judge Kozinski expresses the concern about the consequences of a *Lackey* regime,

By and large, the delay in carrying out death sentences has been of benefit to death row inmates, allowing them to extend their lives, obtain commutation or reversal of their sentences or, in rare cases, secure complete exoneration. Sustaining a [*Lackey*] claim . . . would, we fear, wreak havoc with the orderly administration of the death penalty in this country by placing a substantial premium on speed rather than accuracy.

Id. at 1467.

¹¹⁰ CAPITAL PUNISHMENT 2009, *supra* note 18, at 19 tbl.18.

¹¹¹ *Id.*

¹¹² *Id.*

average number of years prisoners have been on death row. The national average time in 2009 was 12.7 years.¹¹³ For California, a state that rarely executes, the average was 14.2,¹¹⁴ but it was 13.9 for Florida.¹¹⁵ Georgia did not do much better at 13.3.¹¹⁶ Texas, the leader in executions performed, achieved 10.8.¹¹⁷ Other than Virginia's stellar 5.4 years,¹¹⁸ the best records achieved by the ten most execution-prone states were in South Carolina and Oklahoma, which managed to get below 10 years, at 9 and 8.9 respectively.¹¹⁹

I base my skepticism on what I consider to be the dim prospects for efficiency reforms of the death-penalty system. The number of years to resolve cases has increased over a decade in which there has been a pronounced secular decline in the number of executions.¹²⁰ The ratio, as it were, of systemic effort per resulting execution has steadily increased. The two most plausible avenues of reform are money to move cases more quickly and competently through the system and the streamlining of the appellate and postconviction process.¹²¹ To date, such measures have either not made a difference in reversing the secular trend or have failed to garner sufficient support to be introduced. It is vanishingly unlikely that the well-documented shortage of qualified trial and appellate counsel will be addressed any time soon by cash-strapped states that did not take this step even when their resources were greater. The prospects for streamlining the process are no better. The passage of the Anti-Terrorism and Effective Death Penalty Act of 1996,¹²² for example, which restricts habeas relief for death row prisoners, has not reversed the trends to longer delays and fewer executions. To the frustration of some retentionists, the underlying cause of the multitiered and time-consuming legal processes is the so-called super due process for

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ Despite a steep drop in both the number of executions and the number of admissions to death row over the decade, time under sentence of death for those executed increased from eleven years and eleven months in 1999 to fourteen years and one month in 2009. See CAPITAL PUNISHMENT 2009, *supra* note 18; see also CAPITAL PUNISHMENT 1999, *supra* note 17.

¹²¹ The Ninth Circuit Court of Appeals has recently proposed both as solutions to California's backlog of death row cases. Alarcon, *supra* note 54, at 698.

¹²² Pub. L. No. 104-132, 110 Stat. 1214.

death required by the Supreme Court coupled with the matching zeal of pro- and anti-death-penalty litigators. To date, the political will to execute has not been sufficient to result in spending public money and court resources on death cases to reverse the trend toward more time to produce fewer executions. It is doubtful that the recognition that a Clarence Ray Allen is too old to execute would galvanize more public and retentionist reaction than, for example, the Supreme Court's recent decision to prohibit execution of child rapists¹²³ or the increasingly more publicized fact that only a small fraction of those condemned since 1976 have actually been executed.

Let us look at the reaction to the introduction of a *Lackey*-like regime in the Caribbean nation of Jamaica for possible lessons about the impact of such a regime in the United States. The Anglophone Caribbean nations retain capital punishment; the death penalty enjoys strong public and political support as a consequence of the high rates of murder and other violent crime these countries suffer.¹²⁴ Until recently the Judicial Committee of the Privy Council has been the high court for all former British dependencies in the Caribbean, a relationship that is in the early stages of being replaced by a regional court, the Caribbean Court of Justice. In 1993, the Judicial Committee ruled in *Pratt and Morgan v. The Attorney General of Jamaica* that, under the Jamaican Constitution, it would constitute inhuman and degrading punishment to execute a person imprisoned under sentence of death for more than five years.¹²⁵ The decision resulted in the commutation of approximately two hundred death sentences in the region.¹²⁶ The decision stimulated anti-imperialist and nationalist resistance and increased momentum for the creation of a regional court to displace the Privy Council. There were predictions that the decision would inspire "hanging courts."¹²⁷ There have been no executions in Jamaica since *Pratt and*

¹²³ *Kennedy v. Louisiana*, 554 U.S. 407, 447, *opinion modified on denial of reh'g*, 129 S. Ct. 1 (2008).

¹²⁴ See ROGER G. HOOD & CAROLYN HOYLE, *THE DEATH PENALTY: A WORLDWIDE PERSPECTIVE* 106 (4th ed., Oxford 2008).

¹²⁵ *Pratt & Morgan v. Jamaica*, 3 SLR 995, 2 AC 1, 4 All ER 769 (Privy Council 1993) (en banc).

¹²⁶ Andrew Novak, *The Decline of the Mandatory Death Penalty in Common Law Africa: Constitutional Challenges and Comparative Jurisprudence in Malawi and Uganda*, 11 *LOY. J. PUB. INT. L.* 19, 27 (2009).

¹²⁷ Leonard Birdsong, *The Formation of the Caribbean Court of Justice: The Sunset of British Colonial Rule in the English Speaking Caribbean*, 36 *U. MIAMI INTER-AM. L. REV.* 197, 203-04 (2005).

Morgan.¹²⁸ The *Pratt and Morgan* decision has been a much criticized decision by retentionists, but has been criticized by abolitionist critics as well who fear “hanging courts.”

Would prisoners who might otherwise be left to languish in obscure corners of death row be victims of *Lackey-for-the-Elderly*? The sluggishness of the death-penalty system in the United States, Jamaica, and other countries where stringent due process standards are respected suggests that fears of a rush to the gallows are misplaced. My argument is necessarily speculative, as there is no record to consult for the counterfactual *Lackey* scenario in the United States. My argument relies on both the natural experiment produced by *Pratt and Morgan* in Jamaica and the history of protracted multitiered litigation in death cases necessary to satisfy contemporary due process and human rights standards.

B. *On the Merits: The Case that the Eighth Amendment Bars Execution of the Long-Serving Elderly*

The case for *Lackey-for-the-Elderly* is in effect a specialized and augmented version of the *Lackey* claim. Support for the Elderly version therefore rests in part on the strength of the case for the general *Lackey* claim. Likewise, understanding the additional merits of the Elderly claim requires review of the case for the general *Lackey* claim.

1. In Recent Cases, the Supreme Court’s Eighth Amendment Methodology Has Become More Favorable to the Success of *Lackey* Claims

At first blush, the chances for success of the *Lackey* claim look bleak. Justice Thomas pointed out that he was “unaware of any support [for it] in the American constitutional tradition or in this Court’s precedent”¹²⁹ and equally that no state or federal court has recognized a *Lackey* claim since the first denial of certiorari in *Lackey v. Texas*.¹³⁰ His point must be conceded, for it was accurate when made in 1999 and remains true at this writing. However, a methodological shift in recent Supreme Court cases considering whether the Eighth

¹²⁸ HOOD & HOYLE, *supra* note 124, at 106.

¹²⁹ *Knight v. Florida*, 528 U.S. 990, 990 (1999) (Thomas, J., concurring in denial of certiorari for a *Lackey* claim).

¹³⁰ *Id.* at 461.

Amendment permits execution for particular classes of offenders suggests that *Lackey* claims may not be as outside the pale as its critics would prefer.

The Eighth Amendment standard by which the constitutionality of a form of punishment is to be judged was established in *Trop v. Dulles*: whether the punishment comports with “evolving standards of decency that mark the progress of a maturing society.”¹³¹ The Supreme Court has barred the execution of several classes of persons who were traditionally subject to capital punishment because the punishment for them would be cruel and unusual in light of contemporary standards. Invoking the Eighth Amendment’s Cruel and Unusual Punishment Clause, the Court has excluded the mentally retarded,¹³² and youthful murderers,¹³³ and those who have been convicted because, during the course of committing a felony, an accomplice took life.¹³⁴

In two of the recent cases, *Atkins v. Virginia*¹³⁵ and *Roper v. Simmons*,¹³⁶ the Court relaxed the requirements for exclusion, to the dismay of the dissenting justices. The Court relied more heavily than in earlier cases on its “own judgment” or “independent judgment” and less on objective indicia of an evolution in public values. Although also continuing to rely on “objective” indicia of a national consensus to be found in legislative enactments and the practice of the states, the Court’s majorities were satisfied with less robust “objective” evidence of the development of a national consensus.¹³⁷ The Court’s reliance on its “own judgment,” as will be seen, is deeply rooted in its capital Eighth Amendment precedents, and bodes well for the future reception of *Lackey* claims.

Writing for the Court in *Roper*, Justice Kennedy reviewed the method by which a determination is to be made as to whether offenders who kill before their eighteenth birthday

¹³¹ 356 U.S. 86, 100-01 (1958).

¹³² *Atkins v. Virginia*, 536 U.S. 304, 321 (2002).

¹³³ *Roper v. Simmons*, 543 U.S. 551 (2005), *abrogating* *Stanford v. Kentucky*, 492 U.S. 361 (1989).

¹³⁴ *Enmund v. Florida*, 458 U.S. 782, 801 (1982); *see also* *Tison v. Arizona*, 481 U.S. 137 (1987) (refining the *Enmund* standard and holding that reckless indifference is sufficient to satisfy intent if the defendant is a major participant in a felony that results in murder).

¹³⁵ *Atkins*, 536 U.S. 304.

¹³⁶ *Roper*, 543 U.S. 551.

¹³⁷ In the most recent capital exclusion case, *Kennedy v. Louisiana*, 554 U.S. 407 (2008), discussed *infra* at note 165, Justice Kennedy’s majority opinion is yet more assertive of reliance on normative judgment at the expense of the weight accorded legislative enactments.

should be categorically exempt from capital punishment. The three sources of support recognized in previous cases are “legislative enactments,”¹³⁸ “state practice,”¹³⁹ and “our own judgment.”¹⁴⁰ Additionally, the Court looks to foreign and international law as instructive but not controlling.¹⁴¹ In the earlier cases, the Court accorded preeminence to statutes.¹⁴² In *Coker v. Georgia*, for example, the Court relied on the finding that Georgia was the only jurisdiction whose law authorized capital punishment for the rape of an adult woman as support for a constitutional bar against capital punishment for rapists of adult women.¹⁴³ The Court again emphasized the importance of statutes as evidence of the crystallization of consensus in *Enmund v. Florida*.¹⁴⁴ There the record was less “compelling”¹⁴⁵ but nonetheless strong: a large majority of states no longer permitted the execution of those who neither contemplated nor intended killing in the course of a felony, such as robbery during which an accomplice killed.¹⁴⁶ But when the Court barred execution of the mentally retarded in *Atkins*, only eighteen of the then thirty-eight death-penalty states, and the federal jurisdiction, exempted the mentally retarded by statute.¹⁴⁷ In *Roper* in 2005, the Court conceded that the objective indicia embodied in statutes was weaker than in the earlier cases in both *Atkins* and in the instant case exempting persons who were not yet eighteen when they committed murder.¹⁴⁸ Indeed, a bare majority of the death-penalty states had no statutory prohibition against the execution of the mentally retarded or murderers who were seventeen years of age but not yet eighteen when they killed.¹⁴⁹ The majority opinions in the two cases reasoned that recent additions to the ranks of prohibiting states, prohibitory statutes of more long standing, and the addition of the bloc of states that had abolished capital punishment entirely established that we had arrived at a

¹³⁸ *Roper*, 543 U.S. at 563.

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 575-78.

¹⁴² Legislation is the “clearest and most reliable objective evidence of contemporary values.” *Penry v. Lynaugh*, 492 U.S. 302, 331 (1989), *abrogated by Atkins v. Virginia*, 536 U.S. 304 (2002).

¹⁴³ *Coker v. Georgia*, 433 U.S. 584, 595-96 (1976).

¹⁴⁴ 458 U.S. 782 (1982).

¹⁴⁵ *Id.* at 793.

¹⁴⁶ *Id.* at 792.

¹⁴⁷ *Atkins*, 536 U.S. at 313.

¹⁴⁸ *Roper v. Simmons*, 543 U.S. 551, 597-98 (2005).

¹⁴⁹ *Id.* at 564.

national legislative consensus against the execution of the mentally retarded and youthful murderers.¹⁵⁰ Inevitably, to compensate for the comparative weakness of the “objective” case relative to its strength in previous cases establishing categorical exclusions, the arguments for the Court’s independent judgment must bear greater weight in the two recent cases.

The dissenters’ verdict is that the *Atkins* and *Roper* majorities have substituted their own subjective moral judgments for the objective social consensus demanded by *Trop v. Dulles* and the Court’s previous Eighth Amendment jurisprudence of capital exemption. Justice Scalia’s dissents in both cases are scathing, for he found that the Court has abandoned reliance on social consensus as the touchstone of evolving Eighth Amendment values in favor of “the subjective views of individual Justices.”¹⁵¹ In his *Atkins* dissent, Justice Scalia declared, “Seldom has an opinion of this Court rested so obviously upon nothing but the personal views of its Members.”¹⁵² In *Roper*, he again dissented, “Because I do not believe that the meaning of our Eighth Amendment . . . should be determined by the subjective views of five Members of this Court”¹⁵³

Plausible as this criticism may appear initially, it is misleading to characterize the majorities’ reliance on their independent judgment as either merely “subjective” or as a jurisprudential departure. The Court in *Atkins* and *Roper* reverts to a well-established method of normative analysis employed in Eighth Amendment cases, with roots that go back at least as far as the foundation of the contemporary capital regime (i.e., to *Gregg v. Georgia*). Chief Justice Rehnquist and Justice Scalia, dissenters in *Atkins* and *Roper*, rejected this approach. Their view prevailed temporarily in *Stanford v. Kentucky*.¹⁵⁴ In that case the Supreme Court, in an opinion authored by Justice Scalia, repudiated the previously established reliance on the independent judgments of the justices as an ingredient in determinations of contemporary standards of decency.¹⁵⁵ But in *Atkins*, this holding of *Stanford*

¹⁵⁰ *Id.* at 564-68.

¹⁵¹ *Atkins*, 536 U.S. at 341 (Scalia, J., dissenting) (quoting *Coker v. Georgia*, 433 U.S. 584, 592 (1976)).

¹⁵² *Id.* at 338.

¹⁵³ *Roper*, 543 U.S. at 608.

¹⁵⁴ *Stanford v. Kentucky*, 492 U.S. 361 (1989) (holding that the imposition of capital punishment on an individual for a crime committed at sixteen or seventeen years of age did not violate evolving standards of decency and thus did not constitute cruel and unusual punishment under the Eighth Amendment), *abrogated by Roper*, 543 U.S. 551.

¹⁵⁵ *Id.* at 378-80.

proved to be a spur, a single shoot without progeny. The Court in *Atkins* and *Roper* reverted to reliance on the independent judgment of the justices as relevant to its determination of the Eighth Amendment propriety of capital punishment. Their judgment was inevitably normative, but this does not entail that it was merely subjective. The *Atkins* and *Roper* majority opinions apply normative standards regularly employed in the Court's capital Eighth Amendment precedents.

In *Coker v. Georgia*, the first of the categorical exclusion cases, the Court held that "the Constitution contemplates that in the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment."¹⁵⁶ The Court arrived at that judgment by inquiring into whether capital punishment serves the constitutionally required goals of punishment:

Under *Gregg*, a punishment is "excessive" and unconstitutional if it (1) makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering; or (2) is grossly out of proportion to the severity of the crime. A punishment might fail the test on either ground.¹⁵⁷

The goals of punishments, as reiterated in all the Supreme Court cases mandating capital exclusion, are deterrence and retribution: "The death penalty is said to serve two principal social purposes: retribution and deterrence of capital crimes by prospective offenders."¹⁵⁸

Since *Coker*, and relying on *Gregg*,¹⁵⁹ the Court has held that unless capital punishment advances the penal goals of

¹⁵⁶ *Coker*, 433 U.S. at 597 (quoted in *Atkins*, 536 U.S. at 341 and *Roper*, 543 U.S. at 590).

¹⁵⁷ *Id.* at 592 (White, J.). The sentence preceding that quoted in the text above details the precedents for this holding:

In sustaining the imposition of the death penalty in *Gregg*, however, the Court firmly embraced the holdings and dicta from prior cases, *Furman v. Georgia*, [408 U.S. 238]; *Robinson v. California*, 370 U.S. 660 (1962); *Trop v. Dulles*, 356 U.S. 86 (1958); and *Weems v. United States*, 217 U.S. 349 (1910), to the effect that the Eighth Amendment bars not only those punishments that are "barbaric" but also those that are "excessive" in relation to the crime committed.

Id. at 591-92.

¹⁵⁸ *Gregg v. Georgia*, 428 U.S. 153, 183 (1976) (plurality opinion); see also *Coker*, 433 U.S. at 592; *Enmund v. Florida*, 458 U.S. 782, 782-83 (1982); *Atkins*, 536 U.S. at 319; *Lackey v. Texas*, 514 U.S. 1045 (1995); *Roper*, 543 U.S. at 552.

¹⁵⁹ And indeed on *Furman v. Georgia*, 408 U.S. 238, 239-40 (1972) (holding that the imposition of the death penalty on offenders convicted of rape would violate the Eighth Amendment).

retribution or deterrence, it is barred by the Eighth Amendment. In debates about the *Lackey* issue, retribution is to the fore and deterrence recedes in that the plausibility of additional deterrent value in execution after decades of incarceration in the shadow of the gallows is difficult to defend.¹⁶⁰ The Court's *Lackey* debates therefore turn on whether decades-plus-death is excessive retribution offensive to the Eighth Amendment. In *Atkins* and *Roper*, the Court held that in its independent judgment, the deficiencies in judgment and self-control attributable to mental disability and immaturity rendered the retarded and youthful murderers less culpable than normal and mature murderers.¹⁶¹ Thus, these classes were not among the most culpable murderers for whom capital punishment was retributively justified, a judgment reflected in a large and growing number of statutory prohibitions.¹⁶²

Critics of the *Lackey* claim will of course hasten to note that the *Lackey* claim has not been endorsed in a single American statute or adopted by any American court. How then could the *Lackey* claim prevail within the framework established in the capital exclusion cases? Justices Stevens and Breyer adumbrated the available Eighth Amendment arguments in their demurrals from the denial of certiorari in the *Lackey* cases. There are two crucial lines of argument necessary to support *Lackey* claims. One is of course the standard Eighth Amendment argument that decades-plus-death is retributively excessive punishment. The second breaks new Eighth Amendment ground. Previously, cases acknowledging capital exclusion have tested whether traditionally accepted practices had outlived their social mandate. The *Lackey* claim, by contrast, questions whether an *emergent* practice is permitted by the Eighth Amendment.

The *Lackey* claim is directed against a novel form of cruel punishment alien to tradition—persons serving decades on death row, perhaps half a lifetime, perhaps into old age. It is directed against a cruel innovation rather than a cruel relic. The model of social history implicit in *Trop v. Dulles* is progressive. It deserves

¹⁶⁰ In *Lackey v. Texas* Justice Stevens writes, “additional deterrent effect from an actual execution now, on the one hand, as compared to 17 years on death row followed by the prisoner’s continued incarceration for life, on the other, seems minimal.” 514 U.S. at 1046. This proposition resounds through subsequent *Lackey* cases. In *Knight v. Florida*, Justice Thomas apparently concedes as much in noting that Justice Breyer’s criticism of execution after long delay for lack of additional deterrent effect would be remedied by reverting to something like our earlier and sprightlier system. 528 U.S. 990, 990 n.1 (1999).

¹⁶¹ *Roper*, 534 U.S. at 552.

¹⁶² *Atkins*, 536 U.S. at 321; *Roper*, 543 U.S. at 571.

the old-fashioned designation “whiggish” in that it assumes that society continually improves, becomes ever more humane. It can be argued, therefore, that the Court’s Eighth Amendment jurisprudence of capital exclusion is restricted by *Trop v. Dulles* to delivering the *coup de grace* to decaying practices. The alternative is to recognize the limitations of the *Trop v. Dulles* model when confronted by historically novel forms of cruelty. Indeed, the Supreme Court in *Atkins*, and more starkly in *Roper*, without fully acknowledging the fact, relied less on a history of American progress and more on normative judgment to ban practices permitted by the majority of death-penalty states. In *Roper* especially, the majority also turned to the very strong support for barring the execution of persons under eighteen in international and foreign law.¹⁶³ Indeed, whether or not one shares the dissenting justices’ pejorative view of the majority opinions in *Atkins* and *Roper*, those justices are correct that the majority opinions rely on normative judgments and foreign and international law to a far greater extent than previous Eighth Amendment capital exclusion cases. The *Lackey* claim, like the bar on the execution of youthful offenders, enjoys robust support in international and foreign law.

In the most recent of the capital exclusion cases, *Kennedy v. Louisiana*, the Court delivered yet another blow to the vaunted importance of state legislative consensus in its Eighth Amendment capital exclusion methodology.¹⁶⁴ Justice Kennedy considered an objection to the Court’s holding that a national consensus had developed against the execution of rapists of children, based on the small number of states that authorized their execution and the fact that no child rapist had been executed by any state in forty years.¹⁶⁵ The objection was that the Court was “blocking” the development of a national consensus

¹⁶³ Thus, Justice Kennedy writes,

The overwhelming weight of international opinion against the juvenile death penalty is not controlling here, but provides respected and significant confirmation for the Court’s determination that the penalty is disproportionate punishment for offenders under 18 The United States is the only country in the world that continues to give official sanction to the juvenile penalty. It does not lessen fidelity to the Constitution or pride in its origins to acknowledge that the express affirmation of certain fundamental rights by other nations and peoples underscores the centrality of those same rights within our own heritage of freedom.

Roper, 543 U.S. at 554.

¹⁶⁴ 554 U.S. 407 (2008).

¹⁶⁵ *Id.* at 409.

rather than relying on such a consensus.¹⁶⁶ Louisiana argued that the *Coker* decision had been read broadly to ban execution for nonlethal child rape rather than specifically and only the rape of an adult woman. *Kennedy v. Louisiana* clarified any ambiguity about *Coker*. *Coker* prohibited execution for the rape of an adult woman, not nonlethal child rape.¹⁶⁷ Thus, the argument goes, legislatures in the states did not appreciate that they were free to permit or forbid execution for child rapists. The question of whether a national consensus existed against the practice was therefore untested in the states.¹⁶⁸ The Court should wait upon the day when legislatures have affirmatively banned execution for child rapists to declare a national consensus rather than act in the face of legislative inaction.¹⁶⁹ To ban execution of child rapists under the Eighth Amendment would stifle the development of a consensus. To act in the absence of legislative bans would violate the Court's methodological commitment to look to state legislatures for evidence of national consensus.

Justice Kennedy's rejoinder to this criticism would seem to diminish further the relative weight of the "objective" component in Eighth Amendment capital exclusion methodology. He associated "evolving standards of decency" with the Court's duty to restrain the use of capital punishment to insure its use only for crimes that are judged to be among the worst, apparently at the expense of the importance of the record of legislative enactments. He wrote,

These concerns overlook the meaning and full substance of the established proposition that the Eighth Amendment is defined by "the evolving standards of decency that mark the progress of a maturing society." Confirmed by repeated, consistent rulings of this Court, this principle requires that use of the death penalty be restrained. The rule of evolving standards of decency with specific marks on the way to full progress and mature judgment means that

¹⁶⁶ See *id.* at 446 ("Our determination that there is a consensus against the death penalty for child rape raises the question whether the Court's own institutional position and its holding will have the effect of blocking further or later consensus in favor of the penalty from developing. The Court, it will be argued, by the act of addressing the constitutionality of the death penalty, intrudes upon the consensus-making process. By imposing a negative restraint, the argument runs, the Court makes it more difficult for consensus to change or emerge. The Court, according to the criticism, itself becomes enmeshed in the process, part judge and part the maker of that which it judges.").

¹⁶⁷ *Id.* at 426-27, 429.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at 446.

resort to the penalty must be reserved for the worst of crimes and limited in its instances of application.¹⁷⁰

In sum, in its three most recent capital exclusion cases, the Supreme Court has tempered its reliance on the tally of state enactments and reasserted its reliance on its own normative judgment. Normative analysis of whether capital punishment for a crime or a class of offenders is excessive punishment has been a factor in the Court's capital jurisprudence since *Gregg v. Georgia*. In the recent cases, *Atkins* and *Roper*—and in a more limited and subtle way *Kennedy v. Louisiana*—the Court has recalibrated the importance of normative analysis relative to the so-called “objective indicia” of evolution of standards. The Supreme Court could travel further down the road already taken and recognize the *Lackey* claim—or the more modest *Lackey-for-the-Elderly* claim.

2. Decades-Plus-Death Is Excessive Punishment Forbidden by the Eighth Amendment

Justices Stevens and Breyer consider at least three arguments in favor of the general *Lackey* claim in their dissents from denial of certiorari in *Lackey* cases. The touchstone argument is that decades-plus-death is retributively excessive punishment and therefore lacks an Eighth Amendment justification. The justices also argue that decades-plus-death is sanctioned neither by our legal tradition nor by considered or express political recognition. Additionally, Stevens and Breyer find support for *Lackey* in the jurisprudence of foreign constitutional courts and international law.¹⁷¹

a. Decades-Plus-Death Is Retributively Excessive Punishment

The capital exclusion cases hark back to *Gregg v. Georgia* for the framework for understanding retributive

¹⁷⁰ *Id.* at 446-47 (citations omitted).

¹⁷¹ From the retirement of Justice Stevens in 2010 to the present writing, no other justice has publicly endorsed granting certiorari to a *Lackey* claim. Should the day arrive when certiorari is granted, a stock of arguments for granting the petition is in hand in the dissents from denial of certiorari written by Justices Stevens and Breyer. Indeed, Justice Stevens's memorandum to the denial of certiorari in *Lackey v. Texas* in 1995 supplies jurisprudential seed sufficient to the task. *Lackey v. Texas*, 514 U.S. 1045 (1995) (Stevens, J., mem. respecting denial of cert.).

justification and retributive excess. Justice White wrote in *Coker v. Georgia*,

Under *Gregg*, a punishment is “excessive” and unconstitutional if it (1) makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering; or (2) is grossly out of proportion to the severity of the crime. A punishment might fail the test on either ground.¹⁷²

“*Gregg* instructs,” Justice Kennedy reiterated in *Kennedy v. Louisiana*, that “the two distinct purposes served by the death penalty” are “retribution and deterrence of capital crimes.”¹⁷³ Justices Stevens and Breyer in their *Lackey* opinions explored arguments for the thesis that this novel imposition of decades-plus-death is not justified by a gain in deterrence¹⁷⁴ and exceeds the limits of justified retribution. Punishment that is justified neither as deterrence nor as an appropriate level or type of retribution is “gratuitous infliction of suffering” and as such not tolerated by the Eighth Amendment.¹⁷⁵

This doctrine that constitutionally legitimate punishment must respect limits is well grounded in the Court’s Eighth Amendment precedents; yet the bite of the doctrine seems to elude some critics of the *Lackey* claim, perhaps in part because judges sympathetic to *Lackey* claims use emotionally and morally charged terms to describe long tenure on death row—terms like “dehumanizing,”¹⁷⁶ “horrible,”¹⁷⁷ and “frightful.”¹⁷⁸ These usages may invite dismissal as merely expressing personal moral repugnance. Justice Thomas, for example, responds dismissively to what he takes to be a misplaced focus on the suffering of the long incarcerated condemned rather than the gruesome suffering inflicted by the justly condemned.¹⁷⁹ But

¹⁷² *Coker v. Georgia*, 433 U.S. 584, 592 (1976).

¹⁷³ *Kennedy*, 554 U.S. at 441.

¹⁷⁴ Deterrence is invoked but not extensively treated in the *Lackey* opinions. *Lackey*, 514 U.S. at 1046. In *Atkins*, Justice Stevens acknowledges the controversy and uncertainty that swirls around arguments about whether the death penalty deters, and suggests that judgments about deterrence should be left to legislatures. *Atkins v. Virginia*, 536 U.S. 304, 318-19 (2002).

¹⁷⁵ *Gregg v. Georgia*, 428 U.S. 153, 183 (1976).

¹⁷⁶ *Lackey*, 514 U.S. at 1046 n.* (Stevens, J.) (quoting *People v. Anderson*, 493 P.2d 880, 894 (Cal. 1972)).

¹⁷⁷ *Id.* (quoting *In re Medley*, 134 U.S. 160, 172 (1890)).

¹⁷⁸ *Id.* (quoting *Furman v. Georgia*, 408 U.S. 238, 288-89 (1972)).

¹⁷⁹ Justice Thomas gives a detailed description of the extensive torture inflicted on a murder victim by *Lackey* petitioner William Lee Thompson and his codefendant:

Justice Stevens altogether refuses to take into consideration the gruesome nature of the crimes that legitimately lead States to authorize the death

the *Lackey* claimant is not contesting the constitutionality of capital punishment as retribution for cruelly taking life. Justice Thomas's rejoinder misses that the *Lackey* claimant is arguing, and to this extent correctly, that the Eighth Amendment imposes limits on punishment even on those most deserving of punishment. The Eighth Amendment would not, for example, allow a state to inflict drawing and quartering, or the burning of entrails while alive, as the prelude to or the method of execution regardless of how hideous the crime or how cruel the criminal. To meet *Lackey* proponents on the ground on which they are arguing, the proper rejoinder must include an argument that decades-plus-death is not excessive punishment for the worst murders or the worst murderers in the light of contemporary standards of decency.

Another example of a misleading rejoinder is that of Judge Kozinski in the Ninth Circuit's *Mackenzie v. Day*,¹⁸⁰ a case that raises a *Lackey* claim. Judge Kozinski wrote, "By and large, the delay in carrying out death sentences has been of benefit to death row inmates, allowing them to extend their lives," and pursue various forms of legal relief or commutation.¹⁸¹ Intuitively, there is certainly something to be said for remaining in life as well as for the chance for relief from a death sentence. However, Judge Kozinski implicitly compared death plus delay with the prospect of prompt execution. Justice Stevens has concluded that delay in executions is "inescapable"¹⁸² in our death-penalty system. If Stevens is correct—and history to date certainly bears him out—the proper way to frame the Eighth Amendment issue is

penalty and juries to impose it. The facts of this case illustrate the point. On March 30, 1976, petitioner and his codefendant were in a motel room with the victim and another woman. They instructed the women to contact their families to obtain money. The victim made the mistake of promising that she could obtain \$200 to \$300; she was able to secure only \$25. Enraged, petitioner's codefendant ordered her into the bedroom, removed his chain belt, forced her to undress, and began hitting her in the face while petitioner beat her with the belt. They then rammed a chair leg into her vagina, tearing its inner wall and causing internal bleeding; they repeated the process with a nightstick. Petitioner and his codefendant then tortured her with lit cigarettes and lighters and forced her to eat her sanitary napkin and to lick spilt beer off the floor. All the while, they continued to beat her with the chain belt, the club, and the chair leg. They stopped the attack once to force the victim to again call her mother to ask for money. After the call, petitioner and his codefendant resumed the torture until the victim died.

Thompson v. McNeil, 129 S. Ct. 1299, 1302 (2009) (Thomas, J., concurring).

¹⁸⁰ *McKenzie v. Day*, 57 F.3d 1461 (9th Cir. 1995).

¹⁸¹ *Id.* at 1467.

¹⁸² *Thompson*, 129 S. Ct. at 1300.

not as a choice between dispatch and delay, but whether or not decades-plus-death (the system we have had for thirty years) is excessively retributive. Perhaps for many of the condemned, periodic torture would be preferable to certain and immediate death, but that does not render torture plus death a sentence that would survive Eighth Amendment review. Again in the Ninth Circuit, Judge Fletcher, sympathetic to the *Lackey* claim, evokes the life on death row of a *Lackey* claimant who has served twenty-three years on death row:

For twenty-three years, Ceja has suffered the anxiety of impending death and the greatly restricted activity allowed death row inmates. During that time, Ceja has had an execution date set at least five times: February 8, 1978; September 24, 1980; May 11, 1983; December 19, 1984; and January 21, 1998. For 23 years, Ceja has lived in solitary confinement, much of it in the typical death row cell on Cell Block 6 at the Arizona State Prison in Florence. Those cells are little more than a 7' x 10' windowless concrete box with a metal sink and toilet and a concrete slab for a bed. Activity outside that cell is typically limited to 3 one-to-two hour periods per week in which the inmate may shower or exercise. Visitations and phone privileges are much more limited than those for the general prison population. Many of a death row inmate's neighbors are deeply disturbed men responsible for some of the most notorious murders in Arizona.¹⁸³

When Justices Stevens or Breyer called attention to such severe privations and anxieties, it would miss the Eighth Amendment point to dismiss their sympathy for the *Lackey* claim as merely an expression of their personal repugnance contemplating the suffering of the condemned. In *Lackey v. Texas*, Justice Stevens sketched the argument that after seventeen years awaiting death, the length of Lackey's death row incarceration, there was little or no additional deterrent or retributive value to be achieved by executing him and hence no Eighth Amendment justification for execution.¹⁸⁴ Let us suppose for the sake of argument that Justice Stevens underestimated the deterrent or retributive value and overestimates the suffering, exacted from Lackey in seventeen years, such that the commutation of his sentence to life imprisonment would cheat justice and the hangman. Suppose a prisoner were sentenced to die at twenty and executed at sixty after having spent forty years on death row. Suppose a person sentenced at thirty is executed at seventy-five. It is difficult to resist, once it is acknowledged that the Eighth Amendment's Cruel and Unusual Punishment Clause

¹⁸³ *Ceja v. Stewart*, 134 F.3d 1368, 1368-69 (9th Cir. 1998).

¹⁸⁴ *Lackey v. Texas*, 514 U.S. 1045, 1045-46 (1995).

is a doctrine of limitation, that a limit beyond which deterrence is exhausted and retribution is excessive has been reached at some number of years under sentence of death. The method of calculating the Eighth Amendment limit may not be easily agreed upon. Indeed, the line drawn may well be to some extent arbitrary, if no more arbitrary and debatable than maximum sentences for noncapital crimes. An unavoidable degree of arbitrariness and disagreement does not relieve the Supreme Court of the duty to set limits, which the longest serving death row inmates have surely exceeded.¹⁸⁵

In addition to the critical matter of excessive punishment, the opinions of Justices Stevens and Breyer in the *Lackey* cases advance two further arguments for hearing and indeed granting *Lackey* petitions that the Court has endorsed in its capital exclusion cases.

b. The Long Delay Departs from the Traditional Practice Sanctioned by the Constitution

Capital punishment is sanctioned by the U.S. Constitution¹⁸⁶ and is enshrined in its text.¹⁸⁷ However, to the extent that the institutions and practices of the late eighteenth century remain guides to constitutionality today,¹⁸⁸ no such provenance can be claimed for periods of a decade or more awaiting execution or reduction of sentence. The practice of executing within “days or weeks”¹⁸⁹ cannot justify the contemporary national average of twelve years (or even that of the most efficient state, Virginia at 5.4 years¹⁹⁰), much less within two and three decades. Of course, the anti-*Lackey* jurist replies that contemporary review processes produce these

¹⁸⁵ *Lackey* petitioner William Lee Thompson, for example, had been on death row for thirty-two years when his petition was denied in 2009. *Thompson*, 129 S. Ct. at 1303-04.

¹⁸⁶ *Gregg v. Georgia*, 428 U.S. 153, 169 (1976) (“We now hold that the punishment of death does not invariably violate the Constitution.”).

¹⁸⁷ U.S. CONST. amend. V (“No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law.”).

¹⁸⁸ “Evolving standards of decency” determine the extent to which historic practices not deemed “cruel and usual” heretofore continue to pass Eighth Amendment muster. *Trop v. Dulles*, 356 U.S. 86, 99-101 (1958).

¹⁸⁹ *Knight v. Florida*, 528 U.S. 990, 995 (Breyer, J.).

¹⁹⁰ CAPITAL PUNISHMENT 2009, *supra* note 18, at 19 tbl.18.

delays and that prisoners exploit them. But the bare fact that capital punishment has been so constrained by due process as to require long intervals between condemnation and execution does not satisfactorily answer the question of whether such delays should be considered unconstitutionally cruel. They cannot be justified as sanctioned by tradition imported from England, or by the worldview of the Founders, or by American practice prior to the late twentieth century. Decades of uncertainty and waiting were unknown within the tradition.

c. Long Delay Lacks the Legitimacy of Legislative Enactment

A related argument is that the decades-plus-death sentence lacks the legitimacy of legislative enactment. No American legislature has ever authorized this penalty. A rejoinder to this argument is that no legislature has enacted legislation prohibiting the execution of the long serving. In *Ceja v. Stewart*, Judge Fletcher offers an explanation for this lack of positive endorsement: “There has never been such a sentence imposed in this country—or any other, to my knowledge. Neither Arizona nor any other state would ever enact a law calling for such a punishment.”¹⁹¹ The argument about constitutional tradition and the argument about legislation are related in that both criticize decades-plus-death on the grounds that it is an artifact of the contemporary death-penalty system devoid of the legitimacy that emanates from deliberate choice or acknowledgement within political processes.

d. The Repudiation of Execution Long Delayed by Foreign and International Courts

The Supreme Court’s openness to the persuasive force of the decisions of foreign and international courts is a thread that runs through its Eighth Amendment capital jurisprudence. In the most extensive discussion of foreign and international law in its *Lackey* cases,¹⁹² Justice Breyer canvasses the “growing number of courts outside the United States . . . that accept or assume the lawfulness of the death penalty”¹⁹³ that have held that delay is a factor which may

¹⁹¹ *Ceja v. Stewart*, 134 F.3d 1368, 1369 (9th Cir. 1999).

¹⁹² *Knight*, 528 U.S. at 995-97.

¹⁹³ *Id.* at 995.

render execution inhuman, degrading and cruel. “[P]articularly instructive” are the opinions of nations that share our legal traditions.¹⁹⁴ Famously, the Judicial Committee of the Jamaican Privy Council imposed a strict five-year limit on the length of detention after which execution was no longer legal.¹⁹⁵ Justice Breyer also noted that the Supreme Court of India requires that delay must be taken into account in sentencing¹⁹⁶ and the Supreme Court of Zimbabwe¹⁹⁷ bans execution outright in the case of delay.¹⁹⁸ He expressed concern that the decision¹⁹⁹ of the European Court of Human Rights prohibiting extradition because of long delay, the so-called “death row syndrome,” is cruel treatment prohibited by the European Convention on Human Rights will be followed by other international and national courts as periods of delay grow longer on U.S. death rows.²⁰⁰ This proved a prescient concern in that Canada’s Supreme Court subsequently ruled in part because of long death row delays that Canada would no longer extradite persons facing the death penalty to the United States.²⁰¹

International law and foreign law, particularly European law and the law of the former Commonwealth nations with which we share a legal tradition, offer a measure of support to the *Lackey* claim in that the three most recent capital exclusion cases, *Atkins*, *Roper*, and *Kennedy*, all find foreign and international jurisprudence helpful in resolving Eighth Amendment questions.

VII. *LACKEY-FOR-THE-ELDERLY*

Justices Stevens and Breyer have shown that sound Eighth Amendment jurisprudence supports the *Lackey* claim. Nevertheless, the *Lackey* claim has not won further overt support on the Court in the more than fifteen years since Clarence Lackey’s petition for certiorari was denied. The Court has refused certiorari to petitioners with nearly twice Lackey’s

¹⁹⁴ *Id.* at 997.

¹⁹⁵ *Pratt & Morgan v. Attorney General for Jamaica*, [1993] 1 A.C. 1, 29 (P.C.) (appeal taken from Jam.).

¹⁹⁶ *Sher Singh v. State of Punjab*, A.I.R. 1983 S.C. 465 (India).

¹⁹⁷ *Catholic Commission for Peace & Justice in Zimbabwe v. Attorney General* [1993], 1 ZIMB. L. R. 239,240 269(S) (Aug. 4, 1999).

¹⁹⁸ *Knight*, 528 U.S. at 995-96.

¹⁹⁹ *Soering v. United Kingdom*, 11 Eur. Ct. H.R. 439 (1989).

²⁰⁰ *Knight*, 528 U.S. at 996.

²⁰¹ *United States v. Burns*, [2001] S.C.R. 283 (Can.).

seventeen-year tenure on death row.²⁰² Perhaps it is time for the more modest proposal of *Lackey* relief for the elderly. A petition for an elderly inmate marshals all the support for the general *Lackey* claim and builds on the special claims of the aged. It trades on the modest scale of the reform it requires.

It should be clear at the outset that the issue raised by the elderly claim is not the death sentence meted out upon conviction but whether it is constitutional to continue to subject persons who have achieved old age on death row to the threat of execution after long delay from the time of condemnation. If properly convicted and sentenced after the commission of a capital crime, it is assumed that the elderly of death row were culpable and eligible for capital punishment. What then distinguishes the elderly of death row from their younger peers?

I have argued that the elderly ought to be relieved of continuing to live in death row conditions whether or not they remain under threat of execution. Whether or not relieved of death row conditions of confinement, the elderly will have logged long detention in all but the most extraordinary cases of late-life conviction. If we continue to permit death row conditions for the elderly, their fragility due to aging processes and death row incarceration argue that their excess suffering renders their execution an acute violation of Eighth Amendment retribution norms. If they have been spared some years of death row incarceration, the prolongation of the ordeal of waiting for execution should be sufficient to exceed tolerable retributive standards. This argument rests on the proposition that frailty makes such forms of stress too intense to pass Eighth Amendment muster. The decision to spare the elderly from execution would be an application of a recognized protective norm systematically respected in society. The elderly are exempted wholly or in part from social obligations such as labor and military service on the basis of their frailty.

We do not expect persons in the decline of old age to meet the challenges posed to those in the prime of life; we exempt and protect the old as we do the young. Leroy Nash at ninety-three or Clarence Ray Allen at seventy-six were guilty of heinous crimes and served many years before their deaths.²⁰³ Yet the

²⁰² See, e.g., *Johnson v. Bredeesen*, 130 S. Ct. 541 (2009) (denying certiorari to petitioner who had been on death row for twenty-nine years); *Knight*, 528 U.S. 990 (denying certiorari to petitioner who had been on death row for twenty-five years).

²⁰³ Nash served twenty-seven years on death row before his death in 2010. Paul Rubin, *Nation's Oldest Death Row Inmate Will Never Be Executed*, PHOENIX NEW TIMES (Dec. 4, 2008), <http://www.phoenixnewtimes.com/2008-12-04/news/nation-s-oldest-death->

specter of executing the demented and the multiply disabled aged shames us by violating a protective norm. They may deserve execution but they are no longer fit for execution. The Eighth Amendment significance of old age under condemnation is therefore not about acknowledging an evolution in values but rather recognizing that familiar values have become salient because of changes in the institution of capital punishment.

CONCLUSION

The long delays between pronouncement of sentence and execution, and the considerable uncertainty about whether any condemned man or woman will be executed in our system of capital punishment, have given rise to a new form of cruelty unknown to our ancestors. Delay is not aberrant but normal. It cannot be purged from the system without doing unacceptable violence to constitutionally mandated due process. It cannot be reduced without money for representation and court resources that have not been allocated to this purpose and will not be forthcoming. If the general *Lackey* claim is a victim of its consequences, perhaps we can manage a modest special case, *Lackey-for-the-Elderly*.

row-inmate-will-never-be-executed/. Allen served twenty-three years on death row before his execution in 2006. *Allen v. Ornoski*, 435 F.3d 946 (9th Cir. 2006).