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The "Agony of Suspense": How Protracted Death Row Confinement Gives Rise to an Eighth Amendment Claim of Cruel and Unusual Punishment

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I. Introduction

In 1995, Texas death row inmate Clarence Lackey argued that the execution of a prisoner who had spent seventeen years on death row would violate the Eighth Amendment's prohibition of cruel and unusual punishment.[1] The rationale behind the Eighth Amendment argument rested on the severe punishment Lackey had already received during his protracted death row confinement.[2] Lackey contended that years of death row imprisonment, coupled with the extreme psychological anguish caused by such confinement, constitutionally deprived Texas of the power to inflict a death sentence.[3]

Although the Supreme Court's denial of certiorari in *Lackey v. Texas*[4] leaves Lackey's question temporarily unanswered, Justice Stevens noted the novelty and significance of Lackey's claim and wrote a memorandum

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1. Lackey v. Texas, 115 S. Ct. 1421, 1421-22 (1995). The Eighth Amendment of the United States Constitution states: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

2. *See Lackey*, 115 S. Ct. at 1421 (considering Lackey's argument that protracted death row confinement rendered execution unconstitutionally cruel and unusual); *see also* Petitioner's Pre-Hearing Brief at 17, Lackey v. Scott, 885 F. Supp. 958 (W.D. Tex. 1995) (No. MO-95-CA-68-F) (stating that Lackey's protracted death row confinement rendered execution unconstitutionally cruel and unusual punishment).

3. *See Lackey*, 115 S. Ct. at 1421 (considering argument that state had exacted severe punishment by 17-year death row incarceration and that infliction of death penalty after 17-year delay would exceed Eighth Amendment limits on state action).

4. *Id.*

concurring in the Court's denial of certiorari.[5] His concurring memorandum (*Lackey* Memorandum) briefly explored the constitutionality of imposing a death sentence after lengthy death row confinement.[6] Justice Stevens observed that the Court has largely relied on two factors in finding capital punishment constitutionally permissible.[7] First, the Constitution's framers (Framers) tolerated capital punishment.[8] Second, the death penalty traditionally has furthered the public goals of retribution and deterrence.[9] The *Lackey* Memorandum questioned whether either justification retains force after a prisoner has spent seventeen years on death row.[10] Historically, the Framers did not anticipate protracted imprisonment before execution of a death sentence.[11] Moreover, a lengthy and severe incarceration followed by execution of a death sentence may be overly retributive.[12] Finally, any additional deterrent value of a seventeen-year delay followed by execution, as compared with a seventeen-year delay followed by life imprisonment, seems minimal.[13] In the absence of the factors that justify an execution's constitutionality, Justice Stevens concluded that imposition of death after prolonged delay may provide such diminished returns as to be patently excessive under the Eighth Amendment.[14]

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5. *See id.* at 1421-22 (Stevens, J., respecting denial of certiorari) (noting that, although question was novel and important, Court would postpone review until lower courts addressed *Lackey* issue). Justice Stevens observed that the Court's denial of certiorari would allow lower courts to "serve as laboratories in which the issue receives further study before it is addressed by this Court." *Id.* at 1422 (citing McCray v. New York, 461 U.S. 961, 963 (1983)). Justice Breyer agreed with Justice Stevens that the *Lackey* question raised an important and undecided issue. *Id.* (Breyer, J., agreeing that *Lackey* issue is important and undecided).

6. *Id.* at 1421-22 (Stevens, J., respecting denial of certiorari).

7. *Id.* (Stevens, J., respecting denial of certiorari).

8. *Id.* (Stevens, J., respecting denial of certiorari) (citing Gregg v. Georgia, 428 U.S. 153, 177 (1976) (plurality opinion)).

9. *Id.* (Stevens, J., respecting denial of certiorari) (citing *Gregg*, 428 U.S. at 177 (plurality opinion)).

10. *Id.* at 1422 (Stevens, J., respecting denial of certiorari).

11. *See id.* at 1421 (Stevens, J., respecting denial of certiorari) (commenting that "a [17-year] delay, if it ever occurred, certainly would have been rare in 1789").

12. *See id.* (Stevens, J., respecting denial of certiorari) (observing that 17-year death row stay is severe punishment that arguably satisfies state interest in retribution).

13. *Id.* (Stevens, J., respecting denial of certiorari).

14. *See id.* at 1422 (Stevens, J., respecting denial of certiorari) (recognizing that, in absence of Court's justifying factors, capital punishment is without penological value and noting that punishment without penological value violates Eighth Amendment); *see also* Gomez v. Fierro, 65 U.S.L.W. 3291 (U.S. Oct. 15, 1996) (No. 95-1830) (Stevens & Breyer, JJ., dissenting) (noting that "[d]elay in the execution of judgments imposing the death penalty frustrates the public interest in deterrence and eviscerates the only rational

Since the issuance of Justice Stevens's memorandum, several courts have considered claims similar to Clarence Lackey's.[15] A *Lackey*-type claim (*Lackey* claim) states that execution after protracted death row confinement is cruel and unusual punishment prohibited by the Eighth Amendment of the Constitution.[16] The Eighth Amendment argument hinges on the torturous psychological conditions prisoners experience during prolonged death row stays.[17] Due to nearly insurmountable procedural hurdles, however, courts have yet to decide the Eighth Amendment claim on its merits.[18]

This Note argues that execution after protracted death row confinement violates the Eighth Amendment.[19] Part II explores the documented mental

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justification for that type of punishment").

15. *See, e.g.*, White v. Johnson, 79 F.3d 432, 437 (5th Cir. 1996) (raising *Lackey*-type Eighth Amendment delay claim); Bonin v. Calderon, 77 F.3d 1155, 1160 (9th Cir. 1996) (same); Stafford v. Ward, 59 F.3d 1025, 1028 (10th Cir. 1995) (same); Turner v. Jabe, 58 F.3d 924, 926 (4th Cir. 1995) (same); McKenzie v. Day, 57 F.3d 1461, 1463 (9th Cir. 1995) (same); Fearance v. Scott, 56 F.3d 633, 635 (5th Cir. 1995) (same); Free v. Peters, 50 F.3d 1362, 1362 (7th Cir. 1995) (same); Porter v. Singletary, 49 F.3d 1483, 1485 (11th Cir. 1995) (same).

16. *See, e.g.*, White v. Johnson, 79 F.3d 432, 437 (5th Cir. 1996) (considering prisoner's argument that execution after 17-year death row delay violates Eighth Amendment); Bonin v. Calderon, 77 F.3d 1155, 1160 (9th Cir. 1996) (considering prisoner's argument that execution after 14-year death row delay violates Eighth Amendment); Stafford v. Ward, 59 F.3d 1025, 1028 (10th Cir. 1995) (considering prisoner's argument that execution after 15-year death row delay violates Eighth Amendment); Turner v. Jabe, 58 F.3d 924, 926 (4th Cir. 1995) (same); McKenzie v. Day, 57 F.3d 1461, 1463 (9th Cir. 1995) (considering petitioner's argument that execution after 20-year death row delay violates Eighth Amendment); Fearance v. Scott, 56 F.3d 633, 635 (5th Cir. 1995) (considering petitioner's argument that execution after 10-year death row delay violates Eighth Amendment); Free v. Peters, 50 F.3d 1362, 1362 (7th Cir. 1995) (considering petitioner's argument that execution after 20-year death row delay violates Eighth Amendment); Porter v. Singletary, 49 F.3d 1483, 1485 (11th Cir. 1995) (considering petitioner's argument that execution after 17-year death row delay violates Eighth Amendment).

17. *See* Lackey v. Texas, 115 S. Ct. 1421, 1421 (1995) (Stevens, J., respecting denial of certiorari) (commenting on severe mental suffering caused by death sentence and noting debilitating psychological effects of prisoner's uncertainty as to date of execution).

18. *See, e.g.*, White v. Johnson, 79 F.3d 432, 437 (5th Cir. 1996) (rejecting Eighth Amendment delay claim as *Teague*-barred); Bonin v. Calderon, 77 F.3d 1155, 1160 (9th Cir. 1996) (rejecting *Lackey* claim as barred by abuse of habeas writ doctrine); Stafford v. Ward, 59 F.3d 1025, 1028 (10th Cir. 1995) (same); Turner v. Jabe, 58 F.3d 924, 926 (4th Cir. 1995) (same); McKenzie v. Day, 57 F.3d 1461, 1463 (9th Cir. 1995) (same); Fearance v. Scott, 56 F.3d 633, 635 (5th Cir. 1995) (same); Lackey v. Scott, 52 F.3d 98, 100 (5th Cir. 1995) (rejecting Eighth Amendment delay claim as *Teague*-barred); Free v. Peters, 50 F.3d 1362, 1362 (7th Cir. 1995) (rejecting *Lackey* claim as barred by abuse of habeas writ doctrine); Porter v. Singletary, 49 F.3d 1483, 1485 (11th Cir. 1995) (same).

19. Readers should note that, on April 24, 1996, President Clinton signed into law the Antiterrorism and Effective Death Penalty Act of 1996 (ATEDA). Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214. ATEDA sub-

suffering caused by lengthy death row incarceration.[20] Part III examines the substantive Eighth Amendment issues underlying *Lackey* claims, including the death row delay[21] and the prolonged mental suffering[22] that trigger Eighth Amendment protections. Part IV addresses the procedural hurdles associated with *Lackey* claims and proposes solutions for these dilemmas.[23] Part V discusses the policy implications of *Lackey* claims, including the length and types of death row delay that give rise to an Eighth Amendment claim, as well as an appropriate remedy for such claims.[24]

II. Mental Suffering Caused by Protracted Death Row Confinement

The *Lackey* claim rests on the well-documented fact that condemned prisoners experience severe mental suffering while awaiting execution:

> For over two years, [death row prisoner] Henry Arsenault "lived on death row feeling as if the [c]ourt's sentence were slowly being carried out." Arsenault could not stop thinking about death. Despite several stays, he never believed he could escape execution. "There was a day to day choking, tremulous fear that quickly became suffocating." If he slept at all, fear of death snapped him awake sweating. His throat was clenched so tight he often could not eat. His belly cramped, and he could not move his bowels. He urinated uncontrollably. He could not keep still. And all the while a guard watched him, so he would not commit suicide. The guard was there when he had his nightmares and there when he wet his pants. Arsenault retained neither privacy nor dignity. Apart from the guards he was alone much of the time as the day of his

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stantially shortens filing deadlines for federal habeas corpus petitions, *see* 28 U.S.C.A. §§ 2244(d)(1)(A), 2263(a)-(b) (West Supp. 1996), and limits issues that prisoners can raise in the habeas stages of capital proceedings, *see id.* § 2264(a)(1)-(3). As part of ongoing congressional habeas reform efforts, ATEDA effectively accelerates the pace of executions and will most likely result in fewer cases of protracted death row confinement. *See* Jeanne-Marie S. Raymond, Note, *The Incredible Shrinking Writ:* Habeas Corpus *Under the Antiterrorism and Effective Death Penalty Act of 1996*, CAP. DEF. J., Dec. 1996, at 52, 52-56 (discussing ATEDA and its effects).

20. *See infra* notes 25-38 and accompanying text (examining severe psychological effects of lengthy death row confinement).

21. *See infra* notes 39-77 and accompanying text (discussing how Eighth Amendment prohibits protracted pre-execution delay).

22. *See infra* notes 78-132 and accompanying text (arguing that Eighth Amendment should prohibit mental suffering caused by death row confinement).

23. *See infra* notes 133-87 and accompanying text (discussing procedural bars associated with *Lackey* claims).

24. *See infra* notes 188-250 and accompanying text (discussing policy implications of *Lackey* claim and showing that commutation of death sentence to life imprisonment is appropriate remedy for *Lackey* claim).

> execution neared. Arsenault asked the warden to let him walk to the execution on his own. The time came. He walked to the death chamber and turned toward the chair. Stopping him, the warden explained that the execution would not be for over an hour. Arsenault sat on the other side of the room as the witnesses filed in behind a one-way mirror. When the executioner tested the chair, the lights dimmed. Arsenault heard other prisoners scream. After the chaplain gave him last rites, Arsenault heard the door slam shut and the noise echoing, the clock ticking. He wet his pants. Less than half an hour before the execution, the Lieutenant Governor commuted his sentence. Arsenault's legs would not hold him up. Guards carried him back to his cell. He was trembling uncontrollably. A doctor sedated him. And he was moved off death row.[25]

Accounts of death row describe an atmosphere of total despair and hopelessness.[26] The enforced isolation and extreme security measures of death

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25. District Attorney v. Watson, 411 N.E.2d 1274, 1290 (Mass. 1980) (Liacos, J., concurring) (citations omitted) (quoting Arsenault's description of his death row experience); *see also* Coleman v. Balkcom, 451 U.S. 949, 952 (1981) (Stevens, J., concurring in denial of certiorari) (recognizing that mental pain condemned prisoners suffer is "a significant form of punishment" that "may well be comparable to the consequences of the ultimate step itself"); Furman v. Georgia, 408 U.S. 238, 288 (1972) (Brennan, J., concurring) (commenting that "mental pain is an inseparable part of our practice of punishing criminals by death, for the prospect of pending execution exacts a frightful toll during the inevitable long wait between the imposition of sentence and the actual infliction of death"); People v. Anderson, 493 P.2d 880, 894-96 (Cal.) (finding that death penalty violated California Constitution because it inflicted "psychological torture" on prisoners), *cert. denied*, 406 U.S. 958 (1972), *superseded by constitutional amendment as stated in* People v. Hill, 839 P.2d 984, 984 (Cal. 1992). In *Anderson*, the Supreme Court of California determined:

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

Anderson, 493 P.2d at 894 (citations omitted); *see also* Commonwealth v. O'Neal, 339 N.E.2d 676, 680 (Mass. 1975) (Tauro, J., concurring) (noting that "[t]he convicted felon suffers extreme anguish in anticipation of the extinction of his existence"); Hopkinson v. State, 632 P.2d 79, 209-11 (Wyo. 1981) (Rose, J., dissenting in part) (recognizing "the dehumanizing effects of long imprisonment pending execution"), *cert. denied*, 455 U.S. 922 (1982).

26. *See* Catholic Comm'n for Justice & Peace v. Attorney Gen., No. S.C. 73/93 (Sup. Ct. Zimb. June 24, 1993), *reprinted in* 14 HUM. RTS. L.J. 323, 335 (1993) (noting that "from the moment he enters the condemned cell, the prisoner is enmeshed in a dehumanizing environment of near hopelessness . . . . the sole object is to preserve his life so that he may be executed . . . . [he] is the 'living dead'"), *overruled by* ZIMB. CONST. amend. XIII (amending Declaration of Rights' Section 15).

row result in a dehumanizing, laboratory-like environment.[27]

Moreover, lengthy delays intensify the mental suffering caused by pre-execution confinement.[28] Studies show that prolonged death row incarceration undermines a prisoner's sanity and contributes to the total devastation of the inmate's personality.[29] An "unending, uninterrupted immersion in death"[30] can continue for years while the appellate process

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27. *See* Louis J. West, *Psychiatric Reflections on the Death Penalty, in* VOICES AGAINST DEATH 290-91 (Philip E. Mackey ed., 1976) (noting that death row is "organized and controlled in grim caricature of a laboratory, [in which] the condemned prisoner's personality is subjected to incredible stress for prolonged periods of time"); William A. Schabas, *Execution Delayed, Execution Denied*, 5 CRIM. L.F. 180, 183-84 (1994) (describing death row). Schabas noted:

> Combine a hospital ward for the terminally ill, an institution for the criminally insane, and an ultramaximum security wing in a penitentiary, and one begins to approach the horror of death row. The inherent dangerousness of the inmates, their utter despair, the futility of any efforts at rehabilitation or training all contribute to a carceral environment that combines extreme security measures, confinement to cells for most of the day, and virtual inactivity.

Id. (citation omitted).

28. *See* Note, *Mental Suffering Under Sentence of Death*, 57 IOWA L. REV. 814, 830 (1972) (commenting that "human reaction to the threat of death is a function of the duration, as well as the nature of the threat").

29. *See id.* at 829 (discussing mentally debilitative effects of lengthy death row confinement resulting in "undermining of sanity" and "destruction of spirit"). Death row prisoners use defense mechanisms to combat intense mental suffering. *Id.* Without use of these coping mechanisms, the prisoner experiences disorganization and total capitulation to anxiety. *Id.* (citation omitted). The defense mechanisms, however, produce aberrant patterns of behavior including denial of possible execution, denial by living only in the present, obsessive preoccupation with religious or intellectual matters, projection, and delusion. *Id.* at 828 & n.78 (citation omitted).

30. Petition for Writ of Habeas Corpus at 58, Turner v. Jabe (Va. May 22, 1995) (No. 95-0777). Convicted capital offender Willie Lloyd Turner, executed in 1995, described his death row experience:

> It's the unending, uninterrupted immersion in death that wears on you so much. It's the parade of friends and acquaintances who leave for the death house and never come back, while your own desperate and lonely time drains away. It's the boring routine of claustrophobic confinement, punctuated by eye-opening dates with death that you helplessly hope will be averted. It's watching yourself die over the years in the eyes of family and friends, who, with every lost appeal, add to the emotional scar tissue that protects them, long before you're gone, from your death. It's understanding that I was responsible for the death of Mr. Smith and wishing that there was some way that I could undo that one awful moment. It's feeling the pain and sorrow of Mr. Smith's family and wishing that they could understand, even though I know that they could never forgive me. . . . My lawyer tells me that I've spent over 5000 days on death row. Not

plays out.[31] As a prisoner approaches exhaustion of appellate issues, the repeated rescheduling and withdrawal of execution dates exacerbate mental suffering.[32]

Commentators have noted that death row prisoners suffer extreme psychological anguish in anticipation of death.[33] The onset of insanity while awaiting execution is not uncommon.[34] The stressful environment and isolation from nearly all human contact create mental agony properly characterized as psychological torture:

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a single waking hour of any of those days has gone by without me thinking about my date with the executioner.

Id.

31. *See, e.g.*, White v. Johnson, 79 F.3d 432, 437 (5th Cir. 1996) (noting that petitioner spent 17 years on death row); Bonin v. Calderon, 77 F.3d 1155, 1160 (9th Cir. 1996) (noting that petitioner spent 14 years on death row); Stafford v. Ward, 59 F.3d 1025, 1028 (10th Cir. 1995) (noting that petitioner spent 15 years on death row); Turner v. Jabe, 58 F.3d 924, 925 (4th Cir. 1995) (same); McKenzie v. Day, 57 F.3d 1461, 1463 (9th Cir. 1995) (noting that petitioner spent 20 years on death row); Fearance v. Scott, 56 F.3d 633, 635 (5th Cir. 1995) (noting that petitioner spent 10 years on death row); Free v. Peters, 50 F.3d 1362, 1362 (7th Cir. 1995) (noting that petitioner spent 20 years on death row); Porter v. Singletary, 49 F.3d 1483, 1485 (11th Cir. 1995) (noting that petitioner spent 17 years on death row).

32. *See* West, *supra* note 27, at 291 (finding that death row delay, especially if punctuated by last-minute reprieves, exacerbates mental suffering).

33. *See* cases cited *supra* note 25 (discussing inevitable mental anguish of death row inmates); *see also* Vicki Quade, *The Voice of Dead Men: Interview with Sister Helen Prejean*, A.B.A. SEC. OF INDIVIDUAL RTS. & RESPS., Summer 1996, at 12, 12-16 (conducting interview with death penalty abolitionist Sister Helen Prejean). Sister Prejean commented:

> Torture is intrinsic to the death penalty. And we can argue about how much torture there is to the electric chair, or gas chamber, or even lethal injections, about what people feel physically.
>
> But I can witness, in fact, that people have died a thousand times mentally before they've died physically. You can't condemn a person to death and not have them anticipate their death, imagine their death, and vicariously experience their death many, many times before they die.
>
> Every one of the men I've accompanied have all had the same nightmare. . . . The same nightmare is they're coming to get me, the guards are holding me down, the execution chamber, I'm fighting, I'm sweating, and I'm yelling, "No, no."
>
> If we can acknowledge that brainwashing is a form of torture, then how long will it take us to acknowledge that sentencing conscious human beings to their death is a form of torture.

Id. at 14.

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

> The raw terror and unabating stress that [the condemned prisoner] experienced was torture; torture in the guise of civilized business in an advanced and humane polity. This torture was not unique, but merely one degrading instance in a legacy of degradation. The ordeals of the condemned are inherent and inevitable in any system that informs the condemned person of his sentence and provides for a gap between sentence and execution. Whatever one believes about the cruelty of the death penalty itself, this violence done the prisoner's mind must afflict the conscience of enlightened government and give the civilized heart no rest.[35]

Penologists,[36] psychiatrists,[37] and jurists[38] agree that a condemned prisoner's mental ordeal approaches the limit of human endurance.

III. Substantive Issues

A. How Prolonged Pre-Execution Delay Implicates the Eighth Amendment

Substantive analysis reveals that the Eighth Amendment embodies a value which prohibits execution after protracted death row incarceration.[39]

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35. District Attorney v. Watson, 411 N.E.2d 1274, 1291 (Mass. 1980) (Liacos, J., concurring) (equating mental stress of death row inmate with psychological torture); *see also* People v. Anderson, 493 P.2d 880, 894 (Cal.), *cert. denied*, 406 U.S. 958 (1972), *superseded by constitutional amendment as stated in* People v. Hill, 839 P.2d 984, 984 (Cal. 1992).

36. *E.g.*, CLINTON T. DUFFY, EIGHTY-EIGHT MEN AND TWO WOMEN 254 (1962) (commenting on lengthy death row incarceration). Duffy, a former warden of California's San Quentin prison, stated: "One night on death row is too long, and the length of time spent there by [some inmates] constitutes cruelty that defies the imagination. It has always been a source of wonder to me that they didn't all go stark, raving mad." *Id.*

37. *See* West, *supra* note 27, at 292 (noting that condemned inmates experience "behavioral aberrations ranging from malingering to acute psychotic breaks"); Harvey Bluestone & Carl L. McGahee, *Reaction to Extreme Stress: Impending Death by Execution*, 119 AM. J. PSYCHIATRY 393, 393 (1962) (commenting that death sentence inflicts "the greatest of stresses"). *See generally* Johnnie L. Gallemore, Jr. & James H. Panton, *Inmate Responses to Lengthy Death Row Confinement*, 129 AM. J. PSYCHIATRY 167, 171 (1967) (discussing death row inmates' psychiatric interviews and psychological testing to ascertain effects of extended death row confinement).

38. *See* Furman v. Georgia, 408 U.S. 238, 288 (1972) (Brennan, J., concurring) (comparing condemned prisoners' mental suffering to suffering Court found impermissibly cruel in *Trop v. Dulles*, 356 U.S. 86 (1958)); *Watson*, 411 N.E.2d at 1283 (finding Massachusetts capital punishment statute impermissibly cruel and concluding that "death penalty is unacceptable under contemporary standards of decency in its unique and inherent capacity to inflict pain . . . the mental agony is, simply and beyond question, a horror").

39. *See infra* notes 40-132 and accompanying text (examining how Eighth Amendment prohibits inordinate death row delay and severe mental suffering).

In the *Lackey* Memorandum, Justice Stevens duly noted that imposition of the death penalty does not violate the Constitution[40] and stated that the Court has relied on two factors in finding infliction of the death penalty to be constitutionally acceptable.[41] First, the Framers considered capital punishment permissible.[42] Second, the death penalty serves both retributive and deterrent functions.[43] Justice Stevens observed that neither factor may retain force after years of death row imprisonment.[44] Absent the Court's justifying factors, capital punishment may provide such diminished social and public returns as to be prohibited by the Eighth Amendment.[45]

The first factor — whether the Framers found a punishment unacceptable when the United States adopted the Bill of Rights — requires an examination of past practices. If the Framers considered a punishment cruel and unusual, the Court *a fortiori* finds the same punishment cruel and unusual today.[46] Although little evidence exists as to the Framers' intent regarding the Cruel and Unusual Punishments Clause,[47] history demonstrates that

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40. *See* Lackey v. Texas, 115 S. Ct. 1421, 1421 (1995) (Stevens, J., respecting denial of certiorari) (stating that Court has found that capital punishment is not per se unconstitutional).

41. *See id.* (Stevens, J., respecting denial of certiorari) (noting that Court has applied two factors in determining constitutionality of death penalty (citing Gregg v. Georgia, 428 U.S. 153, 177, 183 (1976) (plurality opinion))).

42. *See id.* (Stevens, J., respecting denial of certiorari) (stating that Court has found capital punishment constitutional, in part, because Framers considered capital punishment permissible when United States adopted Bill of Rights (citing *Gregg*, 428 U.S. at 177 (plurality opinion))).

43. *See id.* (Stevens, J., respecting denial of certiorari) (noting that Court has found capital punishment constitutional, in part, because it serves "two principal social purposes: retribution and deterrence" (quoting *Gregg*, 428 U.S. at 183 (plurality opinion))).

44. *Id.* (Stevens, J., respecting denial of certiorari).

45. *Id.* at 1422 (Stevens, J., respecting denial of certiorari); *see* Furman v. Georgia, 408 U.S. 238, 312 (1972) (White, J., concurring) (determining that capital punishment is constitutional only "when it [is] justified by the social ends it [is] deemed to serve"); *see also Gregg*, 428 U.S. at 183 (plurality opinion) (finding that punishment imposed must have penological justification without which punishment is gratuitous infliction of suffering).

46. *See, e.g.*, Stanford v. Kentucky, 492 U.S. 361, 368 (1989) (rejecting claim that execution of juveniles violated Eighth Amendment because Framers did not consider capital punishment of juveniles cruel and unusual when United States adopted Bill of Rights); Penry v. Lynaugh, 492 U.S. 302, 330 (1989) (noting that, at minimum, Eighth Amendment prohibits punishments considered cruel and unusual when Framers adopted Bill of Rights); Ford v. Wainwright, 477 U.S. 399, 405 (1986) (determining that proposed execution of insane prisoner violated Eighth Amendment because Framers found execution of insane prisoners constitutionally impermissible when United States adopted Bill of Rights).

47. *See Furman*, 408 U.S. at 258-62 (Brennan, J., concurring) (stating that there is "very little evidence of the Framers' intent in including the Cruel and Unusual Punishments

early American courts and legislatures did not permit prolonged death row delay.[48] Rather, these courts and legislatures advocated swift infliction of the death penalty to further penological goals and to prevent the condemned prisoner from suffering unnecessarily.[49]

The Court has also looked to the English common law to illuminate the Framers' constitutional vision.[50] A recent decision by the Judicial Committee of the Privy Council[51] indicates that English common law did not

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Clause among those restraints upon the Government enumerated in the Bill of Rights").

48. *See* Lackey v. Texas, 115 S. Ct. 1421, 1422 (1995) (Stevens, J., respecting denial of certiorari) (noting that protracted death row delay was rare in 1789 and concluding that Framers' practice could not justify denying *Lackey* claim); PHILIP ENGLISH MACKEY, HANGING IN THE BALANCE: THE ANTI-CAPITAL PUNISHMENT MOVEMENT IN NEW YORK STATE, 1776-1861, at 17, 20 (Frank Freidel ed., 1982) (demonstrating that New York's colonial laws required execution of convicted felons after fourth day following sentencing at trial); 1 ROBERT GREEN MCCLESKEY, THE WORKS OF JAMES WILSON 45 (1967) (commenting that delay in execution undermines social value of punishment). In the early 1790s, James Wilson, a Framer of the Constitution and an early U.S. Supreme Court Justice, stated:

> The principles both of utility and of justice require, that the commission of a crime should be followed by speedy infliction of the punishment . . . . After conviction, the punishment assigned to an inferior offen[s]e should be inflicted with much expedition. This will strengthen the useful association between them; one appearing as the immediate and unavoidable consequence of the other. When a sentence of death is pronounced, such an interval should be permitted to elapse before its execution, as will render the language of political expediency consonant to the language of religion. Under these qualifications, the speedy punishment should form a part of every system of criminal jurisprudence.

Id.; *see also* EDGAR J. MCMANUS, LAW AND LIBERTY IN EARLY NEW ENGLAND 182 (1993) (stating that condemned prisoners in early New England "were put to death without moral qualms, but they were dispatched swiftly without unnecessary suffering"); BARRETT PRETTYMAN, JR., DEATH AND THE SUPREME COURT 307 (1961) ("Before the beginning of the twentieth century, substantial delay between trial and execution was almost unthinkable, in part because of the wear and tear on the defendant. As one lawyer put it in 1774: 'The cruelty of an execution after respite is equal to many deaths, and therefore there is rarely an instance of it.'"(quoting unnamed source)).

49. *See* 1 MCCLESKEY, *supra* note 48, at 45 (noting that early American jurists believed speedy infliction of death penalty was necessary to serve ends of justice); PRETTYMAN, *supra* note 48, at 307 (stating that early Americans were aware that death row delay caused severe mental suffering in condemned prisoners).

50. *See Ex parte* Grossman, 267 U.S. 87, 108-09 (1925) (finding that Constitution "cannot be interpreted safely except by reference to the common law and to British institutions as they were when the instrument was framed and adopted"); Kempner v. United States, 195 U.S. 100, 125 (1904) (concluding that "[i]n ascertaining the meaning of a phrase from the Bill of Rights it must be construed with reference to the [English] common law from which it was taken"); *Ex parte* Weeks, 59 U.S. 307, 311 (1856) (stating that Court must interpret Constitution according to English laws with which Framers were familiar).

51. *See infra* note 128 and accompanying text (describing authority of Privy Council).

condone protracted pre-execution confinement.[52] In 1689, the English Declaration of Rights — which prohibited "cruell and unusuall Punishments" — took shape from the English common law.[53] Commonwealth jurists have suggested that the English Declaration of Rights, like the English common law, prohibited imposition of the death penalty after prolonged incarceration.[54]

The Framers directly incorporated the English Declaration of Rights' cruel and unusual punishments clause into the Eighth Amendment.[55] The

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52. *See* Pratt v. Attorney Gen., [1994] 2 App. Cas. 1 (P.C. 1993) (appeal taken from Jam.) (en banc) (finding that execution of two Jamaican citizens after 14-year death row incarceration constituted impermissibly cruel punishment), *reprinted in* 33 I.L.M. 364, 366-68 (1994). In *Pratt*, the Judicial Committee of the Privy Council of the United Kingdom (Privy Council) asserted that the United Kingdom has always carried out capital punishment expeditiously after sentencing, within a matter of weeks or, in the event of an appeal to the House of Lords, within a matter of months: "Delays in terms of years are unheard of." *Pratt*, 33 I.L.M. at 365. The Privy Council noted "the pre-existing common law practice that execution followed as swiftly as practical after sentence," *id.* at 369, and commented that "before independence [from England] the law would have protected a . . . citizen from being executed after unconscionable delay." *Id.* at 379. The Privy Council concluded:

> It is difficult to envisage any circumstance in which in England a condemned man would have been kept in prison for years awaiting execution. But if such a situation had been brought to the attention of the court their lordships do not doubt that the judges would have stayed the execution to enable the prerogative of mercy to be exercised and the sentence commuted to one of life imprisonment.

Id. at 367.

53. An Act for Declaring the Rights and Liberties of the Subject and Settling the Succession of the Crown, 1689, 1 W. & M., ch. 2, § 10 (Eng.).

54. *See* Riley v. Attorney Gen., [1983] 1 App. Cas. 719, 734-35 (P.C. 1983) (appeal taken from Jam.) (Lords Scarman & Brightman, dissenting) (concluding that "the jurisprudence of the civilized world . . . recogniz[ing] and acknowledg[ing] that prolonged delay in executing a sentence of death can make the punishment when it comes inhuman and degrading . . . is derived from common law principles and the prohibition against cruel and unusual punishments in the English [Declaration] of Rights"). The *Riley* dissenters additionally noted that "[t]here is a formidable case for suggesting that execution after inordinate delay would have infringed the prohibition against cruel and unusual punishment to be found in Section 10 of the Bill of Rights of 1689." *Id.* at 734. In 1993, a unanimous decision by an en banc Privy Council vindicated the *Riley* dissenters' position. *See Pratt*, 33 I.L.M. at 380 (re-examining *Riley* and concluding that death row delays of more than five years have strong presumption of unconstitutionality); *see also infra* note 128 and accompanying text (describing Privy Council).

55. *See* Harmelin v. Michigan, 501 U.S. 957, 966 (1991) (Scalia, J., concurring) (determining that Section 10 of 1689 English Declaration of Rights is antecedent of Eighth Amendment's Cruel and Unusual Punishments Clause); Anthony F. Granucci, *"Nor Cruel and Unusual Punishments Inflicted": The Original Meaning*, 57 CAL. L. REV. 839, 840 (1969) (noting that Eighth Amendment's Cruel and Unusual Punishments Clause is "a verbatim copy of a prohibition in the English Bill of Rights of 1689").

historical connection between the Eighth Amendment, the 1689 English Declaration of Rights, and the English common law suggests that these bodies of law share similar values.[56] Because the antecedents of the Eighth Amendment prohibited execution after protracted delays,[57] the Eighth Amendment should retain that same value.

Historical evidence does not demonstrate that the Framers tolerated execution after prolonged incarceration.[58] Therefore, infliction of the death penalty after lengthy delay may violate the Eighth Amendment unless the Court's second justifying factor — furtherance of the goals of retribution and deterrence — is met.[59] Although Justice Stevens did not address the

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56. *See supra* notes 50-55 and accompanying text (showing that English common law gave rise to 1689 English Declaration of Rights, which informed Eighth Amendment's Cruel and Unusual Punishments Clause); *see also* Furman v. Georgia, 408 U.S. 238, 319 (1972) (Marshall, J., concurring) (stating that Framers intended Eighth Amendment to retain values of 1689 English Declaration of Rights); *Ex parte* Grossman, 267 U.S. 87, 108-09 (1925) (asserting that courts cannot safely interpret Constitution without reference to English common law and English institutions); Kempner v. United States, 195 U.S. 100, 125 (1904) (concluding that accurate interpretation of Bill of Rights requires deference to English common law); *cf.* VA. CODE ANN. § 1-10 (Michie 1995) (codifying English common law). The English common law is of such precedential importance in Virginia that the General Assembly has codified it: "The common law of England, insofar as it is not repugnant to the principles of the Bill of Rights and Constitution of this Commonwealth, shall continue in full force within the same, and be the rule of decision, except as altered by the General Assembly." *Id.*

57. *See supra* notes 52, 54 and accompanying text (showing that antecedents of Eighth Amendment, including 1689 English Declaration of Rights and English common law, did not sanction protracted confinement before execution of death sentence).

58. *See supra* notes 46-57 and accompanying text (discussing historical evidence that suggests Framers did not tolerate protracted pre-execution delay).

59. *See* Gregg v. Georgia, 428 U.S. 153, 177, 183 (1976) (plurality opinion) (determining that constitutionality of capital punishment largely relies on (1) Framers' tolerance of capital punishment and (2) public goals of retribution and deterrence); *see also Furman*, 408 U.S. at 312-13 (White, J., concurring) (noting that capital punishment's constitutionality hinges on capital punishment's furtherance of public goals). In *Furman*, Justice White stated:

> The imposition and execution of the death penalty are obviously cruel in the dictionary sense. But the penalty has not been considered cruel and unusual punishment in the constitutional sense because it was thought justified by the social ends it was deemed to serve. At the moment that it ceases realistically to further these purposes, however, the emerging question is whether its imposition in such circumstances would violate the Eighth Amendment. It is my view that it would, for its imposition would then be the pointless and needless extinction of life with only marginal contributions to any discernible social or public purpose. A penalty with such negligible returns to the State would be patently excessive and cruel and unusual punishment violative of the Eighth Amendment.

Id. (White, J., concurring).

merits of the *Lackey* claim,[60] he postulated that neither penological goal retains force when prisoners have spent protracted periods of time on death row.[61]

Lackey claimants contend that prolonged death row imprisonment is punishment that satisfies the state's interest in retribution.[62] Indeed, protracted death row delays coupled with execution may result in punishment that exceeds the state's interest in retribution.[63] Although the Court has found the incidental physical pain of execution to be constitutionally permissible,[64] Eighth Amendment analysis turns on whether pain is a *necessary* part of the punishment.[65] Arguably, neither protracted delay nor psychological suffering is inherently necessary to a death sentence.[66] Because long-

60. *See* Lackey v. Texas, 115 S. Ct. 1421, 1422 (1995) (Stevens, J., respecting denial of certiorari) (stating that Court would not rule on merits of *Lackey* question and determining that *Lackey* question would benefit from lower court review).

61. *See id.* at 1421 (Stevens, J., respecting denial of certiorari) (noting that execution after protracted delay may not further public goals of retribution and deterrence); *see also* Gomez v. Fierro, 117 S. Ct. 285, 285 (1996) (Stevens & Breyer, JJ., dissenting) (noting that "[d]elay in the execution of judgments imposing the death penalty frustrates the public interest in deterrence").

62. *See Lackey*, 115 S. Ct. at 1422 (Stevens, J., respecting denial of certiorari) (stating that prisoner's 17-year death row incarceration arguably satisfied state interest in retribution); McKenzie v. Day, 57 F.3d 1461, 1486 (9th Cir. 1995) (Norris, J., dissenting) (noting that petitioner's 20-year death row incarceration arguably satisfied state interest in retribution); Petitioner's Pre-Hearing Brief at 38, Lackey v. Scott, 885 F. Supp. 958 (W.D. Tex. 1995) (No. MO-95-CA-68-F) (contending that state had exacted enough punishment from Clarence Lackey because of his 17-year death row incarceration and asserting that to permit state "to extinguish Lackey's life would, constitutionally speaking, cause the cup to runneth over"); Petition for Writ of Habeas Corpus at 16-28, 44, Turner v. Jabe (Va. May 22, 1995) (No. 95-0777) (describing conditions of Virginia death row and arguing that state lacked legitimate interest to inflict death penalty after petitioner's protracted exposure to death row conditions); *see also* Coleman v. Balkcom, 451 U.S. 949, 952 (1981) (Stevens, J., concurring in denial of certiorari) (recognizing that mental pain suffered by condemned prisoner awaiting execution is significant punishment comparable to punishment of actual execution).

63. *Cf.* Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459, 464 (1947) (determining that Constitution only permits suffering necessary to extinguish life humanely); *In re* Medley, 134 U.S. 160, 172 (1890) (finding that pre-execution solitary confinement and uncertainty of execution date increased punishment of execution).

64. *See Resweber*, 329 U.S. at 464 (asserting that Constitution only permits suffering necessary to form of punishment).

65. *Id.*; *see* Ford v. Wainwright, 477 U.S. 399, 410 (1986) (finding that Eighth Amendment protects condemned prisoners from unnecessary fear and pain); *see also In re* Kemmler, 136 U.S. 436, 447 (1890) (noting that state violates Eighth Amendment when punishment is "more than mere extinguishment of life").

66. *Cf. Resweber*, 329 U.S. at 464 (concluding that Constitution only permits suffering necessary to extinguish life humanely).

time death row inmates undergo punishment distinct from execution,[67] and because neither severe mental suffering nor prolonged incarceration is a necessary aspect of execution,[68] *Lackey* claimants may experience gratuitous pain that is violative of the Eighth Amendment.[69]

Moreover, the Court has found that the deterrent value of any punishment depends on the speed with which the state administers a sentence.[70] Without the swift imposition of penalties, the deterrent value of punishment erodes.[71] Because the deterrent value of even a speedily imposed death

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67. *See Balkcom*, 451 U.S. at 952 (Stevens, J., concurring in denial of certiorari) (stating that condemned prisoner awaiting execution suffers mental pain that is "a significant punishment" comparable to actual execution); *Medley*, 134 U.S. at 172 (noting that condemned prisoner's mental suffering amounts to an increase in punishment of execution); *cf.* People v. Anderson, 493 P.2d 880, 894 (Cal.) (finding capital punishment cruel because of dehumanizing effect of death row imprisonment), *cert. denied*, 406 U.S. 958 (1972), *superseded by constitutional amendment as stated in* People v. Hill, 839 P.2d 984, 984 (Cal. 1992); Solesbee v. Balkcom, 339 U.S. 9, 14 (1950) (Frankfurter, J., dissenting) (finding that onset of insanity while awaiting execution is not uncommon).

68. *Cf. Ford*, 477 U.S. at 410 (determining that Eighth Amendment protects condemned prisoners from unnecessary fear and pain); *Resweber*, 329 U.S. at 463 (finding that Eighth Amendment prohibits unnecessary pain in execution of death sentence); *Kemmler*, 136 U.S. at 447 (asserting that death penalty violates Eighth Amendment when execution is "something more than mere extinguishment of life").

69. Lackey v. Texas, 115 S. Ct. 1421, 1421-22 (1995) (Stevens, J., respecting denial of certiorari); *see* Gregg v. Georgia, 428 U.S. 153, 183 (1976) (plurality opinion) (concluding that Eighth Amendment prohibits gratuitous infliction of suffering); Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459, 463 (1947) (noting Eighth Amendment prohibition of "unnecessary pain" and determining that Constitution only permits suffering necessary to extinguish life humanely).

70. *See* Coleman v. Balkcom, 451 U.S. 949, 952 (1981) (Stevens, J., concurring in denial of certiorari) (determining that punishment's deterrent value hinges on promptness with which state inflicts punishment); Coppedge v. United States, 369 U.S. 438, 449 (1962) (commenting that delay undermines deterrent function of punishment). In *Coppedge*, the Court stated:

> When society acts to deprive one of its members of his life, liberty or property, it takes its most awesome steps. No general respect for, nor adherence to, the law as a whole can well be expected without judicial recognition of the paramount need for prompt, eminently fair, and sober criminal law procedures . . . . [In particular], the preference to be accorded to criminal appeals recognizes the need for speedy disposition of such cases. Delay in the final judgement of conviction, including its appellate review, unquestionably erodes the efficacy of law enforcement.

Id.

71. *See Coppedge*, 369 U.S. at 449 (stating that delay undermines public's adherence to law); Justice Lewis Powell, *Commentary: Capital Punishment*, 102 HARV. L. REV. 1035, 1035 (1989) (noting that "years of delay between sentencing and execution . . . undermines the deterrent effect of capital punishment and reduces public confidence in our criminal justice system").

penalty is debatable,[72] execution after years of delay logically offers even less in furtherance of that goal.[73]

Courts cannot rely on the Framers' intent to justify execution after protracted death row confinement.[74] Furthermore, the punishment *Lackey* claimants experience may be excessively retributive[75] and offers little, if any, deterrent effect.[76] In the absence of the Court's justifying factors, imposition of a death sentence after lengthy delay should be considered cruel and unusual punishment within the meaning of the Eighth Amendment.[77]

B. How Mental Suffering Implicates the Eighth Amendment

Although delay significantly undermines capital punishment's historical and penological justifications,[78] focusing solely on the length of confinement

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72. *See* Harris v. Alabama, 115 S. Ct. 1031, 1038 & n.9 (1995) (Stevens, J., dissenting) (noting that research studies fail to show that death penalty has deterrent effect and stating that research studies show capital punishment actually increases levels of violence (citing William J. Bowers & Glenn L. Pierce, *Deterrence or Brutalization: What Is the Effect of Executions?*, 26 CRIME & DELINQ. 453-84 (1980) (noting that controlled, 56-year study in New York state revealed that average of two additional homicides occurred in month following execution); Robert M. Morgenthau, *What Prosecutors Won't Tell You*, N.Y. TIMES, Feb. 7, 1995, at A25 (finding that experienced prosecutors believe that "by their brutalizing and dehumanizing effect, executions cause more murders than they prevent")); *see also* Sawyer v. Whitley, 505 U.S. 333, 357 (1992) (Blackmun, J., concurring) (doubting that death penalty performs meaningful deterrent function); Judge Alex Kozinski, *Death: The Ultimate Run-On Sentence*, 46 CASE WEST. RES. L. REV. 1, 25 (1995) ("The death penalty, as we now administer it, has no deterrent value because it is imposed so infrequently and so freakishly."); *cf.* Olmstead v. United States, 277 U.S. 438, 485 (1928) (Frankfurter, J., dissenting) ("[G]overnment is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious.").

73. *See Lackey*, 115 S. Ct. at 1421-22 (Stevens, J., respecting denial of certiorari) (stating that deterrent value of execution after protracted confinement seems minimal); *see also* 141 CONG. REC. S7804 (daily ed. June 7, 1995) (statement of Sen. Specter) (commenting that "in the current context in which habeas corpus appeals now run for as long as a couple of decades, the deterrent effect of capital punishment has been virtually eliminated").

74. *See supra* notes 46-56 and accompanying text (discussing historical evidence which shows that Framers did not tolerate protracted pre-execution delay).

75. *See supra* notes 62-69 and accompanying text (noting that protracted death row confinement arguably satisfies state interest in retribution and asserting that death penalty after prolonged delay may exceed state interest in retribution).

76. *See supra* notes 70-73 and accompanying text (discussing minimal deterrent effect gained by execution after protracted death row confinement).

77. *See supra* note 59 and accompanying text (noting that constitutionality of death sentence largely hinges on (1) evidence of Framers' intent and (2) furtherance of social or public purpose).

78. *See supra* notes 39-77 and accompanying text (discussing constitutionality of death row delays and showing how delay undermines capital punishment's historical and penological justifications).

disregards the full extent of Lackey's Eighth Amendment argument.[79] A *Lackey* claim argues that, in addition to delay, the severe mental suffering death row inmates experience renders execution constitutionally impermissible.[80] Although the Court has yet to find that death row's psychological impact exceeds Eighth Amendment limits, judicial treatment of mental suffering demonstrates that psychological pain is, indeed, constitutionally cognizable.[81]

As early as 1890, the Court recognized that pre-execution mental anxiety increases a prisoner's punishment.[82] In *In re Medley*,[83] the Court considered the constitutionality of a Colorado law that mandated pre-execution solitary confinement and allowed prison wardens to conceal execution dates from condemned prisoners.[84] Although the Court ultimately found the Colorado law unconstitutional on ex post facto grounds,[85] the Court expressed concern for the condemned prisoner's mental state during pre-execution confinement.[86] The Court noted that society had long recognized solitary confinement as an additional punishment of the "most important and painful character."[87] The Court also observed that solitary confinement caused undesirable psychological effects[88] and that the punishment's severity

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79. *Cf.* Note, *supra* note 28, at 830 (stating that psychological reaction to death sentence is function of both duration of threat and nature of threat).

80. *See* Lackey v. Texas, 115 S. Ct. 1421, 1422 n.1 (1995) (Stevens, J., respecting denial of certiorari) (noting prisoner's argument that severe mental suffering experienced during prisoner's protracted death row confinement rendered execution constitutionally impermissible); Petition for Writ of Habeas Corpus at 45, Turner v. Jabe (Va. May 22, 1995) (No. 95-0777) (challenging constitutionality of inflicting death penalty after prisoner endured severe mental suffering during 15-year death row incarceration).

81. *See, e.g.*, Hudson v. McMillan, 503 U.S. 1, 16 (1992) (Blackmun, J., concurring) (recognizing psychological pain as constitutionally cognizable); Furman v. Georgia, 408 U.S. 238, 271 (1972) (Brennan, J., concurring) (commenting that Framers recognized cruelty other than cruelty of punishments causing physical pain); Trop v. Dulles, 356 U.S. 86, 102 (1958) (finding punishment of expatriation unconstitutional because of punishment's unconstitutionally cruel psychological effects); Smith v. Aldingers, 999 F.2d 109, 110 n.4 (5th Cir. 1993) (noting that mental or psychological torture can violate Eighth Amendment).

82. *See In re* Medley, 134 U.S. 160, 172 (1890) (determining that condemned prisoner's solitary confinement and uncertainty as to execution date caused mental suffering that increased level of punishment).

83. 134 U.S. 160 (1890).

84. *Id.* at 161-62.

85. *Id.*

86. *See id.* at 168, 171-72 (describing debilitating psychological effects of solitary confinement and uncertainty as to execution date).

87. *Id.* at 171.

88. *Id.* at 168. The Court noted the adverse psychological effects of solitary confine-

had sparked public outrage resulting in the repeal of British laws imposing pre-execution solitary confinement.[89] Finally, the Court noted that the prisoner's uncertainty as to his execution date had needlessly cruel psychological effects.[90]

Medley marked the Court's early acknowledgment of the gratuitous mental suffering that accompanies a death sentence.[91] Although decided on grounds unrelated to the constitutionality of mental suffering, the 1890 opinion shows the Court's awareness that the psychological effects of pre-execution confinement significantly increase the punishment of a death sentence.[92] Given that the *Medley* Court disapproved of the psychological consequences of four weeks of uncertainty,[93] the cruelty of uncertainty presumably applies with even greater force when delay lasts for many years.[94]

Despite *Medley*, Eighth Amendment mental suffering claims met with little success[95] until the Court's 1958 decision in *Trop v. Dulles*.[96] In *Trop*, the Court determined that denationalization of a wartime deserter violated

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ment and described a solitary confinement study showing that:

> A considerable number of the prisoners fell, after even a short confinement, into a semi-fatuous condition, from which it was next to impossible to arouse them, and others became violently insane; others still, committed suicide; while those who stood the ordeal better were not generally reformed, and in most cases did not recover sufficient mental activity to be of any subsequent service to the community.

Id.

89. *See id.* at 170 (noting that Parliament repealed British laws mandating pre-execution solitary confinement because "public sentiment revolted against [the punishment's] severity").

90. *Id.* at 172. The Court commented: "[W]hen a prisoner sentenced to death is confined in the penitentiary awaiting the execution of the sentence, one of the most horrible feelings to which he can be subjected during that time is the uncertainty [creating an] immense mental anxiety amounting to a great increase in the offender's punishment." *Id.*

91. *See id.* (concluding that uncertainty as to execution date increased punishment of execution).

92. *Id.* at 168-72 (finding that condemned prisoner's mental suffering increased severity of death sentence).

93. *Id.* at 161-62.

94. *See* Lackey v. Texas, 115 S. Ct. 1421, 1421 (1995) (Stevens, J., respecting denial of certiorari) (stating that *Medley* Court's findings regarding cruel effects of uncertainty apply with more force when delay lasts for many years).

95. *See* Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459, 473-74 (1947) (rejecting Eighth Amendment mental suffering claim by condemned prisoner who survived state's first attempt at electrocution); McElvaine v. Brush, 142 U.S. 155, 160 (1891) (declining to find that statute mandating pre-execution solitary confinement violated Eighth Amendment).

96. 356 U.S. 86 (1958).

the Eighth Amendment's prohibition of cruel and unusual punishment.[97] In finding denationalization unconstitutionally cruel, the Court emphasized the terrifying psychological effects of statelessness, including fear engendered by an individual's total loss of political rights.[98] The Court found that denationalization's potential consequences caused such severe mental suffering that the Eighth Amendment precluded application of the punishment.[99]

The *Trop* Court recognized that the Eighth Amendment prohibits punishments which (1) undermine human dignity[100] or (2) violate society's "evolving standards of decency" from which the Eighth Amendment derives its meaning.[101] Since the *Trop* decision, commentators have noted that condemned prisoners' mental suffering undermines human dignity[102] and that their prolonged psychological anguish violates society's standards of decency.[103] *Trop*, therefore, is a cornerstone in the Eighth Amendment

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97. *See* Trop v. Dulles, 356 U.S. 86, 103 (1958) (finding that punishment of denationalization inflicted severe mental suffering that violated Eighth Amendment). In *Trop*, the Supreme Court considered whether denationalization violated the Eighth Amendment prohibition of cruel and unusual punishment. *Id.* at 99. The *Trop* Court noted that denationalization stripped citizens of political status and exposed them to potentially disastrous consequences, including discrimination and exile. *Id.* at 101. Additionally, the Court observed that the punishment's severity subjected citizens to "a fate of ever-increasing fear and distress." *Id.* at 102. The Court examined the Eighth Amendment's underlying rationale and found denationalization impermissibly cruel. *Id.* at 108-10. First, the Court noted that the Eighth Amendment exists to ensure human dignity. *Id.* at 100. Next, the Court observed that the Eighth Amendment is neither static nor precise, but draws meaning "from the evolving standards of decency that mark the progress of a maturing society." *Id.* at 101. Because denationalization's psychological consequences undermined human dignity and failed to conform with societal standards of decency, the *Trop* Court held that denationalization exceeded Eighth Amendment limits. *Id.*

98. *Id.* at 101.

99. *See id.* at 101-03 (finding denationalization unconstitutionally cruel because punishment causes fear and severe psychological distress that violates Eighth Amendment).

100. *Id.* at 99.

101. *Id.* at 100-01. In discussing the Eighth Amendment, the Court noted that "the words of the Amendment are not precise, and that their scope is not static [but] draw[s] . . . meaning from the evolving standards of decency that mark the progress of a maturing society." *Id.*; *see also* Weems v. United States, 217 U.S. 349, 378 (1910) (finding that Eighth Amendment prohibition of cruel and unusual punishment "is not fastened to the obsolete, but may acquire meaning as public opinion becomes enlightened by humane justice").

102. *See* District Attorney v. Watson, 411 N.E.2d 1274, 1290-91, 1293 (Mass. 1980) (Liacos, J., concurring) (finding mental anguish of death row prisoners degrading to human dignity); *see also* People v. Anderson, 493 P.2d 880, 894 (Cal.) (stating that death penalty process degrades and brutalizes condemned prisoners), *cert. denied*, 406 U.S. 958 (1972), *superseded by constitutional amendment as stated in* People v. Hill, 839 P.2d 984, 984 (Cal. 1992); *cf.* Solesbee v. Balkcom, 339 U.S. 9, 14 (1950) (Frankfurter, J., dissenting) (noting that onset of insanity while awaiting execution is not uncommon).

103. *See Watson*, 411 N.E.2d at 1283 (finding that capital punishment fails to comport

argument that prolonged psychological anguish renders the death penalty unconstitutionally cruel.[104]

In 1972, the California Supreme Court interpreted *Trop* in the capital context presented by *People v. Anderson*.[105] In *Anderson*, the California court determined that capital punishment violated California's constitutional prohibition of "cruel or unusual punishment."[106] In reaching its decision, the state supreme court first emphasized that the Eighth Amendment prohibits punishments resulting in severe mental suffering.[107] Next, the court analogized denationalization's constitutionally impermissible psychological effects to the experience of prisoners awaiting execution.[108] The court determined that the dehumanizing effects of lengthy pre-execution confinement contributed to capital punishment's cruelty.[109] Because condemned prisoners inevitably undergo "psychological torture" during the lengthy

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with contemporary standards of decency because of mental agony caused by death row incarceration).

104. *See* Trop v. Dulles, 356 U.S. 86, 101-03 (1958) (determining that punishment violates Eighth Amendment when punishment causes mental suffering degrading to human dignity or when punishment fails to conform with evolving standards of decency from which Eighth Amendment derives meaning), *quoted in* Furman v. Georgia, 408 U.S. 238, 289 (1972) (Brennan, J., concurring) (noting that condemned prisoners, like denationalized citizens, suffer "fate of ever-increasing fear and distress"); *Watson*, 411 N.E.2d at 1283 (using *Trop*'s "contemporary standards of decency" test to evaluate constitutionality of mental anguish that death row causes (quoting *Trop*, 356 U.S. at 100-01)); *see also* Note, *supra* note 28, at 830 (analogizing mental suffering denationalization causes to mental suffering that death row causes (citing *Trop*, 356 U.S. at 101)).

105. 493 P.2d 880 (Cal. 1972).

106. *See Anderson*, 493 P.2d at 895 (relying on *Trop* to prohibit capital punishment as "cruel or unusual" within meaning of California Constitution (quoting CAL. CONST. art. I, § 6)), *cert. denied*, 406 U.S. 958 (1972), *superseded by constitutional amendment as stated in* People v. Hill, 839 P.2d 984, 984 (Cal. 1992). In *Anderson*, the California Supreme Court considered whether capital punishment violated California's constitutional prohibition against "cruel or unusual punishment." *Anderson*, 493 P.2d at 894 (quoting CAL. CONST. art. I, § 6). Although the court noted the cruelty of inflicting physical pain, *id.*, the court primarily focused on the psychological effects of death row delay. *Id.* The court observed that the dehumanizing character of lengthy death row confinement undermined human dignity. *Id.* The court also determined that the death penalty process had a degrading and brutalizing psychological effect on condemned individuals. *Id.* Relying on *Trop*, the *Anderson* court determined that condemned prisoners' mental suffering offended contemporary standards of decency. *Id.* at 893, 895. Consequently, the court found capital punishment "cruel or unusual punishment" within the meaning of the California Constitution. *Id.* at 898 (quoting CAL. CONST. art. I, § 6).

107. *Id.* at 895.

108. *Id.*

109. *Id.* at 894.

process of carrying out a death sentence,[110] the court concluded that the California Constitution prohibited capital punishment as unconstitutionally cruel.[111]

In his concurrence to *Furman v. Georgia*,[112] Justice Brennan relied on the California Supreme Court's *Anderson* decision to find capital punishment per se unconstitutional.[113] Justice Brennan observed that mental anguish "exacts a frightful toll" on condemned prisoners.[114] Drawing on the constitutional values articulated in *Trop*,[115] Justice Brennan reinforced the *Anderson* court's findings by concluding that the pre-execution mental suffering experienced by condemned prisoners magnifies the severity of capital punishment.[116]

A United States Supreme Court majority has yet to recognize that the mental suffering endured during prolonged death row confinement implicates the Eighth Amendment.[117] However, a recent appellate decision

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110. *Id.*

111. *Id.* at 895.

112. 408 U.S. 238 (1972).

113. *See* Furman v. Georgia, 408 U.S. 238, 288 (1972) (Brennan, J. concurring) (noting California Supreme Court's conclusion that death penalty process degrades condemned prisoners and determining that unacceptable severity of death penalty hinges, in part, on condemned prisoners' mental anguish (citing People v. Anderson, 493 P.2d 880, 894 (Cal.), *cert. denied*, 406 U.S. 958 (1972), *superseded by constitutional amendment as stated in* People v. Hill, 839 P.2d 984, 984 (Cal. 1992))). In *Furman*, the Court considered whether capital punishment violates the Eighth Amendment when juries have unrestricted discretion to impose either a sentence of life imprisonment or a death penalty. *Id.* at 238. The Court determined that death sentences which juries render without sentencing guidance constitute cruel and unusual punishment. *Id.* All nine justices wrote separate opinions. *Id.* In his concurrence, Justice Brennan concluded that the death penalty is per se unconstitutional because it degrades human dignity. *Id.* at 285 (Brennan, J., concurring). The Brennan concurrence identified four Eighth Amendment principles that determine whether a challenged punishment comports with human dignity. *Id.* at 270 (Brennan, J., concurring). First, a punishment should not be overly severe. *Id.* at 271 (Brennan, J., concurring). Second, the state cannot arbitrarily inflict punishment. *Id.* at 274 (Brennan, J., concurring). Third, punishments must comport with the views of contemporary society. *Id.* at 277 (Brennan, J., concurring) (citing Trop v. Dulles, 356 U.S. 86, 101 n.32 (1958)).. Finally, punishments must be neither excessive nor unnecessary. *Id.* at 279 (Brennan, J., concurring). Because capital punishment failed to satisfy any of the four principles, Justice Brennan concluded that capital punishment violates the Eighth Amendment. *Id.* at 285 (Brennan, J., concurring).

114. *Id.* at 287 (Brennan, J., concurring).

115. *Id.* at 270-79 (Brennan, J., concurring) (citing *Trop*, 356 U.S. at 101 n.32).

116. *Id.* at 287 (Brennan, J., concurring) (relying on *Anderson* and finding that unacceptable severity of death penalty hinges, in part, on condemned prisoners' mental anguish).

117. *See* Lackey v. Texas, 115 S. Ct. 1421, 1421 (1995) (declining to consider death row prisoner's claim that prolonged death row incarceration rendered execution cruel and unusual punishment).

rendered by the Judicial Committee of the Privy Council of the United Kingdom (Privy Council) offers strong support for *Lackey*'s Eighth Amendment argument.[118] In *Pratt v. Attorney General*,[119] the Privy Council, sitting en banc for the first time in fifty years, unanimously overturned the death sentences of two inmates who had spent fourteen years on Jamaica's death row.[120] The Privy Council found that execution after a fourteen-year delay constituted "inhuman or degrading" punishment under the Jamaican Constitution,[121] a document rooted in the same English common-law tradition as the United States Constitution.[122] The Privy Council noted:

> There is an instinctive revulsion against the prospect of [executing] a man after he has been held under sentence of death for many years. What gives rise to this instinctive revulsion? The answer can only be our humanity: we regard it as an inhuman act to keep a man facing the agony of execution over a long extended period of time.[123]

Although the Privy Council focused primarily on the length of delay,[124] the Council addressed a significant secondary theme — the state's setting and

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118. *See* Pratt v. Attorney Gen., [1994] 2 App. Cas. 1 (P.C. 1993) (appeal taken from Jam.) (en banc) (finding death row delay of more than five years presumptively unconstitutional), *reprinted in* 33 I.L.M. 364, 386 (1994), *noted in Lackey*, 115 S. Ct. at 1422 (Stevens, J., respecting denial of certiorari); *see also infra* note 128 and accompanying text (describing Privy Council).

119. [1994] 2 App. Cas. 1 (P.C. 1993) (appeal taken from Jam.) (en banc), *reprinted in* 33 I.L.M. 364 (1994).

120. *Pratt*, 33 I.L.M. at 386. In *Pratt*, the Privy Council considered whether Jamaica could constitutionally inflict the death penalty on two prisoners who had spent 14 years on death row. *Id.* at 364. Earl Pratt and Ivan Morgan received death sentences in 1979. *Id.* The prisoners exhausted their direct appeals in six years. *Id.* at 369-76. Subsequent applications for relief prolonged their death row stay until 1993. *Id.* In 1993, the Privy Council determined that Jamaica could not execute the prisoners for two reasons. *Id.* at 384, 386. First, the Privy Council found that the prisoners were not responsible for the inordinate delay. *Id.* at 384. Specifically, the Privy Council found that the prisoners did not engage in dilatory tactics and that the state could not fault the prisoners for time spent on legitimate appeals. *Id.* Second, the Privy Council determined that the prisoners' prolonged incarceration caused a psychological "agony of suspense." *Id.* The Privy Council reasoned that execution after such agonizing delay constituted inhuman and degrading punishment. *Id.* Consequently, the Privy Council commuted the prisoners' death sentences to life imprisonment. *Id.*

121. *Id.* at 384.

122. *Id.* at 365-66; *see supra* notes 50-57 and accompanying text (discussing historical link between English common law and Eighth Amendment that suggests English common law and Eighth Amendment share similar values).

123. *Pratt*, 33 I.L.M. at 380.

124. *See id.* at 380-86 (considering length of delay and determining that state caused challenged delay).

withdrawing numerous execution dates.[125] The Privy Council determined that the repeated rescheduling of execution dates contributed to the psychological cruelty of delay, provoking a veritable "agony of suspense."[126] Consequently, the Privy Council decided that a strong presumption of constitutional invalidity exists in capital cases when more than five years have passed since sentencing.[127]

Pratt has a twofold significance: First, the American judiciary has traditionally regarded Privy Council opinions as persuasive authority.[128] Therefore, *Pratt* may lead to judicial recognition of a condemned prisoner's severe mental suffering during protracted death row confinement.[129] Second, the Privy Council's decision draws authority from the English common law.[130] The historical connection between the Eighth Amendment and the English common law indicates that the bodies of law have similar values.[131] As such, *Pratt* recognizes a value that the English common law and the Eighth Amendment conceivably share.[132] Thus, the Privy Council's decision in *Pratt* may foreshadow an evolution in Eighth Amendment jurisprudence.

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125. *See id.* at 365-66 (finding that reading of death warrants on three separate occasions produced psychological agony in prisoners and noting that brutal psychological impact of protracted death row confinement "only reveals that which is to be expected").

126. *Id.* at 384; *see also* District Attorney v. Watson, 411 N.E.2d 1274, 1290 n.5 (Mass. 1980) (Liacos, J., concurring) (commenting that lengthy delays, especially if punctuated by series of last-minute reprieves, intensify condemned prisoners' mental suffering (citing West, *supra* note 27, at 291)).

127. *See Pratt,* 33 I.L.M. at 387 (finding that death row delays exceeding five years are presumptively unconstitutional).

128. *See* United States v. Raddatz, 447 U.S. 667, 679 (1980) (citing Privy Council decision with approval); Fisher v. United States, 328 U.S. 463, 488 (1946) (Frankfurter, J., dissenting) (noting that "[t]his Court in reviewing a conviction for murder . . . ought not to be behind . . . the Privy Council"); Kilbourn v. Thompson, 103 U.S. 168, 186 (1881) (citing Privy Council decision with approval); *see also* TERENCE INGMAN, THE ENGLISH LEGAL PROCESS 90-92 (4th ed. 1992) (describing Privy Council). The Privy Council is the highest appellate court for Commonwealth nations, which include Malaysia, New Zealand, Jamaica, and Trinidad. *Id.* at 91. The jurists who sit on the Privy Council are members of England's highest domestic appellate court, the House of Lords. *Id.* at 90.

129. *Cf. Fisher*, 328 U.S. at 488 (Frankfurter, J., dissenting) (urging Court to keep pace with Privy Council decisions).

130. *See Pratt*, 33 I.L.M. at 365-66 (appeal taken from Jam.) (en banc) (noting that Jamaican Constitution is product of English common law).

131. *See supra* notes 50-57 and accompanying text (discussing historical link between English common law and Eighth Amendment that suggests English common law and Eighth Amendment share similar values).

132. *See supra* notes 130-31 and accompanying text (arguing that legal basis for Privy Council's *Pratt* decision stems from antecedents of Eighth Amendment and that Eighth Amendment may therefore share similar legal values).

IV. Procedural Issues

Before a court will explore the substantive issues underlying a *Lackey* claim, the claim must withstand procedural scrutiny. *Lackey* claims raise two distinct procedural questions that, to date, have thwarted review on the merits.[133] First, the claim arguably proposes a new constitutional rule.[134] The Supreme Court has prohibited retroactive application of new constitutional rules in cases on collateral review,[135] the stage at which prisoners raise *Lackey* claims.[136] *Lackey* claimants can avoid the Court's new-rule prohibition by showing (1) that the claim neither collaterally attacks a final judgment nor proposes a new rule[137] or (2) that certain narrow exceptions apply.[138]

The second procedural hurdle facing *Lackey* claimants is the doctrine of abuse of the habeas writ.[139] Raising a new claim in a second or subsequent habeas petition implicates the abuse of the writ doctrine.[140] Because the

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133. *See, e.g.*, White v. Johnson, 79 F.3d 432, 440 (5th Cir. 1996) (rejecting Eighth Amendment delay claim as *Teague*-barred); Bonin v. Calderon, 77 F.3d 1155, 1162 (9th Cir. 1996) (rejecting *Lackey* claim as barred by abuse of habeas writ doctrine); Stafford v. Ward, 59 F.3d 1025, 1028 (10th Cir. 1995) (same); Turner v. Jabe, 58 F.3d 924, 926 (4th Cir. 1995) (same); McKenzie v. Day, 57 F.3d 1461, 1463 (9th Cir. 1995) (same); Fearance v. Scott, 56 F.3d 633, 635 (5th Cir. 1995) (same); Lackey v. Scott, 52 F.3d 98, 100 (5th Cir. 1995) (rejecting Eighth Amendment delay claim as *Teague*-barred); Free v. Peters, 50 F.3d 1362, 1362 (7th Cir. 1995) (rejecting *Lackey* claim as barred by abuse of habeas writ doctrine); Porter v. Singletary, 49 F.3d 1483, 1485 (11th Cir. 1995) (same).

134. *See infra* notes 148-49 and accompanying text (explaining that courts construe *Lackey* as proposing new or novel rule).

135. *See infra* notes 143-45 and accompanying text (noting that Court prohibits retroactive application of new constitutional rules of criminal procedure to cases on collateral review).

136. *See, e.g.*, White v. Johnson, 79 F.3d 432, 436 (5th Cir. 1996) (raising *Lackey* claim in first federal habeas petition); Bonin v. Calderon, 77 F.3d 1155, 1157 (9th Cir. 1996) (raising *Lackey* claim in second federal habeas petition); Turner v. Jabe, 58 F.3d 924, 925 (4th Cir. 1995) (raising *Lackey* claim in fourth federal habeas petition); McKenzie v. Day, 57 F.3d 1461, 1463 (9th Cir. 1995) (raising *Lackey* claim in third federal habeas petition); Fearance v. Scott, 56 F.3d 633, 635 (5th Cir. 1995) (raising *Lackey* claim in third federal habeas petition after three collateral reviews at state level); Porter v. Singletary, 49 F.3d 1483, 1485 (11th Cir. 1995) (raising *Lackey* claim in second federal habeas petition).

137. *See infra* notes 150-59 and accompanying text (demonstrating that *Lackey* claim neither attacks trial court error nor proposes new constitutional rule of criminal procedure).

138. *See infra* notes 160-67 and accompanying text (showing that *Lackey* claims fall within retroactivity doctrine's exceptions).

139. *See, e.g.*, Stafford v. Ward, 59 F.3d 1025, 1028-29 (10th Cir. 1995) (determining that habeas petitioner's *Lackey* claim implicated abuse of writ doctrine); Turner v. Jabe, 58 F.3d 924, 929 (4th Cir. 1995) (same); Fearance v. Scott, 56 F.3d 633, 636-38 (5th Cir. 1995) (same); Porter v. Singletary, 49 F.3d 1483, 1485 (11th Cir. 1995) (same).

140. *See* McCleskey v. Zant, 499 U.S. 467, 470 (1991) (prohibiting habeas petitioners

factual predicate for a *Lackey* claim is the accrual of substantial death row delay, a prisoner typically will submit multiple habeas petitions prior to filing a *Lackey* claim.[141] *Lackey* claimants can skirt writ abuse only by demonstrating that adequate cause and prejudice exist.[142]

A. The Prohibition of Retroactive Application of a New Constitutional Rule

In *Teague v. Lane*,[143] the Supreme Court prohibited the retroactive application of new constitutional rules of criminal procedure in cases when judgment is final.[144] If a petitioner's postconviction claim proposes an

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from raising new claims in second or subsequent habeas petitions). The Court noted:

> The concept of "abuse of the writ" is founded on the equitable nature of habeas corpus. Thus, where a prisoner files a petition raising grounds that were available but not relied upon in a previous petition . . . the court may dismiss the subsequent petition on the ground that the prisoner has abused the writ.

Id. *See generally* JOSEPHINE R. POTUTO, PRISONER COLLATERAL ATTACKS: FEDERAL HABEAS CORPUS AND FEDERAL PRISONER MOTION PRACTICE § 2:34, at 97 (1991) (explaining abuse of habeas writ doctrine).

141. *See, e.g.*, Bonin v. Calderon, 77 F.3d 1155, 1157 (9th Cir. 1996) (raising *Lackey* claim in second federal habeas petition); *Turner*, 58 F.3d at 925 (raising *Lackey* claim in fourth federal habeas petition); McKenzie v. Day, 57 F.3d 1461, 1463 (9th Cir. 1995) (raising *Lackey* claim in third federal habeas petition); *Fearance*, 56 F.3d at 635 (raising *Lackey* claim in third federal habeas petition after three collateral reviews at state level); *Porter*, 49 F.3d at 1485 (raising *Lackey* claim in second federal habeas petition).

142. *See infra* notes 176-83 and accompanying text (discussing abuse of writ doctrine's cause and prejudice exception).

143. 489 U.S. 288 (1989).

144. *See* Teague v. Lane, 489 U.S. 288, 316 (1989) (determining that courts cannot retroactively apply new constitutional rules of criminal procedure to cases on collateral review). In *Teague*, an all-white jury convicted the African-American petitioner of numerous offenses. *Id.* at 292-93. During jury selection, the prosecutor used all peremptory challenges to exclude African-Americans from the jury. *Id.* at 293. The petitioner argued that the jury should represent a cross-section of the population. *Id.* After an unsuccessful state court appeal, the petitioner filed a federal habeas corpus petition and argued that the Court's recent opinions invited re-examination of *Swain v. Alabama*, 380 U.S. 202 (1965), which articulated the necessary evidentiary showing for racially discriminatory peremptory challenges. *Teague*, 489 U.S. at 293. The court of appeals voted to rehear the case after the Court issued *Batson v. Kentucky*, 476 U.S. 79 (1986). *Teague*, 489 U.S. at 294. Ultimately, *Batson* overruled the portion of *Swain* articulating the evidentiary showing necessary to demonstrate racially discriminatory peremptory challenges. *Id.* However, the court of appeals determined that the petitioner could not benefit from *Batson* because *Allan v. Hardy*, 478 U.S. 255 (1986) (per curiam), determined that courts could not retroactively apply *Batson* to cases on collateral review. *Teague*, 489 U.S. at 294. The Court affirmed the court of appeals' decision. *Id.* at 316. The Court concluded that *Allan* prevented the petitioner from benefitting from *Batson*'s new rule because the petitioner's conviction became

obligation that precedent does not dictate, courts will find that a "new rule" exists and reject the claim as *Teague*-barred.[145] *Teague* creates two problems for *Lackey* claimants.[146] First, most of a *Lackey* claimant's challenged delay accrues after a court has rendered final judgment.[147] Second, precedent does not dictate judicial recognition of a *Lackey* claim.[148] Although the *Teague* landscape may appear bleak for *Lackey* claimants, courts have disagreed over the doctrine's relevance in the *Lackey* context.[149]

Lackey claimants arguably evade application of *Teague* because *Teague*'s new-rule doctrine bears solely upon collateral recognition of new constitu-

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final before the Court decided *Batson*. *Id.* The Court determined that, in the interests of comity and finality, *id.* at 308, courts must prohibit retroactive application of a new constitutional criminal procedure rule in cases on collateral review unless the rule falls into one of the following exceptions: First, an exception exists if the rule places certain kinds of primary conduct beyond the power of criminal lawmaking authority to proscribe. *Id.* at 307 (citing Mackey v. United States, 401 U.S. 667, 692 (1971)). Second, an exception exists if the rule requires the observance of those procedures "implicit in the concept of ordered liberty." *Id.* at 307 (quoting *Mackey*, 401 U.S. at 693). Finally, the Court determined that under the Court's retroactivity jurisprudence, petitioners cannot use habeas corpus review to create new constitutional rules of criminal procedure unless the rule falls within one of the two *Teague* exceptions. *Id.* at 316.

145. *See* POTUTO, *supra* note 140, § 2:16, at 63 (stating that "a rule is new although it resolves a question in the precedent or advances the precedent in a way that may have been suggested by the precedent; the rule is new because it was not *dictated* by the precedent"); *see also* Sawyer v. Smith, 497 U.S. 227, 241 (1990) (determining that new rule exists even if it resolves question in manner "susceptible to debate among reasonable minds"); Saffle v. Parks, 494 U.S. 484, 488-90 (1990) (finding existence of new rule despite rule's foundation in prior case law).

146. *See, e.g.*, White v. Johnson, 79 F.3d 432, 440 (5th Cir. 1996) (rejecting Eighth Amendment delay claim as *Teague*-barred); Lackey v. Scott, 52 F.3d 98, 100 (5th Cir. 1995) (same); Porter v. Singletary, 49 F.3d 1483, 1485 (11th Cir. 1995) (same).

147. *See* Turner v. Jabe, 58 F.3d 924, 925 (4th Cir. 1995) (noting petitioner's claim that inordinate postconviction delay violated Eighth Amendment); McKenzie v. Day, 57 F.3d 1461, 1463 (9th Cir. 1995) (noting that *Lackey* claims address constitutionality of postconviction delay); Fearance v. Scott, 56 F.3d 633, 635 (5th Cir. 1995) (same).

148. *See White*, 79 F.3d at 438 (commenting that *Lackey* claimant could "point to no precedent . . . that would require the district court to grant [claimant] habeas relief if it finds that he has remained on death row for 17 years due to the fault of the state"); Stafford v. State, 899 P.2d 657, 660 (Okla. Crim. App.) (rejecting *Lackey* claim because United States Supreme Court and three federal circuit courts of appeals refused to grant relief on *Lackey* claims), *cert. denied*, 115 S. Ct. 2640 (1995).

149. *Compare McKenzie*, 57 F.3d at 1468 n.15 (finding application of *Teague* to *Lackey* claim inappropriate because *Lackey* claim "cannot be raised on direct appeal because much of the delay complained of arises in post-conviction proceedings"), *with* Lackey v. Scott, 52 F.3d at 100 (determining that petitioner's Eighth Amendment delay claim proposed new constitutional rule of criminal procedure and finding claim barred on collateral review by *Teague*).

tional rules of criminal procedure.[150] Although prisoners raise *Lackey* claims collaterally through habeas petitions,[151] these claims do not attack the constitutionality of initial state court proceedings, but instead seek relief for the state's postjudgment action.[152] Because the Eighth Amendment claim does not collaterally attack a final judgment, but demands relief for a postconviction constitutional wrong, *Lackey* petitions should escape *Teague*'s bar.[153] Moreover, *Lackey* claimants do not propose a new rule of constitutional criminal procedure.[154] Rather, substantive criminal law provides the basis for *Lackey* claims.[155]

A closer look at the principles informing *Teague* reveals that *Teague*'s new-rule prohibition should not apply to claims that prisoners could not have raised on direct appeal.[156] In essence, equitable principles underlie the *Teague* doctrine.[157] Using *Teague* to bar claims whose factual predicates do

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150. *See* Teague v. Lane, 489 U.S. 288, 310 (1989) (barring retroactive application of new rules of constitutional criminal procedure to cases on collateral review).

151. *See, e.g.*, *White*, 79 F.3d at 436 (raising *Lackey* claim through petition for writ of habeas corpus); Stafford v. Ward, 59 F.3d 1025, 1028-29 (10th Cir. 1995) (same); *Turner*, 58 F.3d at 929 (same); *McKenzie*, 57 F.3d at 1463 (same); *Fearance*, 56 F.3d at 636-38 (same); *Porter*, 49 F.3d at 1485 (same).

152. *See, e.g.*, Bonin v. Calderon, 77 F.3d 1155, 1160 (9th Cir. 1996) (noting petitioner's claim that inordinate postconviction delay violated Eighth Amendment); *Turner*, 58 F.3d at 925 (same); *McKenzie*, 57 F.3d at 1463 (noting that factual predicate of *Lackey* claim largely relies on postconviction delay); *Fearance*, 56 F.3d at 635 (same). *See generally Teague*, 489 U.S. at 305, 307 (noting that new-rule prohibition exclusively applies to cases attacking final judgment).

153. *See* cases cited *supra* note 152 (showing that *Lackey* claims do not attack conviction or final judgment but instead challenge constitutionality of delay incurred after conviction or final judgment).

154. *See* Lackey v. Texas, 115 S. Ct. 1421, 1421-22 (Stevens, J., respecting denial of certiorari) (suggesting that *Lackey* claim raises substantive Eighth Amendment claim); *see also* United States v. Sood, 969 F.2d 774, 776 (9th Cir. 1992) (commenting that "*Teague* . . . dealt with the retroactive application of a 'new constitutional rule of criminal procedure,' not with the application of decisions affecting the substance of criminal laws" (citation omitted)); Petition for Writ of Habeas Corpus at 48-49, Turner v. Jabe (Va. May 22, 1995) (No. 95-0777) (noting that *Lackey* claim does not propose new rule of criminal procedure, but asserts substantive guarantees of Eighth Amendment).

155. *See* authorities cited *supra* note 154 (showing that *Lackey* claim proposes application of substantive law).

156. *See* McKenzie v. Day, 57 F.3d 1461, 1468 n.15 (9th Cir. 1995) (noting that *Teague* is inapplicable to *Lackey* claim because prisoners typically cannot raise *Lackey* claim on direct appeal).

157. *See* Teague v. Lane, 489 U.S. 288, 308-10 (1995) (noting that fairness concerns underlie *Teague*'s doctrine of retroactivity). In *Teague*, the Court intended to promote finality in the judicial process and therefore determined that habeas courts are only responsible

not arise on direct appeal is neither fair nor equitable.[158] Thus, judicial application of the new-rule prohibition to *Lackey* claims conflicts with *Teague*'s underlying rationale.[159]

Two narrow exceptions to *Teague* should also provide relief for *Lackey* claimants.[160] First, courts will permit a new rule's retroactive application if the rule's effect places a certain defendant class outside a specific punishment's reach.[161] Under such circumstances, the Constitution deprives the state of power to inflict certain penalties on particular defendants.[162] Because *Lackey* claims propose that lengthy death row incarceration renders a class of death row prisoners constitutionally ineligible for the death penalty,[163] such

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for discovering constitutional errors in the original proceeding and in its direct appeal. *Id.* at 306. At bottom, however, *Teague*'s retroactivity doctrine is rooted in fairness concerns, as well as principles of federalism and finality. *Id.* at 308-10. Because *Lackey* claims hinge on factual predicates unavailable at the time of the original proceeding and its direct appeal, courts should recognize that application of the new-rule bar conflicts with *Teague*'s underlying equitable principles.

158. *See supra* note 157 (showing that *Teague*'s underlying equitable principles allow courts to hear claims whose factual predicates do not arise on direct appeal).

159. *See supra* note 157 (explaining that new-rule prohibition should not apply to *Lackey* claims because prohibition conflicts with *Teague*'s underlying equitable principles).

160. *See* POTUTO, *supra* note 140, § 4:8, at 135 (noting that *Teague* permits retroactive application of new constitutional rule in two circumstances).

161. *See* Penry v. Lynaugh, 492 U.S. 302, 330 (1989) (determining that courts may apply new rule on collateral review if new rule prohibits particular punishments for certain class of defendants). Under the first exception to *Teague*, courts may announce and apply new rules on collateral review that "prohibit[ ] a certain category of punishment for a class of defendants because of their status or offense." *Id.* The *Penry* Court explained:

> In our view, a new rule placing a certain class of individuals beyond the State's power to punish by death is analogous to a new rule placing certain conduct beyond the State's power to punish at all. In both cases, the Constitution itself deprives the State of the power to impose a certain penalty and the finality and comity concerns underlying [the Court's doctrine of] retroactivity have little force . . . . Therefore, the first exception [to *Teague*] . . . should be understood to cover not only rules forbidding criminal punishment of certain primary conduct but also rules prohibiting a certain category of punishment for a class of defendants because of their status or offense.

Id.

162. *Id.*; *see* Ford v. Wainwright, 477 U.S. 399, 410 (1986) (finding that although petitioner proposed new constitutional rule on collateral review, Eighth Amendment prohibited state from inflicting death penalty on insane prisoners); Coker v. Georgia, 433 U.S. 584, 592 (1977) (finding that although petitioner proposed new constitutional rule on collateral review, Eighth Amendment prohibited state from inflicting death penalty on prisoners convicted of rape).

163. *See, e.g.*, Stafford v. Ward, 59 F.3d 1025, 1027 (10th Cir. 1995) (noting prisoner's argument that Eighth Amendment prohibits execution after protracted death row

claims should escape *Teague*'s bar under this exception.[164] Second, *Teague* doctrine permits retroactive application of new rules concerning bedrock constitutional principles "implicit in the concept of ordered liberty."[165] The *Lackey* claim rests on the Eighth Amendment's prohibition of cruel and unusual punishment, a fundamental constitutional guarantee.[166] Thus, *Lackey* claims also should evade *Teague* under this second exception.[167]

B. Abuse of the Writ of Habeas Corpus

During postconviction review, prisoners may raise claims of constitutional error collaterally through the petition for writ of habeas corpus.[168] A habeas petitioner who brings a new claim in a second or subsequent habeas application must overcome the abuse of the writ doctrine.[169] Abuse

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confinement); Turner v. Jabe, 58 F.3d 924, 926 (4th Cir. 1995) (same); McKenzie v. Day, 57 F.3d 1461, 1463 (9th Cir. 1995) (same); Fearance v. Scott, 56 F.3d 633, 635 (5th Cir. 1995) (same); Free v. Peters, 50 F.3d 1362, 1362 (7th Cir. 1995) (same); Porter v. Singletary, 49 F.3d 1483, 1485 (11th Cir. 1995) (same).

164. *Cf. Ford*, 477 U.S. at 410 (determining on collateral review that Eighth Amendment prohibited infliction of death penalty on insane prisoners); *Coker*, 433 U.S. at 592 (determining on collateral review that Eighth Amendment prohibited infliction of death penalty on prisoners convicted of rape). *But see* White v. Johnson, 79 F.3d 432, 438 (5th Cir. 1996) (rejecting argument that *Lackey* claimant fell within *Teague*'s first exception because claimant's "proposed 'class' has no innate characteristics such as insanity or mental retardation . . . and is not made up of individuals whose conduct was not eligible for punishment by death at the time of sentencing"); POTUTO, *supra* note 140, § 4:8, at 135 (stating that "it will be the rare cases in which a petitioner may be able to rely on [the first] *Teague* exception").

165. *See* Butler v. McKellar, 494 U.S. 407, 415 (1990) (discussing second exception to *Teague* (quoting Teague v. Lane, 489 U.S. 288, 311 (1989))).

166. *See* Lackey v. Texas, 115 S. Ct. 1421, 1421-22 (Stevens, J., respecting denial of certiorari) (suggesting that *Lackey* claim raises substantive Eighth Amendment claim); *see also* United States v. Sood, 969 F.2d 774, 776 (9th Cir. 1992) (commenting that "*Teague* . . . dealt with the retroactive application of a 'new constitutional rule of criminal procedure,' not with the application of decisions affecting the substance of criminal laws" (citation omitted)); Petition for Writ of Habeas Corpus at 48-49, Turner v. Jabe (Va. May 22, 1995) (No. 95-0777) (noting that *Lackey* claim does not propose new rule of criminal procedure, but concerns substantive guarantees under Eighth Amendment).

167. *See supra* notes 165-66 and accompanying text (arguing that *Lackey* claim falls within *Teague*'s first exception).

168. *See* LARRY W. YACKLE, POSTCONVICTION REMEDIES 15 (1981) (noting that prisoner can request habeas relief if state-obtained conviction violated Constitution).

169. *See* McCleskey v. Zant, 499 U.S. 467, 470 (1991) (stating that "where a prisoner files a petition raising grounds that were available but not relied upon in a previous petition . . . the court may dismiss the subsequent petition on the ground that the prisoner has abused the writ").

of the writ applies if a court determines that the petitioner has inexcusably neglected to raise a claim earlier.[170]

The abuse of the writ doctrine poses a formidable hurdle for *Lackey* claimants.[171] By definition, a prisoner must accrue substantial death row time before a *Lackey* claim is ripe for review.[172] However, a prisoner typically will file interim habeas petitions before accumulating the delay necessary to support a *Lackey* claim.[173] A Catch-22 situation thus arises: The claim is nonjusticiable on ripeness grounds before the passage of substantial time,[174] but courts may bar the claim as untimely if a later habeas petition raises it.[175]

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170. POTUTO, *supra* note 140, § 2:34, at 97. Although "inexcusable neglect" describes the standard for abuse of the writ, certain U.S. Supreme Court members have supported a narrower standard. *Id.* Under the *Kuhlmann* standard, a court will dismiss a prisoner's subsequent petition unless the prisoner can show that the alleged constitutional infringement represented "a colorable claim of factual innocence." *Id.* (quoting Kuhlmann v. Wilson, 477 U.S. 436, 438, 448-54 (1986)).

171. *See, e.g.*, Bonin v. Calderon, 77 F.3d 1155, 1160 (9th Cir. 1996) (finding *Lackey* claimant inexcusably abused habeas writ); Stafford v. Ward, 59 F.3d 1025, 1027 (10th Cir. 1995) (same); Turner v. Jabe, 58 F.3d 924, 926 (4th Cir. 1995) (same); McKenzie v. Day, 57 F.3d 1461, 1463 (9th Cir. 1995) (same); Fearance v. Scott, 56 F.3d 633, 635 (5th Cir. 1995) (same); Free v. Peters, 50 F.3d 1362, 1362 (7th Cir. 1995) (same); Porter v. Singletary, 49 F.3d 1483, 1485 (11th Cir. 1995) (same). Readers should also note that ATEDA now imposes significant limitations on the power of federal courts to hear successive petitions for habeas corpus. *See* Raymond, *supra* note 19, at 52-56 (discussing ATEDA's restrictions on habeas petitions).

172. *See* McKenzie v. Day, 57 F.3d 1461, 1465, 1468 n.15 (9th Cir. 1995) (commenting that *Lackey* claimant's challenged delay arose in postconviction proceedings and noting that petitioner's claim "did not accrue until substantial time had passed after imposition of the sentence").

173. *See, e.g.*, White v. Johnson, 79 F.3d 432, 436 (5th Cir. 1996) (raising *Lackey* claim in first federal habeas petition); Bonin v. Calderon, 77 F.3d 1155, 1157 (9th Cir. 1996) (raising *Lackey* claim in second federal habeas petition); Turner v. Jabe, 58 F.3d 924, 925 (4th Cir. 1995) (raising *Lackey* claim in fourth federal habeas petition); *McKenzie*, 57 F.3d at 1463 (raising *Lackey* claim in third federal habeas petition); Fearance v. Scott, 56 F.3d 633, 635 (5th Cir. 1995) (raising *Lackey* claim in third federal habeas petition after three collateral reviews at state level); Porter v. Singletary, 49 F.3d 1483, 1485 (11th Cir. 1995) (raising *Lackey* claim in second federal habeas petition).

174. *See McKenzie*, 57 F.3d at 1468 (noting that factual predicate for *Lackey* claim is substantial death row delay).

175. POTUTO, *supra* note 140, § 2:34, at 97; *see* Bonin v. Calderon, 77 F.3d 1155, 1160 (9th Cir. 1996) (noting that petitioner raised *Lackey* claim in second federal habeas petition and that petitioner "could have raised this claim in his first habeas corpus petition filed in . . . 1992"); *McKenzie*, 57 F.3d at 1464 (stating that petitioner raised *Lackey* claim in third federal habeas petition and that claim "could have been brought much earlier, quite possibly as early as [petitioner's] first and second federal habeas petitions"); Fearance v.

Courts will excuse abuse of the writ only if a petitioner demonstrates adequate cause and prejudice.[176] The prior absence of a factual or legal basis for a newly raised claim will adequately establish cause.[177] Because a *Lackey* claim does not factually ripen until after substantial delay,[178] a *Lackey* claimant arguably shows adequate cause when the *absence of delay* barred the petitioner from raising the claim earlier.[179] Moreover, the *Lackey* claim also may have lacked a legal basis[180] until April 26, 1995, when Clarence Lackey's claim received the imprimatur of the Court.[181]

Scott, 56 F.3d 633, 636 (5th Cir. 1995) (determining that *Lackey* claim "could and should have been asserted" in petitioner's first federal habeas petition).

176. *See* McCleskey v. Zant, 499 U.S. 467, 494-95 (1991) (discussing exception to abuse of writ doctrine). In *McCleskey*, the Court determined that "[t]o excuse his failure to raise the claim earlier, petitioner must show cause for failing to raise it and prejudice therefrom." *Id.*

177. *See* Amadeo v. Zant, 486 U.S. 214, 222 (1988) (finding adequate cause to overcome abuse of writ if "factual or legal basis for a claim was not reasonably available to counsel" when petitioner filed earlier habeas petition (quoting Murray v. Carrier, 477 U.S. 478, 492 (1986))); POTUTO, *supra* note 140, § 4:6, at 132 (stating that petitioner demonstrates adequate cause if petitioner can show that claim's factual or legal basis was not reasonably available when petitioner filed earlier habeas petition).

178. *See* McKenzie v. Day, 57 F.3d 1461, 1464 (9th Cir. 1995) (stating that *Lackey* claim's factual predicate requires substantial death row delay).

179. *See Amadeo*, 486 U.S. at 222 (noting that petitioner demonstrates adequate cause on showing that factual basis for newly raised claim was unavailable when petitioner filed previous habeas petition); *see also Murray*, 477 U.S. at 492 (determining that cause "requires a showing of some external impediment preventing counsel from constructing or raising the claim").

180. *See Amadeo*, 486 U.S. at 222 (noting that petitioner demonstrates adequate cause on showing that legal basis for newly raised claim was unavailable when petitioner filed previous habeas petition); *see also Murray*, 477 U.S. at 492 (determining that petitioner shows cause when external impediment prevented petitioner from raising claims earlier).

181. *See McKenzie*, 57 F.3d at 1485 (Norris, J., dissenting) (noting that *Lackey* claim appeared to receive imprimatur of full Court on April 27, 1995 when Court "entered a stay of Lackey's execution pending the district court's consideration of petitioner's petition for writ of habeas corpus"). Although only Justices Stevens and Breyer supported further study of the *Lackey* claim on March 27, 1995, *see* Lackey v. Texas, 115 S. Ct. 1421, 1421-22 (1995) (Stevens, J., respecting denial of certiorari), the claim has arguably received the imprimatur of the entire Court, *see* Lackey v. Texas, 115 S. Ct. 1818, 1818 (1995) (overruling Fifth Circuit's revocation of district court's stay of execution and ordering district court consideration of Lackey's habeas petition). After Clarence Lackey raised an Eighth Amendment claim challenging the constitutionality of his prolonged death row stay, the Court stayed Lackey's execution. Lackey v. Texas, 115 S. Ct. 1274, 1274 (1995). On March 27, 1995, the Court issued its denial of certiorari accompanied by Justice Stevens's memorandum, with which Justice Breyer agreed. Lackey v. Texas, 115 S. Ct. at 1421 (Stevens, J., respecting denial of certiorari). Clarence Lackey immediately filed a second

Therefore, prisoners who raise *Lackey* claims in second or subsequent petitions may argue that the absence of either a factual predicate[182] or legal authority[183] posed an impediment to raising the claim earlier.

To date, *Lackey* claimants have been unable to overcome abuse of the writ through the cause and prejudice exception.[184] Habeas courts have con-

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federal habeas petition in federal district court and raised the same Eighth Amendment claim. Lackey v. Scott, 885 F. Supp. 958, 964 (W.D. Tex. 1995). The district court granted a stay of execution to consider the claim fully. *Id.* (order granting stay of execution pending consideration of Lackey's Eighth Amendment claim). On April 26, 1995, the Fifth Circuit found Lackey's claim *Teague*-barred and vacated the district court's stay of execution. Lackey v. Texas, 52 F.3d 98, 99 (5th Cir. 1995). A day later, the Supreme Court overruled the Fifth Circuit's vacatur and issued, *without dissent*, its own stay of execution "pending the district court's consideration of [Lackey's] petition for habeas corpus." *Lackey*, 115 S. Ct. at 1818. The Court's issuance of the April 27, 1995 stay confirms Justices Stevens's and Breyer's opinion that the Eighth Amendment claim is both "important and undecided." *Lackey*, 115 S. Ct. at 1421-22 (Stevens, J., respecting denial of certiorari).

182. *See Amadeo*, 486 U.S. at 222 (noting that petitioner demonstrates adequate cause on showing that factual basis for newly raised claim was unavailable when petitioner filed previous habeas petition).

183. *See* McKenzie v. Day, 57 F.3d 1461, 1480 (9th Cir. 1995) (Norris, J., dissenting) (stating that *Lackey* petitioner lacked plausible legal basis for bringing Eighth Amendment delay claim before events in *Lackey v. Texas*, 115 S. Ct. 1421 (1995) (Stevens, J., respecting denial of certiorari)). *But see infra* notes 186-87 and accompanying text (discussing argument that *Lackey* claims had plausible legal basis as early as 1960).

184. *See* Bonin v. Calderon, 77 F.3d 1155, 1160 (9th Cir. 1996) (noting that *Lackey* claimant abused writ and failed to show cause); Turner v. Jabe, 58 F.3d 924, 925 (4th Cir. 1995) (finding that *Lackey* claimant inexcusably abused habeas writ). In *Turner*, the Fourth Circuit determined that *Lackey* petitioner Willie Lloyd Turner failed to show sufficient cause to overcome abuse of the habeas writ. *Id.* at 931. The court of appeals rejected Turner's contention that his claim could not have been raised earlier for lack of necessary factual predicates. *Id.* The court determined that Turner could have raised an equally ripe *Lackey* claim in a habeas petition filed four years earlier. *Id.* at 925, 930. The Fourth Circuit divided Turner's ripeness defense into two parts: temporal (length of stay) and nontemporal (allegedly torturous conditions of confinement). *Id.* at 930. The court of appeals noted that although Turner could have claimed only twelve years of torturous confinement if he had raised his *Lackey* claim in 1991, twelve years would have been sufficient to support a *Lackey* claim. *Id.* The Fourth Circuit rejected the nontemporal components of Turner's Eighth Amendment claim, including his transfer to the death chamber on three separate occasions, exposure to the odor of executed prisoners' burnt flesh, isolation on death row, and psychological abuse by guards. *Id.* The court of appeals found that these factual predicates for Turner's claim of unconstitutional prison conditions existed when Turner filed his first and second habeas petitions. *Id.* The court concluded that allowing Turner's *Lackey* claim to proceed would encourage prisoners to raise claims on the eve of execution. *Id.*; *see also* Fearance v. Scott, 56 F.3d 633, 637 (5th Cir. 1995) (noting that petitioner failed to show cause adequate to overcome abuse of habeas writ); Porter v. Singletary, 49 F.3d 1483, 1485 (11th Cir. 1995) (same).

cluded that the claim lacks persuasive value and, therefore, that the absence of a *Lackey* claim's factual predicate is irrelevant.[185] Courts have also determined that the legal underpinnings of a *Lackey* claim are not novel and that a reasonable basis for such a claim existed prior to the issuance of the *Lackey* Memorandum.[186] Consequently, prisoners who have raised *Lackey* claims in subsequent habeas petitions have been unable to argue that the absence of legal authority posed an external impediment to raising the claim earlier.[187]

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185. *See* White v. Johnson, 79 F.3d 432, 439 (5th Cir. 1996) (finding that petitioner's Eighth Amendment delay claim lacked persuasive value); Stafford v. Ward, 59 F.3d 1025, 1027 (10th Cir. 1995) (rejecting habeas petitioner's *Lackey* claim for failure to demonstrate cause adequate to overcome abuse of habeas writ). In reaching its decision, the Tenth Circuit noted:

> There is no reported case that has adopted the position advocated by Appellant. Although two Supreme Court justices have expressed the view that lower federal courts should grapple with this issue, those views do not constitute an endorsement of the legal theory, which has never commanded an affirmative statement by any justice, let alone a majority of the court.

Id. at 1028; *see also* Stafford v. State, 899 P.2d 657, 660 (Okla. Crim. App.) (commenting that "[t]he United States Supreme Court and three federal circuit courts have refused to grant relief on this issue . . . we are not inclined to review the claim based on the memorandum opinion of a single Justice"), *cert. denied*, 115 S. Ct. 2640 (1995).

186. *See Turner*, 58 F.3d at 927-28 (determining that legal basis for *Lackey* claim was not novel and concluding that petitioner could have raised claim earlier). In *Turner*, the Fourth Circuit claimed that the legal theory behind *Lackey*'s Eighth Amendment argument existed in 1983 and that it may have existed as early as 1960. *Id.* The court of appeals corrected the district court's reading of Justice Stevens's *Lackey* Memorandum and concluded that Justice Stevens's characterization of *Lackey* as raising a "novel" issue did not apply in the context of a cause inquiry. *See id.* at 929 (commenting that "[p]erhaps by 'novel,' [Justice Stevens] simply meant 'undecided'"); *see also McKenzie*, 57 F.3d at 1465 (finding that *Lackey* petitioner failed to show cause adequate to overcome abuse of habeas writ and noting that "[w]hile Justice Stevens's memorandum in *Lackey* has given new prominence to the argument that delay in carrying out a death sentence constitutes cruel and unusual punishment, the legal theory underlying the claim is not new").

187. *See* cases cited *supra* note 186 (noting that courts have determined that *Lackey* claim's legal underpinnings are not novel). *Compare* Reed v. Ross, 468 U.S. 1, 16, 17 (1984) (determining that, under abuse of writ cause inquiry, omission of claim is excusable only if claim is so novel that it lacked reasonable basis in existing law), *and* Engle v. Isaac, 456 U.S. 107, 129-30, 133 n.41 (1982) (noting that claim has reasonable basis in existing law if petitioner had legal tools with which to formulate claim, even if claim is likely to be futile, and determining that petitioner cannot show cause if other lawyers have previously perceived and litigated same claim), *with Turner*, 58 F.3d at 927-28 (demonstrating that claims like Clarence Lackey's existed as early as 1960), *and McKenzie*, 57 F.3d at 1480-81 (commenting that petitioners litigated claims like Clarence Lackey's, albeit unsuccessfully, in 1980s). *But see Reed*, 468 U.S. at 16 (determining that courts cannot require defense counsel to bring all "remotely plausible constitutional claims that could, someday, gain

V. Policy Implications

Although protracted death row confinement followed by execution arguably violates the Eighth Amendment,[188] some delay is clearly necessary to provide capital defendants with due process.[189] One commentator notes:

> A legalistic society will be unable to impose the death penalty without an unconstitutionally cruel delay, and hence it will be unable lawfully to impose the death penalty at all. It must, at the very least, be accepted by societies committed to due process of law and the rule of law that a death sentence becomes unconstitutionally cruel unless carried out within a reasonable time after it has been awarded, and without the incidental infringement of any of the other rights (such as the right to appeal against conviction and sentence) guaranteed by due process. What constitutes a "reasonable time" is a matter for debate. But one should not forget the degree of agony inflicted on a human being with each day of delay.[190]

Despite the inevitable delays caused by adequate due process, it is unlikely that *Lackey* claims will inspire courts to find capital punishment per se unconstitutional on the basis of unconstitutionally cruel delay.[191] Instead, judicial recognition of *Lackey* claims is more likely to trigger (1) a streamlined capital appeals system or (2) an attribution-of-delay calculus that holds prisoners responsible for delays incurred through discretionary appeals. Should the American judiciary choose to recognize *Lackey* claims, however, the courts must fashion an appropriate remedy.

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recognition" and noting that to do so would require "counsel on appeal . . . [to] be obliged to raise and argue every conceivable constitutional claim, no matter how far-fetched, in order to preserve a right for postconviction relief upon some future, unforeseen development in the law"); *McKenzie*, 57 F.3d at 1480-81 (Norris, J., dissenting) (stating that "the fact that the claim was not completely unheard of, and had been raised . . . is not sufficient to show that counsel engaged in manipulative behavior in declining to bring it previously").

188. *See supra* notes 39-132 and accompanying text (discussing why prolonged death row delay is unconstitutionally cruel and unusual punishment).

189. *See* Coleman v. Balkcom, 451 U.S. 949, 952-53 (1981) (Stevens, J., concurring in denial of certiorari) ("However critical one may be of . . . protracted post-trial procedures, it seems inevitable that there must be a significant period of incarceration on death row during the interval between sentencing and execution."); Ira P. Robbins, *Toward a More Just and Effective System of Review in State Death Penalty Cases*, 40 AM. U. L. REV. 1, 14, 42 (1990) (commenting that American Bar Association Task Force on Habeas Reform found some delay in capital cases necessary to ensure complete and adequate review).

190. DAVID PANNICK, JUDICIAL REVIEW OF THE DEATH PENALTY 84 (1982).

191. *But see id.* (observing that societies committed to ideas of procedural fairness and due process are not able to impose death penalty).

A. Streamlined Capital Appeals

Courts have noted that constitutionally cognizable claims of delay may provide incentive to streamline the capital appeals process.[192] Currently, the capital appellate process provides several layers of judicial review to ensure discovery of trial court error.[193] *Lackey* raises the legitimate concern that courts will truncate necessary appellate review to foil claims of unconstitutional delay.[194]

Streamlining capital appeals would result in less meaningful judicial review and in accelerated rates of execution.[195] An expedited capital appeals process not only increases the risk of error,[196] but also fatally disadvantages death row petitioners, the majority of whom rely on overworked volunteer legal services.[197] In such an environment, courts could decline to grant defense counsel necessary stays and postponements for fear that the state later would lose its ability to enforce a death sentence.[198] Restricted

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192. *See* McKenzie v. Day, 57 F.3d 1461, 1467 (9th Cir. 1995) (noting that judicial recognition of Eighth Amendment delay claims could accelerate pace of future executions); *cf.* Turner v. Jabe, No. 95-530-A, slip op. at 12 (E.D. Va. May 22, 1995) (noting that *Lackey*'s "time is of the essence" emphasis places perverse incentives on criminal justice system).

193. *See* Anthony G. Amsterdam, *Special Report: The Death Penalty in America — In Favorem Mortis*, 14 HUM. RTS. 14, 14-16 (1987) (detailing capital case postconviction review at following levels: state appellate court, federal district court, federal circuit court of appeals, and federal supreme court). *But see* Raymond, *supra* note 19, at 52-53 (noting that ATEDA compromises capital appellate review).

194. *See* cases cited *supra* note 192 (noting that judicial recognition of Eighth Amendment delay claims could accelerate pace of future executions).

195. *Cf.* Coleman v. McCormick, 847 F.2d 1280, 1292-94 (9th Cir. 1989) (en banc) (Reinhard, J., concurring) (commenting that curtailment of federal habeas procedure would undermine system of justice and could result in hasty execution of persons possibly innocent of death penalty).

196. *See McKenzie*, 57 F.3d at 1467 (noting that "most . . . procedural safeguards have been imposed by the Supreme Court in recognition of the fact that the common law practice of imposing swift and certain executions could result in arbitrariness and error in carrying out the death sentence"); Amsterdam, *supra* note 193, at 51 (commenting that expedited capital appeals process "could adversely affect the fairness and reliability of adjudication, both by requiring lawyers to present their cases with less preparation and by requiring judges to decide them with less deliberation").

197. *See* Amsterdam, *supra* note 193, at 51 (noting that capital defense lawyers are, "in almost every case, either (1) unpaid volunteers who are struggling to accommodate the hundreds of hours that must go into adequate representation of a capital client, with their continuing responsibilities to their other clients (including those whose fees pay the bills), or (2) one of the very small corps of [overworked] specialized pro bono death penalty defense attorneys").

198. *See* McKenzie v. Day, 57 F.3d 1461, 1467 (9th Cir. 1995) (noting that although courts have generally erred on side of caution in granting stays of execution, courts would

capital appellate options could ultimately result in the unconstitutional execution of death row defendants.[199]

Because capital punishment is qualitatively different from all other punishments,[200] the Court has determined that the imposition of the death penalty requires extraordinary procedural safeguards.[201] Human fallibility and the finality of the death sentence have led the Court to demand painstaking judicial review in capital cases.[202] Because an expedited capital appellate process conflicts with the Court's mandate of conscientious judi-

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be reluctant to grant stays if aware that action could later impair state's interest in carrying out death sentence).

199. *Cf. McCormick*, 847 F.2d at 1292-94 (finding condemned prisoner innocent of death penalty 13 years after court imposed death sentence). Judge Reinhard commented:

> Despite glaring deficiencies, it was not until thirteen years and thirteen court proceedings that we finally granted relief . . . . These peripatetic passages through our legal system have raised serious questions about both habeas corpus and the practicality of the death penalty. Critics of the former have argued that the extended process undermines judicial finality and threatens the efficient functioning of the federal courts. Some have even suggested that the writ be streamlined or abolished . . . . I believe that the substantial constitutional issues raised by defendants . . . are much more than "arcane niceties," [and] I would conclude that the mockery of our criminal justice system lies not in repetitive federal review but in the persistent disregard by our [state] courts of fundamental constitutional rights.

Id. (citing and quoting Coleman v. Balkcom, 451 U.S. 949, 951 (1981) (Rehnquist, J., dissenting)).

200. *See* Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (plurality opinion) (observing that death is qualitatively "different" from all other punishments because of its finality and commenting that death sentence differs more from life imprisonment than 100-year terms differ from sentences of one or two years); Gregg v. Georgia, 428 U.S. 153, 181-88 (1976) (plurality opinion) (noting that death differs from any other kind of punishment imposed in United States); Furman v. Georgia, 408 U.S. 238, 286-91 (1972) (Brennan, J., concurring) (same).

201. *See Balkcom*, 451 U.S. at 952-53 (Stevens, J., concurring in denial of certiorari) (noting that irrevocability of death sentence requires strict adherence to procedural safeguards); *Woodson*, 428 U.S. at 305 (concluding that capital punishment's qualitative difference from all other punishments demands more reliable sentencing); Reid v. Covert, 354 U.S. 1, 77 (1957) (Harlan, J., concurring) (commenting that, in capital context, "law is especially sensitive to demands for . . . procedural fairness").

202. *See* Amsterdam, *supra* note 193, at 57 (concluding that risk of error and finality of capital punishment mandate extraordinary judicial review). Amsterdam noted:

> The irrevocability of an executed death sentence and the fallibility of human judgement have forever been important objections to capital punishment . . . . Patient, painstaking review of the legal claims of condemned inmates has been the rule of judicial responsibility, not because the task was convenient, efficient, or gratifying, but because its omission was unthinkable.

Id.

cial review,[203] courts should not streamline capital appeals to address the *Lackey* problem.[204]

B. Attribution of Delay

If due process requirements preclude streamlining capital appeals,[205] courts may attempt to fault prisoners, rather than state actors, for death row delays.[206] In the *Lackey* Memorandum, Justice Stevens theorized that there may be constitutional significance to various types of delay[207] and proposed to distinguish among delays resulting from (1) a prisoner's abuse of the judicial system; (2) a prisoner's legitimate exercise of the right to review; and (3) the state's intentionally dilatory tactics.[208] These factors echo the attribution-of-delay calculus employed by the Privy Council in *Pratt*.[209]

In *Pratt*, the Privy Council determined that condemned prisoners lack a constitutional claim for delay incurred through illegitimate means,[210] and it refused to include time spent during escape from prison or pursuit of frivolous legal theories in calculating the length of delay.[211] American courts have agreed that a prisoner's dilatory tactics cannot ripen into Eighth Amendment claims.[212] Additionally, both the American courts and the

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203. *See* Lankford v. Ohio, 500 U.S. 110, 125 n.10 (1991) (discussing Court's heightened standard of reliability for capital cases); Beck v. Alabama, 447 U.S. 625, 637 (1979) (noting that Court invalidates capital procedures which tend to diminish reliability of sentencing determination); *Woodson*, 428 U.S. at 305 (concluding that Eighth Amendment imposes heightened standard for reliability in death sentence determination); Amsterdam, *supra* note 193, at 57 (advocating "patient, painstaking review" of capital cases).

204. *See supra* notes 195-203 and accompanying text (noting that streamlined appeals (1) undermine Court's policy of extraordinary procedural safeguards in capital context and (2) fatally disadvantage capital defendants).

205. *See supra* notes 195-203 and accompanying text (showing that Court's due process requirements preclude expedited capital appeals).

206. *See* Chessman v. Dickson, 275 F.2d 604, 607-08 (9th Cir.) (questioning "how we can offer life . . . as a prize for one who can stall the processes for a given number of years"), *cert. denied*, 362 U.S. 965 (1960).

207. *See* Lackey v. Texas, 115 S. Ct. 1421, 1422 (1995) (Stevens, J., respecting denial of certiorari) (stating that "[t]here may well be constitutional significance to the reasons for the various delays that have occurred in [Clarence Lackey]'s case").

208. *Id.* at 1422.

209. *See* Pratt v. Attorney Gen., [1994] 2 App. Cas. 1 (P.C. 1993) (appeal taken from Jam.) (en banc) (distinguishing delays caused by death row prisoner's dilatory tactics from delays caused by prisoner's legitimate use of appeals process or state's dilatory tactics), *reprinted in* 33 I.L.M. 364, 380 (1994), *cited in Lackey*, 115 S. Ct. at 1422.

210. *Pratt*, 33 I.L.M. at 380.

211. *Id.*

212. *See* Richmond v. Lewis, 948 F.2d 1473, 1491-92 (9th Cir. 1990) (commenting that although courts should not penalize prisoners for pursuing constitutional rights, delay incurred

Privy Council have agreed that a state's intentionally dilatory tactics are actionable.[213] Thus, the state's deliberate attempts to prolong death row incarceration should give rise to a successful constitutional claim.[214]

The more difficult question arises in attributing delay caused by a prisoner's nonfrivolous appeals. In *Pratt*, the Privy Council found the state responsible for delay incurred during the prisoner's exhaustion of appellate issues.[215] The Privy Council acknowledged that prisoners cause delay through discretionary appeals.[216] However, the Council determined that courts could not punish prisoners for the nonfrivolous resort to appellate procedures.[217] The Privy Council reasoned that fault lies with an appellate system that permits years of delay, rather than with the condemned prisoner who legitimately pursues an appeal.[218]

The *Pratt* view finds some support in the international community.[219] However, American courts have neither followed the Privy Council's

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during ultimately unsuccessful pursuit of legal theories does not evolve into Eighth Amendment claim); Chessman v. Dickson, 275 F.2d 604, 607-08 (9th Cir.) (questioning "how we can offer life . . . as a prize for one who can stall the processes for a given number of years, especially when in the end it appears the prisoner never really had any good points"), *cert. denied*, 362 U.S. 965 (1960).

213. *Compare Pratt*, 33 I.L.M. at 380 (noting that Jamaican courts fault state for state's dilatory tactics), *with* McKenzie v. Day, 57 F.3d 1461, 1466-67 (9th Cir. 1995) (acknowledging potential viability of *Lackey* claim in "a situation where the [state] has set up a scheme to prolong the period of incarceration, or rescheduled the execution repeatedly in order to torture [petitioner]"), *and* Porter v. Singletary, 49 F.3d 1483, 1485 (11th Cir. 1995) (stating that *Lackey* claim has potential merit when petitioner offers evidence of state's deliberate or negligent delay).

214. *See McKenzie*, 57 F.3d at 1466-67 (determining that Eighth Amendment claim could arise from state's deliberate or negligent delay in capital case); *Porter*, 49 F.3d at 1485 (same).

215. *See* Pratt v. Attorney Gen., [1994] 2 App. Cas. 1 (P.C. 1993) (appeal taken from Jam.) (en banc) (finding delay incurred through prisoner's legitimate appeals attributable to state), *reprinted in* 33 I.L.M. 364, 384 (1994). The Privy Council explained:

> In their Lordships' view a State that wishes to retain capital punishment must accept the responsibility of ensuring that execution follows as swiftly as practicable after sentence allowing a reasonable time for appeal and consideration of reprieve. It is part of the human condition that a condemned man will take every opportunity to save his life through use of the appellate procedure. If the appellate procedure enables the prisoner to prolong the appellate hearings over a period of years, the fault is to be attributed to the appellate system that permits such delay and not to the prisoner who takes advantage of it.

Id.

216. *Id.*

217. *Id.*

218. *Id.*

219. *See* Catholic Comm'n for Justice & Peace v. Attorney Gen., No. S.C. 73/93 (Sup. Ct. Zimb. June 24, 1993), *reprinted in* 14 HUM. RTS. L.J. 323, 334 (1993) (stating that courts

rule[220] nor employed the *Lackey* calculus that Justice Stevens proposed.[221] Instead, courts have distinguished between the delay incurred through mandatory appeals and the delay occasioned by discretionary or collateral review.[222] Although courts have recognized that the state may bear respon-

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cannot discount mental suffering during delays resulting from prisoner's "maximum use of the judicial process available"), *overruled by* ZIMB. CONST. amend. XIII (amending Declaration of Rights' Section 15); Soering v. United Kingdom, 161 Eur. Ct. H.R. (ser. A) (1989), *reprinted in* 28 I.L.M. 1063, 1098 (1989) (declining to blame condemned prisoners for delay and determining that Virginia death row delays potentially exceed limits of European Convention for Protection of Human Rights and Fundamental Freedoms); Vatheeswaran v. Tamil Nadu, [1983] 2 S.C.R. 348, 353 (India 1983) (contending that "the cause of the delay is immaterial when the sentence is death. . . . [even if] the cause for the delay [is] 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"). *But see* Schabas, *supra* note 27, at 186 (noting that United Nations Human Rights Committee has determined that death row delays are neither cruel nor degrading when prisoners pursue appellate procedures).

220. *See* McKenzie v. Day, 57 F.3d 1461, 1466 (9th Cir. 1995) (stating that *Pratt* holding will not prevail in United States). The *McKenzie* majority stated that death row petitioners concerned with delay "should refuse to avail themselves of avenues of review." *Id.* at 1470 n.21. In responding to the majority's proposal, dissenting Judge Norris argued: "In advocating that death row inmates forgo opportunities to remedy constitutional violations that they may have suffered at trial and at sentencing in order to avoid suffering the additional constitutional violation of cruel and unusual punishment, the majority gives new meaning to the notion of 'mockery of justice.'" *Id.* at 1489 (Norris, J., dissenting) (quoting Coleman v. Balkcom, 451 U.S. 949, 958-59 (1981) (Rehnquist, J., dissenting from the denial of certiorari)); *see also* Note, *supra* note 28, at 831 (concluding that courts should not fault prisoners for delays incurred through legitimate appeals). The author explained:

> Of course, it is possible for a prisoner to reduce the delay by refusing to pursue any appeal or other dilatory course of action. This, however, would seem to be tantamount to state-abetted suicide. As a matter of humane policy, if not constitutional right, no onus should be placed on a prisoner's attempt to delay or prevent his execution. To argue that the condemned's voluntary participation in causing delay removes his mental suffering from constitutional scrutiny both ignores the drive of self-preservation and penalizes the exercise of a legal right.

Id.

221. *See* Stafford v. Ward, 59 F.3d 1025, 1028 (10th Cir. 1995) (declining to employ Justice Stevens's *Lackey* calculus in attributing death row delay); Turner v. Jabe, 58 F.3d 924, 926-32 (4th Cir. 1995) (same); Fearance v. Scott, 56 F.3d 633, 635-39 (5th Cir. 1995) (same); Delvecchio v. Illinois Dep't of Corrections, No. 95-C-6637, 1995 WL 688675, at *8 (N.D. Ill. Nov. 17, 1995) (same); Turner v. Jabe, No. 95-530-A, slip op. at 13 (E.D. Va. May 22, 1995) (asserting that *Lackey* calculus is unhelpful). *But see McKenzie*, 57 F.3d at 1466 (distinguishing state's deliberate or negligent delay tactics from other types of delay); Porter v. Singletary, 49 F.3d 1483, 1485 (11th Cir. 1995) (same).

222. *See* Stafford v. Ward, 59 F.3d 1025, 1028 (10th Cir. 1995) (stating that delays "incurred largely at the behest of Appellant . . . [through] repeated stays to pursue [legal remedies]" did not implicate Eighth Amendment); Free v. Peters, 50 F.3d 1362, 1362 (7th Cir. 1995) (attributing time spent on direct appeal to state but attributing time spent on

sibility for time spent on mandatory appeal,[223] most have concluded that prisoners lack a constitutional claim for delay caused by discretionary appeals.[224]

This current approach falls short of Justice Stevens's theory that courts should distinguish delay caused by a "legitimate exercise of right . . . to review" from delay caused by "repetitive, frivolous filing."[225] In the *Lackey* Memorandum, Justice Stevens proposed that different causes of delay merit different judicial treatment.[226] At present, courts have deter-

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collateral review to prisoner); Delvecchio v. Illinois Dep't of Corrections, No. 95-C-6637, 1995 WL 688675, at *8 (N.D. Ill. Nov. 17, 1995) (determining that delay resulting from petitioner's discretionary appeals did not implicate Eighth Amendment).

223. *See McKenzie*, 57 F.3d at 1485 (noting that state claimed responsibility for time petitioner spent on direct appeal); *cf. Free*, 50 F.3d at 1362 (declining to hear prisoner's Eighth Amendment delay claim after factually distinguishing *Lackey* on basis of Clarence Lackey's protracted direct appeals). Justice Stevens's attention may have alighted on Clarence Lackey because Lackey's claim rested on delay incurred during two direct and mandatory appeals. A Texas trial court sentenced Lackey to death in 1978. Lackey v. Scott, 885 F. Supp. 958, 962 (W.D. Tex. 1995); Petitioner's Pre-Hearing Brief at 12 n.10, Lackey v. Scott, 885 F. Supp. 958 (W.D. Tex. 1995) (No. MO-95-CA-68-F). The Texas Court of Criminal Appeals completed Lackey's first mandatory direct appeal in 1684 days, at which time Lackey was taken off death row. Lackey v. State, 638 S.W.2d 439, 471-76 (Tex. Crim. App. 1982); Petitioner's Pre-Hearing Brief at 12 n.10. The trial court re-tried Lackey and sentenced him to death again on April 16, 1983. Lackey v. Scott, 885 F. Supp. at 963; Petitioner's Pre-Hearing Brief at 12 n.10. The Texas Court of Criminal Appeals took 2252 days to render a decision on Lackey's second mandatory direct appeal. Lackey v. State, 819 S.W.2d 111, 122 (Tex. Crim. App. 1989); Petitioner's Pre-Hearing Brief at 12 n.10. The Fifth Circuit affirmed Lackey's conviction and death sentence. Lackey v. Scott, 28 F.3d 486, 486 (5th Cir. 1994). Lackey's counsel filed a rehearing petition that the court initially granted, but subsequently overruled 699 days later. Petitioner's Pre-Hearing Brief at 12 n.10. The Texas Court of Criminal Appeals spent another 151 days disposing of a second rehearing petition and dismissed it on October 11, 1991. *Id.* The court issued its final mandate on October 26, 1991. *Id.* The state trial court scheduled Lackey's first execution date for July 13, 1992 — 165 days after the Texas Court of Criminal Appeals issued its final mandate. *Id.* Therefore, the state's delay during mandatory direct appeal forced Lackey to spend 4951 days, or twelve and one-half years, either on death row or under sentence of death. *Id.*

224. *See* Williams v. Chrans, 50 F.3d 1362, 1364 (7th Cir. 1995) (finding prisoner caused challenged delay through discretionary collateral review and concluding that such delay did not give rise to Eighth Amendment claim); *Free*, 50 F.3d at 1362 (same); *Delvecchio*, 1995 WL 688675, at *8 (same); *see also Stafford*, 59 F.3d at 1028 (attributing delay to prisoner's use of appellate remedies and concluding that such delay did not give rise to Eighth Amendment claim); *McKenzie*, 57 F.3d at 1466 (same).

225. Lackey v. Texas, 115 S. Ct. 1421, 1422 (1995) (Stevens, J., respecting denial of certiorari); *see also McKenzie*, 57 F.3d at 1486 (Norris, J., dissenting) (noting that *Lackey* calculus requires courts to distinguish between delay caused by legitimate appeals and delay caused by repetitive, frivolous filings).

226. *See Lackey*, 115 S. Ct. at 1422 (Stevens, J., respecting denial of certiorari) (noting that there may be constitutional significance to reasons for delay and proposing that courts

mined that all discretionary appeals, whether frivolous or well founded, deprive prisoners of any protection against unconstitutional delay.[227] This approach disadvantages prisoners with legitimate appellate issues because such prisoners must forgo the Eighth Amendment protections implicated by *Lackey* in order to pursue other constitutional claims.[228] Moreover, this system fails to distinguish prisoners who accrue delay through legitimate appeals from those who accumulate delay through purely dilatory tactics.[229] These inequities warrant the conclusion that the Eighth Amendment protects prisoners who have accrued delay through legitimate appeals.

C. An Appropriate Remedy

In *Pratt*, the Privy Council determined that capital punishment carries a strong presumption of constitutional invalidity five years after sentencing.[230] Although the American judiciary may never adopt a similar bright line rule,[231] courts presented with *Lackey* claims agree that death row confinement reaches unconstitutional proportions between ten and twelve years after sentencing.[232] Even if a prisoner brings a successful *Lackey* claim,

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distinguish between various types of delay).

227. *See Free*, 50 F.3d at 1362 (finding delay in *Lackey* petitioner's case inordinate but concluding that petitioner lacked basis for Eighth Amendment claim because petitioner caused delay by discretionary collateral review); Williams v. Chrans, 50 F.3d 1362, 1364 (7th Cir. 1995) (same); *Delvecchio*, 1995 WL 688675, at *8 (same).

228. *See* District Attorney v. Watson, 411 N.E.2d 1274, 1283 (Mass. 1980) (finding fact that "the delay may be due to the defendant's insistence on exercising his appellate rights does not mitigate the severity of the impact on the condemned individual . . . the right to pursue due process of law must not be set off against the right to be free of inhuman treatment" (citing Furman v. Georgia, 408 U.S. 238, 239 (1972) (Brennan, J., concurring))); *cf.* Spevack v. Klein, 385 U.S. 511, 515 (1967) (prohibiting impediments to exercise of constitutional rights); Griffin v. California, 380 U.S. 609, 614 (1965) (finding that judge could not give instruction that jury could draw adverse inference from defendant's refusal to testify because inference would be "a penalty imposed by courts for exercising a constitutional privilege").

229. *Cf. Lackey*, 115 S. Ct. at 1422 (Stevens, J., respecting denial of certiorari) (suggesting that courts should begin to distinguish between various types of delay); *see also* McKenzie v. Day, 57 F.3d 1461, 1486 (9th Cir. 1995) (Norris, J., dissenting) (noting that *Lackey* calculus would require courts to distinguish between delay caused by legitimate appeals and delay caused by repetitive, frivolous filings).

230. Pratt v. Attorney Gen., [1994] 2 App. Cas. 1 (P.C. 1993) (appeal taken from Jam.) (en banc), *reprinted in* 33 I.L.M. 364, 386 (1994).

231. *See McKenzie*, 57 F.3d at 1466 (stating that *Pratt* rule will not prevail in United States).

232. *See* Turner v. Jabe, 58 F.3d 924, 930-31 (4th Cir. 1995) (finding that petitioner could have brought Eighth Amendment delay claim after spending approximately 11 years on death row); *McKenzie*, 57 F.3d at 1464-65 & n.6 (asserting that petitioner could have

however, the question of an appropriate remedy remains.[233]

Courts have hypothesized that the Eighth Amendment claim lacks an appropriate remedy because nothing can undo a prisoner's past suffering.[234] Alternatively, one court has analogized the *Lackey* claim to prison-condition cases.[235] That court speculated that the appropriate remedy for a *Lackey* claim is judicial amelioration of the complained-of condition.[236]

Presumably, judicial amelioration of a *Lackey* claimant's complained-of condition could include streamlined appellate procedures or better death row living conditions. However, streamlining capital appeals potentially violates due process requirements[237] and fails to compensate prisoners already exposed to harsh conditions of delay. Furthermore, courts cannot improve torturous death row living conditions because the prisoner's undue mental suffering is inherent to the death sentence.[238]

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brought Eighth Amendment delay claim when petitioner had spent 10 years on death row); Free v. Peters, 50 F.3d 1362, 1362 (7th Cir. 1995) (finding that three and one-half years on death row during petitioner's direct appeal did not constitute inordinate delay, but determining that 12 years in discretionary appeals constituted inordinate delay); Delvecchio v. Illinois Dep't of Corrections, No. 95-C-6637, 1995 WL 688675, at *8 (N.D. Ill. Nov. 17, 1995) (finding that five years on death row during petitioner's direct appeal did not constitute inordinate delay, but remaining ten and one-half years spent on discretionary review constituted inordinate delay); *cf.* State v. Richmond, 886 P.2d 1329, 1334 (Ariz. 1994) (en banc) (commuting death sentence of petitioner who had spent more than 20 years on death row). In *Richmond*, the Arizona Supreme Court commuted the death sentence of a prisoner who had spent 20 years on Arizona's death row. *Id.* at 1334. Although declining to decide the prisoner's Eighth Amendment delay claim, the court noted the extraordinary length of time Willie Lee Richmond spent on death row. *Id.* Significantly, the Arizona Supreme Court quoted the Privy Council's *Pratt* opinion in reaching its decision. *Id.* at 1333 (quoting *Pratt*, 33 I.L.M. 364, 380).

233. *See McKenzie*, 57 F.3d at 1467 (questioning whether commutation to life is appropriate remedy for Eighth Amendment delay claim); Fearance v. Scott, 56 F.3d 633, 638 n.8 (5th Cir. 1995) (same).

234. *See McKenzie*, 57 F.3d at 1467 (noting that prisoner's anguish is "in the past" and asserting that commutation to life would not relieve prisoner of pain already suffered); *Fearance*, 56 F.3d at 638 (stating that, under prisoner's *Lackey* theory, prisoner "has already suffered the cruel and unusual punishment occasioned by delay; executing him immediately would not add to this type of punishment").

235. *See* McKenzie v. Day, 57 F.3d 1461, 1467 (9th Cir. 1995) (comparing petitioner's *Lackey* claim to prison-conditions case).

236. *See id.* (noting that courts do not commute sentences in prison-conditions cases, but instead ameliorate challenged conditions).

237. *See supra* notes 195-204 and accompanying text (showing that Court's due process requirements preclude expedited capital appeals).

238. *See supra* notes 25-38 and accompanying text (describing psychologically torturous environment of death rows).

A better remedy for *Lackey* claims is commutation of the death sentence.[239] Because the *Lackey* claim argues that protracted delay followed by death is overly retributive and excessive punishment,[240] commutation of a death sentence provides a remedy that immediately reduces punishment to constitutionally permissible levels.[241] Although courts cannot undo past suffering caused by delay, courts can remedy a prisoner's present and future suffering by removing the death sentence[242] — the death row living condition that makes delay intolerable.

VI. Conclusion

Lackey claims expose the competing tensions of ensuring adequate due process and enforcing swift and humane justice.[243] To date, American courts have sidestepped the *Lackey* dilemma by finding this claim to be procedurally barred.[244] Instead, courts should recognize that *Lackey* claims present an unusual constitutional problem that requires a flexible and equitable approach.[245]

Protracted death row confinement clearly inflicts severe mental suffering on death row inmates.[246] This suffering is gratuitous and devoid of penological value:[247] Execution after prolonged imprisonment may exceed

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239. *See McKenzie*, 57 F.3d at 1488 & n.22 (Norris, J., dissenting) (noting that proper remedy for Eighth Amendment delay claim is commutation to life sentence).

240. *See supra* notes 62-69 and accompanying text (noting that protracted death row confinement arguably satisfies state interest in retribution and asserting that death penalty after prolonged delay may exceed state interest in retribution).

241. *See* PANNICK, *supra* note 190, at 85 (concluding that mental suffering caused by delay may exceed constitutional limits when courts add physical suffering caused by execution to balance). Thus, by removing physical suffering through commutation of a death sentence, courts can restore punishment to constitutionally permissible levels.

242. *See* McKenzie v. Day, 57 F.3d 1461, 1488 & n.22 (9th Cir. 1995) (Norris, J., dissenting) (noting that proper remedy for Eighth Amendment delay claim is commutation to life sentence).

243. *See supra* notes 188-91, 200-04 and accompanying text (showing tension between Court's mandate of extraordinary procedural safeguards and *Lackey*'s Eighth Amendment delay claim).

244. *See* cases cited *supra* note 18 (discussing procedural bars that prevent courts from considering *Lackey* claims on merits).

245. *See supra* notes 152, 172-79 and accompanying text (noting that *Lackey* claims rest on postconviction delay and arguing that courts, out of equity considerations, should consider *Lackey* claims on merits).

246. *See supra* notes 25-38 and accompanying text (examining severe psychological suffering that protracted death row confinement causes).

247. *See supra* notes 62-73 and accompanying text (demonstrating that protracted death

the state's interest in retribution and provides little, if any, deterrent effect on potential criminals.[248] Furthermore, historical evidence fails to show that the Framers or the Eighth Amendment's antecedents tolerated the cruelty of lengthy pre-execution confinement.[249] In the absence of the Court's justifying factors, protracted death row confinement violates the Eighth Amendment.[250] Accordingly, our constitutional prohibition of cruel and unusual punishment mandates commutation of the death sentence for legitimate *Lackey* claimants.

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row confinement causes unnecessary suffering that is without penological value).

248. *See supra* notes 62-73 and accompanying text (discussing how execution after protracted death row confinement exceeds state interest in retribution and showing that execution after protracted death row confinement provides minimal deterrent effect).

249. *See supra* notes 46-57 and accompanying text (examining historical evidence which suggests that Framers did not tolerate protracted pre-execution confinement).

250. *See supra* notes 59, 74-77 and accompanying text (noting that, in absence of Court's justifying factors, death penalty violates Eighth Amendment).