Can Inordinate Delay Between a Death Sentence and Execution Constitute Cruel and Unusual Punishment?

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I. INTRODUCTION

Despite the time, attention, and resources devoted to capital prosecutions relative to the number of defendants convicted of capital offenses, few executions occur. Accordingly, the number of death row inmates continues to rise. One issue that has received scholarly and judicial attention recently concerns the present administration of capital punishment in the United States: Whether the passage of time between the imposition of a death sentence and the carrying out of that sentence can itself ripen into a substantive prohibition against the execution.[1] This Article addresses that issue.

Opinion polls generally show that the public largely favors capital punishment, but is ambivalent about the lack of actual executions.[2] As presently administered, however, the United States' system of capital punishment is problematic.[3] One problem that has re-

[1] A similar, but distinctively different claim arising out of the delay between the pronouncement of a death sentence and an execution is the purported cruelty that arises out of the repeated setting and staying of execution dates and issuance of last minute stays of execution. *See* District Attorney for Suffolk Dist. v. Watson, 411 N.E.2d 1274, 1290 (Mass. 1980) (Liacos, J., concurring) (detailing Henry P. Arsenault's experiences). *See also* Autry v. McKaskle, 465 U.S. 1090, 1091 (1984) (Brennan, J., dissenting from denial of application for stay of execution) (asserting that the mental anguish an inmate suffers while strapped to a gurney awaiting lethal injection is cruel and unusual punishment).

[2] *See* David A. Kaplan, *Anger and Ambivalence*, NEWSWEEK, Aug. 7, 1995, at 24 (detailing purported public support for capital punishment, but apparent ambivalence regarding executing defendants).

[3] This Article does not directly challenge the present understanding that the death penalty does not violate the Constitution. Indeed, one of most intractable problems of capital punishment has been devising a system that properly defines capital offenses and establishes a rationale for the prosecution of these crimes and the imposition of death sentences in a consistent manner. This sentiment was captured in *McGautha v. California*, 402 U.S. 183, 204 (1971), when Justice Harlan stated: "To identify before the fact those characteristics of criminal homicides and their perpetrators which call for the death penalty, and to express these characteris-

ceived relatively little forthright judicial treatment concerns the delay between the imposition of a death sentence and the execution of a capital defendant. The delay between a death sentence and execution is partly attributable to the inequalities in the present administration of the death penalty.[4] As a practical matter, some manner of delay between the sentence and an execution is both desirable and inevitable. During this period the defendant may appeal his or her conviction and sentence, and state officials — such as the prosecutor and the governor — may decide not to go forward with the execution. It is another issue, however, when the period of delay extends beyond that which is necessary for the full litigation of the legal claims in the case.

Today, more than ever, most capital defendants will spend a considerable amount of time in restrictive confinement on death row before they are executed, if they ever are executed. This delay is not always attributable to the litigation of legal issues. While awaiting execution, capital defendants experience mental anguish. This anguish should be viewed as an ancillary, unauthorized punishment that makes no measurable contribution to acceptable goals of punishment. It is cruel punishment. Executing a defendant who has experienced years of that mental anguish would seem to be the infliction of gratuitous pain and suffering, particularly if the capital defendant has experienced a change of character while on death row. Inordinate delay, as defined in this Article, is a rare occurrence. Consequently, inmates on death row for a great length of time, who later face a serious execution date, are unusual. The execution of an inmate who has had an inordinate stay on death row, however, may be cruel and unusual punishment in violation of the Eighth Amendment.

Part II outlines the modern law of death eligibility under the Eighth Amendment. This century, in twelve cases, the United States Supreme Court considered whether executing a particular class of defendants is consistent with the Eighth Amendment. In making its determination, the Court considers whether that class of defendants

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tics in language which can be fairly understood and applied by the sentencing authority, appear to be tasks which are beyond present human ability." Justice Harlan supported this statement with a brief recollection of the history behind the United Kingdom's decision to abolish capital punishment and the acknowledgment by the drafters of the Model Penal Code that their proposed formula of factors to consider was not exhaustive. *See id.* at 204-07.

[4] Courts have so far rejected arguments that the present administration of capital punishment and distribution of death sentences violate the Constitution. *See* McCleskey v. Kemp, 481 U.S. 279, 302 (1987); *see also infra* notes 32-44 and accompanying text.

historically has been subjected to capital punishment, the treatment of the issue in judicial precedents, legislative attitudes about the issue, and the response of capital juries as reflected in their sentencing decisions. An assessment is made on whether deterrence or retribution will be achieved by the execution. On occasion, the Court has also considered how that class of defendants is treated under international law or the laws of other nations.

In non-capital cases, under a different variant of its Eighth Amendment jurisprudence, the Court has ruled that the collateral consequences of an inmate's confinement may violate the Cruel and Unusual Punishments Clause of the Eighth Amendment. These same strictures should apply in capital cases. The additional mental strain experienced by capital defendants while on death row for an inordinate period is a collateral consequence of punishment that should be cognizable under the Eighth Amendment's Cruel and Unusual Punishments Clause.

Part III notes the relative infrequency of executions in light of the number of capital convictions. It also discusses capital cases in which the defendant asserted that the state forfeited the right to execute him, due to the delay between the imposition of the death sentence and the proposed execution date. These cases indicate that inordinate delay claims are likely to arise when a serious error occurs during the prosecution of the case, and while the case is being processed a court rules in the defendant's favor.

Part IV addresses the inordinate delay claim in light of the factors that the Court has outlined since 1976 to define the law of death eligibility. This Part points out that, as in other death eligibility cases, an execution after an inordinate delay is unconstitutional if the punishment makes no measurable contribution to acceptable goals of punishment and is nothing more than the imposition of pain and suffering. After applying the factors established by the Court for determining death eligibility, this Part concludes that an execution after an inordinate stay on death row may violate the Eighth Amendment.

Although a few recent articles have addressed aspects of an inmate's inordinate stay on death row,[5] this Article, unlike others,

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[5] Other commentators have recently considered the issue of delay between the imposition of a death sentence and the execution of that inmate. One author analyzed United States Supreme Court cases decided before the Eighth Amendment was applied to capital punishment as well as psychiatric professional literature on mental stress experienced while awaiting execution. *See* Richard E. Shugrue, *"A Fate Worse Than Death" — An Essay on Whether Long Times on Death Row are Cruel Times*, 29

grounds its analysis on the Court's cases interpreting the Cruel and Unusual Punishments Clause of the Eighth Amendment. This Article concludes that, in certain circumstances, an execution after an inordinate delay between a death sentence and execution may constitute cruel and unusual punishment in violation of the Eighth Amendment.

II. EIGHTH AMENDMENT JURISPRUDENCE

It was not until 1962 that the United States Supreme Court applied the Eighth Amendment to the states.[6] It took an additional fourteen years for the Court to address directly the constitutionality of capital punishment. The Court first considered whether the Eighth Amendment imposed some restraints on the death penalty in *Furman v. Georgia*,[7] which consolidated three cases. The Court, in a five-four decision, issued a one paragraph *per curiam* opinion, declaring that the "imposition and carrying out of the death penalty in these cases constitutes cruel and unusual punishment in violation of

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CREIGHTON L. REV. 1 (1995). Although Shugrue did not proffer a definitive answer, he did observe that resolution of the issue will depend on the Court's methodology. Under one approach, which he associates with Justice Scalia, a form of punishment is valid if it was not prohibited when the Eighth Amendment was enacted or if it is today commonly found in American practice. *See id.* at 23. In contrast, a more contextual approach, as suggested by Justice Breyer's analysis in noncapital cases, involves a systematic examination of the effect of extended incarceration on death row inmates and asks whether that impact is constitutionally cruel, unusual, or inhumane. *See id.* at 24. Another article contains suggestions on how to avoid future delays in executions. *See* Alex Kozinski & Sean Gallagher, *Death: The Ultimate Run-On Sentence*, 46 CASE W. RES. L. REV. 1 (1995). A third article relies on the intent of the Framers of the Eighth Amendment, social science data, international law, and the practices of other nations to conclude that long delays are cruel and unusual punishment. *See* Michael P. Connolly, Note, *Better Never Than Late: Prolonged Stays on Death Row Violate the Eighth Amendment*, 23 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 101, 137-38 (1997). A fourth commentator reviews the substantive and procedural issues and policy implications of the claim. *See* Kathleen M. Flynn, Note, *The "Agony of Suspense": How Protracted Death Row Confinement Gives Rise to an Eighth Amendment Claim of Cruel and Unusual Punishment*, 54 WASH. & LEE L. REV. 291 (1997). Finally, a fifth article argues that the claim is meritorious and that it presents a potentially irreconcilable constitutional conflict. Dan Crocker, *Extended Stays: Does Lengthy Imprisonment on Death Row Undermine the Goals of Capital Punishment?*, 1 J. GENDER, RACE & JUSTICE 555 (1998). In contrast to these articles, this Article addresses the Court's rulings since 1976, which outline the substantive parameters of the Eighth Amendment.

[6] *See* Robinson v. California, 370 U.S. 660, 667 (1962) (holding that the Eighth Amendment's Cruel and Unusual Punishments Clause applies to states through the Due Process Clause of the Fourteenth Amendment to prohibit punishing defendants for being addicted to narcotics).

[7] 408 U.S. 238 (1972).

the Eighth and Fourteenth Amendments."[8] Every judgment was reversed "insofar as it [left] undisturbed the death sentence imposed," and the cases were remanded for further proceedings.[9] Each of the nine Justices wrote separately, and no Justice in the five-person majority joined the opinion of any of the other members of the majority.[10]

Justices Brennan and Marshall, who were members of the five Justice majority, categorically rejected the death penalty as a constitutionally permissible form of punishment.[11] Justices Douglas, Stewart, and White each provided narrower grounds in support of the Court's judgment. Both Justice Stewart's and Justice White's concurrences suggested that if death sentences were imposed more frequently, capital punishment would not be cruel and unusual within the meaning of the Eighth Amendment.[12] Justice Douglas's concurrence also implied that the Constitution required a more equitable distribution of death sentences.[13]

Furman effectively abolished capital punishment in the United States.[14] Thus, for the first time in this nation's history, it was illegal

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[8] *Id.* at 239-40.

[9] *Id.* at 240.

[10] Though not formally joining in the concurrences, Justice Douglas indicated an agreement with the views expressed in the opinions filed by Justices Stewart and White. *See id.* at 248-49 n.11 (Douglas, J., concurring).

[11] *See id.* at 305 (Brennan, J., concurring); *id.* at 359-61 (Marshall, J., concurring). In dissent, Justice Marshall postulated that there were possibly six goals served by capital punishment: retribution, deterrence, prevention of recidivism, encouragement of guilty pleas and confessions, eugenics, and economy. *See id.* at 342 (Marshall, J., concurring). He leveled his most severe attack on the concept of retribution as a permissible objective of the penal system and believed that there was insufficient evidence on the deterrent effect of the death penalty. *See id.* at 345-54 (Marshall, J., concurring). On the issue of recidivism, Justice Marshall stated that the death sentence was excessive both because juries were not asked to consider the issue when they decided to impose the sentence, and because most murderers are model prisoners. *See id.* at 355 (Marshall, J., concurring). Justice Marshall quickly rejected the remaining possible rationales. *See id.* at 355-59 (Marshall, J., concurring).

Commentators have also concluded that eugenics, judicial economy, and the encouragement of guilty pleas do not provide a legal justification for capital punishment. *See* Michael H. Marcus & David S. Weissbrodt, *The Death Penalty Cases*, 56 CAL. L. REV. 1268, 1302-14 (1968).

[12] *See Furman*, 408 U.S. at 309-10 (Stewart, J., concurring); *id.* at 311-14 (White, J., concurring).

[13] *See id.* at 255-57 (Douglas, J., concurring).

[14] *See id.* at 240 (vacating judgment "insofar as it leaves undisturbed the death sentence imposed" and remanding pending capital cases for further proceedings). In each of the cases then pending before it, the Court granted certiorari, reversed the judgment as far as it left undisturbed the death sentence, and remanded the

for a state to execute a defendant.[15] The states then set about rewriting their capital sentencing laws, undoubtedly hoping to persuade at least Justice Douglas, Stewart, or White of the validity of their reconstituted laws. When the Court again addressed the issue, four years later, Justice Douglas had resigned and Justice Stevens occupied his seat. The Court used five cases — from Georgia, Florida, Texas, North Carolina, and Louisiana — to address whether the Eighth Amendment prohibited the death penalty as a criminal sanction.

A. *The 1976 Cases*

The primary treatment of the meaning of the Eighth Amendment was developed in Justice Stewart's plurality opinion in *Gregg v. Georgia*,[16] which adjudicated the constitutionality of Georgia's capital punishment law. The opinion considered the historical origin of the Cruel and Unusual Punishments Clause and the Court's precedents construing that provision. The plurality reasoned that the drafters of the clause were primarily concerned with prohibiting torture and other barbarous methods of punishment. The plurality then extracted two principles from the Court's cases. Contemporary values concerning the infliction of the punishment were relevant to ensure that the challenged sanction reflected the "evolving standards of decency that mark the progress of a maturing society."[17] The sanction also had to respect human dignity, and, thus, could not be excessive. Detecting excessiveness required two further inquiries: First, the punishment could not involve the unnecessary and wanton infliction of pain, and second, the punishment could not be grossly out of proportion to the severity of the crime.[18]

In considering whether the death penalty in the abstract violated the Eighth Amendment, the plurality considered Anglo-

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case for further proceedings. *See id.* at 239-40 The decision impacted the death sentences of the nation's 631 inmates then on death row. *See* Joel C. Moyer, Note, *The Death Penalty in Massachusetts*, 8 SUFFOLK U. L. REV. 632, 639 (1974).

[15] Chief Justice Burger predicted privately that there would never be another execution in the United States. *See* BOB WOODWARD & SCOTT ARMSTRONG, THE BRETHREN: INSIDE THE SUPREME COURT 259 (1979). Interestingly, Justice Brennan has related that one year earlier, after *McGautha*, he did not believe that there was any hope that the Court would hold capital punishment unconstitutional. *See* William J. Brennan, Jr., *Constitutional Adjudication and the Death Penalty: A View from the Court*, 100 HARV. L. REV. 313, 321 (1986). Both Justices were only partially correct.

[16] 428 U.S. 153 (1976). Justices Powell and Stevens joined the opinion. This same plurality of Justices announced the judgment of the Court in all of the 1976 capital punishment cases.

[17] *Id.* at 173 (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958)).

[18] *See id.*

American history, the text of the Constitution, and the Court's own precedents, which had stated that the death penalty was not *per se* invalid. The plurality viewed the enactment of various capital punishment statutes in the four years since *Furman* as a manifestation of society's continuing approval of the death penalty. To determine whether capital punishment comported with human dignity, the plurality considered the penological justifications proffered for the sanction. Justice Stewart noted that the death penalty was most frequently said to serve society's interest in retribution and deterrence, and, to a lesser extent, to assure incapacitation and to prevent recidivism. Though statistical attempts to prove the deterrent effect of the penalty were characterized as "inconclusive,"[19] the plurality did imagine murders that could be deterred by the death penalty:

> There are carefully contemplated murders, such as murder for hire, where the possible penalty of death may well enter into the cold calculus that precedes the decision to act. And there are some categories of murder, such as murder by a life prisoner, where other sanctions may not be adequate.[20]

Thus, the plurality deferred to each legislature's determination that executions for certain types of murders satisfied either retribution or deterrence. The plurality was unwilling to declare that the death penalty was a punishment that could never be imposed no matter the circumstances of the offense, the character of the offender, or the procedure followed in reaching the decision to impose death.[21]

The plurality then reviewed each statutory scheme to determine its constitutionality. Importantly, *Furman* was read as prohibiting the imposition of the death penalty under sentencing procedures that created a substantial risk of arbitrary and capricious sentencing.[22] The Georgia,[23] Florida,[24] and Texas[25] statutes met that standard be-

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[19] *See id.* at 184-85.

[20] *Id.* at 186.

[21] *See id.* at 187.

[22] *See Gregg*, 428 U.S. at 188.

[23] *See id.* at 163-66. After convicting a defendant of a capital crime, Georgia's statute required that the jury find one of the 10 statutory aggravating circumstances and consider any mitigating circumstances in deciding on the appropriate sentence. *See id.* at 164-66. The trial judge was bound by the jury's sentence. *See id.* at 166.

[24] *See* Proffitt v. Florida, 428 U.S. 242, 247-50 (1976). Florida juries also considered aggravating and mitigating circumstances when sentencing capital defendants. *See id.* at 248. In Florida the trial judge decided on the sentence, after taking into account the jury's recommendation on the issue. *See id.* at 249. If the jury recommended life imprisonment, the judge could impose the death sentence if "the facts

cause they all provided for procedures to ensure that the decision to impose a death sentence would be "suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action."[26] The two remaining capital punishment cases, *Woodson v. North Carolina*[27] and *Roberts v. Louisiana*,[28] involved statutes that required the imposition of a death sentence upon conviction of a capital offense. The plurality found both statutes to be unconstitutional, noting that

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suggesting a sentence of death [were] so clear and convincing that virtually no reasonable person could differ." *Id.* (quoting Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975)).

In Georgia and Florida, all death penalty appeals lay with the respective state supreme court, which was to consider, among other things, whether the death sentence was appropriate in the case and consistent with the sentence imposed in similar cases. *See id.* at 250-51. The plurality viewed this appellate court review as an additional guarantee that prevented a sentencer from wantonly and freakishly imposing a death sentence in a particular case. *See id.* at 258-60. The Court found Georgia's capital sentencing scheme constitutional in *Gregg*. *See id.* at 253. Despite the advisory nature of the jury verdict, the Court ruled Florida's capital sentencing laws constitutional in *Proffitt*. *See id.*

[25] *See* Jurek v. Texas, 428 U.S. 262 (1976). In Texas, death was a sentencing option for five kinds of intentional and knowing murders. *See id.* at 268. The categories were: murder of a peace officer or fireman; murder committed during a kidnapping, burglary, robbery, forcible rape, or arson; murder committed for remuneration; murder committed while escaping or attempting to escape from a penal institution; and murder committed by a prison inmate when the victim is a prison employee. *See id.* If a jury found a defendant guilty of one of these murders, that jury would sentence him after a sentencing hearing. *See id.* at 267. At the hearing, both the prosecution and the defense could introduce any relevant evidence. *See id.* In deciding what sentence to impose, the jury had to answer "yes" to three statutory questions before it could impose a death sentence. *See id.* at 269.

In *Jurek*, the plurality reasoned that the five categories of capital murder served the function of narrowing the categories of death-eligible murders, similar to the statutory aggravated circumstances listed in the Georgia and Florida statutes. *See id.* at 270. The plurality also noted that the Texas courts had treated the second of the three questions posed to the jury after a verdict of guilty as an opportunity for the defense to place before the jury any existing mitigating evidence. *See id.* at 272-73. This process ensured that the jury had guided and focused consideration of the facts of the crime and the circumstances of the individual before it sentenced the defendant. *See id.* at 273-74. The plurality rejected the argument that the second statutory question, which focused on the future dangerousness of the defendant, was invalid because it was impossible for a sentencer to predict future behavior. *See id.* at 275-76. Predicting future behavior was an essential element in many decisions made in the criminal litigation process, such as whether to grant a defendant bail, what type of punishment to impose upon conviction, and whether to grant parole to an offender. Texas's capital sentencing procedure was sufficient because the jury would have "before it all possible relevant information about the individual defendant whose fate it must determine" prior to imposing a proper sentence. *Id.* at 276.

[26] *Gregg*, 428 U.S. at 189; *see also Proffitt*, 428 U.S. at 253; *Jurek*, 428 U.S. at 273-74.

[27] 428 U.S. 280 (1976).

[28] 428 U.S. 325 (1976).

juries historically sentenced only a small number of defendants to death, and, to accommodate this practice, states continuously granted juries greater discretion in determining the appropriate punishment in capital cases. Mandatory death penalty statutes did not reflect this contemporary standard of decency.[29]

In sum, *Furman* provided an unclear resolution of whether capital punishment violated the Eighth Amendment. It was four years before the Court clarified the issue in five cases in 1976. Those five cases outlined the principles and considerations relevant in deciding an Eighth Amendment claim. The Court determined that history and judicial interpretation of the Amendment, as well as then-recent legislative enactments and jury verdicts in capital cases, demonstrated that death was still a publicly approved method of punishment. Capital punishment's penological objectives of deterrence and retribution could be achieved best in a limited class of cases: the carefully contemplated murder and cases in which a sentence less than death would not be adequate, perhaps because of the defendant's character. To ensure consistent imposition of the death penalty, sentencers should have objective standards. These objective standards would also facilitate judicial review of death sentences.

Proffitt v. Flordia[30] and *Jurek v. Texas*[31] suggested that the Eighth Amendment did not eliminate all flexibility in how states could design their capital punishment laws. As underscored by *Woodson* and *Roberts*, sentencers had to consider the character and record of each convicted defendant and the circumstances of the particular crime before imposing a death sentence. At bottom, the 1976 cases suggested that the death penalty was a sanction reserved for a limited

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[29] *See Woodson*, 428 U.S. at 304-05; *Roberts*, 428 U.S. at 336. Moreover, it was likely that jurors would consider the sentence that would be imposed when adjudicating the defendant's guilt. *See Woodson*, 428 U.S. at 304. Mandatory death penalty statutes would thus encourage jurors to nullify the law if they believed a death sentence was not the appropriate punishment, notwithstanding sufficient proof to convict the defendant of the capital offense. *See id.* at 302-03. Though a mandatory sentencing process might increase the number of persons sentenced to death and thus address Justices Douglas's, Stewart's, and White's concerns expressed in *Furman*, the Court ruled it violated the essential holding of *Furman* because there were no objective standards that guided, regularized, and made rationally reviewable the process the jury used to decide which defendants to sentence to death. *See id.* at 303. Another defect in mandatory death penalty statutes was that they did not allow for particularized consideration of relevant aspects of the character and record of the defendant, and the circumstances of the crime, before imposing a death sentence. *See id.* at 303-04.

[30] 428 U.S. 242 (1976).

[31] 428 U.S. 262 (1976).

class of criminal defendants: murderers who could be deterred and killers whose conduct merited retribution.

B. Eighth Amendment Limits on Death Eligibility

Since its initial ruling on the issue in 1976, the Court has, on seven other occasions, revisited the question of whether executing a particular class of defendants is consistent with the Eighth Amendment.[32] Those seven cases — *Coker v. Georgia*,[33] *Enmund v. Florida*,[34]

[32] By 1987, most of the major issues on death eligibility had been resolved. One issue that remains somewhat unsettled is whether a conviction for treason can be punished with the death penalty. The common law suggests that it may be not be disproportionate punishment to execute those convicted of treason, even if no one died as a result of the treason. *See* Hanauer v. Doane, 79 U.S. (12 Wall.) 342, 347 (1870) ("No crime is greater than treason" which threatens the very existence of the nation.). Commentators are divided on whether such punishment is permissible. *Compare* Paul D. Kamenar, *Death Penalty Legislation for Espionage and Other Federal Crimes is Unnecessary: It Just Needs a Little Re-Enforcement*, 24 WAKE FOREST L. REV. 881 (1989) (arguing that execution of defendants convicted of espionage is constitutionally permissible), *with* James G. Wilson, *Chaining the Leviathan: The Unconstitutionality of Executing Those Convicted of Treason*, 45 U. PITT. L. REV. 99 (1983) (noting that the Constitution prohibits execution for treason, unless a death occurred).

[33] 433 U.S. 584 (1977). At issue in *Coker* was whether the death penalty was the appropriate proportionate punishment for a defendant who did not kill. *See id.* at 586. Coker was sentenced to death for raping an adult woman. *See id.* at 587-91. The Court's plurality opinion noted that in the previous 50 years state legislatures had infrequently authorized death as a punishment for rape. *See id.* at 595. The Court also noted that international legal developments evidenced the same trend. *See id.* at 596 n.10. Juries rarely imposed death sentences on rapists. Further, in Georgia, before deliberate killers received a death sentence, the jury had to find at least one aggravating circumstance and, even then, the murderer had the opportunity to argue in mitigation of a death sentence. *See id.* at 598. Rapists, however, might receive a death sentence even if they did not take the life of their victim and the state did not have to establish an aggravating circumstance. The plurality refused to accept punishing rape, which it characterized as "[s]hort of homicide ... the ultimate violation of self," more severely than deliberate killings. *See id.* at 597 (citations omitted). Accordingly, sentencing a rapist to death was deemed disproportionate and excessive punishment, and therefore forbidden by the Eighth Amendment. *See id.* at 600. The punishment imposed in *Coker* failed to satisfy the proportionality requirement of the Eighth Amendment. *See id.* at 592. The plurality thus did not consider whether the punishment served the legitimate ends of punishment — retribution or deterrence — and whether the death penalty achieved those ends. *Coker* demonstrates that proportionality — standing alone — serves as a limiting principle on the constitutional availability of the death penalty.

[34] 458 U.S. 782 (1982). In this case the Court addressed whether the Eighth Amendment prohibited the imposition of the death penalty on a defendant who did not kill, attempt to kill, intend that a killing take place, or intend to use lethal force, yet who aided in the commission of a felony, during which an accomplice killed another. *See id.* at 787. The Court reviewed the legislative treatment of non-triggermen felony murderers and considered the instances in which juries sentenced them to death. *See id.* at 789-93. The majority of states at the time did not

Tison v. Arizona,[35] *Ford v. Wainwright*,[36] *Penry v. Lynaugh*,[37] *Thompson v. Oklahoma*,[38] and *Stanford v. Kentucky*,[39] — establish the substantive lim-

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provide for capital punishment in such situations. *See id.* Juries were loath to impose the death sentence on non-triggermen felony murderers in the absence of finding that they hired or solicited someone to kill the victim or participated in a scheme designed to kill the victim. *See id.* at 794-96. The Court ruled that executing non-triggermen felony murderers did not serve either retribution or deterrence. *See id.* at 798-801. The threat of the death penalty was not a deterrent for those who committed capital crimes without intending to take another's life or who did not contemplate the use of lethal force. *See id.* at 799-800. Executing non-triggermen for killings that they did not commit or killings they did not intend to commit or cause, did not advance retributionism because the death penalty would not ensure that that criminal received his just deserts. *See id.* at 801. International legal developments were "not irrelevant," as the Court noted that many British Commonwealth countries and continental Europe had abolished or restricted the felony murder doctrine. *See id.* at 796-97 & n.22. In light of all these factors, the Court reversed the death sentence. *See id.* at 801.

[35] 481 U.S. 137 (1987). *Tison* also addressed the propriety of imposing a death sentence on a non-triggerman felony murderer. As in *Enmund*, the Court reviewed the treatment of the issue by the state legislatures and state court opinions. *See id.* at 152-55. In contrast to *Enmund*, the *Tison* Court concluded that sentencers were not reluctant to impose the death sentence on a defendant who had participated in a violent felony under circumstances likely to result in the loss of innocent human life. *See id.* at 154-55. The Court opined that a defendant who exhibited a reckless indifference to the value of human life may be as morally reprehensible as a defendant who intended to kill his victim. *See id.* at 157. Reckless indifference was a sufficiently culpable mental state that sentencers could consider when sentencing the defendant. *See id.* at 157-58. Thus, after *Tison*, defendants may receive a death sentence, if they had a substantial role in the offense and were at least reckless as to whether a death would occur from their activities. *See id.* at 158. Although less clear on the point, *Tison* suggests that if the defendant has a culpable mental state as to the killing, a death sentence might also satisfy retributive principles. *See id.*

[36] 477 U.S. 399 (1986). *Ford* held that the Eighth Amendment prohibits the execution of the insane. *See id.* at 401. In resolving the issue, the Court first looked to English common law and the contemporary practices in the states. *See id.* at 406-09. These inquiries revealed that neither the common law, nor any state law, authorized executions of the insane. *See id.* Various rationales for the common law rule existed, including that executing an insane person did not provide an example to others. *See id.* at 407. For that reason, executing the insane did not contribute to the deterrence value of capital punishment. *See id.* Similarly, because an insane inmate did not appreciate the reason for the punishment, execution did not have a retributive impact. *See id.* at 408. Due to a virtual unanimity of both the common law and contemporary practices, the Court ruled that execution of the insane violates the Eighth Amendment. *See id.* at 409-10.

[37] 492 U.S. 302 (1992). Penry was mentally retarded. *See id.* at 307-08. In deciding whether the Eighth Amendment permitted the execution of the mentally retarded, the Court considered the English common law at the time that the Eighth Amendment was adopted. To ascertain contemporary values, the Court also analyzed current legislation and recent jury decisions. *See id.* at 329-35. The common law prohibited the execution of "idiots," who were generally described as persons who lacked an understanding of good and evil or who could not distinguish the two ideas. *See id.* at 331-32. In considering whether the execution of a mentally retarded person satisfied retributionism or deterrence, a majority of the Justices could

its of death eligibility. More significantly, despite the passage of time and changes in the Court's personnel, throughout the various issues that the Court has faced, the tests announced in *Gregg* and *Coker* continue to comprise most of the substantive limits of death eligibility under the Eighth Amendment. To determine whether executing a class of defendants accords with the evolving standards of decency or whether the death penalty is excessive punishment as applied to that class of defendants, the Court looks to history, judicial precedent, statutes, jury verdicts in capital cases, and whether deterrence or retribution will be achieved by the execution. International law has informed some decisions. No one factor is dispositive.[40] The death penalty may be excessive either because (1) the penalty does not meaningfully achieve either deterrence or retribution (but generally

not agree. *See id.* at 306. A plurality stated that the Eighth Amendment did not prohibit the execution of the mentally retarded. *See id.* at 340. Thus, after *Penry*, the Eighth Amendment does not preclude the execution of the mentally retarded if the defendant had the requisite mental culpability when committing the capital offense. *See id.*

[38] 487 U.S. 815 (1988). At issue in *Thompson* was the execution of defendants who were 15 years old when they committed a capital crime. *See id.* at 818-19. A plurality canvassed the laws of the states that regulated "adult" activities. *See id.* at 821-31. Included in the survey were the 18 states that had specifically established a minimum age in their death penalty statutes and the 14 states without capital punishment. The plurality also considered the frequency with which juries imposed death sentences on those under 16 years old and whether executing those under age 16 at the time of the offense achieved retribution or deterrence. *See id.* at 826-38. The Court concluded that there was a national consensus that prohibited the execution of those younger than 15. *See id.* at 838. The Court based this decision partly on the relative infrequency of death sentences imposed on 15-year-old defendants, and partly on the proposition that executions did not deter or satisfy retribution. *See id.* at 833-38.

[39] 492 U.S. 361 (1989). In contrast to *Thompson*, the *Stanford* plurality, different from that which announced the Court's judgment in *Thompson*, concluded that executing capital defendants who were at least 16 years old at the time of the capital offense did not violate the Eighth Amendment. *See id.* at 380. The plurality relied on basically the same legislative pronouncements and statistics on jury verdicts that were instructive in *Thompson* and concluded that the defendants had failed to carry their burden of proving that there was a nationwide consensus against capital punishment being imposed on 16- and 17-year-old defendants. *See id.* at 370-80. The *Stanford* plurality did not consider the defendant's argument that the death penalty did not either deter other 16- or 17-year-olds or further retributive objectives. *See id.* at 377-78.

[40] At bottom, determining whether a particular class of defendants can be executed is as much a product of each Justice's own values as it is an analysis of the articulated factors that make up the Court's test. *But see* Susan Raeker-Jordan, *A Pro-Death, Self-Fulfilling Constitutional Construct: The Supreme Court's Evolving Standard of Decency for the Death Penalty*, 23 HASTINGS CONST. L.Q. 455, 555-56 (1996) (arguing that the evolving standards of decency formula is structured to favor imposition of the death penalty).

both),[41] or (2) the penalty is grossly out of proportion to the severity of the crime.[42] In either instance, the punishment violates the Eighth Amendment because executing the defendant involves unnecessary and wanton infliction of pain.

The six-factor test was promulgated in *Gregg* when the Court ruled that the Eighth Amendment was not limited to punishment used at the time the framers wrote the Constitution.[43] As a guide for future cases, these factors are designed to ensure that answers to Eighth Amendment questions are based on "objective" standards and not on the predilections of the individual Justices.[44] Since announcing these factors, however, the Court has not discussed either the aims of the Eighth Amendment or the objectives of capital punishment. In the seven subsequent cases on death eligibility, the Court all but mechanically looked to whether each factor was established before deciding whether the Eighth Amendment prohibited executing that class of defendants. Addressing the question of inordinate delay between imposing a death sentence and executing the defendant presents the courts with another opportunity to consider the justifications for capital punishment and the Eighth Amendment restrictions on that penalty.

C. Collateral Consequences of Punishment as Violative of the Eighth Amendment

Since *Gregg*, the Court, in seven non-capital cases, has outlined the contours of the Eighth Amendment relative to the collateral consequences of an inmate's confinement.[45] These cases can be separated into two, sometimes overlapping, categories: One group deals with the conduct of prison officials toward the inmate, and the second group concerns the permissible conditions under which inmates may be confined. Under either theory, the Eighth Amend-

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[41] *See Ford*, 477 U.S. at 405-10; Gregg v. Georgia, 428 U.S. 153, 179-87 (1976); Woodson v. North Carolina, 428 U.S. 280, 301-05 (1976). *See also* Harvey D. Ellis, Jr., Commentary, *Constitutional Law: The Death Penalty: A Critique of the Philosophical Bases Held to Satisfy the Eighth Amendment Requirements for Its Justification*, 34 OKLA. L. REV. 567, 597 (1981) (asserting that no Justice has stated that social utility alone is a sufficient justification for capital punishment).

[42] *See* Coker v. Georgia, 433 U.S. 584, 592 & n.4 (1977); *Gregg*, 428 U.S. at 173.

[43] *See Gregg*, 428 U.S. at 171.

[44] *See id.* at 173, 175-76.

[45] Farmer v. Brennan, 511 U.S. 825 (1994); Helling v. McKinney, 509 U.S. 27 (1993); Hudson v. McMillian, 503 U.S. 1 (1992); Wilson v. Seiter, 501 U.S. 294 (1991); Whitley v. Albers, 475 U.S. 312 (1986); Rhodes v. Chapman, 452 U.S. 337 (1981); Estelle v. Gamble, 429 U.S. 97 (1976).

ment is violated if the claimed deprivation is objectively cruel and unusual, and prison officials acted with the requisite culpable mental state in bringing about the deprivation.[46]

The first group of cases addressed how inmates are personally treated. For example, in *Hudson v. McMillian*[47] a handcuffed and orderly prisoner was denied his Eighth Amendment rights when a guard "maliciously and sadistically" punched him, causing "minor bruises and swelling of his face, mouth, and lip," loosening his teeth, and cracking his partial dental plate.[48] Another way that prison officials might violate the Eighth Amendment is if, as in *Farmer v. Brennan*,[49] they are deliberately indifferent to the plight of a preoperative transsexual who exhibits feminine characteristics, and after they place that prisoner in the general prison population, the prisoner is assaulted and raped. This conduct violates the Eighth Amendment because "[b]eing violently assaulted in prison is simply not part of the penalty that criminal offenders pay for their offenses against society."[50] In *Helling v. McKinney*,[51] the prison officials' deliberate indifference to the substantial risk of a serious harm that could befall an inmate placed in a cell in which he was exposed to second-hand tobacco smoke, a dangerous health condition, violated the Eighth Amendment. Similar to *Farmer*, the judgment in *Helling* was premised on the notion that when a prison official exposes an inmate to potential health hazards, the official has acted beyond the authority delegated by the sentencing authority.

The second group of cases discussed the conditions of an inmate's confinement. For instance, in *Hutto v. Finney*[52] the Court considered an appeal from a district court order finding that the conditions in two Arkansas prisons violated the prohibition against cruel and unusual punishment. The appellants did not contest this finding and the Court observed that the district court's order noted the "inmates' diet, the continued overcrowding, the rampant violence, the vandalized cells, and the 'lack of professionalism and good judgment on the part of maximum security personnel.'"[53] *Rhodes v.*

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[46] *See* Wilson v. Seiter, 501 U.S. 294, 305 (1991).

[47] 503 U.S. 1 (1992).

[48] *See id.* at 4.

[49] 511 U.S. 825 (1994).

[50] *See id.* at 834 (quoting Rhodes v. Chapman, 452 U.S. 337, 347 (1981) (internal quotation marks omitted)).

[51] 509 U.S. 25 (1993).

[52] 437 U.S. 678 (1978).

[53] *Id.* at 687 (citations omitted).

Chapman[54] decided that housing two inmates in a single cell was not cruel and unusual punishment. In making this ruling, the Court modified the familiar Eighth Amendment test: "Conditions [of confinement] must not involve the wanton and unnecessary infliction of pain, nor may they be grossly disproportionate to the severity of the crime warranting imprisonment."[55] The Court has thus far interpreted the Eighth Amendment to cover those confinement conditions that "have a mutually enforcing effect that produces the deprivation of a single, identifiable human need such as food, warmth, or exercise"[56] and has stated that harsh conditions of confinement do not violate the Eighth Amendment.[57] In short, these non-capital cases establish Eighth Amendment limits on the treatment of prisoners, with a particular focus on how their incarceration affects them. These same strictures should apply in capital cases. A capital defendant's inordinate stay on death row might impose consequential effects on that inmate — which are beyond the sentence authorized by the law — and, therefore, violate the "evolving standards of decency" of Eighth Amendment jurisprudence.

Mental strain is the most obvious collateral consequence experienced by capital defendants on death row for an inordinate period of time. Typically, death row inmates are confined to their cells for the great majority of each day and have relatively limited opportunities to exercise or communicate with other inmates or individuals from outside the prison. Research on the impact of this confinement indicates that inmates exhibit several emotional and psychological stages.[58] Capital defendants have been described as experi-

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[54] 452 U.S. 337 (1981).

[55] *Id.* at 347.

[56] Wilson v. Seiter, 501 U.S. 294, 304 (1991).

[57] *See* Rhodes v. Chapman, 452 U.S. 337, 347 (1981).

[58] *See* Robert Johnson, *Under Sentence of Death: The Psychology of Death Row Confinement*, 5 LAW & PSYCHOL. REV. 141 (1979) [hereinafter Johnson, *Under Sentence of Death*]. Robert Johnson interviewed 35 Alabama death row inmates in 1978 to gauge how they coped while in confinement. *See id.* At the outset, inmates manifested "emotional denial" of their capital sentence. *See id.* at 145. After the shock of receiving a death sentence wore off, most prisoners became introspective. *See id.* During this period, some inmates appeared nonchalant and immune to anxiety, depression, or fear. *See id.* Johnson surmised that this nonchalance may have stemmed from a belief that a commutation or successful appeal was imminent. *See id.*

Other inmates had a contrary reaction to their confinement. This second set of inmates displayed a feverish concern for day-to-day matters, or an "excessive preoccupation with appeals, religion, or intellectual pursuits." *Id.* A few other death row inmates "retreat[ed] into a private psychotic world" in which they imagined themselves exempt from execution. *Id.*

encing a "living death." Years ago, Albert Camus wrote of the "two deaths" that are imposed on a person sentenced to death and confined to death row.[59] These debilitating effects have, of late, been classified by some courts as the "death row phenomenon."[60] The death row phenomenon is an ancillary, unauthorized corollary of a death sentence. The anguish suffered during the inordinate delay makes "no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering."[61] When it is experienced beyond that which is necessary, the death row phenomenon should be viewed as an excessive form of punishment. As such, a state may, over time, forfeit its ability to go forward with an apparently lawfully imposed death sentence because the execution now violates the Eighth Amendment.

After extended periods of confinement, some inmates became suspicious, resentful, and hostile toward others. *See id.* This third group of inmates externalized responsibility and blame for their confinement. *See id.* They emerged transformed from "dissolute criminals into martyrs, adding a dimension of meaning and dignity to their lives." *Id.* *See generally* ROBERT JOHNSON, DEATH WORK: A STUDY OF THE MODERN EXECUTION PROCESS (1990); ROBERT JOHNSON, CONDEMNED TO DIE: LIFE UNDER SENTENCE OF DEATH (1981); BRUCE JACKSON & DIANE CHRISTIAN, DEATH ROW (1980).

[59] *See* ALBERT CAMUS, REFLECTIONS ON THE GUILLOTINE 25-29 (Richard Howard trans., 1960). According to Camus:

> A murdered man is generally rushed to his death, even at the height of his terror of the mortal violence being done to him, without knowing what is happening: the period of his horror is only that of life itself, and his hope of escaping whatever madness has pounced upon him probably never deserts him. For the man condemned to death, on the other hand, the horror of his situation is served up to him at every moment for months on end. Torture by hope alternates only with the pangs of animal despair. His lawyer and his confessor, out of simple humanity, and his guards, to keep him docile, unanimously assure him that he will be reprieved. He believes them with all his heart, yet he cannot believe them at all. He hopes by day, despairs by night. And as the weeks pass his hope and despair increase proportionately, until they become equally insupportable. According to all accounts, the color of his skin changes: fear acts like an acid. "It's nothing to know if you're going to die," one such man in the Fresnes prison said, "but not to know if you're going to live is the real torture." . . . As a general rule, the man is destroyed by waiting for his execution long before he is actually killed. Two deaths are imposed, and the first one is worse than the second, though the culprit has killed but once. Compared to this torture, the law of retaliation seems like a civilized principle.

Id.

[60] *See* Soering v. United Kingdom, 11 Eur. H.R. Rep. 439 (1989).

[61] Coker v. Georgia, 433 U.S. 584, 592 (1977).

III. DEFENDANTS ALLEGING TIME AWAITING EXECUTION AS CRUEL AND UNUSUAL PUNISHMENT

The following section surveys some of the cases of capital defendants who have asserted that the state has forfeited the right to execute them. Most cases that give rise to inordinate delay have both procedural and substantive shortcomings. These flaws often do not themselves disqualify the defendant from being sentenced to death.

For decades, more capital defendants have been sentenced to death than have been executed.[62] Some believed, however, that after *Gregg's* resolution of the general constitutionality of capital punishment, defendants would be executed at a rate that existed before the federal courts expressed doubts about the lawfulness of the death penalty. This belief proved misplaced. Five years after *Gregg*, three executions had occurred, despite an increase of hundreds of inmates sentenced to death.[63] The lack of executions was discussed in an interchange between Justices Rehnquist and Stevens in *Coleman v. Balkcom*,[64] a case in which the Supreme Court did not grant plenary review.

The Court, by a six-three vote, denied Wayne Carl Coleman's certiorari petition to review the denial of his state post-conviction petition.[65] Most noteworthy was Justice Rehnquist's explanation for his vote to grant certiorari.[66] He argued that the Court should grant the certiorari petition because denying it would not, in all likelihood, end the litigation. Rehnquist anticipated that after the denial of certiorari, Coleman would pursue the same claims in a federal habeas

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[62] *See* NATIONAL PRISONER STATISTICS, CAPITAL PUNISHMENT, 1930-1970, at 8 tbl. 1, 9 tbl. 2 (1971).

[63] *See* Godfrey v. Georgia, 446 U.S. 420, 439 (1980) (Marshall, J., dissenting).

[64] 451 U.S. 949 (1981).

[65] Justice Marshall, joined by Justice Brennan, voted to grant the petition. *See id.* at 953-56 (Marshall, J., dissenting). Justice Marshall argued that together the statutes violated Coleman's federal due process rights. *See id.* at 955-56 (Marshall, J., dissenting). The capital nature of the case seemingly prompted Justice Marshall's dissent, and he stressed the limited issue that the case presented. According to Justice Marshall:

> It would not be necessary to hold that compulsory process is constitutionally required in any other civil, or indeed, in any other habeas proceeding. It would instead be sufficient . . . to recognize the unique character of the death penalty and of the restraints required by the Constitution before the State may impose it. Granting the assistance of compulsory process to an individual under sentence of death but ready and willing to demonstrate the unconstitutionality of the manner of his conviction might well be among those restraints.

Id.

[66] *See id.* at 956 (Rehnquist, J., dissenting).

petition. According to Rehnquist, the Court had reached a stalemate in the administration of constitutional law regarding capital punishment. The death penalty had become "virtually an illusion" due to the "endlessly drawn out legal proceedings," as few of the inmates on death row appeared to face any imminent prospect of having their sentence carried out.[67] The Justice held the Court responsible for "this mockery of our criminal justice system."[68] Justice Rehnquist suggested that the Court grant certiorari in all capital cases and address the issues raised by those defendants. In the Justice's view, this procedure would end the federal courts' jurisdiction over some death row cases and place the inmate's fate in the hands of the state officials, who could then decide whether to carry out the sentence or afford the prisoner other relief.[69] In response to Justice Rehnquist's memorandum, Justice Stevens noted that, from *Furman* through 1981, the Court had decided several novel constitutional issues related to capital punishment. With the resolution of those issues, Justice Stevens surmised, "[o]ne therefore should not assume that the delays of the past few years will necessarily be reflected in the future if the various state authorities act with all possible diligence."[70] While acknowledging that housing inmates permanently on death row did not further the death penalty as a deterrent, Justice Stevens thought that it was inevitable that there would be a significant period of incarceration during the interval between sentencing and execution. Although he was uncertain how promptly a diligent prosecutor could complete all of the proceedings necessary to carry out a death sentence, Justice Stevens nonetheless concurred in the

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[67] *Id.* at 958 (Rehnquist, J., dissenting).

[68] *Id.*

[69] A few years later, Chief Justice Burger also began publicly to express exasperation with the delay between the imposition of a death sentence and the execution. In *Sullivan v. Wainwright*, 464 U.S. 109, 112 (1983), the Chief Justice wrote:

> I emphasize that this case has been in the courts for ten years and is here for the fourth time. This alone demonstrates the speciousness of the suggestion that there has been a "rush to judgment." The argument so often advanced by the dissenters that capital punishment is cruel and unusual is dwarfed by the cruelty of 10 years on death row inflicted upon this guilty defendant by lawyers seeking to turn the administration of justice into the sporting contest Roscoe Pound denounced three-quarters of a century ago.

Id. at 112 (Burger, C.J., concurring in denial of application for stay); *see also* Gray v. Lucas, 463 U.S. 1237, 1240 (1983) (Burger, C.J., concurring in denial of petition for certiorari and denial of application for stay) ("This case illustrates a recent pattern of calculated efforts to frustrate valid judgments after painstaking judicial review over a number of years; at some point there must be finality.").

[70] *Coleman*, 451 U.S. at 951 (Stevens, J., concurring in denial of certiorari).

denial of the certiorari petition because he believed that it was unwise to experiment with capital cases by adopting accelerated review procedures.[71]

This exchange between Justices Rehnquist and Stevens not only highlights the lack of executions after *Gregg*, but also evidences insights on the role of the federal courts in the capital litigation process.[72] One of the reasons for the delay in executions was the exploration by federal and state courts, prosecutors, defense attorneys, and state legislatures of the boundaries the 1976 cases mandated. The lack of a large increase in executions from 1976 to 1981 suggested that if a defendant challenged his conviction or sentence, it would generally take more than five years before the case completed state and federal post-conviction review. Supporters of capital punishment may well have wondered whether the frequency of executions would ever approach the pre-*Furman* rate, after the adjudication of most of the major legal issues.[73] Today, after most legal issues have been resolved,[74] most federal courts have adopted special local rules that regularize the consideration of capital cases.[75] These rules gen-

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[71] *See id.* At about the same time, Justice Marshall argued that the lack of executions was another demonstration of the unconstitutionality of the death penalty. *See Godfrey*, 446 U.S. at 438-40 (Marshall, J., dissenting). Justice Marshall noted: "And while hundreds have been placed on death row in the years since *Gregg*, only three persons have been executed. Two of them made no effort to challenge their sentence and were thus permitted to commit what I have elsewhere described as 'state-administered suicide.'" *Id.* at 439.

[72] Discussions between judges concerning the administration of capital punishment and the years that it takes to litigate such cases have not been limited to the United States Reports. *See, e.g.*, Coleman v. McCormick, 874 F.2d 1280, 1292-94 (9th Cir.) (en banc) (Reinhardt, J., concurring), *cert. denied*, 493 U.S. 944 (1989); *id.* at 1298-99 (Trott, J., concurring); *see also* State v. Steffen, 639 N.E.2d 67 (Ohio) (considering delay in several Ohio cases), *cert. denied*, 513 U.S. 895 (1994).

[73] In 1983, in *Barefoot v. Estelle*, 463 U.S. 880 (1983), the Court considered the procedures federal courts might employ in deciding whether to issue a stay of execution to federal habeas petitioners under a state death sentence. *See Barefoot*, 463 U.S. at 892-96. Although the Court affirmed the dismissal of a habeas petition, it noted: "It is a matter of public record that an increasing number of death-sentenced petitioners are entering the appellate stages of the federal habeas process." *Id.* at 892. In apparent anticipation of these cases, the Court outlined procedures for federal courts to use in deciding stays of execution and appeals from the denial of such stays. *See id.* at 892-96.

[74] *But see supra* note 32 (noting that the issue of death eligibility for espionage and treason remains unsettled).

[75] Notwithstanding the promulgation of these local rules, delays do occur in the federal courts. In *In re Blodgett*, 502 U.S. 236 (1992) (per curiam), for example, a Washington jury convicted Charles Rodman Campbell in 1982 of multiple murders and sentenced him to death. *See Blodgett*, 502 U.S. at 237. That conviction became final in April 1985 when the United States Supreme Court denied his petition for certiorari. *See id.* In July 1985, Campbell filed a federal habeas petition, which was

erally provide for notification to the clerk of the appropriate court of appeals when a death penalty habeas petition is filed in a district court within the circuit.[76]

Since *Gregg*, prosecutors have sought the death penalty; sentencers have on occasion imposed death sentences; the courts have, with some frequency, affirmed those convictions and sentences; and some states have executed capital defendants. For instance, from 1977 through June 1998, on average, annually 300 people received a death sentence. During this period, 467 executions occurred.[77]

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eventually denied. *See id.* Campbell filed a second federal habeas petition in March 1989, and it was denied within a month by the district court. *See id.* An appeal followed and a stay of execution was granted. *See id.* The case was argued in June 1989. *See id.* In April 1990 and October 1990, the Washington Attorney General sent letters to the court, inquiring about the status of the appeal. *See id.* Neither letter was answered. *See id.* In July 1990, and again in September 1990, Campbell moved to withdraw some of the issues in his petition from the panel's consideration. *See id.* The court of appeals later permitted Campbell to discharge his attorneys and proceed *pro se* and to file a third federal habeas petition. *See id.* at 238.

On occasion, a substantial period elapses while the case is pending in the federal district court. The federal habeas petitions of C. Michael Anderson and Peter Hochstein reportedly have been pending in the United States District Court for the District of Nebraska for over 11 years. *See* Joy Powell, *Stenberg Asks for Deadline on Decision: Death-Row Appeal in Court for 11 Years*, OMAHA WORLD-HERALD, June 2, 1995, at 19. *In re Michael Dutton*, 1993 U.S. APP. LEXIS 29300 (6th Cir. Nov. 9, 1993), involved a habeas petition filed by Ronald E. Rickman, which had been pending on the docket of the district court for seven years. *See id.* at *1. The petition was lengthy and raised four broad claims — "ineffective assistance of counsel, unconstitutionality of the Tennessee death penalty, denial of due process at trial and on appeal, and [the petitioner's] competency to stand trial." *Id.* at *2. The district judge ruled on a few procedural motions, and in the interim, the petitioner exhausted some other issues, and sought to file an amended habeas petition. *See id.* Subsequently, the Tennessee Attorney General applied for a writ of mandamus. On November 9, 1993, the Sixth Circuit issued the mandamus and directed the district judge to hold a trial on the issues raised by the petition or otherwise to dispose of the petition within 180 days of the date of the mandamus order. *See id.* at *5. The stay of execution entered by the district court was ordered vacated if there were neither a trial nor other disposition of the petition within the designated time period. *See id.* In September 1994, the district judge granted the habeas petition. *See* Rickman v. Dutton, 864 F. Supp. 686 (M.D. Tenn. 1994), *aff'd*, 131 F.3d 1150 (6th Cir. 1997), *cert. denied*, 118 S. Ct. 1827 (1998).

[76] *See, e.g.*, 3D CIR. LOC. APP. R. 8.2; 3D CIR. MISC. LOC. APP. R. 111.0-111.8; 4TH CIR. R. 22(B); 4TH CIR. INT. OP. PROC. 22.2,22.3; 5TH CIR. R. 8.12; 5TH CIR. INT. OP. PROC.; 6TH CIR. R. 28; 7TH CIR. R. 22; 8TH CIR. R. 22A; 9TH CIR. R. 22-1-22-5; 10TH CIR. R. 22.2; 11TH CIR. R. 22-1-22-3.

The case is assigned to a panel of appellate judges in the event of an appeal. This panel generally hears all subsequent appeals. As a result, federal appellate court judges generally know when a death penalty habeas petition is filed in a district court within their circuit. This panel also receives copies of most of the filings in the case, and thus is aware of the major issues in the case even before the district judge rules on the petition.

[77] *See* NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, DEATH ROW, U.S.A. 1 (July

There has been an increase in executions in the United States since 1983. From 1977 to 1983 there were eleven executions, an average of 1.6 executions per year, but from 1984 through mid-1998 there were 453 executions, an annual average of thirty-one executions for those fourteen and one-half years.[78] These executions have typically occurred roughly seven years from the defendant's receipt of a death sentence.[79] Despite the increase in the number of defendants executed, significantly more defendants receive a death sentence each year than are executed. Thus, at the present rate, even if the state and federal courts have abandoned the rigorous scrutiny of capital cases exemplified in the 1976 cases,[80] it is a certainty that most individuals sentenced to death will spend several years on death row before execution, if they are ever executed. In short, the capital litigation system has not fulfilled Justice Stevens's prediction that the time necessary for judicial consideration of death penalty cases would eventually shorten. Considering the number of years that inmates typically spend on death row before execution, it was inevitable that a defendant would legally challenge this state of affairs. On March 27, 1995, Justice Stevens gave new attention to this claim. That day the Court denied Clarence Allen Lackey's petition for a writ of certiorari.[81]

A. Clarence Allen Lackey

Lackey claimed that it was cruel and unusual punishment for the state to execute him after a seventeen-year delay between his conviction and date of execution. In 1983, after his first conviction

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1, 1998) [hereinafter DEATH ROW, U.S.A.].

[78] *See id.* at 8. In 1997 there were 71 executions, which exceeded the previous annual post-*Furman* record of 56, established in 1995. *See id.*

[79] *See* Vivian Berger, *Justice Delayed or Justice Denied? — A Comment on Recent Proposals to Reform Death Penalty Habeas Corpus*, 90 COLUM. L. REV. 1665, 1665 n.3 (1990) (citing American Bar Association, Criminal Justice Section, Task Force on Death Penalty Habeas Corpus, *Towards a More Just and Effective System of Review in State Death Penalty Cases, Recommendations and Report of the ABA Task Force on Death Penalty Habeas Corpus* 33 n.12, 337-38 & n.75 (Aug. 1990) (observing an average time of six and one-half years from death sentence to execution); AD HOC COMMITTEE ON FEDERAL HABEAS CORPUS IN CAPITAL CASES, REPORT ON HABEAS CORPUS IN CAPITAL CASES (noting an average time of over eight years from crime to execution)).

[80] Some have suggested that in 1983 the Supreme Court began to retreat from the principles announced in its 1976 cases. *See, e.g.*, William S. Geimer, *Death at Any Cost: A Critique of the Supreme Court's Recent Retreat From Its Death Penalty Standards*, 12 FLA. ST. U. L. REV. 737 (1985); Raymond J. Pascussi, Special Project, *Capital Punishment in 1984: Abandoning the Pursuit of Fairness and Consistency*, 69 CORNELL L. REV. 1129 (1984); Robert Weisberg, *Deregulating Death*, 1983 SUP. CT. REV. 305.

[81] *See* Lackey v. Texas, 514 U. S. 1045 (1995).

was reversed, Lackey was convicted and sentenced to death for killing Diane Kumph six years earlier. A divided Texas Court of Criminal Appeals affirmed the conviction and sentence in 1989.[82] Though the affirmance was based on questionable reasoning,[83] Lackey's conviction became final in December 1991.[84] His execution was first scheduled for July 1992. The date was then changed to allow him to investigate and litigate a state habeas corpus petition. After the denial of two state and one federal habeas petitions, he petitioned the United States Supreme Court for a writ of certiorari. In March 1995, the Court denied the petition, and Justice Stevens filed his memorandum respecting the denial of certiorari.[85]

Justice Stevens described the claim asserting inordinate delay as "novel," but "not without foundation." The Justice noted that *Gregg* stated that capital punishment might satisfy retribution and deterrence, and that it was arguable whether either ground retained force for prisoners on death row for seventeen years. According to Justice Stevens, a delay of this length was rare when the Constitution was written, and Lackey's continuous confinement on death row arguably satisfied retribution. Citing *In re Medley*,[86] in which the Court mentioned that a defendant waiting on death row for the fulfillment of a death sentence experiences great uncertainty, Justice Stevens said that the same uncertainty "should apply with even greater force in the case of delays that last for many years."[87] Justice Stevens suggested that an execution after an inmate had spent many years on death row might have a small deterrent impact in comparison to the continued incarceration of the inmate. Justice Stevens noted that Lackey's argument drew further strength from the conclusion of the Privy Council, which had interpreted section 10 of the English Bill of Rights of 1689, the recognized precursor of the Eighth Amendment, as prohibiting long delays between the death sentence and execu-

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[82] *See* Lackey v. State, 819 S.W.2d 111 (Tex. Crim. App. 1989).

[83] *See id.* at 122-23 (Clinton, J., dissenting). Judge Clinton believed that the majority had given undue weight to a passage in a United States Supreme Court plurality opinion and that the majority's analysis was not the application of the actual law, but was rather an anticipation of how the Court would rule on a similar issue then pending before the United States Supreme Court. *See id.*

[84] *See id.* at 128. The Court of Criminal Appeals subsequently granted Lackey's motion for a rehearing and, in May 1991, again affirmed Lackey's conviction and sentence. *See id.*

[85] *See Lackey*, 514 U.S. at 1045.

[86] 134 U.S. 160 (1890).

[87] *Lackey*, 514 U.S. at 1046 (Stevens, J., memorandum respecting the denial of certiorari).

tion.[88] Closely related to the issue presented in Lackey's petition was the question of which portion of the delay should be considered. Justice Stevens suggested that it may be appropriate to distinguish among delays resulting from the prisoner's abuse of the judicial process by escape or repetitive, frivolous filings; his legitimate exercise of his right to review; and negligence or deliberate action by the state. In closing, Justice Stevens wrote, "Petitioner's claim, with its legal complexity and its potential for far-reaching consequences, seems an ideal example of one which would benefit from such further study [in the state and federal courts]."[89]

Lackey was not the first death row inmate to argue that due to the delay the state had caused in carrying out his sentence, Eighth Amendment principles should prohibit the state from executing him. More than three decades ago, a notorious death row prisoner made a similar claim.

B. Caryl Whittier Chessman

In 1948, Caryl Whittier Chessman was convicted and sentenced to death for crimes committed by a man dubbed the "Red Light Bandit."[90] For the next twelve years, Chessman claimed that his conviction should be reversed because he was denied due process, based on the manner by which his trial transcript was constructed.[91] He had mixed success.[92] By 1959, Chessman was also asserting that his

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[88] *See id.* at 1047 (citing Riley v. Attorney General of Jamaica, 3 All E.R. 469, 478 (P.C. 1983) (Lord Scarman, dissenting, joined by Lord Brightman)).

[89] *Id.* at 1047. Lackey's inordinate delay claim was ultimately unsuccessful. *See* Lackey v. Johnson, 83 F.3d 116 (5th Cir.), *cert. denied*, 117 S. Ct. 276 (1996). He was executed on May 20, 1997. *See* Michael Graczyk, *Murderer on Death Row for 19 Years is Executed for Lubbock Slaying*, AUSTIN AM.-STATESMAN, May 21, 1997, at B2; *see also* White v. Johnson, 79 F.3d 432 (5th Cir.) (denying a petition asserting that a 17-year stay on death row was unconstitutional), *reh'g denied*, 85 F.3d 627, *cert. denied*, 117 S. Ct. 275 (1996).

[90] *See generally* EDMUND G. BROWN & DICK ADLER, PUBLIC JUSTICE, PRIVATE MERCY: A GOVERNOR'S EDUCATION ON DEATH ROW 20-52 (1989); ERIC CUMMINS, THE RISE AND FALL OF CALIFORNIA'S RADICAL PRISON MOVEMENT 33-62 (1994). *See also* WILLIAM M. KUNSTLER, BEYOND A REASONABLE DOUBT? THE ORIGINAL TRIAL OF CARYL CHESSMAN (1961).

[91] *See* Chessman v. Teets, 354 U.S. 156, 158 (1957). The court reporter died soon after the jury returned its verdict, but before his notes had been transcribed into a trial transcript. *See id.* A substitute court reporter prepared a trial transcript using the original reporter's notes, the trial judge's notes, and the prosecutor's assistance. *See id.* at 159. Chessman received a copy in prison and he objected, claiming that the transcript was inaccurate and incomplete. *See id.* at 159-60. Based on these objections, the trial judge made some corrections Chessman suggested and certified the transcript for appeal. *See id.* at 160.

[92] *See id.* at 161 & n.6. In 1957, on appeal from the denial of a federal habeas

continued confinement was unlawful. The California Supreme Court stated: "It is, of course, in fact unusual that a man should be detained for more than 11 years pending execution of a sentence of death and we have no doubt that mental suffering attends such detention."[93] The court concluded that under the circumstances of the case, Chessman was not subjected to cruel or unusual punishment. The next year, in one of his final efforts to avoid execution, Chessman renewed the delay claim in a federal habeas corpus proceeding. In an opinion dated February 8, 1960, the Ninth Circuit Court of Appeals responded:

> It may show a basic weakness in our government system that a case like this takes so long, but I do not see how we can offer life (under a death sentence) 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. If we did offer such a prize what would be the cutoff date? I would think that the number of years would have to be objective and arbitrary.
>
> But counsel for petitioner suggest that we take a subjective approach on this man's case. We are told of his agonies on death row. True, it would be hell for most people. But here is no ordinary man. In his appearances in court one sees an arrogant, truculent man, the same qualities that [his sexual assault victims] Regina and Mary met, spewing vitriol on one person after another. We see an exhibitionist who never before had such opportunities for exhibition. (All this I get from the record.) And, I think he has heckled his keepers long enough.[94]

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corpus petition, Chessman persuaded a majority of the United States Supreme Court that he should have had a hearing on whether the preparation of the state court record accorded with federal due process. *See id.* at 157. By that time, Chessman had discovered that the substitute reporter was related by marriage to the trial prosecutor, and had worked in close collaboration with the prosecutor and two police officers on their trial testimony. *See id.* at 161. In remanding the case the Court wrote:

> All we hold is that, consistently with procedural due process, California's affirmance of petitioner's conviction upon a seriously disputed record, whose accuracy petitioner has had no voice in determining, cannot be allowed to stand. Without blinking to the fact that the history of this case presents a sorry chapter in the annals of delays in the administration of criminal justice, we cannot allow that circumstance to deter us from withholding relief so clearly called for . . . . This Court may not disregard the Constitution because an appeal in this case, as in others, has been made on the eve of execution.

Id. at 164-65 (footnotes omitted).

[93] People v. Chessman, 341 P.2d 679, 699-700 (Cal. 1959).

[94] Chessman v. Dickson, 275 F.2d 604, 607-08 (9th Cir. 1960).

Chessman did not heckle his keepers much longer; on May 2, 1960, California executed him.[95]

Since *Chessman*, Eighth Amendment jurisprudence has changed remarkably. Notably, the Court has imposed substantive and procedural limitations on the applicability of the death penalty. Before *Lackey*, two other prominent death row inmates — Charles Townsend[96] and Willie Lee Richmond[97] — asked courts to address the issue of delay while awaiting execution.

Since Justice Stevens's memorandum in *Lackey*, several other inmates have unsuccessfully argued that due to the delay in carrying

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[95] *See* KUNSTLER, *supra* note 90, at 286-88.

[96] In 1971, Townsend argued that a 15-year, nine-month delay on death row was unconstitutional. *See* United States *ex rel.* Townsend v. Twomey, 322 F. Supp. 158, 160 (E.D. Ill.), *rev'd on other grounds*, 452 F.2d 350 (7th Cir. 1971), *cert. denied*, 409 U.S. 854 (1972). The district court did not directly rule on the issue, but noted that the delay was "due principally to the skillful, persistent and conscientious efforts on petitioner's behalf by his own counsel to save him from the death penalty and secure his release from confinement." *Id.* at 174. The court also stated that it was bound by stare decisis to declare that execution by electrocution was not cruel and unusual punishment. *See id.*

Prior to his then-record stay on death row, Townsend had achieved notoriety in 1963. The United States Supreme Court used his case to declare the rules requiring a federal habeas court to conduct an evidentiary hearing. *See* Townsend v. Sain, 372 U.S. 293 (1963).

[97] In 1973, Richmond was tried for a murder committed earlier that year. *See* State v. Richmond, 666 P.2d 57, 60 (Ariz.), *cert. denied*, 464 U.S. 986 (1983). He was sentenced to death. *See id.* Five years later, a federal district court granted his writ of habeas corpus, based on the state's use of a constitutionally invalid sentencing scheme. *See id.* After a new sentencing proceeding, Richmond was again sentenced to death. *See id.*

In 1986, Richmond asserted that the state's 12-year delay in executing him and the conditions of his confinement violated his Eighth Amendment rights. *See* Richmond v. Ricketts, 640 F. Supp. 767, 802-03 (D. Ariz. 1986), *aff'd*, 921 F.2d 933 (9th Cir. 1990), *rev'd on other grounds*, 506 U.S. 40 (1992), *vacated*, 986 F.2d 1583 (9th Cir. 1993). The federal courts rejected his claim. *See id.* at 803. The district court judge noted that Richmond had made good use of his time on death row — in no longer exposing himself to drugs and undergoing a religious conversion — and that the delay was initiated by him to challenge his conviction and sentence. *See id.* In affirming that ruling, the Ninth Circuit Court of Appeals added that a capital defendant should not be penalized for his legitimate exercise of his right to appeal, but that the delay caused by such appeals should not itself ripen into a substantive claim. *See* Richmond v. Lewis, 921 F.2d 933, 950 (9th Cir. 1994). Eight years later, the Arizona Supreme Court modified Richmond's death sentence to life imprisonment without parole. *See* State v. Richmond, 886 P.2d 1329, 1338 (Ariz. 1994). The court proffered three reasons for the decision: Richmond's rehabilitation on death row, the possibility of additional years of delay in the event that a new death sentence was imposed, and certain changes in the capital sentencing laws. *See id.* at 1334. The court noted its "expectation and strong recommendation that he remain incarcerated for the remainder of his natural life and never receive parole." *Id.* at 1338.

out their sentences, it is cruel and unusual punishment for the state to execute them. Duncan Peder McKenzie, Jr. and William Lloyd Turner were two such defendants. Their cases are worthy of consideration not only because of their lengthy stays on death row — McKenzie, twenty years; Turner, fifteen years — but also because their long-term residency was prompted by legal rulings in their favor as the cases made their way through the capital litigation process.

C. Duncan Peder McKenzie, Jr.

Soon after the denial of certiorari in *Lackey*, McKenzie asserted a claim of unconstitutional delay, based on the twenty years between the imposition of his death sentence in 1975 and his pending state-ordered execution. In his underlying case, on direct appeal, McKenzie raised, as one of numerous issues, the claim that the jury instructions unconstitutionally shifted to him the burden of proving his state of mind. The United States Supreme Court twice granted McKenzie's petitions for certiorari and each time remanded the case to the Montana Supreme Court for further consideration.[98] In 1980, the Montana Supreme Court ruled that any error regarding the jury instructions was harmless beyond a reasonable doubt.[99]

McKenzie was unsuccessful in each of the three subsequent federal habeas petitions he filed.[100] The third petition was filed on the

[98] *See* McKenzie v. Montana, 433 U.S. 905 (1977); McKenzie v. Montana, 443 U.S. 903 (1979). The United States Supreme Court granted McKenzie's first petition for certiorari, vacated the judgment of conviction, and remanded the case for further consideration in light of the then-recently decided *Patterson v. New York*, 432 U.S. 197 (1977) (finding that due process is not violated by requiring defendant to prove an affirmative defense). *See McKenzie*, 433 U.S. at 905. When the United States Supreme Court granted McKenzie's second petition for certiorari, it vacated the judgment and remanded the case for further consideration in light of *Sandstrom v. Montana*, 442 U.S. 510 (1979) (finding that due process is violated when the jury is instructed that "the law presumes that a person intends the ordinary consequences of his voluntary acts" because it relieves the prosecution of proving the defendant's intent and the defendant is forced to rebut the presumption), a case decided in the period between his first and second certiorari petitions. *See McKenzie*, 443 U.S. at 903.

[99] *See* State v. McKenzie, 608 P.2d 428, 459 (Mont.), *cert. denied*, 449 U.S. 1050 (1980).

[100] *See* McKenzie v. McCormick, 27 F.3d 1415 (9th Cir. 1994), *cert. denied*, 513 U.S. 1118 (1995). While litigating his first federal habeas corpus petition, McKenzie discovered that in February 1975, a week after the jury verdict and a month before his sentencing hearing, the trial prosecutor had a 45-minute ex parte meeting with the trial judge. *See id.* at 1471. This meeting, McKenzie later alleged, violated his rights under *Gardner v. Florida*, 430 U.S. 349 (1977) (holding that due process is violated when a death sentence is imposed on the basis of information that the defendant had no opportunity to deny or explain). *See McKenzie*, 27 F.3d at 1417. He

eve of his execution and included his *Lackey*-type claim. On appeal from the district court's denial of the petition, McKenzie tried to persuade the Ninth Circuit to hold the state responsible for the almost fifteen-year period in which no court proceeding resolved a claim raised in his second habeas petition. Montana countered that it should be considered responsible only for the five years and nine months — of his twenty-year delay — that the case had spent on direct appeal. McKenzie sought a stay of his execution so the courts could resolve the merits of his claim. He further claimed that several international law decisions added support to his argument.[101] A majority of the appellate panel ruled that the petition was abusive. Accordingly, the court required McKenzie to show that the court's failure to consider the merits of his claim would be a miscarriage of justice. After giving "preliminary consideration" to the merits of the claim, the appellate court concluded that the views of the international courts would not prevail in the United States. The Ninth Circuit also noted that the procedural safeguards provided by Montana law were not designed to prolong the period of incarceration, but were established to eliminate arbitrariness and errors in carrying out the death penalty, which could be fostered by immediate executions. The court denied McKenzie's requests for a stay of execution or for summary issuance of the writ.[102] On May 10, 1995, he was executed.[103]

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subsequently filed a second federal habeas corpus petition, asserting the *Gardner* claim. *See id.* After holding a hearing on the claim, in 1992, the federal district court ruled that there was no credible proof that the 1975 conference could have influenced the sentencing decision, and the Ninth Circuit later affirmed that judgment. *See id.*

[101] According to the Ninth Circuit, McKenzie relied on *Pratt & Morgan v. Attorney General for Jamaica*, 4 All E.R. 769 (P.C. 1993) (en banc) (finding that a delay of 14 years violated section 17(1) of the Jamaican Constitution); *Catholic Comm'n for Justice and Peace in Zimbabwe v. Attorney General* S.C. 73/93(Zimb. June 24, 1993, unreported) (finding that delays of two, three, and five years under harsh conditions of confinement violated the Zimbabwe Constitution); *Soering v. United Kingdom*, 11 Eur. H.R. Rep. 439 (1989) (finding that delay in administering the death penalty in Virginia constitutes degrading punishment, in violation of Article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms, precluding extradition to Virginia); and *Riley v. Attorney General of Jamaica*, 3 All E.R. 469, 478 (P.C. 1983) (Lord Scarman, dissenting, joined by Lord Brightman). *See* McKenzie v. Day, 57 F.3d 1461, 1466 (9th Cir. 1995).

[102] *See McKenzie*, 57 F.3d at 1470; *id.* at 1493 (9th Cir.) (en banc) (adopting panel decision), *cert. denied*, 514 U.S. 1104 (1995). In dissent, Judge Norris noted that the 20 years that McKenzie had spent on death row, and the conditions under which he had been confined, were unprecedented and that arguably Montana had satisfied its interest in exacting retribution. *See id.* at 1486 (Norris, J., dissenting). Judge Norris reasoned that McKenzie's claim had further support from recent decisions of the international courts that did not allow executions after a long delay. *See id.* at 1487 (Norris, J., dissenting). These court decisions, in the dissent's view, repre-

D. William Lloyd Turner

In 1986, six years after he had received a death sentence, William Turner's conviction was reversed by the United States Supreme Court. The Court used the capital case to apply standards developed in non-capital cases to inquire into the racial prejudice of prospective jurors.[104] The Supreme Court remanded the case for further proceedings because Turner's right to select an impartial jury had been violated. After a new sentencing hearing before a different jury, Turner received another death sentence.[105] He then began another round of unsuccessful post-conviction proceedings in state and federal court.[106] Days before his scheduled execution, in April 1995, Turner filed his fourth federal habeas petition, relying on Justice Stevens's memorandum in *Lackey*. Turner alleged that after 15 years on death row, while confined under allegedly torturous conditions, he could not be constitutionally executed.[107]

The United States Court of Appeals for the Fourth Circuit did not consider the merits of Turner's claim because the issue was procedurally barred. The court ruled that even before Justice Stevens's

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sented "a growing recognition of the need to redress institutional failures that have resulted in an added dimension of punishment in capital cases that was unknown in historic times." *See id.* Judge Norris posited that the issue in the case was not simply the delay in carrying out the execution, but that it was also the execution following that delay when the defendant had been placed in restrictive confinement. *See id.* at 1488 (Norris, J., dissenting). Judge Norris also faulted the majority for not analyzing whether there was a sufficient penological justification for executing McKenzie after 20 years and for relying on judicial experience — as opposed to facts established in the litigation — to suggest that ruling in McKenzie's favor would halt nearly all executions in the United States. *See id.* at 1489 (Norris, J., dissenting). An en banc panel of the Ninth Circuit later adopted the panel opinion and vacated McKenzie's stay of execution. *See id.* at 1494.

[103] *See* Bob Arnez, *Montana Executes Killer While He Listens to Music*, PHOENIX GAZETTE, May 10, 1995, at A5. Jose Ceja, who was executed January 21, 1998 after a 23-year stay on death row, had the longest time lapse between his conviction and execution for any modern capital defendant. *See* Barry Graham, *Curtains for Ceja*, PHOENIX NEW TIMES, Feb. 5-11, 1998, at 15, 17.

[104] *See* Turner v. Murray, 476 U.S. 28 (1986). The trial judge refused the defense's request, stating that it "had been ruled on by the Supreme Court," which may have been a reference to *Ristaino v. Ross*, 424 U.S. 589 (1976). In *Ristaino*, the Court held that the trial judge was not required to inquire into racial bias of the venirepersons in an intraracial non-capital prosecution. *See id.* at 597. The Supreme Court ruled that *Ristaino* did not control, partly because Turner was being prosecuted for a capital offense. *See Turner*, 476 U.S. at 33.

[105] *See* Turner v. Commonwealth, 364 S.E.2d 483 (Va.), *cert. denied*, 486 U.S. 1017 (1988).

[106] *See* Turner v. Williams, 35 F.3d 872 (4th Cir. 1994) (recounting litigation history and affirming denial of federal habeas petition), *cert. denied*, 514 U.S. 1017 (1995).

[107] *See* Turner v. Jabe, 58 F.3d 924 (4th Cir.), *cert. denied*, 514 U.S. 1136 (1995).

memorandum in *Lackey*, Turner had a legal basis for challenging his execution based on the time that he had spent on death row.[108] The court also ruled that a fundamental miscarriage of justice would not result from a failure to review the merits of the petition.[109] Turner was executed on May 26, 1995.[110]

IV. RESOLVING THE INORDINATE DELAY CLAIM ACCORDING TO EIGHTH AMENDMENT PRINCIPLES

Several state capital defendants, in addition to the defendants in *Chessman, Lackey, McKenzie,* and *Turner,* have argued in federal courts that the convicting state forfeited the right to carry out their executions.[111] These capital defendants claimed that the delay be-

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[108] *See id.* at 926. The court noted that Chessman had raised the issue in 1960, that the California Supreme Court had used the question of delay as one basis for concluding that capital punishment violated the state constitution in 1972, *see* People v. Anderson, 493 P.2d 880 (Cal.), *cert. denied,* 406 U.S. 958 (1972), that William Andrews, *see* Andrews v. Shulsen, 600 F. Supp. 408, 431 (D. Utah 1984) (finding that repeated setting and staying of execution dates over a 10-year period while the prisoner litigated issues was not cruel and unusual punishment because it kept the post-conviction process "moving forward" and preserved the prisoner's due process rights), *aff'd,* 802 F.2d 1256 (10th Cir. 1986), *cert. denied,* 485 U.S. 919 (1988), and Willie Lee Richmond had raised similar claims in the 1980s. *See Turner,* 58 F.3d at 929. Consequently, Turner had the factual and legal tools to construct his claim in 1991 when he filed his third federal habeas petition, having spent 12 years on death row. *See id.* Having concluded that Turner failed to show "cause" to excuse his abuse of the writ, the Fourth Circuit did not consider whether Turner could show that he had suffered "prejudice" from that "cause." *See id.* at 931.

[109] *See id.* at 932. Turner conceded that his death sentence was constitutionally permissible when he received it, but claimed that under *Sawyer v. Whitley,* 505 U.S. 333 (1992), he was "ineligible" to be executed. *See Turner,* 58 F.3d at 932. In *Sawyer,* the Court ruled that a habeas petitioner who established that he was innocent would satisfy the fundamental miscarriage of justice standard, allowing a habeas court to consider otherwise procedurally defaulted claims. *See id.* A convicted capital defendant is innocent of death if he can show by clear and convincing evidence that there was a constitutional error in the sentencing phase of a capital trial, and that but for that error he would not have received a death sentence. *See id.* The Fourth Circuit declined Turner's invitation to extend *Sawyer* to cover his case. *See id.*

[110] *See* June Arney & Laura Lafay, *Turner Executed After 15 Years,* VIRGINIAN-PILOT (Norfolk), May 26, 1995, at A1.

[111] *See, e.g.,* Stafford v. Ward, 59 F.3d 1025 (10th Cir.) (rejecting a claim based on a 15-year delay because of a lack of precedent in the prisoner's favor and under the abuse of writ doctrine), *cert. denied,* 515 U.S. 1173 (1995); Fearance v. Scott, 56 F.3d 633 (5th Cir. 1995) (rejecting a claim based on a 17-year delay between trial and the proposed execution date under the abuse of writ doctrine); Free v. Peters, 50 F.3d 1362 (7th Cir.) (rejecting a claim based on a 12-year delay from the conclusion of direct appeal), *cert. denied,* 514 U.S. 1034 (1995); Porter v. Singletary, 49 F.3d 1483, 1485 (11th Cir. 1995) (rejecting a 17-year delay under the abuse of writ doctrine and finding insufficient facts to warrant a hearing); United States *ex rel.* DelVecchio

tween the commission of the crime and the fulfillment of the sentence violated the Eighth Amendment. They maintained that, due to the delay, they were no longer eligible for execution. These claims were unsuccessful. In fact, in none of the cases has a majority of a reviewing court adjudicated the merits of the inordinate delay claim.[112] Further, no court majority in the United States has directly addressed the issue, or outlined what factors it might consider in resolving an inordinate delay claim.[113] This section addresses the inor-

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v. Illinois Dep't. of Corrections, 1995 WL 688675 (N.D. Ill. Nov. 17, 1995) (relying on *Free* to reject a claim based on a 16-year delay).

State courts presented with the issue have summarily ruled against the defendant. *See, e.g.*, Stafford v. State, 899 P.2d 657, 660 (Okla. Crim. App.), *cert. denied*, 515 U.S. 1173 (1995); State v. McKenzie, 894 P.2d 289, 293 (Mont. 1995); Porter v. State, 653 So. 2d 374, 380 (Fla.), *cert. denied*, 514 U.S. 1092 (1995).

[112] This apparent lack of conflict among the courts of appeal may be one reason why the Supreme Court has yet to resolve the issue. *See generally* Todd J. Tiberi, Comment, *Supreme Court Denials of Certiorari in Conflicts Cases: Percolation or Procrastination*, 54 U. PITT. L. REV. 861 (1993); Arthur D. Hellman, *By Precedent Unbound: The Nature and Extent of Unresolved Intercircuit Conflicts*, 56 U. PITT. L. REV. 693 (1995); Michael F. Sturley, *Observations on the Supreme Court's* Certiorari *Jurisdiction in Intercircuit Conflict Cases*, 67 TEX. L. REV. 1251 (1989). The Court is not precluded from granting review of a certiorari petition, notwithstanding the lack of an intercircuit conflict. *See* SUP. CT. R. 10.1 (providing certiorari may be granted when a federal court of appeals "has decided an important question of federal law which has not been, but should be settled by" the Court).

[113] Several federal habeas courts presented with inordinate delay claims have concluded that not reaching the merits of the capital defendant's claim would not be a miscarriage of justice under the pre-Antiterrorism and Effective Death Penalty Act federal habeas law. *See, e.g.*, *Stafford*, 59 F.3d at 1028-29; *Turner*, 58 F.3d at 931; *Fearance*, 56 F.3d at 637; McKenzie v. Day, 57 F.3d 1461, 1466 (9th Cir. 1995); *Porter*, 49 F.3d at 1485. This is incorrect. The miscarriage of justice standard is a narrow exception that should be used rarely. Before a court could properly conclude that a miscarriage of justice would not occur, it should "preliminarily" consider the sentencer's rationale for imposing the death sentence. One might discern this rationale by the aggravating circumstances that the sentencer relied on when imposing sentence and the rationale proffered by the prosecution at the sentencing proceeding. This consideration might uncover that the penological basis for the death sentence either was never adequately established or no longer exists; thus, permitting an execution in that circumstance would be a miscarriage of justice. Moreover, any sentence — particularly when based on general deterrence or other utilitarian concerns — is a prediction of the future. Therefore, in capital cases courts should be particularly solicitous of claims of sentencing error.

Other federal courts presented with inordinate delay claims have generally held that under federal habeas law the petitioner was precluded from raising the issue. The courts have essentially found the claim procedurally barred or "without merit." Arguably, this conclusion is incorrect. The restrictions placed on habeas corpus — the non-retroactivity rule of *Teague*, the successive petition and the abuse of the writ doctrines, the "cause" and "prejudice" standard, and the miscarriage of justice exception — give vitality to the state's interest in the finality of its criminal convictions. *See* Teague v. Lane, 490 U.S. 1031 (1989). The courts are essentially ordering rules that require a federal habeas petitioner to comply with the state law

dinate delay claim using the factors contained in the United States Supreme Court's cases.

To prevent his pending execution, a capital defendant has to prove that carrying out the execution after an inordinate delay between the sentence and the execution is cruel and unusual punishment. The standards promulgated in *Gregg* and *Coker*, and applied in subsequent cases, govern. If the punishment makes no measurable contribution to acceptable goals of punishment and is nothing more than the purposeless and needless imposition of pain and suffering, it is excessive and, therefore, unconstitutional.[114] Punishment that is grossly out of proportion to the severity of the crime is similarly excessive and unconstitutional.[115] The capital defendant would have to argue that, historically, defendants did not remain on death row for an inordinate period, that court decisions have not routinely permitted long-delayed executions, that the legislatures that have considered the issue have decided against permitting executions after the defendant has been on death row for an inordinate period, and that juries have also declined to sentence defendants to death if they know there will be an inordinate stay on death row. Due to the lack of legislative guidance on the issue and the fact that juries are not asked to consider the impact that an inordinate delay will have on the defendant, courts adjudicating inordinate delay claims should look for guidance in the rulings of courts that have directly addressed the issue — namely, courts in other countries. All of these factors suggest that the execution of an inmate who has spent an inordinate period on death row would likely not achieve retribution, deterrence, or any other utilitarian penal objective. The execution may inflict unnecessary and wanton pain in violation of the Eighth Amendment. The following subsections consider how these factors apply to the inordinate delay claim.

A. *History, Judicial Precedent, and Inordinate Delay in Capital Cases*

The historical treatment of capital defendants sheds some light on the kinds of punishments the drafters of the Eighth Amendment meant to prohibit. It may also answer the question of whether inor-

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procedural rules in raising and litigating claims that have federal constitutional dimensions. The federal courts should not give as much respect to these ordering doctrines when the underlying issue is whether there has been an inordinate delay in carrying out the death sentence. If a capital defendant overcomes the habeas corpus procedural hurdles, he will then have to establish that his inordinate delay claim is meritorious.

[114] *See* Gregg v. Georgia, 428 U.S. 153, 173-76 (1976).

[115] *See* Coker v. Georgia, 433 U.S. 584, 592 (1977).

dinate delay violates the Cruel and Unusual Punishments Clause. Capital punishment has been an authorized sanction for violations of the criminal law for centuries. For example, England once had 222 capital offenses.[116] Although there were many capital crimes and many convictions for capital offenses, after the 1800s there were relatively few executions in England.[117] The period between the imposition of a death sentence and the fulfillment of that sentence generally was not long. In the mid-1700s, execution of convicted murderers occurred two days after sentencing, but if the defendant was sentenced on a Friday, the execution occurred the following Monday.[118]

The American colonial laws authorized capital punishment.[119] In practice, however, there were few executions in comparison to the number of capital offenses. Even after the revolution in 1776, the newly independent states retained most of their capital laws. The time from the imposition of a death sentence to the execution was not long. A cursory survey of the capital punishment process suggests that, if an execution occurred, it routinely happened within one year of the conviction.[120] For instance, one historian reports that

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[116] *See* JOHN LAURENCE, A HISTORY OF CAPITAL PUNISHMENT 13 (1960).

[117] *See* LEON RADZINOWICZ, A HISTORY OF ENGLISH CRIMINAL LAW AND ITS ADMINISTRATION FROM 1750: THE MOVEMENT FOR REFORM, 1750-1833, 138-64 (1948).

[118] *See* LAURENCE, *supra* note 116, at 22. An exception existed for some women. *See id.* If a woman sentenced to death informed the clerk of the court that she was pregnant or if the court suspected that she was pregnant, the court could impanel a jury of matrons to make that determination. *See id.*; *see also* Judy M. Cornett, *Hoodwink'd by Custom: The Exclusion of Women from Juries in Eighteenth-Century English Law and Literature*, 4 WM. & MARY J. OF WOMEN AND THE LAW 1, 17-34 (1997) (discussing the eligibility to serve on jury of matrons and its role). If the defendant was pregnant, the execution was stayed until she gave birth. *See* LAURENCE, *supra* note 116, at 22. After the birth, there was a possibility the state might not execute her. *See id.* By 1903, executions did not occur until three weeks had passed. *See id.* at 24.

[119] *See* LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 41-44 (1993); *see also* Negley K. Teeters, *Public Executions in Pennsylvania: 1682-1834*, *reprinted in* 1 CRIME & JUSTICE IN AMERICAN HISTORY: THE COLONIES AND EARLY REPUBLIC 756 (Eric H. Monkkonen ed., 1991).

[120] One reason for the short time span between the imposition of a death sentence and the execution was the unadorned nature of the criminal litigation process. During the early period of the Republic, criminal cases were generally subject to some type of review that was within the exclusive prerogative of state authorities. David Rossman has canvassed the historical data and provided a summary of the review that was available in criminal cases early in this nation's history. *See generally* David Rossman, *"Were There No Appeal": The History of Review in American Criminal Courts*, 81 J. CRIM. L. & CRIMINOLOGY 518 (1990). According to Rossman, each of the newly formed states created courts specifically for criminal matters. Some states allowed convicted defendants to appeal their cases and receive trials de novo on appeal. *See id.* at 539-40. Other states allowed the trial judge to refer the case to an

in Pennsylvania in October 1785, Elizabeth Wilson was convicted of murdering her "two bastard male children."[121] She obtained a month's reprieve until January 3, 1786, when she was executed.[122] On August 28, 1778, four Pennsylvanians were convicted of desertion to the enemy. On September 2, 1778, two were executed and the other two, who were apparently less blameworthy, received reprieves.[123] Around the same period, another Pennsylvanian, Ralph Mordern, was convicted on October 30, 1780 and executed less than a month later, on November 25.[124] In December 1787, Massachusetts authorities executed John Bly and Charles Rose for their roles in Shays's Rebellion,[125] which had been squelched that summer.[126] Washington Goode's capital trial began on New Year's Day, 1849, in Boston, and lasted four days.[127] Goode was found guilty of murder and sentenced to death. He was hanged as scheduled on May 25, 1849, after the governor rejected his petition for commutation of the sentence. Even when a legal question arose, through the early 1800s, the courts resolved most capital cases within six months of the conviction.[128] Despite the relatively quick judicial process, a pending ap-

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appellate court to obtain more authoritative answers to his rulings. *See id.* at 541-42. Some defendants used post conviction motions to overturn their convictions. *See id.* at 534-37. The executive and legislative branches were other fora for review of criminal convictions. *See id.* at 537-39. Usually, capital cases and non-capital cases were processed differently.

[121] *See* Teeters, *supra* note 119, at 771.

[122] *See id.* at 771-72.

[123] *See id.* at 775-76.

[124] *See id.* at 777.

[125] *See* LOUIS L. MASUR, RITES OF EXECUTION: CAPITAL PUNISHMENT AND THE TRANSFORMATION OF AMERICAN CULTURE, 1776-1865, at 29 (1989). Shays's Rebellion was an uprising largely of farmers in Massachusetts in 1786-87. *See id.* Due to high taxes, heavy indebtedness and declining farm prices, the farmers faced foreclosure. *See id.* They responded by preventing the courts in western Massachusetts from convening. *See id.* Unappeased by legislative measures, Daniel Shays led a group that unsuccessfully attempted to seize a federal arsenal at Springfield. *See id.* Unlike Bly and Rose, most of the other members of the insurrection received pardons or commutations of their sentences. *See id. See generally* DAVID SZATMARY, SHAYS' REBELLION: THE MAKING OF AN AGRARIAN INSURRECTION (1980).

[126] *See* MASUR, *supra* note 125, at 29. Jason Parmenter and Henry McCullough, who were also participants in that insurrection, received death sentences too, but received pardons in June 1787. *See id.* at 29-33.

[127] *See id.* at 9-24.

[128] For example, in *State v. Monaquas*, 1 Charlton Rep. 16 (Ga. 1805), a jury convicted two defendants of murdering Georges Martin. *See id.* at 19. The jury recommended mercy only for the defendant convicted of being a principal in the second degree; the remaining defendant apparently faced a death sentence. *See id.* In the 1805 January term, before sentencing, both defendants objected to their joint indictment and trial. *See id.* The sentencing judge was not prepared to render a decision on one objection because it was an issue of first impression. *See id.* at 22. Ac-

peal apparently did not suspend the judgment because capital defendants often had to get a court order to prevent their execution.[129]

It was not until the mid-twentieth century that the time between the imposition of a death sentence and the execution began to extend into years. In 1960, the State of Washington executed a defendant within thirty-six days of his sentence, while eleven years and ten months elapsed before California carried out one of its executions.[130] The average length of time between sentence and execution in 1960 was about two years.[131] This period has steadily increased. For example, in 1965 there were seven executions, and reliable figures show that forty-five months passed between sentencing and execution.[132] More generally, from 1930 to 1970, the average length of time was

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cordingly, the defendants were remanded to state custody. *See id.* After soliciting the views of judges in other divisions of the court, on May 4, 1805, which was during the May Term of the court, the court sustained the remaining objection and released the defendants the next day. *See id.* at 23.

A few years later in North Carolina, a jury convicted Washington, a slave, of rape, which occurred on February 15, 1811. *See* State v. Washington, 6 N.C. (2 Mur.) 100 (1812). When asked at the May term of the court whether there were any reasons why Washington should not receive a death sentence, his attorney argued that the court could only sentence Washington to death during the court term in which he was convicted. *See id.* Washington's owner used a writ of certiorari to remove the proceedings to Superior Court. *See id.* at 101. In the 1812 January term, the Superior Court issued an opinion rejecting Washington's contention that the time to sentence him had passed, and ruled that the May Term of the County Court could pronounce a death sentence. *See id.* In a separate opinion that was a partial dissent, Judge Hall explained the apparent rationale for the majority's decision. *See id.* at 102 (Hall, J., dissenting). Unlike other courts, the County Court made a record of all of the proceedings, from which it could be inferred whether the judge had complied with court rules and did not violate the defendant's rights. *See id.* at 102 (Hall, J., dissenting).

[129] In New York, for instance, as of 1827, in civil and non-capital criminal cases, courts could issue writs of error as a matter of right. *See* Lavett v. People, 7 Cow. 145 (N.Y. 1827). In capital cases, however, only after providing notice to the attorney general or prosecutor could a court grant a discretionary writ of error. *See* Bedinger v. Commonwealth, 7 Va. (3 Call) 461, 466-67 (1803). Moreover, the issuance of a writ of error would not, by itself, prevent the defendant's execution. *See id.* (stating that the prosecutor argued that the court should not consider the criminal defendant's appeal because "[i]f capital it would be useless, as the judgment would be executed before the decision here .... [i]f it was not capital, but imprisonment, the defendant would have suffered the whole or part of the punishment, before the judgment here.").

[130] *See* UNITED NATIONS DEP'T OF ECONOMIC AND SOCIAL AFFAIRS, CAPITAL PUNISHMENT: PART II — DEVELOPMENTS, 1961 to 1965, at 48 ¶ 170 (1968). The California inmate was Chessman, who was originally sentenced in June 1948 and executed in May 1960. *See* KUNSTLER, *supra* note 90, at 289.

[131] *See* UNITED NATIONS DEP'T OF ECONOMIC AND SOCIAL AFFAIRS, *supra* note 130, at 48 ¶ 170.

[132] *See* U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 1976, tbl. 6.126, at 769 (1977).

about 36.7 months from the imposition of the death sentence until the defendant was executed.[133] According to the most reliable figures, which are based on cases processed before the Antiterriorism and Effective Death Penalty Act of 1996 (AEDPA),[134] in 1995 a capital defendant spent about eleven years on death row before being executed.[135]

There may be several reasons for the increase in the time that an inmate spends on death row. The constitutionalization of criminal procedure[136] and an expansive interpretation of the federal habeas corpus writ[137] both account for generating some delay. These developments have allowed capital defendants to raise more legal issues in both state and federal fora. Just as important as the various legal issues that are cognizable in a capital case are the number of individuals sentenced to death. From 1930 to 1970 there was a national average of about 600 inmates on death row.[138] As of July 1998, there were 3,474 death row inmates.[139] If defendants continue to receive death sentences and are placed on death row, and if resolving each case takes a substantial amount of time, then it is inevitable that, without significantly increasing the number of judges and other court personnel who process and decide capital cases,[140] death row inmates are today — and in the future — more likely to spend more time on death row than they ever have. Since the AEDPA was en-

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[133] *See* U. S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 1973, tbl. 6.145, at 467 (1973).

[134] Pub. L. No. 104-132, 110 Stat. 1214 (codified at scattered portions of 28 U.S.C. §§ 2244-2266 (1996)).

[135] *See* U. S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS BULLETIN: CAPITAL PUNISHMENT 1995, tbl. 11, at 11 (1996) (134 months for 1995 executions).

[136] *See, e.g.*, Duncan v. Louisiana, 391 U.S. 145 (1968) (applying the Sixth Amendment right to jury trial to the states); Miranda v. Arizona, 384 U.S. 436 (1966) (applying the Fifth Amendment right against self-incrimination to the states); Gideon v. Wainwright, 372 U.S. 335 (1963) (applying the Sixth Amendment right to counsel to the states); Robinson v. California, 370 U.S. 660 (1962) (applying the Eighth Amendment's prohibition against cruel and unusual punishment to the states); Mapp v. Ohio, 367 U.S. 643 (1961) (applying the Fourth Amendment exclusionary rule to the states).

[137] *See, e.g.*, Sanders v. United States, 373 U.S. 1 (1963); Fay v. Noia, 372 U.S. 391 (1963); Townsend v. Sain, 372 U.S. 293 (1963).

[138] *See* U.S. DEP'T OF JUSTICE, *supra* note 133, tbl. 6.145, at 467.

[139] *See* DEATH ROW, U.S.A., *supra* note 77, at 1.

[140] The number of federal court judges has increased dramatically during this period. In 1930 there were 45 court of appeals judgeships and 146 district court judgeships, and in 1970 there were 90 court of appeals judgeships and 331 district court judgeships. RICHARD A. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM 356-57 app. B (1985).

acted, it remains to be seen whether this law will reduce the time that capital defendants spend on death row.[141]

The steady increase in time that capital defendants spend on death row has occurred without the state courts, state legislatures, or the United States Supreme Court addressing the issue of a defendant's prolonged stay on death row. The most pertinent statements by the full Court are dicta in a century-old case. In *In re Medley*,[142] the Court ruled that certain aspects of confining a capital defendant, pursuant to a law enacted by the Colorado Legislature after the commission of the crime, violated the Ex Post Facto Clause.[143] The later-enacted statute required the warden to keep the defendant in solitary confinement and prohibited the warden from informing the defendant of either the day or the hour of his scheduled execution. In describing the import of this new law, the Court wrote:

> [W]hen a prisoner sentenced by a court to death is confined in the penitentiary awaiting the execution of the sentence, one of the most horrible feelings to which he can be subjected during that time is the uncertainty during the whole of it... as to the precise time when his execution shall take place.[144]

It is important to note that *Medley* did not rule that the delay was cruel and unusual punishment, but only that this new process by which the punishment was to be implemented violated the Ex Post Facto Clause because the prisoner's "immense mental anxiety amount[ed] to a great increase of the offender's punishment."[145] Evidence suggests that death row inmates today experience the same mental anguish while awaiting execution.[146]

In sum, until the mid-twentieth century, courts in this nation generally processed capital cases like other criminal cases, and there

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[141] There are two reason for this. First, the largest amount of delay occurs when the case is in state court. Second, the enactment of the new habeas law — the Antiterrorism and Effective Death Penalty Act (AEDPA) — will bring a new round of litigation on both its applicability and standards. This, too, may delay the number of executions. Ironically, the AEDPA was designed to reduce the delay between death sentences and executions by imposing certain procedural rights in the state post-conviction review process and modifying certain procedural standards under the federal habeas corpus laws, including the imposition of time limits within which the federal courts have to decide capital habeas corpus cases. *See generally* Larry W. Yackle, *A Primer on the New Habeas Corpus Statute*, 44 BUFF. L. REV. 381 (1996).

[142] 134 U.S. 160 (1890).

[143] U.S. CONST., art. I, § 9, cl. 3.

[144] *Id.* at 172.

[145] *Id.*

[146] *See supra* note 58 (detailing Robert Johnson's study of the effects of extended confinement on death row inmates).

was hardly any delay between the pronouncement of a death sentence and either the execution or granting of relief to the defendant. Consequently, the issue of inordinate delay did not arise. Since the mid-twentieth century, the time that inmates have spent on death row has steadily increased. This may be partly attributable to the increase in the number of legal issues that can be litigated and to the fact that most of these claims can be litigated in both state and federal court. The increase in the length of time between imposition of the sentence and an execution is also a function of the larger number of death row inmates without a corresponding increase in resources dedicated to processing capital cases. Finally, *Medley*, the only full Court opinion that has alluded to the issue, presumed that the mental anguish an inmate experienced while awaiting execution was a form of punishment, seemingly of the sort regulated by the Eighth Amendment.

B. *Contemporary Legislative Attitudes on Inordinate Delay in Capital Cases*

In ruling on the substantive limits of the Eighth Amendment, the Court has considered the statutory work product of the legislatures. Through this inquiry, the Court seeks to ensure that society, via its legislative bodies, has decided to execute a certain class of defendants. In enacting death penalty laws, state legislatures do not consider whether an execution should occur after the prisoner has spent a substantial amount of time on death row. One reason for this may be that most states passed the substance of their death penalty laws before most capital inmates spent decades on death row. In the wake of *Furman*, states commuted the sentences of inmates then on death row.[147] It was only after *Gregg* and the lack of a substantial increase in the number of executions that legislators should have foreseen some of the legal implications of confining an inmate to death row for a substantial period.[148]

Legislatures still have not directly addressed the issue of inordinate delay when enacting or amending capital punishment laws, despite the present likelihood that capital defendants will spend a long

[147] *See* John W. Polous, *The Supreme Court, Capital Punishment and the Substantive Criminal Law: The Rise and Fall of Mandatory Capital Punishment*, 28 ARIZ. L. REV. 143, 145 (1986).

[148] *See* District Attorney for Suffolk Dist. v. Watson, 411 N.E.2d 1274, 1283 (Mass. 1980) (finding that an extended period on death row is cruel and unusual punishment under the Massachusetts Constitution); People v. Anderson, 493 P.2d 880, 894-98 (Cal. 1972) (finding that an extended period under death sentence is cruel punishment under the California Constitution).

time on death row before their execution — if they ever are executed. Legislatures have considered a related issue of the financial costs associated with capital punishment in deciding whether to authorize such punishment. The death penalty is more expensive than other forms of punishment partly because of the various legal avenues by which a defendant may challenge the death sentence.[149] If executions occurred closer to the date of the defendant's conviction, the state would avoid incurring costs associated with some pretrial, trial, and post-conviction processes and in maintaining correctional institutions. Recently, the Kansas,[150] New York,[151] and Wisconsin[152] legislatures, before reinstituting capital punishment, considered the financial costs associated with the penalty and the likelihood that any death sentence would undergo multiple levels of judicial scrutiny. In authorizing capital punishment in the face of reports showing that, on average, each execution would cost millions of dollars, each legislature implicitly decided that having some executions was worth the financial cost associated with the death penalty. There is no evidence, however, that any of these bodies considered the issue of delay associated with the imposition of the death penalty or what effect, if any, the passage of time could have on the validity of a death sentence.

State statutes do not address the issue of inordinate delay, as apparently state legislatures do not consider the issue. Notwithstanding this dereliction, one may argue that the authorization of capital punishment, coupled with the absence of a specific state law prohibiting the state from carrying out that punishment, means that the

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[149] *See* Robert L. Spangenberg & Elizabeth R. Walsh, *Capital Punishment or Life Imprisonment? Some Cost Considerations*, 23 LOY. L.A. L. REV. 45, 47-57 (1989); Ronald J. Tabak & J. Mark Lane, *The Execution of Injustice: A Cost and Lack-of-Benefit Analysis of the Death Penalty*, 23 LOY. L.A. L. REV. 59, 135-36 (1989).

[150] *See* KANSAS LEGISLATIVE RESEARCH DEPARTMENT, MEMORANDUM: COST CONSIDERATIONS OF IMPLEMENTING THE DEATH PENALTY, 1994 H.B. 2578 and S.B. 473, 1994 Kan. Leg. Sess. (rev. Feb. 15, 1994); KANSAS LEGISLATIVE RESEARCH DEPARTMENT, MEMORANDUM: COSTS OF IMPLEMENTING THE DEATH PENALTY, H.B. 2062 *as amended by the House Committee on the Whole*, 1987 Kan. Leg. Sess. (Feb. 11, 1987); *see also* David J. Gottlieb, *The Death Penalty in the Legislature: Some Thoughts About Money, Myth and Morality*, 37 U. KAN. L. REV. 443, 461-63 (1989) (discussing arguments raised about cost of capital punishment in 1987 legislative debate on capital punishment).

[151] *See* THE NEW YORK STATE DEATH PENALTY STATUTE (Laws of 1995, chap. 1), LEGISLATIVE HISTORY DOCUMENTS (on file at Albany Law School Library, Union University).

[152] *See* WISCONSIN DEP'T. OF JUSTICE, FISCAL ESTIMATE, LBR 0270/1 SB 1, DEATH PENALTY OR LIFE IMPRISONMENT FOR 1ST-DEGREE INTENTIONAL HOMICIDE OF A CHILD UNDER 16 (Dec. 20, 1995).

state legislature has implicitly authorized executions, no matter the length of time the defendant spends on death row. Though this argument has a seductive appeal, one should not accept it unquestioningly. In *Thompson v. Oklahoma*,[153] Justice O'Connor faced a similar predicament. There, the Oklahoma legislature had statutorily authorized the transfer of 15-year-old defendants from juvenile to adult proceedings. One consequence of such transfers was that juveniles could face the death penalty, as Thompson did. Justice O'Connor wanted more evidence that the Legislature had foreseen this possibility and, thus, concurred in the Court's judgment reversing the death sentence.[154]

Although *Thompson* discussed the death eligibility of juvenile capital defendants, it is an appropriate analogy for inordinate delay claims. As with the question of death eligibility, an execution after an inordinate delay requires consideration of whether executing the defendant is legally permissible. In both instances external circumstances — biological age or the delay in going forward with the execution — may preclude the ultimate punishment, even though in both situations the defendant committed an aggravated homicide. It therefore seems appropriate to require that state officials clearly indicate their belief that their state has a legitimate interest in going forward with an execution notwithstanding the passage of time between the crime and the defendant's continuous incarceration since the imposition of the death sentence.

The legislature ideally should express such sentiment by statute or, at least, through explicit legislative findings. Such legislative expressions would show that executions after an inordinate delay were products of deliberate legislative judgment.[155] Another way by which a legislature might indicate its specific consideration of the issue of inordinate delay in a particular case is either by an appropriation specifically authorizing the continued prosecution of that case as a capital case or by a resolution announcing its approval of the prosecution strategy. Considering the more recent increased politicization of capital punishment,[156] requiring legislative expression on the

[153] *See* Thompson v. Oklahoma, 487 U.S. 815 (1988); *supra* note 38 (discussing the facts of *Thompson*).

[154] *See Thompson*, 487 U.S. at 850-52 (O'Connor, J., concurring).

[155] Statutes and legislative findings do not necessarily mean that a form of punishment is permissible under the Eighth Amendment. However, they should impact a court's determination of whether the punishment comports with contemporary standards of decency.

[156] *See generally* Stephen B. Bright & Patrick J. Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases*, 75 B.U.

continued prosecution of capital cases may invariably result in the legislature approving of the strategy. Nonetheless, requiring a formal vote on the issue would likely bring the issue of inordinate delay, capital punishment, and the facts of the particular case into the public discourse. Public officials — especially those outside of the prosecutor's office, who might have a more disinterested view of the case — could then assess the commitment of public resources to the case, including whether continuing to try the crime as a capital case is the best allocation of the state's resources.

C. *Response of Juries and Inordinate Delay in Capital Cases*

Another of the Court's indicia of the evolving standards of decency is the response of juries in capital cases. As a way of measuring the public's acceptance of capital punishment, the Court has considered jury verdicts because, in theory, the jury is a microcosm of society. If juries have consistently imposed the death penalty on a particular class of defendants, then, under the Court's analysis, this sentencing pattern indicates that imposing a death sentence on those defendants is in accord with human dignity.

When considering inordinate delay and the response of sentencers, the appropriate inquiry is the sentencer's willingness to impose the death penalty on a person who committed a capital crime years ago and who since that conviction has remained on death row. Under the present system of capital punishment, sentencers are not asked whether the state should execute otherwise death-eligible defendants after these inmates have spent, for example, more than twice the amount of time on death row awaiting their execution than previously executed inmates. Sentencers also do not consider if there is a temporal limit for carrying out a death sentence or whether a capital defendant should remain under a death sentence if during incarceration the defendant has acted exemplarily, perhaps by becoming a useful member of the penal institution.[157] The

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L. REV. 759 (1995).

[157] The inordinate delay claim is an extension of the concept of "deathworthiness." *See* Phyllis L. Crocker, *Concepts of Culpability and Deathworthiness: Differentiating Between Guilt and Punishment in Capital Cases*, 66 FORDHAM L. REV. 21, 26 n.10, 79-85 (1997). Inordinate delay claims, as defined in this Article, can be raised only after the defendant has spent a substantial period of time on death row. In this regard, inordinate delay is the doctrine of "deathworthiness" in a time frame: A defendant must be "deathworthy" when sentenced to death, and that classification must continue to apply until he is executed. The moment he can no longer be classified as "deathworthy," he should receive a sentence less than death. *See* Henry P. Monaghan, *Constitutional Adjudication: The Who and When*, 82 YALE L.J. 1363, 1384 (1973) ("Mootness is . . . the doctrine of standing set in a time frame:

United States Supreme Court has not squarely faced these questions.[158]

One might argue that in deciding whether to impose a death sentence, some capital sentencers do consider whether executing the defendant is the appropriate sanction, no matter how long the delay between the conviction and the execution. For instance, Texas,[159] Virginia,[160] and Oregon[161] require that the sentencer consider the future dangerousness of the defendant when deciding what sentence to impose. In these capital cases, the sentencer is often presented with the testimony of psychiatrists and evidence of the past criminal acts of the defendant, with a particular focus on the heinous nature of the capital crime.[162] If the sentencer concludes that the defendant

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The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness).").

[158] The most analogous case decided by the full Court is *Sumner v. Schulman*, 483 U.S. 66 (1987), in which the Court struck down as unconstitutional a Nevada statute that mandated the death penalty for defendants convicted of murder who were already serving a sentence of life imprisonment. *Sumner*, however, is based more on the Court's disapproval of mandatory capital punishment and its belief in requiring individualized sentencing in capital cases, than on the propriety of sentencing capital defendants to death. Consistent with *Sumner*, sentencers now consider the criminal record of capital defendants, including previous capital crimes committed.

On fewer occasions sentencers consider imposing a second death sentence on a defendant who is already under a sentence of death or life imprisonment. Even in these cases, however, sentencers are instructed to base their verdicts on the character and record of the defendant and the circumstances of the capital offense. They may not impose the death sentence solely because the defendant was already sentenced to death. *See* Romano v. Oklahoma, 512 U.S. 1 (1994) (holding that evidence admitted in a capital case against a defendant already under a death sentence does not violate due process).

One scholar has noted: "Reliable data concerning the frequency of prison homicides are scarce. Even more difficult to obtain is accurate information about inmates who have been sentenced to life imprisonment and the frequency with which they commit homicides while in the service of such sentences." James R. Acker, *Mandatory Capital Punishment for the Life Term Inmate Who Commits Murder: Judgments of Fact and Value in Law and Social Science*, 11 NEW ENG. J. ON CRIM. AND CIV. CONFINEMENT 267, 276-82 (1985); *see also* Wendy Phillips Wolfson, *The Deterrent Effect of the Death Penalty upon Prison Murder*, *in* THE DEATH PENALTY IN AMERICA 159 (Hugo Adam Bedau ed., 3d ed. 1982).

[159] *See* TEX. CODE CRIM. P. ANN. art. 37.071 (b)(1) (West 1997). Texas requires that its sentencer determine whether "there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society." *Id.*

[160] *See* VA. CODE ANN. § 19.2-264.2 (Michie 1995).

[161] *See* OR. REV. STAT. § 163.150(b)(B) (1995).

[162] One study has suggested that in Texas sentencers over-predict the future dangerousness of capital defendants. *See* James Marquart et al., *Gazing into the Crystal Ball: Can Jurors Accurately Predict Dangerousness in Capital Cases?*, 23 LAW & SOC'Y REV. 449 (1989). Moreover, the characterization of the capital offense for which the defendant was convicted, rather than the jury's assessment that the defendant pre-

does present a future danger, then it may sentence the defendant to death. Consequently, one might argue that an affirmative answer to the question of future dangerousness means that irrespective of the delay that may occur between the imposition of the sentence and the execution, the sentencer has already decided that the death penalty is the proper sentence for the defendant. Again, because sentencers usually do not consider the issue of inordinate delay, the argument is not necessarily true. The sentencer might have imposed a sentence less than death if it had been presented with evidence of the possibility that more than twenty years would pass between the pronouncement of the sentence and the execution, and within that period there was a good chance the defendant would prove he was not a future danger to anyone within the penal institution. In short, as the capital sentencing scheme is presently constructed, there is no way to detect how a sentencer would have responded to the argument that an inordinate delay between the imposition of the death sentence and the execution should result in a sentence of less than death. Therefore, in inordinate delay cases, the verdicts of sentencers should not be considered a reliable indicator of the appropriateness of carrying out a previously imposed death sentence.

D. *Penological Objectives and Inordinate Delay in Capital Cases*

In detecting the substantive limits of the Eighth Amendment, the Court has also considered whether executing the capital defendant achieves retribution or deterrence, which *Gregg* asserted as the legitimate goals of capital punishment.[163] Deterrence is achieved when the fear of punishment prevents some crime. According to this theory, a rational person, after considering the likelihood of apprehension, the severity of punishment (including the stigma associated with being branded a criminal), and the swiftness of imposing the criminal penalty, will choose not to engage in criminal behavior. These factors, if appropriately calibrated, supposedly persuade calculating persons that the negative consequences of engaging in the illegal activity outweigh its benefits. Commentators usually divide deterrence into two categories: general deterrence and special (or specific) deterrence. General deterrence is the regulating force that

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sented a future danger to society, determines whether the defendant is sentenced to death. *See id.*

[163] Other than in the 1976 cases, the Court generally has not explored the penological basis of the Eighth Amendment as it relates to capital punishment. Commentators have explored the philosophical underpinnings of the Justices' rationales. *See* Ellis, *supra* note 41; Romaine L. Gardner, *Capital Punishment: The Philosophers and the Court*, 29 SYRACUSE L. REV. 1175 (1978).

the threat of punishment has on all of society. As a theory of punishment, general deterrence is forward-looking because it is based on the notion that while imposing punishment on an offender deters that individual, its greater value is in dissuading others from committing future crimes.[164] As for the deterrent effect of capital punishment, in *Gregg* the Court has acknowledged that statistical analyses of the proposition have been "inconclusive."[165] Nonetheless, the Court deferred to the legislature's determination that the death penalty was a deterrent.

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[164] In contrast, special deterrence is the influence that imposing and carrying out particular punishment has on a particular offender. As a penological theory it employs both backward- and forward-looking conceptions of justice. It is backward-looking in its focus on the defendant's prior conduct; the defendant's previous commission of a crime suggests that the mere threat of punishment was not a sufficient inhibition to criminal activity. Based on that assessment of prior behavior, the forward-looking component of special deterrence subjects the offender to harsher treatment after the commission of the first crime, which is designed to leave him less likely to engage in future criminal activity. Special deterrence allows the rational offender to weigh the likelihood of future, harsher punishment against the satisfaction that he or she may feel by accomplishing his or her criminal objective. Capital punishment does not specifically deter because the executed person will not fear future punishment. *Cf.* Robert Bartels, *Capital Punishment: The Unexamined Issue of Special Deterrence*, 68 IOWA L. REV. 601 (1983) (whimsical aside suggesting that executing capital defendants serves specifically to deter future criminal conduct by those defendants).

Some have suggested that special deterrence is not a proper consideration in capital punishment because life imprisonment without parole is a suitable alternative sentence to execution. *See* Steven G. Gey, *Justice Scalia's Death Penalty*, 20 FLA. ST. U. L. REV. 67, 108 n.183 (1992); Glenn L. Pierce & Michael L. Radelet, *The Role and Consequences of the Death Penalty in American Politics*, 18 N.Y.U. REV. L. & SOC. CHANGE 711, 715-16 (1990-91). Proponents of this view apparently do not distinguish between special deterrence and incapacitation. Incapacitation requires the imposition of certain societal restraints on the offender, whereas special deterrence is operational when the offender, after receiving punishment, chooses not to engage in criminal activities. *See* Pierce & Radelet, *supra*, at 715-16.

[165] *See* Gregg v. Georgia, 428 U.S. 153, 185 (1976). Isaac Ehrlich's study set forth the major argument that capital punishment serves as a general deterrent. *See* Isaac Ehrlich, *The Deterrent Effect of Capital Punishment: A Question of Life and Death*, 65 AM. ECON. REV. 397 (1975). He concluded that for every execution from 1933 to 1969, seven to eight innocent killings had been prevented, and he has subsequently defended that general conclusion. *See* Isaac Ehrlich, *Of Positive Methodology, Ethics, and Polemics in Deterrence Research*, 22 BRIT. J. CRIM. P. 124 (1982); Isaac Ehrlich, *Capital Punishment and Deterrence: Some Further Thoughts and Additional Evidence*, 85 J. POL. ECON. 741 (1977); Isaac Ehrlich, *Deterrence: Evidence and Inference*, 85 YALE L.J. 209 (1975).

Most other researchers have been unable to replicate Ehrlich's conclusions and have criticized his methods and conclusions. For a good summary of those criticisms, see generally Hans Zeisel, *The Deterrent Effect of the Death Penalty: Facts v. Faiths*, 1976 SUP. CT. REV. 317.

Capital punishment may serve as a general deterrent to crime if a potential offender knows that the contemplated offense is a capital crime and, due to the certainty of execution, is unwilling to engage in that criminal activity. Several studies have concluded that, as a practical matter, the present system of capital punishment usually does not achieve general deterrence because only a small percentage of the thousands of capital trials result in death sentences, and an even smaller number of defendants are executed. Further, the delay between the commission of the offense and the actualization of the punishment serves to attenuate the connection between the crime and the punishment. Carrying out executions in relative seclusion further diminishes the educative impact that executions can have on potential capital offenders. In light of all of this, it appears that the Court probably did not mean that general deterrence — as opposed to some other utilitarian goal — was the true penological aim of capital punishment.[166]

The distinction between general deterrence and some other utilitarian basis for capital punishment assumes greater importance when considering whether Eighth Amendment principles can preclude the execution of long-delayed death sentences. On the one hand, if general utility is the penological basis for the death penalty, then perhaps after many years on death row, during which the capital defendant has exhibited a change in character, Eighth Amendment principles militate against going forward with the execution. With a sufficiently dramatic change of character, there is less need for society to carry out a death sentence due to the metamorphosis of the defendant. Executing the offender would no longer serve a greater social utility in preventing future capital crimes than confinement. On the other hand, if general deterrence is the penological basis for capital punishment, then the passage of time and the defendant's character transformation are less relevant because punishing the defendant serves as an example to others. That is, the execution might occur so that potential offenders are discouraged from engaging in similar criminal activities lest the same fate befall them.

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[166] Though the Justices have not been clear on this point, Justice Marshall argued that the death penalty was excessive punishment because there was insufficient empirical evidence that such sentences were a better deterrent than other forms of punishment, such as life imprisonment. *See* Furman v. Georgia, 408 U.S. 238, 342-59 (Marshall, J., concurring). In this regard, the Justice seemed to require that the death penalty serve some societal purpose or utilitarian goal that could not be accomplished by other forms of punishment.

Significantly, however, the Supreme Court has stated that capital punishment can be based on deterrence.[167] Several times individual Justices have questioned the utility of capital punishment. Justice White has argued in dissents that a mandatory death penalty is a readily effective way of achieving general deterrence.[168] In contrast, Justice Stevens, dissenting in *Spaziano v. Florida*[169] and in the plurality opinion in *Thompson*,[170] maintained that deterrence considerations alone were not sufficient bases for carrying out an execution. Justice Stevens has insisted that the sentencer must consider whether there are mitigating circumstances in favor of a sentence less than death, and the sentencer must find the defendant morally blameworthy before imposing a death sentence.[171] Justice Stevens seems to require that death sentences satisfy some measure of both deterrence and retribution. Further, one reason for Justices Brennan's and Marshall's consistent opposition to capital punishment was their belief that it is no more of a deterrent to crime than is life imprisonment.[172]

Retribution, the other penological basis on which capital punishment was justified in *Gregg*, is achieved when offenders receive punishment in proportion to the harm that they have caused. Adherents to the retributionist theory of punishment contend that society has an interest in ensuring the punishment of offenders. The objective of retribution is to restore peace of mind to society and to eliminate private vengeance. The theory holds that imposing punishment on offenders will satiate the appetite for vengeance that victims, their families and friends, and other members of the public feel because of the crime. An additional rationale proffered to support retribution is that in killing another, the murderer has forfeited his right to continue living.

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[167] *See Gregg*, 428 U.S. at 185-86; *see also* Scott W. Howe, *Resolving the Conflict in the Capital Sentencing Cases: A Desert-Oriented Theory of Regulation*, 26 GA. L. REV. 323, 329-61 (1992) (suggesting that capital sentencing schemes should have sentencers focus on the just desert assessment of the defendant).

[168] *See* Sumner v. Shuman, 483 U.S. 66, 87-88 (1987) (White, J., dissenting); Roberts v. Louisiana, 428 U.S. 325, 358-59 (1976) (White, J., dissenting).

[169] 468 U.S. 467, 479-81 (1984) (Stevens, J., concurring in part and dissenting in part).

[170] Thompson v. Oklahoma, 487 U.S. 815, 837-38 (1988).

[171] *See Spaziano*, 468 U.S. at 479-81.

[172] *See Gregg*, 428 U.S. at 227-31 (Brennan J., dissenting); *id.* at 231-41 (Marshall, J., dissenting); Furman v. Georgia, 408 U.S. 238, 257-306 (1972) (Brennan, J., concurring); *id.* at 314-71 (Marshall, J., concurring). For an extensive consideration of Justices Brennan's and Marshall's death penalty jurisprudence and the role of vigorous dissents, see MICHAEL MELLO, AGAINST THE DEATH PENALTY: THE RELENTLESS DISSENTS OF JUSTICES BRENNAN AND MARSHALL (1996).

The death penalty achieves its retributive function by imposing the ultimate punishment for the ultimate violation of a person. There are at least two categories of retribution:[173] (1) *lex talionis*, or the principle of equality between the crime and the punishment, which has commonly been summarized as "an eye for an eye," and (2) proportional retribution, which requires that the range of punishment be proportional to the severity of the crime. For practical purposes, there is one key difference between the two categories. *Lex talionis* focuses more on the harm to society that the offender has inflicted, whereas proportional retribution looks at the criminal act and its accompanying punishment compared with other criminal offenses and their authorized punishment.[174] That is, in deciding whether the defendant should be executed, a *lex talionis* retributionist would focus on the defendant's killing of another human being as the focal point for gauging punishment; a proportional retributionist would compare the murder committed by the defendant and its accompanying punishment to other crimes and their punishments in assessing whether the capital crime merited the death penalty. Under *lex talionis*, capital punishment is justified as the most morally appropriate punishment when a capital offender kills without justification or excuse. A wholesale adoption of *lex talionis* would require the execution of most, if not all, murderers — not simply those who committed aggravated homicides. Further, one could argue under *lex talionis* that capital defendants should experience the indignities and pain that their victims suffered. Even among supporters of capital punishment, there are, however, few who contend that the defendant must suffer as the victim did.[175] More importantly, under the present law the state cannot torture the defendant because the method of execution must comport with human dignity.[176] In con-

[173] One observer has suggested that there are nine philosophical justifications that are included within the concept of retribution. *See generally* John Cottingham, *Varieties of Retribution*, 29 PHIL. Q. 238 (1979).

[174] *See* Margaret Jane Radin, *Cruel Punishment and Respect for Persons: Super Due Process for Death*, 53 S. CAL. L. REV. 1143, 1168-73 (1980). Margaret Jane Radin has similarly divided retribution into "protective retribution" and "assaultive retribution." *See id.* Protective retribution is most analogous to proportional retribution, while assaultive retribution emphasizes the *lex talionis* aspect of retribution. *See id.*

[175] *See* WALTER BERNS, FOR CAPITAL PUNISHMENT (1979); ERNEST VAN DEN HAAG, PUNISHING CRIMINALS: CONCERNING A VERY OLD AND PAINFUL QUESTION 193 (1975); STEPHEN NATHANSON, AN EYE FOR AN EYE? THE MORALITY OF PUNISHING BY DEATH 74-75 (1987); Joesph M.P. Weiler, *Why Do We Punish? The Case for Retributive Justice*, 12 U. BRIT. COLUM. L. REV. 295 (1978).

[176] *See Gregg*, 428 U.S. at 173; *see also* Deborah W. Denno, *Getting to Death: Are Executions Constitutional?*, 82 IOWA L. REV. 319, 402 (1997) (reviewing case law and pro-

trast, proportional retribution requires punishing the worst crime with society's worst penalty, although the authorized punishment need not duplicate the type of injury of the worst crime.[177] A proportional retributionist would accept punishment that morally most closely approximates the type of harm the offender imposed on his victim.[178] The moral scruples of society limit the range of permissible punishments. Also, the authorized punishment must dignify and recompense the victim's injuries. Under proportional retributionism, the punishment must be sufficient not to trivialize the harm that the offender has caused. Consequently, proportional retribution may be achieved without the execution of all capital offenders; only those offenders whose cases represented the worst of the worst homicides would be eligible for execution under this theory.[179]

The Supreme Court has not clearly explained whether the retributionist rationale for capital punishment rests on *lex talionis* or proportional retribution. Again, various Justices have, on occasion, asserted different retributive-based notions in support of the death penalty. Justice Stewart in *Furman* noted:

> The instinct for retribution is part of the nature of man, and channeling that instinct in the administration of criminal justice serves an important purpose in promoting the stability of a society governed by law. When people begin to believe that organized society is unwilling or unable to impose upon criminal offenders the punishment they "deserve," then there are sown the seeds of anarchy — of self-help, vigilante justice, and lynch law.[180]

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posing test for determining constitutionality of execution methods).

[177] *See* Jeffrey H. Reiman, *Justice, Civilization, and the Death Penalty: Answering van den Haag*, 14 PHIL. & PUB. AFF. 115, 120 (1985).

[178] *See id.* at 129.

[179] This concept has been incorporated into capital jurisprudence. *See Gregg*, 428 U.S. at 188 (noting that there must be a "meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not").

There is a further distinction between *lex talionis* and proportional retribution, on the one hand, and revenge, on the other hand. Revenge should be considered a non-state-sanctioned desire to inflict harm on others for real or imagined injuries suffered by themselves or a third party. Unlike retribution, neither principles of equality nor principles of proportionality limit the operation of revenge. *See* RAYMOND PATERNOSTER, CAPITAL PUNISHMENT IN AMERICA 249-55 (1992). Further, retributive punishment is a legal sanction imposed by a duly authorized entity; a by-product of the punishment is public censure and reprobation. Morally responsible parties are the only proper recipients of retribution. In contrast, revenge is not limited only to those who are responsible for the original victim's injury, and is usually inflicted outside of state-authorized processes. Revenge is not the proper basis for the death penalty.

[180] Furman v. Georgia, 408 U.S. 238, 308 (1972) (Stewart, J., concurring).

The Justice expressed a similar view in *Gregg*.[181] Despite the thirst for vengeance, which is the essence of *lex talionis*, the Court has required temperance. A death sentence can be constitutionally imposed only pursuant to a carefully drafted statute ensuring that, during the sentencing phase, sentencers have adequate information and guidance on the crime and the character of the defendant.[182] For instance, in a separate opinion in *Lockett v. Ohio* and in the majority opinion in *Enmund*, Justice White declared that before imposing a death sentence, the sentencer had to find that the capital defendant possessed a purpose to kill.[183] In the Justice's view, the absence of such a finding not only made it "more doubtful" that the threat of capital punishment could have deterred the capital offense, but death sentences imposed under such circumstances were grossly out of proportion to the crime and failed to contribute significantly to retribution.[184] Justice White views such sentences as disproportionate because retribution is dependent on the defendant's intentions, expectations, and actions.[185] Death sentences are appropriate when tailored to the personal responsibility and guilt of the defendant. In these instances, capital punishment advances retribution by ensuring that a criminal receives his just deserts.[186]

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[181] *See Gregg*, 428 U.S. at 184 ("Indeed, the decision that capital punishment may be the appropriate sanction in extreme cases is an expression of the community's belief that certain crimes are themselves so grievous an affront to humanity that the only adequate response may be the penalty of death.").

[182] *See Gregg*, 438 U.S. at 190-95; *see also* Lockett v. Ohio, 438 U.S. 586 (1978).

[183] *See* Enmund v. Florida, 458 U.S. 782, 800-01 (1982); *Lockett*, 438 U.S. at 624-28 (White, J., concurring in part and dissenting in part).

[184] *See Enmund*, 458 U.S. at 800-01; *Lockett*, 438 U.S. at 624-28 (White, J., concurring in part and dissenting in part).

[185] *See Enmund*, 458 U.S. at 800.

[186] *See id.* at 800-01. Another example is *Spaziano*, in which one of the issues before the Court was whether a death sentence imposed by a judge after the jury recommended life imprisonment violated the Eighth Amendment. *See* Spaziano v. Florida, 468 U.S. 447 (1984). Both the majority and the dissenting Justices agreed that deterrence considerations alone could not justify a death sentence. *See id.* at 461-62; *id.* at 478-81 (Stevens, J., concurring in part and dissenting in part). The difference between the Justices turned on whether the jury or a judge would best reflect retributionism. The majority opinion, written by Justice Blackmun, assumed arguendo that retribution was the primary purpose behind capital punishment, and that a sentence pronounced by a jury might best express the sentiments of the community from which the jury was chosen. *See id.* at 461-62. However, because the community's expression was not given "free rein" — a capital sentencing statute must guide the sentencer's discretion and provide meaningful appellate review of death sentences — the majority concluded that the legislature could, without violating the Constitution, permit a judge to impose a death sentence when the jury recommended life imprisonment. *See id.* at 464-65. Justice Stevens, in dissent, stated that imposing the death sentence should depend on the facts of the case and

Retribution, standing alone, does not appear to be a sufficient penological basis for a death sentence. In *Georgia v. Godfrey*,[187] the defendant fatally shot his estranged wife and his mother-in-law. A jury convicted Godfrey of both murders. The jury also found beyond a reasonable doubt the existence of the aggravating circumstance that the killings were "outrageously or wantonly vile, horrible and inhuman," and accordingly sentenced him to death.[188] Previous state court cases had interpreted this aggravating circumstance as requiring either evidence of torture, an aggravated battery of the victim, or a defendant who had acted with a depraved mind. Though there was no such evidence in *Godfrey*, the Georgia Supreme Court affirmed the conviction. On appeal, the issue before the United States Supreme Court was whether the Georgia courts had construed the aggravating circumstance too broadly. The Court reversed the judgment and remanded the case for resentencing. The Court first noted that one could characterize nearly all murders as "outrageous or wantonly vile, horrible and inhuman." According to the federal court, the Georgia Supreme Court did not construe the statute such that there was a principled way to distinguish Godfry's case, in which the death penalty was imposed, from those in which the defendant did not receive a death sentence.[189]

Godfrey established that one has to be able to explain why a particular defendant received a death sentence, and that multiple capital murders, by themselves, are not a sufficient reason to impose the death penalty.[190] Rather, the prosecution has to prove that the defendant "deserved death."[191] The manner of the killing or the suffering of the victim might provide the requisite support for retribution and, thus, a death sentence. One can also view *Godfrey*'s requirement of an adequate explanation for the death sentence as ensuring that society inflicts capital punishment only when retribution calls for the death sentence.[192] In light of *Godfrey*, courts adjudicating an inordi-

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whether such a sentence achieved retribution. *See id.* at 478-81 (Stevens, J., concurring in part and dissenting in part). Justice Stevens reasoned that a representative cross-section of the community, as reflected in the jury, was a more appropriate body than an individual judge in deciding whether to sentence a defendant to death. *See id.* at 481 (Stevens, J., concurring in part and dissenting in part).

[187] 446 U.S. 420 (1980).

[188] *Id.* at 426.

[189] *See id.* at 433.

[190] *See id.* at 429.

[191] *See id.*

[192] Recent death penalty cases have focused more on the retributive nature of capital punishment. *See* Payne v. Tennessee, 501 U.S. 808 (1991). In *Payne*, the Court ruled that the admission of victim impact evidence does not violate the

nate delay claim ought to take into account in capital cases that the sentencer is typically invited to focus primarily on retributionism during the sentencing phase.

Delay between the commission of a capital offense and the execution affects deterrence and the other utilitarian and retributionist bases of capital punishment. The utility of the execution is affected because of the attenuated connection between the crime and the punishment. When the defendant has a personality different from the one he or she had when committing the crime, going forward with the execution may not satisfy retribution. It is an unanswered question whether society still feels sufficient outrage about the crime

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Eighth Amendment. *See id.* at 833. The Court viewed the information on the victim as informing the sentencer of the specific harm caused by the defendant. *See id.* at 823. Victim impact evidence was relevant to the sentencer's decision on whether to impose the death penalty because it related to Payne's moral culpability and blameworthiness. *See id.* at 825. *Payne* reflects this nation's increased interest in a penal policy focused on retribution. *See id.* at 820; *see also* FRANCIS ALLEN, THE DECLINE OF THE REHABILITATIVE IDEAL: PENAL POLICY AND SOCIAL PURPOSE (1981). *Payne* declined to discuss the admissibility of a victim's family members' opinions about the crime, or their views on the defendant or the appropriate sentence. *See Payne,* 501 U.S. at 830 n.2. The decision, nonetheless, does come close to allowing the victim's family and friends to influence greatly the sentence imposed. Consequently, after *Payne,* the distinction between retribution and revenge has become more blurred. That is, the pain of the victim's family and friends may be the primary basis for the judicially imposed sentence. Under the process approved in *Payne,* it is more likely that when the victim's family and friends want a death sentence the sentencer will return with such a verdict. To the extent that *Payne* suggests the Eighth Amendment embodies solely retributionism, it is in tension with the established interpretation of that Amendment.

Prior to *Payne,* some high-profile cases were notable exceptions to the call for retribution, such as John Lennon's widow Yoko Ono's and Robert Kennedy's family's requests that the persons who murdered their loved ones not receive the death penalty. *See* Tabak & Lane, *supra* note 149, at 129-31. Families and friends of both the murderer and the murdered suffer through the trial, appeal, and execution process. *See* David Margolick, *Divided by Shared Grief: Slaying Shatters Two Proud Army Families,* N.Y. TIMES, Sept. 18, 1993, at A7. There is apparently little research on the impact that awaiting an execution has on these victims. *See* Leslie Beollstroff, *Execution Delays Hit Victims' Kin,* OMAHA WORLD HERALD, Mar. 26, 1995, at 1B. Victims' rights groups are divided on whether executing the defendant truly permits healing. *See id.*; Eric Zorn, *Families Discover Peace, Healing in Forgiving Killers,* CHIC. TRIB., Sept. 17, 1996, at 1N; *see also* David Wallechinsky, *"He Killed My Child, But I Don't Want Him to Die,"* PARADE, Jan. 18, 1998, at 4 (classifying the view of loved ones of murder victims who did not want the killers executed as a "minority" view). This willingness to allow those particularly affected by the murder possibly to influence the punishment imposed seems to run counter to established notions of sentencing. That is, historically, when a jury has been used for sentencing, devices such as removal of prospective jurors for cause and on a peremptory basis have been justified as ensuring that an impartial jury was impaneled. Now, through victim impact statements, sentencers are made more aware of the sentiments of the victim's family and friends and are likely influenced by these sentiments.

after the defendant has spent a considerable period on death row and in restrictive conditions of confinement. It is important to ask whether society cares about the issue because the appropriateness of the death penalty, as measured by the evolving standards of decency, is premised on both society's general acceptance of capital punishment and its approval of the death sentence in particular cases.[193] A *lex talionis* retributionist would likely maintain that neither the passage of time nor a radical change in the character of the defendant alleviates society's duty to punish the properly convicted. Immanuel Kant captured this notion when he argued that before a civil society could disband, it had to execute the last murderer in its prisons.[194] However, a proportional retributionist would not necessarily maintain that execution is proper in inordinate delay cases.[195]

The modern system of capital punishment is neither singularly utilitarian nor completely retributionist. It has components of both theories. Moreover, retribution, deterrence, and other utilitarian-based theories, while characterized in Eighth Amendment jurisprudence as one-dimensional constructs, are, in reality, multifaceted. Several aspects of these theories are given currency under the present capital punishment laws. For instance, the aggravating circumstances doctrine furthers retribution. That is, the aggravating circumstances proffered by the prosecution generally focus the sentencer on the social harm caused by the defendant in committing the capital offense, as well as other seemingly socially undesirable aspects of the defendant's life. Similarly, the mitigating circumstances doctrine addresses special deterrence and other utilitarian theories. The general understanding is that if there is some reason for the sentencer to exercise mercy, then execution of that capital defendant is not necessary to deter future offenses committed by that defendant. In proffering mitigating circumstances, the defense seeks to direct the sentencer's attention to the positive attributes of the defendant and the defendant's background. Executing a capital de-

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[193] *See* Gregg v. Georgia, 428 U.S. 153, 179-84 (1976).

[194] *See* IMMANUEL KANT, THE METAPHYSICAL ELEMENTS OF JUSTICE 101 (J. Ladd trans., 1965).

[195] One commentator suggested that a proportional retributionist might likely reason:

> I cannot see how a sentence that would require a murderer to spend his full natural life in prison, or even the lion's share of his adult life (say, the thirty years between age twenty and age fifty), can be regarded as anything less than extremely severe and thus no trivialization of the harm he has caused.

Reiman, *supra* note 177, at 131.

fendant after a long delay, however, may not be the most utilitarian use of the sanction; nor may it fully achieve retribution.

E. International Law and Inordinate Delay in Capital Cases

The United States Supreme Court has considered, though on a somewhat uneven basis, legal developments in other countries in deciding whether executing a particular class of defendants is consistent with the Eighth Amendment. The Court's inquiries have included both a comparative analysis of the law of the death penalty in other nations and a consideration of developments in international law. These inquiries determine whether the practice under consideration "subject[ed] the individual to a fate forbidden by the principle of civilized treatment guaranteed by the Eighth Amendment"[196] because the Eighth Amendment "draws its meaning from the evolving standards of decency that mark the progress of a maturing society."[197] In *Stanford*, however, a plurality of the Court suggested that "*American* conceptions" of decency were dispositive and that the sentencing practices of other nations were not relevant in deciding Eighth Amendment questions.[198] Even before *Stanford*, the Court's reliance on international law was uneven. *Trop v. Dulles*[199] formally started the inquiry in determining the evolving standards of decency. Similar inquiries were made in *Enmund* and *Coker*. Though in footnotes, the inquiry was nonetheless part of the Court's decisionmaking calculus in concluding that those classes of defendants were not death-eligible.[200] Since *Stanford*, however, the Court has not discussed international law in capital cases. Ironically, it was a decision of a foreign court, the Judicial Committee of the Privy Council of the United Kingdom, that seems to have provided recent interest in the inordinate delay claim.[201] In deciding the question of inordinate de-

[196] Trop v. Dulles, 356 U.S. 86, 99 (1958).

[197] *Id.* at 101.

[198] *See* Stanford v. Kentucky, 492 U.S. 361, 369 n.1 (1989). The Court's statement is an apparent reference only to the practices of state and federal governments in the United States and not to all the nations in the Western Hemisphere, as the Court subsequently considered practices only in the United States.

[199] 356 U.S. 86 (1958).

[200] *See* Enmund v. Florida, 458 U.S. 782, 796 n.22 (1982); Coker v. Georgia, 433 U.S. 584, 596 n.10 (1977).

[201] *See* Lackey v. Texas, 514 U.S. 1045, 1047 (1995) (Stevens, J., memorandum respecting denial of certiorari) (citing Pratt v. Attorney General for Jamaica, 4 All E.R. 769 (P.C. 1993) (en banc), which held that a 14-year delay between death sentence and proposed execution date violated Jamaican Constitution). There have been efforts to overturn *Pratt*. *See* Don Bohning, *Convicts Face Faster Trip to the Gallows: Carribean Irked at Legal Delays*, MIAMI HERALD, Sept. 8, 1998, at A1; Shelley Em-

lay, the Court should consider developments beyond this nation's borders.

International law and customary international law[202] are against the imposition of the death penalty and the execution of defendants.[203] The modern trend against the imposition of the death penalty received substantial endorsement in 1948 when the United Nations adopted the *Universal Declaration of Human Rights* (*Declaration*), which in Article 3 recognized a "right to life."[204] Article 5 of the *Declaration* prohibits the use of "torture . . . or cruel, inhuman or degrading treatment or punishment."[205] Though it did not explicitly prohibit capital punishment, the *Declaration* formally recognized that the community of nations sought to impose some limits on a state's relations with individuals. Subsequent treatises have amplified this idea. Part III, Article 6 of the *International Covenant on Civil and Political Rights*, which was written in 1957 and adopted by the United Nations in 1976, excludes those under 18 and pregnant women from being executed.[206] It also limits the use of the death penalty to "the most serious crimes in accordance with the law in force at the time of the commission of the offense."[207] This Article anticipated the eventual abolition of capital punishment. Three more recent international agreements outlaw capital punishment, but substantially fewer countries are parties to these agreements than to the Universal Declaration. *Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty*, states that a state may provide for the death penalty for acts

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ling, *Crime Epidemic Revives Hangings in Carribean*, THE ATLANTA CONSTITUTION, Sept. 20, 1998, at 14A.

Another development recognized in international law that is related to the issue of inordinate delay is the "death row phenomenon." *See* Soering v. United Kingdom, 11 Eur. H.R. Rep. 439 (1989) (denying extradition of German national to face murder charges in Virginia because it could give rise to violation of Article III of the Convention for the Protection of Human Rights and Fundamental Freedoms because of the anticipated six- to eight-year delay on death row).

[202] Customary international law is created when a state adopts a general and consistent practice, which is followed under a sense of legal obligation. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) & com. b. (1987). The practice must reflect wide acceptance among the state particularly involved in the relevant activity. *See id.*

[203] *See generally* WILLIAM A. SCHABAS, THE ABOLITION OF THE DEATH PENALTY IN INTERNATIONAL LAW (1993).

[204] G.A. Res. 217 A (III), U.N. Doc A/810, at 71 (1948).

[205] *Id.*

[206] *See* International Covenant on Economic, Social and Cultural Rights, *opened for signature* Dec. 19, 1966, 993 U.N.T.S. 33.

[207] *Id.*

committed in wartime or under an imminent threat of war.[208] It also declares that the "death penalty shall be abolished" and that "[n]o one shall be condemned to such penalty or executed."[209] The *Second Optional Protocol to the International Covenant on Civil and Political Rights* provides: "No one within the jurisdiction of a State Party to the present Protocol shall be executed."[210] In addition, Article 1 of the *Protocol to the American Convention on Human Rights to Abolish the Death Penalty,* which entered into force on August 28, 1991, declares that "[t]he State Parties to this Protocol shall not apply the death penalty in their territory to any person subject to their jurisdiction."[211] While it may be premature to state that the "international norms on the death penalty show an inexorable progress towards abolition,"[212] these international agreements do indicate that capital punishment is a disfavored sanction in the international community.

Both foreign courts and courts established under international agreements have issued decisions declaring that an inmate on death row for a substantial period cannot be executed. The first was the European Court of Human Rights (ECHR).[213] In *Soering v. United Kingdom,*[214] the ECHR ruled that the United Kingdom would violate Article 3 of the *Convention for the Protection of Human Rights and Fundamental Freedoms*[215] if it extradited a fugitive to Virginia to face capital murder charges. The ECHR relied on evidence that Virginian capital defendants typically spend between six and eight years on death row before they are executed.[216] While on death row, capital inmates are kept under strict conditions of confinement and experience "extreme stress, psychological deterioration and risk of homosexual abuse and physical attack."[217] The Court characterized this mental

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[208] Apr. 28, 1983, 22 I.L.M 538 (entered into force Mar. 1, 1985).

[209] *See id.* at Art. 2.

[210] G.A. Res. 44/128, U.N. GAOR, 44th Sess., Annex, Agenda Item 98 (1990).

[211] 29 I.L.M. 1447, 1448 (1990).

[212] SCHABAS, *supra* note 203, at 18.

[213] The European Convention for the Protection of Human Rights and Fundamental Freedoms established this court. *See* MARK W. JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 257-65 (2d ed. 1993).

[214] 11 Eur. H.R. Rep. 439 (1989).

[215] Article 3 states: "No one shall be subjected to torture or to inhuman or degrading treatment or punishment." *Convention for the Protection of Human Rights and Fundamental Freedoms, in* EUROPEAN CONVENTION ON HUMAN RIGHTS: COLLECTED TEXTS 103 (10th ed. 1975). Twenty-one nations, which form the Council of Europe, are parties to the Convention. *See id.* at 102.

[216] *See Soering,* 11 Eur. H.R. Rep. at 475.

[217] *Id.* at 460.

stress and accompanying anxiety as "the death row phenomenon."[218] The Court concluded:

> Having regard to the very long period of time spent on death row in such extreme conditions, with the ever present and mounting anguish of awaiting execution of the death penalty, and to the personal circumstances of the applicant, especially his age and mental state at the time of the offence, the applicant's extradition to the United States would expose him to a real risk of treatment going beyond the threshold set by Article 3.[219]

In June 1993, the Supreme Court of Zimbabwe ruled that the Zimbabwe Constitution prohibited the execution of a prisoner who had been under a death sentence for six years and three others who had been under a death sentence for three years.[220]

The present position of the Judicial Committee of the Privy Council of the United Kingdom, as announced in 1993, presumes unlawful all executions that occur after a five-year delay.[221] In the case

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[218] *See id.* at 469.

[219] *See id.* at 477-78. Soering was extradited to Virginia after the local prosecutor agreed not to seek a death sentence. He was convicted of two counts of first-degree murder and sentenced to two terms of life imprisonment. *See Judge Orders Life Terms for Soering*, VIRGINIA-PILOT LEDGER-STAR, Sept. 5, 1990, at A6.

[220] *See Catholic Comm'n for Justice and Peace in Zimbabwe v. Attorney General*, S.C. 73/93 (Zimb. June 24, 1993, unreported) *reprinted in* 14 HUM. RTS. L. J. 323 (1993). At issue was section 15(1) of the Zimbabwe Constitution, which reads: "No person shall be subjected to torture or to inhuman or degrading punishment or other such treatment." *Id.* at 325. The Court prohibited the executions. *See id.* at 337. The prisoners asserted that their pending executions were constantly on their minds, that they seriously contemplated suicide, that it was an ordeal to hear an execution being carried out, and that frequently the prison officials taunted them about their pending executions. *See id.* at 324-25. After acknowledging that section 15(1) protected the "dignity of man," the Court then discussed decisions from other jurisdictions, including the United States, that had considered the issue of an execution following a period of delay. *See id.* at 326-35. Most of those courts had ruled that despite the mental anxiety suffered by capital defendants during longer periods of delay, the execution could occur. *See id.* Despite this contrary judicial authority, the Zimbabwe Supreme Court vacated the death sentences and substituted sentences of life imprisonment. *See id.* at 337.

[221] The Privy Council has considered the issue three times in the last two decades. The first occasion was *Abbott v. Attorney General of Trinidad and Tobago*, 1 W.L.R. 1342 (P.C. 1979). In *Abbott*, the Council ruled that a nearly four-year delay — of which the defendant was responsible for eight months — between the defendant's dismissal of his appeal and the issuance of a death warrant did not violate the defendant's constitutional rights under the Trinidad and Tobago Constitution because he had been accorded due process of law. *See id.* at 1345. The Council's next published decision on the issue of delay in capital cases was *Riley v. Attorney General of Jamaica*, 3 All E.R. 469 (P.C. 1982). There, the Council considered the appeals of five defendants, who had been under a sentence of death for five to seven years. It held that "whatever the reason for, or the length of, delay in executing a sentence

in which it announced its decision, *Pratt v. Attorney General for Jamaica*,[222] which was an appeal by two capital defendants who had been confined to death row for fourteen years, it stated:

> 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.[223]

Pratt is a crystallization of the views of the members of the Privy Council. In addition to relying on the death row phenomenon, the decision observes that executions in Jamaica have historically occurred within months of the imposition of the death sentence and notes the Council's "instinctive revulsion" to the length of the delay. This "revulsion" hardly seems to be an objective standard that can be measured, and for that reason should not be incorporated into defining the meaning of the Cruel and Unusual Punishments Clause. Further, *Pratt* is of limited significance to nations such as the United States, where executions typically take years to occur, due partly to the several layers of post-conviction review that have tended to extend the length of time that an inmate spends on death row. In this country, the legal inquiry focuses on objective factors in determining whether the challenged punishment is cruel and unusual.

Courts in India have considered the question of delay in capital cases, "such delay being a notorious feature of the Indian legal system."[224] In *Vathesswaran v. State of Tamil Nadu*[225] the Indian court ruled that a delay of eight years between the imposition of the sentence and the proposed execution violated the Constitution of India. The court set aside the death sentences and imposed life imprisonment. Similarly, in *Triveniben v. State of Gujarat*[226] the Supreme Court of India held that the period to consider in calculating inordinate delay was after the judicial process had come to an end, although no fixed length of time would establish when the delay was a *per se* violation of the Indian Constitution. In another case, the court commuted the death sentence of a defendant and sentenced him to life

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of death lawfully imposed, the delay can afford no ground for holding the execution to be a contravention" of the law. *Id.* at 473.

[222] 4 All E.R. 769 (P.C. 1993) (en banc).

[223] *Id.* at 783.

[224] *See Catholic Comm'n*, S.C. 73/93 (Zimb. June 24, 1993, unreported) *reprinted in* 14 HUM. RTS. L. J., *supra* note 120, at 328.

[225] (India 1983) 2 S.C.R. 348.

[226] (India 1989) 1 S.C.J. 383, 410.

imprisonment when his petition for mercy had been pending before the president for more than eight years.[227]

A unanimity of opinion, however, does not exist among all foreign courts that have considered the question of delay in capital cases. In *Kindler v. Canada (Minister of Justice)*,[228] for instance, the Canadian Supreme Court ruled that extraditing a convicted capital fugitive to the United States, where the defendant would possibly be subject to the death row phenomenon, did not violate Canadian law. The United Nations Human Rights Committee agreed that the extradition did not violate international law.[229]

Each of these judicial bodies — the ECHR, the Supreme Court of Zimbabwe, the Privy Council, courts in India, the Canadian Supreme Court, and the United Nations Human Rights Committee — considered the mental anxiety that capital defendants face while awaiting execution. Indeed, each judicial body considered the death row phenomenon in deciding whether execution after experiencing that strain for the period in question accorded with its notion of permissible punishment. These decisions acknowledged that the death sentence was lawfully imposed, but nonetheless prohibited the pending execution because of the additional suffering encountered by the defendant while awaiting execution. In summary, these cases suggest that international standards are evolving toward requiring that there be some limit on the time that an inmate can spend awaiting his execution.

When adjudicating inordinate delay claims, court decisions in this nation should consider the contemporary trend of international opinion, as the United States Supreme Court has done in previous cases, when deciding capital cases.[230] International law and the law of other nations have become interconnected.[231] If actors and legal institutions in the United States continue to disregard the views of other jurists in the international community, analysis of this nation's laws under the Eighth Amendment will become increasingly dis-

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[227] *See* Mehta v. Union of India, (India 1989) 3 S.C.R. 774, 777.

[228] (Can. 1991) 2 S.C.R. 779. At issue was whether the Canadian Charter of Rights and Freedoms, which is part of the constitution of Canada and which embodies many of the rights in the International Covenant on Civil and Political Rights, would be violated by permitting the extradition to the United States.

[229] *See* Kindler v. Canada, No. 470/1991, *reported at* 14 HUM. RTS. L. J. 307 (1993).

[230] *See* Enmund v. Florida, 458 U.S. 782, 796 n.22 (1982); Coker v. Georgia, 433 U.S. 584, 596 n.10 (1977); Trop v. Dulles, 356 U.S. 86, 101-02 (1958).

[231] *See* Richard B. Lillich, *Harmonizing Human Rights Law Nationally and Internationally: The Death Row Phenomenon as a Case Study*, 40 ST. LOUIS U. L.J. 699, 711-12 (1996).

jointed from the views of the world and will not reflect the full views of a "maturing society," as announced in *Trop*. Moreover, the state and federal courts are the institutions best positioned to adjudicate claims based on international law brought on behalf of otherwise powerless individuals.[232]

F. Inordinate Delay as Violative of the Eighth Amendment

Under the test established by the Court for measuring the evolving standards of decency, inordinate delay between the imposition of a sentence and the actual execution of a capital defendant may violate the Eighth Amendment. The factors that the Court considers either suggest that such delays are impermissible or do not provide a determinate answer to the question. Never in this nation's history have death row inmates routinely spent as long under a death sentence. The most relevant Court precedent suggests that the period spent awaiting execution is itself a form of punishment regulated by the Eighth Amendment. There is no statutory authority that specifically authorizes executions after a capital defendant has spent an inordinate time on death row. In addition, sentencers, when deciding on what punishment to impose, do not formally consider the likelihood that the prisoner will be on death row for an inordinate period. Penologically, an execution after an inordinate delay might achieve retribution; but the Court has disapproved of naked retribution as the sole rationale for executions. Due to the paucity of definite answers to some of the factors that the Court considers, legal developments in other nations and in international law ought to be considered on this issue. International opinion generally tolerates executions so long as they occur before too long a delay between the imposition of the death sentence and the execution.

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[232] *See* Lea Brilmayer, *International Law in American Courts: A Modest Proposal*, 100 YALE L.J. 2277, 2307-09 (1991). The law established by international tribunals and the laws of other nations contain determinate and determinable principles. Others have discussed how customary international law and treaties can be used to inform and complement the laws of this nation. *See* Joan F. Hartman, *"Unusual" Punishment: The Domestic Effects of International Norms Restricting the Application of the Death Penalty*, 52 U. CIN. L. REV. 655 (1983); Joan Fitzpatrick, *The Relevance of Customary International Norms of the Death Penalty in the United States*, 25 GA. J. INT'L & COMP. LAW 165 (1995); *see also* Gordon A. Christenson, *Using Human Rights Law to Inform Due Process and Equal Protection Analysis*, 52 U. CIN. L. REV. 2 (1983); Richard B. Lillich, *Invoking International Human Rights Law in Domestic Courts*, 54 U. CIN. L. REV. 367 (1985). One commentator has compared the scope of the Eighth Amendment with various international treaties and has found the Eighth Amendment generally wanting. *See* David Heffernan, Comment, *America the Cruel and Unusual? An Analysis of the Eighth Amendment Under International Law*, 45 CATH. U.L. REV. 481 (1996).

In light of the above, keeping an inmate on death row for an inordinate period violates the Eighth Amendment. Then the question arises: How long a delay is inordinate? The Eighth Amendment is to be interpreted according to the "evolving standards of decency that mark the progress of a maturing society."[233] Since "the concept of cruel and unusual punishments is an evolving one[,] the minimum standard of decency in prisons is a function of the conditions of life on the outside, and, therefore, as society becomes wealthier, more comfortable, more sensitive, more civilized, the constitutional minimum of decency in incarceration rises."[234] Considering the enormity of the issue and the procedural and substantive requirements that exist in death penalty cases, capital defendants can hardly argue with the proposition that to ensure that the conviction and sentence are proper it can take about seven to eleven years from a capital conviction to execution.[235] Thus, when an inmate claims that the state has forfeited the right to execute him because too much time has passed between his conviction and the proposed execution date, as he has suffered severe mental strain while awaiting his execution, such claims may not be cognizable until there has been an *inordinate* delay between the imposition of the death sentence and the anticipated execution.

The historical background of the Eighth Amendment and the words "cruel and unusual punishment" provide slight guidance. In the seventeenth century, "cruel" was synonymous with severe or excessive.[236] Thus the period of delay must be excessive. The phrase "cruel and unusual" was used in the English Bill of Rights of 1689, a predecessor of the Eighth Amendment, as an apparent limitation on "the imposition of punishments which were unauthorized by statute and outside the jurisdiction of the sentencing court, and . . . a reiteration of the English policy against disproportionate penalties."[237] Long ago, the Court suggested that the Eighth Amendment out-

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[233] *Trop*, 356 U.S. at 101.

[234] Bruscino v. Carlson, 854 F.2d 162, 164 (7th Cir. 1988), *cert. denied*, 491 U.S. 907 (1989); *see also* Davenport v. DeRobertis, 844 F.2d 1310, 1315 (7th Cir.), *cert. denied*, 488 U.S. 908 (1988).

[235] This approximation was valid for the early 1990s. See sources cited *supra* notes 79 & 135. Even when an inmate does not appeal a death sentence or conviction it can take several months before the state carries out the execution. *See Killer's Execution Speediest Since Gary Gilmore in 1977*, DAILY RECORD (Baltimore, Md.), Sept. 20, 1996, at 11 (reporting a ten-month delay between the sentence and execution of an inmate who waived all appeals).

[236] *See* Anthony F. Granucci, *"Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning*, 57 CAL. L. REV. 839, 860 (1957).

[237] *Id.*

lawed punishment that involved "a lingering death."[238] Accordingly, the period must be so excessive that the pending execution, in effect, constitutes punishment unauthorized by statute or the courts because it is a lingering death. This is consistent with the present interpretation of the phrase as outlawing torturous methods of execution,[239] which logically includes the state's conduct in bringing about the execution.[240]

Inordinate delay claims should be ripe for review only after the inmate has been under a sentence of death for twice as long as the national average of time spent on death row. The other cases of executed defendants establish the temporal period by which an execution should occur. If the defendant has been on death row for twice as long as the national average, this is excessive, in the commonly accepted legal usage of the term.[241] While inordinate delay need not be strictly defined as twice the national average, this proposed bright line rule represents a choice that provides a ready reference point for capital cases. The Court adopted an analogous approach in *Barker v. Wingo*[242] for determining whether there has been a violation of a criminal defendant's Sixth Amendment right to a speedy trial. To decide the issue, courts are to consider the length and reason for the delay, the defendant's assertion of the right, and the prejudice suffered by the defendant.[243] Not all of the *Barker* factors apply with full force in the context of inordinate delay. It is nonsensical to require that the capital defendant insist that the state rush to execute him. If the defendant was sincere in such demands, he could almost always "volunteer" to be executed. In fact, having a capital defendant on death row for twice as long as other inmates who have been executed strongly suggests either that for some period the state did not vigorously seek to carry out the death sentence

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[238] *See In re* Kemmler, 136 U.S. 436, 447 (1890).

[239] *See* Gregg v. Georgia, 428 U.S. 153, 168-71 (1976); Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459, 464 (1967); *In re* Kemmler, 136 U.S. 436, 447 (1889); Wilkerson v. Utah, 99 U.S. 130, 134-35 (1879).

[240] *See* Denno, *supra*, note 176.

[241] *See, e.g.*, BLACK'S LAW DICTIONARY 561 (6th ed. 1990) (defining excessive as "[g]reater than what is usual or proper"); William P. Statsky, WEST'S LEGAL THESAURUS/DICTIONARY: SPECIAL DELUXE EDITION 292 (1986) (same); *see also* Stack v. Boyle, 342 U.S. 1 (1951) (holding that bail is excessive and violative of the Eighth Amendment when set at an amount higher than reasonably calculated to assure the presence of the accused).

[242] 407 U.S. 514 (1972)

[243] *See* Doggett v. United States, 505 U.S. 647 (1992) (ruling that an eight-and-one-half year delay between indictment and trial violated the defendant's right to a speedy trial).

or that the defendant is not within the "core" class of death eligible defendants.[244] Today, using the most recent and reliable figures available, from 1995,[245] this limitation period would require an inmate to be incarcerated about twenty-two years before he could claim that his pending execution constitutes cruel and unusual punishment in light of the severe restrictions of confinement and mental strain suffered while awaiting execution.[246]

On the one hand, this bright line rule would ensure that the task of determining when the Eighth Amendment has been violated is based on objective factors. Justice Scalia has argued, in reaction to the apparent subjective nature of the six-factor inquiry to determine the death eligibility of defendants, that the Court should not consider whether a punishment contributed to accepted goals of punishment. According to the Justice:

> The punishment is either cruel and unusual (i.e., society has set its face against it) or it is not. If it is not unusual, that is, if an objective examination of laws and jury determinations fails to demonstrate society's disapproval of it, the punishment is not unconstitutional even if out of accord with the theories of penology favored by the Justices of this Court.[247]

Under Justice Scalia's approach, inordinate delay is both cruel and unusual punishment. Executions after an inordinate delay are unusual because most defendants are executed before spending an inordinate time (i.e., twice as long as usual) on death row. These executions are also constitutionally cruel because the death row prisoner suffers unauthorized mental anguish while awaiting execution.[248] Adopting this proposed rule of inordinate delay will permit a

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[244] *See* Dwight Aarons, *Getting Out of This Mess: Steps Toward Addressing and Avoiding Inordinate Delay in Capital Cases*, 89 J. CRIM. L. & CRIMINOLOGY (forthcoming 1998).

[245] *See* U.S. DEP'T OF JUSTICE, *supra* note 135.

[246] As Justice Stevens suggested in *Lackey* , and as foreign judicial bodies have similarly reasoned, delay directly attributable to the prisoner's exercise of his right to review of his sentence and conviction ought to be excluded from the calculation.

[247] Penry v. Lynaugh, 492 U.S. 302, 351 (1989) (Scalia, J., concurring in part and dissenting in part).

[248] *See* Harmelin v. Michigan, 501 U.S. 957, 973-76 (1991) (Scalia, J.). In *Harmelin*, Justice Scalia suggested that the phrase "cruel and usual" in the Eighth Amendment should be equated with "cruel and illegal." *See id.* at 973. According to the Justice, punishment does not violate the Eighth Amendment unless it is not authorized by law or it is a mode of punishment that is not regularly or customarily employed. *See id.* at 974-76. Under this definition, an inordinate delay violates the Eighth Amendment because no state has specifically authorized the long delay in capital cases, nor is it customary for an execution to occur after such a long delay.

court to declare such unnecessarily long-delayed executions unlawful.

On the other hand, it is quite tempting to follow the Court's lead when assessing the right to a speedy criminal trial[249] or the constitutionality of punitive damages awards under the Due Process Clause of the Fourteenth Amendment, and conclude that the Court "need not, and indeed . . . cannot, draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case."[250] Such an approach eliminates the need for anything more than the observation that the defendant has been treated in a fundamentally unfair manner. The Court has, however, insisted on more precise guidelines when dealing with capital cases under the Eighth Amendment. Another concern that a bright line rule may raise is that as a case approaches the limit set by the rule, there may be a flurry of activity to ensure that the defendant's case is moved along, with an accompanying loss of meaningful review of the defendant's claims. If a bright line rule initiates processing of the case, this should be viewed as beneficial; that review should strive to ensure that the defendant's claims are meaningfully and seriously considered. Objecting to the adoption of a bright line rule seems to disregard the salutary effects of such a rule.

Recent history demonstrates that imposing some substantive limits on the law of death encourages a state to fine tune its administration of the death penalty. For instance, consider the states' reaction to *Furman*'s declaration that the death penalty was being administered in an arbitrary manner. *Furman* forced the states to devise capital punishment schemes that ensured that the discretion in seeking and imposing the death penalty was "suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action."[251] Having a threshold temporal requirement of twice the national average of death row incarceration to state an inordinate delay claim would account for prosecutions that were not perfect and would allow the state the opportunity to correct those proceedings through the regular judicial process.[252] Until the lapse of this

[249] *See Barker*, 407 U.S. at 523 ("We find no constitutional basis for holding that the speedy trial right can be quantified into a specified number of days or months.").

[250] Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 18 (1991).

[251] Gregg v. Georgia, 428 U.S. 153, 189 (1976).

[252] If the defendant's initial conviction is affirmed, but the case is remanded for resentencing, then the time that the defendant spent in death row pursuant to the first conviction may be excluded from a subsequent inordinate delay calculation.

period, an inmate's stay on death row does not state an inordinate delay claim.[253]

Unlike others who have considered the question of the long delay between the imposition of a death sentence and the inmate's execution in the United States, and either have concluded that recognition of the claim would undermine the present safeguards that are part of the capital litigation process[254] or that the death penalty is inherently unconstitutional,[255] I propose a rule that attempts to accommodate these concerns. I am under no delusion that my proposal is perfect, in part because, as detailed elsewhere,[256] notwithstanding a finding that the defendant's Eighth Amendment rights have been violated, the prosecution is not prevented from seeking to have a death sentence imposed in a subsequent proceeding.[257] Yet, as best as I know, my proposal is the first to fashion a rule that accommodates most interests at stake.

V. CONCLUSION

Unlike more recent commentators and courts that have considered the issue of inordinate delay in capital cases, this Article has taken the United States Supreme Court's pronouncements on death eligibility seriously. Starting with *Gregg v. Georgia*,[258] the Court ruled that the state can use the death penalty for deterrence and retribution. To that end, the Court established standards on how to detect which class of defendants is death-eligible. The Court has used essentially those standards in subsequent cases outlining death eligibility.

[253] The presumptive period of twice as long as the national average, however, would likely always include prosecutions sufficiently racked with error that they were fundamentally flawed and of questionable validity under the Constitution.

[254] *See, e.g.*, McKenzie v. Day, 57 F.3d 1461, 1467 (9th Cir. 1995).

[255] *See, e.g.*, Crocker, *supra* note 5, at 573 ("The inevitable stress of impending death causes inhuman and degrading punishment. Where cruel and unusual punishment exists in the criminal justice system, the required remedy is abolition of the particular system until the unconstitutionality is eradicated."); Daniel P. Blank, Book Note, *Mumia Abu-Jamal and the "Death Row Phenomenon,"* 48 STAN. L. REV. 1625, 1656 (1996) ("As a result of these inevitable fatal errors on the one hand, and the tortuous death row phenomenon on the other, the only way to administer capital punishment fairly is not to administer it at all.").

[256] *See* Aarons, *supra* note 244.

[257] *Cf.* Marc M. Arkin, *Speedy Criminal Appeals: A Right Without a Remedy*, 74 MINN. L. REV. 437, 486-90 (1990) (noting that defendants who establish an unconstitutional delay in having their direct criminal appeal adjudicated receive the delayed appeal as the remedy).

[258] 428 U.S. 153 (1976).

Under *Gregg's* objective criteria for measuring the evolving standards of decency, inordinate delay between the imposition of a sentence and the actual execution of a capital defendant violates the Eighth Amendment. Historically, death row inmates have not regularly spent as long under a sentence of death as they may now. The most relevant Court case presumed that the mental strain experienced while awaiting execution, without a realistic notion of when, if ever, that execution would occur, is a form of punishment. Legislatures have not explicitly considered the issue of inordinate delay; consequently, there is no statutory authority that specifically authorizes executions after a capital defendant has spent an inordinate time on death row. Presently, sentencers are not allowed to consider the likelihood that the prisoner will be on death row for an inordinate period in deciding whether to impose a death sentence. Thus, the imposition of a death sentence should not be considered a definitive statement on the issue. Finally, the only penological objective that can justify an execution after an inordinate delay is unmitigated retribution. The Court, however, has disapproved of naked retribution as the sole rationale for a death sentence. Due to the paucity of definite answers to some of the factors that the Court considers, legal developments in other nations and in international law ought to be considered on this issue. These developments reflect the values of other nation states on the death penalty and have traditionally informed the development of this nation's Eighth Amendment jurisprudence. International opinion is generally against the imposition of capital punishment, but is willing to tolerate such sentences so long as they occur before an inordinate delay between the imposition of the death sentence and the execution.

Inordinate delay claims should be ripe for review only after the inmate has been under a sentence of death for twice as long as the national average of time spent on death row by other executed inmates. This standard is based on both the language of the Eighth Amendment and the historical tradition underlying that Amendment. Even if one adopts the view suggested by some members of the Court — that inquiring whether a form of punishment contributes to accepted goals of punishment is not a function of the Court — inordinate delay appears to be both cruel and unusual punishment. Executions after an inordinate delay are unusual because most defendants are executed before spending an inordinate time (i.e., twice as long as usual) on death row. Such executions are cruel in the constitutional sense because the condemned experience severe mental anguish while awaiting execution.

The inordinate delay claims raised by state death row prisoners could be another reason for those opposed to capital punishment to advocate its abolition. These claims can also serve as an occasion to examine the administration of capital punishment in the United States or in a particular jurisdiction. I have chosen the latter course. It is an open question whether other actors in the capital litigation process — namely prosecutors, judges, governors, and others authorized to settle for a sentence other than death — will take the United States Supreme Court decisions on death eligibility seriously when presented with the next claim of inordinate delay made by a capital defendant.