"A FATE WORSE THAN DEATH" — AN ESSAY ON WHETHER LONG TIMES ON DEATH ROW ARE CRUEL TIMES

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INTRODUCTION

In the United States, at last count, 2,848 men and women are prisoners on death row awaiting execution. Some of these prisoners will suffer from severe mental illnesses, while others will resign themselves to their fates. Some will be executed soon. Some will be marched to cells next to the death chambers, only to be returned to the segregation of death row when a stay of execution is granted. Many of those prisoners sentenced to death will remain on death row for years and years.

Just over a year ago, the State of Nebraska carried out its first execution of a prisoner in more than three and a half decades. On September 2, 1994, Harold Lamont Otey was put to death in the electric chair. Professor of Law, Creighton University. The author expresses his gratitude to senior student William Leighner and junior student Christy Todd for their invaluable assistance in preparing this essay.

3. For cases involving severe mental illness, see Furman v. Georgia, 408 U.S. 238, 288-89 (1972); Solesbee v. Balkcom, 339 U.S. 9, 14 (1950) (Frankfurter, J., dissenting) (stating that "the onset of insanity while awaiting execution of a death sentence is not a rare phenomenon"). In Solesbee, a death row prisoner claimed he could not be executed, because he was insane. Solesbee, 399 U.S. at 9-10. The United States Supreme Court did not address the question of whether an insane person could be executed, but affirmed the state scheme requiring three governor-appointed physicians to determine whether or not the prisoner was insane. Id. at 13-14. The Supreme Court stated that due process did not require judicial review of this state system. Id.


5. IRA ROBBINS, TOWARD MORE JUST AND EFFECTIVE SYSTEM OF REVIEW IN STATE DEATH PENALTY CASES 135 (1990) [hereinafter ROBBINS].
tric chair. Otey had been initially convicted and sentenced to death in 1978 for the murder of a young Omaha woman. Otey was just one of several notable Nebraska prisoners who have remained on death row for lengthy periods of time.

The extended death row waiting period of several other Nebraska prisoners in addition to Otey has allowed for numerous, and sometimes innovative, resorts to state and federal courts in the search of last minute reprieves. Such actions by death row prisoners have captured the imagination of the people of the state and have frustrated the victims' friends and families as well as some political leaders. Nebraska prisoners involved in such attempts include:

—John Edward Rust was convicted and sentenced to death in 1975;  
—C. Michael Anderson and Peter Hochstein were convicted and sentenced in 1977 and face execution for a murder committed in October of 1975;  
—Robert Williams was convicted and sentenced in 1978;  
—Steven Roy Harper was found guilty and sentenced for a 1977 murder in 1978;  
—John Joubert pled guilty to murder and was sentenced in 1984; and  
—Clarence Victor was convicted of first degree murder in 1988.

The United States Supreme Court has previously decided that the carrying out of an execution is not a violation of the protection against cruel and unusual punishments guaranteed by the Eighth Amendment of the United States Constitution. That issue is beyond the scope of this essay. Rather, this essay's focus is whether extended incarceration on death row is, itself, so cruel and unusual as to implicate

8. Carson, Neb. L. Rev. at 484.  
EXTENDED DEATH ROW STAY

Eighth Amendment values and constitute a ground for relief. To answer this question, we must explore, first, the meaning of the cruel and unusual punishments clause, and, second, determine whether the prohibition against such punishments extends to the condition of lingering on death row in circumstances in which the state imposes no other hardship on the prisoner.

THE ETIOLOGY OF THE CLAIM

A. The Stevens Memorandum in Lackey

Until the spring of 1995, the United States Supreme Court almost routinely denied certiorari in cases involving death row inmates claiming their extended stays on death row violated the rights conferred under the Eighth Amendment. One such case, Lackey v. Texas, involved a prisoner claiming that the spending of seventeen years awaiting execution amounted to cruel and unusual punishment in violation of the Eighth Amendment. This case would have been but one of thousands refused certiorari review last term, except that Justice John Paul Stevens, joined by Justice Steven Breyer, filed a memorandum respecting the denial of certiorari reasoning that the issue was sufficiently important and novel as to warrant review by the Supreme Court.

Justice Stevens noted that the claim "is not without foundation." In fact, the issue of whether an extended time on death row is such a form of inhuman treatment so as to warrant judicial relief has been considered by scholars and courts for many years.

Justice Stevens' memorandum acknowledged the holding in Gregg v. Georgia which concluded that the Eighth Amendment does not prohibit imposition of the death penalty. That decision, he wrote, was based largely on two grounds: (1) "the death penalty was considered permissible by the Framers," and (2) "the death penalty might

19. Lackey, 115 S. Ct. at 1421.
20. Id. (citing Gregg v. Georgia, 428 U.S. 153 (1976)) (noting that, after seventeen years on death row, neither the fact that the Framers allowed death penalty imposition nor that the dual social purposes of retribution and deterrence retains persuasive force).
serve two principal social purposes: retribution and deterrence.”

Justice Stevens continued however:

It is arguable that neither ground retains any force for prisoners who have spent some [seventeen] years under a sentence of death. Such a delay, if it ever occurred, certainly would have been rare in 1789, and thus the practice of the Framers would not justify a denial of petitioner’s claim.

Justice Stevens’ argument cited language written by Justice Samuel Freeman Miller in the 1890 decision of In re Medley, which stated in part that “when 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.”

In Medley, the delay between sentencing and planned execution was four weeks. The reasoning in Justice Miller’s opinion that noted the pain of death row incarceration referred, in part, to this four week delay. However, that discussion is mere dictum. In fact, Medley was a habeas corpus action addressing the issue of whether the State of Colorado violated the ex post facto provision of the United States Constitution by amending the statute under which the petitioner was sentenced after the fact.

Justice Stevens noted that relatively few American courts have addressed the issue of extended incarceration. Instead, Stevens focused on the recent developments in English and other courts that have directly ruled on the cruelty of extended incarceration. Justice Stevens noted that “the highest courts in other countries” have been persuaded by the same argument advanced by the petitioner in Lackey.

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23. Lackey, 115 S. Ct. at 1421.
24. Id.
25. 134 U.S. 160 (1890).
27. Medley, 134 U.S. at 161-62. See generally, Ex Parte Garland, 71 U.S. 333, 377 (1866) (limiting state and federal lawmakers when enacting penal statutes that have retrospective effects).
28. Lackey, 115 S. Ct. at 1421. See People v. Anderson, 493 P.2d 880, 894 (Cal. 1972), cert. denied, 406 U.S. 958 (1972) (noting the cruelty of capital punishment applies not only to the execution itself but also to the dehumanizing effects of lengthy imprisonment prior to execution). See Dist. Attorney for Suffolk Dist. v. Watson, 411 N.E.2d 1274, 1287 (Mass. 1980) (Braucher, J., concurring) (noting the death penalty is unconstitutional under the state constitution in part because “[i]t will be carried out only after agonizing months and years of uncertainty”).
B. THE RULING OF THE PRIVY COUNCIL

The Privy Council of the United Kingdom ruled on the cruelty of extended incarceration in a case from Jamaica — *Pratt v. Attorney General of Jamaica*. The case of *Pratt* constitutes the most important extra-national judicial examination of the extended incarceration claim because of the significance and reputation of the tribunal issuing the ruling.

Lord Griffiths' opinion distinguishes some of the minimal existing authority not only from the Anglo-American body of jurisprudence but from other jurisdictions as well. Admittedly, an increasing number of the tribunals of the community of nations have granted “relief to applicants who claim that extended incarceration on death row is cruel, inhuman, unusual and thus impermissible.”

What are these arguments? Are the arguments sufficiently persuasive so as to lead the United States Supreme Court, or lower federal and state courts, to conclude that prisoners awaiting execution on death row may escape the ultimate punishment merely because their execution has been delayed?

The *Pratt* claim involved two defendants arrested sixteen years before the Privy Council’s decision for a murder committed in October of 1977. The men have been prisoners since their arrest; they were convicted in January, 1979. Since January, 1979, the prisoners have been on death row, and death warrants have been read to them three times. Each time the death warrants were read, the prisoners were transferred to cells next to the gallows.

Section 17(1) of the Jamaica Constitution provides that “[n]o person shall be subjected to torture or to inhuman or degrading punishment or other treatment.” This statement of fundamental rights is...
unspecific and elusive.\textsuperscript{37} Additionally, this statement derives from Article 5 of the Universal Declaration of Human Rights.\textsuperscript{38} More definitely, a United Nations document on fundamental rights frames this statement with the words of Arthur H. Robertson:

[This statement] has inspired more than forty State constitutions, together with the regional human rights treaties of Europe, Africa and the Americas, and examples of legislation quoting or reproducing provisions of the Declaration can be found in all continents.\textsuperscript{39}

The Privy Council determined that extended delays in carrying out a death sentence "could amount to 'inhuman . . . punishment or other treatment' contrary to § 17(1) of the Jamaican Constitution irrespective of whether the delay was caused by the shortcomings of the state or the legitimate resort of the accused to all available appellate procedures."\textsuperscript{40} The Privy Council declared that:

[a] state that wished to retain capital punishment had to accept the responsibility of ensuring that execution followed as swiftly as practicable after sentence, allowing a reasonable time for appeal and consideration of reprieve and, if the appellate procedure enabled the prisoner to prolong the appellate hearings over a period of years, the fault was to be attributed to the appellate system that permitted such delay and not to the prisoner who took advantage of it.\textsuperscript{41}

The Privy Council concluded that, if the delay was due wholly to the fault of the prisoner, including escape or the filing of frivolous papers, the prisoner would not be allowed to take advantage of the system.\textsuperscript{42} Furthermore, the Privy Council determined that, if the execution date was scheduled to take place "more than five years after sentence there [would] be strong grounds for believing that the delay [was] such as to


\textsuperscript{39} \textsc{Arthur H. Robertson, Human Rights in the World} 27 (3d ed. 1989).

\textsuperscript{40} Pratt, 2 A.C.1, 4 All E.R. at 783. In American cases, many judges have been hesitant to grant relief where delay in execution was caused by invocation of the appellate process. \textit{See} Richmond v. Lewis, 948 F.2d 1473 (9th Cir. 1990), \textit{rev’d}, 113 S. Ct. 528 (1992); Potts v. State, 376 S.E.2d 851 (Ga. 1989), \textit{cert. denied}, 493 U.S. 876 (1989). \textit{But see} Robbins, \textit{supra} n.5, at 137 (explaining that there are numerous sources of delay in the appellate process, including delay in appointing counsel, less than adequate competence of lawyers, and delays in processing transcripts and records).

\textsuperscript{41} Pratt, 2 A.C.1, 4 All E.R. at 770.

\textsuperscript{42} \textit{Id.} at 770-71.
constitute ‘inhuman or degrading punishment or other treatment’ for purposes of § 17(1) of the Constitution.\(^43\)

Lord Griffiths focused on the delay and concluded the delay alone was “sufficient to bring home to the mind of any person of normal sensitivity and compassion the agony of mind that these men must have suffered as they have alternated between hope and despair in the 14 years that they have been in prison facing the gallows.”\(^44\) Lord Griffiths dismissed any necessity to examine evidence regarding either prison conditions or the psychological impact of the experience.\(^45\) These men were not alone;\(^46\) twenty-three have awaited death for ten years or more, and eighty-two have faced the threat of execution for five years or more.\(^47\)

The experience in the United Kingdom, Lord Griffiths declared, is that the death penalty has been swift, “within a matter of weeks or in the event of an appeal even to the House of Lords within a matter of months. Delays in terms of years are unheard of.”\(^48\)

C. The Source of the “Evolving Standards of Decency”

A brief review of the highlights of the history of the cruel and unusual punishments clause of the Eighth Amendment is necessary to determine the disposition of American courts toward, for want of a clearer term, the Pratt-Lackey claim.

The United States Supreme Court has not exhaustively elaborated upon the scope of the constitutional phrase “cruel and unusual punishment.”\(^49\) Prior to Trop v. Dulles,\(^50\) only a few cases addressed the question of when a punishment might be deemed cruel and unusual.\(^51\) In recent years, prisoners have complained that a host of petty nuisances and conditions of prison life amounted to constitutional vio-

\(^43\) Id. at 771.
\(^44\) Id. at 772.
\(^45\) Id.
\(^46\) Id.
\(^47\) Id.
\(^48\) Id. at 773. See Schabas, 5 CRIM. L.F., at 189-90 (noting that, in Great Britain, the average delay in capital cases involving an appeal was six weeks and, in India, two years).
lations. However, this modern prison conditions litigation adds little to the historical understanding of the prohibition against cruel and unusual punishments, much less to the question of whether a lengthy stay on death row constitutes cruel and unusual punishment.

Two early cases catalogued the sorts of punishments considered cruel at common law. In Wilkerson v. Utah, Justice Nathan Clifford listed several specific forms of punishment prohibited. Each of the prohibited punishments involved a type of torture, such as drawing and quartering, emboweling alive, beheading, public dissecting, and being buried alive.

In 1890, the United States Supreme Court's decision in In re Kemmler involved a New York state prisoner who had been sentenced under a newly enacted New York statute imposing death by electrocution. The prisoner, William Kemmler, claimed that death by electrocution was a form of cruel and unusual punishment prohibited by the Eighth Amendment as applied to the states through the Fourteenth Amendment.

In Kemmler, Chief Justice Melville Weston Fuller's opinion noted that both Britain and the American colonies outlawed cruel and unusual punishments by the 17th century. Justice Fuller continued the list of cruel and unusual punishments begun in Wilkerson by adding burning at the stake, crucifixion, and breaking on the wheel. Chief Justice Fuller added that "[d]ifficulty would attend the effort to define with exactness the extent of the constitutional provision," but stated that "[p]unishments are cruel when they involve torture or a lingering death." As such, in Kemmler, the Supreme Court found that electrocution was not "cruel and unusual punishment." Chief Justice Fuller sidestepped the issue of whether the Eighth Amendment guarantee applied to the states through the Fourteenth Amendment, be-

53. 99 U.S. 130 (1878).
55. 136 U.S. 436 (1890).
59. Id. at 447.
60. Id.
61. Id.
cause the accepted definition of cruel and unusual did not mesh with the penalty under consideration in the case.  

In \textit{In re Medley}, the Supreme Court recognized, albeit in dictum, that preexecution confinement is a distinct form of punishment. As such, preexecution confinement may be considered completely severed from the punishment of death when Eighth Amendment assessments are made. The \textit{Medley} discussion of the issue is mere dictum and, thus, is not a controlling ruling.

1. \textit{The Weems Holding}

In 1910, the United States Supreme Court decided the significant case of \textit{Weems v. United States}. In \textit{Weems}, a government officer was charged with and convicted of falsifying a public document. The officer was serving in the Phillipine Islands and was sentenced to fifteen years of hard labor and was required to wear both ankle and wrist chains. The officer's punishment also involved "civil interdiction," which included the denial of interests in family and property as well as surveillance during the remainder of his life.

In \textit{Weems}, the Supreme Court examined the intent of the Framers of the Bill of Rights in drafting the Eighth Amendment prohibition:

The framers had not merely intended to bar the reinstitution of procedures and techniques condemned in 1789 but had intended to prevent the authorization or . . . coercive cruelty being exercised through other forms of punishment. Justice Joseph McKenna wrote that "[t]he clause of the Constitution in the opinion of learned commentators may be therefore progressive, and is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice."

The decision in \textit{Weems} was later viewed by former Associate United States Supreme Court Justice Arthur Goldberg as a seminal decision on the Eighth Amendment. Justice Goldberg observed that:

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62. \textit{Id.} at 447-49. See Ellenbecker v. Dist. Ct. of Plymouth County, 134 U.S. 31 (1890) (dismissing an Eighth Amendment claim regarding a state proceeding on the ground that the first eight amendments to the United States Constitution applied to the federal government and not to the states).

63. 134 U.S. 160 (1890).

64. \textit{In re Medley}, 134 U.S. 160, 171. See \textit{supra} notes 26-28 and accompanying text.


69. \textit{Id.} at 373.

70. \textit{Id.} at 378.

[Weems] stands as the turning point in the interpretation and application of the cruel and unusual punishments clause. It clearly recognized that not only the mode of inflicting punishment but also the extent or severity of punishment is subject to scrutiny under the [E]ighth [A]mendment.\textsuperscript{72}

Goldberg stated that the Weems decision established three tests to determine whether a punishment comports with the protections of the Eighth Amendment:

(1) Giving full weight to reasonable legislative findings, a punishment is cruel and unusual if a less severe one can as effectively achieve the permissible ends of punishment such as deterrence, isolation, rehabilitation or whatever the contemporary society considers the permissible objective of punishment.

(2) Regardless of its effectiveness in achieving the permissible end of punishment, a punishment is cruel and unusual if it offends the contemporary sense of decency.

(3) Regardless of its effectiveness in achieving the permissible ends of punishment, a punishment is cruel and unusual if the evil it produces is disproportionately higher than the harm it seeks to prevent.\textsuperscript{73}

On the other hand, in State of Louisiana ex rel. Francis v. Resweber,\textsuperscript{74} a divided Supreme Court applied the Eighth Amendment prohibition to the states through the Due Process Clause of the Fourteenth Amendment and ruled that a second electrocution, following a mechanical failure of the chair during the first, did not violate the Eighth Amendment.\textsuperscript{75} As a result of the first electrocution, the prisoner was injured but not killed.

2. The Trop Holding

By the time of the decision in Trop v. Dulles,\textsuperscript{76} the United States Supreme Court had little occasion to exhaustively explore the contours of the Eighth Amendment. In Trop, the Supreme Court held in a five to four decision, that expatriation of a native-born American for desertion during wartime amounted to cruel and unusual punishment.\textsuperscript{77}

\begin{itemize}
\item \textsuperscript{72} Goldberg, 15 AIz. L. REv. at 359.
\item \textsuperscript{73} Id. at 359-60.
\item \textsuperscript{74} 329 U.S. 459 (1947).
\item \textsuperscript{75} State of Louisiana ex rel. Francis v. Resweber, 329 U.S. 459, 471-72 (1947).
\item \textsuperscript{76} 356 U.S. 86 (1958).
\end{itemize}
Chief Justice Earl Warren regarded *Trop* as having prime importance, stating that the decision provided a basic lesson in civics. 78 This case afforded the Court an opportunity to expound what it meant to be an American citizen. 79

The Court in its plurality opinion in *Trop* stated that American citizenship was not subject to the general legislative powers of the Congress. 80 Thus, the Court noted that Congress could not divest an individual of the rights of citizenship in the exercise of Congressional power. 81 Chief Justice Warren searched for a doctrinal base upon which to erect his policy. The Eighth Amendment was that basis, and *Trop* became the platform upon which Chief Justice Warren erected the sweeping definition of the cruel and unusual punishments ban. 82

Chief Justice Warren began his opinion by appealing to ancient times as a source for a modern definition of what the cruel and unusual punishments clause banned. 83 The Chief Justice noted that the "basic policy reflected in these words is firmly established in the Anglo-American tradition of criminal justice." 84 The Chief Justice stated that the language of the amendment was "taken directly" from the English Declaration of Rights of 1688. 85 Thus, Chief Justice Warren noted that the principle "can be traced back to the Magna Carta." 86

Chief Justice Warren noted that the fundamental tenet of the Eighth Amendment "is nothing less than the dignity of man." 87 The Eighth Amendment requires that a state apply such punishment within the limits of civilized society. 88 The Supreme Court recognized that the words of the Eighth Amendment "are not precise, and that their scope is not static." 89 Furthermore, the Court stated that "[t]he Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." 90

In his dissenting opinion, Justice Felix Frankfurter saw the case as a titanic battle between judicial activists bent on imposing their unique theories of natural law and positivists determined to allow the

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79. *Id*.
82. See *id* at 102-03.
83. *Id* at 100.
84. *Id*.
85. *Id* See Granucci, 57 CAL. L. REV. at 848-52.
87. *Id*.
88. *Id*.
89. *Id* at 100-01.
90. *Id* at 101.
lawmakers to walk on a long tether.91 In contrast, Chief Justice Warren's interpretive standard "suggested that [the Eighth Amendment's] meaning could be made the equivalent of what a group of judges thought to offend standards of decency at any given time."92

While Trop retains its vitality as a general philosophical principle governing Eighth Amendment decision-making, the debate over the broader meaning of the Eighth Amendment has continued in recent years. For example, in Harmelin v. Michigan,93 members of the Court once again disputed the historical roots of the Eighth Amendment guarantee. Justice Antonin Scalia, writing for himself and Chief Justice William H. Rehnquist, argued that the Eighth Amendment guarantee was directed at the arbitrary use of the sentencing power by the Kings Bench in particular cases in the 1680s and at the illegality, rather than the disproportionality, of such punishments.94

Justice Byron R. White dissented.95 Justice White took a different historical approach by referreing to Stanford v. Kentucky.96 Justice White, citing Stanford, stated that "this Court has not confined the prohibition embodied in the Eighth Amendment to (barbarous) methods that were generally outlawed in the 18th century, but instead has interpreted the Amendment in a flexible and dynamic manner."97 Justice White concluded that the majority's evaluation of punishment under Trop "looked not to [the court's] own conception of decency, but to those of modern American society as a whole in determining what standards have 'evolved.'"98

It is clear that, in the 1990s, the Supreme Court adheres to the central notions of Chief Justice Warren's opinion in Trop. As the Court held in Hudson v. McMillan,99 the cruel and unusual punishments clause is measured with reference to the minimal civilized necessities of life.100 It is not just eighteenth century cruelty that is prohibited by the cruel and unusual punishments clause, but also

91. Id. at 125-28 (Frankfurter, J., dissenting). See Hoerner, 56 Mich. L. Rev. at 1162-63.
92. White, supra note 80, at 233.
96. 492 U.S. 361 (1989) (holding that the Eighth Amendment does not prohibit the execution of an individual for a crime committed when that individual was as young as sixteen years and six months).
98. Id.
practices deemed cruel by contemporary society. Judge Richard Posner of the United States Court of Appeals for the Seventh Circuit summarized the correct modern view of the cruel and unusual punishments clause. Judge Posner stated that "[l]ike much of the rest of the Bill of Rights, the Eighth Amendment would be obsolete if its meaning were thought bounded by the mental horizons of its eighteenth century framers, broad as those horizons were." Notwithstanding these sweeping declarations about the dynamics of the Eighth Amendment, any analysis must take into account the limitation that if the action complained of is not "punishment," it is not prohibited.

3. The Pratt-Lackey Claim in Lower American Courts

A very few courts in the United States have acknowledged that extended stays on death row amount to cruel and unusual punishment in violation of the Eighth Amendment. For example, the decisions of the Supreme Judicial Court of Massachusetts in Commonwealth v. O'Neal and District Attorney for Suffolk District v. Watson addressed extended stays on death row. The court reasoned that, although the delay could be the result of a prisoner's exercising rights to appeal, it "does not mitigate the severity of the impact on the condemned individual, and the right to pursue due process of law must not be set off against the right to be free from inhuman treatment." Quoting Furman v. Georgia, the Massachusetts jurists wrote that "it is often the very reluctance of society to impose the irrevocable sanction of death which mandates, 'even against the wishes of the criminal, that all legal avenues be explored before the execution is finally carried out.'" The court concluded that the death penalty "with its full panoply of concomitant physical and mental tortures" is

103. Wilson v. Seiter, 501 U.S. 294, 297 (1991). Justice Scalia reasoned that two components must come together for a prisoner's claim to be successful: (1) was the deprivation sufficiently severe, and (2) did the officials act with a sufficiently culpable state of mind. Wilson, 501 U.S. at 301-04.
104. See supra notes 106-22 and accompanying text.
unconstitutional under the state's guarantee against cruel punishments.110

One of the more interesting cases in American legal history, Chessman v. Dickson, involved a man who spent eleven years on California's death row. In his battles to avoid execution, Caryl Chessman raised the issue of mental suffering caused by extended delay in carrying out the sentence of death. The California Supreme Court refused to focus on that constitutional claim.113 The court acknowledged that it is unusual for a prisoner to spend eleven years on death row and that one could suffer great mental distress during that incarceration. The court, however, rejected Chessman's contention that the delays were unconstitutional, reasoning the delays were not impermissible. Chessman appealed to the United States Court of Appeals for the Ninth Circuit. The Ninth Circuit refused to grant a stay of execution.

Although the Ninth Circuit upheld the death sentence, the court's opinion referred to the claim that the prisoner had suffered an Eighth Amendment deprivation due to extended pre-execution incarceration. The Ninth Circuit pointed to a statement by the trial judge that "extra-judicially speaking, the appeal of the petitioner in this regard is impressive." Chief Judge Richard H. Chambers stated that, while it may show a basic weakness in our governmental system that a case of this nature took so long, "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."116

Yet another case from California, In re Anderson, addressed the question of mental suffering raised by amicus briefs. The Califor-

110. Id. See State v. Ross, 646 A.2d 1318, 1379 (Conn. 1994) (Berdon, J., dissenting) (finding the language in Furman, 408 U.S. 238, as well as People v. Anderson, 493 P.2d 880 (Cal. 1972) cert. denied, 406 U.S. 958 (1972) persuasive in moving dissenting Justice Berdon on the Connecticut Supreme Court to declare the death penalty to be inherently cruel, regardless of the method that is used to carry it out).
111. 341 P.2d 679, cert. denied, 361 U.S. 925 (1959), overruled by, People v. Morse, 388 P.2d 33, 44 (1964). People v. Morse stated that Linden "developed the danger of involving the jury in matters with which it had no concern." Morse, 388 P.2d at 44.
113. Chessman, 341 P.2d at 682.
114. Chessman v. Dickson, 275 F.2d 604 (9th Cir. 1960).
116. Chessman, 275 F.2d at 607.
nia Supreme Court nevertheless rejected the claim. While there was
evidence of insanity and even suicide among death row inmates, the
court found that there were no percentage figures of prisoners driven
insane or to suicide.\textsuperscript{118}

A second amicus claim was that the petitioner’s imprisonment
for three years awaiting death and the attendant deterioration of per-
sonality resulted in a cruel and unusual punishment.\textsuperscript{119} The court
also rejected this argument, stating that due process violations did not
cause the confinement.\textsuperscript{120} Therefore, the question of unconstitutional
mental suffering did not require scrutiny under the Eighth
Amendment.\textsuperscript{121}

Virtually every student of criminal procedure over the past three
decades has studied the United States Supreme Court decision in
\textit{Townsend v. Sain}.\textsuperscript{122} The federal district court’s decision in Town-
send’s latest habeas corpus action contained a carefully reasoned anal-
ysis of the effect of extended incarceration on capitally sentenced
prisoners.\textsuperscript{123} In \textit{Townsend}, the defendant, Charles Townsend, was
convicted of murder and sentenced to death. Townsend had been con-
fined for seventeen years following his arrest and remained on death
row for fifteen years and nine months before the United States Dis-
trict Court for the Northern District of Illinois issued its latest opin-
on.\textsuperscript{124} The district court characterized Townsend at the time of his
arrest as “an illiterate Negro, 19 years old, with an I.Q. of 63 to 73 . . .
[who] had been a narcotic addict since the age of 15.”\textsuperscript{125} Townsend
asserted that his many exposures to the daily threat of death coupled
with the state’s refusal to allow a rehearing on his drug induced con-
fusion constituted cruel and unusual punishment under the Eighth
Amendment.\textsuperscript{126}

The district court empathized with Townsend’s assertions as evi-
denced by Judge Joseph Perry’s comment that “[t]his court may have
a private opinion about the death penalty being cruel and inhumane
punishment and its violation of petitioner’s constitutional rights, but
it, as a trial court, cannot pronounce new law when it is bound to

\begin{itemize}
\item \textsuperscript{118} Anderson, 447 P.2d 117, 129-30 (Cal. 1968).
\item \textsuperscript{119} Anderson, 447 P.2d at 130.
\item \textsuperscript{120} Id.
\item \textsuperscript{121} Id. at 129-31.
\item \textsuperscript{122} 372 U.S. 293 (1963), \textit{overruled by}, Keeney v. Tamayo-Reyes, 504 U.S. 1, 5
\item \textsuperscript{123} United States \textit{ex rel.} Townsend v. Twomey, 322 F. Supp. 158 (N.D. Ill., 1971),
\item \textsuperscript{124} Townsend, 322 F. Supp. at 159-60.
\item \textsuperscript{125} Id. at 163-64.
\item \textsuperscript{126} Id. at 174-75.
\end{itemize}
maintain and expound the old.” Judge Perry pointed to expert psychiatric evidence showing that Townsend suffered mental anguish. One expert stated that Townsend believed he was “repeatedly caught in false hopes and frustrations.” Nevertheless, the court refused to pronounce new law.

Other contemporary federal circuit courts have also not been amenable to the Pratt-Lackey claim. These courts tend to note that 1) no federal precedents support the claim, and 2) a prisoner should not be able to draw out the post-conviction process and, when unsuccessful, claim that the very delay ripens into a basis for relief to which they are not otherwise entitled.

In Richmond v. Lewis, Judge Diarmuid F. O'Scannlain of the United States Court of Appeals for the Ninth Circuit wrote for the majority stating, “We know of no decision by either the United States Supreme Court or this circuit that has held that the accumulation of time a defendant spends on death row during the prosecution of his appeals can accrue into an independent constitutional violation.” Following precedents set forth in Chessman and Andrews v. Shulsen, Judge O'Scannlain maintained the delay was at least, in part, attributable to the invocation by the petitioner of the appellate process. In Andrews, the district court called the strategy of complaining about excessive preexecution incarceration following denial of many appeals “a mockery of justice.” Judge O'Scannlain also cited Harrison v. United States, “which held that an eight-year delay between an arrest and sentencing was not unconstitutional where the delay resulted from the need to assure careful review of an unusually complex case.”

Judge O'Scannlain reasoned that, while a prisoner should not be “penalized for pursuing his constitutional rights,” nevertheless the prisoner “should not be able to benefit from the ultimately unsuccess-

127. Id. at 175.
128. Id.
129. See infra notes 131-47 and accompanying text.
131. 948 F.2d 1473 (9th Cir. 1990), rev'd on other grounds, 113 S. Ct. 528 (1992).
132. Richmond v. Lewis, 948 F.2d 1473, 1491 (9th Cir. 1990), rev'd on other grounds, 113 S. Ct. 528 (1992).
ful pursuit of those rights." If one could, while ultimately losing on the merits, nevertheless create a vehicle for relief occasioned by the delay, "death-row inmates would be able to avoid their sentences simply by delaying proceedings beyond some threshold amount of time, while other death-row inmates — less successful in their attempts to delay — would be forced to face their sentences." Judge O'Scannlain did not examine the question of whether a lengthy imprisonment while awaiting execution for a death penalty sentence was cruel as defined by scientists and psychologists examining such issues.

The United States Supreme Court reversed the Ninth Circuit on grounds other than the issue of delay in carrying out the sentence. In correcting the constitutional error in sentencing on remand, the Arizona Supreme Court noted that "delay from meritorious challenges, as in this case, certainly cannot be held against prisoners."

The Arizona Supreme Court also discussed on remand the problem that would inhere if the case were remanded to a lower court for disposition. The court noted that "[i]f we remand and [Richmond] is again sentenced to death, it could take five to ten years for completion of another appellate cycle." The court stated that the delay between incarceration and death would then be almost three decades. This, Richmond argued, would constitute cruel and unusual punishment under the United States Constitution as well as the Arizona State Constitution.

Richmond further asserted that such a delay would be tantamount to torture and lingering death, and also constituted "cruel" within the meaning of that term as set forth in In re Kemmler. The Arizona Supreme Court in Richmond referred to the Pratt decision, noting that concern over the issue "has not been limited to the American experience." The supreme court never decided the "cruel and unusual punishment" issue, noting that proper disposition of the case did not require deciding the defendant's constitutional claim.

138. Richmond, 948 F.2d at 1492.
139. Id.
142. Richmond, 886 P.2d at 1333.
143. Id.
144. Id. See Ariz. Const. Art. II § 15 (stating that excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted).
146. Richmond, 886 P.2d at 1333 (citing the British Judicial Committee of the Privy Council, which stated, "There is an instinctive revulsion against the prospect of hanging a man after he has been held under sentence of death for many years"). See Pratt, 2 A.C.1, 4 All E.R. at 783.
147. Richmond, 888 P.2d at 1338.
THE SEARCH FOR SCIENTIFIC CERTITUDE

None of the previously mentioned opinions, whether from American or other tribunals, has adequately addressed the central problem of Eighth Amendment jurisprudence — Is extended confinement in anticipation of imposition of death cruel or inhumane? A central criticism of the Pratt decision is its lack of precision. The decision in Pratt fails to focus on whether lengthy preexecution imprisonment raises a breach of fundamental rights.148

What, then, does the scientific community conclude about the cruelty or inhumaneness of extended confinement under sentence of death? Furthermore, how should American lawyers and judges apply whatever these findings are to arrive at an appropriate application of Eighth Amendment principles?

If one concludes that the success of the claim is dependent upon the existence of “hard” data proving that extended incarceration on death row is cruel and unusual, one will be disappointed for very little of such data exists. If, on the other hand, one concludes that “cruelty is not a factual concept but a moral judgment made in accordance with a principle of justice,” then, it would be possible to agree with the conclusion of the Privy Council, the few American judges, and the mounting number of tribunals throughout the non-American world who have agreed with the Lackey claim.149 However, no amount of moral evidence is likely to move the American jurists who are inclined to hold that cruelty is to be measured in relation to those punishments that offended society three hundred years ago.

Most modern American discussions of this issue reference four sources from the world of psychiatric professional literature. These sources are: (1) West, Psychiatric Reflections on the Death Penalty,150 (2) Hussain and Tozman, Psychiatry on Death Row,151 (3) Bluestone and McGahee, Reaction to Extreme Stress: Impending Death by Execution,”152 and (4) Gallemore and Panton, Inmate Responses to Lengthy Death Row Confinement.153

The first two sources cited above are of little evidentiary or scientific value. West’s essay consists of a rhetorically strong jeremiad di-

148. Phillips, 88 AJIL at 783.
rected against the death penalty in general. The Hussain and Tozman article includes only three case studies of prisoners in then-Ceylon, none of which tends to prove the point being discussed here. The Hussain and Tozman article contains general and subjective observations of death row conduct and was written at the time the United States reinstated the death penalty.\(^\text{154}\)

Bluestone and McGahee conducted a study of nineteen individuals on death row in New York. The theory of the Lackey claim (and Pratt-type cases) postulated that extended incarceration on death row is cruel and unusual punishment. Extending this theory, one could infer that the extended death row stays cause prisoners to suffer and that the suffering might well be manifested in clinical depression and anxiety.

The Bluestone and McGahee study, however, demonstrated that symptoms of anxiety and severe depression were absent from such prisoners. The Bluestone and McGahee study involved projective tests in which a prisoner was asked to interpret ambiguous materials such as inkblots. The prisoners were asked to reveal their interpretations of the ambiguous materials and relate their thoughts and moods to the examiner. A trained examiner then interpreted the responses.\(^\text{155}\)

The most prominent defense mechanisms used to repel stress reactions were denial, projection, and obsessive rumination. The most common form of denial among the prisoners was isolation of affect.\(^\text{156}\) Other forms of denial revealed in the study were “minimizing the gravity of the situation and expecting a successful appeal” as well as a belief that a pardon would be granted.\(^\text{157}\)

Gallemore and Panton studied eight North Carolina death row inmates sequentially over a two-year period.\(^\text{158}\) A variety of testing techniques were employed. The results demonstrated that “three men became significantly less functional with obvious deterioration while five appeared to adjust adequately over time.”\(^\text{159}\) The researchers noted that ego defense mechanisms “hardened with the passage of

\(^{154}\) Hussain & Tozman, 39 J. CLIN. PSYCHIATRY at 183. See Furman, 408 U.S. at 239-40 (holding that death sentences inflicted cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments); see Gregg, 428 U.S. at 153-54 (holding the revised death penalty statutes are designed to guarantee that the death penalty not be inflicted in a discriminatory or arbitrary fashion).


\(^{156}\) Ward, 14 FLA. ST. U. L. REV. at 39 (citing Bluestone & McGahee, 119 AM. J. PSYCHIATRY at 395)).


\(^{158}\) Id. at 40-41 (citing Gallemore & Panton, 129 AM. J. PSYCHIATRY at 167-70).

\(^{159}\) Gallemore & Panton, 129 AM. J. PSYCHIATRY at 169-70.
time on death row." Furthermore, a majority of inmates "described a lessening of anxiety over time and alluded to a point of psychological 'acceptance' of their circumstances."

One commentator, Barbara Ward, concluded, as must any fair-minded analyst, that "[d]rawing firm conclusions from these two isolated studies is impossible." Ward noted that the samples were small, and thus it was impossible to hypothesize general principles from the studies. However, Ward noted that it was not impossible to claim from these studies that every bit of scientific evidence available, albeit small, indicated profound psychological consequences from extended incarceration on death row. Thus, if one couples the conclusions of the studies with those of Professor Robert Johnson, a consistent pattern of "shock, denial, and depression" plus "a fatalistic belief that the person is a pawn in a process that will coldly and impersonally result in his death" is found among death row inmates. Ward notes that two cases adopted this conclusion and "suggest a positive correlation between death row confinement and mental incompetency."

THE FUTURE OF THE CLAIM IN UNITED STATES COURTS

Whether the United States Supreme Court will adopt the position of the Privy Council in applying the prohibition against cruel and unusual punishments to long-termers on death row is doubtful. If sufficient scientific evidence existed that long-termers suffer cruelly, that would not resolve the matter. There are substantive bars to applying the Pratt doctrine in the United States, and there are procedural bars as well.

Procedurally, a claim of the cruellness of an extended stay on death row may not be made on direct appeal simply because such a claim is too early. The prisoner's confinement has not been lengthy enough by the time the case reaches the United States Supreme Court, much less the state appellate system.

160. Id.
161. Id.
163. Id. at 41 n.36 (quoting Robert Johnson, Condemned to Die: Life Under Sentence of Death 94 (1981)).
164. Id. at 42 (citing Ford v. Wainwright, 752 F.2d 526 (11th Cir. 1985), rev'd, 477 U.S. 1019 (1985); Alvord v. State, 459 So. 2d 316 (Fla. 1984)).
166. Schabas, 5 CRIM. L.F. at 189-90.
If, on the other hand, a prisoner waits until the prisoner has been on death row for a long time to raise the claim, the claim may be procedurally barred. The Supreme Court has held that, to qualify for relief through habeas corpus, the issue must be raised and preserved at the earliest possible opportunity.167 The United States Court of Appeals for the Fourth Circuit noted in Turner v. Jake168 that, where a prisoner attempts to raise the claim in a subsequent habeas petition, the prisoner must demonstrate that the issue is novel.169 As the Supreme Court ruled in Reed v. Ross,170 the claimant must demonstrate that the claim is "so novel that its legal basis [was] not reasonably available."171 And yet, the Privy Council’s discussion (though rejected) of the issue in Riley v. Attorney General of Jamaica172 in 1984 “clearly demonstrates that the issue was a live one by 1983.”173

The United States Court of Appeals for the Fifth Circuit in Fearance v. Scott174 applied the Lackey framework in observing that claims are reasonably available even where their assertion would in all likelihood be futile.175 In reaching this conclusion, the Fifth Circuit noted that the Privy Council engaged in what some would characterize as the “natural rights” approach to jurisprudence.176 The British tribunal did not address any specific guarantee in the Jamaican Constitution as the basis for its decision. Rather, the Privy Council held:

There is an instinctive revulsion against the prospect of hanging 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. . . . If delay is due entirely to the fault of the accused such as an escape from custody or frivolous and time wasting resort to legal procedures which amount to an abuse of process the accused cannot be allowed to take advantage of that delay for to do so would be to permit

175. Fearance, 56 F.3d at 637.
the accused to use illegitimate means to escape the punishment inflicted upon him in the interest of protecting society against crime.\textsuperscript{177}

The current intellectual atmosphere on the United States Supreme Court would not be hospitable to such musings.\textsuperscript{178} Twenty years ago, the Supreme Court affirmed the evolving notion of Eighth Amendment protections, declaring that the Eighth Amendment "embraces broad and idealistic concepts of dignity, civilized standards, humanity, and decency."\textsuperscript{179} However, today's Court views substantive claims through a much narrower prism.\textsuperscript{180}

In \textit{Michael H. v. Gerald D.},\textsuperscript{181} Justice Antonin Scalia asserted a formula to correctly define fundamental rights. Justice Scalia sought to pronounce which historical practices and beliefs courts should apply to cases addressing substantive due process analysis. Justice Scalia called for examination of the most specific level at which a relevant tradition can be identified: protecting or denying protection to the claimed right.\textsuperscript{182} In a dissenting opinion, Justice William Brennan stated that the Constitution should not evolve into a "stagnant, archaic, hidebound document steeped in the prejudices of a time long past."\textsuperscript{183}

The Court quite often has invoked tradition as a source of fundamental rights.\textsuperscript{184} But what is tradition? Is tradition what lawmakers say? Or is tradition the custom of a community?

In attempting to determine how the Supreme Court would resolve, under the intellectual tutelage of Justice Scalia, the question of what is "the most specific level" of a relevant tradition regarding the Lackey claim, one must recognize that Justice Scalia is inclined to look only to American tradition, as he reads it. Justice Scalia has written:

We must emphasize that it is \textit{American} conceptions of decency that are dispositive, rejecting the contention of petition-

\textsuperscript{177} Pratt, 2 A.C.I., 4 All E.R. at 783.
\textsuperscript{179} Estelle v. Gamble, 429 U.S. 97, 102 (1976) (quoting Jackson v. Bishop, 404 F.2d 571, 579 (8th Cir. 1968))).
\textsuperscript{180} See supra note 178 and accompanying text.
\textsuperscript{181} 491 U.S. 110 (1989).
\textsuperscript{183} Michael H., 491 U.S. at 141 (Brennan, J., dissenting).
ers and their various amici . . . that the sentencing practices of other countries are relevant. While "[t]he practices of other nations, particularly other democracies, can be relevant to determining whether a practice uniform among our people is not merely a historical accident, but rather so 'implicit in the concept of ordered liberty' that it occupies a place not merely in our mores, but, text permitting, in our Constitution as well," Thompson v. Oklahoma, 487 U.S. 815, 868-869, n.4 (1988) (Scalia, J., dissenting), quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937) (Cardozo, J.) they cannot serve to establish the first Eighth Amendment prerequisite, that the practice is accepted among our people.\(^{185}\)

In Stanford v. Kentucky,\(^{186}\) Justice Scalia preferred to look only at the American experience of whether persons under the age of majority had been executed. Justice Scalia concluded that "at least 281 offenders under the age of 18 have been executed in this country and at least 126 under the age of 17."\(^{187}\) Justice Scalia seemed satisfied that that exploration of the evolving standard of decency was sufficient. Moreover, Justice Scalia followed Justice Thurgood Marshall's holding in Ford v. Wainwright.\(^{188}\) In Ford, Justice Marshall noted that the petitioners did not claim that their sentences constituted a "mode or act of punishment that had been considered cruel and unusual at the time the Bill of Rights was adopted."\(^{189}\)

Under the Scalia regime, if the penalty was not "cruel and unusual" two centuries ago, a modern claim fails the historical test. Justice Scalia also looks to contemporary custom and usage and, if he finds that the subject of the inquiry is commonly found in American practice, it fails the "evolving standards" prong.\(^{190}\) The sheer number of prisoners serving lengthy sentences before execution would indicate to Scalia that such extended incarceration is neither cruel nor unusual.

Justice Stephen Breyer signalled an alternative approach in his dissenting opinion in United States v. Lopez,\(^{191}\) a case whose majority opinion assaulted sixty years of Commerce Clause analysis. The issue in Lopez was whether a Congressional enactment penalizing possession of guns on school grounds sufficiently affected commerce so as to be within the legislative power.

\(^{186}\) 492 U.S. 361 (1989).
\(^{187}\) Stanford, 492 U.S. at 368.
\(^{188}\) 477 U.S. 399 (1986).
\(^{190}\) Stanford, 492 U.S. at 378.
Chief Justice William H. Rehnquist answered in the negative, concluding that the conduct proscribed did not substantially affect commerce. Justice Breyer opted for a more objective analysis of whether the link exists, citing piece after piece of evidence of the singularly disruptive potential of acts of violence and the impact of education on commerce.

If modern scientists engaged in a systematic examination of the effect of extended incarceration of capital prisoners and replicated the tentative findings explored here, jurists inclined to follow the Breyer approach would have compelling evidence to conclude that a long life on death row is constitutionally cruel. If the comprehensive study demonstrated that no discernible alteration in the human condition is directly related to extended imprisonment of these inmates, then courts at least would have an objective basis on which to deny relief in Pratt-Lackey claims.

CONCLUSION

Some courts and some scientists are convinced that extended incarceration while awaiting execution is cruel, unusual or inhuman punishment. A Draconian alternative is to deprive a prisoner of the full panoply of appeals and execute him or her within a short time of conviction and sentence. A nation dedicated to an evolving standard of decency might better insist that the scientific community make a comprehensive examination of the claim so that judges can make principled decisions in this area. Naturally, such a systematic examination might never reveal how long is too long as a general rule. Still, it is better to decide the issue of a fate worse than death on the basis of fact rather than passion.