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FIFTEEN YEARS AND DEATH: DOUBLE JEOPARDY, MULTIPLE PUNISHMENTS, AND EXTENDED STAYS ON DEATH ROW

MICHAEL JOHNSON*

I. INTRODUCTION: FROM DAYS TO DECADES

There's a saying, "Every man is put on Earth condemned to die, time and method of execution unknown." Perhaps this is as it should be.

— Rod Serling[1]

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[1] *The Twilight Zone: Escape Clause* (CBS television broadcast Nov. 6, 1959).

In an early episode of *The Twilight Zone* titled *Escape Clause*, writer Rod Serling presents the story of Walter Bedeker, a man so afraid of dying that he strikes a deal with the Devil in order to avoid death indefinitely. At the end of the tale Bedeker, realizing that delaying death can be its own form of punishment, chooses to die by invoking the "escape clause" of his contract.

There are thousands of real-world variations on this story playing out across the United States today, as inmates exhaust state and federal appeals in a legal dance that results in extremely long waits on death row.[2] This was not always the case. When the United States was founded, it inherited the legal tradition from England that a sentence of death should be carried out almost immediately after sentencing.[3] In the 1800s, it was considered abnormal for an American convict to wait even four weeks to be executed.[4] After new rules were put in place following the death penalty moratorium between 1972 and 1976, the average time spent on death row jumped to about six years.[5] The time has climbed steadily since then, and currently stands at almost fifteen years of waiting between sentence and execution.[6]

The increase in death row wait time from days to decades has been blamed on various factors, including a slow appellate process,[7] frivolous legal maneuvers,[8] and the politicization of the death penalty.[9] In 1996, the Antiterrorism and Effective Death Penalty Act was passed by Congress in part to curb the time inmates spent on death row, which then stood at an average of ten years.[10]

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[2] TRACY L. SNELL, BUREAU OF JUSTICE STATISTICS, CAPITAL PUNISHMENT, 2010—STATISTICAL TABLES, 12 (Jill Thomas, ed., 2011) [hereinafter PUNISHMENT STATISTICS].

[3] *See, e.g.*, Pratt v. AG of Jam., [1994] 2 A.C. 1, 4 All E.R. 769, 773 (P.C. 1993) (noting that "[i]n earlier times execution for murder, as opposed to other capital offences, followed immediately after conviction."); Dwight Aarons, *Can Inordinate Delay Between A Death Sentence and Execution Constitute Cruel and Unusual Punishment?*, 29 SETON HALL L. REV. 147 (1998) (offering anecdotal descriptions of the short timing between capital case adjudications and executions in post-Revolutionary America).

[4] *See In re* Medley, 134 U.S. 160 (1890).

[5] PUNISHMENT STATISTICS, *supra* note 2, at 12 (showing that average elapsed time from sentence to execution for death row was only seventy-four months in 1984, which was the first year after 1976 for which there was sufficient statistical data to estimate an average).

[6] *Id.* PUNISHMENT STATISTICS, *supra* note 2, at 12.

[7] "State and federal courts deal with a high volume of cases, increasing the time it takes for all cases to progress." Jeremy Root, *Cruel and Unusual Punishment: A Reconsideration of the* Lackey *Claim*, 27 N.Y.U. REV. L. & SOC. CHANGE 281, 295 (2002).

[8] *But see id.* at 299 ("[T]hough frivolous filings are often cited in critiques of the appellate process in capital cases, truly frivolous filings are rare . . . Frivolous petitions account for an infinitesimal fraction of the typical period of delay, and the system has ample mechanisms to prevent them from ever occupying a place of prominence.").

[9] *Id.* at 295 ("Given that death penalty appeals are often highly politicized, it is also not unreasonable to assume that decisions are occasionally withheld until an appropriate political moment.").

[10] Jessica Feldman, *A Death Row Incarceration Calculus: When Prolonged Death Row*

The Act appears to have had no recognizable effect on the upward trend of time between sentence and punishment.[11] There is no reason to expect the trend to slow in the foreseeable future. Consequently, a death sentence today is equivalent to a sentence of fifteen years in the harsh conditions of death row, plus death.

Much has been written about whether or not this extended time on death row violates the Constitution, but the discussion focuses largely on the Eighth Amendment.[12] The most popular argument rests on what is known as "death row syndrome," which is generally described as the psychological and physiological deterioration of inmates who are on death row.[13] Popularized in Europe by a man named Jens Soering who was fighting an extradition to Virginia,[14] the idea that these long waiting periods could be cruel and unusual punishments was first advanced in the United States in the 1995 case *Lackey v. Texas*.[15] Though the United States Supreme Court denied certiorari to the case, Justice John Paul Stevens's spirited dissent from denial of certiorari articulated the strengths of the petitioner's legal argument and created the groundwork from which modern challenges have blossomed.[16]

Since 1995, the Eighth Amendment *Lackey* claim has popped up in the Supreme Court at least nine times.[17] *Elledge v. Florida*,[18] a 1998 case, displays today's most common result of a *Lackey* claim: a denial of certiorari over a lone dissent by Justice Stephen Breyer, who picked up the torch from Justice

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Imprisonment Becomes Unconstitutional, 40 SANTA CLARA L. REV. 187, 190–91 (2000) ("Congress passed the Antiterrorism and Effective Death Penalty Act . . . to combat the problem of lengthy appeal proceedings.").

[11] *See* PUNISHMENT STATISTICS, *supra* note 2, at 12.

[12] As of June, 2013, a Westlaw search for the keywords "'death penalty,' 'delay,' and 'Eighth amendment'" within the same paragraph brings up 119 journal articles. An identical search replacing the Eighth Amendment with the Fourteenth Amendment brings up twenty-six. That same search using "Fifth Amendment" finds eleven articles. Running these searches in Lexis Advance yields eighty-five, eleven, and one result(s), respectively.

[13] For an overview of death row syndrome, see Kathleen M. Flynn, *The "Agony of Suspense": How Protracted Death Row Confinement Gives Rise to an Eighth Amendment Claim of Cruel and Unusual Punishment*, 54 WASH. & LEE L. REV. 291 (1997); *see also* Feldman, *supra* note 10, at 202 ("The feeling of powerlessness and solitude of the condemned man . . . is in itself an unimaginable punishment.") (quoting Dist. Attorney for Suffolk Dist. v. Watson, 411 N.E.2d 1274 (Mass. 1980)).

[14] Feldman, *supra* note 10, at 199.

[15] 514 U.S. 1045 (1995).

[16] *Id.* (Stevens, J., dissenting).

[17] *See, e.g.*, Valle v. Florida, 132 S. Ct. 1 (2011); Johnson v. Bredesen, 558 U.S. 1067 (2009); Thompson v. McNeil, 556 U.S. 1114 (2009); Smith v. Arizona, 552 U.S. 985 (2007); Allen v. Ornoski, 546 U.S. 1136 (2006); Foster v. Florida, 537 U.S. 990 (2002); Knight v. Florida, 528 U.S. 990 (1999); Elledge v. Florida, 525 U.S. 944 (1998); Gomez v. Fierro, 519 U.S. 918 (1996).

[18] 525 U.S. at 944.

Stevens.[19] The most recent *Lackey* claim was brought in 2011 by Manuel Valle, who was slated for execution after spending thirty-three years on death row.[20] His case, *Valle v. Florida*, was denied by the Court over the dissent of Justice Breyer, as expected.[21] Attempts to bring up similar Eighth Amendment claims for long death row incarcerations have met near identical failure in circuit[22] and state courts.[23]

Other death penalty opponents attempt to fight the perceived unfairness of extended time on death row with claims suggesting that such confinement violates the Due Process Clauses of the Fifth and Fourteenth Amendments. These arguments still rely on "death row syndrome" or something analogous to it, but decry the harsh conditions on death row rather than the time prisoners spend on it.[24] For example, certain proponents of the Due Process approach allege that prisoners deserve a separate judicial proceeding to determine the level of personal restriction on death row in order to preserve their still-remaining liberty rights as an incarcerated citizen.[25] Without these proceedings, they argue, the default conditions on death row restrict an inmate so terribly that it can have extremely adverse health and mental effects.[26] Justice Stevens expounded on these conditions in his dissent in *Thompson v. McNeil*,[27] remarking that "[a]s he awaits execution, petitioner has endured especially severe conditions of confinement, spending up to 23 hours per day in isolation in a 6-by-9 foot cell . . . . The dehumanizing effects of such treatment are undeniable."[28] Such conditions are not unusual in the United States; at least nineteen of the thirty-two current states with the death penalty require a minimum of twenty-three hours a day of isolation in single cells for death row inmates.[29]

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[19] *Id.* (Breyer, J., dissenting).

[20] *Valle*, 132 S. Ct. at 1 (Breyer, J., dissenting).

[21] *Id.*

[22] *See* Smith v. Mahoney, 611 F.3d 978, 997–99 (9th Cir. 2010); Thompson v. Sec'y for Dep't of Corr., 517 F.3d 1279, 1284 (11th Cir. 2008); ShisInday v. Quarterman, 511 F.3d 514, 526 (5th Cir. 2007); Chambers v. Bowersox, 157 F.3d 560, 569 (8th Cir. 1998) ("Prisoners have been making the delay argument for years, always without success."); Stafford v. Ward, 59 F.3d 1025, 1028 (10th Cir. 1995); *see also* Feldman, *supra* note 10, at 205 ("[T]hese [circuit] courts note that no federal precedent supports the Lackey claim.").

[23] *See* Florencio J. Yuzon, *Conditions and Circumstances of Living on Death Row—Violative of Individual Rights and Fundamental Freedoms?: Divergent Trends of Judicial Review in Evaluating the "Death Row Phenomenon"*, 30 GEO. WASH. J. INT'L L. & ECON. 39, 69–70 (1996).

[24] *See generally* Robert M. Ferrier, *"An Atypical and Significant Hardship": The Supermax Confinement of Death Row Prisoners Based Purely on Status—a Plea for Procedural Due Process*, 46 ARIZ. L. REV. 291 (2004).

[25] *Id.*

[26] *Id.* at 296–303.

[27] 556 U.S. 1114, 1114 (2009).

[28] *Id.* (Stevens, J., dissenting).

[29] Sandra Babcock, *Death Row Conditions,* DEATH PENALTY INFO. CENT. (2008), http://

Whether due to age, disease, suicide, or homicide, 436 inmates have died on death row before execution between 1973 and 2010.[30] Only 1,234 inmates were executed during that same time period,[31] and of those, 135 waived their appeals and "volunteered" to die.[32] Though the precise numbers for those who died of old age are unavailable for the country as a whole, it is likely, given that the median age of newly admitted death row inmates is only thirty-six,[33] that disease and suicide have claimed more lives than old age. Since nation-wide statistics are unavailable, it may be helpful to look at one state in isolation. The California Commission on the Fair Administration of Justice found that, as of 2008, thirty-eight of California's 813 post-1973 death row inmates had died by natural causes and fourteen had died by suicide.[34] Only thirteen of California's inmates were executed during this time.[35] Regardless of how their deaths occurred, it is clear that none of the nation's 436 inmates who died prior to execution received the punishment for which they were sentenced. Instead, they were placed in a limbo to be "dead men walking"[36] for some indeterminate length of time.

Some death row inmates go to court just to have their sentence actually carried out. Gary Haugen, on Oregon's death row, is one of those inmates. He was scheduled to be executed by lethal injection on December 6, 2011, but Governor John Kitzhaber granted a reprieve for the duration of his term in office.[37] Haugen, who had waived his appeals, went all the way to the Oregon Supreme Court for the right to escape his limbo of indeterminate incarceration and to be

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deathpenaltyinfo.org/time-death-row (last visited June 22, 2013). Since the conclusion of this study, New Mexico, Connecticut, and Maryland have all abolished the death penalty. *States With and Without the Death Penalty*, DEATH PENALTY INFO. CENT., http://www.deathpenaltyinfo.org/states-and-without-death-penalty (last visited June 22, 2013).

[30] PUNISHMENT STATISTICS, *supra* note 2, at 18.

[31] PUNISHMENT STATISTICS, *supra* note 2, at 18.

[32] *Information on Defendants Who Were Executed Since 1976 and Designated as "Volunteers"*, DEATH PENALTY INFO. CENT. (July 29, 2013), http://deathpenaltyinfo.org/information-defendants-who-were-executed-1976-and-designated-volunteers.

[33] TRACY L. SNELL, BUREAU OF JUSTICE STATISTICS, CAPITAL PUNISHMENT, 2009—STATISTICAL TABLES 9 (Georgette Walsh and Jill Duncan, eds., 2010). Thirty-six-year-olds have an average life expectancy of 41.93 additional years as of 2009, making it unlikely that many died of old age. *Actuarial Life Table*, SOC. SEC. ADMIN., https://www.socialsecurity.gov/OACT/STATS/table4c6.html (last visited Sept. 25, 2013).

[34] CAL. COMM'N ON THE FAIR ADMIN. OF JUSTICE, REPORT AND RECOMMENDATIONS ON THE ADMINISTRATION OF THE DEATH PENALTY IN CALIFORNIA 20 (2008).

[35] *Id.*

[36] This phrase was popularized by Sister Helen Prejean's book of the same name. *See* HELEN PREJEAN, DEAD MAN WALKING (1993).

[37] *Gov. Kitzhaber Halts Haugen Execution*, KGW (Nov. 22, 2011, 2:46 PM), http://www.kgw.com/news/Kitzhaber-to-address-capital-punishment-ahead-of-Haugen-execution-134351233.html.

put to death according to his sentence.[38] On June 20, 2013, the Oregon Supreme Court ruled in favor of the governor, reasoning that inmates do not have the right to accept or reject a temporary reprieve.[39] In response to Haugen's *Lackey* claim that such an extension of time on death row was cruel and unusual, the Oregon Supreme Court replied that even though life on death row might "exact[ ] a toll on people,"[40] it is not enough of an extra punishment to be cruel or unusual.[41] The constitutional implications are as clear as they are troubling: if some prisoners who have been stuck on death row for years are actively seeking death while the state wishes to either hold them on death row extralegally or institutionalize that legal limbo through reprieves, the system is broken and due process is being skirted.

An unexplored legal challenge that may be combined with this due process claim involves the Fifth Amendment's Double Jeopardy Clause.[42] It is a novel claim that relies on a rarely considered aspect of double jeopardy, but it is something that should be considered in light of the failures of the *Lackey* claim to gain any meaningful traction. In popular culture, the Double Jeopardy Clause may be best known for protecting against subsequent criminal prosecutions for a specific crime following an acquittal of that crime.[43] This prohibition is the most literal interpretation of the phrase "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb,"[44] but is only one of the three protections that the clause creates according to the Supreme Court. In *North Carolina v. Pearce*,[45] the controlling case detailing what the Double Jeopardy Clause protects, the Court held that the Clause also "protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense."[46] It is this third protection against multiple punishments for the same offense that provides a potential conduit for a fresh constitutional claim against prolonged stays on death row.

This Article argues that the current system of implementing the death penalty could be seen as unconstitutional under the multiple punishments prohibition of the Double Jeopardy Clause. Part I will address death row syndrome and why

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[38] Helen Jung, *Gov. John Kitzhaber's Reprieve of Gary Haugen's Execution Goes Before Oregon Supreme Court*, THE OREGONIAN (Mar. 13, 2013, 3:52 PM), http://www.oregonlive.com/pacific-northwest-news/index.ssf/2013/03/gov_john_kitzhabers_reprieve_o.html.

[39] Haugen v. Kitzhaber, 306 P.3d 592, 607–08 (Or. 2013).

[40] *Id.* at 609–10.

[41] *Id.* This is consistent with the logic found in other *Lackey* claim cases as discussed *infra* Part I.B.

[42] U.S. CONST. amend. V.

[43] Though popular culture often misconstrues the precise mechanics of the Double Jeopardy Clause, there seems to be a generalized awareness of this as its primary function. *See, e.g.*, DOUBLE JEOPARDY (Paramount Pictures 1999).

[44] U.S. CONST. amend. V.

[45] North Carolina v. Pearce, 395 U.S. 711, 717 (1969).

[46] *Id.*

the *Lackey* claim has failed up to this point. Part II will analyze the historical meaning of the Double Jeopardy Clause's prohibition against multiple punishments, as well as its modern jurisprudence. Part II will then explain why the basic facts behind *Lackey* claims create the foundation for a multiple punishment claim. Part III will outline the possible remedies for this untested constitutional challenge. The Article concludes that a multiple punishment claim under the Double Jeopardy Clause is a logical and feasible, though entirely untested, method of attacking the perceived rights violations that occur due to extended time on death row. Addressing the issue through the lens of multiple punishments is beneficial because it avoids having to prove the "cruel and unusual punishment" requirements of an Eighth Amendment *Lackey* claim. As a result, this approach may be more palatable to the judges who recognize that fifteen years on death row is clearly a separate punishment from death itself but who are not willing to say that such a punishment is cruel and unusual in nature.[47]

II. DEATH ROW AND CRUEL AND UNUSUAL PUNISHMENT

For years, death penalty opponents have tried to argue that the death penalty is prohibited based on the Eighth Amendment's ban on "cruel and unusual punishments."[48] These attacks on capital punishment's constitutionality have come from many different angles. The most direct argument, that the Eighth Amendment forbids capital punishment itself because death is always cruel and unusual, was tossed aside when America's brief moratorium on capital punishment was lifted in *Gregg v. Georgia*. In *Gregg*, the Court made clear that "the punishment of death does not invariably violate the Constitution."[49] The majority of the Court justified this conclusion, in part, by historical analysis:

> It is apparent from the text of the Constitution itself that the existence of capital punishment was accepted by the Framers. At the time the Eighth Amendment was ratified, capital punishment was a common sanction in every State. Indeed, the First Congress of the United States enacted legislation providing death as the penalty for specified crimes. . . . The Fifth Amendment, adopted at the same time as the Eighth, contemplated the continued existence of the capital sanction by imposing certain limits on the prosecution of capital cases.[50]

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[47] Of course, there are other judges who do believe that the additional punishment is cruel and unusual. For example, Judge William O'Neill, newly elected to the Ohio Supreme Court in 2013, issued a dissent in a recent death penalty case and stated, unequivocally, that "[t]he death penalty is inherently both cruel and unusual and therefore is unconstitutional." Nicole Flatow, *Ohio Supreme Court Justice: Death Penalty Is Inherently Cruel and Unusual*, THINKPROGRESS (Jan. 30, 2013, 5:00 PM), http://thinkprogress.org/justice/2013/01/30/1509641/ohio-supreme-court-justice-death-penalty-is-inherently-cruel-and-unusual/.

[48] U.S. CONST. amend. VIII.

[49] Gregg v. Georgia, 428 U.S. 153, 169 (1976).

[50] *Id.* at 177.

A more oblique argument, that the death penalty violated the Eighth Amendment by being overly arbitrary, had a measure of success four years earlier in the 1972 case *Furman v. Georgia*.[51] While *Gregg* reintroduced executions to the United States and foreclosed the direct Eighth Amendment argument, the Court's holding still allowed for other circumstances in which an Eighth Amendment claim might succeed, such as when there is a "substantial risk that [capital punishment] would be inflicted in an arbitrary and capricious manner."[52] The argument that extended stays on death row violate the Eighth Amendment is another argument not foreclosed by *Gregg* that is still routinely tested, though mostly unsuccessfully, both in state and federal courts.

A. *Waiting as Cruel and Unusual Punishment: Death Row syndrome*

After the ruling in *Gregg*, capital punishment resumed and the United States executed 1,336 death row inmates between January 1977 and June of 2013.[53] Throughout those thirty-six years, 8,033 people were sentenced to death.[54] Of those 8,033, 3,572 had their sentences commuted or overturned, or they died while on death row.[55] This leaves 3,125 inmates sentenced to death since *Gregg* who had not yet been executed as of June of 2013.[56] It is these inmates, incarcerated for an average of almost fifteen years each,[57] who may be subject to "death row syndrome." While legal scholars often argue that "[l]engthy death row confinement causes severe mental pain and psychological suffering,"[58] there is "a dearth of scientific evidence documenting its actual existence."[59] This is not surprising, given the relatively limited number of people on death row and the difficulty of conducting a true scientific experiment when the subjects are confined in high-security settings. Due to this restriction, most of our evidence about death row syndrome comes from a variety of anecdotal cases.[60]

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[51] Furman v. Georgia, 409 U.S. 902 (1972).

[52] *Gregg*, 428 U.S. at 188.

[53] Searchable Execution Database, DEATH PENALTY INFO. CENT., http://www.deathpenaltyinfo.org/views-executions (last visited June 23, 2013).

[54] Death Sentences in the United States from 1977, DEATH PENALTY INFO. CENT., http://www.deathpenaltyinfo.org/death-sentences-united-states-1977-2008 (last visited June 23, 2013).

[55] *Id.*; *see also* Searchable Execution Database, *supra* note 53; Size of Death Row by Year, DEATH PENALTY INFO. CENT., http://www.deathpenaltyinfo.org/death-row-inmates-state-and-size-death-row-year#year (last visited June 23, 2013).

[56] Size of Death Row by Year, *supra* note 55.

[57] PUNISHMENT STATISTICS, *supra* note 2, at 12.

[58] Feldman, *supra* note 10, at 219.

[59] Amy Smith, *Not "Waiving" But Drowning: The Anatomy of Death Row Syndrome and Volunteering for Execution*, 17 B.U. PUB. INT. L.J. 237, 242 (2008).

[60] Specifically, there are a number of instances in which a once-competent inmate has allegedly gone insane while on death row. *See, e.g.*, Ford v. Wainwright, 477 U.S. 399 (1986); Solesbee v. Balkcom, 339 U.S. 9 (1950).

It is within this context that Jans Soering fought his extradition to the United States to be tried for the murder of his girlfriend's parents. He argued that the long waiting time on death row constituted a punishment so severe that Europe could not, in good conscience, allow him to be even potentially subjected to it. His case was heard first by the European Commission, which calculated at the time of the hearing in 1989 that United States death row prisoners "spent an average of six to seven years"[61] waiting for their sentences to be implemented. The Commission did not think that this delay violated basic human rights because "the Commission concluded that the inmates caused much of the . . . delay themselves."[62]

Soering appealed to the European Court of Human Rights, which struck down the Commission's findings and discounted the idea that inmates' appeals were to blame for their own extended incarceration.[63] The reasoning highlighted effect rather than cause:

> However well-intentioned and even potentially beneficial is the provision of the complex of post-sentence procedures in Virginia, the consequence is that the condemned prisoner has to endure for many years the conditions on death row and the anguish and mounting tension of living in the ever-present shadow of death.[64]

Regardless of the lack of concrete scientific analysis on the specific "death row phenomenon," the European Court of Human Rights articulated the common-sense difference between serving time on death row and serving time as part of a non-capital sentence.[65] Though U.S. courts have never recognized the violation of basic human rights found in *Soering*, there have been hints of an awareness that such extended death row confinement is, if not cruel and unusual, at least unnecessarily punitive.[66]

In 1890, the Supreme Court recognized 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, which may exist for the period of four weeks.[67]

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[61] Yuzon, *supra* note 23, at 53.

[62] Yuzon, *supra* note 23, at 53.

[63] Soering v. United Kingdom, 161 Eur. Ct. H.R. (ser. A) (1989), *reprinted in* 11 Eur. Hum. Rts. Rep. 439 (1989).

[64] Yuzon, *supra* note 23, at 57 (quoting *Soering*, 161 Eur. Ct. H.R. at 35).

[65] Other courts have recognized this difference as well. *See, e.g.*, *Pratt*, [1994] 2 A.C. 1, 4 All E.R. at 773.

[66] *See* Yuzon, *supra* note 23, at 69 (quoting People v. Chessman, 341 P.2d 679, 699 (Cal. 1959) ("[I]t is . . . in fact unusual that a man should be detained for more than 11 years pending execution of sentence of death and . . . that mental suffering attends such detention.").

[67] *In re* Medley, 134 U.S. 160, 172 (1890).

Though the case in which that language was used, *In re Medley*,[68] involved a prisoner whose execution might come at any minute, the general concept that the waiting is its own form of punishment is clearly expressed. Further, this language shows that in 1890, a period of just four weeks would have been considered an excessive time to wait for an execution.

Though there is limited scientific data explaining exactly what might happen to inmates during their stays on death row, there are circumstantial factors surrounding an inmate's confinement from which the development of mental distress may be inferred. Death row inmates are not, on average, sitting in their cells and simply waiting fifteen years until a predetermined execution date. On the contrary, like the prisoner in *In re Medley*, these inmates have no idea when their execution might occur because they have no idea when their appeals might be decided. Though every state is different when it comes to appeals following capital convictions, there is typically a mandatory appeal in the state's appellate court,[69] followed by the possibility of appeal to the state's supreme court and to the U.S. Supreme Court.[70] If this direct appeal is unsuccessful, the inmate may then try for post-conviction relief in the state and then the federal courts.[71] If the inmate is successful at any stage, then the case may be sent back down to a lower court to make a determination on a specific issue; if the court finds against the inmate, the process could start anew with another collateral issue.[72]

As a result of this system, any given death row inmate will be entirely unsure as to whether he might be executed in the coming year. Once the appeals process is exhausted, most states require by statute that the execution be scheduled within a very brief time window.[73] For example, in California an execution date must be set "not . . . less than 30 days nor more than 60 days" after the order of death in the court in which the inmate was convicted.[74] In Idaho, after a death sentence has been affirmed, the state applies for a warrant of execution and an execution date must be set "not more than thirty (30) days thereafter."[75] In

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[68] *Id.*

[69] "After *Furman*, virtually all death-penalty jurisdictions created a mandatory direct appeal following imposition of a death sentence." Brent E. Newton, *The Slow Wheels of* Furman's *Machinery of Death*, 13 J. APP. PRAC. & PROCESS 41, 48 (2012).

[70] "Following a direct appeal to the state court of appeals and state supreme court, an inmate on death row may seek a writ of certiorari from the United States Supreme Court." William H. Brooks, *Meaningful Access for Indigents on Death Row:* Giarratano v. Murray *and the Right to Counsel in Postconviction Proceedings*, 43 VAND. L. REV. 569, 570 (1990).

[71] *Id.*

[72] For a more detailed explanation of the appeals process, see Root, *supra* note 7, at 285-86.

[73] *See, e.g., infra* notes 74–77.

[74] CAL. PENAL CODE § 1227 (West 2013).

[75] IDAHO CODE ANN. § 19-2715 (West 2013).

Oklahoma, the time is set between sixty and ninety days.[76] Almost every state with the death penalty, in fact, makes it mandatory to set an execution date within a few months after each appeal is lost.[77] This results in multiple execution dates for most death row inmates and no way for them to know which will be their last.[78] In at least one case, an inmate received fourteen separate execution dates over a period of thirteen years.[79] His attorneys explained the impact of so many execution dates in their petition for certiorari to the United States Supreme Court:

> On fourteen separate occasions since Mr. Suárez Medina's death sentence was imposed, he has been informed of the time, date, and manner of his death. At least eleven times, he has been asked to describe the disposal of his bodily remains, and the distribution of his meager death row spending account. Ten times, he has specified the witnesses he wishes to view his death, and in doing so, has imagined himself strapped to a gurney in the death chamber in Huntsville, Texas. Of course, Mr. Suárez Medina has been envisioning his death by lethal injection for the last thirteen years – but each time a date was set, he was forced to participate in a countdown

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[76] OKLA. STAT. ANN. tit. 22 § 1001 (West 2013).

[77] *See, e.g.*, VA CODE ANN. § 53.1-232.1 (West 2013):

> In a criminal case where a sentence of death has been imposed, the trial court shall set an execution date when . . . (i) the Supreme Court of Virginia has denied habeas corpus relief or the time for filing a timely habeas corpus petition in that Court has passed without such a petition being filed, (ii) the Supreme Court of the United States has issued a final order disposing of the case after granting a stay to review the judgment of the Supreme Court of Virginia on habeas corpus, (iii) the United States Court of Appeals has affirmed the denial of federal habeas corpus relief or the time for filing a timely appeal in that court has passed without such an appeal being filed, or (iv) the Supreme Court of the United States has issued a final order after granting a stay in order to dispose of the petition for a writ of certiorari to review the judgment of the United States Court of Appeals.

[78] *See, e.g.*, Assoc. Press, *Convicted Murderer Awaits Death in Electric Chair*, OBSERVER-REPORTER (June 7, 1987), http://news.google.com/newspapers?nid=2519&dat=19870607&id=OrNdAAAAIBAJ&sjid=0l0NAAAAIBAJ&pg=3334,1195976 (discussing Benjamin Berry's eighth execution date); James Ridgeway and Jean Casella, *14 Years on Death Row. $14 Million in Damages?*, MOTHER JONES (Oct 6, 2010), http://www.motherjones.com/politics/2010/09/connick-v-thompson (discussing the case of John Thompson, who had eight execution dates set over fourteen years before new evidence emerged that resulted in his release); Lea Sherman and Dave Ferguson, *Protesters Denounce Execution of Gary Graham*, THE MILITANT (July 10, 2000), http://www.themilitant.com/2000/6427/642702.html (discussing Gary Graham's eighth execution date); Nancy Waring, *Death in Texas: Sandra Babcock Pioneers Use of International Law in Capital Punishment Appeal*, HARVARD NEWS BULLETIN (Spring, 2000), http://www.law.harvard.edu/news/bulletin/back-issues/spri2000/article6.html (discussing Stanley Faulder's ninth execution date and his lawyer's argument that such treatment constituted torture).

[79] Petition for Writ of Certiorari, Suarez Medina v. Texas, 536 U.S. 979 (2002) (No. 02-5752), *cert. denied*.

of months, days, and hours in anticipation of his death sentence.[80]

In a letter to his sister before his own execution date had been set, death row inmate William Van Poyck reflected on the psychological trauma associated with having an execution delayed at the last minute:

> That's gotta be a Hell of a transition; you are hours away from execution, you've had your final visits (imagine how emotional that is), made your peace with the inevitable, perhaps eaten your last meal, then, in a finger snap, you're told you won't be dying after all (at least not that night) and you are back on a regular death row cell talking with the Fellas. I've seen a number of guys go through this over the years, one of whom was just twenty minutes from execution in the electric chair when he got his unexpected stay. They moved him next to me and I was startled to see that his hair had turned almost entirely white during the six weeks he was on death watch.[81]

At its heart, the uncertainty inherent in this type of experience leads to the psychological punishment that the petitioners in *Lackey*, *Elledge*, and *Valle* argue is cruel and unusual.

B. *The Failures of the* Lackey *Claim*

There are several different ways to define the word "torture." The United Nations Convention Against Torture, of which the United States is a signatory, defines torture as "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted."[82] The United States statute that defines torture, 18 U.S.C. § 2340, explains that "severe" mental "pain or suffering" can be caused by "the threat of imminent death."[83] The statute itself gives no definition for the word "imminent," but the *Merriam-Webster Dictionary* defines imminent as "hanging threateningly over one's head,"[84] and lists its synonyms as "impending, looming, pending, [and] threatening."[85] It is conceivable that an inmate's upcoming and ever-changing execution date might qualify as a looming threat of death sufficiently "imminent" to cause at least significant, if not "severe," mental suffering. Sometimes the treatment of those convicted to die falls even more directly within this definition of torture, as evidenced by the many stories of death row inmates brought to the execution chamber multiple times only to have their executions delayed at the last second.[86]

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[80] *Id.* at 35–36.

[81] *Letter from William Van Poyck, Death Row Inmate, to His Sister*, DEATH ROW DIARY (Feb. 27, 2013), http://deathrowdiary.blogspot.com/2013/03/february-27-2013.html (last visited June 23, 2013).

[82] Convention Against Torture Art. 1, Dec. 10, 1984, S. TREATY DOC. NO. 100.20.

[83] 18 U.S.C. § 2340 (2012).

[84] MERRIAM-WEBSTER DICTIONARY 580 (10th ed. 1999).

[85] *Id.*

[86] For a good example of this type of case, *see* David R. Dow, Jim Marcus, Morris Moon,

Is it possible to label the execution procedures of the various states as a form of unconstitutional torture that gives rise to death row syndrome? While *Lackey* and its progeny attempt to do this in order to make their Eighth Amendment claim, the argument has consistently failed. In order to understand the reasons why the *Lackey* claim has not been well received, it will help to turn back to the definitions of torture. After defining torture, 18 U.S.C. § 2340 adds the parenthetical "(other than pain or suffering incidental to lawful sanctions)."[87] There is a similarly worded provision in the Convention Against Torture.[88] This language suggests that pain and suffering that might amount to torture in one context is not torture at all if the actions resulting in the pain or suffering are "incidental" to a legal sentence. In other words, being put under the threat of death, regardless of any mental pain and suffering such a threat creates, is anticipated and acceptable so long as it is part of a lawful punishment.

This is the main type of justification that has been used to dismiss claims that conditions on death row amount to cruel and unusual punishment. As the U.S. Supreme Court put it in an earlier case addressing the cruel and unusual claim as applied to the conditions in solitary confinement, "[t]o the extent that such conditions are restrictive and even harsh, they are part of the penalty that criminal offenders pay for their offenses against society."[89] Even extreme conditions, such as solitary confinement for years at a time, have been upheld in state courts as being "[i]n no way . . . excessive"[90] given the underlying punishment.

Though a *Lackey* claim has yet to be heard on the merits in the United States Supreme Court, it seems unlikely that such claims will prevail due to the current judicial atmosphere that sees the pre-execution incarcerations that give rise to "death row syndrome" as part of a lawfully given punishment. So long as the punishment is lawful, according to the Court, it inherently anticipates and allows for incidental mental and physical distress without amounting to torture or violating the cruel and unusual punishment prohibition of the Eighth Amendment.

III. FIFTEEN YEARS AND DEATH: THE DOUBLE JEOPARDY CLAIM

The claim that extended stays on death row violate the Constitution is new, but so are the conditions that give rise to the claim. Since *Gregg* ended the moratorium on executions in the United States, average wait times on death row have risen from about six years in 1984 to about fifteen years in 2010.[91]

Jared Tyler, and Greg Wiercioch, *The Extraordinary Execution of Billy Vickers, The Banality of Death, and the Demise of Post-Conviction Review*, 13 WM. & MARY BILL RTS. J. 521 (2004).

87 18 U.S.C. § 2340.

88 Convention Against Torture Art. 1, Dec. 10, 1984, S. TREATY DOC. NO. 100.20.

89 Rhodes v. Chapman, 452 U.S. 337, 347 (1981).

90 Shack v. State, 288 N.E.2d 155, 159 (Ind. 1972).

91 PUNISHMENT STATISTICS, *supra* note 2, at 12.

Even a six-year wait, though, was found to violate human rights by the European Court when they addressed the issue in 1989.[92] The farther back in time that one looks, the more unusual lengthy death row waiting times seem to be. Early American courts simply did not permit prolonged death row incarceration. These courts "advocated swift infliction of the death penalty to further penological goals and to prevent the condemned prisoner from suffering unnecessarily."[93] In 1778, Thomas Jefferson attempted to codify this in Virginia with his Bill for Proportioning Crimes and Punishments, suggesting that "[w]henever sentence of death shall have been pronounced against any person . . . execution shall be done on the next day."[94]

Early American efforts against lengthy delays before punishment are unsurprising given that we draw many of our laws from England, where delay before execution would have been "difficult to envisage."[95] In the 1993 case *Pratt v. Attorney General of Jamaica,*[96] the lords of the judicial committee of the Privy Council remarked that "[t]he death penalty in the United Kingdom has always been carried out expeditiously after sentence, within a matter of weeks or in the event of an appeal . . . within a matter of months."[97]

The language of the Double Jeopardy Clause of the Fifth Amendment, "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb,"[98] was originally proposed by James Madison to be "[n]o person shall be subject, except in cases of impeachment, to more than one punishment or one trial for the same offence."[99] Professors Carissa Byrne Hessick and Andrew Hessick explain that, though this language was changed in the final draft, "no one objected to the restriction on multiple punishments. To the contrary, the only statement on that language was by Representative Egbert Benson, who noted that the 'humane' reason for a prohibition on double jeopardy was to prevent more than one punishment for a single offense."[100] The United States Supreme Court has in many ways embraced this historical prohibition as part of the Double Jeopardy Clause, and no case has overturned the established precedent that "if there is anything settled in the jurisprudence of England and America, it is that no man can be twice lawfully punished for the same of-

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[92] *See supra* Part I.

[93] Feldman, *supra* note 10, at 195 (quoting Flynn, *supra* note 13, at 300).

[94] Thomas Jefferson, *A Bill for Proportioning Crimes and Punishments*, *in* THE PAPERS OF THOMAS JEFFERSON, VOL. 2, 492–504 (Julian P. Boyd, ed., 1950), *available at* http://presspubs.uchicago.edu/founders/documents/amendVIIIs10.html.

[95] *Pratt*, [1994] 2 A. C. 1, 1 All E. R. 769.

[96] *Id.*

[97] *Id.*

[98] U.S. CONST. amend. V.

[99] Carissa Byrne Hessick & F. Andrew Hessick, *Double Jeopardy as a Limit on Punishment*, 97 CORNELL L. REV. 45, 51 (2011) (quoting 1 ANNALS OF CONG. 451-52 (1789) (Joseph Gales ed., 1834)).

[100] *Id.* at 51–52.

fense."[101]

Though most American courts hold that extended time on death row is not "cruel and unusual," there may be an avenue available for a Fifth Amendment challenge under its prohibition on multiple punishments. First, one would have to demonstrate that the waiting time constitutes a separate punishment from the lawfully ordered death sentence. Then it would be necessary to show that this separate punishment is the sort of punishment that the Double Jeopardy Clause meant to prevent. Establishing either of these requires an exploration of the history of the Double Jeopardy Clause's prohibition on multiple punishments.

A. *The Meaning of "Multiple Punishments"*

The Double Jeopardy Clause protects against subsequent prosecutions after an acquittal. As a secondary matter, it also protects against subsequent prosecutions following a conviction. After all, *any* additional prosecution following a final judgment would place a person in additional jeopardy of life or limb, which the Double Jeopardy Clause expressly forbids. When looking at these first two protections, the Supreme Court is consistent as to the general concept and tends to argue only over whether it is the substantive or procedural act of acquittal or conviction that invokes the double jeopardy protection.[102] The third protection of the Fifth Amendment, protecting against multiple punishments for the same offense, has been far more difficult for courts to understand and apply.

1. Historical Sources for Prohibitions on Multiple Punishment

Protecting citizens from multiple punishments for the same crime was not a novel idea when James Madison suggested it at the Constitutional Convention in Philadelphia in 1787. As Hessick and Hessick note, "[t]he prohibition on multiple punishments has deep historical roots. Ancient Athenian, Jewish, Roman, and ecclesiastical law all contain some limitation on the imposition of multiple punishments."[103] Ancient Jewish texts, for example, explain that "Jewish law prohibited a person liable to a death penalty by a human tribunal from also being flogged."[104] In other words, "you make the [the guilty man] liable to punishment for *one* misdeed, but you cannot hold him liable [in two ways as]

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[101] *Ex parte* Lange, 85 U.S. 163, 168 (1873).

[102] *See, e.g.*, Evans v. Michigan, 133 S. Ct. 1069 (2013) (a directed acquittal given in error still bars a second trial for the same offense); Blueford v. Arkansas, 132 S. Ct. 2044 (2012) (a deadlocked jury that has indicated by voice that they have unanimously acquitted on one charge have not formally acquitted the defendant and so double jeopardy protections do not attach).

[103] Hessick & Hessick, *supra* note 99, at 50.

[104] David S. Rudstein, *A Brief History of the Fifth Amendment Guarantee Against Double Jeopardy*, 14 WM. & MARY BILL RTS. J. 193, 197 (2005).

for *two* misdeeds . . . [[i].e., death and lashes]."[105] In this way, the historical prohibition on multiple punishments was not simply a rephrasing of the prohibition on multiple prosecutions but was, in fact, its own separate rule.

Ancient Roman law also contained multiple-punishment protection through the application of the saying "*nemo debet bis puniri pro uno delicto*, that is, '[n]o one ought to be punished twice for the same offense.'"[106] This continued in English common law, and though the precept was often violated, there are indications that those who ignored it knew that they were breaking precedent.[107] In America, this ancient maxim was repeated and revered in early Double Jeopardy Clause cases,[108] though it has since lost much of that power.

2. Multiple Punishment and Modern Jurisprudence

In the late 1800s in the United States, the Supreme Court asked a rhetorical question that fully encapsulates the reasoning behind the prohibition of multiple punishments: "[O]f what avail is the constitutional protection against more than one trial if there can be any number of sentences pronounced on the same verdict?"[109] The case in which the Court asked this question, *Ex parte Lange*, concerned a man unconstitutionally sentenced to both a fine and jail time, though the criminal statute allowed for either a fine *or* jail time. *Lange* is often cited as the main source of Supreme Court precedent in support of a Double Jeopardy Clause prohibition on multiple punishments.[110] Thanks in large part to *Lange,* until the 1990s, the United States' limited treatment of multiple punishments mirrored much of the concept's historical treatment. In *In re Bradley*, for example, a man erroneously received both a fine and jail time for an offense that was supposed to receive only one or the other.[111] Since he paid the fine, the Court held that the state could not amend the judgment, give him back his money, and put him in jail.[112] It is important to note that these cases, similar to the cases of inmates languishing on death row, involved only one prosecution

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[105] *Id.* (quoting BABYLONIAN TALMUD, *Sanhedrin*, 32a, 33b (Isidore Epstein ed., Jacob Shachter trans., Soncino Press 1935) (emphasis in original) (internal quotation marks omitted)).

[106] *Id.* at 200 (emphasis in original) (quoting BLACK'S LAW DICTIONARY 1736 (8th ed. 2004)).

[107] *See* BABYLONIAN TALMUD, *supra* note 105, at 210 (relating a story about how Archbishop Richard, in advocating that the murderers of Archbishop Becket be both excommunicated as well as hanged, "assured several of the King's justices that such a procedure would not punish a person twice for the same offense").

[108] *See, e.g., Ex Parte* Lange, 85 U.S. 163, 168 (1873); Parker v. State, 51 Miss. 535, 540 (Miss. 1875); State v. Warren, 92 N.C. 825 (N.C. 1885); Rupert v. State, 9 Okla. Crim. 226, 231 (Okla. Crim. App. 1913).

[109] *Lange*, 85 U.S. at 173.

[110] *See, e.g.,* North Carolina v. Pearce, 395 U.S. 711, 717 (1969).

[111] *In re* Bradley, 318 U.S. 50 (1943).

[112] *Id.* at 52.

that resulted in more than one punishment.[113] The last major case that followed this trend was *United States v. Halper*, in which the Court ruled that an already punished defendant could not also be punished with a non-remedial, solely punitive fine.[114]

In *Hudson v. United States*, the Supreme Court struck a blow to the concept of a multiple punishment claim when it held that a monetary fine and a criminal punishment could both be levied through two separate proceedings against a defendant accused of one specific crime.[115] Though this seems to contradict the historical prohibition on multiple punishments, the Court avoided conflict by defining "punishment" so that it covered only criminal sanctions. As the Court put it, "the Double Jeopardy Clause does not prohibit the imposition of all additional sanctions that could . . . be described as punishment."[116] The question is whether a specific sanction is "so punitive in form and effect as to render [it] criminal despite Congress' intent to the contrary."[117] As a further requirement, the Court in *Hudson* said that bringing a suit involving multiple punishments "require[s] successive criminal prosecutions,"[118] departing from the precedent set in *Lange*, *Bradley*, and *Halper*. This requirement, however, is not as straightforward as it seems and does not foreclose a multiple punishment challenge based on time spent on death row. As Justice Breyer noted in his concurrence in *Hudson*:

> [T]he Court [previously] held that the collection of a state tax imposed on the possession and storage of drugs was "the *functional equivalent* of a successive criminal prosecution" because, among other things, the tax was "remarkably high"; it had "an obvious deterrent purpose"; it was "conditioned on the commission of a crime"; [and] it was "exacted only after the taxpayer ha[d] been arrested for the precise conduct that gives rise to the tax obligation."[119]

When the functional equivalent of a criminal prosecution results in a sanction, current precedent allows for a multiple punishment challenge under the Fifth Amendment if the punishment meets three criteria. First and most obviously, the punishment must be a criminal sanction resulting from the functional equivalent of a subsequent prosecution; second, the punishment must not be

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[113] It also may be important to note that courts are allowed to *decrease* punishments given, according to their lawful authority, since this would not be adding to any punishment. United States v. Benz, 282 U.S. 304 (1931).

[114] United States v. Halper, 490 U.S. 435 (1989).

[115] Hudson v. United States, 522 U.S. 93 (1997).

[116] *Id.* at 98–99.

[117] *Id.* at 104 (quoting United States v. Ursery, 518 U.S. 267 (1996)).

[118] *Hudson*, 522 U.S. at 106 (Scalia, J., concurring in judgment).

[119] *Id.* at 115 (Breyer, J., concurring in judgment) (emphasis added) (quoting Dep't of Revenue of Mont. v. Kurth Ranch, 511 U.S. 767 (1994)).

authorized by the legislature as part of the original punishment;[120] and third, the punishment must be in addition to the original sentence.[121]

a. *Multiple Punishments and Due Process*

One might argue that a challenge falling under the purview of a "functional equivalen[ce]" test is better categorized as a due process than a double jeopardy claim.[122] After all, to be punished without having gone through a legal proceeding is a clear violation of substantive due process. While that is true, this view ignores the central purpose of the Double Jeopardy Clause: to protect those who have gone through a judicial proceeding from being put in danger of a new punishment separate from those proceedings. The concept of due process becomes almost meaningless without explicit instructions throughout the Constitution as to what due process actually requires. This is best evidenced in the Oregon Supreme Court decision against Gary Haugen. Though Haugen raised a due process claim, he did not articulate a specific constitutional protection other than a deprivation of his "liberty interest."[123] Further, "he [did] not cite any authority in support of that assertion,"[124] and therefore his due process claim was dismissed in a footnote. While due process should certainly be invoked in a constitutional challenge to extended death row stays, it should be subordinate to and not in place of the Double Jeopardy Clause.

b. *Multiple Punishments and the* Ex Post Facto *Clause*

Another possible alternative to the use of the Double Jeopardy Clause in the multiple punishment context lies in the *Ex Post Facto* Clause.[125] After all, the *Medley* case, in which the Supreme Court said that four weeks of prison was excessive, was resolved because the law confining the inmate to four weeks in prison,[126] though written and passed before the crime was committed, did not

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[120] Hessick & Hessick, *supra* note 99, at 55 ("The Double Jeopardy Clause, the courts have said, 'does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended.'").

[121] *But see Kurth Ranch*, 511 U.S. at 798 (Scalia, J., dissenting) ("'To be put in jeopardy' does not remotely mean 'to be punished,' so by the terms of this provision prohibits, not multiple punishments, but only multiple prosecutions.").

[122] *Id.* at 800 ("The dispositions [of the major multiple punishment cases] were entirely consistent with the proposition that the restriction derived exclusively from the due process requirement of legislative authorization.").

[123] Haugen v. Kitzhaber, 306 P.3d 592, 609 n. 16 (Or. 2013).

[124] *Id.*

[125] U.S. CONST. art. I, § 10, cl. 1.

[126] The most relevant portion of the statute in question reads as follows:

> Whenever a person convicted of a crime, the punishment whereof is death, and such convicted person be sentenced to suffer the penalty of death, the judge passing such sentence shall appoint and designate in the warrant of conviction a week of time within

go into effect until two months afterwards.[127] This same *ex post* rationale would not apply in the death row context, even if one could establish the inmates received a de facto *ex post facto* punishment.

With the *Ex Post Facto* Clause, "the Framers sought to assure that legislative acts give fair warning of their effect,"[128] and therefore "in accordance with [that] purpose[ ] . . . for a criminal law to be *ex post facto*[,] it must be retrospective."[129] To start, there is certainly fair warning that someone convicted of a capital crime will face some amount of time on death row before an execution. More importantly, the death row appeals process became precedent prior to the end of the moratorium of the death penalty in 1977,[130] and therefore does not apply to any inmates retroactively. The issue here is not the appellate process itself, but the ever-increasing length of time required to go through such a process.

In *Malloy v. South Carolina*,[131] the Court had to decide whether a change in execution process, from hanging to electrocution, constituted a violation of the *Ex Post Facto* Clause.[132] The Court held that it did not, stating that a "mere alteration in conditions deemed necessary for the orderly infliction of humane punishment"[133] is not an *ex post facto* law. In explaining this holding, the Court noted that the change in process "was intended to secure substantial personal rights against arbitrary and oppressive legislative action,"[134] and had nothing to do with the legislature. As courts could easily justify time on death row both as "necessary for the orderly infliction of humane punishment" and as something that did not arise from the legislature, the *Ex Post Facto* Clause is not an appropriate substitute for the Double Jeopardy Clause challenge.

B. *Death Row as Multiple Punishment*

Courts hearing *Lackey* claims suggest that conditions on death row are merely "part of the penalty"[135] and that additional time on death row, by itself, is not

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which such sentence must be executed. Such week, so appointed, shall be not less than two nor more than four weeks from the day of passing such sentence.

In re Medley, 134 U.S. 160, 163 (1890) (quoting 1889 Sess. Laws Colo. p.118 § 2).

[127] *Medley*, 134 U.S. at 161.

[128] Weaver v. Graham, 450 U.S. 24, 28 (1981).

[129] *Id.* at 29.

[130] On January 17, 1977, the execution of Gary Gilmore by firing squad ended the de facto moratorium on the death penalty in the United States. *Gary Gilmore,* DEATH PENALTY INFO. CENT., http://www.deathpenaltyinfo.org/gary-gilmore (last visited June 23, 2013).

[131] Malloy v. S. Carolina, 237 U.S. 180 (1915).

[132] *Id.* at 182.

[133] *Id.* at 183.

[134] *Id.*

[135] Rhodes v. Chapman, 452 U.S. 337, 347 (1981).

"cruel and unusual" punishment.[136] But it *is* a punishment, and perhaps even a harsher punishment than mere imprisonment for the same amount of time. Even if there were no difference in the conditions between death row detention and the detention of other inmates, there would still be a stark difference between death as a punishment and imprisonment as a punishment. They serve a different purpose: whereas the death penalty is allowed specifically to serve the purposes of "retribution and deterrence,"[137] prison sentences exist to further those two ideas plus "incapacitation[ ] and rehabilitation."[138]

There is some overlap in function, but history and common sense suggest that long terms in prison and execution were not designed to be utilized in tandem. The language of state death penalty statutes further demonstrate this by universal use of the word "or" when speaking of imprisonment as opposed to the death penalty. For example, in South Carolina "[a] person who is convicted of or pleads guilty to murder must be punished by death, *or* by a mandatory minimum term of imprisonment for thirty years to life."[139] In Texas, "prospective jurors shall be informed that a sentence of life imprisonment without parole *or* death is mandatory on conviction of a capital felony."[140]

Insofar as a convicted felon cannot be executed immediately upon the judge's pronouncement, states require at least some time on death row. In Virginia, a "[s]entence of death shall not be executed sooner than thirty days after the sentence is pronounced. The court shall, in imposing such a sentence, fix a day when the execution shall occur."[141] As previously mentioned, most states require the execution date be set within a short timeframe, not years in the future.[142] These are clear indications of legislators' intent that death, not imprisonment, is the punishment. Death *and* imprisonment exceeding state-sanctioned holding times is therefore just as much a violation of the Fifth Amendment's prohibition on multiple punishments as the imprisonment *and* fine imposed in *Ex parte Lange*.[143]

1. Living on Death Row is Not a Prize

A dominant theme of cases that espouse the non-punitive nature of extended death row stays is that living on death row is better than dying, and so the inmates should be grateful that they are given so many legal tools with which to

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[136] *See, e.g.*, Yuzon, *supra* note 23, at 63 (quoting Shack v. State, 887 F. 2d 1287, 1294 (6th Cir. 1989)).

[137] Gregg v. Georgia, 428 U.S. 153, 183 (1976).

[138] Tapia v. United States, 131 S. Ct. 2382, 2387 (2011) (giving a history of the federal sentencing guidelines, the Sentencing Reform Act, and the purpose of prison sentences in the United States).

[139] S.C. CODE ANN. § 16-3-20 (2010) (emphasis added).

[140] TEX. PENAL CODE ANN. § 12.31 (West 2013) (emphasis added).

[141] VA. CODE ANN. § 53.1-232 (West 1982).

[142] *See supra* Part I.A.

[143] *Ex parte* Lange, 85 U.S. 163, 168 (1873).

appeal their sentences.[144] Further, the reason that inmates are allowed a lengthy appeals process in the first place "is a function of the desire of our courts . . . to get it right, to explore exhaustively . . . any argument that might save someone's life."[145] The inmate's stay on death row is therefore for his benefit.[146] Justice Thomas has been the most vocal proponent of this line of thinking on the modern Supreme Court:

> Consistency would seem to demand that those who accept our death penalty jurisprudence as a given also accept the lengthy delay between sentencing and execution as a necessary consequence . . . It is incongruous to arm capital defendants with an arsenal of 'constitutional' claims with which they may delay their executions, and simultaneously to complain when executions are inevitably delayed.[147]

Justice Thomas has historical allies in deriding the inmates who protest their lengthy pre-execution incarcerations. In a 1960 ruling by the Court of Appeals for the Ninth Circuit, Chief Judge Richard Chambers allowed that "[i]t may show a basic weakness in our government system that a [death penalty case] takes so long,"[148] but denied relief by asking rhetorically "how [can we] offer life (under a death sentence) as a *prize* for one who can stall the process for a given number of years[?]"[149] This ruling also admitted that "[death row] would be hell for most people,"[150] but was able to maintain that life on death row was a prize for the inmate in question because he was "no ordinary man."[151]

This "life in jail is a prize" motif displayed by courts in considering Eighth Amendment claims is convenient, and is often usefully applied in a "cruel and unusual" analysis.[152] However, in our current context of multiple punishments, it should not matter whether the inmate was the partial cause of his own delayed execution. The justice system does not allow inmates the right to starve

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[144] *See, e.g.*, Chambers v. Bowersox, 157 F.3d 560 (8th Cir. 1998); Bonin v. Calderon, 77 F.3d 1155 (9th Cir. 1996); Stafford v. Ward, 59 F.3d 1025 (10th Cir. 1995).

[145] *Chambers*, 157 F.3d at 570.

[146] *Id.* ("Delay has come about because Chambers, of course with justification, has contested the judgments against him, and, on two occasions, has done so successfully."); *see also* Stafford v. Ward, 59 F.3d 1025, 1028 (10th Cir. 1995) ("The lengthy delays in this case were incurred largely at the behest of the Appellant himself, who sought the repeated stays to pursue his legal remedies.").

[147] Knight v. Florida, 120 S. Ct. 459, 459 (1999) (quotations in original).

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

[149] *Id.* (emphasis added).

[150] *Id.*

[151] *Id.*

[152] *See, e.g.*, Wilson v. Seiter, 501 U.S. 294, 298–99 (1991) ("To be cruel and unusual punishment, conduct . . . must involve more than ordinary lack of care for the prisoner's interests or safety . . . . It is *obduracy and wantonness, not inadvertence or error in good faith*, that characterize the conduct prohibited by the Cruel and Unusual Punishments Clause." (emphasis in original) (quoting Whitley v. Albers, 475 U.S. 312, 319 (1986))).

themselves[153] or to otherwise engage in self-harm.[154] Prisoners should similarly be barred from punishing themselves with additional time on death row. In order to understand why this should be the case, imagine a justice system in which those waiting to be executed are not imprisoned but must nonetheless embrace punishment as a means to delay execution. In this hypothetical system, inmates are given the option of cutting off one of their fingers or toes on December 31st of each year in exchange for a habeas appeal and a stay of execution.[155] It would certainly be this prisoner's right to take the available legal remedies to prolong his life, and it is doubtless that many would willingly part with a digit until they had none left. Nonetheless, it is doubtful that any court would ever call a yearly amputation a "prize" that one has the pleasure of experiencing instead of death.

As Justice Breyer explained in *Valle v. Florida*, "one cannot realistically expect a defendant condemned to death to refrain from fighting for his life by

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[153] *See, e.g.*, State *ex rel.* White v. Narick, 292 S.E. 2d 54 (W. Va. 1982); Singletary v. Costello, 665 So. 2d 1099 (Fla. Dist. Ct. App. 1996).

[154] In *Washington v. Glucksberg*, an assisted-suicide case involving non-capital claimants, the Supreme Court cited six specific State purposes served by preventing suicide. Most notably, it emphasized the State's "unqualified interest in the preservation of human life" and posited that the prevention of suicide reflected and reinforced the policy that the lives of the terminally ill and disabled were of no less value than those of the young and healthy. Ostensibly, these purposes would also be applicable to capital inmates.

Christopher J. Skinner, *Retaining the Cultural Meaning of Capital Punishment by Prohibiting Volunteerism on Death Row and the Implications of Its Continued Practice*, 39 LINCOLN L. REV. 55, 74 (2012). Skinner argues that allowing death row inmates to volunteer for executions is permitting this same type of self-harm that the state has a duty to prevent. In addition, he argues that permitting volunteerism deprives the death sentence of its cultural meaning. The Supreme Court, in its rulings on volunteerism, does not address the issue as one of self-harm, but instead as a legal decision that can be made by an inmate so long as it is "knowing, intelligent, and voluntary." Whitmore v. Arkansas, 495 U.S. 149, 165 (1990). In some situations, prison officials can even be held liable for failing to stop conscious, self-destructive acts of inmates. *See, e.g.*, Logue v. United States, 412 U.S. 521 (1973) (remanding a wrongful death case to determine the negligence of a deputy marshal who may not have adequately supervised an inmate who then committed suicide); Estate of Miller, *ex rel.* Berram v. Tobiasz, 680 F.3d 984 (7th Cir. 2012) (holding that prison guards did not have qualified immunity in a §1983 action following the death of an inmate who was known to have suicidal and self-harming tendencies); Manuel v. City of Jeanerette, 702 So. 2d 709 (La. Ct. App. 3d Cir. 1997) (holding that a wrongful death award was not erroneous when a prison did not give heightened attention to an inmate who was intoxicated and who later took his own life).

[155] This scenario is not as far-fetched as it may seem. Finger-amputation is still used in lieu of other forms of punishment by yakuza members in Japan in a ritualistic act called yubitsume. *See* Jennifer M. Smith, *An International Hit Job: Prosecuting Organized Crime Acts as Crimes Against Humanity*, 97 GEO. L.J. 1111, 1117 (2009).

seeking to use *whatever* procedures the law allows."[156] Responding to the argument that delay is due to the legal procedures established for the defendant's benefit, Breyer opines that "the argument may point . . . to a more basic difficulty, namely the difficulty of reconciling the imposition of the death penalty as currently administered with procedures necessary to assure that the wrong person is not executed."[157] In other words, if the functioning of the death penalty relies on additional unconstitutional actions, perhaps we should not have a death penalty.

The question remains: is living on death row a punishment? Though there is limited research that leads to conclusive evidence of death row syndrome, the research that is available strongly suggests that extended periods of time on death row might be as bad or even worse, both psychologically and physiologically, than our hypothetical finger-cutting. One summary of several socio-psychological studies noted that "[t]he reactions of prisoners have been found to be similar to those of terminally ill hospital patients but exacerbated by the physical [prison] conditions."[158] Anecdotal evidence on death row's psychological trauma is present in the story of Isidore Zimmerman, a man who was outright "disappointed when he was reprieved" only a few minutes before being electrocuted,[159] because after spending time on death row he wanted to die. He "was later fully exonerated for the crime for which he once 'willingly' sought to be executed."[160] William Van Poyck, who was executed on June 12, 2013 in Florida, wrote to his sister that he had "seen too many men go insane, a sad and scary thing to behold, or just throw in the towel and kill themselves, or get the state to do it for them by giving up their appeals and demanding to be executed."[161]

It cannot be the case that time in prison is meant to be a punishment in all cases except for when a death row inmate is undertaking the appeals process.[162]

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[156] Valle v. Florida, 132 S. Ct. 1, 2 (2011) (mem.) (Breyer, J., dissenting from denial of stay) (emphasis added).

[157] *Id.*

[158] *See* Yuzon, *supra* note 23, at n. 178. (quoting ROGER HOOD, THE DEATH PENALTY: A WORLDWIDE PERSPECTIVE (2d ed. 1996)). One death row inmate in Texas, who was diagnosed with paranoid schizophrenia, managed to gouge out both of his eyes while awaiting sentence. *Mental Illness: Texas Inmate Gouges Out Eyes, Remains on Death Row*, DEATH PENALTY INFO. CENT., http://www.deathpenaltyinfo.org/mental-illness-texas-inmate-gouges-out-eyes-remains-death-row (last visited May 14, 2013).

[159] G. Richard Strafer, *Symposium on Current Death Penalty Issues: Volunteering for Execution: Competency, Voluntariness and the Propriety of Third Party Intervention*, 74 J. CRIM. L. & CRIMINOLOGY 860, 869 (1983).

[160] *Id.*

[161] Letter from William Van Poyck, Death Row Inmate, to Lisa Van Poyck, His Sister (posted January 22, 2013), *available at* http://deathrowdiary.blogspot.com/2013/01/january-17-2013.html (last visited June 23, 2013).

[162] Whether it is truly the inmate punishing himself is a matter of debate. *See* Root, *supra*

Justice Stevens recognized this problem in his 1981 concurrence in *Coleman v. Balkom*.[163] "In capital cases," he said, "the punishment is inflicted in two stages . . . . If the death sentence is ultimately set aside or . . . delayed for a prolonged period, the imprisonment during that period is nevertheless a significant form of *punishment*."[164] It does not matter why someone continues to be on death row; so long as they are there, they are being punished. In other words, if prison were not meant to be a form of punishment, then the United States would not use imprisonment as its punishment of choice for every non-capital felony case.

2. Time on Death Row is not Merely "Accidental" and is the Functional Equivalent to a Successive Prosecution

In 1946, convicted murderer Willie Francis survived one round on the electric chair due to mechanical failure, and thereafter sued to have his sentence commuted to life imprisonment. He argued that his due process rights were violated through the double jeopardy of experiencing an execution twice as well as the cruel and unusual punishment inherent in mentally preparing for a second execution.[165] The Supreme Court rejected these claims, reasoning that the imposition of the second execution was due only to "an accident, with no suggestion of malevolence."[166] The Court compared it to an inmate going through an accidental "fire in the cell block."[167] The *Francis* case is distinguishable from this Article's proposed double jeopardy claim because of the decidedly non-accidental and routine nature of modern lengthy stays on death row. In order to succeed on this claim after *Hudson v. United States*,[168] however, one may have to prove not only that such treatment is not accidental, but also that it is the result of the functional equivalent of a successive prosecution.[169]

The foundation of the functional equivalence argument rests on a case in which a civil fine was found to be equivalent to a successive criminal prosecution for four main reasons: the fine was "remarkably high"; had "an obvious deterrent purpose"; was "conditioned on the commission of a crime"; and was "exacted only after the taxpayer ha[d] been arrested for the precise conduct that [gave] rise to the tax obligation in the first place."[170] Though the historical

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note 7, at 295 (noting that "[p]etitioners do not control the course of their appeals" due to a combination of state statutes and the exhaustion doctrine).

[163] Coleman v. Balkom, 451 U.S. 949 (1981).

[164] *Id.* at 952 (Stevens, J., concurring in denial of certiorari) (emphasis added).

[165] State of La. *ex rel.* Francis v. Resweber, 329 U.S. 459, 461 (1947).

[166] *Id.* at 463.

[167] *Id.* at 464.

[168] Hudson v. United States, 522 U.S. 93 (1997).

[169] *See supra* Part II.A.2. (discussing the *Hudson* decision).

[170] Dept. of Revenue of Mont. v. Kurth Ranch, 511 U.S. 767, 780–81 (1994); *see also supra* Part II.A.2.

predecessors of the multiple punishments prohibition of the Double Jeopardy Clause did not require proof of a successive prosecution, such a proof can still be made in the context of death row using this functional equivalence test. There is no indication that satisfying these factors is either necessary or sufficient to prove that a punishment was given due to the functional equivalent of a criminal prosecution, but as there are no cases that directly address this issue in a death row context, these factors can at least serve as a starting point for discussion.

The first factor of the functional equivalence argument has to do with the uncommon nature of the punishment. If a civil fine that is "remarkably high" is an uncommon punishment, then living on death row certainly crosses that threshold as well. As Richard Strafer wrote after researching death row volunteerism, "[i]t is difficult to imagine a source of psychological stress more exacting than being forced to live the spasmodic certainty and uncertainty of being sentenced to die."[171] Part II.B.1 has already discussed the punitive aspects of living on death row as opposed to normal prison conditions, and it satisfies this first equivalence factor to say that detention on death row is not something that would be required of someone for anything other than the commission of a capital crime.

Next is the deterrence factor. Death row obviously serves as a deterrent to murder. As Justice Stevens put it, "the deterrent value of incarceration during that period of uncertainty [on death row] may well be comparable to the consequences of the ultimate step itself."[172] Imprisonment is the deterrent of choice in the United States, and there is ample evidence that those defendants selected for execution have not necessarily committed a "worse" murder than killers who receive life in prison.[173] As such, proving that the threat of time in jail has a deterrent effect should be simple.

It is similarly easy to conclude that, were it not for the commission of the specific crime of capital murder, the inmates would not have extended sentences on death row. The last element, that the punishment is "exacted only after . . . [an arrest] . . . for the precise conduct giving rise to"[174] the death penalty, is also a *prima facie* assertion.

The counter-argument to all of these efforts to frame extended time on death row as a punishment equivalent to a criminal prosecution is to fall back on the arguments dealt with in Part II.B.1. Just because "justifications exist for this 'custodial regime,'"[175] though, does not mean that those justifications are

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[171] Strafer, *supra* note 159, at 867.

[172] Coleman v. Balkom, 451 U.S. 949, 952 (1981) (Stevens, J., concurring in denial of certiorari).

[173] *See Arbitrariness*, DEATH PENALTY INFO. CENT. (March 9, 2011), http://www.deathpenaltyinfo.org/arbitrariness#Evidence.

[174] Kurth Ranch, 511 U.S. at 767.

[175] Yuzon, *supra* note 23, at 57.

strong enough to replace an unconditional right expressed in the Constitution. The double jeopardy claim, unlike the *Lackey* claim, does not involve argument about whether a punishment exceeds certain standards. If an extra punishment has been given, that is the end of the analysis. Justice Stevens' lament that "it seems inevitable that there must be a significant period of incarceration on death row during the interval between sentencing and execution"[176] ignores the possibility that this significant period between sentencing and execution should not be allowed to exist as a constitutional matter.

3. This Additional Punishment was not Authorized by the Legislature

The final element of modern multiple punishment jurisprudence that must be satisfied rests on the idea that the alleged additional punishment must not have been intended by the legislature.[177] In most cases this is a straightforward analysis, because if the legislature wishes to allow, for example, both a fine and jail time for a given offense, then that will be written into the specific criminal statute. We have already seen that state death penalty statutes are specific and remarkably consistent in listing the punishment for capital crimes as death *or* life in prison.[178] They also have clear provisions that seek to execute the prisoner within thirty to ninety days of conviction or the resolution of the defendant's final appeal, if appeals are raised.[179]

Death penalty statutes have not always utilized this even/or language. At one point in the history of the United States there were statutes that provided for a set time on death row followed by an execution.[180] For example, after a conviction for murder in Minnesota in the 1880s, the relevant statute dictated that the offender "be kept in solitary confinement for a period of not less than one month nor more than six months . . . at the expiration of which time it shall be the duty of the governor to issue his warrant of execution."[181]

Even earlier examples of imprisonment *and* death statutes can be found in other states. In Maine in the 1830s, the state legislature decided that the punishment for someone sentenced to death should be "hard labor in the State prison

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[176] *Coleman*, 451 U.S. at 952 (Stevens, J., concurring in denial of certiorari).

[177] *See, e.g.*, Anne Bowen Poulin, *Double Jeopardy and Multiple Punishment: Cutting the Gordian Knot*, 77 U. COLO. L. REV. 595, 604 (2006) ("[W]hen a defendant complains of multiple punishment, the court must turn to legislative intent to determine whether the defendant's punishment is within the intended range . . . . [L]egislative intent governs whether crimes are multiply punished and . . . [the Court] has upheld multiple punishments as legislatively intended.").

[178] *See supra* Part II.B.

[179] *See supra* Part II.B.

[180] *See, e.g.*, GEORGE BROOKS YOUNG, THE GENERAL STATUTES OF THE STATE OF MINNESOTA, AS AMENDED BY SUBSEQUENT LEGISLATION 882–83 (4th Ed. 1883).

[181] MINN. STAT. ch. 154 § 2 (1883)

until such punishment of death shall be inflicted."[182] Other states copied this "Maine law" and similar statutes were passed in New Hampshire,[183] Massachusetts,[184] and Vermont.[185] Though these statutes may have been designed to slow the pace of the death penalty,[186] for the purpose of the Double Jeopardy Clause challenge it serves to show that statutes containing such language were not foreign and unthinkable to state legislatures. That modern state legislatures rejected the use of a prison sentence *and* death shows a willful choice that results in the sentences of life *or* death today. These factors indicate that it was not the intent of state legislatures to punish, with long pre-execution sentences, those sentenced to death.

That said, the Supreme Court would certainly like to lay at least some of the blame for these lengthy delays on the legislatures. Justice Stevens complained about death sentence delays in his concurrence in *Coleman v. Balkcom*.[187] "One of the causes of delay in the conclusion of litigation in capital cases has been the fact that the enactment of new state legislation after this Court's decision in *Furman v. Georgia* . . . generated a number of novel constitutional questions."[188] Ultimately, however, the problem lies with the courts and the procedures generated post-*Gregg* to ensure Eighth Amendment compliance.[189] Justice William Rehnquist acknowledged in his dissent of *Balkom* that "[the] Court, by constantly tinkering with the principles laid down in the five death penalty cases decided in 1976 . . . has made it virtually impossible for States to enforce . . . constitutionally valid capital punishment statutes."[190] Though all of the legislative evidence available indicates that states wish to execute their death row population as swiftly as possible, this rarely occurs due to the slow and multi-faceted appeals process now available to inmates.

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[182] TOBIAS PURRINGTON, REPORT ON CAPITAL PUNISHMENT MADE TO THE MAINE LEGISLATURE IN 1836, 41–42 (3d ed. 1852).

[183] VOICES AGAINST DEATH xxvii (Philip Mackey ed. 1976).

[184] *Id.*; *see also* Purrington, *supra* note 182, at 46 ("The last legislature of Massachusetts enacted the essential provisions of 'the Maine law,' which does not permit the Executive to issue his warrant for an execution within one year after the criminal has been sentenced by the court . . . .").

[185] *See* Purrington, *supra* note 182, at 47 ("Capital punishment . . . is still authorized by the laws of Vermont. It is provided, however . . . that in cases of conviction for offences so punishable, the prisoner shall be confined in the State prison for the period of one year, and until the Governor shall issue a warrant for his execution, which he may do, at any time, after the expiration of the year.").

[186] Mackey, *supra* note 183, at xxi.

[187] Coleman v. Balkom, 451 U.S. 949 (1981).

[188] *Id.* at 950–51 (Stevens, J., concurring).

[189] Marbury v. Madison, 5 U.S. 137, 147 (1803) (noting that "[t]he second section of the third article of the constitution gives this court appellate jurisdiction in all cases in law and equity arising under the constitution and laws of the United States").

[190] *Balkom*, 451 U.S. at 959 (Rehnquist, J., dissenting).

This is not to say that these appeals are unnecessary. Without even taking into account state court appeals, about forty percent of all capital appeals that go to federal courts are reversed at some point.[191] Professor James Liebman's famous capital punishment statistical study found that the total rate of reversible error throughout the capital punishment system was 68 percent.[192] Even if the states do not want a lengthy appellate process, it is clear that appeals are necessary to avoid error under the current system.

IV. THE REMEDY

Complaining about the lengthy appeals processes that results in extreme death row incarcerations in 1981, Justice Rehnquist remarked that "[w]hen society promises to punish by death certain criminal conduct, and then the courts fail to do so . . . [the courts] undermine the integrity of the entire criminal justice system."[193] This Article has explored the idea that such a failure may be a constitutional violation as well, first by addressing the Eighth Amendment's "cruel and unusual punishment" claim associated with lengthy death row stays, and then by suggesting a Fifth Amendment Double Jeopardy Clause approach to the same problem. Such a claim has never been used in this way before, but if it were accepted it would raise some obvious problems. This final section will recommend methods of overcoming such problems so that death penalty procedure can be brought in line with the Double Jeopardy Clause.

A. *Novelty*

Though this claim has never been raised before, death row limbo is a problem that barely existed prior to the 1970s. The closest analogy to this claim came up in the 1890 *In re Medley* case, discussed above.[194] Although *Medley* was ultimately decided based on a violation of the *Ex Post Facto* Clause, the language in that decision is similar to language that would ideally be used in response to the Fifth Amendment claim proposed here:

> When, in the language of the judgment of the court, the prisoner was ordered to be 'kept by the warden of the penitentiary in solitary confinement until the day of his execution, and when the knowledge of the day and the hour of his execution was by the statute to be withheld from him, the constitution of the United States was violated, because the *additional punishments* were inflicted on him.[195]

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[191] *See* Root, *supra* note 7, at 286.

[192] James S. Liebman, Jeffrey Fagan, & Valerie West, *A Broken System: Error Rates in Capital Cases, 1973–1995*, COLUMBIA LAW SCHOOL 4–5 (2000), http://www2.law.columbia.edu/instructionalservices/liebman/liebman_final.pdf. ("Nationally, over the entire 1973–1995 period, the overall error-rate in our capital punishment system was 68%.")

[193] *Balkom*, 451 U.S. at 959 (Rehnquist, J., dissenting).

[194] *See supra* Part I.A.

[195] *In re* Medley, 134 U.S. 160, 173 (1890) (emphasis added).

In *Medley*, the issue at hand was a mere four weeks of imprisonment before execution as opposed to roughly three, which had been the standard.[196] Today, death row inmates face an average of fifteen years of imprisonment prior to the execution of their sentence.[197] This is not a problem seen anywhere else in the justice system. For every other felony conviction, an inmate may appeal while still serving the specific punishment given. When defendants are criminally fined, they may request a stay during the course of an appeal.[198] Though courts require those who were fined to put down a deposit or post a bond to guarantee that the fine will be paid in the event that the judgment is affirmed,[199] defendants do not necessarily lose total control of the money involved during the appeals process.

This is not the case with death row inmates. Though they have received the very specific sentence of death, they are also subjected to the secondary punishment of living on death row throughout the appeals process. When the time from execution was a few days or even a few weeks, this was hardly an extra punishment; one could characterize it as the time necessary for prisoner transfer, preparation for the execution, and the entire appellate process.[200] Had this remained the case, there would be no double jeopardy issue. Instead, time on death row has slowly but steadily increased over the years since *Gregg*,[201] and though it is easy to recognize the current waiting times serve as independent punishments, it is difficult to point out when they became so.

B. *Drawing a Line*

If a court accepts the double jeopardy argument, they must then establish a remedy. This section will list several options for the remedies that might be crafted to avoid a constitutional violation. Before addressing the court remedies, it is important to acknowledge that, as the modern interpretation of the prohibition against multiple punishments hinges on the will of the legislature, the easiest way to avoid this issue in the future would be for the state legislatures to rewrite their death penalty statutes. This could be done by explicitly stating a waiting period of "time in jail followed by execution" similar to Maine's "hard labor until execution" statute.[202] Though this may seem to be an almost inconsequential change to satisfy a constitutional technicality, it would have the practical effect of prohibiting the setting of execution dates before all appeals have either run out or have been waived, which at the very least avoids some of the mental anguish of having a date of execution constantly set and

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[196] *Id.* at 175 (Brewer, J., dissenting).

[197] PUNISHMENT STATISTICS, *supra* note 2, at 12.

[198] FED. R. CRIM. P. 38(c)

[199] *Id.*

[200] *See* Aarons, *supra* note 3, at 180-81.

[201] PUNISHMENT STATISTICS, *supra* note 2, at 12.

[202] *See supra* Part II.B.3.

reset.[203] This proposal would also quell the concerns of the group arguing that death row inmates are abusing the appellate system in order to lengthen their time on death row only to subsequently put forth a *Lackey* claim.[204]

For current death row inmates, however, a change in the law would not dismiss the constitutional violations already experienced. The first and most readily available judicial remedy would be to commute all death penalty sentences to life sentences and to credit the time already served on death row towards those life sentences as a procedural matter.[205] This way, there would only be one punishment for the crime committed and it would be a punishment allowed by the relevant state statute.[206] Such a solution would likely be quite unpopular among death penalty supporters, however, and would be an admittedly poor ground on which to eliminate the death penalty in the United States.

Since living on death row for extended periods of time is a punishment, some might suggest improving conditions on death row as a potential remedy. Merely moving inmates to conditions better than those on the current death rows, however, would not suffice. For the purposes of a broad constitutional challenge, the physical conditions on death row matter, but matter less than the mental conditions created by the uncertainty of the time of death.[207]

There are alternatives in a harsher direction as well, though those would likely invite new Eighth Amendment challenges. In a denial of certiorari for a *Lackey* claim in 2009, Justice Clarence Thomas outlined one such possibility: "[a]s Blackstone observed, the principle that 'punishment should follow the crime as early as possible' found expression in a 'statute,' . . . decreeing that 'in case of murder, the judge shall in his sentence direct execution to be performed on the next day . . . after [the] sentence [is] passed."[208] Justice Thomas noted

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[203] *See supra* Part I.A.

[204] *See, e.g.*, Knight v. Florida, 120 S. Ct. 459, 459 (1999) (Thomas, J., concurring in denial of certiorari) ("I am unaware of any support in the American constitutional tradition or in this Court's precedent for the proposition that a defendant can avail himself of the panoply of appellate and collateral procedures and then complain when his execution is delayed.").

[205] *See* Poulin, *supra* note 177, at 617 (explaining how precedent provides that "the Double Jeopardy Clause 'requires that credit must be given for punishment already endured.'" (quoting North Carolina v. Pearce, 395 U.S. 711, 717 (1969))).

[206] *See supra* Part II.B.

[207] *See, e.g.*, Johnson v. Bredesen, 130 S. Ct. 541, 543 (2009) (Stevens, J., dissenting from a denial of certiorari) ("[T]he delay itself subjects death row inmates to decades of especially severe, dehumanizing conditions of confinement."); Foster v. Florida, 537 U.S. 470, 471 (2002) (Breyer, J., dissenting from a denial of certiorari) (noting that "the combination of uncertainty of execution and long delay is arguably 'cruel.'"); Knight v. Florida, 120 S. Ct. 459, 462 (1999) (Breyer, J., dissenting from a denial of certiorari) ("It is difficult to deny the suffering inherent in a prolonged wait for execution.").

[208] Johnson v. Bredesen, 130 S. Ct. 541, 546 (2009) (Thomas, J., concurring in denial of certiorari) (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES 397).

that "such a system would find little support from [the] Court,"[209] as if to underscore the futility of the argument. In his dissent in *Callins v. Collins*, Justice Harry Blackmun argued forcefully that if a compromise of fundamental fairness was required to "eliminat[e] arbitrariness and discrimination from the administration of death,"[210] then there should simply be no death penalty. While Blackmun was referring to fundamental fairness in individualized sentencing, perhaps we have a similar situation today when it comes to the constitutional violation inherent in keeping death row inmates confined for decades at a time.

V. CONCLUSION

A man who wishes to live may do anything to ensure that he does, even if the action he takes is, in itself, a punishment. Justice Breyer, recalling the words of his predecessors on the Supreme Court, explained the punishment: "Justice Brennan wrote of the 'inevitable long wait' that exacts 'a frightful toll.' Justice Frankfurter noted that the 'onset of insanity while awaiting execution of a death sentence is not a rare phenomenon.' "[211] The protagonist in Rod Serling's *Escape Clause* episode of *The Twilight Zone* chose to end his life knowing that he had lost a bargain with the devil rather than endure his own "inevitable long wait" in prison. Of the 1,234 inmates who have been executed since 1977, 141, over 10 percent, have waived their appeals and "volunteered" to die.[212] The suicide rate for inmates on death row is about ten times the national suicide rate and six times the rate for all other inmates not on death row.[213] Perhaps these inmates volunteer to die or take their own lives because they cannot withstand the punishment, additional to their execution, of living in uncertainty on death row.

The Double Jeopardy Clause of the Constitution calls for a justice system in which sentences, once given, cannot be augmented in any way. The current practice of keeping inmates within the punitive confines of death row for a period of time currently averaging fifteen years violates this clause by punishing those convicted of capital crimes with additional criminal sanctions not expressly permitted by an underlying capital statute. In addition to violating the Double Jeopardy Clause, these capital statutes drastically misrepresent to the public the punishments given to those sentenced to death. The conditions giving rise to this challenge have never been seen before in the history of Ameri-

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[209] *Id.* at 546.

[210] Callins v. Collins, 510 U.S. 1141, 1144 (1994) (Blackmun, J., dissenting).

[211] *Knight*, 120 S. Ct. at 462 (Breyer, J., dissenting from a denial of certiorari) (quoting Furman v. Georgia, 408 U.S. 238, 288–89 (1972); Solesbee v. Balkom, 339 U.S. 9, 14 (1950)).

[212] *Information on Defendants who Were Executed Since 1976 and Designated as "Volunteers"*, DEATH PENALTY INFO. CENT., http://deathpenaltyinfo.org/information-defendants-who-were-executed-1976-and-designated-volunteers (last visited June 22, 2013).

[213] Skinner, *supra* note 154, at 71–72.

can capital punishment,[214] but the problems with keeping inmates on death row for years on end go beyond an analysis of whether or not such actions are cruel and unusual. Though bringing a constitutional challenge based on the multiple punishment prohibition of the Double Jeopardy Clause may be unconventional, it is worthy of an attempt.

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[214] *See supra* Part II.