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## Article

# Death Delayed Is Retribution Denied

Russell L. Christopher<sup>†</sup>

### INTRODUCTION

In many of the top death penalty states, the leading cause of death for prisoners on death row is not lethal injection. Nor is it the electric chair. It is not even any form of execution. It is death by natural and other causes.<sup>1</sup> From 1973–2011, in four of the top five states with the largest death row populations in 2011, more death row prisoners died of old age than were executed.<sup>2</sup> In California during that period, for every one prisoner executed, six died on death row of other causes.<sup>3</sup> In Pennsylvania during the same period, a death row prisoner was nine times more likely to die from other causes than by execution.<sup>4</sup> The ballooning number of prisoners spending decades on death row who will die prior to execution stems from the combined ef-

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1. See, e.g., DAVID GARLAND, *PECULIAR INSTITUTION: AMERICA'S DEATH PENALTY IN AN AGE OF ABOLITION* 11 (2010) (citing “natural causes” as the leading cause of death for convicted murderers on death row); Ernest van den Haag, *The Ultimate Punishment: A Defense*, 99 HARV. L. REV. 1662, 1662 (1986) (“[M]ost convicts sentenced to death are likely to die of old age.”); David Von Drehle, *When Harry Met Scalia: Why the Death Penalty Is Dying*, WASH. POST, Mar. 6, 1994, at C3 (“What should a man on death row fear most: electrocution, gassing or lethal injection? Try: Old age.”).

2. Aggregating the totals from California, Florida, Pennsylvania, and Alabama, 142 prisoners were executed and 206 died from other causes. See TRACY L. SNELL, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CAPITAL PUNISHMENT, 2011 – STATISTICAL TABLES, NCJ242185, 18 tbl.15, 20 tbl.17 (2013) [hereinafter DOJ STATISTICS 2011]. The other state in the top five is Texas. See *id.* at 18 tbl.15.

3. See *id.* at 20 tbl.17.

4. See *id.*

fects of the lengthy appeal and review process,<sup>5</sup> intentional delay by prisoners,<sup>6</sup> states' constitutionally defective procedures,<sup>7</sup> and states' lack of resources.<sup>8</sup> Nationwide, the average tenure on death row has risen from several weeks in the eighteenth century,<sup>9</sup> to two years in 1968,<sup>10</sup> to six years in 1984,<sup>11</sup> to ten years in 1996,<sup>12</sup> to fourteen years in 2009,<sup>13</sup> and to almost seventeen years in 2011.<sup>14</sup> Recently, one prisoner's stay on death row reached thirty-nine years.<sup>15</sup> What was once a brief period of pre-execution confinement followed by a near-certain execution has now become either "life imprisonment without the possibility of parole, but with the possibility of death,"<sup>16</sup> or a lengthy term of incarceration—upwards of thirty years or more—

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5. See, e.g., *Coleman v. Balkcom*, 451 U.S. 949, 957–58 (1981) (Rehnquist, J., dissenting from denial of certiorari) (“[T]his Court and the lower federal courts have converted the constitutional limits upon imposition of the death penalty . . . into arcane niceties which parallel the equity court practices described in Charles Dickens’ ‘Bleak House.’”).

6. See, e.g., *Turner v. Jabe*, 58 F.3d 924, 933 (4th Cir. 1995) (Luttig, J., concurring) (referring to the prisoner’s “interminable efforts of delay”).

7. E.g., *Thompson v. McNeil*, 556 U.S. 1114, 1116 (2009) (Stevens, J., respecting denial of certiorari) (“[D]elays have multiple causes, including ‘the States’ failure to apply constitutionally sufficient procedures . . . .” (quoting *Knight v. Florida*, 528 U.S. 990, 998 (1999) (Breyer, J., dissenting from denial of certiorari))).

8. See, e.g., Arthur L. Alarcón, *Remedies for California’s Death Row Deadlock*, 80 S. CAL. L. REV. 697, 700–01 n.15 (2007) (noting that a death row prisoner waited almost seventeen years for his automatic appeal to the California Supreme Court); Sara Colón, Comment, *Capital Crime: How California’s Administration of the Death Penalty Violates the Eighth Amendment*, 97 CALIF. L. REV. 1377, 1391 (2009) (noting a lack of “qualified trial counsel”).

9. E.g., STUART BANNER, *THE DEATH PENALTY: AN AMERICAN HISTORY* 17 (2002) (noting that the typical period between sentence and execution was one to several weeks in colonial America).

10. *People v. Anderson*, 493 P.2d 880, 894 n.37 (Cal. 1972) (en banc) (citing 33.3 months as the national median period of death row incarceration), *superseded by constitutional amendment*, CAL. CONST. art. 1, § 27, *as recognized in* *Strauss v. Horton*, 207 P.3d 48, 90 (Cal. 2009).

11. See DOJ STATISTICS 2011, *supra* note 2, at 14 tbl.10.

12. See *id.*

13. See *id.*

14. See *id.*

15. *Muhammad v. Florida*, No. 13-8030, 13A674, 2014 WL 37226, at \*1 (U.S. Jan. 7, 2014) (Breyer, J., dissenting from denial of certiorari). The prisoner, Thomas Knight, received his death sentence in 1975. *Knight v. Florida*, 528 U.S. 990, 994 (1999) (Breyer, J., dissenting from denial of certiorari).

16. Angela April Sun, Note, “*Killing Time*” in the Valley of the Shadow of Death: Why Systematic Preexecution Delays on Death Row Are Cruel and Unusual, 113 COLUM. L. REV. 1585, 1614 (2013).

followed by execution.<sup>17</sup> And this problem will only become worse as the length of death row tenures continues to rise.<sup>18</sup>

In principle, delay in the imposition of punishment is not ideal. Apart from the oft-uttered slogan “justice delayed is justice denied,”<sup>19</sup> delay diminishes the purposes and undermines the justifications of punishment. As the influential eighteenth-century Italian philosopher Cesare Beccaria<sup>20</sup> maintained, “[t]he more prompt the punishment is and the sooner it follows the crime, the more just and useful it will be. I say more just, because it spares the criminal the useless and cruel torments of uncertainty . . . .”<sup>21</sup> Jeremy Bentham, the founder of utilitarianism, contended that the more distant or less proximate the punishment, the lesser the deterrent effect.<sup>22</sup> And as leading con-

17. See, e.g., James S. Liebman & Peter Clarke, *Minority Practice, Majority's Burden: The Death Penalty Today*, 9 OHIO ST. J. CRIM. L. 255, 319 (2011) (“[T]he death penalty is not the punishment for murder in the United States; the penalty instead is life without the possibility of parole, but with a small chance of execution a decade later.”); Carol S. Steiker & Jordan M. Steiker, *Entrenchment and/or Destabilization? Reflections on (Another) Two Decades of Constitutional Regulation of Capital Punishment*, 30 LAW & INEQ. 211, 230–31 (2012) (“The death penalty now encompasses two separate punishments: lengthy incarceration under very severe conditions (essentially solitary confinement in many states), followed by an execution.”).

18. See, e.g., Elizabeth Rapaport, *A Modest Proposal: The Aged of Death Row Should Be Deemed Too Old To Execute*, 77 BROOK. L. REV. 1089, 1090 (2012) (“The ranks of the long serving [on death row] are steadily growing.”); Kara Sharkey, Comment, *Delay in Considering the Constitutionality of Inordinate Delay: The Death Row Phenomenon and the Eighth Amendment*, 161 U. PA. L. REV. 861, 864 (2013) (“[T]he length of time prisoners spend on death row [is] increas[ing].”).

19. 190 PARL. DEB., H.C. (3d ser.) (1868) 1771 (U.K.). The phrase appears to have been coined by Liberal Party leader and future Prime Minister William Gladstone in a speech to the House of Commons advocating measures that would relieve Ireland of the obligation to pay tithes to the Anglican Church. *Id.*

20. E.g., BANNER, *supra* note 9, at 91 (characterizing Beccaria’s volume on punishment, containing his critique of capital punishment, as “one of the most influential books of the eighteenth century”); Carol S. Steiker & Jordan M. Steiker, *Cost and Capital Punishment: A New Consideration Transforms an Old Debate*, 2010 U. CHI. LEGAL F. 117, 127 (“Beccaria’s essay shaped the general structure of the debate about the death penalty on both sides of the Atlantic in the late eighteenth and early nineteenth centuries.”).

21. CESARE BECCARIA, ON CRIMES AND PUNISHMENTS 36 (David Young, trans., Hackett Publ’g Co. 1986) (1764). Prompt punishment is more effective by reinforcing the perception that punishment is “the necessary and inevitable result” of crime. *Id.*

22. See JEREMY BENTHAM, THE COLLECTED WORKS OF JEREMY BENTHAM: AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 173 (J.H. Burns & H.L.A. Hart, eds., Oxford Univ. Press 1970) (1789) (noting “[t]he deficiency of the punishment in point of proximity”); see also *id.* at 170 (“Punish-

temporary capital punishment scholars Carol and Jordan Steiker concluded, “extending the time between sentence and execution undercuts two of the most pressing pro-death-penalty arguments: deterrence and retribution.”<sup>23</sup>

In practice, however, with respect to non-capital punishment, delay is generally accepted for two reasons. First, any delay is apt to be de minimis. Second, even if a delay is appreciable, it is remediable. Post-conviction, any detention counts toward fulfilling a sentence of imprisonment.<sup>24</sup> And pre-conviction, any detention will be credited as time served.<sup>25</sup> Because the nature of the prisoner’s experience during the delay—confinement in a holding cell—is sufficiently similar to the nature of the prescribed punishment—imprisonment—reducing the sentence of imprisonment by the length of the delay supplies a remedy.<sup>26</sup>

But neither of these reasons applies to delay in the imposition of capital punishment. First, decades-long delays are not minimal.<sup>27</sup> Second, there is no clearly acceptable remedy. Because of the different nature of death row incarceration (DRI) and capital punishment, the former cannot be subtracted from the latter.<sup>28</sup> Short of voiding the death sentence, there is no way to give credit to the prisoner for time served while awaiting execution.

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ment must be further increased in point of magnitude, in proportion as it falls short in point of proximity.” (emphasis omitted)).

23. Steiker & Steiker, *supra* note 17, at 230.

24. 18 U.S.C. § 3585(a) (2012) (“A sentence to a term of imprisonment commences on the date the defendant is received in custody awaiting transportation to, or arrives voluntarily to commence service of sentence at, the official detention facility at which the sentence is to be served.”).

25. *Id.* § 3585(b) (“A defendant shall be given credit toward the service of a term of imprisonment for any time he has spent in official detention prior to the date the sentence commences . . .”).

26. See Adam J. Kolber, *Against Proportional Punishment*, 66 VAND. L. REV. 1141, 1147 (2013) (“Federal judges, for example, are required by statute to give credit for time served, as are many state judges.” (citing § 3585(b) and numerous state statutes)).

27. *E.g.*, Valle v. Florida, 132 S. Ct. 1, 1 (2011) (Breyer, J., dissenting from denial of stay of execution) (noting petitioner’s thirty-three-year tenure on death row).

28. See 18 U.S.C. § 3585(a)–(b) (limiting credit for time served during detention to punishments involving “a term of imprisonment”).

Even capital punishment proponents agree that substantial delay between sentence and execution is objectionable.<sup>29</sup> And they even agree as to the reason—it undermines the purposes of punishment. As Chief Justice Rehnquist observed, “[t]here can be little doubt that delay in the enforcement of capital punishment frustrates the purpose of retribution.”<sup>30</sup> Referring to the delay, Ninth Circuit Chief Judge Alex Kozinski and Sean Gallagher similarly commented that “[w]hatever purposes the death penalty is said to serve—deterrence, retribution, assuaging the pain suffered by victims’ families—these purposes are not served by the system as it now operates.”<sup>31</sup>

But capital punishment proponents and opponents disagree as to the constitutionality of and remedy for such substantial delay. Their disagreement has crystallized over what has become known as the “*Lackey* claim.”<sup>32</sup> In 1995, Justice John Paul Stevens drafted a memorandum regarding the Court’s denial of certiorari in *Lackey v. Texas*.<sup>33</sup> Regarding petitioner’s argument that execution following his seventeen years of DRI would violate the Eighth Amendment’s prohibition against “cruel and unusual punishment,” Justice Stevens commented

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29. *Sullivan v. Wainwright*, 464 U.S. 109, 112 (1983) (per curiam) (Burger, C.J., concurring) (“The argument . . . that capital punishment is cruel and unusual is dwarfed by the cruelty of 10 years on death row . . .”).

30. *Coleman v. Balkcom*, 451 U.S. 949, 960 (1981) (Rehnquist, J., dissenting from denial of certiorari).

31. Alex Kozinski & Sean Gallagher, *Death: The Ultimate Run-On Sentence*, 46 CASE W. RES. L. REV. 1, 4 (1995).

32. *E.g.*, Bryan A. Stevenson, *The Politics of Fear and Death: Successive Problems in Capital Federal Habeas Corpus Cases*, 77 N.Y.U. L. REV. 699, 762 (2002) (“[T]he claim of inordinate delay of execution [is] commonly known as a ‘*Lackey* claim’ . . .”). Brent Newton, counsel for the death-row prisoner Clarence Lackey and architect of the “*Lackey* claim,” explains the claim as follows:

Lackey’s Eighth Amendment claim had two discrete components, both of which contended that his execution would be a “disproportionate” punishment and, thus, cruel and unusual: first, that the state’s carrying out the execution after keeping Lackey under the extreme conditions of death row for such a lengthy period of time would exact more punishment than the state was entitled to under the Eighth Amendment; and second, that neither of the state’s primary interests in capital punishment—retribution and deterrence—would be meaningfully served in Lackey’s case after such a lengthy delay, particularly because it was primarily attributable to the state and not to Lackey.

Brent E. Newton, *The Slow Wheels of Furman’s Machinery of Death*, 13 J. APP. PRAC. & PROCESS 41, 54–55 (2012).

33. 514 U.S. 1045 (1995) (Stevens, J., respecting denial of certiorari).

that Lackey's claim, "[t]hough novel . . . is not without foundation."<sup>34</sup>

In several subsequent *Lackey* claim petitions, Justice Stevens expressed support for the prisoners' claims, Justice Steven Breyer dissented from the denials of certiorari, and Justice Clarence Thomas concurred in the denials of certiorari.<sup>35</sup> These dueling memoranda among the three Justices, spanning nearly twenty years, comprise a lively debate. Justices Breyer and Stevens argue that such delay may be unconstitutional on either of two principal grounds. First, it is cruel and unusual punishment.<sup>36</sup> Second, it frustrates the purposes of punishment.<sup>37</sup> The remedy is barring execution after such delays.<sup>38</sup> Justice Thomas finds the delay constitutional because it is due to efforts to ensure that the prisoner receives due process<sup>39</sup> and prisoners' exploitation of these procedural requirements to manufacture delay.<sup>40</sup> Because delay extends the life of the prisoner, the prisoner naturally opts for and benefits from the delay.<sup>41</sup> Otherwise, a prisoner is free to craft his own remedy by simply "submitting to . . . execution."<sup>42</sup>

In addition to the ultimate merit of *Lackey* claims, the Justices disagree as to their seriousness. Justices Breyer and Stevens find *Lackey* claims "important"<sup>43</sup> and worthy of the full

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34. *Id.* at 1045.

35. *See infra* notes 163–67 and accompanying text.

36. *E.g.*, *Valle v. Florida*, 132 S. Ct. 1, 1 (2011) (Breyer, J., dissenting from denial of stay) ("I have little doubt about the cruelty of [thirty-three years] of incarceration under sentence of death . . . . So long a confinement followed by execution would also seem unusual.")

37. *E.g.*, *Johnson v. Bredesen*, 558 U.S. 1067, 1069 (2009) (Stevens, J., joined by Breyer, J., respecting denial of certiorari) ("[T]he penological justifications for the death penalty diminish as the delay lengthens.")

38. *E.g.*, *id.* ("[A] successful *Lackey* claim would have the effect of rendering invalid a particular death sentence . . . .")

39. *See, e.g.*, *Knight v. Florida*, 528 U.S. 990, 991 (1999) (Thomas, J., concurring in denial of certiorari) ("[T]he delay in carrying out the prisoner's execution stems from this Court's Byzantine death penalty jurisprudence.")

40. *See, e.g.*, *Thompson v. McNeil*, 556 U.S. 1114, 1117 (2009) (Thomas, J., concurring in denial of certiorari) (referring to a prisoner's "litigation strategy, which delays his execution")

41. *See, e.g.*, *id.* (emphasizing that "petitioner chose to challenge his death sentence")

42. *E.g.*, *Foster v. Florida*, 537 U.S. 990, 991 (2002) (Thomas, J., concurring in denial of certiorari) ("Petitioner could long ago have ended [the delay] . . . by submitting to what the people of Florida have deemed him to deserve: execution.")

43. *Lackey v. Texas*, 514 U.S. 1045, 1047 (1995) (Stevens, J., respecting denial of certiorari).

Supreme Court's attention.<sup>44</sup> Moreover, as Justice Breyer maintains, "[w]here a delay, measured in decades, reflects the State's own failure to comply with the Constitution's demands, the claim that time has rendered the execution inhuman is a particularly strong one."<sup>45</sup> In contrast, Justice Thomas derides Justice Breyer's arguments as "musings"<sup>46</sup> and dismisses *Lackey* claims as "mak[ing] 'a mockery of our system of justice.'"<sup>47</sup>

Attempting to break this impasse, this Article undertakes the first comprehensive assessment of *Lackey* claims under retributivism.<sup>48</sup> With empirical studies either inconclusive,<sup>49</sup> or affirmatively establishing that capital punishment fails to deter crime beyond noncapital forms of punishment,<sup>50</sup> or even establishing that capital punishment increases crime,<sup>51</sup> the Su-

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44. See, e.g., *Johnson v. Bredeisen*, 558 U.S. 1067, 1070 (2009) (Stevens, J., joined by Breyer, J., respecting denial of certiorari) ("Most regrettably, a majority of this Court continues to find these issues not of sufficient weight to merit our attention.").

45. *Knight v. Florida*, 528 U.S. 990, 993 (1999) (Breyer, J., dissenting from denial of certiorari).

46. *Foster*, 537 U.S. at 991 (Thomas, J., concurring in denial of certiorari).

47. *Thompson v. McNeil*, 556 U.S. 1114, 1117 (2009) (Thomas, J., concurring in denial of certiorari) (quoting *Turner v. Jabe*, 58 F.3d 924, 933 (4th Cir. 1995)).

48. For a succinct explanation of retributivism, see John Rawls, *Two Concepts of Rules*, 64 PHIL. REV. 3, 4–5 (1955) ("[T]he retributive view is that punishment is justified on the grounds that wrongdoing merits punishment. It is morally fitting that a person who does wrong should suffer in proportion to his wrongdoing."). For further explication of retributivism, see *infra* Part I.B.

49. Compare Cass R. Sunstein & Adrian Vermeule, *Is Capital Punishment Morally Required? Acts, Omissions, and Life-Life Tradeoffs*, 58 STAN. L. REV. 703, 711–13 (2005) (citing studies suggesting a strong deterrent effect from capital punishment), with John J. Donohue & Justin Wolfers, *Uses and Abuses of Empirical Evidence in the Death Penalty Debate*, 58 STAN. L. REV. 791, 794 (2005) (criticizing those same studies as unreliable because of the low incidence of executions relative to the dramatically higher incidence of murder), and Jeffrey Fagan, *Death and Deterrence Redux: Science, Law and Causal Reasoning on Capital Punishment*, 4 OHIO ST. J. CRIM. L. 255, 269–89 (2006) (criticizing studies purporting to establish capital punishment's deterrent effect).

50. See, e.g., William C. Bailey & Ruth D. Peterson, *Murder, Capital Punishment, and Deterrence: A Review of the Literature*, in *THE DEATH PENALTY IN AMERICA* 135, 155 (Hugo Adam Bedau ed., 1997) ("The available evidence [including a review of sixty articles] remains 'clear and abundant' that, as practiced in the United States, capital punishment is not more effective than imprisonment in deterring murder.").

51. See, e.g., Joanna M. Shepherd, *Deterrence Versus Brutalization: Capital Punishment's Differing Impacts Among States*, 104 MICH. L. REV. 203, 240 (2005) (noting studies suggesting capital punishment increases the murder rate through a "brutalization effect").

preme Court enshrines retributivism as the “primary justification for the death penalty.”<sup>52</sup> Despite retributivism’s central role in justifying capital punishment per se, neither case law nor scholarly commentary includes a thorough analysis of the justifiability of the combination of substantial DRI plus capital punishment (the Combination) under retributivism. Capital punishment opponents largely assert, without demonstrating, that the Combination fails to further retributivism. And they largely assume, without questioning, that DRI constitutes criminal punishment (rather than a civil sanction). Because its legal status is unclear, this Article presents and supports five different possible conceptions of DRI. Applying retributivism to each of these conceptions, this Article demonstrates that substantially delayed capital punishment violates retributivism.

In order to find common ground, this Article’s argument adopts many of the premises and contentions of capital punishment proponents. First, the argument assesses the Combination under the theory of punishment—retributivism—that proponents find most persuasive and ignores a deterrence-based punishment theory that is more favorable to capital punishment opponents.<sup>53</sup> Second, it concedes retributivism’s justification of capital punishment per se. Third, the argument does not make the legally unsubstantiated assumption that DRI is necessarily “punishment.” And finally, it concedes the possibility that DRI may even be a benefit to the prisoner; by delaying death, the prisoner’s life is extended. As such, DRI may be a mitigation of the capital punishment.

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52. *Spaziano v. Florida*, 468 U.S. 447, 461 (1984); *accord Baze v. Rees*, 553 U.S. 35, 79–80 (2008) (Stevens, J., concurring) (“[R]etribution [is] the primary rationale for imposing the death penalty.”); *Ring v. Arizona*, 536 U.S. 584, 614 (2002) (Breyer, J., concurring) (“[R]etribution provides the main justification for capital punishment . . . .”); *Harris v. Alabama*, 513 U.S. 504, 518 (1995) (Stevens, J., dissenting) (“[T]he interest that we have identified as the principal justification for the death penalty is retribution . . . .”).

53. See Rapaport, *supra* note 18, at 1121 (“[Regarding *Lackey* claims], retribution is to the fore and deterrence recedes in that the plausibility of additional deterrent value in execution after decades of incarceration . . . is difficult to defend. The Court’s *Lackey* debates therefore turn on whether decades-plus-death is excessive retribution offensive to the Eighth Amendment.”). Rapaport observes that “Justice Thomas apparently concedes as much in noting that Justice Breyer’s criticism of execution after long delay for lack of additional deterrent effect would be remedied by reverting to something like our earlier and sprightlier system [when delays between sentencing and execution were only a matter of weeks and months.]” *Id.* at 1121 n.160 (citing *Knigh v. Florida*, 528 U.S. 990, 990 n.1 (1999)).

From the very premise that retributivism justifies capital punishment per se, this Article demonstrates that the Combination is unjustified under retributivism. And it is unjustified regardless of whether DRI constitutes additional punishment aggravating capital punishment or a life-extending, beneficial mitigation of capital punishment. And by being unjustified under retributivism, the Combination loses the primary support for its constitutionality.

This Article unfolds in the following parts. After Part I provides a brief introduction to the constitutionality of capital punishment, the principles of retributivism, and retributivism's application to capital punishment, Part II provides an overview of the issue of substantial DRI. It first sketches a history of the issue prior to *Lackey*. Next, Part II summarizes the debate over the *Lackey* claim. It presents eight principal arguments as to the unconstitutionality of the Combination and ten principal arguments supporting its constitutionality.

Part III demonstrates how the Combination violates retributivism. Because the status of substantial DRI is unclear, it presents five possible approaches: (i) additional punishment, (ii) a lessening or mitigation of the capital punishment, (iii) either additional punishment or a mitigation, (iv) both additional punishment and a mitigation, and (v) legally and retributively nothing. Despite accepting as a premise that retributivism justifies capital punishment per se, this Part demonstrates that under each of the first four approaches, the Combination is undeserved, disproportional, and unjustified under retributivism. Only under the fifth approach—that upwards of thirty years or more of DRI is legally and retributively nothing—is the Combination possibly justified. But this approach yields an absurdity. When death row incarceration culminates in death by old age or nonexecution causes, blameworthy perpetrators of heinous murders would receive no punishment whatsoever (by construing DRI as nothing) despite being in state custody upwards of thirty years or more after sentencing. To avoid this absurdity, substantial DRI must constitute additional punishment. But this only brings us back full circle. As additional punishment, the Combination is unjustified. The resulting dilemma is that either substantial DRI culminating in death by execution is unjustified under retributivism or such incarceration culminating in death by old age entails the absurdity of blameworthy, convicted capital offenders receiving no punishment. After considering several

possible resolutions to the dilemma, this Part argues that converting death sentences to life imprisonment sentences is the preferable resolution. Finally, this Part anticipates and rebuts three possible objections. With retributivism enthroned as the primary justification for the constitutionality of capital punishment, and the Combination violating retributivism, this Article concludes that the Combination may be unconstitutional.

## I. RETRIBUTIVISM AND CAPITAL PUNISHMENT

Before applying retributivism to the Combination, some background on capital punishment and retributivism may be helpful. This Part supplies a brief introduction to the constitutionality of capital punishment, the principles of retributivism, and retributivism's specific application to capital punishment.

### A. CONSTITUTIONALITY OF CAPITAL PUNISHMENT

The modern era of death penalty jurisprudence in the United States perhaps begins with the Supreme Court's invalidation of capital punishment in 1972, in *Furman v. Georgia*.<sup>54</sup> The disparate opinions of the justices in the majority coalesced into two common themes. First, the imposition of the defendants' death penalties was arbitrary and capricious.<sup>55</sup> Second, the challenged death penalties failed to further the goals and purposes of acceptable theories of punishment—retribution and deterrence. As Justice Brennan explained, “[i]f there is a significantly less severe punishment adequate to achieve the purposes for which the punishment is inflicted . . . the punishment inflicted is unnecessary and therefore excessive.”<sup>56</sup> And as Justice White declared, capital punishment that fails to further the purposes of deterrence and retribution “would then be the pointless and needless extinction of human life with only marginal contributions to any discernible social or public purposes. A penalty with such negligible returns to the State would be patently excessive and cruel and unusual punishment violative of the Eighth Amendment.”<sup>57</sup>

In the next landmark case, *Gregg v. Georgia*, the Court upheld capital punishment as per se constitutional, and a plurality enunciated a two-part framework for assessing capital pun-

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54. See generally 408 U.S. 238 (1972).

55. See *id.* at 256–57 (Douglas, J., concurring), 309–10 (Stewart, J., concurring).

56. *Id.* at 279 (Brennan, J., concurring).

57. *Id.* at 312 (White, J., concurring).

ishment's constitutionality.<sup>58</sup> First, capital punishment must be found not only historically acceptable at the time of the Eighth Amendment's adoption in 1791, but also acceptable under "the evolving standards of decency that mark the progress of a maturing society"—acceptable to contemporary society.<sup>59</sup> Citing the literal text of the Constitution<sup>60</sup> and the prevalence of capital punishment in every state at the time of ratification of the Eighth Amendment,<sup>61</sup> the Court found it historically acceptable. Referencing the thirty-five state legislatures' reenacting death penalty statutes<sup>62</sup> and the numerous jury decisions imposing death in the wake of *Furman*,<sup>63</sup> the Court found it presently acceptable.

Second, capital punishment must also satisfy human dignity.<sup>64</sup> In addition to torture and other "barbarous" modes of execution<sup>65</sup> that are "cruelly inhumane,"<sup>66</sup> the principle of human dignity bars excessive punishments.<sup>67</sup> One type of excessive punishment is an unnecessary punishment.<sup>68</sup> Punishment failing to further acceptable goals of punishment—retribution and deterrence—is unnecessary.<sup>69</sup> Such punishment constitutes "the gratuitous infliction of suffering"<sup>70</sup> and "the unnecessary and wanton infliction of pain."<sup>71</sup> Although skeptical of the deterrent

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58. See 428 U.S. 153, 169–87 (1976).

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

60. See *id.* at 177 ("It is apparent from the text of the Constitution itself that the existence of capital punishment was accepted by the Framers."). The Court noted that the Fifth and Fourteenth Amendments "contemplated" capital punishment by imposing restrictions on its imposition. *Id.*

61. See *id.* ("At the time the Eighth Amendment was ratified, capital punishment was a common sanction in every State.").

62. See *id.* at 179–80.

63. *Id.* at 182 ("At the close of 1974 at least 254 persons had been sentenced to death since *Furman*.").

64. See *id.* at 173 (explaining that capital punishment "must accord with 'the dignity of man,' which is the 'basic concept underlying the Eighth Amendment'" (quoting *Trop*, 356 U.S. at 100)).

65. *Id.* at 170–71 (internal quotation marks omitted).

66. *Id.* at 175.

67. *Id.* at 173 (stating that punishment consistent with human dignity "means, at least, that the punishment not be 'excessive'").

68. See *id.*

69. See *id.* at 183.

70. *Id.*

71. *Id.* at 173; accord *Atkins v. Virginia*, 536 U.S. 304, 319 (2002) (stating that such punishment would be "nothing more than the purposeless and needless imposition of pain and suffering" and [thus] unconstitutional" (quoting *Enmund v. Florida*, 458 U.S. 782, 798 (1982)) (internal quotation marks omitted)).

value,<sup>72</sup> the Court deferred to the findings of state legislatures that capital punishment promoted deterrence.<sup>73</sup> More confident of capital punishment's furtherance of retribution, the Court found that giving the capital offender what he deserved served to express and channel "society's moral outrage" at the crime and forestall vigilantism.<sup>74</sup> Another type of excessive punishment is disproportional punishment.<sup>75</sup> Unable to declare "[capital] punishment is invariably disproportionate to the crime [of murder]," the Court held that capital punishment is not per se unconstitutional because it is neither unacceptable under evolving standards of decency nor violative of human dignity.<sup>76</sup>

Although *Gregg* held that "the death penalty is not invariably unconstitutional . . . the Court insists upon confining the instances in which the punishment can be imposed" to a very limited class of offenders and offenses.<sup>77</sup> Since *Gregg*, most constitutional challenges to capital punishment center on claims of disproportionality.<sup>78</sup> Stating that the Eighth Amendment bars excessive as well as cruel and unusual punishments,<sup>79</sup> the Court explained that this protection "flows from the basic 'precept of justice that punishment for [a] crime should be graduat-

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72. See *Gregg*, 428 U.S. at 185 (noting that statistical studies as to the deterrent value of capital punishment over that of life imprisonment "simply have been inconclusive").

73. See *id.* at 186 ("The value of capital punishment as a deterrent of crime is a complex factual issue the resolution of which properly rests with the legislatures.").

74. *Id.* at 183–84.

75. See *id.* at 173 (assessing proportionality between the punishment and "the severity of the crime"); *id.* at 187 (assessing proportionality of capital punishment "in relation to the crime for which it is imposed").

76. *Id.* at 187. Interestingly, as of 2008, there are now five *Gregg* Justices—Brennan, Marshall, Blackmun, Powell, and Stevens—who have declared that capital punishment violates the Eighth Amendment. See Elisabeth Semel, *Reflections on Justice John Paul Stevens's Concurring Opinion in Baze v. Rees: A Fifth Gregg Justice Renounces Capital Punishment*, 43 U.C. DAVIS L. REV. 783, 791 (2010).

77. *Kennedy v. Louisiana*, 554 U.S. 407, 420 (2008) (citation omitted).

78. See LINDA E. CARTER ET AL., UNDERSTANDING CAPITAL PUNISHMENT LAW 32 (3d ed. 2012).

79. The Court's distinction between excessive versus cruel and unusual punishments is susceptible to confusion. According to the Court, all excessive punishments necessarily violate the cruel and unusual punishments clause of the Eighth Amendment and are thus unconstitutional. But not all cruel and unusual punishments are excessive punishments. See *Kennedy*, 554 U.S. at 419 ("The [Eighth] Amendment proscribes 'all excessive punishments, as well as cruel and unusual punishments that may or may not be excessive.'" (quoting *Atkins v. Virginia*, 536 U.S. 304, 311 n.7 (2002))).

ed and proportioned to [the] offense.”<sup>80</sup> Determining the satisfaction of this “proportionality precept,” or “[p]roportionality review,”<sup>81</sup> requires assessment of capital punishment under “[e]volving standards of decency [that] must . . . express respect for the dignity of the person.”<sup>82</sup> Decency entails “restraint and moderation in use of capital punishment;”<sup>83</sup> “use of the death penalty [must] be restrained . . . and limited in its instances of application.”<sup>84</sup> Informing that proportionality review is both an objective and subjective analysis.<sup>85</sup> First, the Court considers “objective indicia of society’s standards,”<sup>86</sup> primarily state statutes and jury sentencing decisions.<sup>87</sup> Second, in the comparatively more subjective portion of the analysis, the Court applies its own independent evaluation and understanding of the Eighth Amendment to determine “[w]hether the death penalty is disproportionate to the crime committed”<sup>88</sup> or for a class of offender.<sup>89</sup> Capital punishment is unconstitutionally disproportionate or excessive if it either (i) is disproportionate to the crime committed or (ii) fails to promote the legitimate goals and purposes of punishment—retribution and deterrence.<sup>90</sup> As to the second ground, capital punishment must promote the penological goals to a degree that is “significant” or “measura-

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80. *Kennedy*, 554 U.S. at 419 (quoting *Weems v. United States*, 217 U.S. 349, 367 (1910)). For similar language see *Roper v. Simmons*, 543 U.S. 551, 560 (2005); *Atkins*, 536 U.S. at 311.

81. *Atkins*, 536 U.S. at 311–12.

82. *Kennedy*, 554 U.S. at 420.

83. *Id.* at 436.

84. *Id.* at 446–47.

85. See *Coker v. Georgia*, 433 U.S. 584, 613 (1977) (Burger, C.J., dissenting) (dividing the Court’s analysis into its “objective” and “subjective” components).

86. *Kennedy*, 554 U.S. at 421 (quoting *Roper v. Simmons*, 543 U.S. 551, 563 (2005)).

87. See, e.g., *Atkins v. Virginia*, 536 U.S. 304, 316 (2002) (noting both that sixteen states had recently passed legislation prohibiting capital punishment for the mentally retarded and that there were few such executions in states still allowing it, the Court concluded that a “national consensus” had emerged and held executions of such persons to be unconstitutional).

88. *Kennedy*, 554 U.S. at 421.

89. See *Roper*, 543 U.S. at 564 (“We then must determine, in the exercise of our own independent judgment, whether the death penalty is a disproportionate punishment for juveniles.”).

90. See, e.g., *Kennedy*, 554 U.S. at 441; *Roper*, 543 U.S. at 571–72; *Atkins*, 536 U.S. at 318–21.

ble.”<sup>91</sup> But “[a] punishment might fail the test on either ground.”<sup>92</sup>

In some cases the Court ruled capital punishment unconstitutional by primarily relying on the first ground of disproportionality. In 1977, in *Coker v. Georgia*, the Court held that capital punishment was unconstitutionally disproportional for the crime of rape without analyzing whether it furthered goals of punishment.<sup>93</sup> And, in 2008, the Court in *Kennedy v. Louisiana* held that capital punishment for the crime of rape of a child is unconstitutionally disproportional despite being unable to rule out that it serves penological goals.<sup>94</sup>

In other cases, the Court relied on the second ground of failure to further penological goals. For example, in 2002, the Court in *Atkins v. Georgia* found capital punishment of the mentally retarded to be unconstitutionally disproportionate based on the two prongs of a national and international consensus opposing it, and its failure to further accepted penological goals.<sup>95</sup> Conceptualizing retribution as “the interest in seeing that the offender gets his ‘just deserts,’” the Court reasoned that capital punishment was undeserved given the lesser culpability of the mentally retarded.<sup>96</sup> Similarly, in *Roper v. Simmons*, in 2005, the Court ruled that execution of juvenile offenders was unconstitutional as disproportionate based on the same two prongs.<sup>97</sup> Finding that execution of juveniles failed to

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91. *Roper*, 543 U.S. at 571; accord *Atkins*, 536 U.S. at 313 (using the standard of “measurably contribut[ing] to the retributive end” of punishment (quoting *Enmund v. Florida*, 458 U.S. 782, 801 (1982))); *Coker v. Georgia*, 433 U.S. 584, 593 n.4 (1977) (referring to a standard of “measurably serv[ing] the legitimate ends of punishment”).

92. *Kennedy*, 554 U.S. at 441 (quoting *Coker*, 433 U.S. at 593 n.4). To clarify, a punishment may fail the test on either ground because a punishment may be unconstitutionally disproportional even if it furthers legitimate goals of punishment. See *Coker*, 433 U.S. at 592–93 n.4 (“Because the death sentence is a disproportionate punishment for rape, it is cruel and unusual punishment within the meaning of the Eighth Amendment even though it may measurably serve the legitimate ends of punishment.”).

93. See 433 U.S. at 592. The Court explained that “[b]ecause the death sentence is a disproportionate punishment for rape, it is cruel and unusual punishment within the meaning of the Eighth Amendment even though it may measurably serve the legitimate ends of punishment.” *Id.* at 592–93 n.4.

94. See 554 U.S. at 446. The Court conceded that “[a]s in *Coker*, here it cannot be said with any certainty that the death penalty for child rape serves no deterrent or retributive function.” *Id.* at 441.

95. See 536 U.S. at 321.

96. *Id.* at 319.

97. See 543 U.S. 551, 575 (2005).

further retributivism, the Court characterized the retributivist goal as either “an attempt to express the community’s moral outrage or as an attempt to right the balance for the wrong to the victim.”<sup>98</sup>

#### B. RETRIBUTIVISM

Whereas consequentialism justifies punishment by the good consequences generated by punishment—deterrence, rehabilitation, incapacitation—the good consequences of punishment are irrelevant to retributivism’s justification of punishment.<sup>99</sup> Under retributivism, an offender’s desert is the necessary and sufficient condition for justified punishment: (i) only those who deserve punishment may be punished; (ii) all those who deserve punishment must be punished; and (iii) those who deserve punishment must be punished neither less than nor more than what they deserve.<sup>100</sup> Because the justifiability of the Combination implicates only the second and third principles, these will be our focus.

Retributivism imposes a duty to punish all culpable wrongdoers.<sup>101</sup> As Immanuel Kant, perhaps the father of retributivism,<sup>102</sup> famously declared, “[t]he principle of punishment is a categorical imperative.”<sup>103</sup> While some contemporary retributivist accounts view punishment of offenders as merely permis-

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98. *Id.* at 571.

99. *See, e.g.*, Gertrude Ezorsky, *The Ethics of Punishment*, in *PHILOSOPHICAL PERSPECTIVES ON PUNISHMENT* xi, xi (Gertrude Ezorsky ed., 1972) (explaining that unlike under a consequentialist or utilitarian view, retributivism’s justification of punishment is “irrespective of any further good consequence, e.g., crime prevention”).

100. *See, e.g.*, MICHAEL MOORE, *PLACING BLAME* 91 (1997) (“Retributivism . . . justify[s] . . . punish[ment] because and only because offenders deserve it. Moral responsibility (‘desert’) in such a view is not only necessary for justified punishment, it is also sufficient. . . . [T]he moral responsibility of an offender also gives society the *duty* to punish.”); Stephen P. Garvey, *Is It Wrong To Commute Death Row? Retribution, Atonement, and Mercy*, 82 N.C. L. REV. 1319, 1324 (2004) (noting that retributivism “obligates the state to punish an offender because and to the extent, but only to the extent, he deserves to be punished”).

101. *E.g.*, IGOR PRIMORATZ, *JUSTIFYING LEGAL PUNISHMENT* 12 (1989) (identifying “[t]he moral duty to punish” as one of retributivism’s central principles).

102. *See, e.g.*, George P. Fletcher, *Law and Morality: A Kantian Perspective*, 87 COLUM. L. REV. 533, 533–34 (1987).

103. IMMANUEL KANT, *THE METAPHYSICS OF MORALS* 141 (Mary Gregor ed. & trans., Cambridge Univ. Press 1991) (1797).

sible,<sup>104</sup> the “dominant”<sup>105</sup> and “standard retributive view”<sup>106</sup> finds punishment of wrongdoers to be obligatory. As Michael Moore, the leading modern retributivist,<sup>107</sup> stated, “the retributivist regards the punishment of the guilty to be categorically imperative.”<sup>108</sup>

The formula for determining the amount or degree of an offender’s deserved punishment has evolved over time. Echoing the biblical *lex talionis* of “eye for eye, tooth for tooth,”<sup>109</sup> Kant propounded the “principle of retribution, of like for like”:<sup>110</sup>

[W]hatever undeserved evil you inflict upon another . . . you inflict upon yourself. If you insult him, you insult yourself; if you steal from him, you steal from yourself; if you strike him, you strike yourself; if you kill him, you kill yourself. But only the *law of retribution (ius talionis)* . . . can specify definitely the quality and the quantity of punishment.<sup>111</sup>

Under this “principle of equality,”<sup>112</sup> the deserved punishment for a crime is whatever the criminal did to his victim.<sup>113</sup> Punishment takes the form of the crime reciprocated back onto the criminal. Retributive punishment is “the crime turned round against itself.”<sup>114</sup> For example, a murderer must be executed, a thief dispossessed of his belongings, etc. Rather than the specific equality espoused by Kant, G.W.F. Hegel, one of the two

104. See, e.g., H. J. McCloskey, *A Non-Utilitarian Approach to Punishment*, 8 INQUIRY 249 (1965), reprinted in PHILOSOPHICAL PERSPECTIVES ON PUNISHMENT, *supra* note 99, at 119, 132.

105. PRIMORATZ, *supra* note 101, at 110. Though the “duty to punish” may be sensitive to “facts calling for mercy,” it is still “paramount.” *Id.*

106. Louis Kaplow & Steven Shavell, *Fairness Versus Welfare*, 114 HARV. L. REV. 961, 1229 n.660 (2001).

107. See Douglas N. Husak, *Retribution in Criminal Theory*, 37 SAN DIEGO L. REV. 959, 960 (2000) (“No contemporary criminal theorist rivals Moore in his unqualified enthusiasm for retribution.”); Mary Sigler, *Contradiction, Coherence, and Guided Discretion in the Supreme Court’s Capital Sentencing Jurisprudence*, 40 AM. CRIM. L. REV. 1151, 1185 (2003) (“Moore has offered one of the most sustained and thorough explications of retributivism.”).

108. MOORE, *supra* note 100, at 156.

109. *Exodus* 21:23–25 (“Wherever hurt is done, you shall give life for life, eye for eye, tooth for tooth, hand for hand, foot for foot, burn for burn, bruise for bruise, wound for wound.”).

110. KANT, *supra* note 103, at 141.

111. *Id.*

112. *Id.*

113. G.W.F. HEGEL, *ELEMENTS OF THE PHILOSOPHY OF RIGHT* § 101 at 127 (Allen W. Wood ed., H. B. Nisbet trans., Cambridge Univ. Press 1991) (1821) (explaining that by punishment, “what the criminal has done should also happen to him”).

114. *Id.* at 129.

leading traditional retributivists along with Kant,<sup>115</sup> argued that the crime and punishment must merely be generally equal.<sup>116</sup> From this general equality, the modern view evolved that the amount or degree of deserved punishment must correspond with,<sup>117</sup> “fit,”<sup>118</sup> or be proportional to the degree of gravity of the crime and the blameworthiness of the offender.<sup>119</sup> As H.L.A. Hart explained, “modern retributive theory is concerned with proportionality.”<sup>120</sup> Antony Duff noted that the principle of proportionality is “intrinsic to any version of retributivism.”<sup>121</sup> As the Supreme Court put it, “[p]roportionality is inherently a retributive concept.”<sup>122</sup> And “[t]he concept of proportionality is central to the Eighth Amendment . . . [and encompasses] the ‘precept of justice that punishment for crime should be graduated and proportioned to [the] offense.’”<sup>123</sup>

115. *E.g.*, PRIMORATZ, *supra* note 101, at 13 (“The most important and influential among classical retributivists are Kant and Hegel.”).

116. Hegel required that a punishment be comparable in character or value to the crime:

[E]quality remains merely the basic measure of the criminal’s *essential* deserts, but not of the specific external shape which the retribution should take. It is only in terms of this specific shape that theft and robbery [on the one hand] and fines and imprisonment etc. [on the other] are completely unequal, whereas in terms of their value, i.e. their universal character as injuries . . . they are comparable.

HEGEL, *supra* note 113, § 101 at 129.

117. *See, e.g.*, *Tison v. Arizona*, 481 U.S. 137, 149 (1987) (“The heart of the retribution rationale is that a criminal sentence must be directly related to the personal culpability of the offender.”).

118. Stanley I. Benn, *Punishment*, in 7 THE ENCYCLOPEDIA OF PHILOSOPHY 29, 32 (Paul Edwards ed., 1972); *accord* Joel Feinberg, *Punishment*, in PHILOSOPHY OF LAW 514, 516 (Joel Feinberg & Hyman Gross eds., 2d ed. 1980) (“The proper amount of punishment to be inflicted upon the morally guilty offender is that amount which fits, matches or is proportionate to the moral gravity of the offense.”).

119. *E.g.*, PRIMORATZ, *supra* note 101, at 12 (“Punishment ought to be *proportionate* to the offense (the *lex talionis*.”); Kent Greenawalt, *Punishment*, 74 J. CRIM. L. & CRIMINOLOGY 343, 347–48 (1983) (“[T]he severity of punishment should be proportional to the degree of wrongdoing . . . .”); Rawls, *supra* note 48, at 4–5 (explaining that an offender should be punished “in proportion to his wrongdoing”).

120. H. L. A. HART, PUNISHMENT AND RESPONSIBILITY 234 (1968).

121. R. A. DUFF, PUNISHMENT, COMMUNICATION, AND COMMUNITY 132 (2001).

122. *Harmelin v. Michigan*, 501 U.S. 957, 989 (1991); *accord* *Ewing v. California*, 538 U.S. 11, 31 (2003) (Scalia, J., concurring) (“Proportionality—the notion that the punishment should fit the crime—is inherently a concept tied to the penological goal of retribution.”).

123. *Graham v. Florida*, 130 S. Ct. 2011, 2021 (2010) (quoting *Weems v. United States*, 217 U.S. 349, 367 (1910)).

Disproportional punishment may be either too much or too little.<sup>124</sup> Referring to punishments that are “either too much, or too little,” Igor Primoratz concluded that they are “in both cases disproportionate, and thus unjust and wrong, from the standpoint of retributive theory.”<sup>125</sup> Norval Morris and Michael Tonry noted that “[a] thoroughgoing retributivist would claim that the punishment to be imposed on an offender should be exactly ‘as much as he deserves, no more, no less.’”<sup>126</sup> Richard Frase stated that under a retributivist just desert theory, “all offenders should receive their particular deserts—no more and no less.”<sup>127</sup> Jean Hampton explained that too little punishment may be even worse than too much: “From a retributive point of view, punishments that are too lenient are as bad as (and sometimes worse than) punishments that are too severe.”<sup>128</sup> As a result, punishments that are either too severe or too lenient are disproportionate, undeserved, and unjustified under retributivism.<sup>129</sup>

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124. See, e.g., HEGEL, *supra* note 113, § 214 at 245 (“[A]n injustice is done if there is even one lash too many, or one dollar or groschen, one week or one day in prison too many or too few.”).

125. PRIMORATZ, *supra* note 101, at 162.

126. NORVAL MORRIS & MICHAEL TONRY, *BETWEEN PRISON AND PROBATION* 84 (1990).

127. Richard S. Frase, *Punishment Purposes*, 58 STAN. L. REV. 67, 76 (2005).

128. Jean Hampton, *Correcting Harms Versus Righting Wrongs: The Goal of Retribution*, 39 UCLA L. REV. 1659, 1691 (1991). Dan Markel explains the wrong of disproportional leniency: “If the state . . . fail[s] to mete out punishment that is commensurate with the severity of the crime, [it] lends plausibility to the offender’s claim of superiority over society and his victim. Punishing insufficiently . . . aid[s] the offender’s claim of superiority . . . .” Dan Markel, *State, Be Not Proud: A Retributivist Defense of the Commutation of Death Row and the Abolition of the Death Penalty*, 40 HARV. C.R.-C.L. L. REV. 407, 446 (2005).

129. Under one variant of retributivism, punishments equal to or less than what is deserved and proportional are permissible. Various called “negative retributivism,” J. L. Mackie, *Morality and the Retributive Emotions*, 1 CRIM. JUST. ETHICS 3, 4 (1982), or “weakened versions” of retributivism, HART, *supra* note 120, at 233, the only limitation imposed on the amount of punishment is a ceiling but not a floor. For example, if an offender deserves ten years’ imprisonment, any punishment equal to or less than ten years’ imprisonment satisfies negative retributivism. Even zero punishment satisfies negative retributivism. For this reason, negative retributivism is not considered a justification of punishment—it fails to provide an affirmative reason to punish any offender with any punishment. E.g., R. A. Duff, *Penal Communications: Recent Work in the Philosophy of Punishment*, 20 CRIME & JUST. 1, 7 (1996) (“[Negative retributivism] clearly provides no complete justification . . . for it tells us that we *may* punish the guilty (their punishment is not unjust), but not that or why we *should* punish them.”). As a result, retributivism is generally under-

## C. RETRIBUTIVISM'S JUSTIFICATION OF CAPITAL PUNISHMENT

Both Kant and Hegel insisted that retributivism demands capital punishment for murder. While allowing some departures from specific equality between crime and punishment,<sup>130</sup> Kant maintained that “every murderer . . . must suffer death.”<sup>131</sup> As Kant declared, “If, however, he has committed murder he must *die*. Here there is no substitute that will satisfy justice. There is no *similarity* between life . . . and death, hence no likeness between the crime and the retribution unless death is judicially carried out upon the wrongdoer.”<sup>132</sup> Despite realizing that “retribution cannot aim to achieve specific equality” between crime and punishment, Hegel acknowledged “this is not the case with murder, which necessarily incurs the death penalty.”<sup>133</sup> The measure of general equivalence cannot determine the deserved punishment for murder “since none is equivalent to life—but only in the taking of another life.”<sup>134</sup>

Contemporary courts and commentators widely view retributivism as supplying a justification, and the most compelling justification, of capital punishment.<sup>135</sup> As Carol and Jordan

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stood to not mean negative retributivism. *E.g.*, Michael S. Moore, *Punishment*, in *THE CAMBRIDGE DICTIONARY OF PHILOSOPHY* 759, 759 (Robert Audi ed., 2d ed. 1999) (“Retributivism is also not the view (sometimes called ‘weak’ or ‘negative’ retributivism) that *only* the deserving are to be punished, for desert on such a view typically operates only as a limiting and not as a justifying condition of punishment.”).

130. See KANT, *supra* note 103, at 141–42 (citing as an example, the deserved punishment of a wealthy thief might differ from that of a poor thief).

131. *Id.* at 143; *accord id.* at 145 (“The categorical imperative of penal justice remains (unlawful killing of another must be punished by death).”).

132. *Id.* at 142.

133. HEGEL, *supra* note 113, § 101 at 129.

134. *Id.* at 129–30.

135. *E.g.*, JOHN PAUL STEVENS, *SIX AMENDMENTS: HOW AND WHY WE SHOULD CHANGE THE CONSTITUTION* 110 (2014) (“The real justification for preserving capital punishment surely rests on the interest in retribution. [It] . . . provides an explanation for preserving capital punishment that is both more realistic and more acceptable than any other. . . . [W]hether we should retain the death penalty depends on the strength of the interest in retribution. . . .”); van den Haag, *supra* note 1, at 1669 (stating that capital punishment is “the only fitting retribution for murder I can think of”); Markel, *supra* note 128, at 423 (“[C]ourts and commentators commonly justify the death penalty in the language of retributive justice.”); Carol S. Steiker & Jordan M. Steiker, *Abolition in Our Time*, 1 OHIO ST. J. CRIM. L. 323, 335 (2003) (“The central justification for the death penalty in the modern era has been retribution.”); Daniel R. Williams, *Mitigation and the Capital Defendant Who Wants To Die: A Study in the Rhetoric of Autonomy and the Hidden Discourse of Collective Responsibility*, 57 HASTINGS L.J. 693, 719 n.91 (2006) (“[Retribution] is the paramount theory undergirding the constitutional legitimation of capital

Steiker characterized the conventional argument, “[r]etributivism’s insistence on proportional punishment as a matter of the offender’s ‘just deserts’ offers powerful support to death penalty proponents, who maintain that only death is a proportional punishment for at least some heinous murders.”<sup>136</sup> Not all, however, believe that retributivism successfully justifies capital punishment.<sup>137</sup> Even some retributivists oppose the death penalty.<sup>138</sup> And perhaps most contemporary retributivists conclude that retributivism does not require capital punishment.<sup>139</sup>

## II. SUBSTANTIAL DEATH ROW INCARCERATION

This Part first sketches a brief overview of the issue of DRI and significantly delayed capital punishment. Next, it surveys the principal arguments both for and against the constitutionality of the Combination.

### A. OVERVIEW

While the issue of delay between sentencing and execution—referred to as the “death row phenomenon” in foreign courts<sup>140</sup>—rose to its current prominence in 1995 in *Lackey v.*

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punishment, insofar as retribution as a punishment theory is rooted in Kantian notions of respect for persons. Personal culpability, not deterrence, repeatedly surfaces as the most important consideration in capital decisionmaking.” (citing *Booth v. Maryland*, 482 U.S. 496, 502 (1987); *Tison v. Arizona*, 481 U.S. 137, 149 (1987); *Ford v. Wainwright*, 477 U.S. 399, 406 (1986) (White, J., dissenting); *Spaziano v. Florida*, 468 U.S. 447, 461–62 (1984); *Enmund v. Florida*, 458 U.S. 782, 798–801 (1982)).

136. Steiker & Steiker, *supra* note 20, at 152.

137. See, e.g., Claire Finkelstein, *A Contractarian Argument Against the Death Penalty*, 81 N.Y.U. L. REV. 1283, 1307 (2006) (“If the retributivist thinks torturing a torturer is unjustified, then it is always possible that killing a murderer is also unjustified.”); Carol S. Steiker, *No, Capital Punishment Is Not Morally Required: Deterrence, Deontology, and the Death Penalty*, 58 STAN. L. REV. 751, 769 (2005) (arguing that retributivism fails to justify capital punishment on a number of grounds, including execution of the innocent).

138. See, e.g., Markel, *supra* note 127, at 458–68 (finding capital punishment’s arbitrariness and offensiveness to human dignity incompatible with retributivism); David McCord, *Imagining a Retributivist Alternative to Capital Punishment*, 50 FLA. L. REV. 1, 6, 11–15 (1998) (opposing capital punishment on numerous grounds including prolonged DRI undermining retributivism).

139. See *infra* notes 302–03 and accompanying text.

140. David A. Sadoff, *International Law and the Moral Precipice: A Legal Policy Critique of the Death Row Phenomenon*, 17 TUL. J. INT’L & COMP. L. 77, 93 n.106 (2008) (explaining that unlike a death row phenomenon claim, a *Lackey* claim “dispenses with any consideration of detention conditions or personal circumstances such as youth or mental infirmity, and focuses exclusively

Texas,<sup>141</sup> it has long been recognized.<sup>142</sup> The Supreme Court perhaps first addressed the issue, albeit in dicta, in the 1890 case *In re Medley*.<sup>143</sup> The Court opined that for a prisoner on death row, “one of the most horrible feelings to which he can be subjected during that time is the uncertainty during the whole of it . . . [The] immense mental anxiety amount[ed] to a great increase of the offender’s punishment.”<sup>144</sup> What was the period of DRI that constituted additional punishment increasing the prisoner’s capital punishment? Four weeks.<sup>145</sup>

Beginning in 1960, courts began to squarely address the issue. In *Chessman v. Dickson*, the Ninth Circuit, refusing to “offer life (under a death sentence) as a prize for one who can stall the processes for a given number of years,” upheld a twelve-year delay as constitutional.<sup>146</sup> The California Supreme Court, however, in *People v. Anderson* in 1972, held that capital punishment violated the state constitution that prohibited cruel or unusual punishment, in part based on lengthy DRI: “The cruelty of capital punishment [also] lies . . . in the dehumanizing effects of the lengthy imprisonment prior to execution . . . .”<sup>147</sup> Eight years later, the Supreme Judicial Court of Massachusetts also based, in part, its ruling that capital punishment was unconstitutionally cruel on the delay between sentence and execution.<sup>148</sup> The court explained that “mental pain is an inseparable

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on the duration of death row confinement and its adverse psychological impact”).

141. 514 U.S. 1045 (Stevens, J., respecting denial of certiorari).

142. *E.g.*, *McKenzie v. Day*, 57 F.3d 1461, 1465 (9th Cir. 1995) (“While Justice Stevens’ memorandum in *Lackey* has given prominence to the argument that delay in carrying out a death sentence constitutes cruel and unusual punishment, the legal theory underlying the claim is not new.”).

143. 134 U.S. 160 (1890).

144. *Id.* at 172.

145. *Id.*

146. 275 F.2d 604, 607 (9th Cir. 1960).

147. 493 P.2d 880, 894 (Cal. 1972). Later that year, however, California voters approved Proposition 17 to amend the state constitution such that capital punishment was neither cruel nor unusual punishment. *E.g.*, Carol S. Steiker & Jordan M. Steiker, *A Tale of Two Nations: Implementation of the Death Penalty in “Executing” Versus “Symbolic” States in the United States*, 84 TEX. L. REV. 1869, 1899 (2006).

148. *Dist. Attorney for Suffolk Dist. v. Watson*, 411 N.E.2d 1274, 1283 (Mass. 1980), *superseded by constitutional amendment*, MASS. CONST. art. CXVI (holding that “the death penalty, with its full panoply of concomitant physical and mental tortures, is impermissibly cruel under art. 26 [of the Declaration of Rights of the Massachusetts Constitution] when judged by contemporary standards of decency”). Passed in 1982 by referendum, Amendment 116 amends article 26 of the Declaration of Rights to explicitly provide that the

part of our practice of punishing criminals by death, for the prospect of pending execution exacts a frightful toll during the inevitable long wait between the imposition of sentence and the actual infliction of death.”<sup>149</sup> But in 1992 the Ninth Circuit again rejected a claim that delayed execution—this time for sixteen years—constituted cruel and unusual punishment.<sup>150</sup> And just a few years before *Lackey*, British Commonwealth and international human rights courts found substantial DRI to be “inhuman” and “degrading.”<sup>151</sup>

In 1995, Justice Stevens’ landmark *Lackey* Memorandum invited lower courts to consider the issue. “Though the importance and novelty of the question . . . [suffice] to warrant review by this Court, those factors also provide a principled basis for postponing consideration of the issue until after it has been

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state constitution is not to be construed to forbid the death penalty. This amendment remains in force; however, the Massachusetts statute allowing for the imposition of the death penalty was later invalidated on separate constitutional grounds. *Commonwealth v. Colon-Cruz*, 393 Mass. 150 (1984). No legislation authorizing the death penalty has been passed in Massachusetts since the *Colon-Cruz* decision, and the death penalty is considered effectively unavailable in the state. See, e.g., Alan Rogers, “Success—at Long Last”: *The Abolition of the Death Penalty in Massachusetts, 1928–1984*, 22 B.C. THIRD WORLD L.J. 281, 352–53 (2002); Garrett Quinn, *The Complicated History of the Death Penalty in Massachusetts, from the Salem Witch Trials to Dzhokhar Tsarnev*, MASSLIVE (Feb. 12, 2014, 10:38 AM), [http://www.masslive.com/news/boston/index.ssf/2014/02/history\\_of\\_the\\_death\\_penalty\\_i.html](http://www.masslive.com/news/boston/index.ssf/2014/02/history_of_the_death_penalty_i.html).

149. *Watson*, 411 N.E.2d at 1283 (quoting *Furman v. Georgia*, 408 U.S. 238, 287–88 (1972) (Brennan, J., concurring)).

150. *Richmond v. Lewis*, 948 F.2d 1473, 1491–92 (9th Cir. 1990), *vacated*, 986 F.2d 1583 (9th Cir. 1993) (noting that a prisoner should not be able to benefit from the very delay that the prisoner sought).

151. In 1989, the European Court of Human Rights blocked extradition to the United States of a German citizen detained in England for a capital murder charge in Virginia. *Soering v. United Kingdom*, 11 Eur. Ct. H.R. 439, 472–75 (1989) (ruling that the anticipated six to eight year stay on death row prior to execution would itself violate Article 3 of the European Convention on Human Rights prohibiting “torture or . . . inhuman or degrading treatment or punishment”). Construing a provision of the Jamaican Constitution, almost identical to that of Article 3, the British Judicial Committee of the Privy Council (the highest court of appeal for Jamaica and other Commonwealth countries) held that execution after fourteen years on death row was unconstitutional. *Pratt v. Attorney Gen. of Jamaica*, [1994] 2 A.C. 1 (Jam.); *The Court Structure and Hierarchy*, THE SUPREME COURT OF JAMAICA, <http://www.supremecourt.gov.jm/content/court-structure-and-hierarchy> (last visited Sept. 22, 2014). The court established the threshold of five years of death row confinement as constituting “strong grounds” for a finding of unconstitutional “inhuman or degrading punishment or other treatment.” *Pratt*, 2 A.C. at 35.

addressed by other courts.”<sup>152</sup> Because of “its legal complexity and its potential for far-reaching consequences,” the issue would benefit from further examination by the lower courts before it percolated up to the Supreme Court.<sup>153</sup> Justice Thomas assessed the lower courts’ response to Justice Stevens’ invitation as follows: “These courts have resoundingly rejected the claim as meritless. I submit that the Court should consider the experiment concluded.”<sup>154</sup> Justice Breyer disagreed, replying that most courts have avoided the merits of *Lackey* claims and denied them instead on procedural grounds.<sup>155</sup> Though some judges have agreed with Justices Stevens and Breyer as to the seriousness of the issue,<sup>156</sup> others have not. For example, one Fourth Circuit judge dismissed it as “a mockery of our system of justice, and an affront to law-abiding citizens . . . absurd . . . frivolous . . . subterfuge . . . [a] manipulation . . . . [and] sophistic . . . .”<sup>157</sup> Despite no lower court favorably recognizing a *Lackey* claim at that time,<sup>158</sup> Ninth Circuit Judge Arthur Alarcón conjectured in 2007 that the “Supreme Court may one day grant certiorari to determine whether such delays violate the Eighth Amendment’s prohibition against cruel and unusual punishment.”<sup>159</sup> Seven years later, and nineteen years after *Lackey*, Judge Alarcón’s conjecture is one step closer to coming

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152. *Lackey v. Texas*, 514 U.S. 1045, 1045 (1995) (Stevens, J., respecting denial of certiorari).

153. *Id.* at 1047.

154. *Knight v. Florida*, 528 U.S. 990, 992–93 (1999) (Thomas, J., concurring in denial of certiorari).

155. *Id.* at 998–99 (Breyer, J., dissenting from denial of certiorari).

156. *E.g.*, *Selsor v. Workman*, No. 01-CV-0721-CVE-TWL, 2009 WL 3233806, at \*44 (N.D. Okla. Sept. 29, 2009) (“This Court agrees that the issue of whether it is cruel and unusual to hold an individual for decades on death row raises a serious constitutional question.”); *State v. Smith*, 931 P.2d 1272, 1292 (Mont. 1996) (Leaphart, J., concurring) (“[L]ike Justices Stevens and Breyer in *Lackey v. Texas*, I do not treat as completely without merit the argument that lengthy delays in the imposition of the death sentence may amount to cruel and unusual punishment under the 8th Amendment.” (citation omitted)).

157. *Turner v. Jabe*, 58 F.3d 924, 933 (4th Cir. 1995) (Luttig, J., concurring).

158. *See, e.g.*, *Sansing v. Ryan*, No. CV-11-1035-PHX-SRB, 2013 WL 474358, at \*54 (D. Ariz. Feb. 7, 2013) (denying *Lackey* claim because neither the Supreme Court nor federal circuit courts have recognized the claim as successfully establishing an Eighth Amendment violation); *Carroll v. State*, 114 So.3d 883, 889 (Fla. 2013) (quoting *Pardo v. State*, 108 So.3d 558, 569 (Fla. 2012)) (“[N]o federal or state court has accepted the argument that a prolonged stay on death row constitutes cruel and unusual punishment.”).

159. Alarcón, *supra* note 8, at 711.

to fruition. On July 16, 2014, *Jones v. Chappell* became the first (American, post-*Lackey*) case to recognize a *Lackey* claim.<sup>160</sup>

After *Lackey*, the issue again came before the Supreme Court in certiorari petitions filed by prisoners drawing responses from Justice Stevens, Justice Breyer, or Justice Thomas, or some combination thereof, concerning their denial of certiorari. Among these petitions, the prisoner's death row tenure rose from seventeen years in *Lackey*<sup>161</sup> in 1995, to thirty years

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160. No. CV-09-02158-CJC, 2014 WL 3567365, at \*1 (C.D. Cal. July 16, 2014) (ordering "California's death penalty system unconstitutional and vacating petitioner's death sentence" after petitioner had spent nineteen years on death row). In ruling that Jones' death sentence violated the Eighth Amendment prohibition against cruel and unusual punishment, the court found that California's dysfunctional administration of the death penalty produced systemically inordinate delay. *Id.* at \*1-6. The average delay is twenty-five years. *Id.* at \*8. As a consequence of this delay, out of the many on death row, so few will be actually executed (rather than die of old age while on death row) as to make execution unconstitutionally arbitrary. *Id.* at \*8-9. In addition to arbitrariness, the court found that the systemic delay undermined the penological purposes upon which the constitutionality of capital punishment rests. *Id.* at \*9-11. "In California, the execution of a death sentence is so infrequent, and the delays preceding it so extraordinary, that the death penalty is deprived of any deterrent or retributive effect it might once have had. Such an outcome is antithetical to any civilized notion of just punishment." *Id.* at \*9.

Of particular interest to the focus of this Article is the court's analysis of retribution. The court seems to find retribution undermined in three ways. *Id.* at \*10-11. First, the sheer interval of time between sentence and execution frustrates retribution. *Id.* at \*10. And the longer the delay, the greater the diminution of retribution's value. *Id.* Second, executions are too infrequent and/or too few in number as to significantly further retribution. *Id.* at \*11 (citing *Furman v. Georgia*, 408 U.S. 238, 311 (1972) (White, J., concurring) ("[W]hen imposition of the [death] penalty reaches a certain degree of infrequency, it would be very doubtful that any existing general need for retribution would be measurably satisfied.")). Third, those few being executed are so randomly and arbitrarily selected as to be inconsistent with retribution. *Id.* ("[T]he few executions [the State] does carry out are arbitrary . . . [and] simply cannot be reconciled with the asserted purpose of retribution." (citing *Furman*, 408 U.S. at 304-05 (Brennan, J., concurring) ("The asserted public belief that murderers deserve to die is flatly inconsistent with the execution of a random few.")).

This Article's approach to retribution is markedly different from *Jones*. Where *Jones* assesses the impact on retribution from the sheer temporal delay alone, this Article considers the possible nature and duration of pre-execution death row incarceration. It assesses the impact on retribution of the combination of execution plus substantial death row incarceration depending on whether that death row incarceration is construed as punishment, a mitigation of punishment, or simply nothing, or some combination thereof. *See infra* Part III.

161. 514 U.S. 1045, 1045 (1995) (Stevens, J., respecting denial of certiorari).

in *Smith v. Arizona*<sup>162</sup> in 2007, and to thirty-nine years in *Muhammad v. Florida*,<sup>163</sup> in 2014. Justice Thomas wrote memoranda concurring in the denial of certiorari in four cases.<sup>164</sup> Justice Stevens expressed support for the merit of the prisoners' claims in three cases<sup>165</sup> and stressed that denial of certiorari "does not constitute a ruling on the merits" in two other cases.<sup>166</sup> Justice Breyer dissented in eight cases<sup>167</sup> and agreed with or joined Justice Stevens in two further cases.<sup>168</sup> The next Section presents the arguments made by Justices Stevens, Breyer, and Thomas, as well as others, regarding *Lackey* claims.

## B. DEBATING THE *LACKEY* CLAIM

This Section first canvasses the principal arguments advanced by Justices Stevens and Breyer, as well as others, supporting the *Lackey* claim (that the Combination is unconstitutional). It next surveys the principal arguments of Justice Thomas and others opposing the *Lackey* claim.

### 1. Unconstitutional as Cruel and Unusual Punishment

There are eight principal arguments supporting the *Lackey* claim. The arguments primarily seek to establish the Combination as cruel and unusual punishment in violation of the Eighth

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162. 552 U.S. 985, 985 (2007) (Breyer, J., dissenting from denial of certiorari).

163. No. 13-8030-13A674, 2014 WL 37226, at \*1 (U.S. Jan. 7, 2014) (Breyer, J., dissenting from denial of certiorari and stay of execution).

164. See *Johnson v. Bredeesen*, 558 U.S. 1067, 1070 (2009) (Thomas, J., concurring in denial of certiorari); *Thompson v. McNeil*, 556 U.S. 1114, 1116 (2009) (Thomas, J., concurring in denial of certiorari); *Foster v. Florida*, 537 U.S. 990, 990 (2002) (Thomas, J., concurring in denial of certiorari); *Knight v. Florida*, 528 U.S. 990, 990 (1999) (Thomas, J., concurring in denial of certiorari).

165. See *Johnson*, 558 U.S. at 1067 (Stevens, J., joined by Breyer, J., respecting denial of certiorari); *Thompson*, 556 U.S. at 1114 (Stevens, J., respecting denial of certiorari); *Lackey*, 514 U.S. at 1045.

166. See *Foster*, 537 U.S. at 990 (Stevens, J. respecting denial of certiorari); *Knight*, 528 U.S. at 990 (Stevens, J., respecting denial of certiorari).

167. See *Muhammad*, 2014 WL 37226, at \*1; *Valle v. Florida*, 132 S.Ct. 1, 1 (2011) (Breyer, J., dissenting from denial of stay from execution); *Smith*, 552 U.S. at 985; *Thompson*, 556 U.S. at 1119 (Breyer, J., dissenting from denial of certiorari); *Allen v. Ornoski*, 546 U.S. 1136 (2006) (Breyer, J., dissenting from denial of certiorari); *Foster*, 537 U.S. at 991 (Breyer, J., dissenting from denial of certiorari); *Knight*, 528 U.S. at 993 (Breyer, J., dissenting from denial of certiorari); *Elledge v. Florida*, 525 U.S. 944, 944 (1998) (Breyer, J., dissenting from denial of certiorari).

168. See *Johnson*, 558 U.S. at 1067; *Lackey*, 514 U.S. at 1047.

Amendment and *Gregg*. First, the substantial periods of DRI common today are unusual.<sup>169</sup> In *Lackey*, Justice Stevens argued that “a [seventeen-year] delay, if it ever occurred, certainly would have been rare in 1789, and thus the practice of the Framers would not justify a denial of petitioner’s claim.”<sup>170</sup> In *Foster v. Florida*, Justice Breyer noted that twenty-seven years on death row is “unusual by any standard.”<sup>171</sup> Second, deterrence is not furthered.<sup>172</sup> As Justice Stevens contended in *Lackey*, “the additional deterrent effect from an actual execution now, on the one hand, as compared to 17 years on death row followed by the prisoner’s continued incarceration for life, on the other, seems minimal.”<sup>173</sup> In *Elledge v. Florida*, Justice Breyer maintained that after twenty-three years, “an execution may well cease to serve the legitimate penological purposes [including deterrence] that otherwise provide a necessary constitutional justification for the death penalty.”<sup>174</sup> Third, retribution is not furthered.<sup>175</sup> As Justice Stevens argued in *Lackey*,

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169. *E.g.*, *People v. Simms*, 736 N.E.2d 1092, 1143 (Ill. 2000) (Harrison, C.J., dissenting) (“By the standards in effect when the United States Constitution was ratified, such a delay [fifteen years] would have been rare, if not unheard of.”); Kate McMahon, *Dead Man Waiting: Death Row Delays, the Eighth Amendment, and What Courts and Legislatures Can Do*, 25 BUFF. PUB. INT. L.J. 43, 49 (2007) (“At the time the Constitution was drafted, the Framers were familiar with a system where the interim between conviction and execution would be a matter of days or weeks, not years or decades.”).

170. 514 U.S. at 1045.

171. 537 U.S. at 992.

172. *See, e.g.*, *Coleman v. Balkcom*, 451 U.S. 949, 959 (1981) (Rehnquist, J., dissenting from denial of certiorari) (arguing that delays “lessen the deterrent effect of the threat of capital punishment”); *Furman v. Georgia*, 408 U.S. 238, 354 n.124 (1972) (Marshall, J., concurring) (“For capital punishment to deter anybody it must . . . follow swiftly upon completion of the offense.”); *Smith v. Mahoney*, 611 F.3d 978, 1006 (9th Cir. 2010) (Fletcher, J., dissenting) (“It is hard to see how Smith’s execution today [after twenty-seven years on death row] would have any deterrent effect.”); Lewis F. Powell, Jr., *Capital Punishment*, 102 HARV. L. REV. 1035, 1035 (1989) (“[Y]ears of delay between sentencing and execution . . . undermine[] the deterrent effect.”).

173. 514 U.S. at 1046.

174. 525 U.S. 944, 945 (1998) (Breyer, J., dissenting from denial of certiorari).

175. *See, e.g.*, *Smith*, 611 F.3d at 1006 (Fletcher, J., dissenting) (“Executing Smith after all this time [twenty-seven years on death row] would go far beyond what is necessary to satisfy society’s moral outrage . . . .”); Dwight Aarons, *Can Inordinate Delay Between a Death Sentence and Execution Constitute Cruel and Unusual Punishment?*, 29 SETON HALL L. REV. 147, 178 (1998) (“[T]he execution of an inmate who has spent an inordinate period on death row would likely not achieve retribution . . . .”); McMahon, *supra* note 169, at 50 (“The state can arguably be said to have already furthered its retributive goals by subjecting the offender to endure almost three decades in

“the acceptable state interest in retribution has arguably been satisfied by the severe punishment already inflicted [seventeen years on death row].”<sup>176</sup> Justice Lewis Powell stated that “[t]he retributive value of the penalty is diminished as imposition of sentence becomes ever farther removed from the time of the offense.”<sup>177</sup> Fourth, not only does substantial delay not further the penological goals of deterrence and retribution, it undermines them.<sup>178</sup> In *Thompson v. McNeil*, Justice Stevens contended that substantial delay “diminishes whatever possible benefit society might receive from petitioner’s death. It would therefore be appropriate to conclude that a punishment of death after significant delay is ‘so totally without penological justification that it results in the gratuitous infliction of suffering.’”<sup>179</sup> In *Johnson v. Bredesen*, Justices Stevens and Breyer concluded that “the penological justifications for the death penalty diminish as the delay lengthens.”<sup>180</sup> Fifth, the anxiety produced by waiting for one’s death over a prolonged period of time and/or the inhumane conditions of DRI constitute psychological torture which is cruel within the meaning of the Eighth Amendment.<sup>181</sup> Justice Stevens observed that “the delay itself subjects

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near-solitary confinement . . . .”); Jessica Feldman, Comment, *A Death Row Incarceration Calculus: When Prolonged Death Row Imprisonment Becomes Unconstitutional*, 40 SANTA CLARA L. REV. 187, 198 (1999) (“When a state executes a prisoner after he or she has spent a prolonged period of time on death row, the sentence is overly retributive.”).

176. 514 U.S. at 1045.

177. Powell, *supra* note 172, at 1041.

178. *E.g.*, *People v. Simms*, 736 N.E.2d 1092, 1144 (Ill. 2000) (Harrison, J., dissenting) (“Retribution and deterrence, the two principal social purposes of capital punishment, carry less and less force [after substantial delay].”); *State v. Azania*, 865 N.E.2d 994, 1013 (Ind. 2007) (Boehm, J., dissenting) (“I . . . find the reasoning of Justices Stevens and Breyer [that *Lackey*-type situations frustrate retribution and deterrence and are cruel and unusual punishment] to be persuasive and therefore would hold that the Indiana Constitution prevents further pursuit of the death penalty in this case [involving a twenty-five year delay].”); Alarcón, *supra* note 8, at 709 (“Inordinate delays . . . undermine the stated purposes of having the death penalty, namely retribution and deterrence.”); Steiker & Steiker, *supra* note 17, at 230 (“Deterrence is attenuated when it is widely understood that an execution will not occur until many years after sentence, if at all. Moreover, the retributive value of executions is diminished when the person executed has lived a ‘second lifetime’ on death row.”).

179. 556 U.S. 1114, 1115 (2009) (Stevens, J., respecting denial of certiorari) (quoting *Gregg v. Georgia*, 428 U.S. 153, 183 (1976)).

180. 558 U.S. 1067, 1069 (2009) (Breyer, J., respecting denial of certiorari).

181. *See, e.g.*, *Thompson*, 556 U.S. at 1115 (citing the “dehumanizing effects” of the prisoner enduring “up to 23 hours per day in isolation in a 6- by 9-foot cell”); *Simms*, 736 N.E.2d at 1143 (“Beyond a certain number of years and a certain number of failed attempts by the State to secure a constitutionally

death row inmates to decades of especially severe, dehumanizing conditions of confinement.”<sup>182</sup> Justice Breyer found as a “commonsense conclusion that 33 years in prison under threat of execution is cruel.”<sup>183</sup> Sixth, a growing number of the highest courts in foreign countries ruled such lengthy delays to be cruel and unusual punishment and/or a violation of internationally recognized human rights.<sup>184</sup> Even international courts accepting the legality of capital punishment “have held that lengthy delay in administering a lawful death penalty renders the ultimate execution in-human, degrading, or unusually cruel.”<sup>185</sup> Seventh, DRI itself constitutes a separate and additional punishment that may be excessive when combined with capital punishment.<sup>186</sup> In *Gomez v. Fierro*, Justice Stevens maintained that “delay can become so excessive as to constitute cruel and unusual punishment.”<sup>187</sup> And eighth, delay is often due not to the prisoner filing frivolous petitions, but the prisoner lawfully

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valid sentence of death, the litigation becomes a form of torture in and of itself.”); Aarons, *supra* note 175, at 149 (“While awaiting execution, capital defendants experience mental anguish . . . in violation of the Eighth Amendment.”).

182. *Bredesen*, 558 U.S. at 1069 (Stevens, J., respecting denial of certiorari).

183. *Valle v. Florida*, 132 S. Ct. 1, 1 (2011) (Breyer, J., dissenting from denial of stay).

184. *E.g.*, *Lackey v. Texas*, 514 U.S. 1045, 1047 (1995) (Stevens, J., respecting denial of certiorari) (“[T]he highest courts in other countries have found arguments such as petitioner’s to be persuasive.”); *McKenzie v. Day*, 57 F.3d 1461, 1487 (9th Cir.) (Norris, J., dissenting) (“McKenzie’s Eighth Amendment claim draws further strength from three recent decisions of foreign courts criticizing the American ‘death row phenomenon.’”), *opinion adopted on reh’g en banc*, 57 F.3d 1493 (9th Cir. 1995).

185. *Valle*, 132 S. Ct. at 1 (quoting *Knight v. Florida*, 528 U.S. 990, 995 (1999) (Breyer, J., dissenting from denial of certiorari)).

186. *See, e.g.*, *Ceja v. Stewart*, 134 F.3d 1368, 1369–70 (9th Cir. 1998) (Fletcher, J., dissenting) (“The sentencing judge who initially decided that the death sentence was the appropriate punishment now unequivocally states that executing Jose Ceja now after 23 years of incarceration on death row is too harsh a punishment for his crimes.”); Aarons, *supra* note 175, at 205 (“[T]he period spent awaiting execution is itself a form of punishment regulated by the Eighth Amendment.”); Alarcón, *supra* note 8, at 725 (“[D]eath row prisoners are being subjected to cruel and unusual punishment in violation of the Eighth Amendment because of their prolonged imprisonment . . . .”); Steiker, *supra* note 137, at 766 n.47 (“The lengthy waits on death row in anticipation of execution . . . [may involve] disproportionality.”); Ryan S. Hedges, Note, *Justices Blind: How the Rehnquist Court’s Refusal To Hear a Claim for Inordinate Delay of Execution Undermines Its Death Penalty Jurisprudence*, 74 S. CAL. L. REV. 577, 607 (2001) (arguing that the death row prisoner “is receiving excessive punishment above and beyond his sentence”).

187. 519 U.S. 918, 918 (1996) (Stevens, J., joined by Breyer, J., dissenting).

pursuing her legal rights and the faulty procedures implemented and established by the states.<sup>188</sup> In *Knight v. Florida*, Justice Breyer observed that the delays were due, in significant part, to states' "constitutionally defective death penalty procedures."<sup>189</sup> In *Johnson v. Bredesen*, Justice Stevens noted that the prisoner was responsible for "little, if any" of the twenty-eight-year delay.<sup>190</sup>

## 2. Constitutional Punishment

There are ten principal arguments opposing the *Lackey* claim (and defending the constitutionality of the Combination). The arguments cluster around the lack of relevant precedent that the Combination is unconstitutional, the view that recognition of a *Lackey* claim would be counterproductive, and the notion that prisoners are responsible for and benefit from the delay. First, there is no binding American precedent establishing the unconstitutionality of the Combination.<sup>191</sup> In *Knight*, Justice Thomas concluded that there is neither Supreme Court precedent nor any support in American constitutional law "for the proposition that a defendant can avail himself of the ppanoly of appellate and collateral procedures and then complain when his execution is delayed."<sup>192</sup> Second, international precedent and authority finding such punishment illegitimate is neither binding nor persuasive.<sup>193</sup> In *Foster v. Florida*, acknowledged

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188. See, e.g., *McKenzie*, 57 F.3d at 1471 ("The extraordinary delay in carrying out his death sentence is not of McKenzie's making."); *State v. Azania*, 865 N.E.2d 994, 1012 (Ind. 2007) (Boehm, J., dissenting) (noting that the prisoner "has spent at least fifteen years on death row due to flaws in the criminal justice system for which he bears no responsibility"); *State v. Smith*, 931 P.2d 1272, 1291 (Mont. 1996) (Leaphart, J., concurring) ("When a defendant is successful in his appeals, it cannot fairly be said that he is merely filing frivolous appeals in order to buy time.").

189. 528 U.S. at 993.

190. 558 U.S. 1067, 1067 (2009) (Stevens, J., respecting denial of certiorari).

191. E.g., *Thompson v. Sec'y for the Dep't of Corr.*, 517 F.3d 1279, 1284 (11th Cir. 2008) (denying prisoner's *Lackey* claim "given the total absence of Supreme Court precedent"); *Gardner v. State*, 234 P.3d 1115, 1142 n.231 (Utah 2010) ("The courts . . . have uniformly rejected *Lackey* claims.").

192. 528 U.S. at 990 (Thomas, J., concurring in denial of certiorari).

193. See, e.g., *McKenzie*, 57 F.3d at 1466 ("With all due respect to our colleagues abroad, we do not believe this view [that delayed executions are unlawful] will prevail in the United States."); *Booker v. McNeil*, No. 1:08cv143/RS, 2010 WL 3942866, \*40-41 (N.D. Fla. Oct. 5, 2010) (denying prisoner's claim that "binding norms of international law" prohibit his execution after twenty-nine years on death row), *aff'd*, 684 F.3d 1121 (11th Cir. 2012).

ing that international precedent continues to side against the permissibility of such lengthy delays, Justice Thomas declared that “this Court’s Eighth Amendment jurisprudence should not impose foreign moods, fads, or fashions on Americans.”<sup>194</sup> Third, all punishment produces anxiety.<sup>195</sup> Moreover, Justice Thomas conjectured, even “[m]urderers . . . who are not apprehended and tried suffer from the fear and anxiety that they will one day be caught and punished for their crimes.”<sup>196</sup> Fourth, recognizing a *Lackey* claim would only exacerbate the delay.<sup>197</sup> In *Knight*, Justice Thomas suggested that allowing a *Lackey* claim would generate the counterproductive effect of “prolong[ing] collateral review by giving virtually every capital prisoner yet another ground on which to challenge and delay his execution.”<sup>198</sup> Fifth, recognizing *Lackey* claims would promote “speed rather than accuracy.”<sup>199</sup> Justice Thomas feared that reviewing courts might give “short shrift to a capital defendant’s legitimate claims so as to avoid violating the Eighth Amendment right suggested by Justice Breyer.”<sup>200</sup> Sixth, the delay results from adherence to due process and constitutional safeguards.<sup>201</sup> “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 conse-

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194. 537 U.S. 990, 990 n.\* (2002) (Thomas, J., concurring in denial of certiorari).

195. See, e.g., Jeremy A. Blumenthal, *Law and the Emotions: The Problems of Affective Forecasting*, 80 IND. L.J. 155, 198 (2005) (noting that psychological dysfunction may be no greater on death row than for non-capital prisoners in “supermax” prisons); Sadoff, *supra* note 140, at 106 (“[T]he very passage of time could in fact lessen—not heighten—the anxiety an inmate feels with regard to the prospect of death.”).

196. *Foster*, 537 U.S. at 991.

197. See *Gardner v. State*, 234 P.3d 1115, 1143 (Utah 2010) (invoking the prospect of “endless delay”).

198. *Knight v. Florida*, 528 U.S. 990, 992 (1999) (Thomas, J., concurring in denial of certiorari).

199. *McKenzie v. Day*, 57 F.3d 1461, 1467 (9th Cir. 1995); accord *Moore v. State*, 771 N.E.2d 46, 55 (Ind. 2002) (“To ensure the just administration of the death penalty the value of speed should not trump the value of accuracy.”).

200. *Knight*, 528 U.S. at 992.

201. E.g., *Johnson v. Bredesen*, 558 U.S. 1067, 1072–73 (2009) (Thomas, J., concurring in denial of certiorari) (delay is unavoidable given the requisite procedural safeguards that defendants enjoy); *Chambers v. Bowersox*, 157 F.3d 560, 570 (8th Cir. 1998) (“[D]elay, in large part, is a function of the desire of our courts, state and federal, to get it right, to explore exhaustively, or at least sufficiently, any argument that might save someone’s life.”).

quence.”<sup>202</sup> Seventh, the delay results from prisoners’ frivolous appeals.<sup>203</sup> In *Knight*, Justice Thomas argued that “[i]t 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.”<sup>204</sup> Eighth, the delay is the choice of, under the control of, and the responsibility of, the prisoner.<sup>205</sup> Justice Thomas noted that a prisoner objecting to delay is not without options: “Petitioner could long ago have ended his ‘anxieties and uncertainties’ by submitting to what the people of Florida have deemed him to deserve: execution.”<sup>206</sup> Ninth, the State is not intentionally delaying the execution.<sup>207</sup> As the court in *Chambers v. Bowersox* explained, “there is no evidence, not even a claim, that the State has deliberately sought to convict [the prisoner] invalidly in order to prolong the time before it could secure a valid conviction and execute him.”<sup>208</sup> And tenth, “the delay in carrying out death sentences has been of benefit to death row inmates, allowing them to extend their lives . . . .”<sup>209</sup> Judge Kozinski characterized prisoners’ efforts to challenge their sen-

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202. *Thompson v. McNeil*, 556 U.S. 1114, 1117 (2009) (Thomas, J., concurring in denial of certiorari) (quoting *Knight*, 528 U.S. at 992).

203. *See, e.g.*, *State v. McKenzie*, 894 P.2d 289, 294 (Mont. 1995) (Leaphart, J., dissenting) (“Obviously the Court cannot allow a defendant to bootstrap himself into a cruel and unusual punishment argument by abusing the system to his advantage through the repetitive filing of meritless appeals and petitions.”); Michael P. Connolly, *Better Never than Late: Prolonged Stays on Death Row Violate the Eighth Amendment*, 23 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 101, 111 (1997) (describing the variety of inappropriate and abusive tactics used by defense attorneys to delay executions).

204. 528 U.S. at 992.

205. *E.g.*, *Thompson*, 556 U.S. at 1117 (noting that the prisoner could have accepted his execution but “chose” to challenge it); *Bieghler v. State*, 839 N.E.2d 691, 697 (Ind. 2005) (“[T]he [twenty-four years] between his conviction and the approaching execution flows from his having availed himself of the appeals process.”).

206. *Foster v. Florida*, 537 U.S. 990, 991 (2002) (Thomas, J., concurring in denial of certiorari) (quoting *id.* at 993 (Breyer, J., dissenting from denial of certiorari)).

207. *See, e.g.*, *White v. Johnson*, 79 F.3d 432, 439 (5th Cir. 1996) (“[The prisoner] cannot now complain of cruel and unusual punishment. . . . [He] does not offer any evidence that Texas’ delay in considering his petition was intentional or even negligent.”); *Porter v. Singletary*, 49 F.3d 1483, 1485 (11th Cir. 1995) (per curiam) (rejecting prisoner’s *Lackey* claim because, in part, the prisoner “has proffered no evidence to establish that delays in his case have been attributable to negligence or deliberate action of the state”).

208. 157 F.3d 560, 570 (8th Cir. 1998).

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

tence as “diminishing the severity of their sentence by endlessly postponing the day of reckoning.”<sup>210</sup>

In addition to disagreeing about the seriousness of *Lackey* claims and the constitutionality of the Combination, capital punishment opponents and proponents even disagree about the status of DRI—cruel and unusual punishment versus life-extending benefit. In an attempt to advance the debate and break the impasse between the capital punishment proponents and opponents, the next Part converts some of the above unsupported assertions into supported arguments and applies retributivism to five possible approaches to the legal status of substantial DRI.

### III. CAPITAL PUNISHMENT PLUS SUBSTANTIAL DEATH ROW INCARCERATION VIOLATES RETRIBUTIVISM

Because the status of substantial DRI is unclear, this Part presents the five possible conceptions of such incarceration. First, it constitutes an aggravation of, or a punishment additional to, capital punishment. Second, substantial DRI serves as a mitigation, or reduction, of the capital punishment. Third, it is *either* additional punishment *or* a mitigation of capital punishment. Fourth, substantial DRI is *both* additional punishment *and* a mitigation of capital punishment. Under each of these four approaches, this Part demonstrates that the Combination is disproportional, undeserved, and unjustified under retributivism. The fifth approach views substantial DRI as *neither* additional punishment *nor* a mitigation of the capital punishment—it is legally and retributively nothing. Though possibly allowing retributivism to justify the Combination, this fifth approach yields an absurdity. The significant number of death row prisoners who die of old age or natural causes prior to execution would receive no punishment whatsoever, despite being in state custody for decades, for their most heinous of crimes. The resulting dilemma is that either substantial DRI culminating in death by execution is unjustified under retributivism or such incarceration culminating in death by old age, or non-execution causes, entails the absurdity of blameworthy, convicted capital offenders receiving no punishment whatsoever. After considering various ways to resolve the dilemma, this Part concludes that the preferable resolution is to convert

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210. Alex Kozinski, *Tinkering with Death*, in *DEBATING THE DEATH PENALTY* 1, 7 (Hugo Adam Bedau & Paul G. Cassell eds., 2004).

death sentences to life imprisonment. Finally, this Part anticipates and rebuts three possible objections.

#### A. ADDITIONAL PUNISHMENT—DISPROPORTIONALLY EXCESSIVE

Viewing substantial DRI as additional punishment is perhaps the most obvious approach. Simple common sense suggests that decades-long DRI, under conditions equal to if not worse than temporal terms of imprisonment, constitutes punishment.<sup>211</sup> It is punishment in addition to, and in aggravation of, the capital punishment. Justices Stevens and Breyer,<sup>212</sup> other judges,<sup>213</sup> and numerous commentators<sup>214</sup> adopt this approach, but fail to explain fully *how* substantial DRI constitutes additional punishment.

While perhaps not crucial, establishing DRI as punishment is helpful in two ways in demonstrating that the Combination is unconstitutional. First, “[t]he Eighth Amendment does not

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211. For examples of the common-sense view that what looks like punishment should be understood as punishment, see *Smith v. Doe*, 538 U.S. 84, 113 (2003) (Stevens, J., dissenting) (“[A] sanction that (1) is imposed on everyone who commits a [particular] criminal offense, (2) is not imposed on anyone else, and (3) severely impairs a person’s liberty is punishment.”); Jenny Roberts, *The Mythical Divide Between Collateral and Direct Consequences of Criminal Convictions: Involuntary Commitment of “Sexually Violent Predators,”* 93 MINN. L. REV. 670, 708–09 (2008) (asserting that civil commitment of certain sex offenders is “quite similar to incarceration” and thus constitutes punishment).

212. *Coleman v. Balkcom*, 451 U.S. 949, 952 (1981) (Stevens, J., concurring in denial of certiorari) (“If the death sentence is ultimately set aside, or its execution delayed for a prolonged period, the imprisonment during that period is nevertheless a significant form of punishment.”); *supra* note 187 and accompanying text.

213. *United States ex rel. DelVecchio v. Ill. Dept. of Corr.*, No. 95 C 6637, 1995 WL 688675, at \*8 (N.D. Ill. Nov. 17, 1995) (acknowledging that prisoner’s sixteen years of DRI may constitute “additional punishment”); *see, e.g.*, *People v. Ochoa*, 28 P.3d 78, 115 (Cal. 2001) (arguing that prisoner’s nine years of DRI furthers the goals of punishment by “increasing the penalty imposed for the commission of capital crimes”), *abrogated by* *People v. Harris*, 185 P.3d 727 (Cal. 2008); *cf.* *Ceja v. Stewart*, 134 F.3d 1368, 1369 (9th Cir. 1998) (Fletcher, J., dissenting) (characterizing the prisoner’s twenty-three years of DRI as a “de facto sentence”).

214. *See, e.g.*, Daniel Givelber, *Innocence Abroad: The Extradition Cases and the Future of Capital Litigation*, 81 OR. L. REV. 161, 171 (2002) (“[D]eath row itself represents unacceptable punishment.”); Adam M. Samaha, *Undue Process*, 59 STAN. L. REV. 601, 668 (2006) (“Incarceration pending execution is undoubtedly a component of punishment . . . .”); Steiker & Steiker, *supra* note 17, at 230–31 (“The death penalty now encompasses two separate *punishments*: lengthy incarceration . . . followed by an execution.” (emphasis added)); *supra* note 186 and accompanying text.

outlaw cruel and unusual ‘conditions’; it outlaws cruel and unusual ‘*punishments*.’<sup>215</sup> If substantial DRI is not punishment, then one might challenge *Lackey* claim supporters to explain how the addition of a nonpunishment (DRI) to a punishment that is not clearly cruel and unusual (capital punishment) combines to create a cruel and unusual punishment. If instead, DRI is punishment, it is easier to explain how the addition of one punishment to a second punishment that is not cruel and unusual might combine to create a cruel and unusual punishment. Second, capital punishment is unconstitutional if it fails to further the legitimate penological goals of punishment, including retributivism.<sup>216</sup> As a justification of punishment, that which retributivism finds justified or unjustified is most clearly punishment.<sup>217</sup> If substantial DRI is not punishment, then one might again challenge *Lackey* claim supporters to explain how the addition of a nonpunishment (DRI) to a justified punishment (capital punishment) combines to create an unjustified punishment. But, if instead, substantial DRI is punishment, then it is easier to explain how the addition of one punishment to a second, justified punishment might create a combined unjustified punishment.

While clearly a punishment “look-alike[],”<sup>218</sup> whether substantial DRI constitutes (criminal) punishment or instead a civil, regulatory sanction is far from clear.<sup>219</sup> No American court

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215. *Farmer v. Brennan*, 511 U.S. 825, 837 (1994) (emphasis added); *accord* *Wilson v. Seiter*, 501 U.S. 294, 300 (1991) (stressing that the Eighth Amendment “bans only cruel and unusual *punishment*”).

216. *See supra* notes 56–57, 64–71, 90–92 and accompanying text.

217. A variant of retributivism applies to suffering regardless of whether it comes in a punitive or non-punitive form. *See* Mitchell N. Berman, *Two Kinds of Retributivism*, in *PHILOSOPHICAL FOUNDATIONS OF CRIMINAL LAW* 433, 437–38 (R. A. Duff & Stuart P. Green eds., 2011) (explaining that retributivism maintains offenders deserve suffering, even if it does not constitute punishment); Husak, *supra* note 107, at 972 (“[O]ur retributive beliefs only require that culpable wrongdoers be given their just deserts by being made to suffer [regardless of whether it constitutes punishment].”). Of course, under this version of retributivism it would be far easier to establish the Combination as disproportionately excessive and unjustified. Even if the substantial DRI does not constitute punishment, it clearly constitutes suffering. *Knight v. Florida*, 528 U.S. 990, 994 (1999) (Breyer, J., dissenting) (“It is difficult to deny the suffering inherent in a prolonged wait for execution . . .”). But an argument relying on an atypical version of retributivism would presumably fail to persuade capital punishment proponents.

218. Kolber, *supra* note 26, at 1142 (referring to nominally civil sanctions that involve the same suffering and deprivation as punishment).

219. In general, whether a nominally civil sanction is so punitive in effect as to constitute criminal punishment is a “problem [that] has been extremely

considering a *Lackey* claim has held that it does constitute punishment. But equally, no such court has held that it does not constitute punishment. Under the federal Bail Reform Act, post-conviction, pre-punishment confinement nominally constitutes a detention<sup>220</sup> similar to a pre-trial detention.<sup>221</sup> In *United States v. Salerno*, the Supreme Court considered whether the Bail Reform Act's authorization of pre-trial detention of the defendants on the ground that they posed a danger to the community constituted impermissible punishment.<sup>222</sup> Noting that not all detentions constitute punishment, the Court first looked to legislative intent<sup>223</sup> and then whether the detention was excessive in relation to any legitimate regulatory goal.<sup>224</sup> "The legislative history . . . clearly indicates that Congress did not formulate the pretrial detention provisions as punishment for dangerous individuals."<sup>225</sup> Rather, "preventing danger to the community is a legitimate regulatory goal."<sup>226</sup> The Court "conclude[d] that the detention imposed by the Act falls on the regulatory side of the dichotomy."<sup>227</sup>

Though a broad reading of *Salerno* suggests that all (not just pre-trial) detentions imposed by the Bail Reform Act are

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difficult and elusive of solution." *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168 (1963). For critical views on drawing the punitive/nonpunitive distinction, see *United States v. Salerno*, 481 U.S. 739, 760 (1987) (Marshall, J., dissenting) (criticizing the Court's manipulation of the punitive/regulatory distinction as "merely redefin[ing] any measure which is claimed to be punishment as 'regulation,' and, magically, the Constitution no longer prohibits its imposition"); Gabriel J. Chin, *The New Civil Death: Rethinking Punishment in the Era of Mass Incarceration*, 160 U. PA. L. REV. 1789, 1808 (2012) (lamenting that "the quest for a sharp difference between punitive and regulatory measures is futile").

220. 18 U.S.C. § 3141(b) (2012) ("A judicial officer of a court . . . shall order that, pending imposition or execution of sentence, or pending appeal of conviction or sentence, a person be released or detained under this chapter.").

221. For discussion of Eighth Amendment claims concerning pretrial detention, see Catherine T. Struve, *The Conditions of Pretrial Detention*, 161 U. PA. L. REV. 1009 (2013).

222. 481 U.S. at 745–48 (majority opinion).

223. *Id.* at 746–47 ("[T]he mere fact that a person is detained does not inexorably lead to the conclusion that the government has imposed punishment. To determine whether a restriction on liberty constitutes impermissible punishment or permissible regulation, we first look to legislative intent." (citation omitted)).

224. *Id.* at 747 (citing and applying two factors of the seven-factor test from *Kennedy*, 372 U.S. at 168–69). For discussion of the seven-factor test, see *infra* notes 235–38 and accompanying text.

225. *Salerno*, 481 U.S. at 747.

226. *Id.*

227. *Id.*

nonpunitive, the substantial DRI challenged in *Lackey* claims still might constitute punishment under *Salerno* for two reasons. First, the Court noted that “the maximum length of pre-trial detention is limited by the stringent time limitations of the Speedy Trial Act.”<sup>228</sup> In a subsequent case, the Court also stressed that the detention found constitutional in *Salerno* was “strictly limited in duration.”<sup>229</sup> Quite plausibly, upwards of thirty years or more of DRI would exceed such stringent and strict limitations on the duration of the detention. Second, the Court strongly suggested that sufficiently lengthy detention constitutes punishment: “We intimate no view as to the point at which detention in a particular case might become excessively prolonged, and therefore punitive, in relation to Congress’ regulatory goal.”<sup>230</sup> While unsure of the precise point at which the duration of a detention would convert it from regulatory to punitive, the Court is clearly stating that a sufficiently lengthy detention constitutes punishment. Surely, over thirty years of DRI qualifies as “excessively prolonged, and therefore punitive.”<sup>231</sup> If not, what possible period of detention could qualify?

Apart from *Salerno*, there is another basis for DRI to constitute additional punishment. Nominally civil sanctions may nonetheless constitute punishment under the “intent-effects’ test.”<sup>232</sup> The test’s first step assesses the legislature’s intention as to the nature of the sanction.<sup>233</sup> If the legislature’s intent was that the sanction be punishment, the test is complete and the sanction is punishment.<sup>234</sup> If the legislature instead intended to establish a civil sanction, the test is not complete. Undertaking the test’s second step, courts “have inquired further whether the statutory scheme was so punitive either in purpose or effect’ as to ‘transfor[m] what was clearly intended as a civil remedy into a criminal penalty.”<sup>235</sup>

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228. *Id.* (footnote omitted).

229. *Foucha v. Louisiana*, 504 U.S. 71, 82 (1992).

230. *Salerno*, 481 U.S. at 747 n.4 (emphasis added). This proposition continues to have vitality. *See, e.g., United States v. Stanford*, 722 F. Supp. 2d 803, 806, 808 (S.D. Tex. 2010) (citing and quoting this proposition).

231. *Salerno*, 481 U.S. at 747 n.4.

232. *Russell v. Gregoire*, 124 F.3d 1079, 1084 (9th Cir. 1997).

233. *See Hudson v. United States*, 522 U.S. 93, 99 (1997); *see also Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 169 (1963).

234. *See Smith v. Doe*, 538 U.S. 84, 92 (2003); *Hudson*, 522 U.S. at 99; *Kennedy*, 372 U.S. at 169.

235. *Hudson*, 522 U.S. at 99 (quoting *United States v. Ward*, 448 U.S. 242, 248–49 (1980)).

This second step assesses the effects of the nominally civil sanction by considering the following seven *Kennedy v. Mendoza-Martinez* factors:<sup>236</sup>

- (1) “[W]hether the sanction involves an affirmative disability or restraint”;
- (2) “whether it has historically been regarded as a punishment”;
- (3) “whether it comes into play only on a finding of scienter”;
- (4) “whether its operation will promote the traditional aims of punishment—retribution and deterrence”;
- (5) “whether the behavior to which it applies is already a crime”;
- (6) “whether an alternative purpose to which it may rationally be connected is assignable for it”; and
- (7) “whether it appears excessive in relation to the alternative purpose assigned.”<sup>237</sup>

The Court emphasizes that “these factors must be considered in relation to the statute on its face”<sup>238</sup> and that “only the clearest proof will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty.”<sup>239</sup>

DRI clearly satisfies the first five factors. Incarceration is clearly an affirmative restraint on physical liberty (factor 1)<sup>240</sup> that has historically been regarded as a paradigmatic punishment (factor 2)<sup>241</sup> promoting the traditional aims of punishment (factor 4). And a finding of the requisite criminal mens rea of the offense (factor 3)<sup>242</sup> and the criminal behavior constituting the offense (factor 5) necessarily precedes the imposition of DRI.

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236. *Doe*, 538 U.S. at 97 (citing *Kennedy*, 372 U.S. at 168–69).

237. *Hudson*, 522 U.S. at 99–100 (quoting *Kennedy*, 372 U.S. at 168–69) (emphasis omitted).

238. *Hudson*, 522 U.S. at 100 (quoting *Kennedy*, 372 U.S. at 169). In a previous case, the Court adopted a different standard—evaluating the “actual sanctions imposed.” *United States v. Halper*, 490 U.S. 435, 447 (1989). *Hudson* rejects the *Halper* test as “ill considered.” *Hudson*, 522 U.S. at 101.

239. *Hudson*, 522 U.S. at 100 (quoting *Ward*, 448 U.S. at 249).

240. *See, e.g., Doe*, 538 U.S. at 100 (referring to “the punishment of imprisonment, which is the paradigmatic affirmative disability or restraint” (citing *Hudson*, 522 U.S. at 104)).

241. *See, e.g., Hudson*, 522 U.S. at 104 (referring to the “infamous punishment’ of imprisonment” (quoting *Flemming v. Nestor*, 363 U.S. 603, 617 (1960))); *Hutto v. Finney*, 437 U.S. 678, 685 (1978) (“Confinement in a prison . . . is a form of punishment subject to scrutiny under Eighth Amendment standards.”).

242. *Cf. Kansas v. Hendricks*, 521 U.S. 346, 362 (1997) (“[U]nlike a criminal statute, no finding of scienter is required to commit an individual who is found to be a sexually violent predator.”). In contrast, death row incarceration may only follow conviction under a criminal statute and thus after a finding of the requisite scienter.

DRI, however, fails to satisfy at least one of the last two factors. Factor 6 is clearly not satisfied: there are non-punitive purposes served by DRI including safeguarding the community and ensuring the presence of the convict at the imposition of his punishment.<sup>243</sup> Regarding factor 7, the sanction actually imposed—upwards of thirty years or more of DRI—is arguably excessive relative to the above goals. But considering, as *Hudson v. United States* requires, the sanction imposed by “the statute on its face”<sup>244</sup>—a period of indefinite detention—it is arguably not excessive. As discussed above, however, *Salerno* specifically stated that a sufficiently prolonged detention would be excessive and thus constitute punishment.<sup>245</sup> Moreover, it is unclear whether the *Hudson* standard of assessing the sanction “on its face”<sup>246</sup> is still required. In a case subsequent to *Hudson*, the Court failed to require the *Hudson* standard.<sup>247</sup> As a result, it is unclear whether the seventh factor supports detention pending imposition of a sentence as punitive or non-punitive.

Whether satisfaction of five or possibly six of the seven factors meets the proviso that “only the clearest proof”<sup>248</sup> suffices to transform a nominal civil sanction into a criminal punishment is unclear.<sup>249</sup> But given that there is no requirement that all of the factors be satisfied,<sup>250</sup> satisfaction of five or six of the seven factors may well constitute the requisite “clearest proof.”<sup>251</sup> As a result, the nominally civil sanction of DRI plausibly qualifies as punishment.

An exhaustive and definitive analysis of whether sufficiently prolonged DRI constitutes punishment is both beyond

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243. See 18 U.S.C. § 3143 (2012) (authorizing detention to prevent the convict from “flee[ing] or pos[ing] a danger to the . . . community”).

244. 522 U.S. at 100 (quoting *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 169 (1963)).

245. See *supra* text accompanying notes 223–24.

246. *Hudson*, 522 U.S. at 100 (quoting *Kennedy*, 372 U.S. at 169).

247. See *Smith v. Doe*, 538 U.S. 84, 97–105 (2003) (applying the seven-factor test without mentioning the ‘on its face’ *Hudson* standard).

248. *Hudson*, 522 U.S. at 100 (quoting *United States v. Ward*, 448 U.S. 242, 249 (1980)).

249. On the difficulty of clearly applying the factors, see Wayne A. Logan, *The Ex Post Facto Clause and the Jurisprudence of Punishment*, 35 AM. CRIM. L. REV. 1261, 1282 (1998) (“The *Mendoza-Martinez* factors over the years have been applied in a highly selective and ultimately inconsistent manner.”).

250. See *Hudson*, 522 U.S. at 99–105; see also *Ward*, 448 U.S. at 249 (characterizing the factors as “neither exhaustive nor dispositive”).

251. *Hudson*, 522 U.S. at 100 (quoting *Ward*, 448 U.S. at 249).

the scope and unnecessary for the purposes of this Article. Apart from the assertions of Justices Stevens and Breyer, other judges, and commentators,<sup>252</sup> there are two bases for sufficiently prolonged death row detention to formally constitute punishment. First, *Salerno* conceives of sufficiently prolonged detention as punishment.<sup>253</sup> Second, satisfying five or six factors of the seven-factor test for punitive effect plausibly establishes sufficiently prolonged detention as punishment.<sup>254</sup> That the nominally civil sanction of DRI, particularly when sufficiently prolonged, merely plausibly constitutes punishment suffices to ground DRI as punishment as one of the five possible approaches to the status of substantial DRI.

If substantial DRI constitutes punishment, the following argument demonstrates that the Combination is disproportionately excessive, undeserved, and unjustified under retributivism:

(1) Under retributivism, death by execution matches the moral and legal desert of at least some offenders. Death by execution, for such offenders, is a proportional, deserved, and justified punishment.

(2) Therefore, punishment substantially greater, or substantially less, than capital punishment would not match the moral and legal desert of such offenders. Such punishment would thus be disproportional, undeserved, and unjustified under retributivism.

(3) Substantial DRI constitutes a substantial, additional punishment.

(4) Therefore, the Combination is disproportionately excessive, undeserved, and unjustified under retributivism for such offenders.

Explaining each step in the argument might be helpful. Step 1 accepts as a premise that retributivism justifies capital punishment for at least some offenders.<sup>255</sup> Following from step 1, step 2 reasons that if capital punishment alone is the punishment that an offender deserves (and thus is proportional and justified) under retributivism, then a punishment substantially different than capital punishment would be undeserved, disproportional, and unjustified. A punishment substantially

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252. See *supra* notes 185–86, 211–13 and accompanying text.

253. See *supra* text accompanying notes 223–29.

254. See *supra* text accompanying notes 236–51.

255. For the view that, under retributivism, death by execution is the only deserved, proportional, and justified punishment for some offenders, see *supra* notes 131–36 and accompanying text.

greater or more severe than capital punishment alone would thus be undeserved, disproportionately excessive, and unjustified under retributivism.

While steps 1–2, as well as 4, are fairly straightforward, step 3 is easily contested. Step 3 asserts as a premise that substantial DRI constitutes substantial, additional punishment. While the premise reflects a plausible approach to the status of DRI,<sup>256</sup> there are other approaches that are also plausible. The premise of step 3 is not strenuously argued for or defended because one may reject step 3 while still reaching the same conclusion that the Combination is unjustified under retributivism. In arguments below, different premises as to the status of substantial DRI will replace the premise of step 3. Even with this replacement, the conclusion will remain that retributivism is unsatisfied.

Step 4 concludes that if capital punishment alone is the proportional, deserved, and justified punishment under retributivism for some offenders, and if substantial DRI constitutes a substantial, additional punishment, then the Combination is disproportional, undeserved, and unjustified under retributivism for such offenders. If capital punishment alone is the proportional, deserved, and justified punishment under retributivism for a particular offender, then adding a substantial punishment to the capital punishment necessarily makes the Combination disproportionately excessive, undeserved, and unjustified under retributivism.

One might concede that substantial DRI constitutes punishment in addition to death by execution but object that it is additional punishment integral to the offender's sentence of capital punishment. That is, rather than it being additional punishment extrinsic to the capital punishment it is additional punishment intrinsic to the capital punishment.<sup>257</sup> Under this objection, capital punishment that includes the integral component of the additional punishment of substantial DRI is nothing more than capital punishment itself. Given the stipulated

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256. See *supra* text accompanying notes 252–54.

257. See *People v. Frye*, 959 P.2d 183, 263 (Cal. 1998) (“Confinement in prison following a judgment of death is part and parcel of the administration of the death penalty.”); MATTHEW H. KRAMER, *THE ETHICS OF CAPITAL PUNISHMENT* 108 (2011) (discussing the issue outside of the *Lackey* claim context and arguing that for a person sentenced to death, “his incarceration on death row is itself a part of his [capital] punishment”). *But see* PRIMORATZ, *supra* note 101, at 164 (“[T]he interval between sentencing someone to death and carrying out the sentence is not a *part* of capital punishment itself.”).

premise that retributivism justifies capital punishment (step 1 in the above argument), a capital punishment that includes everything which is integral or intrinsic to capital punishment must also be justified.

The objection fails, however, because the concession which is a premise of the objection is fatal to the objection. Conceding that substantial DRI constitutes additional punishment (whether extrinsic or intrinsic) triggers the possible problem of explaining why some convicted capital offenders receive a punishment of death by execution plus, for example, thirty years imprisonment on death row and some receive death by execution plus only five years on death row. If the former are more blameworthy and thus deserving of more punishment than the latter, then there is no problem. Each might be receiving the punishment each deserves. But there does not seem to be any correlation between extra years on death row and greater desert. Offenders spend more or less time on death row depending on procedural issues that have little to do with their desert.<sup>258</sup> If any correlation exists, however, it would be an inverse correlation. Offenders with comparatively less desert spend more time on death row because their guilt, and the procedures that established their guilt, are more open to attack and litigation which thereby extends their time on death row.<sup>259</sup> In contrast, offenders whose guilt was soundly established will have comparatively fewer opportunities to litigate and thereby extend their time on death row. As a result, conceding that substantial DRI is additional punishment undermines the objection. The objection fails because greater amounts of the additional punishment of DRI (even if integral to the capital punishment) are

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258. See Dan Markel, *Executing Retributivism: Panetti and the Future of the Eighth Amendment*, 103 NW. U. L. REV. 1163, 1197 (2009) (noting that rather than the extent of the delay between sentencing and execution being based on retributivist considerations of desert, “the delay occurs largely because of procedural wrangling”).

259. See *People v. Simms*, 736 N.E.2d 1092, 1143 (Ill. 2000) (Harrison, C.J., dissenting) (“In nearly every instance where an execution remains to be carried out after a decade or more, the additional litigation has been necessary to address errors occasioned by the prosecution or attributable to incompetent representation.”); Dwight Aarons, *Getting out of This Mess: Steps Toward Addressing and Avoiding Inordinate Delay in Capital Cases*, 89 J. CRIM. L. & CRIMINOLOGY 1, 1 (1998) (“[A] defendant is more likely to be on death row for an inordinate period when the case is on the margins of death eligibility and errors occur during the state’s processing of the case.”). As an example, consider *Elledge v. Florida*, 525 U.S. 944 (1998) (Breyer, J., dissenting to denial of certiorari), in which the prisoner’s “three successful appeals account for 18 of the 23 years of delay.” *Id.* at 945 (emphasis added).

not based on greater desert and are thus unjustified under retributivism.

#### B. MITIGATION—DISPROPORTIONALLY LENIENT

Courts rejecting *Lackey* claims often argue that rather than prejudicing prisoners, substantial DRI supplies the benefit of extended life.<sup>260</sup> Some courts and commentators further argue that the benefit of extended life reduces or lessens the severity or retributive value of the capital punishment.<sup>261</sup> Though the relevance is unclear, these arguments are meant to supply a basis for rejecting *Lackey* claims. These arguments suggest the second possible approach to the status of substantial DRI: it is a reduction or diminution of the capital punishment. Rather than an aggravation, it is a mitigation of the capital punishment. As one court explained in comparing capital with noncapital punishment, “[i]t is the common judgment of man that . . . punishment which leaves life is less than that which ends it.”<sup>262</sup> On this basis, punishment that leaves more life (delayed capital punishment) is less than that which leaves less life (undelayed capital punishment).

Accepting the claim that substantial DRI constitutes a mitigation of capital punishment, however, does not support the position of the capital punishment proponents who advance the claim. Accepting the claim does not lead to the conclusion that the Combination is justified under retributivism. Retributivism requires that offenders be given the punishment that they deserve—no more *and no less*.<sup>263</sup> Punishments less than what are deserved are as unjustified as punishments that are more than what are deserved.<sup>264</sup> Thus, undeserved mitigations of punishments are no less unjustified than undeserved aggravations of

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260. See, e.g., *State v. Schackart*, 947 P.2d 315, 336 (Ariz. 1997) (en banc) (rejecting prisoner’s *Lackey* claim because, in part, “delay in carrying out executions benefits inmates, allowing them to extend their lives” (citing *McKenzie v. Day*, 57 F.3d 1461, 1466–67 (9th Cir. 1995))); *People v. Hill*, 839 P.2d 984, 1018 (Cal. 1992) (in bank [sic]) (denying *Lackey* claim because, in part, “the delay—again, no matter how long—benefitted defendant rather than prejudiced him because the delay prolonged his life”).

261. E.g., *People v. Ochoa*, 28 P.3d 78, 115 (Cal. 2001) (“[D]efendant, by delaying his execution for these past nine years, has already reduced the full retributive function of execution, and indefinitely rendered his status more like that of a life prisoner . . . .”); *supra* note 209 and accompanying text.

262. *People ex rel. Patrick v. Frost*, 117 N.Y.S. 524, 527–28 (App. Div. 1909).

263. See *supra* notes 124–29 and accompanying text.

264. See *supra* notes 124–29 and accompanying text.

punishment. The following argument, with this second approach as a new premise, demonstrates that the Combination is disproportionately lenient, undeserved, and unjustified under retributivism:

(1) Under retributivism, death by execution matches the moral and legal desert of at least some offenders. Death by execution, for such offenders, is a proportional, deserved, and justified punishment.

(2) Therefore, punishment substantially greater, or substantially less, than capital punishment would not match the moral and legal desert of such offenders. Such punishment would thus be disproportional, undeserved, and unjustified under retributivism.

(3) Substantial DRI constitutes a substantial mitigation of capital punishment.

(4) Therefore, the Combination is disproportionately lenient, undeserved, and unjustified under retributivism for such offenders.

The argument is similar to the preceding argument in Part III.A. The principal difference is the new premise in step 3. While the premise reflects a plausible approach to the status of DRI,<sup>265</sup> there are other approaches that are also plausible. In arguments below, different premises as to the status of substantial DRI will replace the premise of step 3. Even with this replacement, the conclusion will remain that retributivism is unsatisfied. Step 4 concludes that if capital punishment alone is the proportional, deserved, and justified punishment under retributivism for some offenders, and if substantial DRI constitutes a substantial mitigation of capital punishment, then the Combination is disproportional, undeserved, and unjustified under retributivism for such offenders.<sup>266</sup>

One might object that imposing a punishment less severe than what the offender deserves does satisfy one version of retributivism, variously termed negative or weak retributivism.<sup>267</sup> A lessened or mitigated capital punishment would satisfy negative or weak retributivism, even for an offender who deserves a full or unmitigated capital punishment. The difficulty with negative retributivism, however, is that it fails to affirmatively

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265. See *supra* notes 209–10, 260–62 and accompanying text.

266. Construing substantial DRI as a mitigation of capital punishment also yields an absurdity. See *infra* Part III.E and note 295.

267. See *supra* note 129.

provide a justification for any punishment.<sup>268</sup> It merely provides a ceiling on the amount of punishment that may justifiably be imposed.<sup>269</sup> A mitigated capital punishment would no more satisfy negative retributivism than a \$5 fine or even no punishment—each is less than what the offender deserves. Imposing a mitigated (or any type of) capital punishment that no more satisfies or contributes to the goals or purposes of negative retributivism than a \$5 fine or even no punishment at all would be pointless, needless, unnecessary, and thus excessive, and thus cruel and unusual in violation of the Eighth Amendment.<sup>270</sup> Negative retributivism (allowing any lesser punishment or even no punishment at all) violates the very claim on which the proponents of the constitutionality of capital punishment depend—capital punishment, at least for some offenders, is the only deserved, proportional, and justified punishment under retributivism.<sup>271</sup> As a result, the objection that a mitigated capital punishment would satisfy negative retributivism, while true, only serves to undermine the imposition of capital punishment in general. For the capital punishment proponent, embracing negative retributivism only hurts, it does not help.

C. EITHER ADDITIONAL PUNISHMENT OR MITIGATION—EITHER DISPROPORTIONALLY EXCESSIVE OR LENIENT

Whether substantial DRI constitutes additional punishment or a mitigation of capital punishment is unclear.<sup>272</sup> Each approach is plausible. From this uncertainty, a third possible approach emerges: it is *either* additional punishment *or* a mitigation of capital punishment. The following argument, with this third approach as a new premise, demonstrates that the Combination is undeserved, disproportional, and unjustified under retributivism:

(1) Under retributivism, death by execution matches the moral and legal desert of at least some offenders. Death by execution, for such offenders, is a proportional, deserved, and justified punishment.

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268. See *supra* note 129.

269. See *supra* note 129.

270. See *supra* notes 56–57, 64–71 and accompanying text.

271. See *supra* notes 130–36 and accompanying text.

272. See Carol Steiker, *The Death Penalty and Deontology*, in THE OXFORD HANDBOOK OF PHILOSOPHY OF CRIMINAL LAW 441, 446 (John Deigh & David Dolinko eds., 2011) (“[I]t becomes difficult to know whether to consider lengthy delay as a harm or a benefit to any particular death row inmate.”).

(2) Therefore, punishment substantially greater, or substantially less, than capital punishment would not match the moral and legal desert of such offenders. Such punishment would thus be disproportional, undeserved, and unjustified under retributivism.

(3) Substantial DRI constitutes either a substantial additional punishment or a substantial mitigation of capital punishment.

(4) Therefore, the Combination is disproportional (either excessive or lenient), undeserved, and unjustified under retributivism for such offenders.

The argument is similar to the two preceding arguments in Part III.A–B. The principal difference is the new premise in step 3. Regardless of the different premises, the conclusion of each argument is largely the same—the Combination is disproportional (either excessive or lenient), undeserved, and unjustified under retributivism.<sup>273</sup>

#### D. BOTH ADDITIONAL PUNISHMENT AND MITIGATION—UNJUSTIFIED

While the previous approach was disjunctive, the fourth approach is conjunctive. Substantial DRI is *both* additional punishment *and* a mitigation of capital punishment. *People v. Ochoa*, wherein the court found that a nine-year delay both increased and decreased the prisoner's punishment, somewhat illustrates this approach.<sup>274</sup> The court's argument for increase: the delay "increase[es] the penalty imposed for the commission of capital crimes."<sup>275</sup> The court's argument for decrease: the delay "has already reduced the full retributive function of execution, and indefinitely rendered [the defendant's] status more like that of a life prisoner."<sup>276</sup>

Under this fourth possible approach, substantial DRI is both an additional punishment of one type—incarceration—and a mitigation of another type—capital punishment. With each year on death row, the prisoner suffers an additional year of incarceration but "enjoys" an additional year of life (thereby de-

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273. Construing substantial DRI as either additional punishment or a mitigation of capital punishment may also yield an absurdity. *See infra* Part III.E and note 295.

274. 28 P.3d 78, 114–15 (Cal. 2001) (denying *Lackey* claim because the delay does not frustrate the deterrent and retributive goals of punishment).

275. *Id.* at 115.

276. *Id.*

creasing the severity of execution). One might be tempted to conclude the net effect is necessarily a wash. The decrease in capital punishment offsets the increase of carceral punishment. The disproportionately lenient component offsets the disproportionately excessive component. But only if capital and carceral punishment are the same type of punishment would the net effect be *necessarily* a wash.

As obviously different types of punishment, the net result may not be a wash. As Justice Stewart explained, “[t]he penalty of death differs from all other forms of criminal punishment, not in degree but in kind.”<sup>277</sup> That is, the difference is not merely quantitative: “the penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two.”<sup>278</sup>

Because capital and carceral punishment are qualitatively different, there are three possible net effects. First, for each additional year on death row, the increase in carceral punishment substantially exceeds the decrease in capital punishment. If so, the Combination is disproportionately excessive. Second, the increase in carceral punishment is substantially less than the decrease in capital punishment. If so, the Combination is disproportionately lenient. Third, the increase in carceral punishment is roughly equivalent to the decrease in capital punishment. If so, the punitive value of the Combination would be roughly equivalent to capital punishment alone. Under the first two possible net effects, the Combination violates retributivism. Only under the third possible net effect might the Combination satisfy retributivism.

So which is the correct net effect? The correct net effect may be indeterminate. Comparing the punitive value of additional years of incarceration with the mitigating value of additional years of life is incommensurate. There is no obvious conversion rate between the two different types of punishment. It is perhaps apples and oranges. Both because of and despite this indeterminacy, retributivism fails to justify the Combination.

Because the correct net effect is indeterminate, whether retributivism justifies the Combination is indeterminate. But punishment requires affirmative justification; lacking an affirmative justification the imposition of punishment is unjusti-

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277. *Furman v. Georgia*, 408 U.S. 238, 306 (1972) (Stewart, J., concurring).

278. *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976).