

# ESSAY

## Justice Kennedy, the Purposes of Capital Punishment, and the Future of *Lackey* Claims

BRENT E. NEWTON†

### INTRODUCTION

Although caution always must be exercised in interpreting Justices' comments during oral arguments at the Supreme Court of the United States—something likened to reading tea leaves<sup>1</sup>—Justice Kennedy's remarks during the argument in *Hall v. Florida*<sup>2</sup> in early 2014 nevertheless are intriguing. Justice Kennedy's positions on high-profile legal issues like the death penalty, abortion rights, or civil rights are a matter of great public concern because his vote

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† J.D., Columbia University School of Law; B.A., University of North Carolina at Chapel Hill. The author is Deputy Staff Director of the United States Sentencing Commission and also serves as an adjunct professor of law at both Georgetown University Law Center and Washington College of Law, American University. The opinions expressed here do not reflect the position of the United States Sentencing Commission and are solely expressed in the author's private capacity. I wish to thank the editors of the *Buffalo Law Review* for their excellent work preparing this Essay for publication on an expedited basis.

1. See Paul M. Secunda, *The Many Mendelsohn "Me Too" Missteps: An Alliterative Response to Professor Rubinstein*, 102 NW. U. L. REV. 374, 378 n.28 (2008), available at [www.law.northwestern.edu/lawreview/Colloquy/2008/19/index.html](http://www.law.northwestern.edu/lawreview/Colloquy/2008/19/index.html) (warning that attempting to interpret a Justice's remarks during oral argument is "an exercise tantamount to reading tea leaves").

2. 134 S. Ct. 471 (2013) (granting certiorari to review *Hall v. State*, 109 So. 3d 704 (Fla. 2012) (holding that Florida's definition of "mental retardation" did not violate the Eighth Amendment)). In *Hall*, the Court held that the definition of "mental retardation" used at Hall's trial was unconstitutional under the Eighth Amendment. See *Hall v. Florida*, No. 12-10882, 2014 WL 2178332 (U.S. May 27, 2014).

in a case is frequently the “swing vote” on the Court.<sup>3</sup> As I discuss below, Justice Kennedy’s remarks at the *Hall* argument suggest an interest in a “*Lackey* claim”<sup>4</sup>—an argument under the Eighth Amendment that the state loses its right to carry out a death sentence as a result of excessive delay following the imposition of the sentence at trial.<sup>5</sup> In 1995, the Court twice stayed Clarence Lackey’s execution date based on his Eighth Amendment claim—and two Justices, Stevens and Breyer, explicitly endorsed the claim—although ultimately the full Court denied a third stay and refused to review the issue in Lackey’s own case. He was executed in 1997.<sup>6</sup>

I have a particular interest in *Lackey* claims, as I was Lackey’s attorney who raised that claim in his two certiorari petitions in 1995. While I no longer litigate capital cases, my interest in *Lackey* claims has continued in the following two decades.<sup>7</sup> Although a majority of the Justices have not yet addressed a *Lackey* claim in any case, Justice Kennedy’s questions posed to Florida’s attorney during the *Hall* argument in early 2014 indicate that he may be on the brink of joining Justice Breyer and former Justice Stevens in their oft-stated position that the Court should grant certiorari to address whether excessive delays in death penalty cases violate the Eighth Amendment under any circumstances.

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3. See Charlotte Schneider, *Supreme Court 2012-2013 Highlights*, LII SUP. CT. BULL., [http://www.law.cornell.edu/supct/cert/supreme\\_court\\_2012-2013\\_term\\_highlights](http://www.law.cornell.edu/supct/cert/supreme_court_2012-2013_term_highlights) (last visited May 19, 2014) (“For some controversial . . . issues, the Court often still splits along ideological lines, with Chief Justice Roberts along with Justices Scalia, Thomas, and Alito on the conservative side and Justices Ginsburg, Breyer, Sotomayor, and Kagan having a more liberal view. Justice Kennedy remains the central, or ‘swing,’ vote.”).

4. See *infra* Part II.

5. See *infra* Part I.

6. See *Lackey v. Texas*, 514 U.S. 1045, 1045-47 (1995) (opinions of Stevens & Breyer, JJ., respecting the denial of certiorari); see also *In re Lackey*, 520 U.S. 1227, 1227 (1997) (denying third stay application and denying certiorari); *Lackey v. Scott*, 514 U.S. 1093, 1093 (1995) (granting second stay application); *Lackey v. Texas* 514 U.S. 1001, 1001 (1995) (granting first stay application).

7. See Brent E. Newton, *The Slow Wheels of Furman’s Machinery of Death*, 13 J. APP. PRAC. & PROCESS 41 (2012) (discussing the evolution of the *Lackey* claim since 1995).

## I. LACKEY CLAIMS AND THE FOCUS ON THE PURPOSES OF CAPITAL PUNISHMENT

In early 1995, when I was a capital defense attorney in Texas, I took over the legal representation of Clarence Lackey, who at the time was facing an imminent execution date. Lackey originally had been sentenced to death in 1978. In 1982, on his mandatory direct appeal, the Texas Court of Criminal Appeals reversed his capital murder conviction and death sentence and ordered a new trial.<sup>8</sup> On the mandatory direct appeal following the second jury's capital murder conviction and death sentence, Lackey's case remained before the state high court for nine more years before the court ultimately affirmed his conviction and sentence in 1991.<sup>9</sup> He unsuccessfully pursued discretionary post-conviction appeals during the ensuing four years.<sup>10</sup> In early 1995, I raised the claim that executing Lackey at that point—after he had spent nearly seventeen years (over 6,000 days) living under a sentence of death, the vast majority of which were spent on *mandatory* direct appeals—would constitute cruel and unusual punishment in violation of the Eighth Amendment.<sup>11</sup>

Lackey's Eighth Amendment claim had two independent components, both of which contended that his execution after seventeen years of delay would be "disproportionate" and, thus, cruel and unusual punishment.<sup>12</sup> First, it contended

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8. *Id.* at 54 and accompanying notes.

9. *Id.*

10. *Id.*

11. *See id.* at 54-55.

12. It is well established, as a general constitutional principle, that "disproportionate" punishments violate the Eighth Amendment. *See, e.g.,* Gregg v. Georgia, 428 U.S. 153, 169 (1976) (plurality op.) (citations omitted) ("The history of the prohibition of 'cruel and unusual' punishment [in the Eighth Amendment] already has been reviewed at length. The phrase first appeared in the English Bill of Rights of 1689, which was drafted by Parliament at the accession of William and Mary. . . . The English version appears to have been directed against punishments unauthorized by statute and beyond the jurisdiction of the sentencing court, as well as those disproportionate to the offense involved."); *see also* Furman v. Georgia, 408 U.S. 238, 420 (1972) (Powell, J., dissenting, joined by Burger, C.J., & Blackmun & Powell, JJ.) ("It is . . . within the historic process of constitutional adjudication to challenge the imposition of the death penalty . . . as a penalty wholly disproportionate to a particular criminal

that the state's carrying out the execution after keeping Lackey under the physically and psychologically extreme conditions of death row for such a lengthy period of time would be cruel and unusual because it would exact more punishment than the state was entitled to under the Eighth Amendment.<sup>13</sup> By 1995, several foreign courts had recognized, as a basis for prohibiting capital punishment, that lengthy stays on death row were cruel and inhumane.<sup>14</sup> Particularly notable was the British Privy Council's 1994 decision in *Pratt & Morgan v. Attorney Gen. for Jamaica*, in

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act."); *Lambert v. California*, 355 U.S. 225, 231 (1957) (Frankfurter, J., dissenting, joined by Harlan & Whittaker, JJ.) ("Then, too, a cruelly disproportionate relation between what the law requires and the sanction for its disobedience may constitute a violation of the Eighth Amendment as a cruel and unusual punishment, and, in respect to the States, even offend the Due Process Clause of the Fourteenth Amendment.").

13. See Newton, *supra* note 7, at 55-57.

14. See, e.g., *Pratt & Morgan v. Attorney Gen. for Jamaica*, 2 A.C. 1, All E.R. 769 (P.C. 1993); *State v. Makwanyane*, 1995 (3) SA 391 (CC) at para. 26 (S. Afr.) (opinion of Chaskalson, P.J., in which a majority of judges concurred); Catholic Comm'n for Justice & Peace in Zimbabwe v. Attorney-Gen., 1 Zimb. L. Rep. paras. 36, 49-51, 87-88 (Zimb. 1993); see also *Gomez v. Fierro*, 519 U.S. 918, 919 n.3 (1995) (Stevens, J., dissenting, joined by Breyer, J.) ("Sadly, in refusing to hear these [*Lackey*] claims, the Court turns a deaf ear to an argument that courts in other countries have found persuasive.") (citing foreign case law); cf. *Soering v. United Kingdom*, 11 Eur. Ct. H.R. 439 (1989) (European Court of Human Rights, in interpreting the European Convention on Human Rights, noted the Convention did not forbid capital punishment yet held that the Convention nevertheless prohibited the United Kingdom from extraditing a capital defendant to Virginia in large part because the six- to eight-year delay that typically accompanied a death sentence there would be "cruel, inhuman, [or] degrading treatment or punishment" forbidden by the Convention). Since *Lackey v. Texas*, the Supreme Court of Canada, in allowing extradition to the United States of two Canadian citizens charged with murder in Washington State, conditioned its ruling on the guarantee that they would not receive the death penalty as punishment if convicted. The Canadian high court reasoned that that the potential for lengthy delays before execution was a "relevant consideration" in determining whether extradition to the United States on capital charges would violate principles of "fundamental justice," as guaranteed by the Canadian Constitution. See *United States v. Burns*, [2001] 1 S.C.R. 283 (Can.). Also notable is the fact that, "[i]n 2009, the President of Kenya commuted the death sentences of all of the over 4,000 death row inmates [there] to life [imprisonment], citing the wait to face execution as 'undue mental anguish and suffering.'" Death Penalty Information Center, *Time on Death Row: International Perspective*, <http://www.deathpenaltyinfo.org/time-death-row>.

which the highest court in Britain observed that lengthy delays in carrying out death sentences would never have been tolerated at any point in the past in England when capital punishment was practiced.<sup>15</sup> The Eighth Amendment was based on the 1689 English Bill of Rights' proscription against "cruel and unusual punishment."<sup>16</sup> Justice Kennedy,

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15. See *Pratt & Morgan*, 2 A.C. at 4 ("It is difficult to envisage any circumstances in which in England a condemned man would have been kept in prison for years awaiting execution. But if such a situation had been brought to the attention of the court their Lordships do not doubt that the judges would have stayed the execution to enable the prerogative of mercy to be exercised and the sentence commuted to one of life imprisonment."); see also *id.* at 3 (noting "the pre-existing common law practice that execution followed as swiftly as practical after sentence"); *id.* at 7 ("Before independence [from England] the law would have protected a Jamaican citizen from being executed after an unconscionable delay"); *Riley v. Atty. Gen. for Jamaica*, 1 A.C. 719, 734-35 (Privy Council 1983) (Lord Scarman, dissenting, joined by Lord Brightman, on grounds not addressed by majority) (arguing that "execution after inordinate delay would have infringed the prohibition against cruel and unusual punishments to be found in Section 10 of the Bill of Rights of 1689," and concluding that "the jurisprudence of the civilized world, much of which is derived from common law principles and the prohibition against cruel and unusual punishments in the English Bill of Rights, has recognized and acknowledged that prolonged delay in executing a sentence of death can make the punishment when it comes inhuman and degrading").

Notably, in 1972, the four dissenting Justices in *Furman* stated that:

[A]lthough a man awaiting execution must inevitably experience extraordinary mental anguish, no one suggests that this anguish is materially different from that experienced by condemned men in 1791, even though protracted appellate review processes have greatly increased the waiting time on "death row." To be sure, the ordeal of the condemned man may be thought cruel in the sense that all suffering is thought cruel. But if the Constitution proscribed every punishment producing severe emotional stress, then capital punishment would clearly have been impermissible in 1791.

408 U.S. at 382 (Burger, C.J., dissenting, joined by Blackmun, Powell & Rehnquist, JJ.). The *Furman* dissenters appear to have been unaware of Anglo-American practices concerning delays in carrying out execution in the late 1700s. Furthermore, the average delays in carrying out executions have grown exponentially since *Furman*. See, e.g., James A. McCafferty, *The Death Sentence, 1960*, in *THE DEATH PENALTY IN AMERICA* 95-96 (Hugo Adam Bedau ed., 1964) (in 1960, the median delay between capital sentencing at trial and execution in America was sixteen months); see also *infra* note 37 and accompanying text (noting that average delays have grown to between fifteen and twenty years).

16. *Trop v. Dulles*, 356 U.S. 86, 100 (1958) ("The phrase in our Constitution was taken directly from the English Declaration of Rights of 168[9]."); see also *Ford v. Wainwright*, 477 U.S. 399, 405 (1986) ("There is now little room for doubt

in an opinion for the Court discussing the Eighth Amendment in a context other than *Lackey* (that of the execution of juvenile capital defendants), observed: "The United Kingdom's experience bears particular relevance here in light of the historic ties between our countries and in light of the Eighth Amendment's own origins. The Amendment was modeled on a parallel provision in the English Declaration of Rights of 1689 . . . ." <sup>17</sup>

Lackey's petitions to the Supreme Court in 1995 had a second argument that did not focus on the inhumanity of keeping a condemned man under a death sentence for seventeen years. The second component of his claim contended that neither of the state's primary justifications for capital punishment—retribution and deterrence—would be meaningfully served in Lackey's case after such a lengthy delay, particularly a delay primarily attributable to the state (as opposed to Lackey). <sup>18</sup> This argument found strong support in the writings of the Framers of the Constitution and influential contemporary legal theorists such as Blackstone and Beccaria. <sup>19</sup> Significantly, it also was buttressed by Justice White's concurring opinion in *Furman v. Georgia*, <sup>20</sup>

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that the Eighth Amendment's ban on cruel and unusual punishment embraces, at a minimum, those modes of punishment that had been considered cruel and unusual at the time that the Bill of Rights was adopted [in 1791.]; *Ex Parte Grossman*, 267 U.S. 87, 108-09 (1925) ("The language of the Constitution cannot be interpreted safely except by reference to the common law and to British institutions as they were when the instrument was framed and adopted."); *Kepner v. United States*, 195 U.S. 100, 125 (1904) ("In ascertaining the meaning of a phrase from the Bill of Rights it must be construed with reference to the [English] common law from which it was taken.").

17. *Roper v. Simmons*, 543 U.S. 551, 577 (2005).

18. See Newton, *supra* note 7, at 58. Although the Court has mentioned both retribution and deterrence as purposes of capital punishment, the Court has stated that retribution is the "primary justification for the death penalty." *Spaziano v. Florida*, 468 U.S. 447, 461 (1984).

19. See Newton, *supra* note 7, at 55-58, nn.65-68 & 70.

20. 408 U.S. 238, 312 (1972) (White, J., concurring). Justice White wrote:

The [death] penalty has not been considered cruel and unusual punishment in the constitutional sense because it was thought justified by the social ends it was deemed to serve. At the moment that it ceases realistically to further these purposes, however, the emerging question is whether its imposition in such circumstances would violate the Eighth

an unusual 1981 opinion from then-Justice Rehnquist dissenting from the denial of certiorari in *Coleman v. Balkcom*,<sup>21</sup> and commentary from retired Justice Powell.<sup>22</sup> All three—White, Rehnquist, and Powell—were Justices (along

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Amendment. It is my view that it would, for its imposition would then be the pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes. A penalty with such negligible returns to the State would be patently excessive and cruel and unusual punishment violative of the Eighth Amendment.

*Id.*; see also *id.* at 308 (Stewart, J., concurring) (retribution is undermined “[w]hen people begin to believe that organized society is unwilling or unable to impose upon criminal offenders the punishment they ‘deserve’ . . .”).

21. 451 U.S. 949, 959-60 (1981) (Rehnquist, J., dissenting from denial of certiorari). Justice Rehnquist wrote:

When society promises to punish by death certain criminal conduct, and then the courts fail to do so, the courts not only lessen the deterrent effect of the threat of capital punishment, they undermine the integrity of the entire criminal justice system. . . . There [also] can be little doubt that delay in the enforcement of capital punishment frustrates the purpose of retribution.

*Id.* Justice Rehnquist’s dissenting opinion did not contend that there was any “cert-worthy” issue in Coleman’s case. Rather, Justice Rehnquist complained that denying certiorari and allowing Coleman’s case to proceed to federal habeas corpus review would only improperly postpone his execution beyond the delays already occasioned by his direct and collateral appeals in the state court system:

Ordinarily I would have no hesitation joining the majority of my colleagues in denying the petition for certiorari in this case. The questions presented in the petition are of importance only to petitioner himself and therefore are not suitable candidates for the exercise of our discretionary jurisdiction. But in a larger sense, the case raises significant issues about the administration of capital punishment statutes in this country, and reflects the increasing tendency to postpone or delay the enforcement of those constitutionally valid statutes. Because I think stronger measures are called for than the mere denial of certiorari in a case such as this, I would grant the petition for certiorari so that the case can be fully briefed and argued.

See *id.* at 956.

22. Justice (Retired) Lewis Powell, *Commentary: Capital Punishment*, 102 HARV. L. REV. 1035, 1035 (1989) (“[Y]ears of delay between sentencing and execution . . . undermine[] the deterrent effect of capital punishment and reduce[] public confidence in [our] criminal justice system.”). Like Justice Rehnquist in his *Coleman* dissent, former Justice Powell was not endorsing an Eighth Amendment *Lackey*-type claim. Nevertheless, like Justice Rehnquist, he recognized that excessive delay undermined the penological purposes of capital punishment—a point fully supporting the second constitutional basis of a *Lackey* claim.

with Chief Justice Burger and Justices Stewart, Blackmun, and Stevens) who voted to uphold the post-*Furman* death penalty system in *Gregg v. Georgia*<sup>23</sup> in 1976, a time when delays in the administration of the death penalty obviously did not exist.

Although the Supreme Court ultimately refused to grant certiorari and stay Clarence Lackey's execution, Justices Stevens and Breyer suggested that the claim was worthy of close judicial scrutiny and may have merit.<sup>24</sup> Justice Stevens contended that the case was cert-worthy but stated that its "novelty" was a valid basis for denying certiorari at that juncture.<sup>25</sup> He nevertheless suggested that the state's interests in retribution and deterrence did not "retain any force" for a condemned inmate who had already spent seventeen years under a death sentence.<sup>26</sup> He also noted that such a delay would have been considered cruel and unusual punishment according to Anglo-American jurisprudence antedating the Eighth Amendment's adoption in 1791.<sup>27</sup> Justice Breyer noted his agreement with Justice Stevens's assessment of Lackey's claim being an "important undecided" issue.<sup>28</sup>

Following the two Justices' encouragement for the claim to be raised in other cases, many death row inmates around the country raised what soon came to be known as a "*Lackey*

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23. 428 U.S. 153, 157 (1976).

24. *See* *Lackey v. Texas*, 514 U.S. 1045, 1045 (1995) (opinions of Stevens & Breyer, JJ., respecting the denial of certiorari).

25. *See id.*

26. *See id.*

27. *See id.*

28. *Id.* at 1047; *see also* *Lackey v. Johnson*, 519 U.S. 911 (1996) (denying certiorari, but noting that Breyer, J., voted to grant certiorari in Lackey's subsequent appeal).



claim”<sup>29</sup> based on inordinate delays in their cases.<sup>30</sup> Although no lower court has granted relief on a *Lackey* claim, and the Supreme Court has denied certiorari in several cases raising *Lackey* claims between 1995 and 2014, some of these cases have occasioned a recurring dialogue between Justice Breyer (at times joined by former Justice Stevens) and Justice Thomas in dueling opinions issued in connection with the denials of certiorari or stays of execution.<sup>31</sup> In cases where

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29. See *Lagrand v. Stewart*, 170 F.3d 1158, 1160 (9th Cir. 1999) (“[c]laims that the Eighth Amendment would be violated by the execution of an inmate after many years [on death row] are called *Lackey* claims, after *Lackey v. Texas*”); *Gardner v. State*, 234 P.3d 1115, 1142 n.229 (Utah 2010) (“[W]e . . . refer to the claims as ‘*Lackey* claims,’ given its now common usage. . .”).

30. See, e.g., *Chambers v. Bowersox*, 157 F.3d 560, 568-70 (8th Cir. 1998); *Turner v. Jabe*, 58 F.3d 924, 926, 929-30 (4th Cir. 1995); *Fearance v. Scott*, 56 F.3d 633, 636 (5th Cir. 1995); *Free v. Peters*, 50 F.3d 1362, 1362 (7th Cir. 1995); *McKenzie v. Day*, 57 F.3d 1461, 1463 (9th Cir. 1995); *Stafford v. Ward*, 59 F.3d 1025, 1028 (10th Cir. 1995); *Porter v. Singletary*, 49 F.3d 1483, 1485 (11th Cir. 1995); *Ex Parte Bush*, 695 So. 2d 138, 139-40 (Ala. 1997); *State v. Schackart*, 947 P.2d 315, 336 (Ariz. 1997); *People v. Massie*, 967 P.2d 29, 44-45 (Cal. 1998); *Booker v. State*, 773 So. 2d 1079, 1096 (Fla. 2000); *People v. Simms*, 736 N.E.2d 1092, 1141 (Ill. 2000); *Bieghler v. State*, 839 N.E.2d 691, 697-98 (Ind. 2005); *State v. Smith*, 931 P.2d 1272, 1287-88 (Mont. 1996); *State v. Moore*, 591 N.W.2d 86, 93-94 (Neb. 1999); *State v. Davis*, No. 2011-0538, 2014 WL 1622936, ¶ 70 (Ohio Apr. 22, 2014). Several concurring or dissenting lower court judges have indicated that, in their opinion, *Lackey* claims may have merit at least in some cases. See, e.g., *Ceja v. Stewart*, 134 F.3d 1368, 1369-78 (9th Cir. 1998) (Fletcher, J., dissenting); *McKenzie*, 57 F.3d at 1484-89 (Norris, J., dissenting); cf. *Simms*, 736 N.E.2d at 1143-45 (Harrison, C.J., dissenting); *Smith*, 931 P.2d at 1291-92 (Leaphart, J., specially concurring).

31. See, e.g., *Muhammad v. Florida*, 134 S. Ct. 894, 894 (2014) (Breyer, J., dissenting from denial of certiorari and denial of stay of execution); *Valle v. Florida*, 132 S. Ct. 1, 1-2 (2011) (Breyer, J., dissenting from denial of stay); *Johnson v. Bredesen*, 130 S. Ct. 541, 542-46 (2009) (statement of Stevens & Breyer, JJ., respecting denial of certiorari; opinion of Thomas, J., concurring in denial of certiorari); *Thompson v. McNeil*, 129 S. Ct. 1299, 1299-1304 (2009) (statement of Stevens, J., respecting denial of certiorari; opinion of Thomas, J., concurring in denial of certiorari; opinion of Breyer, J., dissenting from denial of certiorari); *Smith v. Arizona*, 552 U.S. 985, 985-86 (2007) (Breyer, J., dissenting from denial of certiorari); *Allen v. Ornoski*, 546 U.S. 1136, 1136 (2006) (Breyer, J., dissenting from denial of certiorari and stay of execution); *Foster v. Florida*, 537 U.S. 990, 990-93 (2002) (statement of Stevens, J., respecting denial of certiorari; opinion of Thomas, J., concurring in denial of certiorari; opinion of Breyer, J., dissenting from denial of certiorari); *Knight v. Florida*, 528 U.S. 990, 990-99 (1999) (opinion of Stevens, J., respecting denial of certiorari; opinion of Thomas, J., concurring in denial of certiorari; opinion of Breyer, J., dissenting

condemned men have been on death row for cumulative periods of years ranging from nineteen to thirty-three years as a result of repeated resentencings following appellate reversals, Justice Breyer has argued that such inmates had made out strong cases under the Eighth Amendment for being removed from death row.<sup>32</sup> Justice Thomas has responded that the *Lackey* claims in such cases categorically lack merit because there is no basis in “American constitutional tradition” for the “proposition that a [capital] defendant can avail himself of the panoply of appellate and collateral procedures [permitted in the modern era] and then complain when his execution is delayed.”<sup>33</sup>

In addition to the many cases during the past two decades addressing *Lackey* claims, a large number of legal scholars have written about the *Lackey* issue.<sup>34</sup> The vast

from denial of certiorari); *Elledge v. Florida*, 525 U.S. 944, 944-46 (1998) (Breyer, J., dissenting from denial of certiorari).

32. See, e.g., *Muhammad*, 134 S. Ct. at 834 (Breyer, J., dissenting from denial of certiorari and stay of execution); *Knight*, 528 U.S. at 996-99 (opinion of Breyer, J., dissenting from denial of certiorari); *Elledge*, 525 U.S. at 944-46 (Breyer, J., dissenting from denial of certiorari).

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

34. See, e.g., Dwight Aarons, *Can Inordinate Delay Between a Death Sentence and Execution Constitute Cruel and Unusual Punishment?*, 29 SETON HALL L. REV. 147, 168-70 (1998); Corey D. Burton & John D. Burrow, *How Long Must They Wait? Lackey Claims, Excessive Delay, and Evolving Standards of Decency*, CRIM. JUST. POL'Y REV. (forthcoming 2014); Russell Christopher, *Death Delayed Is Retribution Denied*, 99 MINN. L. REV. (forthcoming 2015); Jessica Feldman, *A Death Row Incarceration Calculus: When Prolonged Death Row Imprisonment Becomes Unconstitutional*, 40 SANTA CLARA L. REV. 187, 187-89 (1999); Kathleen M. Flynn, *The “Agony of Suspense”: How Protracted Death Row Confinement Gives Rise to an Eighth Amendment Claim of Cruel and Unusual Punishment*, 54 WASH. & LEE L. REV. 291, 291-94 (1997); Ryan S. Hedges, *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, 581 (2001); Michael Johnson, *Fifteen Years and Death: Double Jeopardy, Multiple Punishments, and Extended Stays on Death Row*, 23 B.U. PUB. INT. L.J. 85 (2013); Karl S. Myers, *Practical Lackey: The Impact of Holding an Execution After a Long Stay on Death Row Unconstitutional Under Lackey v. Texas*, 106 DICK. L. REV. 647, 650 (2002); Elizabeth Rapaport, *A Modest Proposal: The Aged of Death Row Should Be Deemed Too Old to Execute*, 77 BROOK. L. REV. 1089 (2012); Jeremy Root, *Cruel and Unusual Punishment: A Reconsideration of the Lackey Claim*, 27 N.Y.U. REV. L. & SOC. CHANGE 281, 284 (2001-02); Kara Sharkey, Comment, *Delay in Considering the Constitutionality of Inordinate Delay: The Death Row*

majority of them have contended that the *Lackey* claim has merit, at least in some cases.<sup>35</sup>

During the two decades since *Lackey v. Texas*, the average delay between the imposition and execution of death sentences has steadily grown.<sup>36</sup> In 1995, the delay averaged around ten years. Currently, that average delay had grown to at least fifteen (and actually closer to twenty) years.<sup>37</sup> As a recent commentator noted, in the four decades since the death penalty was reinstated following the Supreme Court's decision in *Furman*, "in four of the top five states with the largest death row populations, more death row prisoners [have] died of old age than were executed."<sup>38</sup> Thus, the basis for the *Lackey* claim—particularly as a "systemic" *Lackey* claim, that is, one challenging the entire system of American capital punishment (or at least a single state's system of capital punishment) based on systemic delays<sup>39</sup>—has only

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*Phenomenon and the Eighth Amendment*, 161 U. PA. L. REV. 861, 865 (2013); Erin Simmons, Comment, *Challenging an Execution After Prolonged Confinement on Death Row [Lackey Revisited]*, 59 CASE W. RES. L. REV. 1249, 1250-51 (2009); 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 (2013).

35. See, e.g., Christopher, *supra* note 34; Sun, *supra* note 34.

36. See Newton, *supra* note 7, at 43 (figure showing "Average Time Between Sentencing and Execution (Months)").

37. *Id.* As I explained in that article, the average delay is closer to twenty years when the cumulative time that executed inmates spent under death sentences is considered (as opposed to only delays since their most recent death sentences). Many capital defendants received second death sentences at retrials following appellate reversals. See *id.* at 43-44.

38. See Christopher, *supra* note 34, at 2 (citing TRACY L. SNELL, BUREAU OF JUSTICE STATISTICS, U.S. DEPT. OF JUSTICE, *Capital Punishment*, 2011, tbls. 15, 17 (2013), available at <http://bjs.gov/content/pub/pdf/cp11st.pdf>). That same commentator noted the inevitability of "tenures of forty or even fifty years on death row" in the future (based on trends during the past two decades). Christopher, *supra* note 34, at 43.

39. Cf. Sara Colón, *Capital Crime: How California's Administration of the Death Penalty Violates the Eighth Amendment*, 97 CALIF. L. REV. 1377, 1384-85 (2009) (contending that "California's capital punishment system is unconstitutional both because its delays and low execution rate mean that it in many ways is not retributive or deterrent at all, and because it is never more retributive or deterrent than life without parole.").

grown more compelling since the Court refused to review Lackey's case in 1995.<sup>40</sup>

## II. JUSTICE KENNEDY'S REMARKS DURING THE *HALL* ARGUMENT

In *Hall v. Florida*, in 2013, the Court granted certiorari to address Florida's definition of "mental retardation" used to decide whether mentally disabled capital defendants like Hall are constitutionally ineligible for the death penalty under *Atkins v. Virginia*.<sup>41</sup> During the argument,<sup>42</sup> Justice Breyer initially noted that Hall had been on Florida's death row for thirty-five years, a point which did not relate to the legal issue on which the Court had granted certiorari.<sup>43</sup> Justice Breyer's comment was not surprising to those interested in the evolution of the *Lackey* jurisprudence during the past two decades, given his repeated assertions that the Court should grant certiorari and address the *Lackey*

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40. As I have written elsewhere:

The original *Lackey* claim was based on an inmate-specific case of excessive delay and, in particular, on delay more attributable to the state than to the death-row inmate. Yet the claim's jurisprudential basis arguably transcends individual cases of delay and extends to all inmates on death row when systemic delays reach a certain point. Just as *Furman* had the effect of invalidating every existing death sentence in America, the ineluctable logic of the *Lackey* claim—if ever embraced by a majority of the Court—would provide a forceful argument that every death sentence in America is invalid because systemic delays have undermined the legitimate purposes of capital punishment.

Newton, *supra* note 7, at 64-65; see also Carol S. Steiker & Jordan M. Steiker, *Capital Punishment: A Century of Discontinuous Debate*, 100 J. CRIM. L. & CRIMINOLOGY 643, 682 (2010) ("The real power of the *Lackey* claim is not in its potential to yield fruit as a cognizable claim of individual deprivation. Rather, the issue sheds light on the dysfunctional character of our capital system.").

41. 536 U.S. 304, 321 (2002) (holding that execution of mentally retarded criminals is cruel and unusual punishment).

42. Transcript of Oral Argument at 1, *Hall v. Florida*, 2014 WL 2178332 (U.S. Mar. 3, 2014), (No. 12-10882), available at [http://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/12-10882\\_7758.pdf](http://www.supremecourt.gov/oral_arguments/argument_transcripts/12-10882_7758.pdf) [hereinafter Transcript].

43. *Id.* at 45-46. Immediately after Justice Breyer's question, Justice Scalia asked, "How has it gone on this long? 1978 is when he killed this woman," to which Florida Solicitor General Alan Winsor responded, "There have been a number of appeals in this case. There have been a number of issues raised [over the years]. . . ." *Id.*

issue. What occurred next at the *Hall* argument—Justice Kennedy’s follow-up comments and questions—was surprising to such observers:

JUSTICE KENNEDY: [T]he last ten people Florida has executed have spent an average of 24.9 years on death row. Do you think that that is consistent with the purposes of the death penalty, and . . . is it consistent with sound administration of the justice system?

MR. WINSOR [counsel for the State of Florida]: Well, I certainly think it’s consistent with the Constitution, and I think that there are obvious . . .

JUSTICE KENNEDY: That wasn’t my question.

MR. WINSOR: Oh, I’m sorry, I apologize.

JUSTICE KENNEDY: Is it consistent with . . . the purposes that the death penalty is designed to serve, and is it consistent with an orderly administration of justice?

MR. WINSOR: It’s consistent with the . . .

JUSTICE KENNEDY: Go ahead.

MR. WINSOR: It is consistent with the purposes of the death penalty certainly.

JUSTICE SCALIA: General Winsor, maybe you should ask us . . . that question, inasmuch . . . as most of the delay has been because of rules that we have imposed.<sup>44</sup>

JUSTICE KENNEDY: Well, let me . . . ask this. Of course most of the delay is at the hands of the defendant. In this case it was 5 years before there was a hearing on the on the . . . *Atkins* question. Has the Attorney General of Florida

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44. Justice Scalia’s comments indicate his apparent agreement with Justice Thomas’s position regarding *Lackey* claims:

It is worth noting, in addition, that, in most cases raising this novel claim, the delay in carrying out the prisoner’s execution stems from this Court’s Byzantine death penalty jurisprudence, . . . It is incongruous to arm capital defendants with an arsenal of “constitutional” claims with which they may delay their executions, and simultaneously to complain when executions are inevitably delayed.

*Cf.* *Knight v. Florida*, 528 U.S. 990, 991-92 (1999) (Thomas, J., concurring in denial of certiorari).

suggested to the legislature any . . . measures, any provisions, any statutes, to expedite the consideration of these cases.

MR. WINSOR: Your Honor, there was a statute enacted last session, last spring, that is -- it's called the Timely Justice Act, that addresses a number of issues that you raise, and it's presently being challenged in front of the Florida Supreme Court. . . .<sup>45</sup>

\* \* \*

Justice Kennedy's comments are notable for two main reasons. First, they did not appear to be off the cuff. In the oral argument of a case in which certiorari had been granted on a legal issue that had nothing to do with *Lackey*,<sup>46</sup> Justice Kennedy clearly had prepared for his *Lackey*-related questions because he cited an arcane statistic about the average delay before executions in the past ten Florida cases.<sup>47</sup> Second, his repeated question about "the purposes that the death penalty is designed to serve" certainly appears to allude to the primary arguments made by Justices Stevens and Breyer in addressing *Lackey* claims since 1995.<sup>48</sup> Part III addresses Justice Kennedy's Eighth Amendment opinions regarding the purposes of punishment in other contexts.

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45. Transcript, *supra* note 42, at 46-47.

46. Neither Justice Kennedy nor any other Justice made reference to the *Lackey* issue in the majority or dissenting opinions later issued in *Hall*. See *Hall v. Florida*, No. 12-10882, 2014 WL 2178332 (U.S. May 27, 2014). The fact that the issue was not addressed in the written opinions is not surprising, considering the Court's well-established practice of not ordinarily addressing issues not raised in certiorari petitions. See, e.g., *Parke v. Raley*, 506 U.S. 20, 28 (1992). The *Lackey* issue in *Hall* was not raised in the certiorari petition. See *Petition for Writ of Certiorari, Hall v. Crews et al.*, 2013 WL 5702378 (U.S. June 6, 2013) (No. 12-10882).

47. It is not apparent what the source of that data was. It was not mentioned in any of the petitions or briefs submitted in *Hall v. Florida*.

48. See, e.g., *Johnson v. Bredesen*, 130 S. Ct. 541, 543 (2009) ("[D]elaying an execution does not further public purposes of retribution and deterrence but only diminishes whatever possible benefit society might receive from petitioner's death. . . . In other words, the penological justifications for the death penalty diminish as the delay lengthens.") (Stevens, J., respecting the denial of certiorari, joined by Breyer, J.) (citations and internal quotation marks omitted).

### III. JUSTICE KENNEDY'S EIGHTH AMENDMENT JURISPRUDENCE CONCERNING THE PURPOSES OF PUNISHMENT

As discussed below, Justice Kennedy's interpretation of the Eighth Amendment consistently has been with a keen eye toward whether a legislatively authorized sentence meaningfully serves the legitimate purposes of punishment. His judicial opinions, though, have not been written on a blank slate. In 1976, the controlling plurality of the Court in *Gregg v. Georgia*,<sup>49</sup> which upheld the modern death penalty nearly four decades ago (when it was in its infancy), recognized that retribution and deterrence are the two primary purposes of capital punishment,<sup>50</sup> and further stated that "the sanction imposed cannot be so totally without penological justification" or it will violate the Eighth Amendment.<sup>51</sup> Although the Court in *Gregg* upheld the post-*Furman* death penalty as a general matter, in future cases the Court invalidated particular applications of capital

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49. 428 U.S. 153 (1976) (plurality op.). Although it was a plurality opinion, it was the "controlling" opinion of the Court because it represented the Court's judgment on the "narrowest grounds." See *Johnson v. Texas*, 509 U.S. 350, 360 (1993); see also *Gregg*, 428 U.S. at 169 n.15.

50. *Gregg*, 428 U.S. at 183 ("The death penalty is said to serve two principal social purposes: retribution and deterrence of capital crimes by prospective offenders."). In a footnote, the plurality in *Gregg* also briefly mentioned a third purpose arguably served by capital punishment—incapacitation. *Id.* at 183 n.28 ("Another purpose that has been discussed is the incapacitation of dangerous criminals and the consequent prevention of crimes that they may otherwise commit in the future."). Incapacitation—which the Court has never discussed in any other case in which the death penalty has been invalidated under the Eighth Amendment as not serving the purposes of punishment, see, e.g., *Roper v. Simmons*, 543 U.S. 551, 571 (2004) (only discussing retribution and deterrence)—would not be meaningfully served by executing an inmate after a long period of delay because the inmate (likely in his middle-age or geriatric years by that time) would still remain incarcerated. See *Valle v. Florida*, 132 S. Ct. 1,2 (2011) (Breyer, J., dissent from denial of a stay of execution) ("It seems yet more unlikely that the execution, coming after what is close to a lifetime of imprisonment, matters in respect to incapacitation.").

51. *Gregg*, 428 U.S. at 182-83 (citation omitted); see also *Coker v. Georgia*, 433 U.S. 584, 592-93 n.4 (1976) (plurality op.) (capital punishment would be unconstitutional if it did not "measurably serve the legitimate ends of punishment"); *McCleskey v. Kemp*, 481 U.S. 279, 301-02 (1987) (same; quoting *Gregg*).

punishment as not measurably advancing deterrence or retribution.<sup>52</sup>

In *Enmund v. Florida*,<sup>53</sup> the first post-*Gregg* case invalidating the death penalty on the grounds that it did not serve the purposes of capital punishment, the Court addressed whether capital punishment could be applied to a non-triggerman accomplice who did not act with intent or deliberate indifference towards a coconspirator's killing of the victim:

Unless the death penalty when applied to those in *Enmund's* position measurably contributes to [retribution or deterrence], it is nothing more than the purposeless and needless imposition of pain and suffering, and hence an unconstitutional punishment. We are quite unconvinced, however, that the threat that the death penalty will be imposed for murder will measurably deter one who does not kill and has no intention or purpose that life will be taken. . . . Putting *Enmund* to death to avenge two killings that he did not commit and had no intention of committing or causing does not measurably contribute to the retributive end of ensuring that the criminal gets his just deserts.<sup>54</sup>

Two decades later, in *Atkins v. Virginia*,<sup>55</sup> the Court (with Justice Kennedy joining Justice Stevens's majority opinion), held that the purposes of capital punishment also would not be served by executing mentally retarded capital defendants:

With respect to retribution—the interest in seeing that the offender gets his “just deserts”—the severity of the appropriate punishment necessarily depends on the culpability of the offender. Since *Gregg*, our jurisprudence has consistently confined the imposition of the death penalty to a narrow category of the most serious crimes. . . . If the culpability of the average murderer is insufficient to justify the most extreme sanction available to the State, the lesser culpability of the mentally retarded offender surely does not merit that form of retribution. Thus, pursuant to our narrowing jurisprudence, which seeks to ensure that only the most deserving of execution are put to

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52. Although the state's interests in both deterrence and retribution have been considered in such analyses, the central focus arguably should be on retribution, as the Court has recognized that “the primary justification for the death penalty is retribution.” *Spaziano v. Florida*, 468 U.S. 447, 461 (1982).

53. 458 U.S. 782 (1982). Justice Kennedy was not a member of the Court at the time it decided *Enmund*. *Id.* at 783.

54. *Id.* at 798-99, 801 (citations and internal quotation marks omitted).

55. 536 U.S. 304 (2002).



death, an exclusion for the mentally retarded is appropriate. With respect to deterrence—the interest in preventing capital crimes by prospective offenders—it seems likely that capital punishment can serve as a deterrent only when murder is the result of premeditation and deliberation. . . . The theory of deterrence in capital sentencing is predicated upon the notion that the increased severity of the punishment will inhibit criminal actors from carrying out murderous conduct. Yet it is the same cognitive and behavioral impairments that make these defendants less morally culpable—for example, the diminished ability to understand and process information, to learn from experience, to engage in logical reasoning, or to control impulses—that also make it less likely that they can process the information of the possibility of execution as a penalty and, as a result, control their conduct based upon that information. Nor will exempting the mentally retarded from execution lessen the deterrent effect of the death penalty with respect to offenders who are not mentally retarded. Such individuals are unprotected by the exemption and will continue to face the threat of execution. Thus, executing the mentally retarded will not measurably further the goal of deterrence.<sup>56</sup>

In *Roper v. Simmons*,<sup>57</sup> Justice Kennedy authored the Court's majority opinion, which held that "neither retribution nor deterrence provides adequate justification for imposing the death penalty on juvenile [capital] offenders" and, thus, the penalty was deemed "disproportionate" under the Eighth Amendment in all such cases.<sup>58</sup> His opinion reasoned that:

Once the diminished culpability of juveniles is recognized, it is evident that the penological justifications for the death penalty apply to them with lesser force than to adults. We have held there are two distinct social purposes served by the death penalty: retribution and deterrence of capital crimes by prospective offenders. . . . Whether viewed as an attempt to express the community's moral outrage or as an attempt to right the balance for the wrong to the victim, the case for retribution is not as strong with a minor as with an adult. Retribution is not proportional if the law's most severe penalty is imposed on one whose culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity. As for deterrence, it is unclear whether the death penalty has a significant or even measurable deterrent effect on juveniles, as counsel for petitioner acknowledged at oral argument. . . . Here, however, the absence of evidence of deterrent effect is of special concern because the same characteristics that

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56. *Id.* at 319-20 (citations and internal quotation marks omitted).

57. 543 U.S. 551 (2005).

58. *Id.* at 572, 575.

render juveniles less culpable than adults suggest as well that juveniles will be less susceptible to deterrence. . . . To the extent the juvenile death penalty might have residual deterrent effect, it is worth noting that the punishment of life imprisonment without the possibility of parole is itself a severe sanction, in particular for a young person.<sup>59</sup>

In *Kennedy v. Louisiana*,<sup>60</sup> Justice Kennedy's opinion for the Court concluded that capital punishment for rape of a child (not resulting in death) likewise did not meaningfully serve the two purposes of capital punishment:

The goal of retribution, which reflects society's and the victim's interests in seeing that the offender is repaid for the hurt he caused, does not justify the harshness of the death penalty here. In measuring retribution, as well as other objectives of criminal law, it is appropriate to distinguish between a particularly depraved murder that merits death as a form of retribution and the crime of child rape. There is an additional reason for our conclusion that imposing the death penalty for child rape would not further retributive purposes. In considering whether retribution is served, among other factors we have looked to whether capital punishment has the potential . . . to allow the community as a whole, including the surviving family and friends of the victim, to affirm its own judgment that the culpability of the prisoner is so serious that the ultimate penalty must be sought and imposed. In considering the death penalty for nonhomicide offenses this inquiry necessarily also must include the question whether the death penalty balances the wrong to the victim. It is not at all evident that the child rape victim's hurt is lessened when the law permits the death of the perpetrator. . . . With respect to deterrence, if the death penalty adds to the risk of nonreporting, that, too, diminishes the penalty's objectives. Underreporting is a common problem with respect to child sexual abuse. . . . In addition, by in effect making the punishment for child rape and murder equivalent, a State that punishes child rape by death may remove a strong incentive for the rapist not to kill the victim. Assuming the offender behaves in a rational way, as one must to justify the penalty on grounds of deterrence, the penalty in some respects gives less protection, not more, to the victim, who is often the sole witness to the crime. . . . Each of these propositions, standing alone, might not establish the unconstitutionality of the death penalty for the crime of child rape. Taken in sum, however, they demonstrate the serious negative consequences of making child rape a capital offense. These

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59. *Id.* at 571-72 (citations and internal quotation marks omitted).

60. 554 U.S. 407 (2008).

considerations lead us to conclude, in our independent judgment, that the death penalty is not a proportional punishment for the rape of a child.<sup>61</sup>

Justice Kennedy's interest in assessing whether the purposes of punishment measurably contribute to a particular penalty has extended beyond capital cases. In his seminal concurring opinion in *Harmelin v. Michigan*,<sup>62</sup> in which a majority of Justices upheld a mandatory sentence of life without parole for a first-time defendant convicted of possession of over 650 grams of cocaine, Justice Kennedy stated that "the Michigan Legislature could with reason conclude that the threat posed to the individual and society by possession of this large an amount of cocaine—in terms of violence, crime, and social displacement—is momentous enough to warrant the deterrence and retribution of a life

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61. *Id.* at 442-46 (citations and internal quotation marks omitted). In *Panetti v. Quarterman*, 551 U.S. 930 (2007), Justice Kennedy's opinion for the Court held that a death row inmate who had become mentally incompetent by the time of the scheduled execution date could not be executed consistently with the Eighth Amendment until competency was restored. His opinion reasoned, in part, that execution of an incompetent offender would not meaningfully advance the state's interest in retribution:

Considering . . . whether retribution is served[,] it might be said that capital punishment is imposed because it has the potential to make the offender recognize at last the gravity of his crime and to allow the community as a whole, including the surviving family and friends of the victim, to affirm its own judgment that the culpability of the prisoner is so serious that the ultimate penalty must be sought and imposed. The potential for a prisoner's recognition of the severity of the offense and the objective of community vindication are called in question, however, if the prisoner's mental state is so distorted by a mental illness that his awareness of the crime and punishment has little or no relation to the understanding of those concepts shared by the community as a whole.

*Id.* at 934-35, 958-59. The state's interest in deterrence was not at issue in *Panetti* because his mental incompetency developed long after the capital murder.

62. 501 U.S. 957 (1991) (Kennedy, J., concurring in the judgment, joined by O'Connor & Souter, JJ.). Subsequently, in *Ewing v. California*, 538 U.S. 11 (2003)—another case challenging a lengthy prison sentence as violative of the Eighth Amendment—Justice Kennedy's concurring opinion in *Harmelin* was deemed to be the controlling opinion of the Court. See *Ewing*, 538 U.S. at 23-24 (plurality opinion of O'Connor, J., joined by Rehnquist, C.J. & Kennedy, J.); see also *Lockyer v. Andrade*, 538 U.S. 63, 76 (2003) (citing Justice Kennedy's concurring opinion in *Harmelin* as setting forth "the governing legal principle").

sentence without parole.”<sup>63</sup> By contrast, in *Graham v. Florida*,<sup>64</sup> Justice Kennedy’s opinion for the Court held that a life without parole sentence for a juvenile offender who committed a nonhomicide offense did not satisfy the purposes of such a sentence. As his opinion stated:

A sentence lacking any legitimate penological justification is by its nature disproportionate to the offense [under the Eighth Amendment]. With respect to life without parole for juvenile nonhomicide offenders, none of the goals of penal sanctions that have been recognized as legitimate—retribution, deterrence, incapacitation, and rehabilitation—provides an adequate justification.<sup>65</sup>

His opinion for the Court in *Graham* thus invalidated a sentence of life without parole for all juveniles convicted of a nonhomicide offense, no matter how serious in nature.<sup>66</sup>

### CONCLUSION

Several of the Court’s prior decisions—including *Roper*, *Kennedy*, and *Graham* during the past decade, in which the majority opinions were authored by Justice Kennedy—have held that certain criminal sentences, both capital and non-capital, violate the Eighth Amendment because the legitimate purposes of punishment would not be measurably served by such penalties. Justice Kennedy’s questions posed to counsel for the State of Florida during the *Hall* argument about whether the purposes of capital punishment would be served by executing capital defendants after decades of delay thus appear significant.

A central premise of a *Lackey* claim is that excessive delays in carrying out executions undermine the penological justifications for the death penalty and, therefore, the state forfeits its right to implement the death penalty in such cases

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63. *Hamerlin*, 501 U.S. at 1003.

64. 130 S. Ct. 2011 (2010).

65. *Id.* at 2028 (internal citation omitted).

66. *Id.* at 2034. Subsequently, in *Miller v. Alabama*, 132 S. Ct. 2455 (2012), the Court—in a majority opinion written by Justice Kagan and joined by Justice Kennedy—similarly struck down mandatory life-without-parole sentences for juvenile murder defendants and reasoned in part that such mandatory sentences were without adequate penological justification. *See id.* at 2465-66.

because life imprisonment would serve those justifications sufficiently. When the Court decided *Gregg* in 1976, inordinate delays obviously did not exist in the administration of capital punishment in the United States. Nearly four decades later, it has become an issue of such significance that the Justice holding the “swing vote” on the current Supreme Court felt compelled to raise the issue during an oral argument in a case in which certiorari had been granted on an entirely unrelated issue. Justice Kennedy’s concern may be limited to individual cases with inordinate delays (like the thirty-five years in Hall’s case), although his citation of data about the average delay before the last ten executions in Florida suggest he may have larger, systemic concerns. Only time will tell whether Justice Kennedy’s apparent interest in the issue will result in the Court’s decision to grant certiorari and finally address it nearly two decades after certiorari was denied in *Lackey*.

#### POST-SCRIPT

Shortly before this Essay was published, a federal district court in California declared that the state’s death penalty is categorically unconstitutional under the Eighth Amendment because of “systemic delay” in the implementation of the penalty.<sup>67</sup> In *Jones v. Chappell*, the court specifically reasoned that the two primary purposes of capital punishment—deterrence and retribution—are not served when such “systemic delay” exists and, for that reason, the state’s death penalty is unconstitutional.<sup>68</sup> *Jones* is likely to serve as a catalyst for a renewed round of *Lackey* claims, in particular “systemic *Lackey* claims.”<sup>69</sup> It may well be the vehicle for the Supreme Court to finally address the *Lackey* issue.

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67. See *Jones v. Chappell*, No. CV 09-02158-CJC, 2014 U.S. Dist. LEXIS 97254 (C.D. Cal. July 16, 2014).

68. See *id.*; see also *supra* Part I.

69. See *supra* Part I.