

## TIME, DEATH, AND RETRIBUTION

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### INTRODUCTION

Even before Justice John Paul Stevens wrote his so-called *Lackey* memo<sup>1</sup> prisoners on death row were asserting that the lengthy delays—many times

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decades-long<sup>2</sup>—before their executions made their punishments constitutionally infirm.<sup>3</sup> As Justice Stevens and plaintiffs presented the claim, it embodied two discrete points. First, the mere fact of delay, usually accompanied by horrible prison conditions including solitary confinement, was itself “cruel and unusual.” Prisoners were made to wait indefinite periods of time before they were killed, sometimes due to the fault of the state, sometimes due to their own appeals, but in any case, the possibility of their execution kept on being put off. This wait, said some, was akin to

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<sup>1</sup> *Lackey v. Texas*, 514 U.S. 1045 (1995) (Stevens, J., memorandum respecting the denial of certiorari).

<sup>2</sup> *See, e.g.*, Brent E. Newton, *The Slow Wheels of Furman’s Machinery of Death*, 13 J. APP. PRAC. & PROCESS 41, 42 (2012) [hereinafter Newton, *Slow Wheels*] (noting that based on DOJ statistics the “average condemned inmate in 2010 . . . spent nearly fifteen years under a sentence of death before being executed,” but concluding that “the actual average likely is closer to twenty years”); Alex Kozinski & Sean Gallagher, *Death: The Ultimate Run-On Sentence*, 46 CASE W. RES. L. REV. 1, 10–11 (1995) (“Putting aside the relatively few cases in which a death row inmate simply gives up, a case that comes to its conclusion within seven years of the crime is relatively rare. Ten years is about average, and cases like that of Duncan Peder McKenzie, whose case took over two decades to shuttle its way repeatedly between the state and federal courts, are not that atypical.”); *see also* Brent E. Newton, *Justice Kennedy, the Purposes of Capital Punishment, and the Future of Lackey Claims*, 62 BUFF. L. REV. 979, 991 (2014) (indicating that the last ten people executed by Florida spent an “average of 24.9 years on death row” (quoting Justice Kennedy)); Megan Elizabeth Tongue, Note, *Omnes Vulnerant, Postuma Necat; All the Hours Wound, the Last One Kills: The Lengthy Stay on Death Row in America*, 80 MO. L. REV. 897, 897 (2015) (explaining that the “amount of time an inmate spends on death row has almost tripled over the past few decades”) (citations omitted); *Jones v. Chappell*, 31 F. Supp. 3d 1050, 1062 (C.D. Cal. 2014), *appeal dismissed* (Dec. 1, 2014), *rev’d sub nom. Jones v. Davis*, 806 F.3d 538 (9th Cir. 2015) (“[In California,] [t]he review process takes an average of 25 years, and the delay is only getting longer.”).

<sup>3</sup> One of the earliest versions of a *Lackey* claim seems to be *Chessman v. Dixon*, in the Ninth Circuit. *See Chessman v. Dickson*, 275 F.2d 604, 607 (9th Cir. 1960) (addressing petitioner’s assertion that being confined for eleven and one-half years on death row amounts to cruel and unusual punishment); *see also Lackey*, 514 U.S. at 1045 (Stevens, J., memorandum respecting the denial of certiorari) (recognizing that the Supreme Court should consider the importance and novelty of a death row prisoner’s Eighth Amendment challenge to delayed execution after other courts have addressed this issue); *Sireci v. Florida*, 137 S. Ct. 470 (2016) (Breyer, J., dissenting from denial of certiorari); *Valle v. Florida*, 564 U.S. 1067, 1067–68 (2011) (Breyer, J., dissenting from denial of stay) (recognizing as cruel and unusual the execution of a person on death row after decades of incarceration); *Thompson v. McNeil*, 556 U.S. 1114, 1116 (2009) (Stevens, J., statement respecting the denial of the petition for writ of certiorari) (expressing that executing incarcerated persons after delays is “unacceptably cruel”); *Smith v. Arizona*, 552 U.S. 985, 986 (2007) (Breyer, J., dissenting from the denial of certiorari) (explaining that he would have granted the petition for certiorari because executing a prisoner more than thirty years after his conviction would be cruel and unusual); *Foster v. Florida*, 537 U.S. 990, 992 (2002) (Breyer, J., dissenting from the denial of certiorari) (expressing that the prisoner’s twenty-seven years awaiting execution could be considered cruel and unusual punishment).

torture.<sup>4</sup> The second argument was different. It said that the fact of delay, while perhaps bad in itself, removed the original penological justifications for their punishment.<sup>5</sup> The extended delay vitiated any deterrent potential of the punishment; and delay made it no longer the case that their punishments were in any sense “retributive.”<sup>6</sup> The outrage that prompted the demand for the prisoners’ death might have faded (or been otherwise sated);<sup>7</sup> the prisoners, too, could be said to be different people, no longer deserving of death as they once might have been.<sup>8</sup>

*Lackey* arguments have overwhelmingly failed,<sup>9</sup> but not for want of trying. One plaintiff came close in *Jones v. Chappell* when he won at the district court level,<sup>10</sup> but his case was reversed on appeal on procedural grounds.<sup>11</sup> What I

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- 4 See, e.g., *Valle*, 564 U.S. at 1067–68 (Breyer, J., dissenting from denial of stay) (considering the execution of an incarcerated person who has been on death row for decades to be cruel and unusual).
- 5 See, e.g., *Thompson*, 556 U.S. at 1115 (Stevens, J., statement respecting the denial of the petition for writ of certiorari) (“[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.”).
- 6 See *Valle*, 564 U.S. at 1068 (Breyer, J., dissenting from denial of stay) (“The commonly accepted justifications for the death penalty are close to nonexistent in a case such as this one. It is difficult to imagine how an execution following so long a period of incarceration could add significantly to that punishment’s deterrent value.”).
- 7 *Id.* (“And, I would ask how often that community’s sense of retribution would forcefully insist upon a death that comes only several decades after the crime was committed.”).
- 8 See *Glossip v. Gross*, 135 S. Ct. 2726, 2769 (2015) (Breyer, J., dissenting) (“The offender may have found himself a changed human being.”).
- 9 See, e.g., *State v. Azania*, 865 N.E.2d 994, 998 (Ind. 2007), *decision clarified on reh’g*, 875 N.E.2d 701 (Ind. 2007) (“It appears that no *Lackey* claim has been successful.”).
- 10 *Jones v. Chappell*, 31 F. Supp. 3d 1050, 1069 (C.D. Cal. 2014) (“Inordinate and unpredictable delay has resulted in a death penalty system in which very few of the hundreds of individuals sentenced to death have been, or even will be, executed by the State. It has resulted in a system in which arbitrary factors, rather than legitimate ones like the nature of the crime or the date of the death sentence, determine whether an individual will actually be executed. And it has resulted in a system that serves no penological purpose. Such a system is unconstitutional.”). The district court judge in *Jones* also made an independent argument that the imposition in any one case was “arbitrary.” *Id.* at 1053. (“Indeed, for most, systemic delay has made their execution so unlikely that the death sentence carefully and deliberately imposed by the jury has been quietly transformed into one no rational jury or legislature could ever impose: *life in prison, with the remote possibility of death*. As for the random few for whom execution does become a reality, they will have languished for so long on Death Row that their execution will serve no retributive or deterrent purpose and will be arbitrary.”). I do not deal with that argument at any length here.
- 11 See *Jones v. Davis*, 806 F.3d 538, 553 (9th Cir. 2015) (reversing judgment in favor of prisoner based on the recognition that “the purpose of federal habeas corpus is to ensure that state convictions comply with the federal law in existence at the time the conviction became final, and not to provide a mechanism for the continuing reexamination of final judgments based upon later emerging legal doctrine” (quoting *Sawyer v. Smith*, 497 U.S. 227, 234 (1990))).

want to suggest in this Article is that *Lackey* arguments may be insufficiently radical.<sup>12</sup> Many scholars and two Justices have asserted, especially in the second variant of the *Lackey* claim, that delay undermines the arguments for the death penalty because a late execution no longer deters or satisfies retribution. However this might be true of deterrence—and I largely leave deterrence to the side in this Article<sup>13</sup>—it is not obvious that a delay in execution means that a punishment is no longer retributively just. It depends on what retribution is. And here both advocates of the *Lackey* argument as well as the Supreme Court have been less than clear as to which version of retribution they are endorsing. This matters, because on some versions of retribution, the *Lackey* argument works; but on others, it falls flat.<sup>14</sup> The first contribution of my Article is to clarify the various meanings of retribution and to run the *Lackey* argument through them. It seems surprising that such a fundamental part of the *Lackey* claim should have gone unexamined for so long. Over the years the Supreme Court has presented very different versions of retribution,<sup>15</sup> and whether delay undermines “retribution” critically depends on which version we adopt.

But this conceptual clarification leads me to the second and more fundamental contribution of my Article. It turns out that the version of retribution under which *Lackey* succeeds is not very persuasive, but that the version of retribution under which the *Lackey* claims do have merit has a strange and problematic implication—so strange, in fact, that we should be led to wonder whether a retributive theory of this kind can be a permissible purpose for governments to pursue.<sup>16</sup>

Briefly, my argument is this. If retribution is understood as simply expressing community outrage and the need to satisfy that outrage, then the *Lackey* claim seems to succeed. It is plausible that community outrage may fade over time, and so we may actually—after ten, twenty, thirty years<sup>17</sup>—no longer *be* as outraged as we once were: accordingly, the claim that we need death to satisfy that outrage doesn’t have the same bite. If the purpose of killing someone was for *this* purpose, the purpose is arguably no longer served when people no longer care, or are indifferent about the execution

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<sup>12</sup> See *infra* Part III.

<sup>13</sup> The Court has routinely stated that the main reason for imposing the death penalty is not deterrence, but retribution. See, e.g., *Spaziano v. Florida*, 468 U.S. 447, 461 (1984) (claiming retribution is the “primary justification for the death penalty”).

<sup>14</sup> See *infra* Part II.

<sup>15</sup> *Id.*

<sup>16</sup> See *infra* Part III.

<sup>17</sup> See *Jones v. Chappell*, 31 F. Supp. 3d 1050, 1069 (C.D. Cal. 2014) (pointing to Appendix A of the district court record, which indicates that there are currently dozens of inmates who have been on California’s death row for as long as thirty to thirty-five years).

(or whatever outrage they had is satisfied by the long term in prison on death row).

But this “community outrage” version of retribution is not all that appealing. It smacks of revenge, for one. Even bracketing that, it is not even a satisfying view of retribution.<sup>18</sup> It leaves too much in the hands of fickle community sentiment. What if a community values some lives too cheaply, so that when they *ought* to be outraged, they are not? Nor is it obvious as an empirical matter that community outrage will fade over time—couldn’t we stoke it back up again as the execution date nears?<sup>19</sup> So this version of retribution has problems. If it were the only version of retribution we had to offer, then the *Lackey* claim might succeed, although even then it might be an empirical question as to whether members of the community would still be angry after decades of waiting. If they were, the claim would fail.

There is a better and more persuasive version of retribution out there. As opposed to the community sentiment version, this version says that some people who have done terrible crimes ought to die as a matter of justice. If a community does not feel that these people ought to die, then it is wrong—they *should* feel that way. And if a person is not sentenced to death then we collectively have made a mistake, a mistake that threatens justice being done on this earth. Immanuel Kant advocated for this kind of retributivism, so it has a philosophically respectable lineage.<sup>20</sup> In some instances, retribution may demand death, no matter what the community feels. If this is the version of retribution we accept, then it is not obvious that the retributive purpose of punishment is undermined by delay. So long as the person is executed, a delay in the date of that execution may be unfortunate, but it

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18 In my criticism below, I also leave out an obvious concern: who is the relevant community? I assume it includes at least those immediately affected by the crime in question, most especially the victim.

19 See, e.g., Bob Ross, *Old Wounds Reopen for River Ridge Parents as Daughter’s Killer Resentenced*, TIMES-PICAYUNE (Mar. 5, 2012), [http://www.nola.com/crime/index.ssf/2012/03/twelve\\_years\\_after\\_daughters\\_k.html](http://www.nola.com/crime/index.ssf/2012/03/twelve_years_after_daughters_k.html) (reflecting the intense emotions that can resurrect in victims as their perpetrator’s execution date approaches).

20 IMMANUEL KANT, *THE METAPHYSICAL ELEMENTS OF JUSTICE: PART I OF THE METAPHYSICS OF MORALS* 140 (John. Ladd trans., Hackett Publishing 2d. 1999) (“Even if a civil society were to dissolve itself by common agreement of all its members (for example, if the people inhabiting an island decided to separate and disperse themselves around the world), the last murderer remaining in prison must first be executed, so that everyone will duly receive what his actions are worth and so that the bloodguilt thereof will not be fixed on the people because they failed to insist on carrying out the punishment; for if they fail to do so, they may be regarded as accomplices in this public violation of legal justice.”). See generally Jeffrie G. Murphy, *Does Kant Have a Theory of Punishment?*, 87 COLUM. L. REV. 509, 509 (1987) (exploring “Kant’s writings on crime and punishment” and considering “Kant as a paradigm retributivist in the theory of punishment”).

does not remove the point of executing the person: it was to give that person their “just deserts.”<sup>21</sup>

In one large set of cases, however, delay would hurt the satisfaction of this sort of intrinsic justice retribution. If delay means that the death row inmate in prison *dies* before being executed,<sup>22</sup> then he will have cheated his just punishment. In other words, if retribution demands *execution by the state*, it is not enough that the person have *died* in prison, anymore than if the prisoner had been hit by a truck before being captured. We are all going to die eventually, after all—we are all in this sense “sentenced to death.” But the unique thing about the person who deserves to die is that he deserves to die in a certain way: at the hands of the state—that is, at the hands of *us*.

So there is a version of (intrinsic justice) retribution in which the *Lackey* claim would in theory succeed, albeit in a way that would help no inmate who is still alive. But noting that retribution might demand the execution of someone at death’s door may lead us to reflect on retribution as a purpose in the first place. Retribution may be, in some guises, a philosophically attractive theory. But for all that, is it an acceptable purpose for the state to have? This is an under-examined part of death penalty writing and punishment jurisprudence more generally. There is plenty of talk about whether the death penalty is a deterrent or whether it satisfies retribution. But what makes these purposes appropriate, and by what standard should we assess them?<sup>23</sup> The Supreme Court at various times has written that retribution was going out of fashion as a theory of punishment;<sup>24</sup> it also expressed the possibility of some purposes (e.g., eugenics<sup>25</sup>) that we would never countenance as acceptable today. They would be beyond the pale. It is thus something we should consider that *some purposes* of punishment, when we understand them aright, are simply not acceptable purposes for the state to pursue.

I think that this is what we could say about the intrinsic justice variety of retribution—the kind of retribution that is robust enough to resist most *Lackey* claims. The argument here is speculative, and points to the need for

21 See *Atkins v. Virginia*, 536 U.S. 304, 319 (2002) (defining retribution as “the interest in seeing the offender gets his ‘just deserts’”).

22 This, in fact, is what happens in a large percentage of cases. See *infra* Part II.C.

23 See Michele Cotton, *Back with A Vengeance: The Resilience of Retribution as an Articulated Purpose of Criminal Punishment*, 37 AM. CRIM. L. REV. 1313, 1313–14, 1361–62 (2000) (examining the various purposes for state punishment).

24 See *Williams v. New York*, 337 U.S. 241, 248–49 (1949) (holding reformation and rehabilitation—especially in the form of modern probation practices aimed at restoring offenders to “useful citizenship”—have become “important goals of punishment” and “[r]etribution is no longer the dominant objective of the criminal law”).

25 See Carol S. Steiker & Jordan M. Steiker, *Capital Punishment: A Century of Discontinuous Debate*, 100 J. CRIM. L. & CRIMINOLOGY 643, 655–61 (2010) (discussing the history of eugenics as an argument for capital punishment).

more thinking in this area, but I base it on two claims.<sup>26</sup> First, the intrinsic retribution theory could represent an impermissible endorsement by the state of a sort of quasi-religious view. It is recognized that the state cannot establish a particular religious view over others, and the intrinsic version of retribution may represent nothing more than a religious view on the nature of responsibility, and the need to exact justice in this world (rather than the next). Ronald Dworkin has made a similar claim in relation to the abortion debate,<sup>27</sup> and I try to transplant his argument into this new context.

But the intrinsic retribution argument can also be seen as—and has been seen as by members of the Court—a kind of personal vendetta, a kind of revenge.<sup>28</sup> It is also, we might think, impermissible for the state to base its purposes on passion, or hatred.<sup>29</sup> And this, too, is what intrinsic retribution can look like. Consider the implications if a person is on his deathbed, moments away from dying, and his appeals have been exhausted. Intrinsic retribution says that we still *need to execute this person* in order for justice to be served. If this is not some high-minded belief in settling moral scores in this world, it does look to be a lot like vengeance and perhaps it is here that intrinsic retribution seems to sort of bottom out in community outrage. It is not enough, after all, that the prisoner dies; it must be at our hands. We get to choose the time of his dying—he can't go on his terms. This need to kill either looks like some religious compulsion gone wrong or is really a sophisticated kind of vendetta, motivated by animus, against the death row inmate. Or so I want to suggest.

My Article has three parts. In Part I, I look at the history of *Lackey* claims, and try to pare down the essence of those claims. In this, I am helped by situating my argument in this Article against some recent claims made by Russell Christopher, one of the most philosophically sophisticated scholars to examine *Lackey* claims in depth.<sup>30</sup> Christopher's work helps me to strip away a fallacious rebuttal made to *Lackey* claims and to focus on the novel parts of my argument. In Part II, I spell out the two versions of retribution

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<sup>26</sup> See *infra* Part III.

<sup>27</sup> See RONALD DWORKIN, *LIFE'S DOMINION: AN ARGUMENT ABOUT ABORTION, EUTHANASIA, AND INDIVIDUAL FREEDOM* 102–17 (1993) (Developing the argument that controversies about abortion deal with contested philosophical and theological issues, about which the state properly does not take sides).

<sup>28</sup> See *Trop v. Dulles*, 356 U.S. 86, 112 (1958) (Brennan, J., concurring) (equating “forcing retribution from the offender” with “naked vengeance” in a case considering exile as punishment for desertion during time of war).

<sup>29</sup> See *Romer v. Evans*, 517 U.S. 620, 632 (1996) (holding that a similar sensibility is behind the Court's rule that animus or hostility to a vulnerable group cannot be a legitimate state interest that justifies discrimination).

<sup>30</sup> See Russel L. Christopher, *Death Delayed is Retribution Denied*, 99 MINN. L. REV. 421, 421–23, 483 (2014) (explaining how the combination of capital punishment and a substantial death row incarceration is unconstitutional under *Lackey*).

with which the Court may be operating in considering *Lackey* claims. Part of this is expository, and historical. It is striking that the Court should be inconsistent in what it means by retribution, given how boilerplate its invocations of that purpose have become in its recent opinions. I also, in Part II, appeal in passing to several important recent papers that look at the important role *time* plays in our understanding of punishment.<sup>31</sup> I show how *Lackey* claims can work if we adopt a version of retribution that is time sensitive, but how they fail if we choose to side with a time-insensitive version. This leads me to the third and final part of my Article, where I question whether the state can pursue a time-insensitive version of retribution as an appropriate state purpose. I argue that it can't, which leads me to my overall conclusion: either *Lackey* claims work under an unattractive and weak theory of retributive punishment, or they don't work; but the theory under which they don't work makes (or should make) retribution off-limits as an appropriate purpose of state punishment.

### I. DISSECTING THE LACKEY MEMO

The canonical statement of a *Lackey* claim is by Justice Stevens, written as a dissent to a denial of certiorari in Clarence Lackey's case.<sup>32</sup> It was more of an invitation than an argument, but it has since been elaborated on by another member of the Court (Justice Stephen Breyer<sup>33</sup>), disputed on the Court by another Justice (Justice Clarence Thomas<sup>34</sup>), and launched a score of attempts by death row inmates. I here want to lay the foundation of the

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<sup>31</sup> See *infra* Part II.

<sup>32</sup> See generally *Lackey v. Texas*, 514 U.S. 1045 (1995) (Stevens, J., memorandum respecting the denial of certiorari). In *Lackey*, Justice Stevens recognized that “[t]he deterrent value of incarceration during that period of uncertainty may well be comparable to the consequences of the ultimate step itself” and that the “sanction imposed cannot be so totally without penological justification that it results in the gratuitous infliction of suffering.” *Id.* (quoting *Coleman v. Balkcom*, 451 U.S. 949, 952 (1981) (Stevens, J., respecting denial of certiorari) and *Gregg v. Georgia*, 428 U.S. 153, 183 (1976)).

<sup>33</sup> See *Sireci v. Florida*, 137 S. Ct. 470 (2016) (Breyer, J., dissenting from denial of certiorari); *Valle v. Florida*, 564 U.S. 1067, 1067–68 (2011) (Breyer, J., dissenting from denial of stay) (recognizing as cruel and unusual the execution of a person on death row after decades of incarceration); *Smith v. Arizona*, 552 U.S. 985, 986 (2007) (Breyer, J., dissenting from the denial of certiorari) (explaining that he would have granted the petition for certiorari because executing a prisoner more than thirty years after his conviction would be cruel and unusual); *Foster v. Florida*, 537 U.S. 990, 992 (2002) (Breyer, J., dissenting from the denial of certiorari) (expressing that prisoner's twenty-seven years awaiting execution could be considered cruel and unusual punishment).

<sup>34</sup> *Knight v. Florida*, 528 U.S. 990, 992 (1999) (mem.) (Thomas, J. concurring in denial of certiorari) (“Five years ago, Justice STEVENS issued an invitation to state and lower courts to serve as ‘laboratories’ in which the viability of this claim could receive further study. These courts have resoundingly rejected the claim as meritless.”) (citation to *Lackey* memo omitted).

*Lackey* argument, show its variations, and try to strip out several debates that it has spawned which seem to me to either focus on irrelevant issues, or to be not the strongest part of the *Lackey* argument. It is no secret that many of those who side with *Lackey* oppose the death penalty root-and-branch.<sup>35</sup> But it is important, I think, for the general success of *Lackey* claims that they be presented as different than arguments that say that the death penalty itself is cruel and unusual (even though it may be).<sup>36</sup> Presenting *Lackey* claims as independent arguments increases their appeal to those who may otherwise believe the death penalty is just (which includes, apparently, a majority of the current Court<sup>37</sup>). It also, as a matter of analytical clarity, separates *Lackey* claims from general arguments that putting someone to death is unjust. When Justice Stevens wrote his memo, it was, I think, in this spirit: that plaintiffs have *something in addition* to argue, instead of only a general opposition to the death penalty and any other procedural claims they may have.

#### A. *The Two Lackey Claims*<sup>38</sup>

As presented over the years by Justices Breyer and Stevens, the so-called *Lackey* claim actually comprises two discrete claims, although both press the problem with delaying imposition of the death penalty for an extended period of time.<sup>39</sup> The first kind of *Lackey* claim—and the one, I will say up front, that I am less interested in—deals with the punishment inherent in the delay itself. Waiting to be executed, or rather, waiting a *long time* to be executed exacts a terrible physical and psychological toll on the prisoner, to the point where just waiting is enough for his punishment to be “cruel and unusual.”<sup>40</sup> On this version of the *Lackey* claim, there is something in the

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<sup>35</sup> Justice Breyer, joined by Justice Ruth Bader Ginsburg, called for revisiting the constitutionality of the death penalty itself the previous summer. *Glossip v. Gross*, 135 S. Ct. 2726, 2755 (2015) (Breyer, J., dissenting). *But see* Christopher, *supra* note 30, at 484 (“Capital punishment proponents might even have the most to gain [if the Supreme Court granted certiorari and decided a *Lackey* claim].”).

<sup>36</sup> Christopher, *supra* note 30, at 426–27 (clarifying that the *Lackey* claim is that execution following decades-long incarceration is cruel and unusual and not the claim that any execution is cruel and unusual).

<sup>37</sup> This may change, depending on who replaces Justice Antonin Scalia on the Court.

<sup>38</sup> For a good summary of these two claims that I follow, see Judge William A. Fletcher’s dissent in *Ceja v. Stewart*, 134 F.3d 1368, 1376 (9th Cir. 1998). I also entertain a third type of *Lackey* claim, below. *See infra* Part I.C.

<sup>39</sup> *Lackey v. Texas*, 514 U.S. 1045 (1995) (Stevens, J., memorandum respecting the denial of certiorari).

<sup>40</sup> *See Valle v. Florida*, 564 U.S. 1067, 1068 (2011) (Breyer, J., dissenting from denial of stay) (“I have little doubt about the cruelty of so long a period of incarceration under sentence of death.”); *Furman v. Georgia*, 408 U.S. 238, 288 (1971) (Brennan, J., concurring) (“[T]he prospect of pending execution exacts a frightful toll during the inevitable long

delay itself that makes it an impermissible punishment (what this is, precisely, is something I will get to shortly). The second kind of *Lackey* claim, however, deals with the purpose of executing someone after a long delay, and not merely with the delay itself. After a long delay, this second argument goes, there really may be no point in executing the person. The deterrent value of such an execution will be minor after such a long delay, if not non-existent—at the very least, the deterrent value will have already been realized in the long prison stay, so no additional deterrent value will be gotten by the execution. So too will the retribution exacted be either already realized (he will have suffered a long delay already, and certainly this can count as “retribution” for his crime) or too little (people will no longer have the same outrage they did when the person committed his crime, so his death will mean little to them and so is not required by retribution).<sup>41</sup> On this second *Lackey* claim, the problem is the execution happening after the delay, not merely the horror inherent in the delay itself. Again, I am more interested in the second kind of *Lackey* claim.

But I should say some things about the first type of *Lackey* claim.<sup>42</sup> As even its proponents note, there is some ambiguity in the content of the claim, especially when we put it at a high level of generality. Two points are worth mentioning here about the ambiguities in the first *Lackey* claim. First, how much delay is too much, or enough to give rise to the anxiety and the worry of a pending execution? How long does the delay have to be to make it *too* long? The answer to that seems to me unclear.<sup>43</sup> One might imagine that even learning that one’s execution is a month away, or a week away, would inspire anxiety about the precise date and time that one would die.<sup>44</sup> The so-called “death row” phenomenon can even be said to be inherent in

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wait between the imposition of sentence and the actual infliction of death.”); *Knight v. Florida*, 528 U.S. 990, 994 (1999) (Breyer, J., dissenting from denial of certiorari) (imprisonment under threat of imminent execution is “horrible” and “dehumanizing”); *People v. Anderson*, 493 P.2d 880, 894 (Cal. 1972) (noting “dehumanizing effects of the lengthy imprisonment prior to execution” which are “often so degrading and brutalizing to the human spirit as to constitute psychological torture”). For a meditation on the topic, see ALBERT CAMUS, *Reflections on the Guillotine*, in RESISTANCE, REBELLION, AND DEATH 173 (Justin O’Brien trans., Alfred A. Knopf, Inc. 1961).

<sup>41</sup> Christopher, *supra* note 30, at 431–32.

<sup>42</sup> Later in this section, I discuss another possible interpretation of this kind of *Lackey* claim, which I think should be separated and considered as a possible “third” *Lackey* argument.

<sup>43</sup> *Foster v. Florida*, 537 U.S. 990, 992 (2002) (Breyer, J., dissenting from the denial of certiorari) (“[T]he combination of uncertainty in the execution and long delay is arguably cruel.”).

<sup>44</sup> *See, e.g., In re Medley*, 134 U.S. 160, 172 (1890) (“[W]hen a prisoner sentenced by a court to death is confined in the penitentiary awaiting the execution of the sentence, one of the most horrible feelings to which he can be subjected during that time is the uncertainty during the whole of it . . .”). Note how the mere fact of being sentenced to die *at some point in the future* gives rise to some uncertainty as to *when* exactly that will be.

the very act of having a death penalty.<sup>45</sup> Of course, one might say that if a delay of a month is bad, *a fortiori* a delay of ten or more years is even worse and more psychologically damaging than that one month (it may differ depending on the psychological stability of the inmates; the anxiety may be greater or lesser depending on the person).<sup>46</sup> But it is hard to draw a firm line here—one that clearly puts punishment that is cruel and unusual on one side of the line, and a permissible punishment on the other side. And indeed, it is most plausible to say that this anxiety is *always* present. That is why the first *Lackey* claim, to my mind, comes very close to simply being an objection to the death penalty: a penalty which causes this kind of suffering, this kind of anxiety, is *per se* cruel and unusual,<sup>47</sup> thus making the death penalty never okay. And of course there will always be *some* delays (necessarily) in an execution<sup>48</sup> (a point I will return to later<sup>49</sup>).

But this gets us to a second ambiguity about the *Lackey* claim. It may not be merely the fact of delay, and uncertainty, that makes the delay intolerable, but the conditions in which the person is confined.<sup>50</sup> And it is true that conditions on death row are horrible *on top of the fact* that one is

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<sup>45</sup> Such a conclusion seems to be made by Brent E. Newton when he says in a footnote that “such [awful] conditions are inherently part of the death penalty.” Newton, *Slow Wheels*, *supra* note 2, at 55 n.62. For a discussion of the death row phenomenon in connection with a *Lackey* claim, see, e.g., *McKenzie v. Day*, 57 F.3d 1461, 1487 (Norris, J., dissenting) (discussing the “death row phenomenon” or “the protracted incarceration of condemned prisoners under a sentence of death in extreme conditions of confinement”). See also Tongue, *supra* note 2, at 901–02 (describing “death row syndrome,” with citations). The locus classicus of a court finding the death penalty impermissible by reference to the conditions on death row alone is *Soering v. United Kingdom*, 11 Eur. Ct. H.R. 439, 478 (1989) (holding that while international law does not prohibit the death penalty, the risk of “death row phenomenon” would violate the Convention’s Article 3 prohibition on torture or inhuman or degrading treatment).

<sup>46</sup> *Lackey v. Texas*, 514 U.S. 1045, 1046 (1995) (Stevens, J., memorandum respecting the denial of certiorari) (noting that if the effect of uncertainty is terrible in a delay of four weeks, delays that “last for many years” will be even worse).

<sup>47</sup> Consider, in this regard, the discussion in a footnote in *Dist. Atty. v. Watson*, 411 N.E.2d 1274, 1291 n.5 (Mass. 1980), which ponders whether even one night on death row is too much. *Id.* (“My argument that the ordeal imposed on the condemned is cruel and unusual punishment does not depend on the existence of lengthy delays between sentence and execution.”).

<sup>48</sup> See *State v. Azania*, 875 N.E.2d 994, 998–99 (listing among delays to a speedy trial: “delay between the commission of the crime and indictment; delay between indictment and arrest; delay between arrest and trial; delay between trial and sentencing; delay in processing appeal; delay between appellate court decision and subsequent retrial; and delay between appellate court decision and subsequent resentencing proceeding”), *decision clarified on reh’g*, 875 N.E.2d 701, 702–03 (Ind. 2007).

<sup>49</sup> See *infra* Part I.C.

<sup>50</sup> See, e.g., *Thompson v. McNeil*, 556 U.S. 1114, 115 (2009) (describing “severe conditions of confinement” including “spending 23 hours per day in isolation in a 6- by 9-foot cell” and concluding that the “dehumanizing effects of such treatment are undeniable”).

waiting—with considerable uncertainty—for one’s death.<sup>51</sup> But this strikes me as a point that can be addressed on its own, perhaps separated from the delay. It seems, in other words, that we could conceptualize awful prison conditions on their own as being in possible violation of the Eighth Amendment—if one is in solitary confinement for the duration of one’s life (and one knows this) this may amount to cruel and unusual punishment, even when one is not sentenced to be executed by the state.<sup>52</sup> This seems to me not too different than a person on death row who experiences the same conditions. It is not that his experience may be worse because of the delay; certainly it may be. But there is no reason to think that the conditions by themselves might be bad enough to rise to the level of being cruel and unusual. It does not seem to me that it is necessary that there be delay *and* bad conditions to have an Eighth Amendment violation, that there is some alchemy that makes delay *plus* bad conditions to be only sufficient for being cruel and unusual. Whereas my first point suggested that delay on its own might be enough to be cruel and unusual, here I suggest something different, but still something that I think diminishes the uniqueness of the first variant of the *Lackey* claim: conditions in many prisons may be awful by themselves for any prisoner, not just those waiting on death row. We should prise this objection apart from the *Lackey* claim.

So as a result, I find the second type of *Lackey* claim the more interesting, viz., the idea that delay undermines the purposes involved in punishing someone. Such an argument could, at least in principle, appeal to those who support the death penalty and who feel it serves some useful purposes. If the first *Lackey* claim can appear to condemn *any* delay in waiting for the death penalty or to focus on something not unique to the death penalty (bad prison conditions), the second type of *Lackey* claim says: there is a time at which the delay in imposition of the death penalty makes the death penalty pointless, and so possibly cruel and unusual.<sup>53</sup> This claim is careful

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51 See, e.g., *Allen v. Ornoski*, 435 F.3d 946, 948 (9th Cir. 2006) (describing a *Lackey* claim based on “long tenure on death row under ‘horrific conditions’”); *id.* at 950.

52 See, e.g., *Davis v. Ayala*, 135 S. Ct. 2187, 2208–10 (2015) (Kennedy, J., concurring) (“[T]he judiciary may be required . . . to determine whether workable alternative systems for long-term confinement exist, and, if so, whether a correctional system should be required to adopt them.”), *reh’g denied*, 136 S. Ct. 14 (2015); see also George Lombardi, Richard D. Sluder & Donald Wallace, *The Management of Death-Sentenced Inmates: Issues, Realities, and Innovative Strategies* (Mar. 1996) (unpublished manuscript), <https://doc.mo.gov/Documents/DeathSentencedInmates.pdf> (reviewing several court decisions addressing whether death row conditions violated the Eighth Amendment).

53 This broader claim—about the pointlessness of an execution making it cruel and unusual is present in Justice White’s concurrence in *Furman*:

At the moment that [an execution] ceases realistically to further [the] purposes [of punishment], the emerging question is whether its imposition in such circumstances would violate the Eighth Amendment. It is my view that it would, for its imposition would then be the pointless and needless extinction of life with

not to say that the death penalty *always* is unjustified; that is, to maintain that any delay will moot the purposes for which death is imposed. It only says that there is a certain point where the delay becomes “too long” that death may no longer be warranted. Certainly there is an ambiguity here, but unlike the first type of *Lackey* claim, it is not an ambiguity which seems to cut against imposing the death penalty at all.

In fact, the proponent of the second type of *Lackey* claim could be a death penalty supporter and lament the fact that there are too many delays in administering the death penalty, to the point where the death penalty loses its bite. Chief Justice William Rehnquist in fact wrote just such an opinion. In *Coleman v. Balkcom*, Chief Justice Rehnquist complained that because the Court had introduced so many procedural obstacles to the death penalty, it had made it “virtually impossible for States to enforce with reasonable promptness their constitutionally valid capital punishment statutes,” which “lessen[ed] the deterrent effect of the threat of capital punishment” and “undermine[d] the integrity of the entire criminal justice system.”<sup>54</sup> Justice Lewis F. Powell, Jr., expressed a similar concern in an article written after he had stepped off the bench.<sup>55</sup>

I think it is fairly plausible to believe that the longer the delay in executing someone, the less deterrent value the mere fact of execution has. It is axiomatic in deterrent theory that the key things in making a punishment have a high deterrent value are that the punishment be *swift* and *certain*.<sup>56</sup> Delay undermines both of these things. Pushing an execution back further and further separates the connection between doing the bad act and suffering a punishment for it. And delay makes the punishment uncertain—especially when that delay is not mere dilatoriness, but the product of appeals by the defendant, appeals which the defendant may actually win.<sup>57</sup> Of course, it seems to be an open question whether the deterrent value of executing someone after a dozen years or more

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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.

*Furman v. Georgia*, 408 U.S. 238, 312 (1972) (White, J., concurring).

<sup>54</sup> *Coleman v. Balkcom*, 451 U.S. 949, 959–60 (Rehnquist, J., dissenting).

<sup>55</sup> Lewis F. Powell, Jr., Commentary, *Capital Punishment*, 102 HARV. L. REV. 1035, 1041 (1989) (“The retributive value of the penalty is diminished as imposition of sentence becomes ever farther removed from the time of the offense.”). Justice Powell voted for the death penalty during his tenure on the Court.

<sup>56</sup> CESARE BECCARIA, ON CRIMES AND PUNISHMENTS 36 (David Young trans., Hackett Pub. Co. 1986) (1764).

<sup>57</sup> See, e.g., *Knight v. Florida*, 528 U.S. 990, 998 (1999) (Breyer, J., dissenting from denial of certiorari) (observing that many of these cases “involve delays which resulted in large part from the States’ failure to apply constitutionally sufficient procedures at the time of initial sentencing”).

diminishes to zero. Perhaps there is still some minor value to executing someone decades after he has committed the crime.<sup>58</sup> But then we have to ask: is it really necessary to cause someone to die in order to achieve that diminished value? And might we also think: haven't we achieved enough deterrence by giving that person what is in effect a lengthy prison sentence?

I put aside deterrence for most of the rest of this Article because even though I think the best theory points to the value of deterrence declining the more delay there is, this is an empirical question—and I suppose that people may even stick to their guns and say even a slight deterrence benefit justifies the death penalty. I am more interested in the retributive argument here, because it seems more robust and less dependent on empirical evidence.<sup>59</sup> Either one deserves death or not, and while delay may be unfortunate, it does not defeat the point of retribution. In fact, I think this claim is correct, but it needs to be spelled out more, something I do at length in Part II of this Article. But I need, first, to address two claims about the second *Lackey* argument which will help me clarify the exact type of the argument I am interested in. First, does it matter that the prisoner himself might be responsible for the delay? Second, can't we say that the delay in punishment is obviously retributively unjust because the person who is ultimately executed will have suffered *more than he deserves* because he has (a) been on death row for many years and in addition to that is (b) executed? Both of these claims have been analyzed recently and incisively by Russell Christopher, and I use his essays to help situate my interest and my development of the second *Lackey* argument. The second point, especially, is useful in refining the nature of the *Lackey* claim I will mostly be examining.<sup>60</sup>

### B. Does it Matter if the Inmate Is Responsible for the Delay?<sup>61</sup>

Here, I need to deal with a key objection to *Lackey* claims, one that has shown a surprising durability in the lower courts.<sup>62</sup> It is also an argument

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58 Justice Stevens says as much in the *Lackey* memo. *Lackey v. Texas*, 514 U.S. 1045, 1046 (1995) (Stevens, J., memorandum respecting the denial of certiorari) (“Finally, 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.”).

59 Retribution has also, as I document *infra* Part III.A., become the “primary” argument in favor of the death penalty.

60 This third *Lackey* claim exists between the first two I mentioned above. It points to the fact of long delay to show that the punishment is unjust given one theory of punishment, *viz.*, retribution.

61 My debt to Russell Christopher’s paper on this subject will be obvious to anyone who has read it. Russell Christopher, *The Irrelevance of Prisoner Fault for Excessively Delayed Executions*, 72 WASH. & LEE L. REV. 3 (2015).

made at length in Justice Thomas's response to Justices Stevens and Breyer.<sup>63</sup> The *Lackey* claim involves a prisoner complaint about delay. But in many cases, that delay is the prisoner's own fault.<sup>64</sup> After all, he is the one who is—in most cases—filing appeal after appeal in order to prevent his execution from happening, and so is at least in part responsible for the delay he is complaining about. It is *chutzpah* for the prisoner to turn around and complain that it has *taken such a long time* for the state to get around to executing him.<sup>65</sup> For one, he is surely benefitting from the delay that he is getting—he is still alive!<sup>66</sup> Second, he could of course in many cases *get on with it already* by dropping his appeals and agreeing to be executed.<sup>67</sup> There is precedent for that. Some on death row get exhausted, give up their appeals, and simply submit to their penalties.<sup>68</sup>

62 See, e.g., *Moore v. State*, 771 N.E.2d 46, 54 n.2 (Ind. 2002) (emphasizing that any delay was caused by defendant, and not by the state, either intentionally or unintentionally); *Bieghler v. State*, 839 N.E.2d 691, 697 (Ind. 2005) (noting that delay of execution was caused by defendant's "having availed himself of the appeals process"). A near comprehensive listing of the lower court cases rejecting *Lackey* claims on this basis can be found in Christopher, *supra* note 61, at 20–31; see also *id.* at 12 n.45.

63 *Thompson v. McNeil*, 556 U.S. 1114, 1117 (2009) (Thomas, J., concurring in the denial of certiorari); *Foster v. Florida*, 537 U.S. 990, 990–91 (2002) (Thomas, J., concurring in the denial of certiorari); *Johnson v. Bredesen*, 558 U.S. 1067, 1071–73 (2009) (Thomas, J., concurring in the denial of certiorari). As Christopher points out, both Justices Stevens and Breyer—despite approving *Lackey* claims in principle—do not entirely seem to deny the force of Thomas's argument. Christopher, *supra* note 61 at 23–28. See, e.g., *Lackey v. Texas*, 514 U.S. 1045, 1047 (1995) (Stevens, J., memorandum respecting the denial of certiorari) ("It may be appropriate to distinguish . . . delays resulting from . . . petitioner's abuse of the judicial system by escape or repetitive, frivolous filings . . .").

64 Justice Stevens acknowledged that some of the delay might properly be ignored for this reason. *Lackey*, 514 U.S. at 1047 (Stevens, J., memorandum respecting the denial of certiorari) (citations omitted) ("It may be appropriate to distinguish, for example, among delays resulting from (a) a petitioner's abuse of the judicial system by escape or repetitive, frivolous filings; (b) a petitioner's legitimate exercise of his right to review; and (c) negligence or deliberate action by the State. Thus, though English cases indicate that the prisoner should not be held responsible for delays occurring in the latter two categories, it is at least arguable that some portion of the time that has elapsed since this petitioner was first sentenced to death in 1978 should be excluded from the calculus.").

65 Kozinski & Gallagher, *supra* note 2, at 25 ("It is somewhat akin to the classic definition of *chutzpah* for death penalty opponents to say we can't execute someone too fast because he is entitled to a searching review, and then to say what we are doing is immoral when we delay the execution precisely to afford such review.") (footnotes omitted). It puts one in mind of the joke in which a person kills his parents and then asks the court to have mercy on him because he's an orphan.

66 I return to this point in a different context in Part II.

67 *Foster*, 537 U.S. at 991 (Thomas, J., concurring in the denial of certiorari) ("Petitioner could long ago have ended his 'anxieties and uncertainties' . . . by submitting to what the people of Florida have deemed him to deserve: execution.").

68 The story of Gary Gilmore, who was ultimately executed for murdering two individuals, is a case in point. See Barbara Allen Babcock, *Gary Gilmore's Lawyers*, 32 STAN. L. REV. 865,

Justice Thomas's rebuttal to Justices Stevens and Breyer works best, surely, if the appeals made by the prisoner are largely frivolous and thus in a real sense simply "buying him time."<sup>69</sup> The argument seems less persuasive on its face if the appeals are—as they are at least in the early stages in many states—mandatory, or entirely legitimate. If the delay is occasioned by the prisoner winning many of his appeals, then the idea that the delay in his penalty is somehow *made in bad faith* seems a little more outrageous. The state should take responsibility for some of the delay, at least.<sup>70</sup> Justice Breyer has made this sort of defense at an even more abstract level, in both a legal and an emotional vein. The death row inmate has been given a right to make his appeals, and surely the court system cannot fault him for asserting those rights that he has been given.<sup>71</sup> Indeed, on the other side, Chief Justice Rehnquist lamented the many procedural protections that the death row inmate had been given over the years by the Supreme Court<sup>72</sup>—but if they are there, can the Court legitimately fault the prisoner for employing them? More viscerally, can we blame someone who is facing his or her death for doing all within his or her power to avoid that fate?<sup>73</sup> It is at least understandable, even if the underlying legal claims are not the

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865–66 (1980) (“[Gilmore] was arrested, confessed to the killings, had two court-appointed lawyers for his trial, was convicted of first-degree murder, and, the jury finding no mitigating circumstances, was sentenced to death. He decided to waive his appeals, and, with the aid of two retained lawyers, embraced the death penalty. He was executed, the first United States citizen in a decade whose life was taken in payment for his crimes.”).

69 For example, Justice Thomas's lament that “a defendant can avail himself of the panoply of appellate and collateral procedures and then complain when his execution is delayed” only makes sense if the defendant's actions are assumed to be meritless. *Knight v. Florida*, 528 U.S. 990, 990 (1999) (Thomas, J. concurring in the denial of certiorari).

70 *See, e.g., Elledge v. Florida*, 525 U.S. 944, 945 (1998) (Breyer, J., dissenting from the denial of certiorari) (“Not only has he, in prison, faced the threat of death for nearly a generation, but he has experienced that delay because of the State's own faulty procedures . . .”).

71 Society, too, has an interest in making sure the trial is fair and that the right person gets punished. A hasty trial may, in many cases, result in a harm to the state as well. *See Barker v. Wingo*, 407 U.S. 514, 521 n.15 (1972) (quoting *United States v. Ewell*, 383 U.S. 116, 120 (1966)) (“A requirement of unreasonable speed would have a deleterious effect both upon the rights of the accused and upon the ability of society to protect itself.”).

72 *Coleman v. Balkcom*, 451 U.S. 949, 959–60 (Rehnquist, J., dissenting) (complaining that the Court's imposition of so many procedural obstacles to the death penalty had made it impossible for states to effectuate their capital punishment statutes, undercut capital punishment's deterrent effect, and eroded the integrity of the criminal justice system as a whole); *see also McKenzie v. Day*, 57 F.3d 1461, 1467 (9th Cir. 1995) (noting that present death penalty delay “is a consequence of our evolving standards of decency, which prompt us to provide death row inmates with ample opportunities to contest their convictions and sentences”).

73 *Cf. State v. Azania*, 865 N.E.2d 994, 1013 (Ind. 2007) (Rucker, J., dissenting) (noting that the defendant's goal at the penalty phase is “quite simple: to save his or her life”), *decision clarified on reh'g*, 875 N.E.2d 701 (Ind. 2007).

strongest. They may, at least, be worth a try. And a good attorney may be duty bound to try them.<sup>74</sup> But Russell Christopher has recently shown why the argument of Justice Thomas doesn't work—however persuasive it may be at a rhetorical level. Nor do we need to parse the claims of death row litigants to see if their delay is made in good faith or in bad faith. Christopher's argument shows why good or bad faith doesn't really matter to the ultimate justness of the punishment.<sup>75</sup> We can start by rephrasing Justice Thomas's rebuttal this way: even if the resulting punishment after the delay is unjust, the fact that the delay that makes the punishment *now* unjust is the prisoner's fault means that, in a sense, he has given up any right to complain about the resulting (unjust) punishment. Put this way, the problem with Justice Thomas's argument becomes more apparent. If a punishment is unjust, does it really matter *how* it became unjust? We may begrudge the prisoner who is able to exploit a loophole in order to make it the case that the state can no longer execute him justly. But at the end of a day, the state should not be able to pass an unjust punishment, no matter *how* that punishment became unjust.<sup>76</sup>

To see this, consider a simple hypothetical taken from an article by Christopher.<sup>77</sup> The state, for whatever reason, agrees to let a prisoner who has been sentenced to death pick the date of his execution. He can choose to get it over with (and let's say that some do) but he can also choose to delay it for up to thirty years. Maybe an inmate wants to be alive while his grandchildren are born, or maybe he just wants to put off the inevitable as long as he can. Or suppose even that some inmates make the choice to put off the execution *entirely* in bad faith, because they believe that they can challenge the punishment as unconstitutional after such a long delay (that is, they see picking a late date as providing the ground for a *Lackey* claim). On this hypothetical, the choice is up to the inmate and we can attribute his choice of date to as much bad faith as we like. Now, when we get to the date of the punishment and the prisoner balks, by saying that the punishment is

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<sup>74</sup> The attorney may also hold out hope that delay will give legislatures and courts time to reconsider whether the death penalty should be applied in any case—not just in his client's case. Thanks to Joe Welling and Joe Perkovich for this point.

<sup>75</sup> Christopher, *supra* note 61, at 14-15 (arguing that "prisoner fault for delay seems irrelevant to the Eighth Amendment's concern with placing limits on state-imposed punishment," and that the rationales purportedly supporting the constitutionality of excessively delayed executions are unpersuasive).

<sup>76</sup> As Christopher puts it, "there is a gap between the prisoner fault argument addressing delay, and . . . *Lackey* claims and the Eighth Amendment addressing punishment. Who is at fault for the delay does not alter the nature or character of the punishment that the prisoner receives." Christopher, *supra* note 61, at 13-14.

<sup>77</sup> Christopher, *supra* note 61, at 64-65 n.353 ("Suppose a prisoner chose to be drawn and quartered, disemboweled, burned at the stake, or tortured by the state. Would the prisoner's choice preclude these from being cruel and unusual punishment?").

unjust, we still have to consider his claim. We cannot say that he has waived his right to complain because he chose the date (and could have chosen an earlier date). When we get to the point of punishing him, the question of the justness of the punishment is still there—waiting for us, as it were.

Christopher makes the point this way: giving the prisoner the *choice* of punishment does not make it the case that he can choose an impermissible punishment.<sup>78</sup> The argument works both with the “how” of punishment as well as with the “when.” Suppose a choice was given to a prisoner on death row between death by torture and death by electrocution.<sup>79</sup> The fact that a prisoner may choose to be tortured to death does not make the punishment not cruel and unusual.<sup>80</sup> So too the fact that a prisoner may choose to delay his execution does not make the punishment not cruel and unusual. It may be. That is a separate analysis, quite apart from the fact of choice and even the motivation behind the choice. The prisoner cannot waive his right to be free from a cruel and unusual punishment. The argument that Justice Thomas makes, while rhetorically and superficially appealing, is really a non-starter.

### C. A Third Lackey Claim?

Above, I presented the second type of *Lackey* claim as saying that delay meant that the purposes of execution would no longer be realized by the execution. But I was ambiguous on a crucial point. One way of cashing out the claim would be to say that it would be *pointless* to execute someone who is on death row for decades. It would no longer add any deterrent value, and it wouldn't fulfill any retributive purpose, either. But one could read it another way, especially concerning the value of retribution being satisfied or not. Maybe it is no longer *pointless* to execute someone who has been languishing on death row, but it would be *excessive*. Consider it this way: the person who is sentenced to execution is sentenced *to die*; he is not *sentenced to die plus twenty years in prison*. So we might imagine a third type of *Lackey* claim, viz., that the punishment is proportionally unjust, that the person is being punished much more than he was sentenced to, and for that reason it is cruel and unusual. It is not a claim that retribution would be pointless—because the purpose of retribution would no longer be satisfied—but that

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78 Christopher, *supra* note 61, at 60 (“[A] defendant’s choice does not transform an unconstitutional punishment into a constitutional one.”).

79 As Christopher points out, the Supreme Court, over Justice Stevens’s dissent, has “opened the door” to the constitutionality of this type of choice in its per curiam opinion in *Stewart v. LaGrand*. *Id.* at 61–62 (citing *Stewart v. LaGrand*, 526 U.S. 115 (1999) (per curiam) (holding that by choosing lethal gas over lethal injection the defendant waived his right to challenge whether the gas method violated the Eighth Amendment)).

80 Again, the example is Christopher’s.

delay plus execution would be wrong because the person is getting much more than he deserves, or at least, much more than what he was sentenced to. If one way of looking at the second *Lackey* claim is that the execution wouldn't fulfill the goal of retribution at all, another way of looking at it is to say that delay plus execution means that the person is being over-punished, that there is *too much* retribution. As Justice Breyer put it at one point discussing the case of Charles Foster: "If executed, Foster, now 55, will have been punished both by death *and also* by more than a generation spent in death row's twilight."<sup>81</sup>

Russell Christopher pursues this point as part of an impressive analytical investigation of what a *Lackey* claim might be.<sup>82</sup> If the delay that happens before an execution should be construed as punishment, and not mere delay (and it seems plausible that it should be), then the person who is executed and has to endure twenty years of prison is getting *more than he or she deserves*.<sup>83</sup> That would make the punishment disproportional, and thus cruel and unusual.<sup>84</sup> Now, bracketing that the Court has been sparing in its willingness to call sentences disproportionate,<sup>85</sup> and also bracketing the fact that some delay in execution is inevitable<sup>86</sup>—an extreme version of

81 *Foster v. Florida*, 537 U.S. 990, 993 (2002) (Breyer, J., dissenting from the denial of certiorari) (emphasis added). Another way of phrasing this is to say that the state's interest in retribution *ought to have* been satisfied by the years in prison and the harsh conditions many face on death row. See, e.g., *McKenzie v. Day*, 57 F.3d 1461, 1486 (9th Cir. 1995) (Norris, J., dissenting) ("This delay, coupled with the allegedly harsh and punitive confinement conditions on death row, arguably satisfies the State's interest in exacting retribution."). See also *Lackey v. Texas*, 514 U.S. 1045, 1421 (1995) (Stevens, J., memorandum respecting the denial of certiorari) ("Moreover, after such an extended time, the acceptable state interest in retribution has arguably been satisfied by the severe punishment already inflicted"). But see *infra* note 93 for a different interpretation of this passage.

82 Christopher, *supra* note 30, at 453–62 (exploring the argument that delay constitutes additional punishment).

83 Judge Fletcher suggests this version of a *Lackey* claim when he writes (summarizing the trial court judge's opinion) that "executing Joe Ceja now after 23 years of incarceration on death row is *too harsh a punishment for his crimes*." *Ceja v. Stewart*, 134 F.3d 1368, 1369–70 (9th Cir. 1998) (Fletcher, J., dissenting) (emphasis added). But then Judge Fletcher goes on to say that executing him would be pointless, because the reasons for the execution "are no longer served by execution." *Id.* at 1370. This latter statement is consistent with the second type of *Lackey* claim I mentioned above.

84 See, e.g., *Roper v. Simmons*, 543 U.S. 551, 560 (2005) ("[T]he Eighth Amendment guarantees individuals the right not to be subjected to excessive sanctions.").

85 See, e.g., *Harmelin v. Michigan*, 501 U.S. 957, 996 (1991) (upholding a mandatory life without possibility of parole sentence in a drug possession case).

86 *Coleman v. Balkcom*, 451 U.S. 949, 952 (1981) (Stevens, J., concurring in denial of certiorari) ("However critical one may be of these protracted post-trial procedures, it seems inevitable that there must be a significant period of incarceration on death row during the interval between sentencing and execution."). But Justice Stevens goes on to note that when the delay is "for a prolonged period, the imprisonment during that period is nevertheless a significant form of punishment." *Id.*

Christopher's claim would make it disproportionate punishment if a prisoner was not executed *immediately* upon receiving a sentence of death—I think this type of *Lackey* claim is less interesting than the one I pursue at length in Part II of my Article. The problem comes in thinking about the remedy for someone who complains that his new sentence (execution plus delay, rather than just execution) is disproportionate, and so retributively unjust.<sup>87</sup> Maybe the fact that the delay adds to the punishment makes the punishment taken as a whole (again, delay plus execution) unjust—but is the correct, or even the only, remedy to this that the execution not take place? I take it that the force of a *Lackey* claim is that it means that the remedy is not having the execution—that would be cruel and unusual, because it would be too much punishment. But can this third kind of *Lackey* claim get us that result?

Consider what I take to be a similar (or similar enough) claim. A person is sentenced to five years in prison. However, in the third year of his sentence, he is badly beaten by a prison guard. He sues, and asks that his prison sentence be reduced, because if he were to serve his full sentence, he will have been punished *too much*—he will have been beaten badly *and* had to serve his full punishment. There are certainly some complicated questions here about remedies, but I believe my point here can bypass at least some of them. One complication is whether the beating by the prison guard should be considered *punishment* at all—such that we can trade off one aspect of the prisoner's punishment with it. But let us stipulate that the beating *is* an additional punishment. Does it follow that the right remedy to the fact of the beating is to reduce the term of years the prisoner is facing? Are the punishments—stipulating, again, that they are both punishments—*commensurable* in that way? Not necessarily. We could look at them on different vectors. We might say that the prisoner didn't *deserve* to be beaten, and we could give him money damages to represent that fact. But we might still hold on to the fact that prisoner still *deserves* his five years in prison because of the crime he committed. We might say, in this vein, that the punishments are to a certain extent *incommensurable*. Getting an additional unjustified punishment of one type does not mean that you should automatically get less of another, justified punishment.<sup>88</sup> As one court has put it, “When prisoners complain about the conditions in prison, we do not commute their sentence; we order the conditions ameliorated. If inordinate

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<sup>87</sup> See Dan Markel, Chad Flanders & David Gray, *Beyond Experience: Getting Retributive Justice Right*, 99 CALIF. L. REV. 605, 608–12 (2011) (discussing retributive proportionality).

<sup>88</sup> Cf. Alexander A. Reinert, *Release as Remedy for Excessive Punishment*, 53 WM. & MARY L. REV. 1575 (2012) (arguing for release as a remedy to unconstitutional punishment). *But see id.* at 1637 (noting early release as a remedy “has never been seriously considered by courts or advocates”).

delay in carrying out an execution is adjudged to be a problem of constitutional dimension, there may be other remedies that are more appropriate in addressing the harm done.”<sup>89</sup>

If it is not obvious in that example that the punishments are incommensurable, things get considerably clearer, I think, when we move to term of years sentences as opposed to a sentence of death.<sup>90</sup> If one is sentenced to death, (I will have more to say about this later), then the judgment is of the sort: “you deserve to die.” Can any amount of years add up to an equivalent punishment? I do not think so. Death is different, and qualitatively so.<sup>91</sup> No amount of some other punishment can add up to a punishment of death. In other words, death as a punishment and a term of years as punishment are incommensurable. We cannot satisfy a sentence of death with a long sentence of a term of years.

Why does this matter? It matters, first, because it may be that even if a person is sentenced, unjustifiably, to a term of years in prison *plus* a death sentence, he still deserves to die for all that. It is not as if the death sentence becomes unjustified *because* of that sentence to a certain amount of years. The death sentence would still be retributively justified; the person has still been condemned to death. For the retributivist, the person deserved to die and so he should die. To offer not executing the person as a sort of remedy would lead to something retributively unjust—it would mean the person not getting what he deserved. And in so doing, we would replace one sort of injustice—giving a person years in prison *plus* what he deserves—with

<sup>89</sup> *McKenzie v. Day*, 57 F.3d 1461, 1467 (9th Cir. 1995).

<sup>90</sup> It is on this point, I think, that I most differ and depart from Christopher’s analysis. I think that the retributivist may hold that death is still deserved, even if there is added to it some amount of undeserved additional punishment. The question then becomes whether it is disproportionate to keep a person alive when he deserves to die *now*, or whether it is in fact a benefit to the person to stay alive just a little bit longer. And there is a further wrinkle: even if it is not a benefit to the person to stay alive longer, it is unclear whether the remedy for that lack-of-benefit is to stop the execution, or to compensate the inmate in some other way. I expand on this analysis in the text.

<sup>91</sup> This is usually applied in the context of “death is final, whereas other punishments are not, so we need to add extra due process protections in order to make sure we get it right.” See, e.g., *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (“Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two.”); *Jones v. Chappell*, 31 F. Supp. 3d 1050, 1061 (C.D. Cal. 2014) (“Indeed, in its finality, the punishment of death ‘differs more from life imprisonment than a 100-year prison term differs from one of only a year or two.’”) (quoting *id.*). But it seems to me equally applicable in the context of “death in its severity and finality is utterly unlike any punishment which involves the person still living.” Kant, of course, famously insisted on this point (as against Beccaria): “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 . . .” IMMANUEL KANT, *THE METAPHYSICS OF MORALS* 142 (Mary Gregor trans., Cambridge Univ. Press 1991) (1797).

another—not giving the person what he deserves. (Either way we lose.<sup>92</sup>) The conclusion here has to be something like that it is not the case that the state’s interest in *execution* can be satisfied by any additional amount of years. Death and years in prison are fundamentally different punishments.<sup>93</sup> We have to look elsewhere for a remedy, if such a remedy is to be had. One thing seems clear: the fact of the extra years in prison *in itself* can’t be used as a substitute for an execution, if that is what the person deserves.

But maybe that is not the point. Maybe the point is that the state cannot give out cruel and unusual punishments. The Constitution does not require that sentences be just; it mandates that they *not be unjust*. A disproportionate punishment is cruel and unusual, and so the state can’t do it. If the only remedy to the punishment becoming cruel and unusual is not to execute, then the person can’t be executed.<sup>94</sup> The third *Lackey* claim would push execution off the table as permissible punishment, because it would literally be overkill. Maybe it would mean that the person was not punished as much as he deserved, but again—the Constitution prohibits the disproportionately harsh punishment, and does not guarantee a punishment that is not disproportionately lenient.

Here, then, we get to the crux of the matter, and to my rejoinder. The problem with the third *Lackey* claim, and one which may doom it, is that it is not obvious that delay is a *bad thing* for which the prisoner needs a remedy, such as money or forgoing the execution altogether. The time the person is still in prison is *time that he is still alive*, maybe living under horrible conditions, but living all the same. Here again the notion of punishment incommensurability is relevant.<sup>95</sup> If nothing is as bad as death, *nothing is as*

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<sup>92</sup> Christopher describes this as the problem of irremediability of delay in the context of the death penalty. In other contexts, delay is either *de minimis* or remediable, but the only remedy for delay plus death is to commute the sentence. Christopher, *supra* note 30, at 424 (“Short of voiding the death sentence, there is no way to give credit to the prisoner for time served while awaiting execution.”).

<sup>93</sup> *Contra Lackey v. Texas*, 514 U.S. 1045, 1045 (1995) (Stevens, J., memorandum respecting the denial of certiorari) (“[A]fter such an extended time [on death row], the acceptable state interest in retribution has arguably been satisfied by the severe punishment already inflicted.”). However, this claim could be read another way, viz., that even though the state interest in retribution may not be satisfied, it is not *acceptable* for the state to have this interest. I advance a version of this claim in Part III, below.

<sup>94</sup> There is however, still this: if money can do the trick as a remedy to the years spent in prison, then the execution can go on. *But see* Christopher, *supra* note 30, at 424 (“Because of the different nature of death row incarceration . . . and capital punishment, the former cannot be subtracted from the latter.”).

<sup>95</sup> Because I emphasize the incommensurability of death and a term of years as punishments, my argument is agnostic on whether the additional years spent in prison is in fact punishment. I assume that it is—and argue nonetheless that the fact of additional years does (1) not diminish the need for death in order for retribution to be satisfied and also (2) that being alive in prison is better for the prisoner than dying right away, so the

*bad as death*—not even an extended stay in prison. The years of delay are years that the inmate is not dead. Here the difference between extra years in prison (however many) is different from a sentence to death. Being in prison *longer* would be a bizarre remedy for bad treatment in prison, or even being mistakenly sentenced to more years in prison than you deserved. But it is plausible at some level to see a longer prison term as a good thing—even a sort of remedy—if the alternative is death.<sup>96</sup>

Now it does seem a relevant data point that many prisoners choose to file appeals in part to extend their stays in prison rather than be put to death. Not that this delay can make the resulting punishment just; we saw that it cannot. But it may show that it may be better for the inmate to live longer than to live shorter; that it is better, all things considered, that the inmate be alive than that he be dead.<sup>97</sup> It goes to the question of whether *years in prison* plus execution is really disproportionate in the same way that *years in prison plus a beating* would be disproportionate. It may be that living longer is a benefit to the inmate, or at the least not obviously a further injustice, rather than an additional punishment, one that needs to be remedied.<sup>98</sup> It seems to me plausible to think that being alive in prison is better than death, based on the fact that death is so different from other punishments—so different that it can make prison seem a comparatively better deal. If this is right, then the idea that the punishment is disproportionate is a non-starter. This does not mean that the execution plus the delay, however, may not be cruel and unusual in some other way—only that it is not cruel and unusual *because it is disproportionate*.<sup>99</sup>

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years in prison do not result in a *disproportionate* punishment (at least relative to the alternative, viz., death).

96 As I examine in Part II.B. below, the intrinsic desert retributivist will insist that each day the person who deserves to die is left to live is a *bad thing*—allowing an unjust state of affairs to persist.

97 My meaning should not be missed here. The desire for the prisoner to keep on living rather than die is not dispositive to the argument, for, in fact, some prisoners may *prefer* to die. But I think it is an implication of my argument here that the prisoner who wants to die is wrong about this, because it is better to be alive than to die, even to be alive in miserable circumstances. Overreliance on actual prisoners' subjective preferences is the flaw in the otherwise interesting analysis given by Noah Feldman in *Delaying Execution Isn't Cruel and Unusual*, BLOOMBERG: VIEW (May 3, 2016, 12:04 PM), <https://www.bloomberg.com/view/articles/2016-05-03/delaying-execution-isn-t-cruel-and-unusual>.

98 And suppose we concede that the prisoner is harmed by continuing to live, so that the time he spends in prison *when combined* with an execution, is disproportionate. Still, it does not follow that the remedy to this is to call off the execution. It is important (again) to separate the question of whether the additional delay is good or bad with the question of what remedy the prisoner should get. It may be that the additional delay *is* bad, and in fact a punishment, but from this it does not follow that he does not *deserve* execution.

99 Maybe from the point of view of the retributivist, the punishment is not retributively *ideal*—that would be to execute as soon as possible. But my conclusion here is only that

Thus, for the rest of the Article, I focus on the idea that execution may be *pointless* because the purpose of retribution is no longer served after a long delay, not that the execution may be disproportional. If a too-long-delayed execution is pointless, because it serves no deterrent or retributive function, the execution is cruel and unusual, and it doesn't matter why the delay happened. Nor is the proper remedy for the delay an issue. If the execution really has no point, then it shouldn't happen, because to do so would be cruel and unusual—it is not a question of removing the execution because having it would make the punishment disproportional. And the pointlessness of an execution should matter to even those who favor the death penalty. Presumably, they favor the death penalty because it serves some purpose. If it no longer did, then they should oppose it. Otherwise, they are left simply with a form of bloodlust—killing for no reason other than for killing.

This is different from what the third *Lackey* claim just discussed. Those who believed that the death penalty was still deserved, even though execution would make the punishment disproportionate, might think it tragic that the only solution to an Eighth Amendment violation was nixing the execution. They would still see the inmate as deserving death. If delay made it the case that retribution no longer made sense—that the purpose of retribution would no longer be served—then maybe those who favor the death penalty would lament the fact that the death penalty was *once* justified, but no longer is. But they could not still see the death penalty as justified, or at least fully justified, *now*. So I think this version of the *Lackey* claim is the most interesting. In order to fully understand it, though, we have to know more about what retribution might be.

## II. TWO VERSIONS OF RETRIBUTION

My narrow interest in the *Lackey* claim comes down to the version that says that executing a person after a long delay makes the execution pointless. And narrowing things even further, I am interested in the version of the *Lackey* claim that says that the retributive purpose of an execution would no longer be served after a long delay. Elaborating on this version of a *Lackey* claim requires us to say what exactly retribution is, so that we can figure out when punishment serves a retributive purpose and when it does not. There are many varieties of retributivism, some rather baroque in their

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executing someone after too long of a delay would not be disproportionate—and so cruel and unusual—and would still at least satisfy the requirement that the person who deserves the death penalty must die.

complexity.<sup>100</sup> But the Supreme Court has made our task here somewhat easier, because over the years it has described retribution as a purpose of punishment, and in so doing has articulated some assumptions about what retribution is. As far as I can tell, there are two broad kinds of retribution that the Court talks about when it talks about retribution.<sup>101</sup>

The first version of retribution focuses on punishment's ability to satisfy community outrage. Call this the outrage version of retribution. Crime makes us mad at criminals, and the point of punishment is to satisfy this outrage. This is a crude sketch (although I will eventually make the case that this is a rather crude version of retribution), but it pops up regularly in the Court's discussion of retribution. The second version of retribution focuses on the offender's *desert*.<sup>102</sup> In this version, retribution requires that bad people be punished for the bad things they have done. At the extreme, people who have killed other people may deserve to die. Retribution is not about pleasing the community, or satisfying its outrage, but about meting out justice, giving people what they—because of their bad acts—deserve. Call this intrinsic desert (or intrinsic justice) retribution.

I spend the rest of this Part running the *Lackey* claim about the pointlessness of executing someone after a delay with these two versions of retribution. I will also elaborate on these two kinds of retribution and, when I think it makes sense, criticize them. The general arc of my argument is that the *Lackey* claim works well under the community outrage theory of retribution—but community outrage retribution is a bad theory of retribution. The intrinsic desert theory of retribution is much better philosophically speaking. But the *Lackey* claim doesn't work with it—in fact, it shows the limits of the *Lackey* claim: if we understand retribution in the most plausible way, the *Lackey* claim doesn't go through, except in one rare (and telling) case. The best thing to do in this case is to question whether the state can ever legitimately embrace intrinsic desert retribution as a purpose of punishment. I develop the argument that it cannot in Part III.

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100 See John Cottingham, *Varieties of Retribution*, 29 PHIL. Q. 238 (1979); Nigel Walker, *Even More Varieties of Retribution*, 74 PHIL. 595 (1999).

101 These are both briefly addressed in *Roper v. Simmons*, 543 U.S. 551, 571 (2005) (“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.”).

102 See, e.g., Chad Flanders, *Retribution and Reform*, 70 MD. L. REV. 87 (2010).

### A. Community Outrage Retribution

In writing about why *Lackey* claims might work, Justice Breyer most clearly attaches it to a community outrage version of retribution.<sup>103</sup> In his recent dissent in *Valle v. Florida*, this comes out clearly: “I would ask how often [the] community’s *sense of retribution* would forcefully insist [on] a death that comes only several decades after the crime was committed.”<sup>104</sup> The argument is fairly straightforward.<sup>105</sup> If punishment, including the execution of an inmate, is about satisfying community outrage, then it stands to reason that the community may become less mad over time. Its anger may diminish, to the point even of indifference. Suppose someone commits a horrible crime. There is pressure by the community to find the person and to punish him. The police find him, he goes to trial, and is sentenced to death. The community gradually forgets about him, and goes about its business.<sup>106</sup> Maybe some still remember: the family of the victim; the prosecutor.<sup>107</sup> But even their anger is considerably diminished. Ten years

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<sup>103</sup> *Valle v. Florida*, 564 U.S. 1067, 1068 (2011) (Breyer, J., dissenting from denial of stay) (arguing that a community’s “moral sensibility” must be taken into account when examining whether the death sentence is the proper punishment for a crime).

<sup>104</sup> *Id.* (emphasis added); see also *Glossip v. Gross*, 135 S. Ct. 2726, 2767 (2015) (Breyer, J., dissenting) (“[T]he death penalty’s penological rationale in fact rests almost exclusively upon a belief in its tendency to deter and upon its ability to satisfy a community’s interest in retribution.”) (emphasis added), *reh’g denied*, 136 S. Ct. 20 (2015); *Lackey v. Texas*, 514 U.S. 1045, 1045–46 (1995) (Stevens, J., memorandum respecting the denial of certiorari) (asserting that the length of time a prisoner spends while awaiting execution of the death sentence is a severe punishment in itself, and the actual execution is no more a deterrent than time spent on death row).

<sup>105</sup> The clearest expression of it can be found in Justice Breyer’s *Glossip* dissent, which I borrow from here. See *Glossip*, 135 S. Ct. at 2769 (Breyer, J., dissenting) (arguing that the decades-long delays before the execution of a death sentence do not justify such a penalty, and that with the passage of time, communities may be less inclined to seek retribution in the form of the death penalty).

<sup>106</sup> Blackstone early on noted this worry: “Delay of execution serves only to separate these ideas [of the advantages of crime and the risk of punishment]: And then the execution itself affects the minds of the spectators rather as a terrible sight than as the necessary consequence of transgression.” 4 WILLIAM BLACKSTONE, COMMENTARIES \*404.

<sup>107</sup> Maybe prosecutors do an injustice to family members by holding out the false hope of “closure” knowing full well the death sentence won’t be executed for decades, if at all. See, e.g., Allen G. Breed, *Victims’ Families Seek Justice, Retribution and Closure from Death Penalty*, HUFFINGTON POST (July 28, 2014, 6:12 AM), [http://www.huffingtonpost.com/2014/07/28/death-penalty-victims-families\\_n\\_5626141.html](http://www.huffingtonpost.com/2014/07/28/death-penalty-victims-families_n_5626141.html) (reporting on the reactions of victims’ families after learning that the prisoners endured inefficient, slow, and painful executions); Susan Bandes, *When Victims Seek Closure: Forgiveness, Vengeance and the Role of Government*, 27 FORDHAM URBAN L.J. 1599, 1599 (2000) (quoting a victims’ advocate reporting that families “put their lives on hold” while “the appeals process drag[s] out”). Bandes also notes a divergence in “closure” interests of the state and victims. *Id.* at 1605–06; see also Vik Kanwar, *Capital Punishment as “Closure”: The Limits of a Victim-Centered Jurisprudence*, 27 N.Y.U. REV. L. & SOC. CHANGE 215, 215–16 (2001) (noting that since death sentences are really prison

pass; now twenty. His appeals exhausted, the prisoner now gets a notice that he will be put to death soon. There is a brief flurry of news coverage; some protestors make last-ditch pleas to the governor for commutation. Compared to the initial uproar at the time of the commission of the crime, the community interest, let alone *outrage*, is muted, and practically nonexistent. It has run itself out.<sup>108</sup> What, we might ask, is the point of executing the person anymore? Or is it not more plausible to think that the retributive justification “diminish[es] as the delay lengthens”?<sup>109</sup> Maybe he’s suffered enough; maybe the community is happy enough just to let the person languish in prison until he dies. Is it really necessary to go ahead and kill the inmate? As Judge Fletcher has written, the community outrage version of retribution seeks to “secure some form of moral and emotional closure to the community.”<sup>110</sup> But what if the community has already “secure[d]” this closure prior to the death penalty? Or what if such closure is now impossible or at least “grievously undermined”?<sup>111</sup>

So goes the argument against executing someone after a delay—it would no longer serve any retributive function, on the theory that if retribution is meant to slake community outrage, that outrage may—after a long enough time—no longer need to be slaked. When the Court articulates this theory, it is clear that it does not want to equate community outrage with a brute desire for revenge. Indeed, in a contrast that we will have occasion to revisit (in Part III), the Court insists that, when using punishment as a vehicle of community outrage, the goal is precisely to *prevent* the community breaking

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sentences with a remote chance of execution, the indeterminacy of the death sentence is not only an obstacle to closure but a source of anxiety and frustration to victims). Furthermore, long delays and the need for victims to participate in legal procedures reopens wounds or prevents healing. According to one family member: “You never bury a loved one who’s been murdered, because the justice system keeps digging them up.” *Id.* at 241. The Catholic Church is also skeptical of the ability of the death penalty to provide “closure”: “For many left behind, a death sentence offers the illusion of closure and vindication.” *The Church’s Anti-Death Penalty Position*, U.S. CONF. CATH. BISHOPS, <http://www.usccb.org/issues-and-action/human-life-and-dignity/death-penalty-capital-punishment/catholic-campaign-to-end-the-use-of-the-death-penalty.cfm> (last visited Mar. 5, 2016).

108 *See Valle*, 564 U.S. at 1068 (Breyer, J., dissenting from denial of stay) (“I would ask how often that community’s sense of retribution would forcefully insist upon a death that comes only several decades after the crime was committed.”).

109 *Johnson v. Bredesen*, 558 U.S. 1067, 1069 (2009) (Stevens, J., statement respecting denial of certiorari).

110 *Ceja v. Stewart*, 134 F.3d 1368, 1373 (9th Cir. 1998).

111 *State v. Santiago*, 122 A.3d 1, 64 (Conn. 2015) (“What is clear, however, is that the most tangible retributive fruit of capital punishment—providing victims and their families with a sense of respite, empowerment, and closure—is grievously undermined by the interminable delays in carrying out the sentence imposed.”), *reconsideration denied*, 124 A.3d 496 (Conn. 2015); *Nichols v. Heidle*, 725 F.3d 516, 559 (6th Cir. 2013) (Martin, J., concurring) (delay means providing “no closure for families of the victims”).

out into a vendetta against the accused.<sup>112</sup> Suppose there is a terrible crime, but the state does nothing to investigate or put on trial or to punish the person who is suspected of doing it. In this case, seeing the state fail to act, the community will take the law into its own hands. It will seek out the suspect—or the family of the suspect, or the suspect’s compatriots, or all of them—and enforce a punishment itself. This is a consequence the state wants to avoid; the state wants to remove revenge from the equation and put itself between the accused and the community. It wants to stand in for the community, and be the relatively more restrained version of the community’s desire to see justice done. It acts to keep the punishment within bounds, to make sure the suspect is treated fairly, and not arbitrarily. In other words, the punishment (even and up to an execution) *channels* the anger and hatred of the community. It channels it into something more appropriate, something at least approximating justice. The role of the state here is precisely to *recognize* community outrage and its deep basis in human nature, but also to limit and constrain it, so that things do not get out of hand.

The *Lackey* argument, however, also has its basis in human nature. Someone commits a wrong against us. We are angry, for a time.<sup>113</sup> We may even exact some punishment. But anger and hatred fade. Sometimes they mature into forgiveness, as we are ready to look at the person who has harmed us in a new light, one not irredeemably tainted by the wrong he has done. Sometimes this happens. What usually happens, though, is that time passes and we forget. We just no longer *feel* the same things about the person that we did, especially if we are not in continual contact with that person. We move on with our lives. But if this is true of our sentiments, and if the *reason* we punish is that we need our feelings to be satisfied or validated, what happens when those feelings change? What happens when we are no longer outraged?<sup>114</sup> Maybe, in the case of criminal justice, we keep the person in prison for reasons of incapacitation or deterrence. But the original reason, the reason that made us so in need of seeing this person punished or even to suffer, is gone. Now, is it implausible to think that this may happen in the case of the death penalty? We start out very angry; we want to see this person not just punished but punished in the worst way

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112 *Furman v. Georgia*, 408 U.S. 238, 308 (1972) (Stewart, J., concurring) (“When people begin to believe that organized society is unwilling or unable to impose upon criminal offenders the punishment they ‘deserve,’ then there are sown the seeds of anarchy-of self-help, vigilant justice, and lynch law.”).

113 Jules Coleman & Alexander Sarch, *Blameworthiness and Time*, LEGAL THEORY 1, 5 (2012) (examining “the ways in which the *passage of time* affects both the moral significance of what we have done and the correctness of our responses to those doings”).

114 See Justice Breyer’s dissent in *Glossip v. Gross*, 135 S. Ct. 2726, 2769 (2015) (Breyer, J., dissenting) (“Feelings of outrage may have subsided.”).

possible—we want to see him or her dead. The person is placed on death row, and then ten years pass; then twenty, or more. The anger is replaced with some sort of rough reconciliation with the facts of what has happened, or in any case the anger is no longer red hot. What then is the purpose of going on with the execution? Maybe our anger has been satisfied by the person languishing on death row and so we don't see the need for any more punishment. Maybe it is enough that the person die on death row, but we may not feel the need to see him executed anymore. In either case, the need to mete out the ultimate punishment (death) doesn't have the same force it did. The execution seems now an empty ritual—a promise we made a long time ago, and which now we no longer may feel is worth fulfilling.

The force of this argument depends crucially on getting what we mean by retribution right, and finding that version of retribution plausible and palatable. Is it? I think there are a few problems.<sup>115</sup> First, we have to analyze whether this version of retribution is getting what *we are feeling* right when we are feeling angry about punishing someone. What do we want? The community outrage version of retribution, the one relied on by some of the *Lackey* claim proponents, seems to say something like: the reason we punish is that we want to see our anger expressed and, by punishment, satisfied.<sup>116</sup> We want to see that a person is punished *so that we are ourselves sated*.<sup>117</sup> The state, on this picture of retribution, also sees punishment in this light. If the state does not punish, then the community's outrage might get out of control; it may see itself having to deal with angry citizens trying to take the law into their own hands. In short, the community outrage sees the point of punishment as *taming* or *satisfying* or *channeling* the community's potentially volatile emotions. Punishment bottoms out in subjective feelings, not in anything objective—at least if community outrage is what we are focusing on. This view at least has the virtue of understanding why *time* matters in executing someone. The longer we wait, the better the chances that our feelings will have changed, or gone away altogether.<sup>118</sup>

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115 The arguments I advance here also make me skeptical—in a more philosophical vein—about tying our ideas about blameworthiness too closely to our reactive attitudes. For a sensitive examination of this point (with a focus on how time affects our outrage), see Coleman & Sarch, *supra* note 113; see also Chad Flanders, Responsibility and Objectivity (2004) (unpublished Ph.D. dissertation, University of Chicago) (on file with author).

116 See, e.g., *Gregg v. Georgia*, 428 U.S. 153, 183 (1976) (describing retribution as “an expression of society's moral outrage at particularly offensive conduct”) (emphasis added).

117 This focus on what the community *feels*—as opposed to what it believes is just—is especially clear in Justice Breyer's *Glossip* dissent. *Glossip*, 135 S. Ct. at 2769 (noting the “community's sense of retribution” and its “feelings of outrage” and the possibility that these things may “attenuate” over time).

118 See, e.g., *Knight v. Florida*, 528 U.S. 990, 995 (1999) (Breyer, J., dissenting from denial of certiorari) (“At the same time, the longer the delay, the weaker the justification for

But it is debatable that community outrage retribution gets right what we are actually feeling when we feel anger or hatred about someone who has done us wrong. Certainly we have emotions, and we may feel better when something is done to appease those emotions. But we are also making a *judgment*, at least implicitly—aren't we?<sup>119</sup> We are saying that the person who has done us wrong *deserves* to suffer, or even that it would be good or fitting that the person suffer for what he has done.<sup>120</sup> Our emotions aren't just raw feelings, which need to be dealt with (although they are surely that); they are also implicitly claims about what should happen. The point of punishment is not merely to channel those emotions but in some sense to vindicate them, or more properly to vindicate the judgment embodied in them.<sup>121</sup> The community outrage version of retribution sells our emotions short. It treats those emotions as ends in themselves, when they are in fact much more than that, even nobler than that. They have a reason to them—maybe a reason we only see dimly ourselves—but a reason nonetheless.

To see how this is so, consider how, if the community outrage theory of retribution is right, the *Lackey* claim may still not work. It is certainly at least an empirical question as to whether our outrage really will fade after many years. Isn't it possible that a community could, after many years, still gather up the anger and hatred against a person who has committed a vicious crime? Maybe the community remembers every year the date the crime was committed, and its anger—far from fading—seems to grow ever hotter as the person is *still* not executed. Or maybe the community does tend to forget, but then the anger again is renewed as it looks like the person finally

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imposing the death penalty in terms of punishment's basic retributive or deterrent purposes.”).

119 Dan M. Kahan & Martha C. Nussbaum, *Two Conceptions of Emotion in Criminal Law*, 96 COLUM. L. REV. 269, 270 (1996) (“Emotions are ubiquitous in criminal law, as they are in life. But how do they, and how should they, affect legal assessment? Should the law be more sympathetic to defendants who are taken over by passions such as anger and fear, or should it view such defendants as especially dangerous? Or should the response of the law depend on an appraisal of the emotion itself—whether it is appropriate or inappropriate, ‘reasonable’ or ‘unreasonable’? What does it mean for an emotion to be reasonable? Aren’t emotions, after all, just disturbances of the personality that can be more or less strong but that are always hostile to reason? Or do they embody judgments, ways of seeing the world? If they do, should we hold people morally accountable for those judgments?”).

120 I qualify this point a bit, later, when I write that what in fact we believe a person deserves is to be caused to suffer *by us*, not just to have some suffering befall him. See also Chad Flanders, *Adam Smith’s Jurisprudence: Resentment, Punishment, and Justice*, in ADAM SMITH: HIS LIFE, HIS THOUGHT, HIS LEGACY 371 (Ryan Patrick Hanley ed., 2016) for this distinction.

121 See Chad Flanders, *In Defense of Punishment Theory, and Contra Stephen: A Reply to DeGirolami*, 10 OHIO ST. J. CRIM. L. 243, 252–54 (2012) (explaining the distinction between punishment as a mere gratification of hatred towards a criminal and punishment as “validating these feelings”).

will be executed; people are reminded again how much that person has harmed the community. In these scenarios, the *Lackey* claim wouldn't work: "You thought that our outrage would disappear, but look it hasn't—it was there all along, albeit slightly below the surface. We still demand that you heed our feelings, and execute this person!" If the community outrage version of retribution is right, then the success or failure of the *Lackey* claim is not settled; it just depends. It depends on whether we are still outraged, or whether we can gather up that outrage again. If we are still outraged, then maybe we *do* need to punish the person by execution, even many, many years after the crime was committed.

The community outrage version of retribution also has problems, if considered as a general theory of punishment. Suppose someone kills a particularly disfavored member of the community; there is no outrage. Does it follow the person *shouldn't* be punished? If we are retributivists, this seems an unpalatable result—it seems to make retribution depend on contingent judgments of a person's value to the community, which at times could come to seem arbitrary. And this again is the problem with looking at the main thing as being the community's *outrage* itself, rather than the judgment that outrage may contain. If the main thing is the judgment, then we can sometimes say to the community: "A horrible crime has been committed here, which we should all see as a horrible crime that deserves punishment—we really *should* feel outraged!" If all that matters are the feelings of the community, then we can't say this. Maybe we can try to stoke outrage, but we cannot criticize the community for not feeling outraged—it feels what it feels.<sup>122</sup> I don't think this "outrage" version of retribution captures what we are actually feeling, and it does not get at what is appealing about retribution. Retribution is about a judgment about what people deserve, not a statement about what the community feels. If it was just about community feeling, then the answer to crime might not need to be punishment, but something that distracted the community from its feelings, to make those feelings fade and for the community to forget about the terrible thing that has been done.<sup>123</sup> Punishment drops out as essentially related to crime; crime just demands that people's emotions be managed in some way or another, not that crime be punished. The necessary link

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122 Kahan & Nussbaum, *supra* note 119, at 278–80 (describing the mechanistic view of emotion).

123 See Chad Flanders, *Shame and the Meanings of Punishment*, 54 CLEV. ST. L. REV. 609, 624 (2006) (arguing that conventional punishment by imprisonment can sometimes work against purging public anger). "I am not at all convinced that our emotions work this way. Why couldn't we become increasingly compassionate, rather than just shifting around a fixed quantity of hatred? This seems an unduly pessimistic view. And, even if Kahan and Stephen are right, why couldn't our illiberal emotions be diverted (to sporting events, for example) or sublimated altogether?" *Id.* at 635.

between an offender's crime and an offender's punishment isn't there on the community outrage version of retribution. It's just not a plausible theory of punishment, even if, sometimes as a contingent matter, it may make sense of some *Lackey* claims. I suggest we look elsewhere.

### B. *Intrinsic Desert Retribution*

Fortunately, there is an alternative to community outrage retributivism, and it is better, philosophically, than that version. This version—which I'll call intrinsic desert retributivism—takes seriously the *judgment* at the bottom of the community's outrage at the person who has committed the crime. The point of punishment, the intrinsic desert retributivist says, is that the person *get what he or she deserves*. If the person is not punished as much as desert says he or she should be punished, or is punished less, then retribution has not been satisfied—no matter what the community thinks. If the community thinks a person should be executed, but his crime doesn't merit that, then the person *shouldn't* be executed, even if it means that the community will take the law into its own hands.<sup>124</sup> Kant is probably the paradigm of an intrinsic desert theorist. He famously said that even if an island was about to disband, and a person still needed to be executed, then the island, as possibly its very last act, should kill that person. That person *deserved to die*.<sup>125</sup> Even if the community had forgotten about that person, because he had been languishing on death row; even if the community has better things to do, the community *ought* to go ahead with the execution. To fail to do so would be an injustice—it would be wrong. It would be wrong because the person, because of his crime, deserved the punishment. Failure to give him his punishment—to give him what he deserved—would be a sin against justice. Justice stands apart from what we feel, and what we happen to be concerned about at the moment. It has its own logic and its own demands, which we might hope that community sentiment would track, but if it doesn't, then so much the worse for community sentiment. As the Court affirmed in *Gregg v. Georgia*, “[t]he truth is that some crimes are so outrageous that society insists on adequate punishment, because the wrongdoer deserves it.”<sup>126</sup>

But this version of retribution, even though it may be more philosophically appealing, may not offer much support for a *Lackey* claim. If

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124 Justice Breyer, in particular, seems to focus on the Court's duty to placate the community's thirst for retribution rather than its duty to find independently a need for retribution (intrinsic desert retribution). *Glossip v. Gross*, 135 S. Ct. 2726, 2767 (2015) (Breyer, J., dissenting).

125 See KANT, *supra* note 20 and accompanying text.

126 *Gregg v. Georgia*, 428 U.S. 153, 184 n.30 (1976) (quoting Lord Justice Denning, speaking before the British Royal Commission on Capital Punishment).

a person deserves to die, then he deserves to die, and no amount of delay is really relevant to that. It may be the case that it is *better* if the person is executed sooner rather than later. Patrick Tomlin has recently advanced this sort of argument, in the context of retribution more generally.<sup>127</sup> For intrinsic desert retribution, each day a person is not given what he deserves, the time is out of joint—the universe is unbalanced.<sup>128</sup> It is bad when people do not get what they deserve, and so we should consider it somewhat pressing that we *do* give them what they deserve. Delay in executing someone who deserves death is a delay in justice being done. It is not clear to me that this injustice *aggregates* over time: is each passing day an additional injustice, or is it the same injustice as it was before? It may be that each passing day of delay makes the victims of the crime all the more aggrieved or the community angrier, but it is not clear that each day of delay an additional injustice is being done to them<sup>129</sup> or to the inmate who also is not getting his “just deserts.” But regardless of whether the injustice increases or stays the same during a long delay, one point is clear: the person still deserves to die. Even though it might be better (even better from the standpoint of justice) that the person be executed sooner rather than later, this doesn’t change the fact that the person sentenced to die *really deserves to die* at some time. As one court has said: “Insofar as the ‘just deserts’ theory holds certain murderers do not deserve a fate better than that inflicted on their victims, the passage of time and alteration of circumstances have no bearing on this retributive imperative.”<sup>130</sup>

But there may be two ways in which even intrinsic desert retributivism may give some legitimacy to a *Lackey* claim. I deal with one of those ways briefly now, and the second one I deal with at length in the next section because it will provide the basis for a much longer discussion in Part III about whether intrinsic desert retribution could ever be a proper purpose for the state to pursue. In other words, the upshot of my argument in this part and the next will be that *even if* the best version of retribution prevents a *Lackey* claim from going through, the best version of retribution may not be suitable as a goal for the state to advance. Before we get to that, however, I want to consider a not-implausible way in which we may think that delay matters to someone deserving a punishment.

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127 Patrick Tomlin, *Time and Retribution*, 33 LAW & PHIL 655, 662 (2014) (arguing that “retributivists should prefer the guilty to be punished quickly”). I don’t claim to capture Tomlin’s argument in all its sophistication here, and in fact I agree with much of it.

128 As Tomlin phrases it at one point, we might think “whilst we are waiting for [a] deserved punishment to be delivered . . . this is a bad state of affairs, since there is a retributive injustice which is yet to be rectified. The longer this state of affairs persists, the worse things are.” *Id.* at 671.

129 *See id.*

130 *People v. Ochoa*, 28 P.3d 78, 115 (Cal. 2001).

Suppose it were possible that a person, while he is awaiting execution, could have his desert status changed. Maybe he has undergone a religious conversion, and now repents of his former ways. Or maybe he has just undergone a gradual process of reform, so that now he is in some real sense *a different* person. Or perhaps the passage of time has disconnected him, psychologically, from his crime.<sup>131</sup> Is it now fair to say that this person, the person who twenty years later has changed so much, really is the person who committed the crime, really now *deserves* to die? Justice Breyer, at least in passing, has suggested this possibility.<sup>132</sup> In context, he may be tying it to a community outrage version of retribution. The person has changed, so we are no longer as mad at *him* as we used to be—we can't be, because “he” is not the same person he was. But we can also run the “change in identity” theory through an intrinsic desert retribution lens. The person has changed, and so we can say that *this person now* no longer deserves to be executed.<sup>133</sup> It follows, then, that intrinsic retribution would not be satisfied after such a long delay, and where such a change has happened. We could win a *Lackey* claim under such a theory.<sup>134</sup> Executing a person who is *no longer the same* person is pointless; it is not justified by intrinsic retribution, so going ahead with the execution would be cruel and unusual.

The personal identity theory that this claim requires is interesting, but not obviously right, either as a metaphysical matter or as a matter of describing how our criminal justice system operates. I put my focus mainly on the latter point. It is true that we reconsider sentences—we may think that someone is eligible for early release, based on that person having rehabilitated him- or herself. Sometimes this can be phrased in terms of desert: the person no longer “deserves” to be in jail. But I wonder if the determination in these cases is for other reasons, compatible with saying that the person is still getting what she deserves. An early release determination could simply mean that the person no longer needs to be locked up because she is no longer a danger to the community. Or maybe the “second look” at the sentence reveals that the sentence was in some sense originally

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131 DEREK PARFIT, *REASONS AND PERSONS* 177–80 (1984) (exploring the effects of the passage of time on reason and a “bias towards the future”).

132 *Glossip v. Gross*, 135 S. Ct. 2726, 2769 (2015) (Breyer, J., dissenting) (“The offender may have found himself a changed human being.”).

133 “After such lengthy delays, scholars have questioned whether there can be any true retribution when the middle aged inmate who goes to the gallows bears little resemblance to the individual who offended years before.” *State v. Santiago*, 122 A.3d 1, 63 (Conn. 2015). See also *Glossip*, 135 S. Ct. at 2769 (Breyer, J., dissenting) (citing various sources on this point).

134 *Glossip*, 135 S. Ct. at 2769–70 (Breyer, J., dissenting) (discussing how if the goals of deterrence and retribution are not filled, the death penalty becomes an unconstitutional punishment).

*retributively* wrong. The initial sentence was too harsh, which we now see—we thought the defendant wasn't remorseful, but he was, or maybe some new evidence shows a diminished responsibility for the crime. Both of these things are compatible with saying that the retributive purpose of the punishment has still been served, even if the person is released early. If a person is sentenced to death *for reasons of safety* rather than for reasons of desert, then of course commuting the death penalty would be consistent with—and perhaps even demanded by—retribution. And if new evidence demonstrated that the person did not commit the crime or was not as big a participant in the crime as was originally thought, then intrinsic desert retribution would be perfectly fine with changing the punishment, including changing the punishment from death to a prison sentence.

Our criminal justice system operates for the most part on the idea that we can judge people for a bad act and give them a punishment that they must fulfill, in order for retribution to be satisfied. The criminal justice system does not normally believe that people change and so we must continually calibrate punishments accordingly, in case a person's identity changes. The default is instead that the person should stay in prison for his or her entire sentence, subject to some exceptions. In other words, the picture of personal identity generally in place in our criminal justice system does not buy into the "change in identity" theory.<sup>135</sup> At the extreme, a person who goes insane may not be executed.<sup>136</sup> But we have this rule not necessarily because the person has changed, so he is somehow not the same person who committed the crime: we do not execute the insane because it would be cruel.<sup>137</sup> Our criminal justice system is more than happy to condemn a person for the rest of his life—even to his death—for something bad he did as an adult. If we except juveniles from this, as we do, it is because we are not really sure that the act of the child demonstrated a fully responsible act, so that we wonder if the juvenile really deserves to be condemned for the rest of his life for something he did as a child.<sup>138</sup> Adults

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135 ALAN BRUDNER, PUNISHMENT AND FREEDOM 69 (2009) (arguing that "[w]hatever fundamental changes characters undergo, the identity that persists through them is that of their formal agency," and that because the agent—as the bearer of responsibility for deeds it chose—"is so abstract and characterless, it can persist throughout changes of character, so that judicial punishment is not undeserved just because the character clothing the agent has changed or because the agent chose an action unreflective of its character").

136 *Ford v. Wainwright*, 477 U.S. 399, 410 (1986).

137 *Id.* at 407 ("[T]he execution of an insane person simply offends humanity.")

138 See *Allen v. Ornoski*, 435 F.3d 946, 952–53 (9th Cir. 2006) (analyzing why we exclude both the insane and juveniles from execution); see also *Roper v. Simmons*, 543 U.S. 551, 571 (2005) (explaining that the case for retribution for juveniles is weaker because "[r]etribution is not proportional if the law's most severe penalty is imposed on one

do not get such an out. They are made to suffer for the rest of their lives, even if they are exemplary prisoners, show remorse, or do good deeds for the outside world. We stick people with their past deeds in our criminal justice system, to the point that they can, in some sense, never really shake them from their identity. So it does not seem as if our criminal justice system is ready to buy into the theory of identity that this version of the *Lackey* claim needs to work. Our criminal justice system is perfectly fine with sentencing someone based on his or her culpability at the time of the offense committed, even if this means decades (and indeed, the rest of one's life).<sup>139</sup> Of course, things could change—but it does not seem as if they will anytime soon.

### C. *Dying in Prison*

I have not yet remarked upon one of the more important facts about the death penalty today, which is that most of those on death row, a great majority of them, are never actually executed. It is not because they are pardoned, or win their appeals. Instead, they die in prison.<sup>140</sup> Thus, many have said, rightly, that if you are sentenced to death, it is more likely that you will die in prison than you will actually be executed by the state and that “for all practical purposes . . . a sentence of death in California is a sentence of life imprisonment with the remote possibility of death . . . .”<sup>141</sup> Now, this fact should trouble those who believe in intrinsic desert retribution. If long delays in the imposition of the death penalty mean that people are dying in prison instead of being executed, then they are not getting what they deserve.<sup>142</sup> They are cheating their punishment, in the same way as if,

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whose culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity”).

139 See *Allen*, 435 F.3d at 952 (“Allen’s age and infirmity do not render him less culpable *at the time of his offenses* . . . .”) (emphasis added); *Time on Death Row*, DEATH PENALTY INFO. CTRL., <http://www.deathpenaltyinfo.org/time-death-row#drs> (last visited Mar. 4, 2016) (providing statistics on the time inmates spend awaiting execution).

140 Christopher, *supra* note 30, at 421 (“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.”); *Jones v. Chappell*, 31 F.Supp.3d 1050, 1054 (C.D. Cal. 2014) (“Indeed, the most common way out of California’s Death Row is not death by State execution, but death by other means. Of the 511 individuals sentenced to death between 1978 and 1997, 79 died of natural causes, suicide, or causes other than execution by the State of California. Another 15 sentenced after 1997—or two more than the total number of inmates that have been executed by California since the current death penalty system took form—have died of non-execution causes.”) (citations omitted).

141 *Jones*, 31 F. Supp. 3d at 1062.

142 Tomlin, *supra* note 127, at 674 (“The most obvious way in which we potentially risk injustice by delaying the full delivery of punishment is that people may die. . . . The

moments before their execution, they had run away—only to be eaten by a wild animal. There is a presupposition that becomes evident in making this point, a presupposition that I believe is essential to intrinsic desert retribution: those who do bad things do not merely deserve bad things to happen to them, which they suffer in some way. Rather, those who do bad things deserve punishment.<sup>143</sup> The intrinsic desert retribution theory, if it is to be taken as a theory of state punishment, and not just a sort of a metaphysical theory about good and evil, needs to have something like this presupposition. A person who commits a crime as it is defined by the state, and in doing so offends the state and its citizens, deserves to be punished at the hands of the state and not just to have someone hurt him or have bad things befall him. There needs to be a kind of symmetry in the offense, which is against the state, and the nature of the punishment, which is exacted by the state.

This is a point that I think many have missed.<sup>144</sup> But an example will help show the point. Suppose a person has committed a bank robbery, and is able to escape. During the escape he is badly injured, and briefly himself kidnapped and held by a stranger—unable to leave, and given very little to eat. Eventually, the bank robber is captured, tried, and found guilty. Can the bank robber at his sentencing hearing appeal to the fact that he was injured or kidnapped after he committed his crime? He might appeal to the mercy of the judge and say: “Your honor, certainly I have already suffered enough. Put aside my very bad leg injury, which I thought was God’s way of telling me I had done something wrong. But the kidnapping was the worst. I have already known the horrors of being deprived of my freedom. Please show leniency on me.”<sup>145</sup> It seems that the judge could reply, in turn: “I feel

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longer we leave the full delivery of deserved punishment, the greater the possibility that this bad state of affairs will come about.”).

143 Chad Flanders & Dan Markel, *Bentham on Stilts: The Bare Relevance of Subjectivity to Retributive Justice*, 98 CAL. L. REV. 907, 965–66 (2010) (disputing Shawn Bayern’s contention that if a state acknowledges suffering from some other source, punishment by the state is not required).

144 *Contra* Douglas N. Husak, *Retribution in Criminal Theory*, 37 SAN DIEGO L. REV. 959, 971–72 (2000). I do not think our retributive emotions are (or should be) satisfied by knowledge that the wrongdoer has suffered rather than been punished. *See* Flanders & Markel, *supra* note 143, at 965–66. (I cannot pretend to have given the full argument for my conclusion here, however). *But see id.* at 966–67.

145 Shawn J. Bayern, *The Significance of Private Burdens and Lost Benefits for A Fair-Play Analysis of Punishment*, 12 NEW CRIM. L. REV. 1, 11–12 (2009) (using a similar hypothetical to explore the importance of the “punisher” being the state); *see also* Adam J. Kolber, *The Comparative Nature of Punishment*, 89 B.U. L. REV. 1565, 1593 (2009) (arguing that punishment proportionality should be measured in terms of the subjective deprivation suffered by the convict, suggesting that measuring degree of deprivation from the state’s perspective might over-punish by not taking into account deprivation from other sources including characteristics of the convict).

sorry for you, certainly. But your crime means that you have a debt to pay to society. And our laws say that for your crime, you must spend three years in prison, and so that is what you will get.” Maybe the judge could show some mercy, but she need not; she could stick to the prescribed sentence on the books. She need not, in other words, take the bank robber’s previous suffering *at all* into account. Why should she? Here again we have to return to the fact of incommensurability. Above, we discussed how it may be that spending time in prison could not be traded off with death. A prisoner could not say: “It is enough that I have suffered this many years in prison; it is not fair now that you, in addition, *execute* me.” Now we face a different kind of incommensurability—the incommensurability of suffering and punishment. What the bank robber *owes* to society in the form of punishment is not something that can be paid in terms of other suffering—he could not self-flagellate in order to reduce the number of years he might be sentenced. He must actually *pay the debt he owes* to society in the form of a *punishment imposed on him by society*. You can’t pay that debt with some other sort of suffering that you happen to have undergone.

We need to tie this back to the *Lackey* issue, and say why it matters. On the theory of intrinsic retribution, a person deserves to be punished, and it is a failure of justice if that person is not punished. If a person deserves to die as a result of what he has done, he deserves to die, and no amount of *other* suffering will do. But maybe we can make a *Lackey* claim along the following lines. Suppose an inmate has been sentenced to death, but due to appeals and just the inherently slow nature of the machinery of justice, the delay lasts years, decades. He is now on his deathbed, just barely alive and moments away from death. However, it is also at this moment that his appeals have been exhausted and the state says he must be put to death. Can his attorney argue that execution at this point is pointless? He is about to die anyway, under the watchful eye of the state—and what the state wants to do would *at most* cut his life off by a matter of minutes. Here, if anywhere, the *Lackey* argument that the execution would be pointless seems to have some real bite. What possible state interest could be satisfied by taking a dying man on his death bed and hooking him up to be executed? We might say that the punishment that the person has gotten to that point is *good enough* or at least *close enough* to satisfy any interest the state has, even in intrinsic retribution. Let the person die naturally; it would not be serving any purpose of punishment to instead have the person be executed.

But here the intrinsic desert retributivist may instead dig in his heels.<sup>146</sup> If we buy that intrinsic desert means that the person does not simply deserve

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<sup>146</sup> And it looks like present practice supports him. See *Sell v. United States*, 539 U.S. 166, 179 (2003) (holding that the Constitution allows the government to forcibly administer

to suffer some bad thing, but to actually suffer *punishment* and moreover *punishment* at the hands of the state, a natural death and a death by execution cannot be traded off with one another. If the sentence is one of death by the state—by means of execution—then the person who instead dies in prison of natural causes is not getting what he deserves. He is, in a way, cheating his punishment. Maybe the intrinsic desert retributivist will not go ahead with the execution for reasons of mercy or sympathy. But in these cases, there would be values that would *outweigh* the value of just punishment—they would not show that the retribution in itself would be pointless.<sup>147</sup> The fact of the matter would still be that the person *deserves* to be put to death, and that not executing would be a failure of desert. A *Lackey* claim under these circumstances would fail, at least if we believe that the purpose of retribution is to give people what they deserve, because the person still *should* be executed, even if he is shortly to die anyway. The only way a *Lackey* claim would work is if the person had died already by natural causes—then it really would be pointless to execute him. But for obvious reasons, no one would make this type of claim (because he would be dead). I conclude, then, that on the best version of retributive theory—the intrinsic desert theory—delay cannot render an execution pointless if the inmate deserves death. Indeed, delay *even up to the very moment before death* does not remove the retributive value of executing the person.

### III. IS RETRIBUTION A LEGITIMATE STATE PURPOSE?

If we stick with intrinsic desert retribution, it is hard to see that a delay in execution, while it may not be all that *desirable* (it would be better if justice were done sooner rather than later), would not make the execution *pointless*. If justice demands that a person be executed by the state, then that person should be executed, because he deserves to die. Even if the person is on his

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antipsychotic drugs to render a person competent to stand trial when the treatment is otherwise medically appropriate and the treatment will further a compelling state interest in the prosecution); *Singleton v. Norris*, 319 F.3d 1018, 1025, 1027 (8th Cir. 2003) (holding that the rule from *Sell* applies when the state interest is rendering a person otherwise death-ineligible under *Ford* competent to be executed); see also STEPHEN TROMBLEY, *THE EXECUTION PROTOCOL: INSIDE AMERICA'S CAPITAL PUNISHMENT INDUSTRY* 108, 110–12 (1992) (detailing the Missouri execution protocol, including the fact that inmates under a death warrant are moved to isolation or “administrative segregation” to prevent suicides on the eve of scheduled executions).

<sup>147</sup> Such an appeal may be what drives Justice Breyer’s claim in *Allen* that it would be cruel and unusual to execute a person who is “76 years old, is blind, suffers from diabetes, is confined to a wheelchair, and has been on death row for 23 years.” *Allen v. Ornoski*, 546 U.S. 1136, 1140 (2006) (Breyer, J., dissenting). A hard core retributivist may say: “It may be sad, but the *person still deserves to die* at the hands of the state—even if out of mercy we choose to spare them that fate.” David Gray, *Punishment as Suffering*, 63 VAND. L. REV. 1619, 1692 (2010) (striking just such a note).

deathbed, and will die anyway, he should still be killed because his sentence was not to die in prison, but to suffer execution at the hands of the state. In a way, this implication of the intrinsic desert retributivist's position should not be surprising. It is simply something entailed by Kant's position.<sup>148</sup> Kant said we should give the death penalty to a person who deserved it even if the community was disbanding the next day.<sup>149</sup> There was no *point* to his execution: no gratification of people's emotions (they had other things on their mind); no need to prevent revenge spilling out into public; no need to deter others from committing a similar crime (again, no one is paying attention). The killing looks pointless in every possible way, except from the point of view of retributive desert. Justice would not be done if the execution were not carried out. So too would it be wrong to let the death row inmate simply *die* rather than executing him. This all makes sense if one looks at things from the perspective of desert. When we execute the person, rather than letting him go or letting him die, we are making sure (even at the very end of his life) that he gets what he deserves.

In this Part, I raise the question of whether satisfying this idea of intrinsic desert is, after all, a legitimate *state purpose*.<sup>150</sup> There has not been much sustained discussion of what purposes of punishment are legitimate for the state to pursue. This is in part because many people do not look at desert from the point of view of politics—that is, in terms of what the state can do—but rather of moral philosophy. If the punishment serves a legitimate *moral* purpose, then for many philosophers, the inquiry is nearly at an end.<sup>151</sup> I disagree deeply with this point of view. The state is the entity that punishes, and so we are not done with our inquiry by merely asking whether there is some moral purpose to punishment. We have to go on to ask whether this purpose is something that the *state* can legitimately pursue. But here again we may run into a problem. The Supreme Court, in its discussions of sentencing, and of the death penalty in particular, has said pretty clearly that certain purposes of punishment are permissible for the state to pursue. It has also indicated, more generally, its tendency to defer to the state in deciding for what purpose it punishes. Retribution seems to always make that list, along with deterrence. If there is to be a convincing argument that retribution—meting out desert—is a legitimate state purpose, then we need to dislodge the intuition that retribution *has* to be on this

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148 See KANT, *supra* note 20, at 140.

149 *Id.*

150 See Chad Flanders, *Can Retributivism Be Saved?*, 2014 BYU L. REV. 309, 313 (2014) (questioning whether retribution is a permissible state purpose); Chad Flanders, *Public Reason and Public Wrongs*, 55 DIALOGUE 45 (2016).

151 See MICHAEL S. MOORE, *PLACING BLAME: A THEORY OF THE CRIMINAL LAW* 153–54 (1997).

list.<sup>152</sup> I do this first by noting how contingent the list of purposes of punishment has been in the Supreme Court. I then suggest two reasons why retribution may not be a permissible state purpose of punishment, making two analogies: I first analogize the state pursuing retribution to the state establishing a religion. Second, I suggest that executing someone for the sake of desert, especially in the scenario where the person is on his deathbed, may not be the product of “reason” but rather only “animus.”

#### A. *Purposes of Punishment and the Supreme Court*

Given how regularly the purposes of deterrence and retribution appear in the Supreme Court’s death penalty jurisprudence, it is worth reminding ourselves that this was not always the case. In the second half of the twentieth century, the Supreme Court on many occasions said things suggesting that not only was retribution, in particular, on the way out as a purpose of punishment, but also it might even be the case that retribution *could not* be a permissible purpose of punishment. In *Williams v. New York*, for instance, the Court in several places indicated that retribution was on its way out, to be replaced by rehabilitation and reform of offenders: “Retribution is no longer the dominant objective of the criminal law,” it wrote.<sup>153</sup> “Reformation and rehabilitation of offenders have become important goals of criminal jurisprudence.”<sup>154</sup> Here it may be objected that the Court is just making a survey of what is happening on the ground, and not necessarily endorsing that trend. This seems belied by the *Williams* opinion itself. Moreover, it is not too hard to discern a narrative emerging out of the Court’s cases in the 60s and 70s that points to a larger dissatisfaction with retribution.<sup>155</sup>

That narrative would go something like this: public safety and deterrence seem important, and rehabilitation seems to be the ideal, but retribution, the Court comes close to saying, is on the way out, *and deservedly so*.<sup>156</sup> Our

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152 Justice Thomas, in replying to Justices Stevens and Breyer, alleged that their disagreements “boil down to policy disagreements with the Constitution and the . . . Legislature.” *Johnson v. Bredeson*, 558 U.S. 1067, 1072 (Thomas, J., concurring in the denial of certiorari). But not all policy disagreements are the same; some justifications for some policies may run afoul of the Constitution.

153 *Williams v. New York*, 337 U.S. 241, 248 (1949).

154 *Id.*; see also Chad Flanders, *The Supreme Court and the Rehabilitative Ideal*, 49 GA. L. REV. 383, 395 (2015) (discussing the rise of rehabilitation in the Court’s jurisprudence).

155 This narrative is hinted at by Justice Thurgood Marshall when he writes in *Furman* that “[t]o preserve the integrity of the Eighth Amendment, the Court has consistently denigrated retribution as a permissible goal of punishment.” *Furman v. Georgia*, 408 U.S. 238, 344 (1972) (Marshall, J., concurring).

156 *Williams*, 337 U.S. at 248 (asserting that the primary objective of criminal law is no longer retribution, as “[r]eformation and rehabilitation of offenders have become important goals of criminal jurisprudence”).

standards are evolving away from it, and the more they do so, the more appropriate it is for the Court to not only disparage but also to reject retribution as a permissible purpose the state can have in punishing someone. Retribution is a relic of a past age, a more brutal and barbaric one.<sup>157</sup> It is inconsistent with treating human beings with dignity—it seems punishment is just being pursued for punishment’s sake. But this gives up on the possibility of human beings to change and to grow and to get better. Punishment may be justified as a sad necessity to protect society; that is one thing. It is another thing altogether to say *this person just deserves to suffer* for no reason other than that he deserves it.

This perspective on retribution all changed after the backlash against the Court’s decision in *Furman*.<sup>158</sup> *Furman* had held that the application of the death penalty was cruel and unusual because of the way it was being applied.<sup>159</sup> If the death penalty were given to people not necessarily because they had committed the worst crimes, but just as—to a certain degree—a matter of luck, then we could not say that such a policy was really fulfilling any legitimate aim of punishment.<sup>160</sup> Some of the Justices who concurred in the opinion wanted to say that death *never* could satisfy a legitimate aim of punishment, that death was always excessive or always cruel.<sup>161</sup> The dissenters said that the Constitution could not be read in a way that forbade the imposition of the death penalty for purely “retributive” reasons.<sup>162</sup>

Those who objected to retribution as cruel and unusual did not prevail in *Furman*, and the dissenters in that case were vindicated a few years later. The dissenters in *Furman* talked about retribution as having always been at least a permissible purpose of punishment.<sup>163</sup> They rejected the concurring justices in *Furman* as mistakenly seeing retribution itself as contrary to the Eighth Amendment.<sup>164</sup> And it is in *Gregg* that retribution not only appears as a not “forbidden” objective of punishment, but it is also one that is not

157 See, e.g., *Trop v. Dulles*, 356 U.S. 86, 112 (1957) (Brennan, J., concurring) (equating retribution with “naked vengeance”).

158 See EVAN J. MANDERY, *A WILD JUSTICE: THE DEATH AND RESURRECTION OF CAPITAL PUNISHMENT IN AMERICA* 264–80 (2013) (examining the backlash against *Furman*, which included an increase in violent crime, an increase in fear of crime, and a dramatic increase in support for the death penalty).

159 *Furman*, 408 U.S. at 242 (Douglas, J., concurring).

160 *Id.* at 293, 300–05 (Brennan, J., concurring); *id.* at 311–13 (White, J., concurring).

161 Justice Marshall was first and foremost in this. See, e.g., *id.* at 343 (Marshall, J., concurring) (“Punishment as retribution has been condemned by scholars for centuries, and the Eighth Amendment itself was adopted to prevent punishment from becoming synonymous with vengeance.”).

162 *Id.* at 394–95 (Burger, C.J., dissenting).

163 *Id.*

164 *Id.*

“inconsistent with our respect for the dignity of men.”<sup>165</sup> Retribution is important to channel society’s outrage (the community outrage theory) but it is also “an expression of the community’s *belief* that certain crimes are themselves so grievous an affront to humanity that the only adequate response may be the penalty of death.”<sup>166</sup> This is very close to an exact statement of intrinsic desert retribution—that we must punish others as this is the only way to give them what they deserve, that this is the only appropriate way to respond to them, to get them back for what they have done.<sup>167</sup> After *Gregg*, there is no serious debate as to whether retribution is at least a permissible purpose of punishment; indeed after *Gregg*, it becomes possible to think of retribution as again the *dominant* purpose of punishment, especially when it comes to the penalty of death.<sup>168</sup> Deterrence may be an open question, but retribution does not depend on the facts being one way or another. It just depends on our intuitions of justice. Even in his rejection of the death penalty *tout court* in *Glossip v. Gross*, Justice Breyer pauses to acknowledge that “retribution is a valid penological goal.”<sup>169</sup>

Nonetheless, the debate in *Furman*, despite being eventually resolved in favor of retribution as a purpose of punishment, is instructive. It shows that the Court is open to considering—and maybe even rejecting—what we see now as immutable purposes of punishment. Here a passing comment by Justice Marshall in the *Furman* case may be instructive. Justice Marshall, in his concurring opinion, writes of several purposes of punishment that might be at play in considering the death penalty. In addition to the familiar purposes, he also lists “eugenics” as one of them.<sup>170</sup> What is interesting is not that Justice Marshall finds that eugenics is not a good justification for the death penalty (indeed, he is skeptical that states even have procedures in place that suggest that they *believe* in the eugenics justification). After all, Justice Marshall is persuaded that nothing could justify the death penalty. What is interesting is that Justice Marshall spends any time considering the

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165 *Gregg v. Georgia*, 428 U.S. 153, 183 (1976).

166 *Id.* at 184 (emphasis added).

167 See Leo Zaibert, *Of Normal Human Sympathies and Clear Consciences: Comments on Hyman Gross’s Crime and Punishment: A Concise Moral Critique*, 10 CRIM. L. & PHIL. 91, 95 (2016) (distinguishing between retributivist and utilitarian approaches by noting that retribution ends “the very moment deserved punishment is inflicted” while that is not the end of the story for utilitarian approaches).

168 See *Baze v. Rees*, 553 U.S. 35, 79 (2008) (Stevens, J., concurring) (“We are left [having eliminated incapacitation and deterrence as sufficient justification], then, with retribution as the primary rationale for imposing the death penalty.”).

169 *Glossip v. Gross*, 135 S. Ct. 2726, 2769 (2015) (Breyer, J., dissenting).

170 *Furman v. Georgia*, 408 U.S. 238, 342 (1972) (Marshall, J., concurring).

eugenics justification *at all*. He ends up spending a couple of paragraphs and a footnote on it.<sup>171</sup>

It seems clear, by contrast, that if such a defense of the death penalty were offered today—that is, a state said that it wanted to execute someone for the reason that we need to *kill* them in order to prevent them from reproducing—the Court would not discuss it in a few paragraphs and then dismiss it. Rather, it would reject such a purpose of punishment as wholly beyond the pale. It would not say that it was not a good justification. It would say it doesn't rise to the level of a *legitimate reason* to execute someone. And indeed, for that reason, no one would bring eugenics to the Court *as a reason* (and no one has). Justice Marshall's treatment of the eugenics justification is revealing, even if it was only there for reasons of comprehensiveness. Its very treatment shows that at least *some* people thought it might be a justification. It is doubtful that there is anyone who believes so today. That is, we have at least one example of a purpose of punishment that could be rejected, not because a punishment failed to fulfill that purpose, but because *the very purpose itself was not legitimate*, and so executing someone for that reason would be itself "cruel and unusual."<sup>172</sup> Could something similar be said of retribution?

### B. Retribution as Establishment

I should make clear at the outset what my goal in this section and the next is: to ask whether retribution, in the form we have developed it in considering the various kinds of *Lackey* claims, is a legitimate state purpose. I am going to proceed by making an analogy between retribution in this form and other kinds of disfavored—that is to say, illegitimate—state purposes. Those two illegitimate *kinds* of purpose are 1) when the government promotes some religious aim, so that it violates the prohibition on the state establishing a religion<sup>173</sup> and 2) when the government advances an end based on nothing, ultimately, except passion, or caprice, or whimsy, so that that state action becomes without a real rational basis whatsoever, and seems to be based only on "animus."<sup>174</sup> I am not saying that retribution

171 *Id.* at 355–57, 357 n.130. For a longer historical discussion of the eugenics argument, see Carol S. Steiker, Jordan M. Steiker, *Capital Punishment: A Century of Discontinuous Debate*, 100 J. CRIM. L. & CRIMINOLOGY 643, 655 (2010).

172 *See Furman*, 408 U.S. at 331 (Marshall, J., concurring) ("Third, a penalty may be cruel and unusual because it is excessive and serves no valid legislative purpose.").

173 *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971) (creating the three-part test to distinguish when a state purpose is legitimate in the context of the Establishment Clause).

174 *Romer v. Evans*, 517 U.S. 620, 632 (1996) (holding that a state constitutional amendment which is "inexplicable by anything but animus toward the class it affects . . . lacks a rational relationship to legitimate state interests").

is *in fact* an establishment of religion, or that it might violate the prohibition under the Fourteenth Amendment that government actions always have some “rational basis.”<sup>175</sup> I am only saying that retribution as a state purpose looks an awful lot *like* these two types of illegitimate purposes, to the extent that we may wonder whether retribution itself is a purpose that the state cannot pursue. So I should not be taken to be saying, for example, that retribution as a purpose can be challenged under the Establishment Clause or under the Equal Protection Clause.<sup>176</sup> My point is only that retribution tends to look like an illegitimate state purpose to the extent it resembles these other, clearly illegitimate state purposes.<sup>177</sup>

I am also not taking another tack against retribution. The Justices who questioned retribution as a purpose of punishment tended to think that it, like perhaps the death penalty itself, was not consistent with the “dignity of human beings,” and that our “evolving standards of decency” had surely evolved to the point where we could recognize this fact.<sup>178</sup> As much as I would like to think that this is so, I am not sure. Insofar as evolving standards of decency reflect, in essence, a societal consensus, it seems obvious that our *current* consensus supports the death penalty, from which it seems plausible to infer that there is support for the overall *retributive* aim of that penalty.<sup>179</sup> The backlash that greeted *Furman* seems testament to that fact. Many believe that criminals deserve to be punished, and that the death

175 *Id.*; *but see id.* at 644 (Scalia, J., dissenting) (“But I had thought that one could consider certain conduct reprehensible—murder, for example, or polygamy, or cruelty to animals—and could exhibit even ‘animus’ toward such conduct.”).

176 Although I note in passing that the imposition of the death penalty has been challenged at least once as an establishment of religion, to no avail. *See Holberg v. State*, 38 S.W.3d 137, 140 (Tex. Crim. App. 2000) (“The primary effect of the [death penalty] statutes is penal in nature, not religious, and the mere fact that the statutes are consistent with the tenets of a particular faith does not render the statutes in violation of the Establishment Clause.”); *see also State v. James*, 512 P.2d 1031, 1035–36 (Utah 1973) (noting that capital punishment is prescribed punishment in the Christian Bible). It is certainly possible, as well, that jurors may bring their faith into believing that the death penalty is a fitting punishment.

177 The argument, then, is not that retribution as a state purpose violates the Establishment Clause, or that it fails rational basis scrutiny. The point is that retribution *looks a lot like* illegitimate state purposes in other areas of the law, which may make us more confident that, *under the Eighth Amendment*, retribution should not be considered a permissible aim for the state to pursue.

178 *See, e.g.,* Mary Sigler, *The Political Morality of the Eighth Amendment*, 8 OHIO ST. J. CRIM. L. 403, 407–08 (2011) (relying on *Trop v. Dulles*, 356 U.S. 86 (1958), to argue that an evolving-standards-of-decency Eighth Amendment challenge must find that society has matured to the extent that it finds the punishment to be inconsistent with human dignity).

179 *See* Andrew Dugan, *Solid Majority Continue to Support Death Penalty*, GALLUP (Oct. 15, 2015), <http://www.gallup.com/poll/186218/solid-majority-continue-support-death-penalty.aspx>. Recent data suggests that this support may be waning, even though it remains the case that more Americans support the death penalty than oppose it.

penalty is sometimes something that people deserve. The recent polling done in the wake of the Tsarnaev bombings shows that support for the death penalty, while waning, is still rather robust.<sup>180</sup> To the extent that evolving standards of decency represents a *normative* judgment about whether killing people is consistent with treating them with dignity—I think (and have said) that this seems to be a contested matter. Kant thought that giving people death respects their dignity because *that is what they deserve*.<sup>181</sup> To not punish them, when this is something they deserve, would be to treat them more as things that could not be responsible for their actions, as something less than human. Questions of dignity are difficult, complicated questions of morality and theology. I do not think we could say, conclusively, that one side or the other of the death penalty debate is categorically correct about what is or is not consistent with human dignity.

But it is on precisely this point that I want to draw the analogy between the government promoting retribution as a purpose of punishment and the government establishing a religious viewpoint. Ronald Dworkin, in his book on abortion, suggests that debates over abortion really reflect deeper debates about the worth and value of human life.<sup>182</sup> When we argue about abortion, underneath it is really a kind of *religious* debate about what life is for, and when it becomes valuable. Such questions touch on matters of the intrinsic worth of humans—their dignity, etc.—which Dworkin puts in the category of the theological.<sup>183</sup> Even though the participants in these debates may not cast their positions in explicitly religious terms, it still is the case that what they are debating—what they are arguing about—has overtones of a religious debate.<sup>184</sup> Dworkin puts the debate in the terms of the “sacredness” of human life: is human life, even from the very beginning, so sacred that abortion should always be prohibited?<sup>185</sup> Dworkin says that for the state to decide this debate in one way, viz., to say that the intrinsic value of human life means that abortion is *never* permissible, would be akin to the state supporting a particular religion.<sup>186</sup> Per the Establishment Clause, the

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180 Evan Allen, *Few Favor Death for Dzhokhar Tsarnaev, Poll Finds*, BOSTON GLOBE (Apr. 26, 2015), <https://www.bostonglobe.com/metro/2015/04/26/globe-poll-shows-diminishing-support-for-death-penalty-for-tsarnaev/S3GMhFlGj5VUKZrmLzhliN/story.html>; Jennifer Agiesta, *Poll: 53% Say Boston Bomber Should Face Death Penalty*, CNN: Politics (Apr. 21, 2015), <http://www.cnn.com/2015/04/21/politics/dzhokhar-tsarnaev-boston-bombing-death-penalty-poll/>.

181 Chad Flanders, *The Case Against the Case Against the Death Penalty*, 16 NEW CRIM. L. REV. 595, 611 (2013).

182 DWORKIN, *supra* note 27, at 156–57.

183 *Id.*

184 *Id.* at 94.

185 *Id.* at 68–71.

186 *Id.* at 99–101.

government cannot demand conformity on a religious question—and put the force of the state in support of one religious viewpoint over another.

Dworkin's argument about the "religious" nature of the abortion debate has obvious resonance with debates about the death penalty.<sup>187</sup> People on both sides of the debate put their positions in terms of respect for life and its sacredness. Those who oppose the death penalty insist that respect for the sanctity of life means that the state should never kill. Those who favor the death penalty may say, to the contrary, that respect for the value of life above all means that those who kill must face the ultimate sanction, e.g., death—and also make a distinction between those who are innocent and those who by their guilt have shown they deserve to die.<sup>188</sup> So the death penalty in many ways has characteristics of a religious debate. But my concern here is to show also that *retribution* in many ways has these characteristics as well.

The value of retribution is not something that can be cashed out in what we might call (following Dworkin again) secular values of public safety or of crime reduction; more generally, retribution stands in contrast to debates over the deterrence value of the death penalty. People who favor retribution of the intrinsic desert variety will say that there is an intrinsic value to executing someone: he is getting his just deserts; society is promoting justice overall and avoiding its complicity in the injustice of not punishing the deserving.<sup>189</sup> Kant is yet again our standard bearer. Even if an island society were to dissolve the next day, they must still execute the last murderer. This is a value that could only be called *intrinsic*: there is nothing that the society "gets" from executing the murderer except the value of justice. We would be killing the person for the sake of nothing but justice. Such a value transcends the ordinary, instrumental values that are the usual stuff of government policy. In this, the debate over retribution is also a kind of religious debate, because the value at stake is kind of like a religious value—it has to do with things "higher" than preventing crime, or protecting the public. It has to do with a *higher* sort of justice. And so too (to bring this into the death penalty context) is the debate about whether this kind of justice when it demands death really is consistent with treating people with

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187 *Id.* at 47, 113, 125, 153.

188 MICHAEL JOHN KRONENWETTER, CAPITAL PUNISHMENT: A REFERENCE HANDBOOK 41 (2d ed. 2001) ("Those who oppose the death penalty insist that respect for the sanctity of life means that the state should never kill. Those who favor the death penalty may say, to the contrary, that respect for the value of life above all means that those who kill must face the ultimate sanction, e.g., death—and also make a distinction between those who are innocent and those who by their guilt have shown they deserve to die.").

189 Michael S. Moore, *Justifying Retributivism*, 27 ISR. L. REV. 15, 16 (1993) (arguing that the state is obligated and not merely permitted to mete out retributivist punishment).

dignity, or whether it is, in a way, fundamentally undignified—“the total denial of the wrong-doer’s dignity and worth,” as Justice Marshall puts it.<sup>190</sup>

The scenario with which I ended Part II puts this debate clearly into focus: it is the *Lackey* analogue of Kant’s island. A person is on his deathbed, moments away from dying—and we learn that his appeals have been exhausted. *Should society execute him?* What would be the point? Those who believe in intrinsic desert retribution will say that justice demands that the person be executed, regardless of how close he is to death. Again, there may be no *secular* purpose served by his execution, but that is not the point—the point is retribution, the point is justice! It is a mistake to see some other value that is supposed to be served. And I want to say here that this retributive value, when we see it in this context, really is akin to a sort of religious value. It is a value of transcendental, intrinsic importance.<sup>191</sup> A state that promotes this value, that sees this value as being realized even in an execution in the face of someone’s imminent death, is pushing a religious point of view, or at least something very close to it.

Dworkin’s position can be put against the background of a larger philosophical theory.<sup>192</sup> On that theory, the government should not promote a particular religious point of view or, even more generally, metaphysical views about which people may generally disagree. I want to suggest that retribution is precisely a value of this sort<sup>193</sup>—people who insist that retribution is a value that the state *ought* to promote are insisting on a value over which reasonable people can and do disagree. Compare this to punishment for the sake of public safety, or crime control. These values—secular values, using Dworkin’s framework—are values that most people can agree upon, and see punishment as reasonably related to. It is not obvious that retribution is like this—certainly not to the extent that retribution would need to be insisted upon *even up to* the execution of a person already dying. There, we see retribution as the only value at play, not mixed in with other values such as deterrence or incapacitation—the person is incapacitated, the deterrence value of killing him rather than letting him die would be nil. It is not that retribution in a circumstance like that would be *pointless*. For those who believe in intrinsic desert retribution, it is not pointless—indeed justice demands it. It is that pursuing retribution in this case would be to pursue a goal the state should not be able permissibly to

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190 *Gregg v. Georgia*, 428 U.S. 153, 241 (1976) (Marshall, J., dissenting).

191 See DWORKIN, *supra* note 27.

192 Here I build on my earlier work on Rawls’s theory of “public reason.” Chad Flanders, *The Mutability of Public Reason*, 25 *RATIO JURIS* 180 (2012).

193 See *State v. Santiago*, 122 A.3d 1, 64 (Conn. 2015) (“[T]he retributive value of an execution defies easy definition and quantification, shrouded as retribution is in metaphysical notions of moral restoration and just deserts.”).

pursue. But in the end it does suggest a sort of modified *Lackey* claim. Such an execution would be cruel and unusual, not because the execution would serve no purpose, but that it would serve no *purpose that governments can legitimately pursue in punishing someone*. Retribution might be satisfied in executing the person on his deathbed, but this kind of retribution is something that is not the government's business.<sup>194</sup>

### C. Retribution as Animus

It may seem odd to claim that retribution as a purpose of punishment may both be in service of some transcendental value *and* also be the result of passion and caprice. But retribution may seem—and has seemed this way to many people—to traffic in both of these possibilities. At a minimum, state action has at least to be based in some *reason*; it has to be rational, to fulfill some public purpose.<sup>195</sup> State action cannot be based simply in someone's passion, or desire to see some result done. It may be the case that retribution as a goal is cover just for people's passions—their desire for revenge, for instance. And many have collapsed retribution and revenge in precisely this way.<sup>196</sup> When you take away any public purpose—any desire for deterrence or for public safety—you are left simply with the *bare desire* to avenge the wrong, the *bare desire* to “get back” at the person who has harmed you. This may make sense as an individual matter, but it may be illegitimate when it comes to a state purpose. What is the *state's interest* in allowing people to vent their passions in this way, by causing harm to another just for the sake of revenge? Note that at least the community outrage version of retribution based its need for punishment on the fear that, if not satisfied, the anger of the community would break out in vigilante justice. That is a public purpose: the desire to prevent individuals from taking the law into their hands, and making punishment a matter of personal vendetta. As Justice Marshall observed in his dissent to *Gregg*, this ground of punishment can sound even utilitarian: we must punish so that we prevent society from dissolving into chaos, with people seeking to carry out justice on their own.<sup>197</sup> We need to restrain them, so we punish, sometimes even executing people.

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194 I take this phrase from Anthony Duff. For a discussion of Duff's theory, see Flanders, *supra* note 150, at 53–56.

195 *Romer v. Evans*, 517 U.S. 620, 632, 634 (1996) (identifying pure animus as an illegitimate state interest).

196 At least one scholar has done so explicitly and unapologetically, defending revenge as a valid way of doing justice. THANE ROSENBAUM, *PAYBACK: THE CASE FOR REVENGE* 281 (2013); Thane Rosenbaum, *Eye for an Eye: The Case for Revenge*, *CHRON. HIGHER EDUC.* (Mar. 26, 2013), <http://chronicle.com/article/The-Case-for-Revenge/138155/>.

197 *Gregg v. Georgia*, 428 U.S. 153, 237–38 (1976) (Marshall, J., dissenting).

If we take the Part II scenario again, and look at it in terms of *revenge* rather than in terms of intrinsic desert, we also see similarities. A person is at his deathbed, and we insist on the need to execute him. There is again no purpose served here in terms of deterrence, or in terms of public safety. Perhaps there is a need to satisfy community outrage, but it must be quite small: the person is about to die anyway, and it seems plausible that *at this point*, the main people interested will be those who are personally invested in seeing the person die rather than the community at large.<sup>198</sup> What explains why *we* must do the executing, rather than just letting nature take its course—to let the person die on his own and without the help of the state? We might even say that the retributive interest here is so slight, the difference between dying *in* a state institution and being executed *by* that state institution, that the only possible remaining explanation of the desire to kill the person has to be not based on a reason, but based on just the bare desire *to be the instrument of this person's death*.<sup>199</sup> Motives that are based in nothing but passion—and not in any overarching state purpose—are sometimes called arbitrary, but this is just shorthand for saying that what is motivating state action is really just animus, pure and simple. There is nothing we could point to and say: “Yes, this is the reason we *have* to do this.” Isn’t the execution of a dying man more a matter of spite than anything else? “No, you can’t cheat your punishment,” we can imagine the executioner saying, “even at this late date. It is up to *us* whether you live or die; it is not up to you or to God. That’s what your punishment means—and the present circumstances don’t change that.” This, if anything, looks a lot like the “gratuitous infliction of suffering.”<sup>200</sup> Or, to put it in the language of animus, the only thing grounding the law is “a bare . . . desire to harm a politically unpopular group,” something which “cannot constitute a legitimate governmental interest.”<sup>201</sup>

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198 *Glossip v. Gross*, 135 S. Ct. 2726, 2769 (2015) (Breyer, J., dissenting) (“By then the community is a different group of people. The offenders and the victims’ families have grown far older. Feelings of outrage may have subsided. The offender may have found himself a changed human being. And sometimes repentance and even forgiveness can restore meaning to lives once ruined. At the same time, the community and victims’ families will know that, even without a further death, the offender will serve decades in prison under a sentence of life without parole.”).

199 Flanders, *supra* note 120, at 380–81.

200 *Gregg*, 428 U.S. at 183 (“[T]he sanction imposed cannot be so totally without penological justification that it results in the gratuitous infliction of suffering.”).

201 *U.S. Dep’t of Agric. v. Moreno*, 413 U.S. 528, 534 (1973). Again, my claim here is just by way of analogy. No suit has been successful in claiming that prisoners or death row inmates are a constitutionally protected group. *See, e.g.*, *Hampton v. Hobbs*, 106 F.3d 1281 (6th Cir. 1997) (holding prisoners are not a protected class). For a broad discussion of the idea of “animus” with which I am in substantial agreement, see Susannah W. Pollvogt, *Unconstitutional Animus*, 81 *FORDHAM L. REV.* 887 (2012).

There has been a more or less ongoing debate over whether retribution *as such* is just a matter of revenge. Robert Nozick famously made a point of distinguishing how retribution was different than revenge.<sup>202</sup> Nozick said, *inter alia*, that retribution was a matter of justice, and not a personal vendetta;<sup>203</sup> that retribution focused only on the wrong and not the person; that retribution wanted just to punish the person who did the wrong, and revenge did not so limit itself.<sup>204</sup> All of these points of contrast are well-taken. But it does not seem to follow that a state punishment could *never* in fact be a vehicle of a person's revenge. Maybe all of the usual features of retribution are there, but only in sort of a formal way, so that the only real remaining driving purpose to the punishment is to satisfy someone's desire for revenge. What substantively is driving the punishment is revenge—even though the punishment does look to be retributive in all of the ways Nozick identifies, e.g., it is done by the state against the person for his wrong and is limited only to the punishment of the person who has done the wrong.<sup>205</sup> And isn't this close to what we have in the case of killing the dying man? What is left of the usual retributive function of punishment? He is about to die anyway, and that seems close enough. Add to this the fact of delay, and the likely subsequent reduction in the community's interest in seeing justice done, and you have the form of retribution but the substance of revenge.<sup>206</sup> Nozick's typology may fit as a broad matter and may fit most cases where retribution is presented as a justification for punishment; but it does not seem to adequately capture cases like this one. Of course, it does not follow that such a punishment *has* to be one that is motivated by revenge. Again, I have just presented an argument for retribution that casts it in terms of a transcendent value, the value of giving a person what he deserves. It is possible that this *really is what the state wants*. But it is interesting that we can also give an explanation that *the state in this case is just pursuing revenge*, and that the punishment here is not motivated by reason but by passion.<sup>207</sup>

Once more then, we can run a *Lackey* claim along these lines—but one slightly different than the one canvassed at the end of Part I and developed a

202 ROBERT NOZICK, *PHILOSOPHICAL EXPLANATIONS* 366–70 (1981). See also Flanders & Markel, *supra* note 143, at 941–43.

203 See *Furman v. Georgia*, 408 U.S. 238, 333–34 (1972) (Marshall, J., concurring) (“It was during the reign of Henry II . . . that English law first recognized that crime was more than a personal affair between the victim and the perpetrator.”).

204 NOZICK, *supra* note 202, at 366–68.

205 *Id.* at 367–68, 370–71.

206 See Flanders, *supra* note 102, at 127–29.

207 Judge Fletcher, in his *Ceja* dissent, distinguished between community outrage and “blood vengeance.” *Ceja v. Stewart*, 134 F.3d 1368, 1373 (9th Cir. 1998) (Fletcher, J., dissenting). I think in this type of scenario, we clearly have a case of “blood vengeance,” which (on Judge Fletcher's reading) the Supreme Court has “definitively” stated “is not a legitimate basis for the imposition of the death penalty.” *Id.*

little further in Part II. It is not that retribution as a goal is no longer fulfilled by the execution; it is, rather, at some point, retribution is no longer a suitable state purpose in punishing someone. We have gone from saying that the execution would be pointless because it would no longer fulfill retribution to saying that the execution would be cruel and unusual because *no permissible state punishment* could be fulfilled. This is similar to the original *Lackey* claim, but more radical. It goes to attacking a purpose of punishment as legitimate, rather than conceding the purpose is legitimate but not realized by the execution.<sup>208</sup> To be sure, this is a harder argument to make. Retribution has long been held to be a legitimate purpose of punishment, although support for it on the Supreme Court has waxed and waned at least when it comes to the death penalty.<sup>209</sup> And I have certainly not done the work to show that retribution in all of its instances is *only* either an impermissible sort of “establishment of religion” or otherwise just motivated by pure passion and so having no “rational basis.”<sup>210</sup> That would be a strong claim, and probably false. But it may be enough to show that, at *some point* in the state’s planned execution of a prisoner, the purpose of retribution begins to change its cast. It comes to look less like an ordinary goal of punishment and more like a kind a religious mission or personal vendetta. I merely assert that conclusion here, but I hope to have said enough to show why I think that suggestion is, to me, persuasive.

#### CONCLUSION

This Article started with consideration of a very specific type of claim, viz., the idea that a certain punishment—death—might be cruel and unusual because, after a certain amount of delay, that punishment would be pointless. In particular, I considered and developed in Part I the idea that putting a person to death after substantial delay would no longer have a point given certain theories of retributive punishment. On one theory, this kind of *Lackey* claim would work. If retributive punishment were merely a matter of community outrage, then it was plausible (although not necessarily always true) that community outrage would fade over time, and the community might come to forgive the person who committed such an awful crime—or at least grow indifferent to him. If that happened, then it

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208 Thus the objection is not that blood vengeance (e.g.) is not a penological goal, but that it is not a *legitimate* one. As Fletcher puts it, “The death penalty can be justified, when it can be justified, only to the extent that it is necessary to serve vital and legitimate penological goals. I believe it to be firmly established that a bare desire to exact blood vengeance from the perpetrator of a crime, harbored and nursed along over the course of years and decades, cannot satisfy that requirement.” *Id.* at 1375 (emphasis added).

209 See *supra* text accompanying notes 169–74.

210 E.g., *Romer v. Evans*, 517 U.S. 620, 635 (1995) (“[A] law must bear a rational relationship to a legitimate governmental purpose . . .”).

would indeed be pointless to punish the person with death. Why go on with it? The community has gotten over its outrage. To kill the person on death row would be needlessly cruel, because it would be pointless. So on one version of retributivism, the Lackey claim had a good chance of succeeding.

However, community outrage was not, I argued, a good way to understand retribution. A better theory (one which I think captures better what most people think of as retribution and is also the most philosophically defensible) would be one that saw punishing people as a matter of giving them what they deserved. If we adopted this theory of retribution, a Lackey claim becomes much harder to make. Although it might be better to kill the person sooner rather than later, it is not obvious that there is some point where the person would no longer “deserve” to die. If his crime demanded a punishment of death, then he should get death—whether it is today, tomorrow, or ten years down the road. Moreover, on intrinsic desert retributivism, at least as I understand it, no amount of other types of suffering can make up for the fact that the person deserves to die. Unless he is given the death penalty, we have a kind of injustice. He is not being given what he deserves—and so he should be given the death penalty even if he is on his deathbed, moments away from death. After all, his punishment was to be executed by the state, not just to die while being imprisoned by the state.

It is after reaching this peculiar result at the end of Part II that my Article took on a much broader target: the theory of retribution itself, and especially as a theory of what the *state* might permissibly do. What would it mean for a theory to require as a matter of justice that someone on his or her deathbed be killed? Such a theory seemed to me to be of one of two varieties, neither entirely suitable for a government to adopt. First, the theory could be a sort of religious one, which saw the intrinsic value of giving people what they deserved, even if this had no practical, earthly benefit. The second saw the need to kill someone even as that person was dying as a kind of revenge—the need to have the last word, even if no purpose were served by the person being killed seconds before he was going to die anyway. I then proposed that neither of these purposes might be legitimate for the state to have. The first represented a sort of establishment of religion by the state—promoting one intrinsic value that some people might disagree was a value. The second ran the risk of grounding state policy just on bare “animus” alone: the desire to see someone killed *by us* rather than just dead. Of course, both these interpretations of retribution (and the rejection of them as legitimate state goals) might be seen as just begging the question against retribution. The whole *idea* of an intrinsic value is that it does not depend on contingent goods being realized—they are ends in themselves.<sup>211</sup> If this is so, then my Article may be seen as

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<sup>211</sup> See David Dolinko, *Retributivism, Consequentialism, and the Intrinsic Goodness of Punishment*, 16 L. & PHIL. 507 (1997) (refuting the validity of a “consequentialist version of retributivism”).

suggesting the more modest point that at least some intrinsic values are not proper, that is to say, legitimate state goals because they look too much like things that are *not* legitimate state goals, viz., establishment of religion and animus.

Could my overall argument be used to ground a *Lackey* claim? I offered as much at the end of Part III, but it may pay to reiterate that claim here, and extend it. If a person is dying, and the state insists on executing him, I think that the desire to punish for the sake of retribution would then be cruel and unusual—not because the execution would not fulfill some retributive purpose (it might) but because retribution *in that context* would be an illegitimate state purpose. This may seem a very circumscribed claim, if it means only asserting a *Lackey* claim for clients who are on death's row and also on death's door. But I could see the claim being presented in the following way: if life in prison really is secure, and there is no risk of the prisoner escaping, and therefore we have a certainty that the person will in fact *die* in prison, then the further drive to not let the person simply die in prison but the need to *kill* him before he dies seems to traffic in the same sort of illegitimate desire for retribution. Whether this means that, ultimately, retribution is never a legitimate purpose the state can have in punishing, I leave for another day.<sup>212</sup> But I do want to close by noting that it was not always obvious to some members of the Supreme Court that retribution *could* be a proper purpose of punishment—and it is not out of the question that it may again seem that way to the Court sometime in the future.

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212 See Flanders, *supra* note 150; Flanders, *supra* note 102.