

INCONSISTENT RATIONALES FOR CAPITAL PUNISHMENT PLUS

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While capital punishment is constitutional, death row prisoners argue that “capital punishment plus”—execution plus decades of post-sentencing, pre-execution incarceration—is unconstitutional. In denying that capital punishment plus violates the Eighth Amendment prohibition against cruel and unusual punishment, courts employ three principal rationales. First, lengthy delays between sentencing and execution are attributable to and the fault of prisoners. Second, lengthy delays affording thorough appellate and collateral review are necessary to ensure the accuracy and fairness of death sentences. In short, accuracy trumps speed. Third, the lengthy review process extending prisoners’ stay on death row is necessary to satisfy the Eighth Amendment. That is, delays caused by satisfying the Eighth Amendment cannot violate it. This Article argues that these rationales are inconsistent with each other. The first rationale—delay is the prisoner’s fault—is inconsistent with the second and third rationales—delay is a consequence of what is constitutionally permissible, desirable, and obligatory. The first rationale blames prisoners for the very delays that the other two rationales defend and justify as consequences of what is affirmatively good. As inconsistent rationales, at least one is incorrect, and all three are suspect. While not conclusively establishing that capital punishment plus is unconstitutional, this Article erodes the foundations of its constitutionality.

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I. INTRODUCTION

The evolution of the length and nature of the interval between capital sentencing and execution is startling. What was once a brief period of custodial detention is now a *de facto* punishment nearly as severe as the *de jure* punishment that follows it. Writing about England in the 1700s, legal historian William Blackstone reported, “it is enacted by statute that the judge, before whom a murderer is convicted, shall in passing sentence direct him to be executed on the next day but one”¹ While from our contemporary perspective two days between sentencing and execution is unfathomably brief, Blackstone nonetheless described it as a torturous, “short but awful interval” for the prisoner.² The interval must be short, Blackstone explained, because “it is of great importance, that the punishment should follow the crime as early as possible” in order to further the penological goals of punishment.³ The typical interval in colonial-era America was longer: one to several weeks.⁴ In the modern era, the nationwide average period of delay between sentencing and execution jumped from two years in 1968,⁵ to six years in 1984,⁶ to eight years in 1989,⁷ to ten years in 1994,⁸ to twelve years in 1999,⁹ to fourteen years in 2009,¹⁰ to sixteen years in 2011,¹¹ and to “about eighteen years” in 2014.¹²

1. 4 WILLIAM BLACKSTONE, COMMENTARIES *202 (internal citation omitted) (stating that execution must occur two days after the sentence).

2. *Id.*

3. *Id.* at *397 (“[T]he prospect of gratification . . . [from] commit[ting] the crime, should instantly awake the attendant idea of punishment. Delay of execution serves only to separate these ideas; and then the execution itself affects the minds of the spectators rather as a terrible sight, than as the necessary consequence of transgression.”).

4. *E.g.*, STUART BANNER, THE DEATH PENALTY: AN AMERICAN HISTORY 17 (2002).

5. *People v. Anderson*, 493 P.2d 880, 894 n.37 (Cal. 1972) (en banc) (noting that the national median period of death row incarceration in 1968 was 33.3 months).

6. *See* TRACY L. SNELL, U.S. DEPT. OF JUSTICE, CAPITAL PUNISHMENT, 2013–STATISTICAL TABLES 14 tbl.10 (rev. 2014) [hereinafter DOJ STATISTICS 2013].

7. *See id.*

8. *See id.*

9. *See id.*

10. *See id.*

11. *See id.*

In the two leading death penalty states (by number of persons on death row)—California and Florida¹³—the current average delay is twenty-five years.¹⁴ These averages, however, do not tell the full story. Recently, the Supreme Court declined review of a prisoner on death row for thirty-nine years.¹⁵ Far from being an isolated instance, nearly 200 prisoners nationwide have been on death row for over thirty years.¹⁶ Of those, over fifty have been on death row for about thirty-five years¹⁷ and twenty-five have been on death row for approximately forty years.¹⁸ Skeptical the ever escalating “trend will soon be reversed,” Justice Stephen Breyer extrapolates that the average term of death row incarceration will eventually exceed fifty years.¹⁹

What was once an execution preceded by a *de minimis*, but nonetheless “awful,”²⁰ period of administrative or custodial detention measured in days or weeks is now “two separate punishments: lengthy incarceration under very severe conditions (essentially solitary confinement in many states), followed by an execution.”²¹ The death penalty has become the equivalent of (*de facto*) incarceration in the form of life imprisonment without the possibility of parole *plus (de jure)* capital punishment. With death row prisoners receiving “decades-plus-death,”²² these increasingly lengthy periods of death row incarceration have transformed a

12. *Glossip v. Gross*, 135 S. Ct. 2726, 2764 (2015) (Breyer, J., dissenting) (citing *Execution List 2014*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/execution-list-2014> (last visited May 30, 2017)).

13. DOJ STATISTICS 2013, *supra* note 6, at 18 tbl.15 (California—735, Florida—398). The next three states with the most death row prisoners are Texas—273, Pennsylvania—190, and Alabama—190. *Id.* By the Department of Justice’s latest statistics, these five states “held 60% of all inmates on death row on December 31, 2013.” *Id.* at 1.

14. *Glossip*, 135 S. Ct. at 2764 (Breyer, J., dissenting) (“[T]he State admitted that the last 10 prisoners executed in Florida had spent an average of nearly 25 years on death row before execution.” (citing Tr. of Oral Arg. in *Hall v. Florida*, O.T. 2013, No. 12-10882, pg. 46)); *Jones v. Chappell*, 31 F. Supp. 3d 1050, 1066 (C.D. Cal. 2014) (noting that in California delays between sentencing and execution exceed “25 years on average”).

15. See *Muhammad v. Florida*, 134 S. Ct. 894, 894 (2014) (Breyer, J., dissenting from denial of certiorari). The prisoner, Thomas Knight, received his death sentence in 1975. *Knight v. Florida*, 528 U.S. 990, 994 (1999) (Breyer, J., dissenting from denial of certiorari). Therefore, he had been incarcerated on death row for thirty-nine years.

16. See DOJ STATISTICS 2013, *supra* note 6, at 18 tbl.15 (citing 192 current death row prisoners originally placed there from 1974 to 1985).

17. *Id.* (citing fifty-one current prisoners originally placed on death row from 1980 to 1982).

18. *Id.* (citing twenty-five current prisoners originally placed on death row from 1974 to 1979).

19. Justice Breyer explains as follows: “Nearly half of the 3,000 inmates now on death row have been there for more than 15 years. And, at present execution rates, it would take more than 75 years to carry out those 3,000 death sentences; thus, the average person on death row would spend an *additional* 37.5 years there before being executed.” *Glossip*, 135 S. Ct. at 2764–65 (Breyer, J., dissenting) (citing DOJ STATISTICS 2013, *supra* note 6, at 14 tbl.11, 18 tbl.15) (emphasis added). Adding the fifteen years already spent on death row to Justice Breyer’s speculated additional time of 37.5 years results in a sum of 52.5 years on death row, on average.

20. BLACKSTONE, *supra* note 1, at *202.

21. Carol S. Steiker & Jordan M. Steiker, *Entrenchment and/or Destabilization? Reflections on (Another) Two Decades of Constitutional Regulation of Capital Punishment*, 30 LAW & INEQ. 211, 230–31 (2012).

22. Elizabeth Rapaport, *A Modest Proposal: The Aged of Death Row Should Be Deemed Too Old to Execute*, 77 BROOK. L. REV. 1089, 1124 (2012).

death sentence from capital punishment per se into capital punishment plus.

In the wake of this transformation of both the length and nature of death row incarceration, prisoners began to contest the constitutionality of capital punishment plus. In what have become known as “*Lackey* claims” since 1995 when Clarence Lackey petitioned the Supreme Court for a writ of certiorari, prisoners have advanced two reasons that execution following decades of death row incarceration is disproportionate punishment violating the Eighth Amendment’s prohibition against cruel and unusual punishment.²³ As Brent Newton, counsel for Lackey and architect of the *Lackey* claim explained:

[F]irst . . . execution after [incarceration] under the extreme conditions of death row for such a lengthy period of time would exact more punishment than . . . the Eighth Amendment [allows]; and second, that neither of the state’s primary interests . . . — retribution and deterrence—would be meaningfully served . . . after such a lengthy delay . . .²⁴

Despite Justice Breyer and former Justice John Paul Stevens repeatedly endorsing the *Lackey* claim as meritorious,²⁵ there is no standing court decision—state or federal—recognizing the claim.²⁶

In repeatedly denying *Lackey* claims, courts principally invoke the following three rationales. First, death row prisoners choose to pursue appellate and collateral review of their sentence.²⁷ As chosen by prisoners, the consequence of that choice—delay between sentence and execu-

23. U.S. CONST. amend. VIII (“[N]or cruel and unusual punishments inflicted.”). Although the Supreme Court denied Lackey’s petition, *Lackey v. Texas*, 514 U.S. 1045, 1045 (1995) (Stevens, J., respecting denial of certiorari), the similar claims brought by numerous other death row prisoners have become known as “*Lackey* claims.” *E.g.*, *Jones v. Davis*, 806 F.3d 538, 541 (9th Cir. 2015) (noting that a claim of excessive delay between sentence and execution violating the Eighth Amendment “is commonly known as a ‘*Lackey* claim’”); Bryan A. Stevenson, *The Politics of Fear and Death: Successive Problems in Capital Federal Habeas Corpus Cases*, 77 N.Y.U. L. REV. 699, 762 (2002) (“[T]he claim of inordinate delay of execution [is] commonly known as a ‘*Lackey* claim’ . . .”).

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

25. Carol S. Steiker & Jordan M. Steiker, *Capital Punishment: A Century of Discontinuous Debate*, 100 J. CRIM. L. & CRIMINOLOGY 643, 681 (2010) (“Over the past fifteen years, Justices Stevens and Breyer have repeatedly called for the Court to address the issue, with Justice Breyer characterizing the claim as ‘serious,’ (quoting *Elledge v. Florida*, 525 U.S. 944, 944 (1998) (Breyer, J., dissenting from denial of certiorari)), and ‘particularly strong,’ (quoting *Knight v. Florida*, 528 U.S. 990, 993 (Breyer, J., dissenting from denial of certiorari)), and Justice Stevens ultimately declaring that prolonged death row incarceration is ‘unacceptably cruel,’ (quoting *Thompson v. McNeil*, 556 U.S. 1114, 1116 (2009) (Stevens, J., respecting denial of certiorari)).” For Justice Breyer’s most recent dissent from a denial of certiorari of a *Lackey* claim, see *infra* note 36.

26. See, e.g., *Booker v. McNeil*, No. 1:08cv143/RS, 2010 WL 3942866, at *40 (N.D. Fla. Oct. 5, 2010) (“[N]o federal or state courts have accepted [*Lackey* claims] . . .”). For decisions ruling capital punishment unconstitutional based on excessive delay that have been superseded or reversed, see *infra* notes 54, 55, 73 and accompanying text.

27. See, e.g., *Thompson v. McNeil*, 556 U.S. 1114, 1117 (2009) (Thomas, J., concurring in denial of certiorari) (emphasizing that the “petitioner chose to challenge his death sentence”); *McKenzie v. Day*, 57 F.3d 1461, 1470 n.21 (9th Cir. 1995) (“[T]o the extent petitioners choose to delay execution in the hope of obtaining relief, that is a choice they make for themselves.”).

tion—is attributable to the prisoners and not the state.²⁸ Second, appellate and collateral review of capital sentences is necessary to ensure their accuracy and fairness.²⁹ Therefore, the consequence of such review—delay between sentence and execution—must be constitutionally permissible.³⁰ Third, appellate and collateral review of capital sentences is necessary to satisfy the Eighth Amendment.³¹ Delays caused by satisfying the Eighth Amendment cannot violate it.³²

These three rationales have been extraordinarily influential in dispatching *Lackey* claims. Nearly every court denying such claims on the merits have invoked at least one, if not all three.³³ Most of the federal circuit courts have endorsed all three.³⁴ The leading opponent of *Lackey* claims on the Supreme Court, Justice Clarence Thomas, utilizes at least two of them.³⁵ Furthermore, these rationales have apparently influenced the full Court, which has steadfastly declined to review *Lackey* claims over the last twenty years.³⁶

Despite the icy reception of *Lackey* claims in the courts due to the pervasive influence of these three rationales, three recent developments suggest signs of a thawing. First, in March 2014, Justice Anthony Kennedy, often the crucial “swing vote” in high profile cases that split an ideologically divided court,³⁷ signaled a potential endorsement of *Lackey*

28. See, e.g., *Turner v. Jabe*, 58 F.3d 924, 933 (4th Cir. 1995) (Luttig, J., concurring) (“The delay of which he [the prisoner] now complains is a direct consequence of his own litigation strategy . . .”).

29. See, e.g., *State v. Smith*, 931 P.2d 1272, 1288 (Mont. 1996) (“[T]he cause for the delay . . . [was that the prisoner] ‘availed himself of procedures our law provides to ensure that executions are carried out only in appropriate circumstances.’” (quoting *McKenzie*, 57 F.3d at 1466–67)).

30. See, e.g., *Thompson v. Sec’y for Dep’t of Corr.*, 517 F.3d 1279, 1284 (11th Cir. 2008) (“[D]eath row delays do not constitute cruel and unusual punishment because delay results from the ‘desire of our courts, state and federal, to get it right, to explore . . . any argument that might save someone’s life.’” (quoting *Chambers v. Bowersox*, 157 F.3d 560, 570 (8th Cir. 1998))).

31. See, e.g., *White v. Johnson*, 79 F.3d 432, 439 (5th Cir. 1996) (noting the state’s “interest in insuring that those who are executed receive fair trials with constitutionally mandated safeguards”).

32. See, e.g., *McKenzie*, 57 F.3d at 1467 (“We cannot conclude that delays caused by satisfying the Eighth Amendment themselves violate it.”); *State v. Moore*, 591 N.W.2d 86, 94 (Neb. 1999) (“It would be a mockery of justice to conclude that delays caused by satisfying the Eighth Amendment themselves violate it.”).

33. See, e.g., Jane Marriott, *Walking the Eighth Amendment Tightrope: ‘Time Served’ in the United States Supreme Court*, in *AGAINST THE DEATH PENALTY: INTERNATIONAL INITIATIVES AND IMPLICATIONS* 159, 179 (Jon Yorke ed., 2008) (“[There are] three forms of reasoning that inevitably le[a]d to the [*Lackey*] claim being rejected. First . . . that courts may find compelling reasons for the delay. Second . . . delays caused by way of satisfying the demands of the Eighth Amendment simply cannot violate it. Third . . . the delay was not attributable to the state . . .”); *infra* note 49.

34. See *infra* Part II.

35. See *infra* Part II.

36. See, e.g., *Thompson v. Sec’y for Dept. of Corr.*, 517 F.3d 1279, 1284 (11th Cir. 2008) (noting “the total absence of Supreme Court precedent”). For the most recent denial of certiorari of a *Lackey* claim triggering a response by a Justice, see *Correll v. Florida*, Nos. 15-6551, 15A424, 2015 WL 6111441, at *1 (Oct. 29, 2015) (Breyer, J., dissenting from denial of certiorari) (“I remain convinced that the Court should consider whether nearly 30 years of incarceration under sentence of death is cruel and unusual punishment.”).

37. Brent E. Newton, *Justice Kennedy, the Purposes of Capital Punishment, and the Future of Lackey Claims*, 62 *BUFF. L. REV.* 979, 979–80 (2014) (quoting Charlotte Schneider, *Supreme Court 2012-13 Term Highlights*, *LEGAL INFO. INST. SUP. CT. BULL.*, https://www.law.cornell.edu/supct/cert/supreme_court_2012-2013_term_highlights (last visited May 30, 2017) (internal quotation marks omitted).

claims.³⁸ During oral argument for *Hall v. Florida*, Justice Kennedy repeatedly asked Florida's counsel whether average delays of twenty-five years were "consistent with the purposes of the death penalty."³⁹ Justice Kennedy "may be on the brink of joining Justice Breyer and former Justice Stevens" in urging the full Court to address *Lackey* claims.⁴⁰

Second, in July 2014, a federal court recognized a *Lackey* claim for the first time.⁴¹ *Jones v. Chappell* held that execution following nineteen years on death row violated the Eighth Amendment prohibition against cruel and unusual punishment for two reasons.⁴² First, because of systemic inordinate delay, so few death row prisoners will actually be executed (as opposed to dying of old age or other causes while on death row) as to make execution unconstitutionally arbitrary.⁴³ Second, delays are sufficiently lengthy "that the death penalty is deprived of any deterrent or retributive effect it might once have had."⁴⁴ On appeal, however, the Ninth Circuit reversed *Jones* on procedural grounds.⁴⁵

Third, in June of 2015, Justice Ruth Bader Ginsburg expressed support for *Lackey* claims for the first time. Justice Ginsburg joined Justice Breyer's dissent in *Glossip v. Gross* that identified "unconscionably long delays that undermine the death penalty's penological purpose"⁴⁶ as one of three "fundamental constitutional defects"⁴⁷ in the imposition of capital punishment. In addition to undermining capital punishment's penological justifications, "lengthy delay in and of itself is especially cruel because it 'subjects death row inmates to decades of especially severe, dehumanizing conditions of confinement.'"⁴⁸

In light of these recent developments suggesting a renewed appreciation of *Lackey* claims, this Article critically examines the principal rationales that presently serve to deny *Lackey* claims. It makes the novel argument that these three influential rationales are inconsistent with

38. *Id.* at 980.

39. *Id.* at 991 (quoting Transcript of Oral Argument at 46–47, *Hall v. Florida*, 134 S. Ct. 1986 (2014) (No. 12-10882), https://www.supremecourt.gov/oral_arguments/argument_transcripts/12-10882_7758.pdf) (internal quotation marks omitted). Newton suggested that Justice Kennedy's questioning is significant for two reasons: "First, they did not appear to be off the cuff. In the oral argument of a case in which certiorari had been granted on a legal issue that had nothing to do with *Lackey*, Justice Kennedy clearly had prepared for his *Lackey*-related questions because he cited an arcane statistic about the average delay before executions in the past ten Florida cases." *Id.* at 992. "Second, his repeated question about 'the purposes that the death penalty is designed to serve' certainly appears to allude to the primary arguments made by Justices Stevens and Breyer in addressing *Lackey* claims since 1995." *Id.*

40. *Id.* at 980.

41. *Jones v. Chappell*, 31 F. Supp. 3d 1050, 1052–53 (C.D. Cal. 2014).

42. *See id.* at 1053.

43. *See id.* at 1062–63.

44. *Id.* at 1063.

45. *Jones v. Davis*, 806 F.3d 538, 541, 553 (9th Cir. 2015) (ruling that the death row prisoner's Eighth Amendment claim impermissibly sought application of a new constitutional rule of criminal procedure on collateral review).

46. *Glossip v. Gross*, 135 S. Ct. 2726, 2756 (2015) (Breyer, J., joined by Ginsburg, J., dissenting).

47. *Id.* at 2755.

48. *Id.* at 2765 (quoting *Johnson v. Bredesen*, 558 U.S. 1067, 1069 (2009) (Stevens, J., statement respecting denial of certiorari)).

each other. The first rationale—delay is the prisoner’s fault—is inconsistent with the second and third rationales—delay is a consequence of that which is constitutionally permissible, desirable, and obligatory. In short, the first rationale blames prisoners for the very delays that the other two rationales defend and justify as consequences of what is affirmatively good. This inconsistency renders at least one, or as many as all three, of the rationales incorrect. While not conclusively establishing the unconstitutionality of capital punishment plus, this inconsistency does undermine the foundations of its constitutionality.

This Article proceeds in the following Parts. Part II presents each of the three principal rationales courts employ to deny *Lackey* claims in greater depth. After tracing the origin of each rationale, this Part examines their use by Justice Thomas, federal circuit courts, federal district courts, and state courts.

Part III argues that the three principal rationales supporting the constitutionality of capital punishment plus are inconsistent with each other. The prisoner-fault rationale conflicts with both the accuracy/fairness rationale and the rationale that delays caused by satisfying the Eighth Amendment cannot violate it. The prisoner-fault rationale seeks to blame and hold prisoners responsible for what the other two rationales seek to defend and justify as consequences of what is constitutionally permissible, desirable, and obligatory. Part III next considers the effects of these rationales’ inconsistency. It explains that either (1) the prisoner-fault rationale is wrong, (2) the other two rationales are wrong, or (3) all three rationales are wrong. Because the rationales’ inconsistency entails that at least one of the rationales is wrong, but does not inform which one or ones are wrong, their inconsistency raises doubts as to each rationale. Finally, Part III considers possible resolutions and consequences of the inconsistency. This Article concludes that consistency bars courts from invoking all three rationales and their inconsistency erodes the foundations of the constitutionality of capital punishment plus.

II. PRINCIPAL RATIONALES SUPPORTING CONSTITUTIONALITY OF CAPITAL PUNISHMENT PLUS

This Part presents more expansively each of the three principal rationales employed to deny *Lackey* claims.⁴⁹ It identifies the origin of each

49. See Karl S. Myers, Comment, *Practical Lackey: The Impact of Holding Execution After a Long Stay on Death Row Unconstitutional Under Lackey v. Texas*, 106 DICK. L. REV. 647, 661 (2002) (“[T]here are several fundamental reasons why . . . courts have rejected *Lackey* claims: first, that the need for careful review commands the delay; second, that upholding the claim would result in an inconsistency with other Eighth Amendment requirements; and third, because the state did not negligently or intentionally cause the delay.”); see also *Chappell*, 31 F. Supp. 3d at 1065 (“[C]ourts often rely on two justifications for rejecting the . . . [*Lackey* claim]: first, . . . delay is reasonably related to . . . safeguard[ing] the inmate’s constitutional rights by ensuring the accuracy of . . . [the] death . . . sentence, and second, . . . delay is caused by the petitioner himself, and therefore cannot be constitutionally problematic.”); Angela April Sun, Note, “*Killing Time*” in the Valley of the Shadow of Death: Why Systematic Preexecution Delays on Death Row Are Cruel and Unusual, 113 COLUM. L. REV. 1585, 1602–04 (2013) (identifying as the principal arguments against *Lackey* claims as first, the post-

rationale, examines their subsequent use, and charts the breadth of their adoption by Justice Thomas, federal circuit courts, federal district courts, and state courts.

A. Prisoner Fault

Perhaps the single most prevalent rationale used to deny *Lackey* claims is that delays between sentencing and execution are the prisoners' own fault.⁵⁰ Though not always expressly articulated, unpacking the rationale reveals the following steps of argument. Prisoners choose to pursue appellate and collateral review of their capital sentences. A consequence of such review is delay. The consequence of prisoners' choice—delay—is therefore the responsibility and fault of the prisoners.⁵¹ This Section traces the history of the prisoner-fault rationale. First, it discusses the first case to invoke the rationale and surveys all subsequent pre-

conviction review process that causes the delays are necessary for accuracy and ensuring due process and second, whether the state or prisoner bears responsibility for the delay); Marriot, *supra* note 33 at 179.

50. See, e.g., Rapaport, *supra* note 22, at 1090 (“For many jurists attribution of fault [between the prisoner and the state for the delay] is critical to resolving [the *Lackey* claim].”). See generally *supra* note 49.

51. For authorities rejecting this rationale, see *Johnson v. Bredesen*, 558 U.S. 1067, 1067 (2009) (Stevens, J., dissenting from denial of certiorari) (“[Petitioner] bears little, if any, responsibility for this delay.”); *Smith v. Arizona*, 552 U.S. 985, 985–86 (2007) (Breyer, J., dissenting from denial of certiorari) (noting that delay resulted not from prisoner fault but from two different “constitutionally defective sentencing proceedings”); *Foster v. Florida*, 537 U.S. 990, 993 (2002) (Breyer, J., dissenting from denial of certiorari) (noting that much of the twenty-seven year delay stemmed from “the State’s repeated procedural errors”); *Chappell*, 31 F. Supp. 3d at 1066 (“[M]uch of the delay in California’s post-conviction process is created by the State itself, not by inmates’ own interminable efforts to delay.”); *People v. Simms*, 736 N.E.2d 1092, 1143 (Ill. 2000) (Harrison, C.J., dissenting) (rejecting prisoner-fault rationale and noting that nearly all *Lackey* claims are nonfrivolous); *State v. Smith*, 931 P.2d 1272, 1291 (Mont. 1996) (Leapheart, J., concurring) (rejecting prisoner-fault rationale where prisoner has been successful in appeals because “the blame properly rests with the State or the courts”); *Vatheeswaran v. State of Tamil Nadu*, (1983) 2 SCR 348, 353 (“We think that the cause of the delay is immaterial when the sentence is death. Be the cause for the delay the time necessary for appeal . . . or some other cause for which the accused himself may be responsible, it would not alter the dehumanizing character of the delay.”); Dwight Aarons, *Getting Out of this Mess: Steps Toward Addressing and Avoiding Inordinate Delay in Capital Cases*, 89 J. CRIM. L. & CRIMINOLOGY 1, 22 (1998) (“[D]efective [state] processing systems are the true cause of most of the delay in capital cases.”); Russell L. Christopher, *The Irrelevance of Prisoner Fault for Excessively Delayed Executions*, 72 WASH. & LEE L. REV. 3, 34–74 (2015) (contending that the rationale lacks an explicit basis and that neither of its possible bases—analagizing to attribution of fault in the Sixth Amendment speedy trial right context and waiver of the Eighth Amendment right against cruel and unusual punishment—are persuasive); Michael Johnson, *Fifteen Years and Death: Double Jeopardy, Multiple Punishments, and Extended Stays on Death Row*, 23 B.U. PUB. INT. L.J. 85, 105–06 (2014) (“[I]t should not matter whether the inmate was the partial cause of his own delayed execution. The justice system does not allow inmates the right to starve themselves or to otherwise engage in self-harm. Prisoners should similarly be barred from punishing themselves with additional time on death row.”); Newton, *supra* note 24, at 64 (“[T]he delays occasioned by such discretionary appeals, at least non-frivolous ones, should not be attributed to inmates who pursue such appeals.”); Ryan S. Hedges, Note, *Justices Blind: How the Rehnquist Court’s Refusal to Hear a Claim for Inordinate Delay of Execution Undermines Its Death Penalty Jurisprudence*, 74 S. CAL. L. REV. 577, 581 (2001) (“[D]elay of execution, regardless of who is responsible and whether it is intentional or inadvertent . . . giv[es] rise to a claim of cruel and unusual punishment under the Eighth Amendment.”); Jeremy Root, Note, *Cruel and Unusual Punishment: A Reconsideration of the Lackey Claim*, 27 N.Y.U. REV. L. & SOC. CHANGE 281, 299 (2001) (“Frivolous petitions account for an infinitesimal fraction of the typical period of delay.”). See generally *infra* note 61.

Lackey cases. Second, it presents Justice Thomas's articulations of the rationale. Third, it canvasses post-*Lackey* state and lower federal courts' adoption of the rationale.

1. *Pre-Lackey Decisions*

Perhaps the 1960 case *Chessman v. Dickson* is the first case to express the prisoner-fault rationale.⁵² In denying the prisoner's claim of cruel and unusual punishment stemming from delay of over eleven years, the Ninth Circuit court stated, "I do not see how we can offer life (under a death sentence) as a prize for one who can stall the processes for a given number of years, especially when in the end it appears the prisoner never really had any good points."⁵³

The next two cases addressing the issue rejected the prisoner-fault rationale, finding excessive delay unconstitutional. In 1972, in *People v. Anderson*, the California Supreme Court held that "[a]n appellant's insistence on receiving the benefits of appellate review of the judgment condemning him to death does not render the lengthy period of impending execution any less torturous or exempt such cruelty from constitutional proscription."⁵⁴ In 1980, in *District Attorney for Suffolk District v. Watson*, the Supreme Judicial Court of Massachusetts ruled "that the delay may be due to the defendant's insistence on exercising his appellate rights does not mitigate the severity of the impact on the condemned individual, and the right to pursue due process of law must not be set off against the right to be free from inhuman treatment."⁵⁵

Subsequent cases in the pre-*Lackey* era all invoked the prisoner-fault rationale. In 1986, the court in *Richmond v. Ricketts*, citing *Chessman*, explained that the twelve-year delay failed to violate the Eighth Amendment because it "was prompted by Richmond's request . . . to have his challenges . . . heard by several courts."⁵⁶ Affirming *Richmond* in 1992, the Ninth Circuit supported its use of the prisoner-fault rationale

52. 275 F.2d 604, 607 (9th Cir. 1960).

53. *Id.* A subsequent case interprets this proposition as "distinguish[ing] between innocent delays and delays caused by a defendant's dilatory tactics." *Turner v. Jabe*, 58 F.3d 924, 928 (4th Cir. 1995).

54. 493 P.2d 880, 895 (Cal. 1972), *superseded by constitutional amendment*, CAL. CONST. art. 1, § 27, *as recognized in* *Strauss v. Horton*, 207 P.3d 48, 90 (Cal. 2009) (rejecting the state's argument "that these delays are acceptable because they often occur at the instance of the condemned prisoner").

55. 411 N.E.2d 1274, 1283 (Mass. 1980), *superseded by constitutional amendment*, MASS. CONST. art. CXVI, *as recognized in* *Commonwealth v. Colon-Cruz*, 393 Mass. 150, 150 (1984). The court rejected the prisoner-fault rationale offered by the dissent: "[t]o the extent that a defendant resorts to those endless appellate procedures, he should not be heard to complain about the prolongation of his period of anxiety and agony over his possible execution." *Id.* at 1302. Further explaining the irrelevance of the prisoner's choice, the court noted, "[i]t is often the very reluctance of society to impose the irrevocable sanction of death which mandates, 'even against the wishes of the criminal, that all legal avenues be explored before the execution is finally carried out.'" *Id.* at 1283 (quoting *Furman v. Georgia*, 408 U.S. 238, 289 n.37 (1972) (Brennan, J., concurring)).

56. 640 F. Supp. 767, 803 (D. Ariz. 1986). For a brief discussion of *Chessman*, see *supra* notes 52-53 and accompanying text.

by offering *Chessman* and *Andrews v. Shulsen*⁵⁷ as “relevant, though not controlling, precedents.”⁵⁸ The court explained that the *Andrews* “court reasoned that to accept the petitioner’s argument would be ‘a mockery of justice’ given that the delay was attributable more to petitioner’s actions [of challenging his death sentence] than to the state’s.”⁵⁹ In 1995, just prior to *Lackey*, the Seventh Circuit in *Free v. Peters* found that “any inordinate delay in the execution of Free’s sentence is directly attributable to his own conduct.”⁶⁰

2. Justice Thomas

Justice Thomas emphasized prisoners’ choice of and fault for execution delays in all four of his concurrences to the denial of certiorari of *Lackey* claims.⁶¹ In *Knight v. Florida*, Justice Thomas characterized the prisoner as “avail[ing] himself of the panoply of appellate and collateral procedures and then complain[ing] when his execution is delayed.”⁶² In *Foster v. Florida*, Justice Thomas commented that the “[p]etitioner could long ago have ended his ‘anxieties and uncertainties’ by submitting to what the people of Florida have deemed him to deserve: execution.”⁶³ In *Thompson v. McNeil*, Justice Thomas emphasized that the “petitioner chose to challenge his death sentence”⁶⁴ and quoted from a Fourth Cir-

57. *Andrews v. Shulsen*, 600 F. Supp. 408, 431 (D. Utah 1984).

58. *Richmond v. Lewis*, 948 F.2d 1473, 1491 (9th Cir. 1992).

59. *Id.* (quoting *Andrews*, 600 F. Supp. at 431). The prisoner in *Andrews* was not making a *Lackey* claim, but instead argued that the repeated setting and staying of execution dates violated the Eighth Amendment. *Andrews*, 600 F. Supp. at 431. *Andrews* reasoned that “[t]he extensive and repeated review of petitioner’s death sentence was sought by petitioner and is afforded by the Eighth and Fourteenth Amendments and by federal law. To accept petitioner’s argument would create an irreconcilable conflict between constitutional guarantees and would be a mockery of justice.” *Id.*

60. 50 F.3d 1362, 1362 (7th Cir. 1995).

61. Apart from Justice Thomas, the only other current member of the Supreme Court that has addressed the rationale is Justice Stephen Breyer. Unlike Justice Thomas, Justice Breyer is clearly not a proponent of the rationale. But also unlike Justice Thomas, his precise view is not entirely clear. In individual cases he maintains that delay was the fault of the state and not the prisoner. *E.g.*, *Thompson v. McNeil*, 556 U.S. 1114, 1120 (2009) (Breyer, J., dissenting from denial of certiorari) (“[The thirty-two year] delay here resulted in significant part from constitutionally defective death penalty procedures for which petitioner was not responsible.”); *Knight v. Florida*, 528 U.S. 990, 993 (1999) (Breyer, J., dissenting from denial of certiorari) (referring to “astonishingly long delays flowing in significant part from constitutionally defective death penalty procedures”); *Elledge v. Florida*, 525 U.S. 944, 944 (1998) (Breyer, J., dissenting from denial of certiorari) (“[The prisoner] has experienced that [twenty-three year] delay because of the State’s own faulty procedures and not because of frivolous appeals on his own part.”); *supra* note 51. But Justice Breyer never clearly rejects the prisoner-fault rationale as irrelevant in principle. The closest he comes to doing so is as follows: “one cannot realistically expect a defendant condemned to death to refrain from fighting for his life by seeking to use whatever procedures the law allows.” *Valle v. Florida*, 132 S.Ct. 1, 2 (2011) (Breyer, J., dissenting from denial of stay). Justice Breyer’s most recent statement possibly concerning the rationale, though not specifically referring to it, suggests that at least some causes of delay may be irrelevant: “though these legal causes [adherence to constitutional procedural requirements] may help to explain, they do not mitigate the harms caused by delay itself.” *Glossip v. Gross*, 135 S. Ct. 2726, 2764 (2015) (Breyer, J., joined by Ginsburg, J., dissenting).

62. 528 U.S. 990, 990 (1999).

63. 537 U.S. 990, 990 (2002) (Thomas, J., concurring in denial of certiorari) (quoting *id.* at 993) (Breyer, J., dissenting from denial of certiorari).

64. 556 U.S. 1114, 1117 (2009) (Thomas, J., concurring in denial of certiorari).

cuit concurring opinion: “It makes ‘a mockery of our system of justice . . . for a convicted murderer, who, through his own interminable efforts of delay . . . has secured the almost-indefinite postponement of his sentence, to then claim that the almost-indefinite postponement renders his sentence unconstitutional.’”⁶⁵ Finally, in *Johnson v. Bredesen*, Justice Thomas reiterated the above statement from *Knight*.⁶⁶

3. *Post-Lackey Decisions*

The most influential American case deciding a *Lackey* claim is perhaps *McKenzie v. Day*.⁶⁷ Rejecting the prisoner’s claim that execution following a twenty-year delay violates the Eighth Amendment, *McKenzie* stated that “[t]he delay has been caused by the fact that McKenzie has availed himself of [opportunities to challenge his sentence].”⁶⁸ *McKenzie* stressed that delay is the choice of the prisoner:

A number of death row inmates have refused to avail themselves of avenues of review precisely to avoid this ordeal [of decades on death row]. This option is available to anyone sentenced to die, and to the extent petitioners choose to delay execution in the hope of obtaining relief, that is a choice they make for themselves.⁶⁹

Numerous other federal circuit court cases have denied *Lackey* claims by relying on the prisoner-fault rationale.⁷⁰ Federal district court cases⁷¹ and state cases⁷² have similarly rejected *Lackey* claims on this basis. The only

65. *Id.* (quoting *Turner v. Jabe*, 58 F.3d 924, 933 (4th Cir. 1995)).

66. *See* 558 U.S. 1067, 1071 (2009).

67. 57 F.3d 1461 (9th Cir. 1995).

68. *Id.* at 1466–67.

69. *Id.* at 1470 n.21 (citations omitted).

70. *See, e.g., Allen v. Ornoski*, 435 F.3d 946, 957 n.10 (9th Cir. 2006) (distinguishing the prisoner’s claim from other cases where “much of the delay had been due to the State’s own errors”); *Chambers v. Bowersox*, 157 F.3d 560, 570 (8th Cir. 1998) (“Delay has come about because Chambers, of course with justification, has contested the judgments against him, and, on two occasions, has done so successfully.”); *White v. Johnson*, 79 F.3d 432, 439 (5th Cir. 1996) (“White has had the choice of seeking further review . . . or avoiding further delay of his execution by not petitioning for further review . . .”); *Stafford v. Ward*, 59 F.3d 1025, 1028 n.5 (10th Cir. 1995) (“[B]ecause Appellant chose to avail himself of stays to pursue these avenues of review, they may not be used to support an Eighth Amendment claim.”); *Turner v. Jabe*, 58 F.3d 924, 933 (4th Cir. 1995) (Luttig, J., concurring) (“The delay of which he [the prisoner] now complains is a direct consequence of his own litigation strategy . . .”); *Fearance v. Scott*, 56 F.3d 633, 639 (5th Cir. 1995) (“Fearance was not the unwilling victim of a *Bleak House*-like procedural system hopelessly bogged down; at every turn, he . . . sought extensions of time, hearings and reconsiderations.”); *Porter v. Singletary*, 49 F.3d 1483, 1485 (11th Cir. 1995) (“We note that Porter has proffered no evidence to establish that delays in his case have been attributable to negligence or deliberate action of the state.”).

71. *See, e.g., Booker v. McNeil*, No. 1:08cv143/RS, 2010 WL 3942866, at *40 (N.D. Fla. Oct. 5, 2010) (“[N]o federal or state courts have accepted [the prisoner’s claim] . . . especially where both parties bear responsibility for the long delay.”); *Hairston v. Paskett*, No. CV-00-303-S-BLW, 2008 WL 3874614, at *8 (D. Idaho Aug. 15, 2008) (“[P]rolonged incarceration under a sentence of death does not offend the Eighth Amendment, particularly when the delay results from the prisoners’ unsuccessful pursuit of collateral relief and not from the State’s dilatory tactics.”); *Delvecchio v. Illinois*, No. 95 C 6637, 1995 WL 688675, at *8 (N.D. Ill. Nov. 17, 1995) (“Petitioner has extended the time . . . of his execution and therefore, any additional punishment caused by the delay is attributable to the petitioner.”).

72. *See, e.g., State v. Schackart*, 947 P.2d 315, 336 (Ariz. 1997) (“[D]efendant’s claim that the state is solely responsible for the delays in this case is inaccurate.”); *People v. Hill*, 839 P.2d 984, 1017

post-*Lackey* decision recognizing a *Lackey* claim, *Jones v. Chappell*, rejected the prisoner-fault rationale not on principle but on empirical grounds: “much of the delay in California’s post conviction process is created by the State itself, not by inmates’ own interminable efforts to delay.”⁷³

B. *Post-Conviction Review Necessary for Accuracy and Fairness*

Many courts reject *Lackey* claims on the ground that a lengthy post-conviction review process is necessary to ensure an accurate and fair verdict or sentence so that no innocent is convicted and punished. Unpacking the rationale reveals the following steps of argument. Because accuracy and fairness are constitutionally valuable, any consequence of that pursuit of accuracy and fairness must be constitutionally acceptable. Delay between sentencing and execution is such a consequence. Therefore, such delay must be constitutionally acceptable. In short, accuracy trumps speed.⁷⁴

(Cal. 1992) (“Defendant, however, does not—and in good faith cannot—allege even the slightest undue delay by the state in this case.”); *Valle v. State*, 70 So. 3d 530, 552 (Fla. 2011) (“Valle ‘cannot now contend that his punishment has been illegally prolonged because the delay in carrying out his sentence is in large part due to his own actions in challenging his conviction[s] and sentence.’” (quoting *Tompkins v. State*, 994 So. 2d 1072, 1085 (Fla. 2008))); *McKinney v. State*, 992 P.2d 144, 151 (Idaho 1999) (“Death row prisoners are not entitled to have their sentences commuted to life because of the delay caused by their own unsuccessful collateral attacks on their sentences.”); *Bieghler v. State*, 839 N.E.2d 691, 697 (Ind. 2005) (“[T]he time between his conviction and the approaching execution flows from his having availed himself of the appeals process.”); *State v. Sparks*, 68 So. 3d 435, 492 (La. 2011) (“Much of the delay in the direct appeal is clearly attributable to the defendant Thus his argument contending the length of time on death row violates the Eighth Amendment rings hollow.”); *Jordan v. State*, 786 So. 2d 987, 1028 (Miss. 2001) (“[T]he Constitution would not protect a defendant who availed himself of the ‘panoply of appellate and collateral procedures’ and then claimed that his execution had been too long delayed.” (quoting *Knight v. Florida*, 528 U.S. 990, 990 (1999) (Thomas, J., concurring in denial of certiorari))); *State v. Smith*, 931 P.2d 1272, 1288 (Mont. 1996) (noting that defendant “has availed himself [of the review process] . . . which has resulted in the delay and the multiple sentencing hearings in this case”); *Moore v. State*, 591 N.W.2d 86, 94 (Neb. 1999) (“The delay in carrying out the sentence of death has been caused by the fact that Moore has availed himself of [the review process].”); *State v. Austin*, 87 S.W.3d 447, 486 (Tenn. 2002) (“As in most cases, the delay in the instant case was caused in large part by numerous appeals and collateral attacks lodged by the Appellant.”).

73. 31 F. Supp. 3d 1050, 1066 (C.D. Cal. 2014), *rev’d*, *Jones v. Davis*, 806 F.3d 538 (9th Cir. 2015).

74. For authorities criticizing this rationale, see *Furman v. Georgia*, 408 U.S. 238, 289 n.37 (1972) (Brennan, J., concurring) (“The right not to be subjected to inhuman treatment [prolonged death row incarceration] cannot, of course, be played off against the right to pursue due process of law.”); *Jones v. Chappell*, 31 F. Supp. 3d 1050, 1067 (C.D. Cal. 2014) (rejecting that a prisoner must choose between speed and accuracy); *Dist. Att’y Suffolk Dist. v. Watson*, 411 N.E.2d 1274, 1283 (Mass. 1980) (“[T]he right to pursue due process of law must not be set off against the right to be free from inhuman treatment.”); *State v. Smith*, 931 P.2d 1272, 1292 (Mont. 1996) (Leaphart, J., concurring) (“I see no simple answer to the conundrum which results from the conflict between a defendant’s right to due process and appellate review and his right to be free from cruel and unusual punishment.”); DAVID PANNICK, *JUDICIAL REVIEW OF THE DEATH PENALTY* 84 (1982) (“[A] death sentence becomes unconstitutionally cruel unless carried out within a reasonable time . . . and without the incidental infringement of any of the other rights (such as the right to appeal against conviction and sentence) guaranteed by due process.”); Newton, *supra* note 24, at 64 (“[I]t is axiomatic in our legal system that a person should not have to waive one constitutional right in order to exercise another.”); Rapaport, *supra* note 22, at 1126–27 (“[T]he proper way to frame the Eighth Amendment issue is not as a choice between dispatch and delay.”); Jessica Feldman, Comment, *A Death Row Incarceration Calculus: When Prolonged Death Row Imprisonment Becomes Unconstitutional*, 40 SANTA CLARA L. REV. 187, 218 (1999) (“Re-

Perhaps the first decision invoking this rationale is *Richmond v. Ricketts* in 1986.⁷⁵ *Richmond* rejected a twelve-year delay as constituting cruel and unusual punishment because “it is better to take the time to consider each issue [presented by the prisoner] thoroughly rather than quickly dispatching someone to the gas chamber.”⁷⁶ Affirming the district court’s decision, the Ninth Circuit found relevant a case relied upon by the lower court—*Harrison v. United States*.⁷⁷ In *Harrison*, the Supreme Court “held that an eight-year delay between an arrest and sentencing was not unconstitutional where the delay resulted from the need to assure careful review of an unusually complex case.”⁷⁸ The Ninth Circuit returned to this theme of error prevention justifying delays in *McKenzie v. Day*.⁷⁹ *McKenzie* stated that “[t]he delay has been caused by the . . . procedures our law provides to make sure that executions are carried out only in appropriate circumstances.”⁸⁰ According to *McKenzie*, “most of these procedural safeguards have been imposed by the Supreme Court in recognition of the fact that the common law practice of imposing swift and certain executions could result in arbitrariness and error in carrying out the death penalty.”⁸¹ Similarly, the Fifth Circuit rejected a *Lackey* claim based on a seventeen-year delay because the prisoner’s “claim demands that capital punishment be carried out quickly in spite of the importance of thorough fact-finding in capital cases and the state’s compelling interest in ensuring that it does not execute innocent defendants.”⁸² In *Chambers v. Bowersox*, the Eighth Circuit contended, “delay, in large part, is a function of the desire of our courts, state and federal, to get it right, to explore exhaustively, or at least sufficiently, any argument that might save someone’s life.”⁸³ Denying that a thirty-one year stay on death row violated the Eighth Amendment, the Eleventh Circuit quoted approvingly the above language from *Chambers*.⁸⁴

quiring a prisoner to forgo either the right to appeal his sentence or an Eighth Amendment claim [unconstitutionally] forces the prisoner to choose the protection of one constitutional guarantee over another.”); Root, *supra* note 51, at 326 (“To suggest that a citizen loses the protection of the Eighth Amendment because he chooses to pursue appellate review of his capital sentence seems highly improper.”).

75. 640 F. Supp. 767, 803 (D. Ariz. 1986).

76. *Id.*

77. *Richmond v. Lewis*, 948 F.2d 1473, 1491 (1992) (citing *Harrison v. United States*, 392 U.S. 219, 221 n.4 (1968)).

78. *Id.*

79. 57 F.3d 1461, 1467 (9th Cir. 1995).

80. *Id.* at 1466–67.

81. *Id.* at 1467.

82. *White v. Johnson*, 79 F.3d 432, 438 (5th Cir. 1996); *accord. id.* at 440 (“On the merits, these claims would likewise fail because the delay that White complains of arises from post-conviction proceedings which exist to protect White and which White, himself, requested when he petitioned for habeas relief.”).

83. 157 F.3d 560, 570 (8th Cir. 1998).

84. *Thompson v. Sec’y Dep’t. of Corr.*, 517 F.3d 1279, 1284 (11th Cir. 2008) (“[D]eath row delays do not constitute cruel and unusual punishment because delay results from the ‘desire of our courts, state and federal, to get it right, to explore . . . any argument that might save someone’s life.’” (quoting *Chambers*, 157 F.3d at 570)).

State courts rejecting *Lackey* claims also invoke this rationale. Both the Supreme Courts of Montana and Nebraska approvingly quoted *McKenzie*'s above language.⁸⁵ The Supreme Court of Illinois approvingly quoted the above language from *Chambers*.⁸⁶ The Indiana Supreme Court rejected a *Lackey* claim, reasoning that “[t]o ensure the just administration of the death penalty the value of speed should not trump accuracy.”⁸⁷ Similarly, the Supreme Court of Louisiana concluded that “[t]he value of speed should not trump the value of accuracy.”⁸⁸

C. *Post-Conviction Review Necessary to Satisfy Eighth Amendment*

The last of the principal rationales employed to deny *Lackey* claims is that delays that are a consequence of adherence to the Eighth Amendment or other constitutional mandates cannot be unconstitutional. Unpacking the rationale reveals the following steps of argument. The various levels of appellate and collateral review are constitutionally necessary, and a consequence of that which is constitutionally necessary must also be constitutional. The consequence of post-conviction review is delay between sentence and execution. Therefore, such delay is constitutional. In short, delay caused by satisfying the Eighth Amendment cannot violate it.⁸⁹

Two federal circuit court opinions have advanced the most influential versions of this rationale.⁹⁰ In *White v. Johnson*, the Fifth Circuit denied a *Lackey* claim involving seventeen years on death row because “there are compelling justifications for the delay between conviction and

85. *State v. Smith*, 931 P.2d 1272, 1288 (Mont. 1996) (quoting *McKenzie*, 57 F.3d at 1466–67); *State v. Moore*, 591 N.W.2d 86, 94 (Neb. 1999) (quoting *McKenzie*, 57 F.3d at 1466–67).

86. *People v. Simms*, 736 N.E.2d 1092, 1141 (Ill. 2000) (quoting *Chambers*, 157 F.3d at 570).

87. *Moore v. State*, 771 N.E.2d 46, 55 (Ind. 2002).

88. *State v. Sparks*, 68 So. 3d 435, 493 (La. 2011).

89. For criticisms of this rationale, see *Glossip v. Gross*, 135 S. Ct. 2726, 2772 (2015) (Breyer, J., dissenting) (“A death penalty system that is unreliable or procedurally unfair would violate the Eighth Amendment. And so would a system that, if reliable and fair in its application of the death penalty, would serve no penological purpose [because of excessive delay].”) (citation omitted); Russell L. Christopher, *Absurdity and Excessively Delayed Executions*, 49 U.C. DAVIS L. REV. 843, 896–98 (2016) (the third rationale erroneously conflates what is necessary to satisfy the Eighth Amendment with what is sufficient); cf. *Recent Cases*, 114 HARV. L. REV. 648, 650–51 (2000) (“The court [denying the *Lackey* claim] failed to acknowledge the possibility that extensive post-trial procedures could be both necessary and cruel—necessary because they satisfy a constitutional mandate, and cruel because they generate delays prohibited by the Eighth Amendment.”).

90. It is not entirely clear whether Justice Thomas articulates this rationale. He at least comes quite close in his following statement: “[c]onsistency would seem to demand that those who accept our death penalty jurisprudence as a given also accept the lengthy delay between sentencing and execution as a necessary consequence.” *Knight v. Florida*, 528 U.S. 990, 992 (1999) (concurring in denial of certiorari). And Justice Thomas quotes this statement approvingly in two of his other concurrences to the denial of certiorari of *Lackey* claims. *Thompson v. McNeil*, 556 U.S. 1114, 1117 (2009) (quoting *Knight*, 528 U.S. at 992); *Foster v. Florida*, 537 U.S. 990, 991 (2002) (quoting *Knight*, 528 U.S. at 992). If Justice Thomas’ phrase “death penalty jurisprudence,” *Knight*, 528 U.S. at 992, may be understood as the constitutional requirements for the imposition of the death penalty prescribed by the Supreme Court, then Justice Thomas seems to be arguing that delay is a necessary consequence of satisfying capital punishment’s constitutional requirements. Interpreted in this way, Justice Thomas might well be arguing that because delay is necessary to satisfy constitutional requirements, delay must be constitutionally acceptable.

the execution of a death sentence. The state . . . [has an] interest in insuring that those who are executed receive fair trials with constitutionally mandated safeguards.”⁹¹ Decisions from the Ninth and Eleventh Circuits have approvingly quoted *White*’s argument that such delays stem from compliance with “constitutionally mandated safeguards.”⁹² In *McKenzie v. Day*, the Ninth Circuit found the prisoner’s twenty-year delay “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.”⁹³ Because evolving standards of decency is a measure of the constitutionality of capital punishment under the Eighth Amendment,⁹⁴ *McKenzie* is, in effect, declaring that delay is a product of satisfying the Eighth Amendment. In rejecting the prisoner’s claim of cruel and unusual punishment, the court stated, “[w]e cannot conclude that delays caused by satisfying the Eighth Amendment themselves violate it.”⁹⁵

State courts have also invoked the rationale. Citing *McKenzie* and *White*, the Supreme Court of Arkansas stated that “the very nature of capital litigation . . . suggests that delay . . . is the product of evolving standards of decency.”⁹⁶ The Texas Court of Criminal Appeals maintained that “[t]he existence of delays in appellant’s case have arguably been necessary to ensure that his conviction and sentence are proper and not inhumane.”⁹⁷ The court explained that the Constitution “does not and cannot protect [death row prisoners] against those costs which are necessary and inherent in the exercise of the rights it guarantees.”⁹⁸ Echoing *McKenzie*, the court is essentially stating that delays due to procedures necessary to satisfy the Constitution cannot violate the Constitution. The California Supreme Court, in a decision predating *McKenzie*, held that “[t]he existence of an automatic appeal under state law [that caused significant delay and prolonged the prisoner’s stay on death row] is not a constitutional defect; it is a constitutional safeguard.”⁹⁹ That is, delays caused by constitutional safeguards cannot be constitutional defects. In *People v. Ochoa*, the California Supreme Court reasoned that “the time required for our statutorily mandated review is not a violation of a criminal defendant’s constitutional rights; it is essential to ensuring

91. 79 F.3d 432, 439 (5th Cir. 1996).

92. *Thompson v. Sec’y, Dep’t of Corr.*, 517 F.3d 1279, 1284 (11th Cir. 2008) (quoting *White*, 79 F.3d at 439); *Allen v. Ornoski*, 435 F.3d 946, 959 (9th Cir. 2006) (quoting *White*, 79 F.3d at 439).

93. 57 F.3d 1461, 1467 (9th Cir. 1995).

94. See *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (declaring that punishment which does not satisfy “evolving standards of decency that mark the progress of a maturing society” may be unconstitutionally cruel and unusual).

95. *McKenzie*, 57 F.3d at 1467.

96. *Hill v. State*, 962 S.W.2d 762, 767 (Ark. 1998).

97. *Bell v. State*, 938 S.W.2d 35, 53 (Tex. Crim. App. 1997) (en banc).

98. *Id.* (citing *Louisiana ex rel. v. Resweber*, 329 U.S. 459, 464 (1947) (holding only unnecessary suffering in the execution of a death sentence constitutes cruel and unusual punishment)).

99. *People v. Hill*, 839 P.2d 984, 1017 (Cal. 1992) (en banc).

that those rights are and have been respected.”¹⁰⁰ Again, the underlying principle is that delays essential to satisfying prisoners’ rights cannot violate prisoners’ rights. Finding *White* persuasive and adopting *McKenzie*’s language, another California Supreme Court decision declared that “the delays caused by satisfying the Eighth Amendment cannot violate it.”¹⁰¹ The Supreme Court of Nebraska advanced an even more forceful formulation of *McKenzie*’s language: “[i]t would be a mockery of justice to conclude that delays caused by satisfying the Eighth Amendment themselves violate it.”¹⁰²

III. INCONSISTENCY OF THE RATIONALES

This Part argues that the three rationales are inconsistent with each other. The first rationale blames and holds prisoners responsible for the consequences of what the second rationale acknowledges is necessary to ensure accurate and fair sentences and what the third rationale concedes is necessary to satisfy the Eighth Amendment and the Constitution. The first rationale blames and holds prisoners responsible for what the second and third rationales defend as consequences of what is constitutionally permissible, desirable, and obligatory. In short, the first rationale seeks to blame prisoners for the very delays that the second and third rationales seek to justify as consequences of what is affirmatively good. After establishing the rationales’ inconsistency, this Part considers various resolutions and consequences of the inconsistency. Part III concludes that, as a result of the rationales’ inconsistency, at least one of the rationales is incorrect, and all three are suspect.

A. *The Prisoner-Fault and Accuracy/Fairness Rationales Conflict*

This Section argues that the accuracy/fairness rationale is inconsistent with the prisoner-fault rationale. The prisoner-fault rationale blames and holds prisoners responsible for the delays;¹⁰³ the accuracy/fairness rationale defends and justifies the delays as consequences of ensuring accurate and fair death sentences and ensuring no innocent is executed.¹⁰⁴ The prisoner-fault rationale blames and holds prisoners responsible for the very delays that facilitate and promote what the accuracy/fairness rationale defends as “the state’s compelling interest” in and “the desire of our courts” for accurate and fair sentences.¹⁰⁵ It is inconsistent to hold against prisoners the very same actions deemed constitutionally permissible and desirable.

100. 28 P.3d 78, 115–16 (Cal. 2001) (quoting *People v. Ochoa*, 996 P.2d 442, 446 (1998)) (internal quotation marks omitted).

101. *People v. Frye*, 959 P.2d 183, 263 (Cal. 1998) (citing *McKenzie v. Day*, 57 F.3d 1461, 1467 (9th Cir. 1995)).

102. *State v. Moore*, 591 N.W.2d 86, 94 (Neb. 1999).

103. See *supra* Section II.A.

104. See *supra* Section II.B.

105. See *supra* notes 82–84 and accompanying text.

To further illustrate the inconsistency of the rationales, consider the accuracy-trumps-speed articulation of the accuracy/fairness rationale.¹⁰⁶ The prisoner-fault rationale blames prisoners for the very delays that facilitate and promote accuracy over speed. Prisoners causing delays through appellate and collateral review of their sentences promote (rather than undermine) accuracy over speed. If accuracy is preferred over speed, then there is no reason to blame prisoners for delays that promote accuracy. The two rationales are inconsistent with each other. The prisoner-fault rationale is instead consistent with the converse of the accuracy/fairness rationale—a speed trumps accuracy rationale. *If* speed trumps accuracy, *then* it would be consistent to blame prisoners for delays that undermine speed prevailing over accuracy. But since the accuracy/fairness rationale claims that accuracy trumps speed, blaming prisoners for seeking accuracy at speed's expense is inconsistent. As a result, the prisoner-fault rationale is inconsistent with the accuracy/fairness rationale.

B. Prisoner-Fault and Eighth-Amendment Rationales Conflict

This Section argues that the Eighth-Amendment rationale—delays caused by satisfying the Eighth Amendment cannot violate it—is inconsistent with the prisoner-fault rationale. The two rationales conflict in two ways: the cause for the delays and the blame for the delays. First, the prisoner-fault rationale identifies prisoners as the cause of the delays;¹⁰⁷ the Eighth-Amendment rationale identifies satisfaction of the Eighth Amendment as the cause of the delays.¹⁰⁸ If satisfying the Eighth Amendment is the cause of the delays (as the Eighth-Amendment rationale maintains), then prisoners are not the cause of the delays (contrary to what the prisoner-fault rationale maintains). If prisoners, however, are the cause of the delays (as the prisoner-fault rationale maintains), then satisfying the Eighth Amendment is not the cause of the delays (contrary to what the Eighth-Amendment rationale maintains). By attributing the cause of the delays to different sources—death row prisoners and satisfaction of the Eighth Amendment, the prisoner-fault and Eighth-Amendment rationales are inconsistent with each other.¹⁰⁹

106. See *supra* notes 76, 87–88 and accompanying text.

107. See *supra* Section II.A.

108. See *supra* Section II.C.

109. One might argue that both are not “the cause,” but both are “a cause” of the delays. As Justice John Paul Stevens commented, “delays have multiple causes.” *Thompson v. McNeil*, 556 U.S. 1114, 1116 (2009) (Stevens, J., respecting denial of certiorari). Of course, when there is a plurality of causes there is a diminution of responsibility for any one cause or party. That is, if prisoners are a cause but not the sole cause of delays they should bear not full but at most partial responsibility. And there are many possible causes of the delays. First, the State may be a cause by holding constitutionally defective trials and sentencing hearings. See, e.g., *Smith v. Arizona*, 552 U.S. 985, 986 (2007) (Breyer, J., dissenting from denial of certiorari) (“[M]uch of the delay at issue seems due to constitutionally defective sentencing proceedings.”); *Knight v. Florida*, 528 U.S. 990, 998 (1999) (Breyer, J., dissenting from denial of certiorari) (characterizing delays as stemming primarily from states’ “constitutionally defective death penalty procedures”). Second, States may fail to provide sufficient resources of court time and counsel for indigents to prevent delays. See, e.g., *Jones v. Chappell*, 31 F. Supp. 3d 1050, 1053

Second, if the delays are caused by satisfying the Eighth Amendment, and are thus constitutional as the Eighth-Amendment rationale maintains,¹¹⁰ then there is no legitimate reason to blame and fault prisoners for the delays. It is inconsistent to blame and hold prisoners responsible for the consequences of what is constitutionally obligatory. Moreover, why blame and fault *prisoners* for what is constitutionally obligatory for the *State*? It is the State, not a prisoner or defendant, that has constitutional duties in criminal matters.¹¹¹ The State, not the prisoner, has the ultimate constitutional responsibility for both the nature and manner of imposition of punishment.¹¹² No matter what a prisoner chooses, causes, or intends, the State has the ultimate constitutional responsibility of not imposing cruel and unusual punishment.¹¹³ Therefore, it is inconsistent to

(C.D. Cal. 2014) (“[T]he dysfunctional administration of California’s death penalty system has resulted, and will continue to result, in an inordinate and unpredictable period of delay preceding . . . execution[s].”); *id.* at 1056–57 (noting “the State’s underfunding of its death penalty system to be a key source of the problem”). Third, the Supreme Court and lower federal courts may be yet another cause. *See, e.g.,* *Coleman v. Balkcom*, 451 U.S. 949, 958 (1981) (Rehnquist, J., dissenting from denial of certiorari) (“[T]his Court and the lower federal courts have converted the constitutional limits upon imposition of the death penalty . . . into arcane niceties which parallel the equity court practices described in Charles Dickens’ ‘Bleak House.’”); *id.* (“I do not think that this Court can continue to evade some responsibility for this mockery of our criminal justice system.”). For statements by Justice Thomas and former Justice Antonin Scalia that the Supreme Court is the *sole* cause of the delays, see *infra* text accompanying notes 116–18.

110. *See supra* Section II.C.

111. The State may be responsible for the consequences of defendants’ choices even in the arguable absence of any State action. For example, in *Cuyler v. Sullivan*, the Supreme Court considered whether ineffectiveness of privately retained (not State-appointed) counsel constituted a Sixth Amendment violation of the defendant’s right to the assistance of counsel. *See* 446 U.S. 335, 343 (1980). Clearly, any ineffectiveness of counsel stemmed from the defendant’s choices and not the State. The defendant both chose to exercise his right to the assistance of counsel and the defendant chose (selected) his counsel. If the consequence of those choices by the defendant was the ineffectiveness of counsel, how could the State be responsible when the State did nothing to contribute to the ineffectiveness of counsel? The State advanced this very argument: ineffectiveness of “retained counsel does not involve State action” and thus cannot be the basis for a constitutional violation. *Id.* at 342. Rejecting the State’s argument, *see id.* at 344, the Court explained that “a state criminal trial, a proceeding initiated and conducted by the State itself, is an action of the State within the meaning of the Fourteenth Amendment.” *Id.* at 343 (citing *Lisenba v. California*, 314 U.S. 219, 236–37 (1941); *Moore v. Dempsey*, 261 U.S. 86, 90–91 (1923)). *Cuyler* further explained that “[w]hen a State obtains a criminal conviction through such a trial [a trial in which the defendant lacks effective assistance of counsel], it is the State that unconstitutionally deprives the defendant of his liberty.” *Id.* at 343. Therefore, regardless of defendants’ choices, it is the State that has the ultimate constitutional duty and responsibility to provide defendants with a fair trial. *See id.* at 344 (“[T]he State’s conduct of a criminal trial itself implicates the State in the defendant’s conviction . . .”).

112. *See, e.g.,* *Hall v. Florida*, 134 S. Ct. 1986, 1992 (2014) (“[T]he Eighth Amendment reaffirms the duty of the government to respect the dignity of all persons.”); *Godfrey v. Georgia*, 446 U.S. 420, 428 (1980) (“[I]f a State wishes to authorize capital punishment it has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty.”); *Furman v. Georgia*, 408 U.S. 238, 270 (1972) (Brennan, J., concurring) (“The State, even as it punishes, must treat its members with respect for their intrinsic worth as human beings.”); *Trop v. Dulles*, 356 U.S. 86, 100 (1958) (“The basic concept underlying the Eighth Amendment is nothing less than the dignity of man. While the State has the power to punish, the Amendment stands to assure that this power be exercised within the limits of civilized standards.”); Youngjae Lee, *The Constitutional Right Against Excessive Punishment*, 91 VA. L. REV. 677, 683 (2005) (“The purpose of the Eighth Amendment ban on ‘cruel and unusual punishments,’ however, is to place constraints on the ways in which we pursue [the penological purposes of punishment].”).

113. For example, suppose a death row prisoner intentionally becomes insane (by consuming illegal drugs, ingesting toxic substances, or sustaining a head injury) for the purpose of delaying or per-

blame and hold prisoners responsible for consequences of what is constitutionally obligatory for the State. As a result of either of these two bases of conflict or inconsistency, the prisoner-fault rationale is inconsistent with the Eighth-Amendment rationale.

C. *Resolutions and Consequences of the Inconsistency*

As argued in the two previous Sections, the three principal rationales courts invoke to deny *Lackey* claims are inconsistent with each other. The prisoner-fault rationale is inconsistent with both the accuracy/fairness and Eighth-Amendment rationales. Due to their inconsistency with each other, at least one of the rationales is incorrect. If the prisoner-fault rationale is correct, then both the accuracy/fairness and Eighth-Amendment rationales are incorrect. If the latter rationales are correct, however, then the prisoner-fault rationale is incorrect. The rationales' inconsistency means either (1) the prisoner-fault rationale is incorrect, (2) both the accuracy/fairness and Eighth-Amendment rationales are incorrect, or (3) all three rationales are incorrect. Merely that they are inconsistent, however, cannot determine which of the three rationales are incorrect.

One obvious solution to the inconsistency is to simply eliminate the incorrect rationale(s), thereby expunging the inconsistency. But is there a basis for determining which of the three inconsistent rationales are incorrect? Courts and commentators have criticized all three.¹¹⁴

Moreover, each of the three is inconsistent, not only with each other, but also with other arguments offered by those denying *Lackey* claims. Both the accuracy/fairness and Eighth-Amendment rationales conflict with the following remedy offered by Justice Thomas to a *Lackey* claimant objecting to twenty-seven years on death row: “[p]etitioner could long ago have ended his ‘anxieties and uncertainties’ by submitting to what the people of Florida have deemed him to deserve: execution.”¹¹⁵ Inviting death row prisoners to submit to execution, thereby foregoing a lengthy review process, is inconsistent with both the accuracy/fairness

manently preventing execution. The prisoner chose to commit a capital crime with the possible consequence of capital punishment. The prisoner also chose to harm herself with the possible consequence of insanity. The prisoner chose, is the sole cause of, and is at fault for everything—the commission of the crime, the punishment, and the insanity. Surely the State can constitutionally execute the prisoner? It cannot. As the Supreme Court in *Ford v. Wainwright* held, “the Eighth Amendment prohibits a state from carrying out a sentence of death upon a person who is insane.” 477 U.S. 399, 409–10 (1986). Executing an insane person constitutes cruel and unusual punishment. *See id.* *Ford* announced a categorical bar against executing the insane. *See, e.g.,* Jonathan Greenberg, Note, *For Every Action There is a Reaction: The Procedural Pushback Against Panetti v. Quarterman*, 49 AM. CRIM. L. REV. 227, 229 (2012) (“*Ford* . . . establish[ed] a categorical exclusion shielding [insane] defendants from capital punishment . . .”). That a person is insane is sufficient to trigger the bar, how the person became insane is irrelevant. That the insanity was a consequence (even intended) of the prisoner’s choices does not preclude imposition of capital punishment on this prisoner from being unconstitutionally cruel and unusual.

114. *See* sources cited *supra* notes 51, 74, and 89.

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

and Eighth-Amendment rationales that defend and justify the lengthy review process as necessary for accuracy, fairness, and satisfaction of the Eighth Amendment.

The prisoner-fault rationale is inconsistent with arguments made by both Justice Thomas and former Justice Antonin Scalia that blame the Supreme Court for the excessive delays. While the prisoner-fault rationale blames prisoners for the delays, Justice Thomas argued in *Knight v. Florida* that “in most cases raising [a *Lackey* claim,] the delay in carrying out the prisoner’s execution stems from this Court’s Byzantine death penalty jurisprudence.”¹¹⁶ In dismissing Justice Breyer’s claim that capital punishment is unconstitutional due, in part, to excessive delay, Justice Scalia, joined by Justice Thomas, contended that the Supreme Court is the *sole* cause of the delays:

Of course, this delay is a problem of the Court’s own making. As Justice Breyer concedes, for more than 160 years, capital sentences were carried out in an average of two years or less. But by 2014, he tells us, it took an average of eighteen years to carry out a death sentence. What happened in the intervening years? *Nothing* other than the proliferation of labyrinthine restrictions on capital punishment, promulgated by this Court.¹¹⁷

Justices Scalia and Thomas are clearly stating that not only are delays a problem caused by the Court, but also that *nothing* other than the Court’s “Byzantine” and “labyrinthine restrictions on capital punishment” are the cause of the delays.¹¹⁸ That would seem to exclude prisoner fault as a basis for the delays and contradict the prisoner-fault rationale. As a result, the prisoner-fault rationale is inconsistent with arguments of Justices Thomas and Scalia.

Without an obvious resolution, the inconsistency of the three rationales has two effects—one direct and another that is indirect and subtler. First, either the prisoner-fault rationale or the other two rationales are incorrect. In denying *Lackey* claims, courts cannot consistently assert all three. Consistency bars their joint assertion. Consistency requires courts to choose either the prisoner-fault rationale or the other two rationales. The second effect, comparatively indirect and subtle, is that the joint inconsistency of the three rationales raises doubts about each individually. While consistency permits assertion of either the prisoner-fault rationale or the other two rationales (but not all three), the very indeterminacy of which rationale is incorrect (and the possibility that all three might be incorrect) renders each individual rationale suspect.

116. 528 U.S. 990, 991 (1999) (Thomas, J., concurring in denial of certiorari).

117. *Glossip v. Gross*, 135 S. Ct. 2726, 2749 (2015) (Scalia, J., joined by Thomas, J., concurring) (emphasis added) (internal citations omitted).

118. See *supra* notes 116–17 and accompanying text.

IV. CONCLUSION

The constitutionality of execution plus decades of death row incarceration—capital punishment plus—rests principally on three rationales. These three rationales, however, are inconsistent with each other. While establishing their inconsistency does not determine which of the rationales are incorrect, it does establish that at least one of them is incorrect. Therefore, consistency bars courts from invoking all three rationales. While only jointly inconsistent, the very indeterminacy as to which rationale is incorrect renders each individual rationale suspect. Although not conclusively establishing the unconstitutionality of capital punishment plus, the inconsistency of the three principal rationales erodes the foundations of the constitutionality of capital punishment plus.

