



The Troubling Fate of Aged Prisoners on Death Row

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At 94 years, Leroy Nash was the oldest inmate on death row in a U.S. prison – until he died of natural causes in February 2010, after spending decades under the shadow of execution. Among the more than three thousand death row inmates in American prisons today, fewer than one hundred are 65 or older. Yet these elderly condemned prisoners have typically spent an astonishing twenty to thirty years or more on death row. From time to time, one of them is marched into the execution chamber. Since 2000, eleven condemned ranging in age from 65 to 77 have been executed. Some were disabled, demented, or both.

Why are So Many Old People on Death Row?

Waves of capital crimes are not being committed by America's elderly. Rather, a death sentence often marks the beginning of decades on death row before appeals are resolved. Whether appeals finally culminate in execution or in a reduced sentence and removal to the general prison population, repeated and protracted court proceedings are involved. For many long-serving inmates, the ultimate answer has not yet come. Across the states, only fifteen percent of all convicts sentenced to die during the past 35 years have actually been executed. More than two out of every five condemned persons are growing older on death row. The rest have left death row due to legal errors in their cases uncovered in proceedings after the original convictions.

States that regularly execute condemned prisoners are just as likely as states with sporadic executions to have growing numbers of prisoners living on death row into middle age and beyond. Texas is the national leader in executions, yet nineteen inmates have been on that state's death row for at least a quarter century. Among the top ten states in carrying out executions, Florida holds the largest number of elderly convicts; sixty have been on death row for 25 years or longer.

Lengthy confinement on U.S. death rows is a relatively recent development. Traditionally, death row stays were measured in weeks and months, not decades. The prisoner had no earthly future and was supposed to devote a short interlude on death row to making peace with his or her Maker. Bleak conditions of confinement were justified as transitory. But now, death row amounts to prolonged, narrow confinement for a person facing the dread possibility, but not certainty, of execution.

Why the Death Penalty Moves Slowly

The phenomenon of aging on death row is not about to go away. Reforms are unlikely to shorten the time between condemnation and execution. In fact, delays have steadily expanded over the 35 year history of the current legal incarnation of America's death penalty. Capital litigation is extraordinarily complex, because the Supreme Court has imposed stringent due process standards in death penalty cases, including multiple levels of post-conviction review. However frustrating the pace may be to proponents of capital punishment, no one can deny that the error rate in capital cases is high. Care must be taken to avoid such mistakes.

Death-row appeals pile up not only because they are complex, but also because most states have not committed the legal resources necessary to make so much as a small dent in the backlog. States did not want to spend additional money on moving death-row cases along in better economic times. They will be even less likely to do so now that fiscal circumstances are tight.

Will the Courts Step In?

The U.S. Supreme Court has thus far declined to consider whether this novel form of punishment – decades in a solitary, tiny cell, followed by death – is permitted by our Constitution. The Court has refused to hear petitions from inmates serving as long as 32 years on death row.

The argument the Supreme Court has pushed aside is known as the “Lackey claim,” named for Clarence Lackey, who was the first in a series of unsuccessful petitioners seeking relief. Lackey went to court after 17 years on death row. His lawyers argued that the combination of long confinement in anticipation of death by execution followed by execution constitutes cruel and unusual punishment prohibited by the Eighth Amendment. The Supreme Court gave Lackey’s claim a chilly reception, refusing to entertain it in a full proceeding – not because the argument lacks all merit, but because a ruling for Lackey would fundamentally disrupt capital punishment. Because execution in the United States follows condemnation by more than a dozen years on average, and hundreds of death row cases are still not resolved after twenty to thirty years, recognizing the Lackey claim would take the United States a long way down the road to abolition.

In the mid-1970’s The Supreme Court rejected the choice of totally abolishing capital punishment. The Court opted instead for more stringent regulation and limited reform, restricting the kinds of crimes and criminals subject to capital punishment and attempting to raise barriers to the arbitrary or biased use of this extreme sanction. Following this approach, the Supreme Court has altogether banned execution for crimes other than murder. And the Court has ruled that certain classes of criminals – including juveniles and the mentally retarded – may not be sentenced to capital punishment. These steps have circumscribed capital punishment, but left it in place for some convicted murderers, subject to thorough review after the initial convictions. Recognizing the Lackey claim would take Supreme Court jurisprudence in a very different direction, because current review practices make long delays between capital sentences and executions virtually inevitable. Lackey would represent an epoch-changing movement away from limits and careful reviews toward abolition.

The Oldest Condemned Should be Reprieved

Whether by Supreme Court decision – or through actions by governors and legislatures – commutation should be considered for the oldest, long-serving death row inmates. Letting them die of natural causes in regular confinement would be a modest measure consonant with the Supreme Court’s measured approach to reform. Such relief would bring an end to a practice that should not be tolerated under the Eighth Amendment, the spectacle of elderly prisoners carried or wheeled to the execution chamber after decades of severe confinement on death row.

Read more in Elizabeth Rapaport, “**A Modest Proposal: The Aged of Death Row Should be Deemed Too Old to Execute**,” *Brooklyn Law Review* 77, no. 3 (2012): 1089-1132.

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