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Clutching at Life, Waiting to Die: The Experience of Death Row Incarceration

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Abstract: *This paper seeks to answer whether the official post-sentence process experienced by the condemned awaiting execution creates conditions of cruelty that can invalidate the legality of the death sentence. The study addresses the Supreme Court's refusal to hear a case based on the issue of delay in the application of the death penalty, and examines the standards that have been set by international courts in Africa and the Commonwealth Caribbean in restricting the post sentencing process to a limited time frame in which the state has to carry out the execution, after which the death sentence becomes invalid. The paper also looks at research on the experience and impact of death row incarceration, and presents a case study of the writings of condemned author Caryl Chessman to examine the validity of research findings. The paper concludes that protracted delay in carrying out the death penalty increases the harshness of the punishment to a threshold that renders the sentence cruel and thus unlawful.*

Keywords: capital punishment, death row, death row experience, delay in executions

"Abattoirs are not very nice places. Death Row is no exception."

Caryl Chessman, executed 1960 (1955:118)

INTRODUCTION

In the United States, the average length of time a condemned man or woman can expect to spend awaiting execution is 14 years and 10 months (Snell 2011). The delay between the convict being sentenced to death and being put to death is in theory designed for the condemned to appeal their sentence. In practice, the condemned are subject to years of confinement on 'death row' – isolated in a high security prison, contemplating their impending fate. The dehumanizing experience of confinement prior to execution has been defined by criminologists and condemned alike as a 'living death' (see Johnson 1989; Chessman 1954), but the psychological effects of this confinement are rarely taken into account when weighing the death penalty. The United States Supreme Court has repeatedly refused to take a case based upon the protracted

delay between sentence and execution, denying certiorari in nine cases, but internationally, there is a growing recognition of the psychological torment of a prolonged delay, and countries are gradually holding that execution after an extended period of incarceration constitutes cruel and inhumane punishment.

The purpose of the paper is to inform the reader of the international standards that have evolved with regards to the human experience on death row, and the United States refusal to hear a delay case and thus to consider the issue, despite research in the United States that demonstrates the suffering inherent in prolonged delays in carrying out capital punishment. This paper seeks to answer the question of whether the official post-sentence processes experienced by the condemned awaiting execution create conditions of cruelty that can invalidate the legality of the death sentence.

This paper reviews the international developments towards recognizing the pains of facing execution, and restricting the post-sentencing process to a limited time frame in which the state has to carry out the execution, after which the death sentence becomes invalid. These

rulings – from African courts and the Commonwealth Caribbean – establish a framework for the capital post-sentencing process to ensure that the application of the death penalty does not inflict undue suffering on the condemned. This paper reviews these international legal rulings, and the US Supreme Court's rejection of the question of delay in the post conviction process for death sentenced inmates, with the view of determining if the United States meets these evolving standards of decency. The paper then reviews the research done on the psychological effects of death row incarceration of prisoners in the US and South Africa. Lastly, the experience of waiting to die is illustrated through a reflexive case study analysis of the writings of condemned author Caryl Chessman, who was executed in 1960 after a then-unprecedented twelve-year wait on death row.

REVIEW

The death penalty was suspended in 1972 in the United States when the Supreme Court held that its imposition was arbitrary and racially disparate (see *Furman v Georgia*). States sought to rewrite their statutes, and four years later, the Supreme Court upheld the new capital procedures in the state of Georgia, which included a bifurcated trial, whereby the trial is divided into two stages, one to determine guilt and the other to determine sentence, which ensures that information used to determine the appropriate sentence for the defendant does not bias the jury in establishing whether or not they are guilty. Other procedures introduced in *Gregg* are standards to guide the jury's sentencing process and an automatic appeal to the state Supreme Court (*Gregg v Georgia* 1976). Thirty-five states reinstated the death penalty, although only 32 now retain it, and 1337 executions have been carried out since (Death Penalty Information Center 10th October 2013).

Based on the proportionality review established in *Gregg*, which required that the state Supreme Court, in their automatic review of the sentence, determine firstly whether the sentence is consistent with those handed down in other comparable cases, and whether the sentence is based on constitutionally permissible factors, not arbitrary or prejudice factors (See *Gregg* 1976); hence, the scope of the death penalty has been significantly narrowed in the past decade, with the Supreme Court categorically excluding certain classes of people (juveniles, or the mentally retarded) and classes of crimes (the rape of a child) from capital punishment (see *Roper v Simmons*, *Atkins v Virginia* and *Kennedy v Louisiana*). But capital punishment in the United States continues to be plagued by serious problems.

The arbitrary application of the death penalty is most prominent in the racial disparity of who gets sentenced to death, and there is a large body of research that demonstrates that racial minorities receive unequal treatment compared to their similarly situated white

counterparts (see e.g. Pierce and Radelet 2011; Pierce and Radelet 2005; Baldus et al. 1998). But despite demonstrable evidence of systematic racial bias, the Supreme Court held that there needs to be evidence of purposeful discrimination in the individual's particular case to raise a claim of equal protection violation (*McCleskey v Kemp* 1987).

The issue of innocence is perhaps the most compelling due to the irrevocable nature of the death penalty. Since 1976, 142 people have been exonerated (Death Penalty Information Center 10th October 2013), despite the fact it was only in 2006 that the Supreme Court held that death penalty cases could be re-opened in the light of new evidence (*House v Bell* 2006). Prior to this, the Supreme Court had ruled that new evidence that demonstrated 'actual innocence' was not grounds for habeas corpus relief, because appeals dealt with error of procedure, not error of fact (*Herrera v Collins* 1993).

The plethora of problems in the application of the death penalty led the American Law Institute to declare that the system is 'irretrievably broken', and they have abandoned efforts to create a framework designed to ensure that the death penalty system would be less arbitrary (Liptak 4th January 2010). But delay and the experience awaiting execution is an overlooked aspect of the application of capital punishment in the United States.

METHODS

The research question this paper seeks to address is: Can the official post-sentence process experienced by the condemned awaiting execution create conditions of cruelty that can invalidate the legality of the death sentence? The research method is triangulation of three sources of information: the international and US Supreme Court's rulings on the issue of delay, a review of the academic research conducted on the effect of death row incarceration, and lastly as reflexive case study of the writings of Caryl Chessman.

Chessman is an instrumental case, meaning that it provides an insight into a larger phenomenon (Stake 2005), by illustrating the experience of death row incarceration from the viewpoint of a condemned man, thereby providing a human context with which to better understand the effect of delay and awaiting execution in order to evaluate the question of whether the post-sentence process creates conditions that are cruel.

The data were collected through reflexive readings of Chessman's three autobiographies, *Cell 2455*, *Death Row* (1954), *Trial by Ordeal* (1955) and *Face of Justice* (1957). Chessman's time on death row was several decades ago, and his experience of confinement may differ from today, but the delay he experienced is comparable to current times. At the time of Chessman's incarceration, in the 1940s and 1950s, the condemned could only expect to spend a matter of months on death row before they were

executed (Aarons 1999b). In 1960, a twelve-year delay between sentence and execution was unheard of; in 2012, it is the norm (Snell 2011). As such, despite the passage of time since Chessman's life and execution, his experience in many ways is more analogous to the application of the death penalty in the US today.

The limitation of Chessman books as a data source is that it the analysis is subjective. Coding was conducted based on what seemed relevant to the reader. This is where it is important to be reflexive to promote rigor in the research process (Guillemin and Gillam 2004:275), which requires "critical reflection on how the researcher constructs knowledge from the research process" (Guillemin and Gillam 2004:275). The analysis is also influenced by the findings from previous studies on the topic of the effect of death row incarceration. The case study is important nonetheless to situate the legal developments and research in an experiential context.

LEGAL CHALLENGES

Prior to the Furman decision, the condemned did not expect to spend more than a few months – a couple of years at most – on death row before their sentences were carried out. Extended periods of confinement prior to execution were highly unusual. It was not until the death penalty was reintroduced in 1976 that the appeals process was overhauled, and procedural safeguards were implemented, such as automatic appeals to the state Supreme Court. These post-conviction reviews and appeals have resulted in longer and longer stays on death row (Simmons 2009). More recently, challenges to the lethal injection procedure – the primary method in all 32 retentionist states – have resulted in delays and suspensions of executions, further increasing the time spent on death row (see *Baze v Rees* 2008; Pilkington 28th September 2010).

The period of incarceration between sentence and execution is spent on 'death row', and is necessary in order to afford the condemned a chance to appeal their sentence. As Johnson points out, "a corollary of our modern concern for humanely administered executions is our desire to allow inmates to explore every avenue of appeal before we execute them. This greatly lengthens the prisoner's stay on death row...(during which) the condemned die a slow psychic death" (1998:43). But prolonged delays before the sentence is carried out have resulted in extended periods of imprisonment on death row, prior to execution. Death row inmates face the problem of trying to accept impending death while maintaining the hope that they might still live. Aarons (1999a:53) argues that the "psychological impact associated with death row detention...is probably exacerbated by the elusive hope of eventual release."

Internationally, courts have begun to recognize the pains of death row incarceration. In Zimbabwe, the Commonwealth Caribbean, Uganda and, most recently,

Kenya, limits have been set on the delay between a death sentence being passed and carried out, with an 'inordinate' delay rendering any subsequent execution unconstitutional (see Catholic Commission for Justice and Peace in *Zimbabwe v The Attorney General and Others* 1993; *Pratt and Morgan v the Attorney General of Jamaica* 1993; *Susan Kigula and 417 Others v Attorney General of Uganda* 2009; *Godfrey Ngotho Mutiso v Republic of Kenya* 2010). Zimbabwe became the first country to formally recognize the psychological effects of prolonged confinement prior to execution, and sought to mitigate this by limiting the time the condemned could spend on death row waiting to die. The case, Catholic Commission for Justice and Peace in *Zimbabwe v. The Attorney General and Others* (1993), was filed on behalf of four prisoners who had spent between fifty-two and seventy-two months on death row. The Court considered the physical conditions of their confinement and the psychological torment (including acute fear, suicidal thoughts and preoccupation with hanging) experienced by the condemned.

The Court held that, making allowances for time necessary for the appeals process, a delay of seventy-two months was contrary to Section 15(1) of the Constitution, which provides that no person is to be subjected to 'torture or to inhuman or degrading punishment or other such treatment'. The Justices stated that "the sensitivities of fair-minded Zimbabweans would be much disturbed, if not shocked, by the unduly long lapse of time during which these four condemned prisoners have suffered the agony and torment of the inexorably approaching foreordained death while in demeaning conditions of confinement" (Catholic Commission for Justice and Peace in *Zimbabwe* 1993). However, the country's constitution was rewritten a year later, invalidating the ruling (Hudson 2000).

The Judicial Committee of the Privy Council – the United Kingdom based court of final appeals for most of the Commonwealth Caribbean – followed suit later that year, when they ruled in *Pratt and Morgan v Attorney General of Jamaica* (1993) that a delay of five years between sentence and execution – the length of time they had ascertained the appeals process should take – was 'inordinate' and constituted inhumane and degrading punishment. The ruling applied to all of the Commonwealth Caribbean over which the Privy Council had jurisdiction. The Law Lords stated that "we regard it as an inhuman act to keep a man facing the agony of execution over a long extended period of time" and further that "there is an instinctive revulsion against the prospect of hanging a man after he has been held under sentence of death for many years" (Pratt and Morgan 1993). The Privy Council subsequently held that in countries where citizens had no access to international appeals, the five-year limit was to be reduced accordingly, to discount the time allowed for such international appeals. In *Henfield v Attorney General of the Bahamas* (1997), the Privy

Council held that the limit on delay was three and a half years, as Bahamians did not have access to the UN Human Rights Committee, which was an appeals process the Privy Council determined should take eighteen months. These decisions are of particular importance to the United States because the decisions are handed down by a British Court, and the US relies on British common law (Flynn 1999).

In 2009, the Ugandan Supreme Court upheld a ruling made two years earlier by the Constitutional Court that struck down the mandatory death penalty and inordinate delay as cruel and inhumane. In *Susan Kigula and 417 Others v Attorney General of Uganda* (2009), the Supreme Court stated that the extended period of incarceration prior to execution amounted to cruel, inhuman or degrading punishment. In complaining about the delay, the Court noted that the convicts were not seeking quick execution, but that the delay should exempt them from execution. The Court determined that “a delay beyond three years after a death sentence has been confirmed by the highest appellate court is an inordinate delay” (Kigula 2009 emphasis added).

Kenya set a limit of three years on death row incarceration in 2010, when the *Godfrey Ngotho Mutiso v Republic* was handed down by the Court of Appeal. A year prior to the decision, the President commuted the sentences of the 4,000 inmates on death row on the grounds that the extended wait had caused “undue mental anguish and suffering” (Amnesty International 5th August 2009).

The United States Supreme Court, however, has refused to hear a case based on the extensive length of death row incarceration, despite the fact that the average length of time the condemned spend on death row in the United States is currently 14 years and 10 months (Snell 2011). In 1995, a Texan inmate, Clarence Lackey applied to the US Supreme Court for certiorari in his case, contending that the seventeen years he had spent on death row rendered his execution unconstitutional, contrary to the Eighth Amendment’s prohibition on cruel and unusual punishment. In denying relief, the US Supreme Court, held that the penal objectives of capital punishment – namely, deterrence and retribution – could still be achieved even after a ‘protracted delay’ (*Lackey v Texas* 1995). Appeals based on a ‘protracted delay’ between sentence and execution have subsequently been named Lackey claims, and can only be pursued after an extended period of incarceration for the purpose of execution (Flynn 1997).

A challenge to the extended period of incarceration on death row in the United States has been raised in foreign courts, on the basis of death row phenomenon. The death row phenomenon is not a clinical concept, but rather, it is a legal one. It was adopted in the case of *Soering v the United Kingdom*, a case brought before the European Court of Human Rights in which a German national, Jens Soering, sought to challenge his extradition to the United States where he faced capital murder charges, on the

grounds that were he sentenced to death, the conditions and length of confinement prior to execution breached the European Convention on Human Rights prohibition on inhuman and degrading treatment. Soering did not challenge the death penalty itself, but rather the risk of being exposed to the ‘death row phenomenon’. The Court defined the phenomenon as “consisting in a combination of circumstances to which the applicant would be exposed if, after having been extradited to Virginia to face a capital murder charge, he were sentenced to death” (Soering 1989, 81).

The death row phenomenon tends to be defined by two components: both the conditions of confinement on death row, and the duration of time spent in these conditions. While the two components no doubt influence one another, they are both required to constitute death row phenomenon (Sadoff 2008; Smith 2008). The attendant legal concept, death-row syndrome, refers to the psychological effects that occur as a result of death-row phenomenon. The basis for ‘death-row syndrome’ has its roots in a study on the psychological impact of detention in ‘supermax’ prison, where the conditions of prolonged, solitary confinement was found to give rise to a host of mental health problems (Grassian 1986; Haney 2003), so it is the conditions of detention that gives rise to the syndrome (Schwartz 2006).

The death-row phenomenon claim has been used on an ex ante basis, in order to fight extradition to the United States, but to date the term has not been used to challenge actual death row incarceration in an American court (Sadoff 2008; Smith 2008). This is not to say there have been no challenges to the conditions of death row or the prolonged detention on death row – as these have been raised in US courts – but none have adopted the specific concept of a ‘death-row phenomenon’. Instead, challenges have tended to address the issue of protracted delay. Similarly, the challenges in the Commonwealth Caribbean and parts of Africa have focused solely on the delay issue, not on the conditions of confinement.

The United States has always blamed the prisoner for the delay in his own execution on the grounds that the delay is a result of the condemned pursuing his appeals, rather than with the state for taking their time (Hudson 2000). However, the Privy Council Law Lords stated in *Pratt and Morgan* that if the appeals system allows for the condemned to take advantage in delaying their execution, the fault is with the system. They argue that:

A state that wishes to retain capital punishment must accept the responsibility of ensuring that execution follows as swiftly as practicable after sentence, allowing a reasonable time for appeal and consideration of reprieve. It is part of the human condition that a condemned man will take every opportunity to save his life through use of the appellate procedure. (Pratt and Morgan 1993)

Aarons (1999a:1) has pointed out that an extended delay could in reality be a reflection of the fact that the case is not cut and dry: “a defendant is more likely to be on death row for an inordinate period when the case is on the margins of death eligibility and errors occur during the state’s processing of the case”, which makes the appeals process – as a safeguard against wrongful execution – all the more important.

In 1959, Caryl Chessman challenged his execution on the grounds of the extended delay he had experienced, after he had spent eleven years on death row. The Californian Supreme Court eventually rejected his claim in February 1960 – just three months before he was finally put to death – stating that “we can(not) offer life...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” (Chessman v Dickson 1960:607-608).

RESEARCH

While much has been written about – and by – the condemned, there is a surprising dearth of scholarly research on the effects of death row incarceration. Two years after Caryl Chessman’s execution, Blustone and McGahee (1962) published a study on the psychological coping mechanisms that the condemned employed to deal with their sentence. The researchers conducted psychiatric interviews and psychological examinations over a period of time with 18 men and one woman who were awaiting death in Sing Sing Prison, in New York State. They found that none of the condemned exhibited signs of overwhelming depression or anxiety, which they thought would be the natural reaction to such extreme stress. Therefore, they were interested to learn what mechanisms the condemned used to avoid severe depression and anxiety, and whether these mechanisms changed during the course of their pre-execution incarceration. They found that the most prevalent psychological defense mechanisms utilized to stave off the extreme stress of their situation were “denial, projection and obsessive rumination” (Blustone and McGahee 1962:395). The condemned would deny their predicament by minimizing it, only living in the present, isolating the feelings surrounding possible execution, or through delusions that they would not be executed. Another defense mechanism was projection, where they would blame something or someone outside of themselves for their predicament, such as believing they were framed by the police. Others would become obsessed with their appeals, religion or intellectual pursuits, whereby they were able to avoid depression or anxiety by thinking obsessively about something else (Blustone and McGahee 1962). In this study, the reaction and adaption of the condemned to death row incarceration were treated as psychological defense mechanisms.

In 1978, criminologist Robert Johnson (1989) interviewed 35 of the 37 men under sentence of death in Alabama. He termed life on death row as a ‘living death’, which is “intended to convey the zombie-like, mechanical existence of an isolated physical organism...when men are systematically denied their humanity” (Johnson 1989:17). He found that the experience of death row incarceration was characterized by feelings of powerlessness, fear, and emotional emptiness. The prospect of execution, in particular, was a source of extreme concern - Johnson reports that: “Inmates speculate about the mechanics of electrocution and its likely impact on the body, which they visualize in vivid detail” (1989:85). Denial, too, became an important defense mechanism, especially after initially being sentenced to death. Similar to the findings of Blustone and McGahee (1962), Johnson found that the condemned often displayed “nonchalance and a proclaimed immunity from anxiety, depression, or fear” (1989:7). They were further able to deny these feelings through preoccupations with their appeal process, a religion or some other intellectual pursuit. Ultimately, he found that “death row confinement...is experienced as a...totality of human suffering” (Johnson 1989:99).

Continuing his study into the process of executions, Johnson (1989) also looked at how the condemned and guards alike approach executions, which he termed ‘death work’. Johnson studied the psychological effects of the death work, and discovered that it was a highly bureaucratic process, and execution were carried out in a mechanical and impersonal manner, in order to allow all those but the condemned to maintain an emotional distance. This is a dehumanizing process for the inmate that invokes feelings of powerlessness, loneliness and vulnerability.

Outside of the US, there was a study by Lloyd Vogelman (1989) of life on South Africa’s death row at Pretoria Central Prison. South Africa abolished the death penalty in 1995, in *State v Makwanyane and Mchum* - the first case to be heard by the newly established, post-apartheid Constitutional Court. Prior to a moratorium on executions in 1989, South Africa had one of the highest execution rates in the world, hanging 2,173 people between 1967 and 1989 (cited in Makwanyane and Mchum). Vogelman (1989) conducted interviews with eight men who had been incarcerated on death row for more than a year, before they had had their sentences overturned – some of whom had been only hours from execution. He states that death row incarceration was characterized by fear, anxiety and helplessness. The men expressed a fear of death, stating that “there is intense anxiety about the unknown, the physical pain, as well as leaving their family” (Vogelman 1989:193).

Denial was an important defense mechanism – Vogelman reported that there was a popular myth that existed among the condemned, that on the day of

execution, rather than being hanged, the condemned man – or men – were dropped alive into the ‘blood pit’ below the gallows, where they then lived and worked below the floor boards of the prison. This belief “provides the prisoner with hope, which is a necessary prerequisite for psychological survival” (Vogelman 1989:190). The censorship of newspapers also enforced this posture of hope:

Missing newspaper articles are often incorrectly interpreted by death row prisoners as an attempt to hide information about their particular case. For most, this both a hopeful and persecutory fantasy since their cases receive little media attention. (Vogelman 1989:186)

Like Johnson (1998), Vogelmann found that the condemned’s anguish was exacerbated by the prison wardens, who were not interested in the inmates’ complaints or emotions, as they wished to remain detached.

CASE STUDY

Caryl Chessman’s twelve-year battle to stay alive ended in San Quentin’s gas chamber on 2nd May, 1960. He was convicted and executed for two cases of kidnap for the purpose of robbery, which, under the Little Lindberg law – repealed six years before his execution – carried the death penalty. At the time, Chessman had spent longer on death row than any condemned man before him. He faced death eight times, before the State of California finally succeeded in asphyxiating him on his ninth execution date (Bisbort 2006). Chessman detailed his experience under sentence of death, as he fought for his life, in three autobiographies that were published as he waited to die: *Cell 2455, Death Row* (1954), *Trial by Ordeal* (1955) and *Face of Justice* (1957).

One of the most prominent features of Chessman’s three books is his preoccupation with execution, which is evident from the descriptions of a gas chamber execution throughout the trilogy. In several places, Chessman wrote detailed accounts of what he envisioned an execution to be like, including the mechanisms of the gas chamber, the smell of the gas, the sensation of losing consciousness:

You die alone – but watched. It’s a ritualistic death, ugly and meaningless. They walk you into the green, eight-sided chamber and strap you down in one of its two straight-backed metal chairs. Then they leave, sealing the door behind them. The lethal gas is generated and swirls upward, hungrily seeking your lungs. You inhale the colorless, deadly fumes (1955:3, italics in original).

The executioner is signaled by the Warden. With scientific precision, valves are opened. Closed. Sodium cyanide eggs are dropped into the immersion pan – filled with sulphuric acid – beneath your metal chair. Instantly

the poisonous hydrocyanic acid gas begins to form. Up rise the deadly fumes. The cell is filled with the odor of bitter almond and peach blossoms. It’s a sickening-sweet smell. Only seconds of consciousness remain (1955:197). “They would walk me into the gas chamber, strap me down, seal the door shut. They would generate the gas. I would go to sleep for keeps. Then – oblivion” (1954:341).

Vogelman (1989) relates that the South African condemned who he interviewed were likewise preoccupied with hanging – he states that they would discuss the process in detail, and one prisoner even reported ‘practicing’ what it would be like not being able to breathe. Johnson (1989) too relates that Alabama’s condemned were obsessed with the thought of dying by electrocution, in particular the workings of the electric chair, how they would bear up in the death chamber, and whether they would experience pain. This preoccupation is a result of a fear of death and of the unknown (Vogelman, 1989).

To deal with this, Chessman exhibits different coping mechanisms throughout his books. He denies that he fears death, or is indifferent towards death, and he dissociates himself from his death sentences by preoccupying himself with his legal appeals and his writing. Coping mechanisms are necessary in order to protect the condemned from the crippling stress and anxiety they would otherwise experience as they waited to be put to death (Blustone and McGahee 1962).

Chessman goes to great lengths to deny that he felt fear about death – a common psychological defense mechanism identified by Johnson (1989). At the beginning of his third book, he states:

There is still a gas chamber in my future. I don’t like THAT worth a damn. Not that I am gripped by a paralyzing death fear, for I have seen, heard, tasted and smelled too much of Death; I have been too perilously close to Death too long, too often, to be troubled by the prospect of imminent physical extinction (1957:xii).

After his sixth stay of execution, he relates:

On the surface I was calm enough. Too calm, perhaps. Yet it wasn’t cavalier calmness. I had been equally prepared to live – or die. I had been punished too long, I had been snatched from the gas chamber one time too many, to react emotionally. Death had simply lost all personal meaning for me (1955:275).

This indifference can be attributed to the psychological impact of having to prepare himself to die, only to be reprieved, and sometimes only hours before he was due to be executed. That must have been a truly harrowing experience, and left him at least consciously expressing an indifference to death. Given the psychological toll that facing six execution dates must

have had on him, dissociation would seem the natural reaction to protect himself from what must be intolerable stress.

Chessman employs dissociation – he detaches himself from his situation by viewing his case as an outsider – a lawyer, or an author. He refers to his own case as the ‘Chessman case’. He says: “The Chessman case...it was either a lawyer’s dream or a lawyer’s nightmare, depending on the lawyer” (1957:52, ... in original), and later, “This time there wasn’t going to be another stalemate in the Chessman case, even if it meant getting checkmated” (1957:101). He also talks extensively about the legal mechanics of the case, and when he talks about his case, he talks as if he is the lawyer on the case, concerned with the legal maneuvers and technicalities, rather than the very fatal consequences these could have for him:

His Honor then dropped a blockbuster on us. If we hadn’t anticipated the way the hearing would go, it would have been fatal. Our petition squarely alleged that the shorthand notes of the deceased reporter were ‘undecipherable to a large degree’ and that Fraser was ‘incompetent to transcribe’ those notes. This was the fundamental issue in the case (1957:134).

On writing his third book, he states that “I began by letting Caryl Chessman, the condemned man, speak. Of course, it was not he who would write the book. The writing itself would be done by Caryl Chessman, the author” (1957:202). This portrayed the detachment he had – he compartmentalized different parts of his life, so he was able to be an author, rather than a condemned man. He is able to deny his feelings by becoming preoccupied in the legal nuisance of his appeals, or in the process of writing and publishing. Both Johnson (1989) and Blustone and McGahee (1962) found that their participants also focused furiously on other pursuits, such as their appeals or religion, in order to stave off the feelings of intense anxiety or fear over their death sentence.

Lastly, Chessman appears to try and distance himself from his situation by using the second and third person to describe his own life. In Cell 2455, Death Row, when he was describing his childhood, he exclusively uses the third person. In many parts where he is describing an execution, or his thoughts and reactions to his various executions dates and subsequent stays, he uses ‘you’ – for example, at his trial, he talks in the first person:

I spent that night chain smoking, pacing the cramped floor of my jail cell, reviewing the evidence from every conceivable angle and forming in my mind what I would – or could – say on the morrow when I confronted those twelve grim-faced talismen and talked for my life (1954:293).

But when he got sentenced to death, he moves from talking in the first person to the second person:

The jury has found you guilty on seventeen of the eighteen charges. On two it has fixed the punishment at death. You know then that the long, tough battle for survival, rather than just ending, is just beginning. You know you are headed for Death Row and you will be lucky – damned lucky – to come off the Row alive (1954:294).

Earlier in the book, when discussing his legal battle to live, Chessman talks about it in the third person, stating that he is “stubbornly refusing to acquiesce to California’s demand that he forfeit his life, the only possession he has left.” (1954:123-124). This use of different voices is an attempt to distance himself from the more painful parts of his life, and the grim reality of his situation. It supported a posture of denial, which was a prominent finding in previous research.

Blustone and McGahee (1962), Johnson (1989) and Vogelmann (1989) all found that denial was a coping mechanism that the condemned used frequently to deal with their situation. Denial is essential part of survival on death row, to prevent the condemned from falling into depression or extreme anxiety about their predicament. Blustone and McGahee (1962) identify four main forms of denial utilized by their 19 death row inmates, which included delusion or only living in the present, while Vogelmann (1989) found that a belief in myths was a popular form of denial – especially the myth that one was not actually hanged at the execution – while Johnson (1989) found that turning to religion was means of denying the finality of death.

However, Hamm (2001:71) has argued that the use of the second or third person by Chessman is “an obvious attempt to implicate the audience in his plight” in order to generalize the experience.

But at some points, Chessman seems ready to give up, as his stay on death row takes its toll on him: “the depressing atmosphere of Death Row, the baffling legal maze, the feeling of being trapped – these made it easy to say to hell with it...Just take a deep breath and your worries were over, the anxiety and the torment were gone” (1955:76). Vogelmann (1989) also reports some condemned men in South Africa had similar suicidal ideations when the emotional pain became too much, and the coping mechanisms failed to allay the fear and helplessness they experienced.

A defining characteristic of death row incarceration is the uncertainty of eventual execution. The condemned are furnished with the time and a complex appeals system with which to fight for their life after being sentenced to death. Johnson (1989) points out that it is this uncertainty that means the condemned cannot choose to either maintain hope or just give up; they are instead stuck in limbo,

waiting, for forces outside their control to decide whether they live or die. Chessman described the wretched powerlessness he felt as the legal system toyed with his life, constantly raising and dashing his hopes: “after six years of this, death itself couldn’t be too bad. It was the waiting that was rough, the pressure and the tension.” (1955:68). He goes on to state that “the waiting and uncertainty are a fierce, punishing experience” (1955: 201) and a “devilish form of torture” (1955:190). The appeals process fosters a torturous hope for the condemned, allowing them the belief that they may still live.

The appeals and stays of executions did give Chessman false hope. Following his second reprieve from the gas chamber, Chessman discusses his hope to live – for a life and future beyond death row. “I wanted only to do something with my life so long as I retained pulse and breath and thought. Months before I had recognized that if my existence were to have any meaning, it was I who would have to create that meaning in the days left to me” (1955:17). Later in the book, he discusses his ties to the outside world, reiterating that he hopes for a future:

I’ve learned to love and to know the meaning of friendship and I’m not ashamed of it. I have ten approved correspondents on my mailing and visiting list, the maximum number allowed. I’ve kept up with the world beyond this tiny, violent one around me. Someday I hope to be a part of that larger world again (1955:121).

His writing, too had given him a reason to want to live:

I’ve found a challenge in my writing that has given my life meaning, purpose, direction. I’ve added a new dimension to my existence. I’ve learned to value love and friendship. I’m still fighting, but now it is for what I believe in” (1955:184).

Vogelman (1989) notes that hope was essential to psychological survival on death row, and several of the men in his study went so far as to make plans for the future – he relates how two men under sentence of death would make plans to set up a business together in the outside world.

But when the appeals do not succeed and the condemned do not receive the outcome they had wanted, Chessman states that “it is the most terrible thing of all to watch hope die, only to be reborn and then, again and again, to be strangled slowly and mercilessly” (1957:201). Worse than the hope and despair of the appeals is the experience of a reprieve from execution, which exacerbates the uncertainty over whether they will be put to death or not. Chessman experienced a total of eight stays of execution, more than once receiving a reprieve at the eleventh hour. He was forced to prepare himself for

death nine times, and eight times he received a stay. Chessman records the elation of being spared, only to face another execution date. Chessman relates the experience as being in limbo, not part of the world of the living, but not quite dead. As his fourth execution date loomed, he writes: “the imminence of a state-imposed death had walled me off from the living. And was a walking dead man in the eyes of those looking at us” (1955:54), and when he receives an 11th hour stay: “time lurched, stopped, started. Suddenly, unbelievably, I belonged to the world of the living again” (1955:55). But his execution was rescheduled, and he had prepared himself to die yet again:

For the second time in less than three months, I found myself with only twenty-seven hours of life left...Again I tore up my bed, folded the sheets and blanket, got the cell ready to leave it. Again, I listened as the newscaster virtually had me in the gas chamber already. You have a choice: you can get scared or mad (1955:69).

For the fifth time, he had an execution date, and for the fifth time, he received a stay:

I had another stay! It was hard to believe. I was surprised to find my voice even, my hands steady...How did it feel to have been literally snatched again from the gas chamber? How did it feel to look around and see life and know that I still would be part of it tomorrow and the next day and the day after that? It felt good, and I said so unashamedly (1955:72).

He went through similar emotions when he received his sixth stay of execution: “I wouldn’t be put to death in sixty-odd hours. I’d go on living on Death Row, as I had for six years, six months and eight days. Judge Denman had jerked me back from the grave. I was grateful beyond words” (1955:274).

The experience of being exposed to imminent execution, only to receive a stay is a kin to mock execution, which is considered a form of torture under international law (Pilkington 20th September 2011). While there is no research on the effects of mock execution, the research on torture survivors demonstrates that they experience post-traumatic stress disorder, depression and anxiety (Basoglu et al. 2001; Campbell 2007), although research has also demonstrated that they also suffer from emotional numbing, nightmares, social withdrawal and problems of impulse control (Basoglu et al. 1994). In Pratt and Morgan, the Law Lords reacted to the three stays that the appellants had experienced – once, not receiving news of the stay until 45 minutes before they were due to be hanged – stating that: “the statement of these bare facts is sufficient to bring home to the mind of

any person of normal sensitivity and compassion the agony of mind that these men must have suffered as they alternated between hope and despair in the 14 years that they have been in prison facing the gallows” (1993).

Chessman’s hope did end up proving futile. Three years after the publication of his final autobiography, he was put to death. After eight stays of execution, Chessman’s ninth date with the gas chamber was scheduled for 10am on 2nd May 1960. Chessman’s ninth stay of execution came through at 10.05am (Bisbort 2006).

CONCLUSION

The purpose of this paper was to address whether the official post-sentence process experienced by the condemned awaiting execution creates conditions of cruelty that can invalidate the legality of the death sentence. This question has been addressed through a triangulation of three interrelated presentations of legal rulings, academic research and the experiential, through a reflexive case study of the writings of a condemned man. The research and Chessman’s writings demonstrate that the experience of living under a death sentence causes the condemned intense suffering, and several jurisdictions have sought to remedy this by setting limits on the delay between sentence and execution.

Waiting to die inevitably causes suffering, but a delay between sentence and execution is necessary for the appeals process. Internationally, courts have deemed that it only becomes cruel when the delay is no longer attributable to a legitimate purpose, because the appeals process is not being carried out in a timely manner. This is not to say that appeals should be expedited, as that could result in a less thorough judicial review, and render the safeguard of the appeals process meaningless. Rather, if a state wishes to maintain capital punishment, it must have a fully functioning and efficient capital appeals process that is capable of carrying out thorough judicial reviews of all of those that the state sentences to death in a timely fashion. If the system cannot do that, then the fault is with the system, and it is not just to subject men and women to years on death row because the system does not work. Furthermore, a system that allows for multiple execution dates, followed by temporary reprieves suggests a legal process that is unable to determine who should live and who should die, making it, in the words of the American Law Institute, irretrievably broken.

The standard that the Privy Council set in their decision in *Pratt and Morgan* meant that the Law Lords worked out how long both the domestic and international appeals process should take in Commonwealth Caribbean countries, and set the limit of five years based upon this, reducing the time limit in jurisdictions which had fewer appellate options (see *Henfield v Attorney General of the Commonwealth of the Bahamas* 1997). This way, the appeal process for condemned is protected, and it is the

responsibility of the state to ensure that the appeal process is carried out in a reasonable time. If the state fails to do this, then the sentence becomes unlawful.

The sentence of death requires merely that the life of the condemned be extinguished, not that they are confined in a living tomb for an extended period of time, awaiting the executioner. Guilty or innocent, good or bad, nothing justifies the caging of human beings for the sole purpose of killing them. Internationally, there is a growing realization of the dehumanizing and inhumane experience of waiting for execution, and it is time the United States recognized that capital punishment involves more than the mere extinguishing of life. Living on death row is dehumanizing, and Chessman perhaps best summed it up when he said that: “Its inhabitants didn’t live; they clutched at life, waiting to die” (1955:62).

Caryl Chessman died over 53 years ago. His books are now out of print. It is important not to lose the value of what he wrote, or the contribution his insights make. His case may involve an outdated method of execution, for a crime no longer punishable by death, but his prolonged wait to die is still a very real part of the modern execution process. The impact of the post-conviction process, which includes a lengthy delay awaiting execution, and which is characterized by uncertainty over the eventual outcome of the sentence, increases the harshness of the punishment to a threshold that renders the sentence cruel and thus unlawful.

This study seeks to contribute to an under-studied phenomenon. The delay between being sentenced to death and being put to death is an ignored cost of capital punishment. Internationally, courts are beginning to recognize the “agony of suspense” of an extended delay on death row (*Pratt and Morgan v The Attorney General of Jamaica* 1993), but it is something the US Supreme Court has not addressed, despite the fact that there are now 3,158 men and women on death row in the United States (Snell 2011), a place they are likely to stay for well over a decade. The punishment of death cannot be evaluated – in terms of retribution, constitutionality, or merely as a moral issue – without taking into account the experience of waiting to die.

Notes

¹ *Lackey v Texas* 514 U.S. 1045 (1995); *McKenzie v Day* 115 S. Ct. 1840 (1995); *Ellege v Florida* 525 U.S. 944 (1998); *Knight v Florida* 528 U.S. 990 (1999); *Moore v Nebraska* 120 S. Ct. 459 (1999), *Forest v Florida* 123 S. Ct. 470 (2002); *Johnson v Bredesen* 130 S. Ct. 541 (2009); *Thompson v McNeil* 129 S. Ct. 1299 (2009); *Valle v Florida* 654 U.S. 132 (2011).

² The Caribbean Court of Justice (CCJ) in Trinidad is seeking to replace the Privy Council as the final court of appeals for the Commonwealth Caribbean. So far, Belize Barbados and Guyana have acceded to the CCJ.

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