

Summer 6-1-2016

Solitary Confinement Until Death by State-Sponsored Homicide: An Eighth Amendment Assessment of the Modern Execution Process

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Recommended Citation

Robert Johnson, *Solitary Confinement Until Death by State-Sponsored Homicide: An Eighth Amendment Assessment of the Modern Execution Process*, 73 Wash. & Lee L. Rev. 1213 (2016), <https://scholarlycommons.law.wlu.edu/wlulr/vol73/iss3/7>

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Solitary Confinement Until Death by State-Sponsored Homicide: An Eighth Amendment Assessment of the Modern Execution Process

Robert Johnson*

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I. Introduction

The death penalty in America is a punishment with two essential and inseparable dimensions: (1) solitary confinement under sentence of death for years and even decades, followed by (2) execution in the death chamber in what amounts to a state-sponsored homicide. In practice, these dimensions merge, yielding a regime of solitary confinement that culminates in a death by state-sponsored homicide. The killing process—from solitary

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confinement on death row through execution in the death house—is an objectively dehumanizing one: condemned prisoners are stored on death row like objects rather than human beings, and then dispatched in the death chamber following an impersonal and degrading execution routine.

It is fitting, then, that many condemned prisoners see themselves as “the living dead” and death row confinement as “a living death.” These observations were first established in my ethnographic study of life under sentence of death on Alabama’s death row at Holman Prison in 1979,¹ reinforced in my study of the death house and execution process in Virginia in 1989,² and recently confirmed by other observers (including the ACLU).³ The notion that the condemned are in some sense dead before they are executed supports the prescient observations of the French existentialist, Albert Camus. In Camus’ reckoning, the condemned prisoner “is undone by waiting for capital punishment well before he dies. Two deaths are inflicted on him, the first being worse than the second Compared to such torture, the penalty of retaliation seems like a civilized law.”⁴

Drawing on my prior writing on the death penalty, from which I borrow liberally, I will dissect the process by which a prisoner

1. See generally ROBERT JOHNSON, CONDEMNED TO DIE: LIFE UNDER SENTENCE OF DEATH 99–118 (1981) [hereinafter CONDEMNED TO DIE]; see also MARIO HECTOR, DEATH ROW: JAMAICAN PRISON DIARY (1984) (characterizing death rows as unremittingly bleak living environments); Lloyd Vogelmann, *The Living Dead: Living on Death Row*, 5 S. AFR. J. HUM. RTS. 183, 195 (1989) (“While the condemned are [on death row], they are the living dead.”); LISA GUENTHER, SOCIAL DEATH AND ITS AFTERLIVES: A CRITICAL PHENOMENOLOGY OF SOLITARY CONFINEMENT 253–56 (2013) (concluding that the “social death of prisoners” affects society in its entirety); Diana Peel, *Clutching at Life, Waiting to Die: The Experience of Death Row Incarceration*, W. CRIMINOLOGY REV. 61, 69 (Nov. 2013) (suggesting that international reforms to the death row appeals process could benefit the system in the United States).

2. See ROBERT JOHNSON, DEATH WORK: A STUDY OF THE MODERN EXECUTION PROCESS 153 (2d ed. 1998) [hereinafter DEATH WORK] (arguing that the modern execution process is an actual, and not merely a metaphorical, example of torture).

3. See ACLU, A DEATH BEFORE DYING: SOLITARY CONFINEMENT ON DEATH ROW 6–7 (2013) (describing the typical “negative physiological and psychological reactions” of prolonged solitary confinement).

4. ALBERT CAMUS, *Reflections on the Guillotine*, in RESISTANCE, REBELLION, AND DEATH 205 (1961).

dies twice under sentence of death and show how this process facilitates executions that are carried out efficiently, with no resistance from the typical condemned prisoner.⁵ In essence, this process entails the dehumanization of the prisoner—the death of the person’s humanity, which in turn paves the way for passive participation in the death of the body carried out in the killing process that unfolds in the death chamber.⁶ I will argue that the totality of the experience of prisoners put to death in America today necessarily and inevitably entails dehumanization, which I contend is at the heart of all forms of torture.⁷ I conclude that the death penalty in practice is a form of torture (exposing condemned prisoners to intense suffering in the form of ongoing torment),⁸ that it is cruel for Eighth Amendment purposes (failing to meet a “carceral burden”⁹ to respect and protect prisoners, which is essential to humane punishment), and that the death penalty is therefore in clear violation of the Eighth Amendment.¹⁰

II. *Death Row as a Human Warehouse*

There is something basic and timeless about the plight of those held captive awaiting execution. The very label, Death Row, is evocative. Helen Prejean—noted author of *Dead Man Walking*—

5. *Infra* Part II.

6. *Infra* Part III.

7. *Infra* Parts III and IV; see CONDEMNED TO DIE, *supra* note 1, at 129 (“[A] death sentence amounts to death with torture in a society that has explicitly renounced torture as a remnant of barbarism.”); see also DEATH WORK, *supra* note 2, at 201–02 (describing death row inmates as “objects” suffering from “personal deterioration”).

8. Torment is an essential ingredient of torture, as will be elaborated upon in this Article. See DARIUS REJALI, TORTURE AND DEMOCRACY 554 (2007) (describing various forms of torture).

9. Dolovich establishes that a “carceral duty” to protect and respect prisoners is an essential ingredient of just punishment, a point that will be elaborated upon later in this article. See Sharon Dolovich, *Cruelty, Prison Conditions, and the Eighth Amendment*, 84 N.Y.U. L. REV. 881, 881–82 (2009) (stating that the state’s carceral duty includes “an affirmative obligation to protect prisoners from serious physical and psychological harm”).

10. *Infra* Parts IV and V.

upon her first visit to death row, observed: “My stomach can read the letters better than my brain.”¹¹ Her stomach can read the words better than her brain because she has a “gut feeling of empathy evoked by the helplessness and vulnerability of the condemned.”¹² Michael Lesy reports a similarly basic reaction upon visiting death row, falling back on the image of the setting as a dungeon for the dispossessed: “The place was a dungeon,” he stated, “full of men who were as good as dead.”¹³

Death rows, even the best of them, are human warehouses. The vast majority of death rows—more than ninety percent by a recent count—store condemned prisoners in their solitary cells for up to twenty-two hours a day as they await execution.¹⁴ Other death rows offer what amounts to congregate solitary confinement: condemned prisoners are allowed out of their cells, sometimes for many hours during the day, but are contained in small groups in dayrooms on the pod or tier in which they are housed, in complete isolation from the larger prison.¹⁵ In earlier research, I described one such congregate death row as follows:

The dayrooms are complete with glass-encased control modules that are manned around the clock; these modules supplement the bars and locks that keep the dayroom areas securely segregated from the rest of the prison. Surveillance is unremitting. As a result, the dayrooms serve less as a respite from the prisoners’ cells and more as an extension of those cells, yielding a kind of group solitary confinement. Movement outside the dayrooms is fully controlled at all times, with prisoners handcuffed, shackled, and escorted under heavy guard. It is as if the prisoners drag the death row environment around with them wherever they go, like the chains that bind their hands and feet during their rare excursions within the

11. Robert Johnson & Harmony Davies, *Life Under Sentence of Death: Historical and Contemporary Perspectives*, in AMERICA’S EXPERIMENT WITH CAPITAL PUNISHMENT: REFLECTIONS ON THE PAST, PRESENT, AND FUTURE OF THE ULTIMATE PENAL SANCTION 661 (James R. Acker et al. eds., 3d ed. 2014).

12. *Id.*

13. *Id.* at 662.

14. See ACLU, *supra* note 3, at 5 (stating that “93 percent of states lock up their death row prisoners for 22 or more hours per day”).

15. See CONDEMNED TO DIE, *supra* note 1, at x–xi (describing congregate death rows).

prison. Officers and inmates alike describe this death row as a cold, lonely, and often frightening world.¹⁶

Life on congregate death rows offers prisoners more time out of the cell but nothing of substance to do with that time. The result is a numbing regimen of cards, board games, and sometimes television viewing, empty exercises that create an environment marked by human interaction but no escape from others, either officers or fellow condemned prisoners, or from the hopelessness that comes with the weight of the death sentence.¹⁷ This grim world is in some ways hauntingly reminiscent of Jean-Paul Sartre's notion "that hell is other people" from whom there is "no exit."¹⁸ On a congregate death row, one is trapped with people one neither likes nor trusts.¹⁹ Yet, each and every day, one must deal with them and their concerns, as well as with one's own growing despair in the face of the miserable existence that is life under the threat of execution. In the words of one prisoner condemned to this congregate hell:

Not a day passes that I do not fight just to get out of bed. And in the late hours of the night, it takes much strength just to keep a grip on my sanity. I have spent many hours, at my window, standing on my toilet at the air vent, pleading with men who were considering suicide . . . I have been on that very edge myself.²⁰

This congregate death row, much like its solitary counterpart, is "a psychological nightmare that very few survive."²¹

I will focus here on solitary confinement death rows, the more common form, but it is crucial to note that all death rows offer prisoners a species of dead time: The death row confinement regime, whatever its details, offers no life to speak of, only an isolated world devoid of purpose or meaning other than waiting for the executioner. My research has led me to conclude that death rows may differ in the details of their administration, but no death

16. *Id.*

17. *See generally* CONDEMNED TO DIE, *supra* note 1.

18. NO EXIT & THREE OTHER PLAYS 47 (1955).

19. *See generally* CONDEMNED TO DIE, *supra* note 1.

20. *Id.* at x–xi.

21. *Id.* at x.

row, solitary or congregate, offers its inmates a round of activity that might in any way prepare them for the ordeal they must face.²² In this basic and profound sense, all condemned prisoners are warehoused for death.²³ Moreover, as executions approach, condemned prisoners are moved from death row to the death house, to undergo especially close custody during a process called the death watch, which occurs during the final days and hours before a prisoner is put to death.²⁴ A rigid, solitary-confinement regimen marked by constant and unremitting surveillance is universally imposed during the deathwatch.²⁵ Thus it can be said that condemned prisoners live—metaphorically if not literally, in solitary cells or in solitary pods, and finally in the death house—in the shadow of executions.²⁶

22. See generally DEATH WORK, *supra* note 2.

23. Condemned prisoners in Missouri are held in general maximum-security housing in Potosi Correctional Center rather than on a separate death row. Death row confinement would be classified as “supermaximum confinement” by comparison. See Mark D. Cunningham, Thomas J. Reidy & Jon R. Sorensen, *Wasted Resources and Gratuitous Suffering: The Failure of a Security Rationale for Death Row*, 22 PSYCH., PUB. POL. & LAW 185, 185 (2016) (discussing the differences in death row confinement). For further discussion of the confinement of condemned prisoners in Missouri and also North Carolina, which offers a similar regime, see CELINA ALDAPE ET AL., RETHINKING “DEATH ROW”: VARIATIONS IN THE HOUSING OF INDIVIDUALS SENTENCED TO DEATH 8 (2016), https://www.law.yale.edu/system/files/documents/pdf/Liman/deathrow_reportfinal.pdf (comparing housing arrangements of death-sentenced prisoners in North Carolina, Missouri, and Colorado). Maximum-security prisons offer more options for living than can be found on death rows, but these prisons, like death rows, offer no meaningful preparation for the threat of execution under which condemned prisoners live. Most maximum-security prisons, not unlike death rows, are human warehouses in their own right, though less repressive and dehumanizing human warehouses than those typically found on death row. See ROBERT JOHNSON, ANN MARIE ROCHELEAU & ALISON B. MARTIN, *HARD TIME: A FRESH LOOK AT UNDERSTANDING AND REFORMING THE PRISON* (forthcoming 2017) (discussing conditions of maximum-security prisons) (on file with author).

24. See Johnson & Davies, *supra* note 11, at 669 (describing death row confinement as “expressly undertaken as confinement in preparation for execution”).

25. See generally JOSEPH B. INGLE, *THE INFERNO: A SOUTHERN MORALITY TALE* (2012); DEATH WORK, *supra* note 2.

26. See generally INGLE, *supra* note 25; see also CONDEMNED TO DIE, *supra* note 1, at 80–98 (discussing the contemplative state of inmates awaiting execution).

An execution is a state-sponsored homicide—“a killing of one human being”—the condemned prisoner—“by another”—the executioner or, more typically these days, the correctional officers who make up the execution team.²⁷ No death row is or has ever been organized to prepare prisoners for the traumatic experience of living under the threat of death by homicide and then submitting to that killing at the hands of a team of prison officers. This, in plain view of one or more groups of witnesses, all occurs in the context of an impersonal ritual in which the violence of execution unfolds according to a protocol that amounts to a killing script. This killing script is captured in the Death Row Diary of William Van Poyck, who was executed by the State of Florida on June 12, 2013:

Watching Elmer [Carroll] go through his final days really drove home how ritualized this whole process has become; the ritual aspect perhaps brings some numbing comfort—or sense of purpose—to those not really comfortable with this whole killing people scheme. This is akin to participating in a play where the participants step to a rote cadence, acting out their parts in the script, with nobody pausing to question the underlying premise. It's like a Twilight Zone episode where you want to grab someone, shake them hard, and yell “Hey, wake up! Don't you know what's going on here?!!!”²⁸

No death row is or ever has been organized to prepare prisoners for the moments of ersatz decency, seen most clearly in last meals and last words, which offer breaks in the killing routine but also are evidence of breathtaking hypocrisy. The hard truth is that for years, even decades, condemned prisoners are fed on swill and denied any voice whatsoever in their daily lives. Then, on the threshold of execution, the state pays attention to the prisoners as individuals—typically offering special last meals, always encouraging last words, sometimes extending a gentle hand to help the prisoner in his last walk to the death chamber—the implication being that justice is meted out by compassionate, caring

27. See DEATH WORK, *supra* note 2, at 123–41 (discussing modern execution teams).

28. William Van Poyck, DEATH ROW DIARY (June 25, 2013, 4:57 PM), <http://deathrowdiary.blogspot.com> (last visited Sept. 8, 2016) (on file with the Washington and Lee Law Review).

professionals who kill reluctantly, and impersonally, in the service of justice.²⁹

The condemned on death row, then, are held in a sort of existential limbo—a place offering a life on the barest terms, at once a sterile, repetitive, empty existence; and a death framed in the menacing guise of a homicide dressed up as justice. As noted earlier, some death row inmates characterize their existence as a living death and themselves as the living dead.³⁰ The imagery of living death, in my view, offers an appropriate description of the human experience in a world where life is so obviously ruled by death. This deeply compelling image, I contend, captures the fundamentals of life under sentence of death: the condemned prisoners' profound deprivation of personal autonomy and control over resources critical to psychological survival; their suspension in a stark, empty, tomblike setting, a sort of dead zone that is utterly indifferent to basic human needs and desires; and their enforced isolation from the living, with the resulting “emotional emptiness and death” that is a hallmark of dehumanization.³¹

My research on the experiences of prisoners on death row and in the death house supports the proposition that the condemned have, as a general rule, died psychologically before they are physically put to death.³² These prisoners, today as in past centuries, take their last walks as defeated creatures, effectively beyond resistance.³³ This death before execution, if you will, would

29. See generally Linda Ross Meyer, *The Meaning of Death: Last Words, Last Meals*, in WHO DESERVES TO DIE: CONSTRUCTING THE EXECUTABLE SUBJECT 176 (Austin Sarat et al. eds., 2011); Joanna Heaney, *Too Little, Too Late*, 6 BLEAKHOUSE REV. 15 (2013); Robert Johnson et al., *Death Row Confinement and the Meaning of Last Words*, 3 LS. 141 (2014); Michael Owen Jones, *Dining on Death Row and the Crutch of Ritual*, 127 J. AM. FOLKLORE 3 (2014); Daniel LaChance, *Last Words, Last Meals, and Last Stands: Agency and Individuality in the Modern Execution Process*, 32 L. & SOC. INQUIRY 701 (2007).

30. See *supra* note 1 and accompanying text (discussing life as the living dead).

31. See sources cited *supra* note 29 (discussing states' dehumanizing techniques).

32. See Johnson & Davies, *supra* note 11, at 662 (describing this phenomenon as “dehumanization”).

33. See DEATH WORK, *supra* note 2, at 143 (discussing the defeated nature of death row inmates); see generally SCOTT CHRISTIANSON, *CONDEMNED: INSIDE THE SING SING DEATH HOUSE* (2000).

seem to be the case regardless of the particulars of the penal regime, the execution process, or, indeed, the prisoner population.³⁴

A regimen of solitary confinement has been and remains the central characteristic of life under sentence of death.³⁵ For the death row prisoner, more than any other category of inmate, being alone—and being lonely, even when in the presence of others—is a central and perhaps even defining fact of existence: “No one really knows what loneliness is until they come to the row,” observed one condemned prisoner.³⁶ “On the row a person feels lost in deep despair. You feel no one will ever be able to help you. All is lost.”³⁷ Death row is the extreme case of the pain and deprivation of prison, an existential vacuum, the prison’s prison.

The empty existence offered to death row prisoners is reflected in the objective conditions of their confinement. “Most death row prisoners in the United States,”—we learn from a recent national survey—“are locked alone in small cells for 22 to 24 hours a day with little human contact or interaction.”³⁸ Sterility is a salient feature of these regimes, where there is “reduced or no natural light” as well as “severe constraints on visitation, including the inability to ever touch friends or loved ones.”³⁹ The limited and limiting life on death row is the core of the prisoner’s existence; “An overwhelming majority of states do not allow death row prisoners to have access to work or employment opportunities, or provide access to educational or vocational programming of any kind.”⁴⁰ Eight in ten death rows “allow only one hour or less of

34. See Johnson and Davies, *supra* note 11, at 663 (describing those condemned prisoners as being “already half dead”).

35. As noted earlier, most death rows—over ninety percent, by one recent count—impose what amounts to round-the-clock storage in a cramped, barren, single-person prison cell. See ACLU, *supra* note 3, at 5 (stating that “93 percent of states lock up their death row prisoners for 22 or more hours per day”).

36. WELCOME TO HELL: LETTERS AND WRITINGS FROM DEATH ROW 44 (Jan Arriens ed., 1997).

37. *Id.*

38. ACLU, *supra* note 3, at 2.

39. *Id.*

40. *Id.* at 5.

exercise daily for death row prisoners.”⁴¹ These brief respites from the solitary regime are commonly taken in “a cage, pen, or cell” in which there typically is no “exercise equipment, or even a simple ball to bounce up and down.”⁴² The result is a regimen of human storage apart from the larger prison and outside world in which “many prisoners will go years without access to fresh air or sunshine.”⁴³

The trend on death rows today is toward increased isolation and control in those states where executions occur with any regularity.⁴⁴ Texas, Florida, Virginia, and Oklahoma are the top four execution states as of this writing.⁴⁵ Together, they account for roughly two-thirds of all executions carried out since the executions commenced in 1977.⁴⁶ The death rows in these states are especially repressive, featuring undiluted regimes of solitary confinement.⁴⁷ Texas, which accounts for over 500 executions since the return of the death penalty in 1976—the most of any state—has a death row that offers “the most cell time and the fewest amenities” of any death row in the nation: “23 hours a day in the cell, no TV, solitary exercise, no work, and no programs.”⁴⁸

41. *Id.*

42. *Id.*

43. *Id.*

44. See Johnson & Davies, *supra* note 11, at 668–69 (listing nine general conclusions that apply to most condemned prisoners in the United States).

45. *Number of Executions by State and Region Since 1976*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/number-executions-state-and-region-1976> (last updated July 15, 2016) (last visited Oct. 4, 2016) (on file with the Washington and Lee Law Review).

46. Johnson & Davies, *supra* note 11, at 668.

47. See *id.* (discussing the severe examples of solitary confinement on death rows in the United States). States with less active death penalties, in which years or even decades may pass between executions, typically have confinement regimes that are less repressive. See *id.* (noting, however, that some of these states still retain repressive regimes mimicking solitary confinement). Some offer what I have termed congregate solitary confinement, allowing condemned prisoners more time out of the cell and more human contact with other condemned prisoners but no contact with the larger prison, from which they are strictly isolated (examples at the time of this writing would include North Carolina and Utah). See generally Sandra McGunigall-Smith, *Men of a Thousand Days: Death-Sentenced Inmates at Utah State Prison* (2004) (unpublished Ph.D. dissertation, University of Wales, Bangor) (on file with the Washington and Lee Law Review).

48. Johnson & Davies, *supra* note 11, at F669; see also Dave Mann, *Solitary*

In addition to more repressive regimes in high-execution states, stays on death row are much longer than in any time in history. Justice Breyer, in *Glossip v. Gross*,⁴⁹ cites compelling statistics: “In 2014, 35 individuals were executed. Those executions occurred, on average, nearly 18 years after a court initially pronounced its sentence of death.”⁵⁰ Remarkably, Breyer reports, that “[i]n some death penalty States, the average delay is longer. In an oral argument last year, for example, the State admitted that the last 10 prisoners executed in Florida had spent an average of nearly 25 years on death row before execution.”⁵¹ Breyer notes that these lengthy stays—new in human experience with executions—are significant because they subject “death row inmates to decades of especially severe, dehumanizing conditions of confinement.”⁵² At least two legal scholars have argued that extended stays on death row are, in and of themselves, violations of the Eighth Amendment.⁵³

III. Death Row Confinement Is Objectively Dehumanizing

Death row confinement, which I have indicated is best described as solitary confinement in service of death by state-sponsored homicide, is dehumanizing because the conditions of this confinement violate essential elements of human nature and

Men, OBSERVER (Nov. 10, 2010, 7:01 PM), <http://www.texasobserver.org/solitary-men/> (last visited Sept. 8, 2016) (discussing the negative effects of prolonged isolation on death row inmates) (on file with the Washington and Lee Law Review).

49. 135 S. Ct. 2726 (2015).

50. *Id.* at 2764 (Breyer, J., dissenting).

51. *Id.*

52. *Id.* at 2765.

53. See Kathleen M. Flynn, Note, *The “Agony of Suspense”: How Protracted Death Row Confinement Gives Rise to an Eighth Amendment Claim of Cruel and Unusual Punishment*, 54 WASH. & LEE L. REV. 291, 293 (1997) (arguing that “execution after protracted death row confinement violates the Eighth Amendment”); see also Dwight Aarons, *Can Inordinate Delay Between a Death Sentence and Execution Constitute Cruel and Unusual Punishment?*, 29 SETON HALL L. REV. 147, 151 (1998) (arguing that an “inordinate delay between a death sentence and execution may constitute cruel and unusual punishment in violation of the Eighth Amendment”).

therefore are violations of the human dignity shared by all human beings by virtue of their status as human beings. What are the essential elements of human dignity that are violated? My claim is that, in essence, human dignity boils down to the right to live as a human being.⁵⁴ Do condemned prisoners live on death row and in the death house as human beings? That question can be answered by spelling out the essential elements of human nature and determining whether these elements are respected in the experiences of condemned prisoners.

I have argued that the essence of personhood or humanity is a sense of identity or self that conveys the capacity and confers the moral right to make choices and hence be self-determining.⁵⁵ To be sure, self-determination is not an absolute; full self-determination is probably impossible in this world, but some degree of self-determination is required for the person to live as a human being. It has been my contention that self-determination, in whatever degree and form it exists in a given environment, is achieved in the world of other human beings through a process of self-defining social interactions.⁵⁶ These interactions, in my assessment, require some degree of autonomy, security, and relatedness to others.⁵⁷

In making these assertions, I understand autonomy to mean the capacity to influence one's environment and hence exert some modicum of control over the conditions of one's existence. I understand security to mean shelter from harm, which entails some element of social stability; secure and safe, one is defined in

54. See Robert Johnson, *Reflections on the Death Penalty: Human Rights, Human Dignity, and Dehumanization in the Death House*, 13 SEATTLE J. SOC. JUST. 583, 586 (2014) (arguing that respecting a human's dignity "comes down to acknowledging their humanity, a humanity shared by all human beings by virtue of being human beings").

55. See Robert Johnson & Chris Miller, *An Eighth Amendment Analysis of Juvenile Life Without Parole: Extending Graham to All Juvenile Offenders*, 12 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 101, 112 (2012) ("A person or human being has inherent self-worth that is the source of human dignity.").

56. See Johnson, *supra* note 54, at 585 ("Self-determination is necessarily achieved in the world of other human beings through a process of self-defining social interactions.").

57. See *id.* ("We are born into a society composed of others who, like ourselves, possess the capacity for autonomous thought and action, and who must be seen and treated as intrinsically equal in kind and value to use because they are fellow human beings.").

some measure by one's choices rather than by the vagaries of one's environment. Relatedness or connectedness to others entails the ability to feel for oneself and others and hence to have caring and constructive relationships in which other human beings are seen as persons in their own right.⁵⁸ Autonomy, security, and relatedness to others develop in interaction with one another as individuals become persons.⁵⁹ The process of becoming a person is never fully finished, however, as "man's nature is a self-surpassing and a self-transcending one."⁶⁰ We are, then, emergent persons. The element of growth is thus a part of our nature and must be respected, even in the context of punishment.⁶¹

It has been my contention that "our understanding of what it means to be a human being—to appreciate our own humanity and that of others—creates a bright line distinction: while punishments can legitimately deprive persons of their liberty, they cannot degrade them by ignoring or violating their essential human dignity."⁶² With even the worst criminals, it must be recognized that they, like all human beings, "feel and think as we do" and, further, that "our inner feelings are alike in some fundamental fashion" that marks us, criminal and non-criminal alike, as fellow human beings.⁶³ This line of reasoning has led a colleague and me to conclude that "[l]ike us, other human beings, even criminals, must be seen as autonomous entities, separate and

58. See Johnson & Miller, *supra* note 55, at 112–13 (defining relatedness as one of three components of humanity).

59. See DEATH WORK, *supra* note 2, at 205 (contending that to be self-determining, individuals must influence their environment).

60. *Id.*

61. See ROBERT A. FERGUSON, *INFERNO: AN ANATOMY OF AMERICAN PUNISHMENT* 222–24 (2014) (discussing an incentive structure based on the recognition of the innate human need for personal growth); LUC FERRY, *A BRIEF HISTORY OF THOUGHT: A PHILOSOPHICAL GUIDE TO LIVING* 112–14 (2011) ("[N]o essence predetermines it, no programme can ever succeed in entirely hemming it in; no system can imprison it so absolutely that it cannot emancipate itself The human individual is free: endlessly improvable, and in no sense programmed by characteristics supposedly linked to race or gender.").

62. Johnson & Miller, *supra* note 55, at 112.

63. *Id.* at 113.

protected in [their] separation from others, as we know ourselves to be separate and protected in our separation from others.”⁶⁴

The notion that human beings are “separate and protected in [their] separation from others” goes to the integrity of the human self or identity. By definition, some degree of separation from the social world—of self and society—is required for the formation of an individual human identity. It is no accident that all known societies honor “the social institution of privacy”⁶⁵ or its functional equivalent, which is to say, some social practice that offers separation or insulation of the person from the surrounding environment, such that actions can be, at least in some measure, self-generated rather than externally determined.⁶⁶ Insulation from the world, I have argued, confers and confirms selfhood and permits individual selves to become persons—that is, to negotiate their lives with some degree of autonomy, security, and relatedness to others.⁶⁷ Condemned prisoners cannot insulate themselves from an environment in which they are denied privacy and subjected to total control.⁶⁸

Some degree of privacy and hence control of one’s life is possible in most regular prisons, including maximum-security prisons, where inmates typically have some free time to themselves, and hence can escape the reaches of prison surveillance and form a subculture that offers some shelter from the larger institutional world.⁶⁹ Individual prisoners typically can carve out “niches,” sheltered spaces and routines that offer them insulation from the mainline prison.⁷⁰ Control of one’s daily round

64. *Id.* (citation omitted).

65. Jeffrey H. Reiman, *Privacy, Intimacy, and Personhood*, 6 PHIL. & PUB. AFF. 26, 39 n.10 (1976). *See generally* LEWIS MUMFORD, *THE CONDITION OF MAN* (1944).

66. *See generally* MUMFORD, *supra* note 65.

67. *See* DEATH WORK, *supra* note 2, at 206 (describing privacy as a “social skin”).

68. *See generally* CONDEMNED TO DIE, *supra* note 1; DEATH WORK, *supra* note 2.

69. *See generally* Ben Crewe, *The Sociology of Imprisonment*, in *HANDBOOK ON PRISONS* (Yvonne Jewkes et al. eds., 2d ed. 2016).

70. *See* HANS TOCH, *LIVING IN PRISON: THE ECOLOGY OF SURVIVAL* 38 (1992) (discussing prison ecology, including a consideration of niches). *See generally* JOHNSON, ROCHELEAU, & MARTIN, *supra* note 23. There is no research that

of life is impossible on death row, and especially in the death house. It is my contention that, absent privacy and control, the condemned prisoner cannot establish an existence separate from the environment. Without a separate existence, one is exposed and hence vulnerable to contamination of one's self, if not indeed dissolution of that self, leaving in its wake a damaged person who is in some objective sense less than human—in my terms, objectively dehumanized. Note that death row confinement, as a profoundly isolating human warehouse, renders prisoners powerless, vulnerable, and alone.⁷¹ This confinement violates each and every element of human dignity as I have defined it and is, by its very nature, profoundly and objectively dehumanizing.⁷²

IV. Death Row Confinement Is a Form of Torture

Is the typical experience of condemned prisoners in America today, which I have termed solitary confinement in service of death by state-sponsored homicide, a case of torture? If so, is the suffering entailed in this confinement cruel in the Eighth Amendment sense of the term? I will argue that the answer to both these questions is yes—that death row brings in its wake an objective dehumanization of the person that is the hallmark of torture, and that this torture is cruel in a way that violates the Eighth Amendment.

In Darius Rejali's masterful work on torture, *Torture and Democracy*, the essence of torture is boiled down to this proposition:

suggests that niches have been or could be developed on death row or in the death house. Cohen has proposed segregated settings that offer "insulation, not isolation," but this would entail major reforms that would be hard to implement on death row and even harder to preserve in the face of executions. See Fred Cohen, *Isolation in Penal Settings: The Isolation-Restraint Paradigm*, 22 WASH. U. J.L. & POL'Y 295, 322 (2006) (arguing that "with a disturbed or disruptive inmate a form of insulation, not isolation, may be required"). Nothing resembling niches was uncovered in my research on death row or the death house. See generally CONDEMNED TO DIE, *supra* note 1; DEATH WORK, *supra* note 2.

71. See CONDEMNED TO DIE, *supra* note 1, at 17 (describing the central psychological features of a death row inmate as "powerlessness, fear, and emotional emptiness").

72. See *id.* (describing the "emotional death" of a death row inmate).

In each case one must inquire whether physical torment is involved, whether the individual is helpless and detained, whether the agents who practice it are state or quasi-state officials, and whether it is put toward public purposes. If the answer in each case is yes, then it is torture, regardless of what it is called.⁷³

This definition is correct, in my view, but limiting suffering to physical torment is needlessly restrictive. In the United Nations Declaration against Torture, torture “means any act by which severe pain or suffering, whether physical or mental”⁷⁴ is inflicted. More importantly, the distinction between physical and psychological torment is arbitrary and inaccurate. Any experience of torment will necessarily merge physical and psychological elements: emotional pain (sometimes called “social” or “psychological” pain), such as occurs in the wake of social exclusion or personal rejection, “activates the same brain regions as physical pain.”⁷⁵ Physical pain brings with it a psychological component and indeed the reverse is true as well: psychological pain brings with it a physical component.

An instructive case in point is the experience of dread—continuing and substantial fear and anxiety—which is the overarching personal experience of condemned prisoners, particularly as their executions draw near.⁷⁶ Note the dread, fear, and anxiety in the account of two typical death row prisoners when merely “thinking about the death penalty”:

When that sentence comes across my mind, that brings a quite a bit of fear. It brings quite a bit of fear and worry, you know . . . causes the person to pace back and forth, become nervous, you know. Can't sit down. It's hard for such a person to sleep. This happens to me at times. The fact that my

73. REJALI, *supra* note 8, at 554.

74. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85.

75. Christopher Bergland, *The Neuroscience of Social Pain*, PSYCHOL. TODAY, <https://www.psychologytoday.com/blog/the-athletes-way/201403/the-neuroscience-social-pain> (last updated Mar. 3, 2014) (last visited Sept. 8, 2016) (on file with the Washington and Lee Law Review).

76. See CONDEMNED TO DIE, *supra* note 1, at 80 (“For some prisoners, even thinking about the death sentence can aggravate fears and set in motion an obsessive reaction bordering on anxious panic.”).

sentence might not get commuted or the death penalty might not be thrown out. This causes me to grow nervous. Can't sleep. You are full of anxiety and really it's insanity.⁷⁷

I go to sleep and I dream of me sitting down in that chair. I mean it's such a fearful thought. Me walking down the tier, sitting down in it, them hooking it up and turning it on . . . I don't know. I can wake up, my heart's beating fast, I'm sweating like hell, just like I rinsed my head in water . . . I feel I'm gonna have a heart attack.⁷⁸

Fear and anxiety are experienced as mental or psychological in origin, but it is apparent in the statements of these condemned prisoners that these emotions have bodily consequences: disrupted sleep, drained energy, and physical exhaustion.⁷⁹

On death row, the daily regime highlights one's vulnerability, which reinforces fears and anxieties. Some of the elements of life on death row that highlight one's vulnerability are physical. The prisoner is alone in a cage, physically constrained and, like the proverbial sitting duck, defenseless against insult or attack in an environment in which they are under the total control of officers, some of whom, in the words of one condemned prisoner, "take it upon themselves to be your judge and your jury and your executioner."⁸⁰ When moved from that cage, the prisoner is typically stripped and searched, then heavily (and often painfully) restrained in handcuffs and leg irons that chaff and bruise and cut the skin in varying degrees.⁸¹ Even medical care can be a painful

77. *Id.* (quoting a death row prisoner in Alabama).

78. *Id.* at 88 (quoting a death row prisoner in Alabama).

79. *See id.* at 116 (describing the physical side effects of fear and anxiety). The experience of condemned prisoners seems to parallel that of persons who suffer from general anxiety disorder, with the difference being that their anxieties are triggered by widely shared perceptions of the environment. "Hans Toch has described prison as impersonal enough to help a man suspect that others want him dead.' Such suspicions become self-evident truths on death row, where prison policy uniformly 'reflects that [we] prisoners are already doomed and forgotten.'" *Id.* at 116 (quoting Hans Toch). In the death row context, the essentially accurate perception that prisoners "are already doomed and forgotten," in the words of one such prisoner, translates into a life on the knife-edge of dread. *Id.* *See generally* INGLE, *supra* note 25.

80. CONDEMNED TO DIE, *supra* note 1, at 66.

81. *See id.* (discussing the painful process of moving death row inmates).

and degrading routine for condemned prisoners. Von Poyck reports that a fellow death row prisoner seeking dental care was

forced to lay on his back, reclined, in the dentist's chair for two hours with his hands handcuffed behind his back with the 'black box' on (a very painful device which locks your hands rigidly in place in the handcuffs) When [the prisoner] returned to his cell his extreme distress was evident and when the cuffs were removed and he tried to move his arms in front of him he found one of his shoulders was dislocated. His wrists were red, swollen and completely numb. Somehow he managed to pop his shoulder back in place.⁸²

However inured some prisoners may become to the degrading and often painful treatment that is common in close confinement, these abuses almost certainly live on in their awareness as reminders of their helplessness and vulnerability at the hands of their keepers.⁸³ In a frightening sense, death row is sufficiently isolated that—as a practical matter—it is law unto itself.⁸⁴ The vulnerability this image of lawlessness implies is very much on the minds of condemned prisoners.⁸⁵ Life in solitary confinement under a sentence of death is a torment, pure and simple.

The remaining elements of torture in Rejali's definition are self-evidently true in the case of death row.⁸⁶ I contend that, given the conditions of confinement on death row as examined in this essay, condemned prisoners are "helpless and detained," which is the essential reality of death row confinement; the correctional officers who supervise condemned prisoners, as well as the officers that carry out their executions, are "state or quasi-state officials." I contend that the confinement regime serves "public purposes": the facilitation of executions by the imposition of a regime that

82. DEATH ROW DIARY, *supra* note 28.

83. *See, e.g.*, CONDEMNED TO DIE, *supra* note 1, at 66 (describing that some prison guards take on the roles of judge, jury, and executioner).

84. *See id.* ("Paradoxically, death row is a lawless world, or, perhaps more properly, it is a law unto itself.")

85. *See generally* CONDEMNED TO DIE, *supra* note 1.

86. *See* REJALI, *supra* note 8, at 554 (describing various forms of torture and torment).

dehumanizes the prisoners, rendering them, virtually without exception, passive participants in the execution process.⁸⁷

Rejali's definition of torture is consistent in its essentials with that offered by the United Nations. In the United Nations Declaration against Torture, torture

means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted by or at the instigation of a public official on a person for such purposes as obtaining from him or a third person information or confession, punishing him for an act he has committed, or intimidating him or other persons⁸⁸

Here, intimidation would be the link to dehumanization and its usefulness on death row. The intimidating, dread-producing death row regimen is the leading edge of the dehumanization process.

The UN definition of torture excludes "pain or suffering arising only from, inherent in, or incidental to lawful sanctions."⁸⁹ This would seem to mean that death row cannot be a form of torture because it is undertaken pursuant to a lawful punishment—the death penalty. This is a logical fallacy. Any punishment that involves torturous conditions in its administration is no longer a lawful punishment. As Rejali notes

87. There are, to my knowledge, one or perhaps two prisoners who have physically resisted the execution process since the return of the modern death penalty with the 1977 execution of Gary Gilmore. Gilmore dropped his appeals and, in effect, volunteered to be executed. See *Gilmore v. Utah*, 429 U.S. 1012, 1013–14 (1977) (Burger, C.J., concurring) (describing Gilmore's opposition of others trying to intervene on his behalf). Over ten percent of executions involve volunteers. John H. Blume, *Killing the Willing: "Volunteers," Suicide and Competency*, 103 MICH. L. REV. 939, 940 (2005). Oppressive death row conditions and the dreary prospect of a life sentence in the event that one's death penalty is overturned are factors that influence some, perhaps many of these decisions, as alluded to by Justice Breyer in *Glossip* when he observed: "given the negative effects of confinement and uncertainty, it is not surprising that many inmates volunteer to be executed, abandoning further appeals Nor is it surprising that many inmates consider, or commit, suicide." *Glossip v. Gross*, 135 S. Ct. 2726, 2766 (2015) (Breyer, J., dissenting). See generally John H. Blume, *Killing the Willing: "Volunteers," Suicide and Competency*, 103 MICH. L. REV. 939 (2005); Robert Johnson et al., *Autonomy in Extremis: An Intelligent Waiver of Appeals on Death Row*, 39 AM. J. CRIM. JUST. 787 (2014).

88. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *supra* note 74.

89. *Id.*

acerbically, “the fact that a practice is legally authorized does not magically transform the practice into ‘not torture’ any more than magic words uttered over an ass change it into a Ferrari.”⁹⁰ Torture must be defined independently of law. To hold otherwise is to contend that anything can be done to persons under color of law.

My research has led me to conclude that standard instances of torture and death row confinement have in common an assault on persons that both causes intense suffering and violates their integrity as human beings by treating them as if they were mere animals or objects.⁹¹ The death row regime—particularly during the crucial deathwatch period—incorporates many of the standard elements of torturous confinement: total control of basic life activities by essentially “omnipotent” keepers, who can neglect or abuse prisoners, sometimes at will, often with little or no accountability; isolation of condemned prisoners—either singly or as a group, for years on end and, increasingly, for a decade or more—from the larger prison and from the outside world, with only limited contact with other human beings in a carefully monitored and controlled environment; chronic uncertainty about one’s fate—uncertainty which, like death row confinement itself, extends for years, leaving prisoners preoccupied about if and when they will be executed (a morbid reality brought home to them vividly by executions stayed at the final hour), and about what the experience of execution will be; a situation of personal humiliation, because the prisoners are, in effect, objects—mere “parcel[s]” or “thing[s]”⁹²—stored for execution, itself an exercise in humiliation; and, in varying degrees, personal deterioration, if not debilitation and exhaustion, in the existentially Spartan regime that is death row confinement.⁹³ All of this occurs in the context of a barren and impoverished setting marked by physically and psychologically painful conditions.

90. REJALI, *supra* note 8, at 554.

91. See CONDEMNED TO DIE, *supra* note 1, at 129 (noting the ironic conclusion that a death sentence amounts to torture even though our society has explicitly renounced torture).

92. CAMUS, *supra* note 4, at 201.

93. See DEATH WORK, *supra* note 2, at 201–02 (describing the different features of death row as tortuous confinement).

It is certainly true that suffering on death row stems primarily from what psychologists would call “psychological maltreatment” (defined as “emotional abuse or emotional neglect”) rather than overt physical abuse.⁹⁴ Here it is wise to remember that the emotional traumas associated with emotional abuse can be as harmful, and sometimes more harmful, than physical abuse: neglect, which yields depression and anxiety stemming from “unseen wounds,” arguably tears at the foundation of the self in a uniquely pernicious way.⁹⁵ The very authenticity of one’s suffering is cast into doubt in the wake of neglect, since the source of suffering and indeed the damage it produces are hidden from view.⁹⁶ It is likely that the suffering attendant to emotional abuse and neglect on death row is not inflicted expressly because its effects are intended or useful, as one finds in much torture and as seen in the UN definition of torture.⁹⁷ Nevertheless, this suffering is known to exist, and is exploited because its effects are useful in facilitating executions that go off smoothly, without resistance from condemned prisoners.⁹⁸

94. See *Emotional Abuse: Definitions, Signs, Symptoms, Examples*, HEALTHY PLACE, <http://www.healthyplace.com/abuse/emotional-psychological-abuse/emotional-abuse-definitions-signs-symptoms-examples/> (last updated July 18, 2016) (last visited Sept. 8, 2016) (“Emotional abuse can happen to anyone at any time in their lives, . . . which can have devastating consequences on relationships and all those involved. Just because there is no physical mark doesn’t mean the abuse isn’t real and isn’t a problem or even a crime in some countries.”) (on file with the Washington and Lee Law Review).

95. See *id.* (discussing signs of emotional abuse).

96. See *Childhood Psychological Abuse as Harmful as Sexual or Physical Abuse*, AM. PSYCHOL. ASSOC. (Oct. 8, 2014), <http://www.apa.org/news/press/releases/2014/10/psychological-abuse.aspx> (last visited Sept. 8, 2016) (“Children who are emotionally abused and neglected face similar and sometimes worse mental health problems as children who are physically or sexually abused.”) (on file with the Washington and Lee Law Review). The same holds for adults. See *Effects of Emotional Abuse on Adults*, HEALTHY PLACE, <http://www.healthyplace.com/abuse/emotional-psychological-abuse/effects-of-emotional-abuse-on-adults/> (last updated July 18, 2016) (last visited Sept. 8, 2016) (“Make no mistake about it; the effects of emotional abuse can be just as severe as those from physical abuse.”) (on file with the Washington and Lee Law Review).

97. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *supra* note 74.

98. See generally DEATH WORK, *supra* note 2.

Whatever the precise origin of the suffering on death row, execution team officers recognize the dehumanization process at work, watch it unfold, and knowingly benefit from it.⁹⁹ Officers offer firsthand accounts of the dehumanization of the prisoners, describing prisoners on the threshold of execution as defeated, demoralized, and compliant figures in the killing process:

His mind goes first All resistance disappears, they're exhausted. I think he makes it up in his mind then, you know, that he's ready to go. He blocks everything out, you know, as far as where I'm gonna be tomorrow, what I'm gonna do, you know. I know what I've got to do. There's no more pain, no more sorrow. I'm going. And that's it, gonna get it over with. I don't have to fight the lawyers and the judges and the courts no more.

They work it out in their minds and they accept it A lot of 'em die in their minds I've never known of one or heard of one putting up a fight By the time they [take that last] walk . . . they've completely faced it. Such a reality most people can't understand. 'Cause they don't fight it. They don't seem to have anything to say. It's just something like "Get it over with." They may be, they may be numb, sort of.

They go through stages. And at this stage, they're real humble. Humblest bunch of people I ever seen. Most all of 'em is real, real weak. Most of the time, you'd only need one or two people to carry out an execution, as weak and as humble as they are. They're really a humble bunch of people.¹⁰⁰

It is telling that observations by execution team officers about the passivity of the prisoners they encounter in the death house dovetail with the observations of the French existentialist Albert Camus. Decades earlier, and in reference to an execution process that culminated in beheading at the guillotine, Camus described the condemned as "no longer a man but a thing waiting to be handled by the executioners."¹⁰¹

Death row prisoners, moreover, are exposed to dehumanizing conditions that will typically, if not inevitably, produce a torturous regime. Moral restraints against brutality, including torture, are

99. *See id.* at 156 (discussing the manner in which execution team officers are involved in the execution process).

100. *Id.*

101. *Id.*

compromised when officials are authorized to harm, when the procedures that give rise to harm are made routine, and when prospective victims of harm are dehumanized.¹⁰² These conditions clearly apply on death row. Correctional officers responsible for death row are explicitly and unambiguously authorized to warehouse prisoners awaiting execution. Officers and their superiors can readily view themselves as impersonal instruments of authority; as such, they bear no individual moral responsibility for the actions necessary to maintain an orderly death row or for the executions that may take place under their auspices. And since routine is almost blindly relied upon to structure each day, and especially each execution day, correctional personnel are further removed from the human consequences of the policies they implement. Indeed, a preoccupation with routine generates enthusiasm to achieve technical proficiency at the various tasks attendant to death work and discourages more thoughtful examination of the nature and import of these activities. Finally, death row inmates are effectively isolated from one another and the larger world, and hence are denied the personal and group support necessary to retain their autonomy in the face of overwhelming authority, a suffocating routine, and a degrading existence. Thus, the dehumanization of condemned prisoners emerges as the culmination of instruments of authority acting within stipulated routines on condemned prisoners rendered as objects to be stored and ultimately dispatched in the execution chamber.¹⁰³ Persons engaged in death work, in other words, are strongly predisposed to treat the condemned as already dead or

102. See Robert Johnson, *Institutions and the Promotion of Violence*, in *VIOLENT TRANSACTIONS: THE LIMITS OF PERSONALITY* 181, 181–205 (A. Campbell & J.J. Gibbs, eds., 1986) (comparing adjustment dynamics of modern corrections officers to prison guards at Auschwitz, particularly in regards to the methods they use to cope with the daily routine of violence); see also *CONDEMNED TO DIE*, *supra* note, at 130 (describing how the daily routine of life on death row enables corrections officers to see themselves as impersonal, autonomous figures of justice).

103. See *CONDEMNED TO DIE*, *supra* note 1, at 130 (noting how daily procedures enable corrections officers to take satisfaction in their work, since human nature derives a natural sense of pleasure from the successful completion of routines).

dying—as the living death suffered by death row prisoners so vividly attests.

*V. Death Row Confinement Is Cruel in the Eighth Amendment
Sense of the Term*

Does death row confinement as described here violate the Eight Amendment? It is customary in Eight Amendment jurisprudence to separate the conditions of confinement from the punishment, whether that punishment is a prison term or a death sentence.¹⁰⁴ This separation confuses matters, we learn from *Dolovich*, because the experience of a prison term (and, by implication, a death sentence) is directly related to the conditions of confinement under which the sentence is served.¹⁰⁵ A reasonable person would stipulate that a life sentence in a brutal prison is a more punishing experience than a life term in a safe prison that is replete with programs and services that offer the possibility of personal growth and rehabilitation.¹⁰⁶ Likewise, a reasonable person would stipulate that a sentence of death preceded by years of solitary confinement on death row, with the threat of degradation and deterioration, is more punishing than a sentence of death served in a more accommodating prison setting where programs and opportunities for personal development are present, offering at least the prospect of a death that unfolds in some measure on the terms of the individual prisoner.¹⁰⁷

104. See *Dolovich*, *supra* note 9, at 890 (discussing the separation of death row confinement from punishment). As the *Farmer* [*v. Brennan*] Court put it, “[t]he Eighth Amendment does not outlaw cruel and unusual ‘conditions’; it outlaws cruel and unusual ‘punishments.’” 511 U.S. 825, 837 (1994). And, the Court found, prison conditions not explicitly authorized by the statute or the sentencing judge qualify as punishment only if some prison official actually knew of and disregarded the risk of harm. *Id.*

105. See *id.* at 885–86 (noting how different factors must be considered when the prison conditions are challenged as being cruel and unusual, as opposed to challenging the death sentence itself).

106. See JOHNSON, ROCHELEAU & MARTIN, *supra* note 23 (explaining how prison conditions and programs make a documented difference in the quality and impact of prison life).

107. See generally LORNA RHODES, *TOTAL CONFINEMENT: MADNESS AND REASON IN THE MAXIMUM SECURITY PRISON* (2004); JOHNSON, ROCHELEAU, &

Each of these sentences—imprisonment or execution—may be cruel in themselves, but that cruelty, in the eyes of the prisoners, hinges in some measure on the conditions of confinement under which they are served. As I have observed, drawing on an extensive body of interviews with condemned prisoners, the notion that death row confinement is not in itself punishment is psychologically inconceivable.¹⁰⁸ Failure to connect conditions of confinement to the punishment of imprisonment or of death results in an inability to come to a meaningful understanding of the term cruel as it applies to the experience of prison sentences or death sentences as undergone by their recipients.

The Eighth Amendment, as Dolovich has noted, “prohibits cruel and *unusual* punishment, but its normative force derives chiefly from its use of the word *cruel*.”¹⁰⁹ Since “incarceration is the primary mode of criminal punishment”—prisons are implicated in all harsh sanctions—“it is necessary to determine when prison conditions are cruel.”¹¹⁰ Remarkably, as Dolovich reports, “the Supreme Court has thus far avoided this question.”¹¹¹ In the key case on this matter, *Farmer v. Brennan*,¹¹² Dolovich describes that the Court held that “unless some prison official actually knew of and disregarded a substantial risk of serious harm to prisoners, prison conditions are not ‘punishment’ within the meaning of the Eighth Amendment.”¹¹³ This analysis is flawed. When the state puts people in prison, it puts them in a dangerous and degrading setting “while depriving them of the capacity to provide for their own care and protection.”¹¹⁴ As a result, “the state has an affirmative obligation to protect prisoners from serious physical

MARTIN, *supra* note 23 (noting that, in extreme penal settings like solitary confinement and supermax prisons—and by inference, solitary confinement on death rows—conditions matter and affect prospects for adjustment).

108. See DEATH WORK, *supra* note 2, at 198 (reporting the words of death row inmates who describe how the thought of their impending deaths takes a toll on their psyche every day, making the wait worse than the punishment).

109. Dolovich, *supra* note 9, at 881 (emphasis in original).

110. *Id.*

111. *Id.*

112. 511 U.S. 825 (1994).

113. Dolovich, *supra* note 9, at 881.

114. *Id.*

and psychological harm.”¹¹⁵ This obligation, which amounts to an ongoing duty to provide for prisoners’ basic human needs, may be understood as “*the state’s carceral burden*.”¹¹⁶ The standard in *Farmer*¹¹⁷ undermines the state’s capacity to understand and honor its carceral burden: “It holds officers liable only for those risks they happen to notice—and thereby creates incentives for officers *not* to notice—despite the fact that when prison officials do not pay attention, prisoners may be exposed to the worst forms of suffering and abuse.”¹¹⁸

Building on Dolovich’s work, I contend that in capital cases, the death penalty includes state-created conditions of confinement on death row and in the death house, not simply the method of execution by which death is administered (whether the method of execution, *per se*, is cruel is another matter entirely, beyond the scope of this Article). In capital cases, the state typically puts people on death row, an isolated and restrictive prison environment in which daily life unfolds under the ever-present threat of execution; prisoners on death row are unable “to provide for their own care and protection”¹¹⁹ in relation to the threats and insults of daily life on death row, let alone the threat of execution, which as we have noted is a carefully choreographed homicide and, by any reckoning, horrifying to contemplate from the profound vulnerability of one’s solitary cell. In the context of the death penalty, Dolovich’s carceral burden includes the obligation to provide for prisoners’ basic needs as human beings on death row and throughout the execution process.¹²⁰ When the carceral burden is not honored by the state, this “causes serious harm to prisoners;” the resulting “prison conditions may be said to be

115. *Id.*

116. *Id.* at 882 (emphasis added).

117. *Farmer*, 511 U.S. at 846 (“[We] hold that a prison official may be held liable under the Eighth Amendment for denying humane conditions of confinement only if he knows that inmates face a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it.”).

118. Dolovich, *supra* note 9, at 882.

119. *Id.* at 881.

120. *See id.* (“[T]he state has an affirmative obligation to protect prisoners from serious physical and psychological harm.”).

cruel.”¹²¹ This logic applies readily to death row confinement and execution: failure to honor the state’s carceral burden results in punishment that is cruel.

Dolovich argues that the “the state will be unable to meet its carceral burden—which requires that prison officials meet prisoners’ basic human needs—unless prison officials are able to acknowledge and are willing to affirm the humanity and capacity for suffering of the people in their custody.”¹²² Death row confinement is typically a species of solitary confinement that fails to meet basic human needs other than food and shelter; the execution process is framed as an impersonal bureaucratic undertaking in which an unwillingness or inability to “affirm the humanity” of the condemned prisoner or to appreciate the “capacity for suffering” of these prisoners is central to the operation of the execution process.¹²³ Thus, the failure to honor the carceral burden on death row and during the execution process is the norm, not the exception, as documented in studies of the dehumanizing effects of death row confinement and the modern execution process.¹²⁴

The Eighth Amendment, as Dolovich has made clear, “is concerned with a very particular form of punishment: that imposed by the state as penalty for crime.”¹²⁵ The key consideration for the purposes of this analysis is this: “whatever conditions a prisoner is subjected to while incarcerated, whatever treatment he receives from the officials charged with administering his sentence, *is* the punishment the state has imposed.”¹²⁶ As a result, “all the conditions to which an offender is subjected at the hands of state officials over the course of his incarceration are appropriately open to Eighth Amendment scrutiny.”¹²⁷ It follows that when offenders

121. *Id.* at 892.

122. *Id.* at 893.

123. *See generally* CONDEMNED TO DIE, *supra* note 1; DEATH WORK, *supra* note 2.

124. *See generally* BRUCE JACKSON & DIANE CHRISTIAN, IN THIS TIMELESS TIME: LIVING AND DYING ON DEATH ROW IN AMERICA (2012); DEATH WORK, *supra* note 2.

125. Dolovich, *supra* note 9, at 898.

126. *Id.* at 899 (emphasis added).

127. *Id.*

are condemned to death, the conditions of confinement under which they live and under which they are executed are central elements of the punishment for Eight Amendment purposes.

A key feature of the carceral burden as enunciated by Dolovich is protection from fear. “To force prisoners to live in constant fear,” she states, “is to inflict a form of physical and psychological suffering akin to torture.”¹²⁸ Prisoners on death row are, without question, forced to live in a state of constant fear, not only from the hazards of life on death row but from the threat of execution by officials of the prison system, if not of the very death row on which they live.¹²⁹ To live daily in what can be called a state of dread—again following Dolovich—suggests that prisoners on death row “exist in a permanently traumatized state, bereft of any peace of mind and constantly terrorized.”¹³⁰ Anticipating some of the arguments in this article, Dolovich concludes, “[t]here is something deeply dehumanizing about being forced to endure such conditions, which could leave victims desperate to protect themselves at all costs and rob them of the ability to function in any reasoned or self-possessed way.”¹³¹ Or, indeed, in the terms of this Article, to possess a self from which to maintain their humanity.

Some prisoners, including some death row prisoners, escape into a state of denial, sometimes marked by intense mental fantasies,¹³² but this does not alter the cruelty of the conditions of confinement. It simply shows that human beings cope, well or badly, with extreme, even tortuous, conditions of confinement. Such coping in extremity has been well documented in studies of

128. *Id.* at 915.

129. Ingle reports a vivid case of such trauma on the threshold of execution. The prisoner lived in constant anxiety evidenced in physical and psychological suffering described by a psychological professional as “Complex Post Traumatic Stress Disorder.” INGLE, *supra* note 25; *see also* CONDEMNED TO DIE, *supra* note 1, at 64–79 (describing how prisoners on death row do not respect the guards but instead live in fear of them).

130. Dolovich, *supra* note 9, at 916.

131. *Id.*

132. *See* Sandra McGunigall-Smith and Robert Johnson, *Escape from Death Row: A Study of “Tripping” as an Individual Adjustment Strategy Among Death Row Inmates*, 6 PIERCE L. REV. 533, 536–45 (2008) (describing how death row inmates “trip” by pacing back and forth in their cells and channeling their thoughts into vivid imaginings that offer a mental escape from confinement).

death camps, perhaps the most extreme setting of torture and death known to modern man.¹³³ That people can psychologically survive cruelty of great magnitude does not make the conditions to which they are exposed less cruel. Conditions are objectively cruel or not, independent of the person's reaction. "[P]sychological suffering," notes Dolovich, "need not leave its victims in a state of such heightened desperation for its infliction to be cruel."¹³⁴ As a corollary of this observation, conditions are cruel even if they are the usual fare of life in prison for those serving prison terms or death sentences.

The state's carceral duty "may be understood as that of ensuring the minimum conditions for maintaining prisoners' physical and psychological integrity and well-being—those basic necessities of human life, including protection from assault, without which human beings cannot function and that people in prison need just by virtue of being human."¹³⁵ The carceral duty thus "offers a standard for assessing claims of cruel prison conditions as they arise."¹³⁶ That standard can be readily applied to treatment of condemned prisoners. On death row and in the death house, "individual officers responsible for designing and running the prison must be ever-conscious that prisoners are human beings with the same capacity for suffering as anyone else. Otherwise, those officers will be incapable of meeting prisoners' basic needs or of recognizing dangers to their well-being."¹³⁷ No such humane consciousness is apparent on death row, and there is no evidence that "prisoners' basic needs" or "well-being" are met on death row.

Dolovich's carceral duty is universally violated in the solitary confinement in service of death by state-sponsored homicide that is imposed on condemned prisoners. Research reviewed here shows unequivocally that death rows are human warehouses. Human beings cannot be stored like so many commodities without

133. See generally TERRENCE DES PRES, *THE SURVIVOR: AN ANATOMY OF LIFE IN THE DEATH CAMPS* (1977).

134. Dolovich, *supra* note 9, at 916.

135. *Id.* at 921.

136. *Id.*

137. *Id.* at 931.

violating their human dignity. Warehousing condemned prisoners denies that “prisoners are human beings with the same capacity for suffering as anyone else,”¹³⁸ a key element of Dolovich’s carceral burden. These regimes embody the notion that “officers will be incapable of meeting prisoners’ basic needs or of recognizing dangers to their well-being,”¹³⁹ another key element of Dolovich’s carceral burden. It is clear that the carceral burden owed condemned prisoners is not met on death row, and likely can never be met under the conditions of death row confinement as they exist today. We as a society are left with a punishment that, in its present and likely future form, is an instance of torture that is cruel as that term is understood in an Eighth Amendment context.

138. *Id.*

139. *Id.*