

Decency Comes Full Circle: The Constitutional Demand to End Permanent Solitary Confinement on Death Row

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Many of the two thousand Americans living under a sentence of death spend twenty-three hours a day in a concrete box the size of a parking space. Often the only human touch they feel is being handcuffed and the only natural light comes from a small grill at the top of an exercise cell. However, change is at hand. The Supreme Court has emphasized that the Eighth Amendment's prohibition of cruel and unusual punishments draws its meaning from the evolving standards of decency that mark the progress of a maturing society. To date, there has been a dearth of information available regarding the historical and modern conditions on death row.

This Note addresses this gap. Part I provides, for the first time, a complete historical narrative of the development of the American death row from the Colonial Era to the Twenty-First Century. Part II reviews the findings of a survey of every jurisdiction with capital punishment to capture a national snapshot of conditions on America's death rows. The findings in both Parts suggest that the system of permanent solitary confinement on death row has neither the weight of history nor the support of the majority in either contemporary practice or social values. Indeed, there is an accelerating trend away from the practice. Part III places this evidence in constitutional context and argues that the twelve states that retain permanent solitary death rows are out of pace with America's evolving standards of decency and violate the Eighth Amendment.

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INTRODUCTION

I have cried and cried real tears from my soul out of remorse for the things I have done. . . . I even felt that I would end my appeals if [my victims' families] wanted me to die to make amends for killing their loved ones. All of that is still there. But again I am exhausted by remorse. I am exhausted by everything involving those crimes. I don't have anything left to give. My tears, my grief, my sorrow, my dignity, my very spirit . . . this ongoing torment has taken it all.

— Alim Braxton, on North Carolina Death Row since 1996¹

The Constitution prohibits cruel and unusual punishments.² Yet, without a judge, jury, or legislature ordering it, many of the nearly two and a half thousand people on America's death rows will spend an average of seven thousand days sealed for twenty-three hours behind a solid steel door, inside a windowless cell the size of a parking space.³ Since the 1970s, the United States carceral system has combined the ever-present threat of execution hanging over people sentenced to die with the crushing isolation of permanent solitary confinement—regardless of their behavior or individual circumstances.⁴ Many people on death row

1. Letter from Alim [(also known as Michael Braxton)] to Tessie Castillo (Oct. 7, 2017), in *CRIMSON LETTERS: VOICES FROM DEATH ROW*, 151, 154 (Tessie Castillo ed., 2020).

2. See U.S. CONST. amend. VIII.

3. See *Davis v. Ayala*, 576 U.S. 257, 286–87 (2015) (Kennedy, J., concurring). The National Association for the Advancement of Colored People [hereinafter NAACP] releases death row demographical information quarterly. See NAACP LEGAL DEF. FUND, *DEATH ROW U.S.A.: WINTER 2022 1* (Jan. 1, 2022), <https://www.naacpldf.org/wp-content/uploads/DRUSAWinter2022.pdf> [<https://perma.cc/ASU5-LXG4>] (reporting that 2,436 death row inmates are known to the Legal Defense Fund, as of Jan. 1, 2022). According to the Death Penalty Information Center [hereinafter DPIC], more than half of all people currently sentenced to death in the United States have been on death row for more than 18 years, often in conditions tantamount to solitary confinement. *Time on Death Row*, DPIC, <https://deathpenaltyinfo.org/death-row/death-row-time-on-death-row> [<https://perma.cc/PBJ9-T2VG>]. For a state-by-state survey of death row conditions, *infra* Appendix.

4. The most common end result of a death sentence is reversal of the conviction, often after decades; however, besides the small number of commutations, every other death row resident will eventually be executed or otherwise die on the row. See Frank Baumgartner & Anna Dietrich, *Most Death Penalty Sentences are Overturned. Here's Why That Matters*, WASH. POST (Mar. 17, 2015), <https://www.washingtonpost.com/news/monkey-cage/wp/2015/03/17/most-death-penalty-sentences-are-overturned-heres-why-that-matters/> [<https://perma.cc/28XX-4KF5>]; see also *Furman v. Georgia*, 408 U.S. 238, 309 (1972) (Stewart, J., concurring) (“These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual.”).

have not seen the sun or felt the touch of another human being outside of being handcuffed since sentencing.⁵

People on death row often describe the conditions as worse than even their death sentence.⁶ The reality of life on death row causes “death row syndrome,” characterized by extreme anxiety, dissociation, and even full-blown psychosis.⁷ Since the reinstatement of the death penalty in 1976, at least 152 people sentenced to death have voluntarily dropped their appeals—in effect, choosing to die.⁸ People on death row are five times more likely to commit suicide than general population prisoners.⁹

5. Appendix (describing conditions); see also Ruth Graham, *On Death Row in Texas, a Last Request: A Prayer and ‘Human Contact’*, N.Y. TIMES (Aug. 30, 2021), <https://www.nytimes.com/2021/08/30/us/on-death-row-in-texas-a-last-request-a-prayer-and-human-contact.html> [<https://perma.cc/P3ML-TAA2>] (describing John Henry Ramirez’s appeals to have his priest touch him during execution).

6. See, e.g., Anthony Graves, *I Spent 16 Years in Solitary Confinement Hell. It Needs to End.*, TIME (June 10, 2015), <https://time.com/3915168/solitary-confinement/> [<https://perma.cc/CN64-S624>] (“Whatever you think hell is, that’s what solitary confinement is—365 days a year, 24 hours a day. It’s a system that seems designed to break a man’s will to live.”); Joan Lunden, *Joan Lunden Behind Closed Doors: Death Row Interview* 7:35, YOUTUBE (July 11, 2016), https://youtu.be/54qpm7G_5Ks?t=455 [<https://perma.cc/2QJM-YEQ6>] (“Dying doesn’t scare me. . . . The bad part is living here every day.”); Batya Swift Yasgur, *Psychiatry on Death Row: Interviews from the Inside*, MED. BAG (Feb. 22, 2019), <https://www.medicalbag.com/home/business/psychiatry-on-death-row-interviews-from-the-inside/3/> [<https://perma.cc/K2MQ-W5J9>] (When asked “What frightens you on death row?” one death-sentenced person replied, “I am afraid of breaking down.”).

7. See Amy Smith, *Not “Waiving” But Drowning: The Anatomy of Death Row Syndrome and Volunteering for Execution*, 17 B.U. PUB. INT. L.J. 237 (2008); Harold I. Schwartz, *Death Row Syndrome and Demoralization: Psychiatric Means to Social Policy Ends*, 33 J. AM. ACAD. PSYCHIATRY & L. 153, 154 (2005); see also Craig Haney, *Mental Health Issues in Long-Term Solitary and “Super-Max” Confinement*, 49 CRIME DELINQUENCY 124, 134 (2003) (describing the symptomology of long-term solitary confinement in modern “super-max” conditions).

8. DPIC lists 150 executed volunteers from 1976 to Nov. 17, 2021. *Execution Volunteers*, DPIC, <https://deathpenaltyinfo.org/executions/executions-overview/execution-volunteers> [<https://perma.cc/8FRE-HPT7>] (last updated Nov. 17, 2021). In recent years, three other volunteers are noteworthy. In January 2019, Scott Dozier committed suicide after his attempts to volunteer for execution were frustrated. Maurice Chammah, *The Volunteer*, MARSHALL PROJ. (Jan. 18, 2018), <https://www.themarshallproject.org/2018/01/18/the-volunteer> [<https://perma.cc/KEE8-AGBB>]. Two other recent volunteers were not executed. See Bill Chappell, *Death Row Inmate Fights for Right to Die in Oregon*, NAT’L PUB. RADIO (Mar. 14, 2013), <https://www.npr.org/sections/thetwo-way/2013/03/14/174340080/death-row-inmate-fights-for-right-to-die-in-oregon> [<https://perma.cc/WJ62-YDUG>] (describing Gary Haugen dropping his appeals before receiving clemency, which Haugen tried to reject in a lawsuit); *Judge Rules Oregon Death Row Inmate’s Lawyers Did a Bad Job*, WASH. TIMES (Aug. 1, 2015), <https://www.washingtontimes.com/news/2015/aug/1/judge-rules-oregon-death-row-inmates-lawyers-did-b/> [<https://perma.cc/Y5AU-UBDF>] (reporting Jason Van Brumwell requested execution before later canceling).

9. David Lester & Christine Tartaro, *Suicide on Death Row*, 47 J. FORENSIC SCI. 1108, 1108 (2002) (finding a median of 1.13 death row suicides per 1,000 people in 1977–

Thus, the combination of capital punishment with uninterrupted solitary confinement imposes deep physical and psychological trauma.¹⁰

However, the United States has begun to rapidly move away from this model of punishment, as more and more states take steps to ameliorate conditions on or even abolish solitary death rows.¹¹ In the last six years, a set of politically and socially diverse states—Arizona, California, Florida, Louisiana, Nevada, North Carolina, Oregon, Pennsylvania, South Carolina, and Virginia—have significantly reduced or eliminated the default use of solitary confinement for death row detainees.¹² Several other states have implemented smaller changes or launched pilot programs to improve conditions for individuals on death row, for example allowing congregated time or access to religious services.¹³ These changes suggest that those states that maintain permanent solitary confinement for death row detainees are out of step with the modern understanding of the Eighth Amendment’s prohibition on cruel and unusual punishment.

The Supreme Court has explained that the Eighth Amendment’s protection from cruel and unusual punishment “draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society.”¹⁴ This standard “embodies a moral judgment . . . [that] remains the same, but its applicability must change as the basic mores of society change.”¹⁵

99 compared to a 1980–83 baseline average of .24 male suicides per 1,000 people across all prisons); see also Robert Johnson, *Under Sentence of Death: The Psychology of Death Row Confinement*, 5 L. & PSYCHOL. REV. 141, 174 (1979) (“Just under one-half of the prisoners, in fact, consider the possibility of suicide in lieu of execution. . .”).

10. See, e.g., Melvin I. Urofsky, *A Right to Die: Termination of Appeal for Condemned Prisoners*, 75 J. CRIM. L. & CRIMINOLOGY 553, 568–69 (1984) (“The simple reason most condemned prisoners want to terminate their appeals is that they find conditions on death row intolerable.”); Jackie Flynn Mogensen, *For Years, This Nevada Death Row Inmate Asked to Be Executed. He Finally Just Took His Own Life*, MOTHER JONES (Jan. 6, 2019), <https://www.motherjones.com/crime-justice/2019/01/nevada-death-row-inmate-scott-dozier-suicide> [<https://perma.cc/5QLH-Q65C>] (Scott Dozier, who later killed himself on Nevada’s death row, stated “I don’t want to die, I just would rather be dead than do this.”).

11. The change has been decisive, only fourteen states retain a death row where solitary confinement is imposed for twenty-two or more hours daily. For a full accounting of state policies, see *infra* Appendix.

12. For a detailed history of this change, see *infra* Part II.A; see also *infra* Appendix (listing changes).

13. For example, Tennessee has a tiered honors system. *Death Penalty in Tennessee*, TENN. DEP’T OF CORR., <https://www.tn.gov/correction/statistics-and-information/executions/death-penalty-in-tennessee.html> [<https://perma.cc/S9FQ-9DDC>].

14. *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion).

15. *Furman v. Georgia*, 408 U.S. 238, 382 (1972) (Burger, C.J., dissenting).

This Note argues that the combined practice of permanent solitary confinement and capital punishment unconstitutionally violates societal standards of decency in violation of the Eighth Amendment.¹⁶

To do so, this Note provides a comprehensive view of death row in the United States, combining historical research with an original empirical survey of modern death row conditions across the fifty states. It proceeds in three Parts. Part I presents the first full historical narrative of the evolution of conditions of confinement on American death rows. Part II reviews the key findings from an original national survey of death row conditions. This dataset is the most comprehensive to date.¹⁷ Applying a historical lens to today's death row, Part III concludes that the modern practice of permanent solitary confinement on death row is anathema to contemporary American standards of decency and, moreover, lack a historical analogue. The Appendix contains the findings of the survey in Part II for each jurisdiction, including a brief summary.

I. THE ORIGINS OF PERMANENT SOLITARY DEATH ROW

This Part traces the historical development of death row in America. Because the evolution of societal standards of decency informs the substance of the Eighth Amendment, this historical context is crucial to any meaningful assessment of whether and to what degree modern death row aligns with modern American

16. The Supreme Court explained that the Eighth Amendment “must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.” *Trop*, 356 U.S. at 101 (plurality opinion).

17. In recent years, two reports have addressed parts of this topic. The ACLU took a survey of death-sentenced people in 2013 and published an analysis of their conditions of isolation. See ACLU, *A DEATH BEFORE DYING: SOLITARY CONFINEMENT ON DEATH ROW* (2013). The ACLU report reasonably claimed to be the first critical overview of solitary confinement on death row. *Id.* at 4. Three years later, Yale Law School published a survey of the public statutory law and regulations related to conditions on death row. See YALE L. SCH., *RETHINKING DEATH ROW: VARIATIONS IN THE HOUSING OF INDIVIDUALS SENTENCED TO DEATH* (2016). In addition, Merel Pontier published a detailed comparative analysis of housing policies for death-sentenced and other incarcerated people which includes substantial insights into the conditions of confinement on many of America's death rows. Merel Pontier, *Cruel but not Unusual the Automatic Use of Indefinite Solitary Confinement on Death Row: A Comparison of the Housing Policies of Death-Sentenced Prisoners and Other Prisoners throughout the United States*, 26 TEX. J. C.L. & C.R. 117 (2020).

societal standards of decency.¹⁸ First, Part I.A details the origins of solitary confinement and capital punishment in the United States. Part I.B then explores how the two systems melded into the contemporary practice of perpetual solitary confinement on death row. This Part pays particular attention to conditions at the time of the founding and the early republic, in light of the emphasis placed on these periods by judicial decisionmakers weighing Eighth Amendment challenges.¹⁹

A. THE DIVERGENT DEVELOPMENTS OF CAPITAL PUNISHMENT AND SOLITARY CONFINEMENT IN THE EARLY REPUBLIC

1. *Capital Punishment in the Early Republic*

The United States inherited a system of swift, lethal punishment.²⁰ From the thirteenth century and through the colonial period, it was firmly established in English law that the punishment for a felony conviction was execution.²¹ During the sixteenth and seventeenth centuries, Parliament dramatically expanded the scope of felonious criminal conduct, making England home to one of the harshest criminal code in Europe.²²

18. See, e.g., *Trop*, 356 U.S. at 99–100 (looking to “our history” and the “Anglo-American tradition of criminal justice” in measuring the “concept of cruelty”); *Roper v. Simmons*, 543 U.S. 551, 560 (2005) (explaining that the Eighth Amendment must be weighed “by considering history, tradition, and precedent, and with due regard for its purpose and function in the constitutional design”); William Heffernan, *Constitutional Historicism: An Examination of the Eighth Amendment Evolving Standards of Decency*, 54 AM. U. L. REV. 1355, 1364 (2005) (“Modern judicial interpretation of [cruel and unusual punishment] posits a connection between past and present. . .”).

19. See Craig Lerner, *Justice Scalia’s Eighth Amendment*, 42 HARV. J.L. & PUB. POL’Y 91 (2019) (reviewing originalism and the Eighth Amendment); see also Heffernan, *supra* note 18, at 1370–76.

20. STUART BANNER, *THE DEATH PENALTY: AN AMERICAN HISTORY* 7–8, 15–16 (2003) (detailing the Colonial-era development of lengthy lists of capital crimes and rapid executions designed to show a clear causal link between criminalized conduct and rapid execution); Douglas Hay, *Property, Authority, and Criminal Law*, in ALBION’S FATAL TREE 17–63 (Douglas Hay ed., 1975) (describing the “bloody code” inherited in the Thirteen Colonies from English law).

21. JOHN BAKER, *AN INTRODUCTION TO ENGLISH LEGAL HISTORY* 512 (1971). Felonies were considered to be so wicked that in preceding centuries a felony act severed the fundamental bond between landholding lord and the peasants, forfeiting the lands back to the feudal lord. See MAGNA CARTA art. 32.

22. Hay, *supra* note 20, at 18–19 (“The most recent account suggests that the number of capital statutes grew from about 50 to over 200 between 1688 and 1820.”). In a contemporary account, William Blackstone noted the “melancholy truth” that by his count there were no less than 160 statutory felonies “worthy of instant death.” 4 BLACKSTONE, COMMENTARIES *18.

While the thirteen American colonies imported a somewhat tempered version of England's "Bloody Code," delays before execution remained brief.²³

Several factors contributed to minimizing delays. For example, courts of the era operated with weak due process protections; appellate review in particular was exceedingly rare.²⁴ Additionally, antebellum capital codes were racialized, with numerous provisions targeting enslaved and free Black people for expedited or harsher punishment.²⁵ Swift executions also

23. See BANNER, *supra* note 20, at 7–8, 15–18.

24. Dwight Aarons, *Can Inordinate Delay Between a Death Sentence and Execution Constitute Cruel and Unusual Punishment?*, 29 SETON HALL L. REV. 147, 180–81 (1998). Both federal and state courts provided limited, if any, jurisdiction for appellate review through writs of error. It was only after the Civil War that the federal courts gained appellate jurisdiction to review either state or federal criminal cases. See *United States v. Moore*, 7 U.S. (3d Cranch) 159, 174 (1805) (Chief Justice John Marshall's holding explained that the limited grant of civil appellate jurisdiction in the First Judiciary Act implied the withholding of any appellate jurisdiction.); see also *United States v. Sanges*, 144 U.S. 310, 323 (1892) (reviewing recent legislative changes and holding that they provided federal circuit courts of appeal with general federal appellate jurisdiction in criminal matters). Even where appellate courts were technically available, they sat infrequently and, often, far away, placing capital defendants in a lethal double-bind since the common law writ of error did not stay judgements. See David Rossman, "Were There No Appeals?" *The History of Review in American Criminal Courts*, 81 J. CRIM. L. & CRIMINOLOGY 518, 544 (1990) (reviewing appeals in the early republic). Largely, states tried serious crimes by one or several experienced judges riding circuits and offered the ability to raise legal issues both during and after proceedings; however, appellate review was severely limited with only six of the original thirteen colonies offering Writs of Error and six additional states offering legislative or executive *de novo* review, while Georgia offered neither form of review. Rossman, *supra*, at 525–50. In general, writs of error provided a more limited scope of appellate review compared to modern appellate review practices. See *Writ of Error*, BLACK'S LAW DICTIONARY (1st ed. 1891); see also *Cohens v. Virginia*, 19 U.S. 264, 410 (1821) ("Under the [First] [J]udiciary [A]ct, the effect of a writ of error is simply to bring the record into Court. . . . Nothing is demanded from the State. No claim against it of any description is asserted or prosecuted. The party is not to be restored to the possession of anything. Essentially, it is an appeal on a single point. . . .").

25. BANNER, *supra* note 20, at 8–9. Broadly, more established slave states placed more value on swift punishment for enslaved people charged with capital crimes compared to newer slave states where the cost of enslaved human beings made additional due process economically desirable for capital crimes. See Daniel Flanigan, *Criminal Procedure in Slave Trials in the Antebellum South*, 40 J.S. HIST. 537, 540 (1974). For Antebellum jurists, the economic rationale was not subtle. See, e.g., *United States v. Amy*, 24 F. Cas. 792, 810 (Taney, Circuit Justice, C.C.D. Va. 1859) ("[W]e must not lose sight of the twofold character which belongs to the slave. He is a person, and also property. As property, the rights of the owner are [protected]."); *Creswell's Ex'r v. Walker*, 37 Ala. 229, 233 (1861) ("So far as their civil status is concerned, slaves are mere property. . . ."); *Ned v. State*, 7 Port. 187, 214 (Ala. 1838) (describing Ned as property with an assessed value of eight hundred dollars without constitutional protections); *Batten v. Faulk*, 49 N.C. 233, 233–34 (1856) ("He has no legal mind. He is the property of his master. All the proceeds of his labor belong to his master. . . . [a] slave has no legal status in our courts, except as a criminal, or as a witness in certain cases. The policy of our laws in keeping slaves within their proper sphere, has run through all our legislation. . . ."); *Murray v. State*, 9 Fla. 246,

fulfilled certain religious obligations held by the state and society at large.²⁶ Short delays were perceived to not only serve religious interests but also to balance state interests in deterrence and publicity.²⁷ Finally, the financial and logistical realities of

254 (1860) (“[Rather] than that the slave be dignified and brought into court with the same importance with the white man[,]” summary punishment by the Justice of the Peace would have been preferred); *Flora v. State*, 4 Port. 111, 112–15 (Ala. 1836) (overturning an execution of an enslaved person for economic reasons when no evidence of their slave holder was entered); see also THE FEDERALIST NO. 54 (James Madison) (“[Enslaved persons are] considered by our laws, in some respects, as persons, and in other respects as property.”); THOMAS COBB, AN INQUIRY INTO THE LAW OF NEGRO SLAVERY IN THE UNITED STATES OF AMERICA 88–90 (Applewood Books ed., 2009) (1858) (arguing general statutory and the common criminal law only applied to “persons” and, thus, did not bind enslaved persons unless explicitly named). This sentiment was not limited to trained jurists; “[w]e, again, recommend planters to explain to their slaves offenses that are punishable by death,” the *Montgomery Advertiser* urged after the 1855 execution of an enslaved person, “it would not only be humane to do so, but it would be a savings of property.” MONT. ADVERT’R & STATE GAZETTE, Mar. 20, 1855.

Whether or not general criminal statutes applied often came down to a matter of expedience, particularly the economic expedience of the plantation class. Compare *State v. Levin*, 4 N.C. 250 (1815) (holding that a general statute requiring hanging for horse stealing was not applicable to enslaved persons) with *State v. Peter*, 53 N.C. 19 (The North Carolina Supreme Court found that a general rape statute applied to an enslaved person who was accused of raping a white woman because, as the court reasoned, while “person” did not apply to enslaved persons, there was a general presumption of legislative intent anyways.). Many states codified “the right to the owner” of part or even all of the market value of enslaved persons sentenced to death. See, e.g., ALA. CODE ANN. § 3327 (1852); ROBERT WATKINS & GEORGE WATKINS, A DIGEST OF THE LAWS OF THE STATE OF GEORGIA 169 (1799). Capital codes were often ancillary to the extrajudicial systems of lethal plantation ‘justice’ and the terror of the slave patrol. See Flanigan, *supra*, at 539; see also MICHAEL PFEIFER, ROUGH JUSTICE 35 (2006) (describing how mob lynching had become a familiar [practice] in the south by the 1850s); see also Gillian v. Senter, 9 Ala. 395, 397 (1846) (“[I]t is quite as well, perhaps better, that . . . punishment should be admeasured by a [plantation] tribunal. Certainly, this mode of procedure would be preferable for the master, as it would relieve him both from anxiety and the necessity of expending money.”); cf. *State v. Mann*, 13 N.C. 263, 267 (1829) (*per curiam*) (“The slave, to remain a slave, must be made sensible that there is no appeal from his master.”).

26. The process was designed to both facilitate the private repentance to God and serve as a public platform for religious edification. BANNER, *supra* note 20, at 33–35. During the colonial period, executions “were both civil and religious acts, as magistrates and clergy each played a role.” Davison Douglas, *God and the Executioner: The Influence of Western Religion on the Use of the Death Penalty*, 9 WM. & MARY BILL RTS. J. 137, 156 (2000). The Puritans, in particular, heavily borrowed from Mosaic law in developing their capital codes. *Id.* at 155. In a “drama of penitence,” the soon-to-executed almost always played their assigned social role of sober penitence. LOUIS MASUR, RITES OF EXECUTION: CAPITAL PUNISHMENT AND THE TRANSFORMATION OF AMERICAN CULTURE, 1776–1865, at 41–43 (1989). The minister’s role in this political-religious process was so formalized that a day-by-day guidebook was published instructing clergy on how to save the souls of the people condemned. See WILLIAM SMITH, THE CONVICT’S VISITOR: OR, PENITENTIAL OFFICES, (IN THE ANTIENT WAY OF LITURGY) CONSISTING OF PRAYERS, LESSONS, AND MEDITATIONS; WITH SUITABLE DEVOTIONS BEFORE, AND AT THE TIME OF EXECUTION (1791).

27. Speed was viewed as pivotal to effective deterrence, and “meant that trials normally took place when the community’s memory of the crime was still vivid and when

incarceration in the early republic limited the length of any detention.²⁸

In 1811, New York City witnessed one of its last public executions; the circumstances leading up to the execution illustrate the interplay of these five factors. After a racially-influenced jury trial with no ability to appeal, James Johnson, a Black citizen, was sentenced to death; Johnson was confined with John Sinclair to await their executions.²⁹ People ranging from acquaintances, to religious figures to curious citizens visited Johnson and Sinclair; so many people came to the jail that, during their four weeks, guests had to be admitted in shifts of twenty, which was not out of the ordinary for condemned people.³⁰ One of their guards wrote a journal of Johnson and Sinclair's pre-execution incarceration (rapidly published and

the connection between the crime and the resulting legal proceedings was still perceived to be strong." BANNER, *supra* note 20, at 16. For example, William Linsey burgled a Massachusetts home on September 8, 1770. He was caught the next day, and by September 22, he had been indicted, tried, and sentenced to death. He was hanged within 40 days of his offense. *See id.* at 15–16; WATT ESPY & JOHN ORTIZ SMYLA, EXECUTIONS IN THE UNITED STATES, 1608–2002: THE ESPY FILE, INTER-UNIV. CONSORTIUM FOR POL. & SOC. RSCH. (July 20, 2016), <https://www.icpsr.umich.edu/web/NACJD/studies/8451/versions/V5> [hereinafter *The Espy File*] (listing Linsey's execution as October 25, 1770). At Linsey's execution, clergy delivered a long sermon, closing with the following:

We may here see the bitter fruits and effects of indulged wickedness.— Overmuch wickedness tends to an immature death, sometimes by the sword of civil justice being drawn upon the committers of it, as in the instance before us, and in the instance we had in this place but about two years ago, as well as in other instances; and partly also as many vices tend by a natural causality to shorten men's days upon earth. But then this is not the worst of it, for it tends to eternal death and destruction, as has been shown in the preceding discourse. O then, how ought every one, young and old, to take warning by the examples of others, and shun the paths of vice, and of the Destroyer! Let every sinner immediately repent and turn to God, and fly to Jesus who saves from sin, and delivers from the wrath to come; and henceforth live soberly, righteously and godly in the world, that so he may be happy in the favour of God here, and at last be received to the kingdom of glory. And O that all Israel may hear and fear and do no more so wickedly!

Thaddeus Maccarty, *The Most Heinous Sinners Capable of The Saving Blessings of the Gospel*, Sermon Preached at Worcester, Massachusetts (Oct. 25, 1770).

28. Historians have often highlighted ramshackle and crowded conditions among jails, where death-sentenced people were typically held, in the Early Republic. *See, e.g.*, Stephen E. Tillotson & Jennifer A. Colanese, *Jails in the Early American Republic: Transcarceration, Decarceration, and Rabble Management*, 97 PRISON J. 118, 120–21 (2016); MARK KANN, PUNISHMENT, PRISONS, AND PATRIARCHY: LIBERTY AND POWER IN THE EARLY REPUBLIC 236 (2005). Delay also risked escapes, and the risk was far from theoretical—between 1790 and 1805, at least fifteen people sentenced to death or awaiting capital trials in Georgia escaped. BANNER, *supra* note 20, at 18.

29. *See generally* Shane White, *The Death of James Johnson*, 51 AM. Q. 753, 782 (1999).

30. *Id.* at 782, 785–86; BANNER, *supra* note 20, at 21–22.

printed on the day of the execution for sale as a souvenir), in which the guard detailed a nearly endless cavalcade of “respectable” visits by clergy and citizens.³¹ On their execution day, Johnson and Sinclair were dressed in white “to signif[y] their innocence before . . . God” and, accompanied by New York militia and religious figures, they marched to the scaffold near what is now Greenwich Village.³² Before the ropes were secured, there was a half hour of prayers, sermons, and singing of Christian Psalms before the tens of thousands assembled.³³ Johnson and Sinclair shook hands, the platform dropped, Sinclair died instantly, and Johnson convulsed painfully for several minutes before dying.³⁴

The three months between Johnson’s arrest and his execution highlight the pressures to minimize delays between sentencing and execution.³⁵ The due process was anemic: trial proceedings were “simple, almost informal,” featured startlingly unprepared defense counsel, and left no avenue for appeal.³⁶ Johnson was among New York’s first generation of free black people, and his race strongly influenced his quick trial and execution.³⁷ The short period before his execution was a flurry of state and religious action to pressure Johnson into redeeming his soul and offering a moral lesson to the public.³⁸

31. A Correct Journal of the Conduct of the Two Unfortunate Prisoners, Sinclair & Johnson, From the Time of Their Conviction Until Their Execution 8 (1811). The journal concludes with claim that the visitation and reflection thrust upon the pair, left “no doubt, when the fatal moment arrives which is to launch them into eternity, they will display a degree of fortitude which can only be acquired by a consciousness of their having obtained pardon from the Omnipotent Father.” *Id.* at 13–14.

32. White, *supra* note 29, at 754, 787–88.

33. *Id.* at 786, 788.

34. *Id.* at 788.

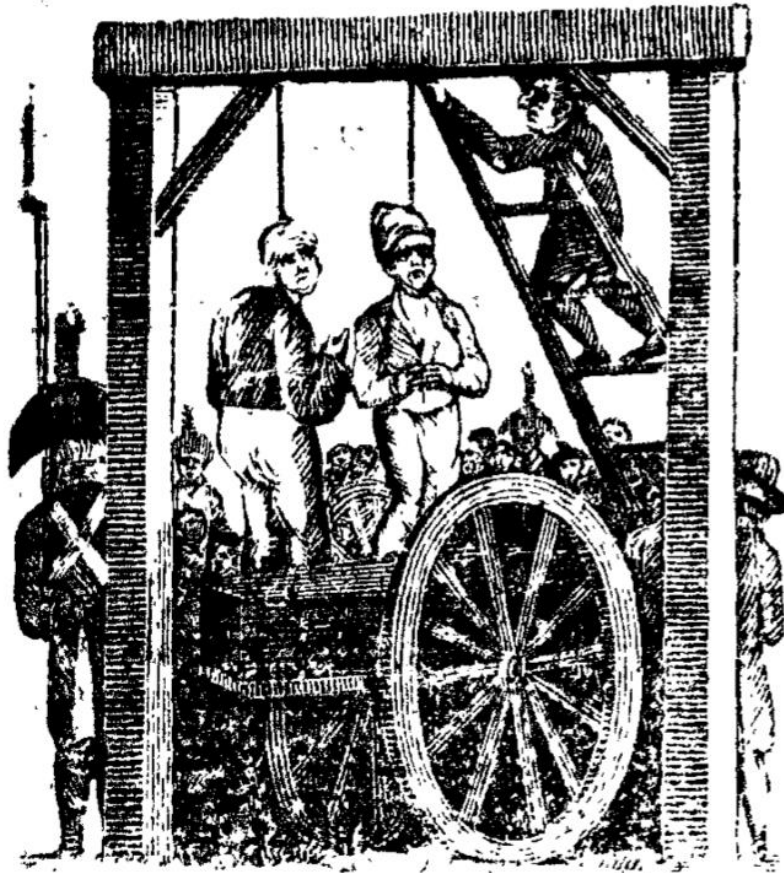
35. *Id.* at 754.

36. *Id.* at 780–82.

37. His crime was cast as evidence validating white New Yorkers’ perceptions that the dancing halls run by Black New Yorkers were dens of drinking, dancing, and other immorality. *See id.* at 755, 782, 789–90. Race also affected the trial process, with defense council showing a lack of “awareness that they were defending a black man and playing to a white jury in a city in which race relations were an important and frequently abrasive issue.” *Id.* at 782. In general, Black New Yorkers “accounted for much more than their fair share of [New York’s caseload,]” though they tended to have faith in the system. *Id.* at 778.

38. White, *supra* note 29, at 786.

IMAGE 1: AN ETCHING OF THE HANGING OF JOHNSON AND SINCLAIR, CARVED BEFORE THEIR EXECUTION TO BE SOLD IN SOUVENIR PAMPHLETS³⁹



2. *The Development of Solitary Confinement*

The story of Johnson and Sinclair illustrates how the procedural, racial, religious, political, and logistical pressures of the early republic ensured executions were highly public, swiftly concluded affairs. At the same time—before the colonies declared independence—the American people were moving away from the systemic use of capital punishment that characterized English

39. A Correct Journal, *supra* note 31

law.⁴⁰ For many revolutionaries, rejection of the excesses of the Bloody Code was part-and-parcel of rejecting the monarchy.⁴¹ The young republic witnessed a dramatic shift in public attitudes, as many states rapidly decapitalized crimes less heinous than homicide.⁴² The vanguard of this reformist movement was the Pennsylvania Prison Society, a group of leading intellectuals.⁴³ The Society proposed replacing capital punishment with terms of solitary confinement, limited by statute to durations of only days or weeks, subject to both judicial oversight and outside

40. Tillotson & Colanese, *supra* note 28, at 123 (“Americans, fresh from the revolution, rejected corporal and capital punishments found in colonial period penal codes and adopted terms of incarceration to replace outworn inflictions of physical punishment.”).

41. For example, one of the first post-independence acts of the Virginia Legislature in 1776 was to appoint Thomas Jefferson, Edmund Pendleton, George Wythe, George Mason, and Thomas Judwell Lee as a committee to review the Commonwealth’s laws. An Act for the Revision of the Laws (Oct. 1776), reprinted in 9 WILLIAM WALLER HENING, *THE STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA, FROM THE FIRST SESSION OF THE LEGISLATURE, IN THE YEAR 1619*, at 175–76 (Richmond, J. & G. Cochran 1821). The Committee, headed by Jefferson, corporal and capital punishment head-on in one of their recommended reforms, saying: “[T]he reformation of offenders, tho’ an object worthy the attention of the laws, is not effected at all by capital punishments, which exterminate instead of reforming . . . which also weaken the state by cutting off so many who, if reformed, might be restored sound members to society. . . .” Thomas Jefferson et al., *The Revisal of the Laws* [of Virginia], 1776–1786: 64. *A Bill for Proportioning Crimes and Punishment in Cases Heretofore Capital* (June 18, 1779), in NAT’L ARCHIVES FOUNDERS ONLINE, <https://founders.archives.gov/documents/Jefferson/01-02-02-0132-0004-0064> [https://perma.cc/7TMD-HUQN]. John Adams opened his argument in the Boston Massacre trial by quoting the Italian philosopher Cesare Beccaria, saying: “If I can but be the instrument of preserving one life, his blessing and tears of transport, shall be a sufficient consolation to me, for the contempt of all mankind.” John Adams, *Argument in Defense of the Soldiers in the Boston Massacre Trials* (December 4, 1770), in NAT’L ARCHIVES FOUNDERS ONLINE, <https://founders.archives.gov/documents/Adams/05-03-02-0001-0004-0016> [https://perma.cc/6KTY-LGED]. Pennsylvania, Maryland, New Hampshire, and South Carolina adopted constitutions during or shortly after the Revolution that explicitly called for legislators to limit the penal code’s severity. *See, e.g.*, S.C. CONST. of 1778, art. XL (“That the penal laws, as heretofore used, shall be reformed, and punishments made in some cases less sanguinary, and in general more proportionate to the crime.”); MD. CONST. of 1776, art. XIV (“That sanguinary laws ought to be avoided, as far as is Consistent with the safety of the State: and no law, to inflict cruel and unusual pains and penalties, ought to be made in any case, or at any time hereafter.”); PENN. CONST. of 1776, sec. 38 (“The penal laws as heretofore used shall be reformed by the legislature of this state . . . and punishments made in some cases less sanguinary, and in general more proportionate to the crimes.”); N.H. CONST., art. 18 (“[A] multitude of sanguinary laws is both impolitic and unjust. The true design of all punishments being to reform, not exterminate mankind) (as amended in 1784).

42. BANNER, *supra* note 20, at 88, 97–98.

43. David Shapiro, *Solitary Confinement in the Young Republic*, 133 HARV. L. REV. 542, 552 (2019) (noting the organization’s original name as the Philadelphia Society for Alleviating the Miseries of Public Prisons).

inspection.⁴⁴ The program was a radical penological shift, but the Prison Society would soon get a chance to test its unprecedented model.⁴⁵

In 1790, the Pennsylvania legislature implemented this system at the Walnut Street Jail, in Philadelphia.⁴⁶ Walnut Street relied on a sophisticated system of checks: only people convicted of the most serious felonies qualified for solitary confinement *at all*, and judges could impose solitary confinement for no more than half of the sentenced term of imprisonment;⁴⁷ prison officials had to seek approval from an external oversight board and the mayor to impose more than two days of solitary for behavioral infractions by incarcerated people, and could seek a maximum of only fifteen days;⁴⁸ and solitary periods were broken up by periods of normal incarceration and a system of organized visitation.⁴⁹ None of this is to suggest the Walnut Street system lacked cruelty—some incarcerated people there begged to be killed.⁵⁰ This robust system of checks, however, compares favorably to many modern death row practices and suggests a recognition of the cruelty of prolonged isolation.⁵¹

Walnut Street Jail was the debut of solitary confinement, and it was intended as a replacement for, not a prelude to,

44. *Id.* at 553–56. The Society viewed themselves as the successors to John Howard, whose pioneering ideas for improving the lives of incarcerated people the Society drew upon; while exiled in the United States, the social reform-minded Duc de Le Rochefoucauld-Liancourt studied the new Philadelphia prison system. In his report, he emphasized that the spirit of John Howard underpinned the new penal system. FRANÇOIS FRÉDÉRIC, DES PRISONS DE PHILADELPHIE PAR UNE EUROPÉEN 1 (2d ed. 1799) (“Sa doctrine [d’Howard], son système, sont soigneusement adoptés à Philadelphie: ils le sont depuis plusieurs années et le succès couronne l’entreprise, ainsi que l’avait annoncé ce bienfaiteur de l’humanité.”) (explaining that Howard’s system and philosophy were adopted in detail in Philadelphia, with great success and humanity); *see also* JOHN HOWARD, AN ACCOUNT OF THE PRINCIPAL LAZARETTOS OF EUROPE (1798).

45. See LeRoy B. DuPuy, The Walnut Street Prison: Pennsylvania’s First Penitentiary, 18 PENN. HIST. 130, 130–32 (1951).

46. Shapiro, *supra* note 43, at 552–53, 556. There is a rich literature on the “Pennsylvania System.” *See, e.g.*, Peter S. Smith, *The Effects of Solitary Confinement on Prison Inmates: A Brief History and Review of the Literature*, 34 CRIME & JUST. 441, 456–61 (2006) (reviewing the primary historical narrative of the Pennsylvania System); MICHEL FOUCAULT, *THE PUNITIVE SOCIETY* 86–92 (Bernard Harcourt et al. eds. 2013) (describing, *inter alia*, the juridical-religious nature of the Pennsylvania System).

47. Shapiro, *supra* note 43, at 546, 558. By 1827, the longest period of continuous solitary was 16 months. *Id.* at 558.

48. *Id.* at 546, 557, 562, 565–66.

49. Negley Teeters, *The Pennsylvania Prison Society—A Century and a Half of Penal Reform*, 28 J. CRIM. L. & CRIMINOLOGY 374, 378 (1937).

50. Shapiro, *supra* note 43, at 546, 558.

51. *Id.* at 559.

execution.⁵² Observers from across the United States and abroad marveled at the new regime.⁵³ “I have not a doubt,” South Carolina lawyer and politician Robert Turnbull wrote after his visit, that “a congeniality of legislative sentiment [towards the Walnut Street model] will soon become general throughout the Union.”⁵⁴ It was a pioneering effort, whose records “present many vivid glimpses of social customs and conditions during the early days of our republic.”⁵⁵ Philadelphia, the early republic’s largest city and trade center, was at the forefront of a national dialogue about progress away from the Bloody Code.⁵⁶

52. DuPuy, *supra* note 45, at 130.

53. Teeters, *supra* note 49, at 37. Many of these observers wrote reports. *See, e.g.*, FRÉDÉRIC, *supra* note 44; ROBERT TURNBULL, A VISIT TO PHILADELPHIA PRISON; BEING AN ACCURATE AND PARTICULAR ACCOUNT OF THE WISE AND HUMANE ADMINISTRATION ADOPTED IN EVERY PART OF THAT BUILDING (1797) (originally published in the *Charleston Daily Gazette*); CALEB LOWNES, AN ACCOUNT OF THE ALTERATION AND PRESENT STATE OF THE PENAL LAWS OF PENNSYLVANIA: CONTAINING ALSO AN ACCOUNT OF THE GAOL AND PENITENTIARY HOUSE OF PHILADELPHIA AND THE INTERIOR MANAGEMENT THEREOF (1799).

54. TURNBULL, *supra* note 53, at 85.

55. DuPuy, *supra* note 45, at 135.

56. *Id.* at 135–36; BANNER, *supra* note 15, at 88, 97–98; *see also* Shapiro, *supra* note 43, at 547, 551–54; TURNBULL, *supra* note 53, at 79–80 (“In fine, it appears, that the genii of reason and true philosophy have, ager a long and tedious flight over the regions of the earth, at length lighted upon this spot [Philadelphia] as their residence. . .”).

IMAGE 2: AN 1804 ETCHING OF WALNUT STREET JAIL BY WILLIAM RUSSELL BIRCH⁵⁷



At the Walnut Street Jail, solitary confinement was developed to displace capital punishment and to demonstrate the viability of a radical alternative. The robust system of checks adopted at Walnut Street evinces the jailers' understanding of the cruelty of prolonged isolation.⁵⁸ Judges' sentencing decisions further reflected social unease with solitary confinement, which averaged closer to the minimum sentence than to the maximum.⁵⁹ As American society moved away from capital punishment, many viewed solitary confinement—carefully controlled—as the replacement.

57. W. Birch, *Jail in Walnut Street Philadelphia* (engraving), Library Company of Philadelphia, <https://digital.librarycompany.org/islandora/object/Islandora%3A13356> [<https://perma.cc/38RH-PUTJ>].

58. See Shapiro, *supra* note 43, at 558–59.

59. *Id.* at 558.

3. Conclusion

In the early republic, as detailed above, capital punishment and solitary confinement were distinct penal approaches. Procedural, racial, religious, political, and logistical dynamics led capital punishment to be swift and highly public. As early American society shifted away from the Bloody Code, solitary confinement emerged to displace capital punishment. Unlike capital punishment, solitary confinement relied on a carefully managed and checked system of isolation. In short, solitary confinement and capital punishment stemmed from distinct normative bases and operated according to divergent processes and procedures. Combining these two systems would consequently seriously undermine the purposes and administration of both systems.⁶⁰

B. CAPITAL PUNISHMENT AND SOLITARY CONFINEMENT ONLY FOUND THEIR CONFLUENCE IN THE MID-TWENTIETH CENTURY

Colonial and Founding-era conceptions of solitary confinement and capital punishment in are antithetical to contemporary death row practices. This subpart lays out four chronological phases that led to the formation of the modern death row in the twentieth century: (1) the Antebellum penal reform movement, which movement's led to rejection of permanent solitary confinement and even the death penalty itself; (2) the retrenchment in the Post-Bellum era retrenchment; (3) the twentieth century's increasing reliance on the death penalty, swifter executions, and hardening prison conditions; and (4) the dramatic worsening of conditions in the post-*Gregg v. Georgia*⁶¹ era.

60. *Id.* at 594–95.

61. 428 U.S. 153 (1976) (approving the resumption of capital punishment).

1. *1800–1860: National Reform and the Rejection of Perpetual Solitary Confinement*

Following the example set by Walnut Street, states experimented with different levels of solitary confinement. By the 1830s, however, solitary confinement began to lose support.⁶² In the 1820s, several states attempted and—in short order—abandoned permanent solitary confinement.⁶³ Faced with overcrowding and mounting public pressure against the costs of administration, even Pennsylvania rapidly moved away from solitary confinement—reducing maximum solitary sentences to nine months by 1853.⁶⁴ In multiple states, opinion decisively turned against extended solitary confinement; by Reconstruction, prolonged solitary confinement was abandoned and came to be seen as “a hopelessly crude and elementary penal system [that] few possessed the audacity or stupidity to prolong.”⁶⁵ By the turn of the century, the United States had so thoroughly repudiated solitary confinement that the Supreme Court granted a rare habeas petition, releasing a man convicted of capital murder

62. Craig Haney & Mona Lynch, *Regulating Prisons of the Future: A Psychological Analysis of Supermax and Solitary Confinement*, 23 N.Y.U. REV. L. & SOC. CHANGE 477, 483 (1997); Smith, *supra* note 46, at 456–57 (outlining how states experimented with differing levels of isolation).

63. For example, in New York a disastrous 1821 pilot program for complete isolation produced “results so dire” the governor ended the experiment and released the 26 “survivors.” Smith, *supra* note 46, at 457; Harry E. Barnes, *Historical Origins of the Prison System in America*, 12 J. CRIM. L. & CRIMINOLOGY 35, 52–53 (1922). Maine, New Jersey, and Virginia also piloted programs to fully isolate part of their prison population, which all three swiftly abandoned as disastrous on mental and physical health. For a description of each, see FRANCIS GRAY, PRISON DISCIPLINE IN AMERICA 43 (1848).

64. See Barnes, *supra* note 62, at 56 n.54 (showing several dates of adoption and abandonment of the Pennsylvania system). For an overview of these issues at Pennsylvania’s Eastern State Penitentiary, see Margaret Charleroy & Hilary Marland, *Prisoners of Solitude: Bringing History to Bear on Prison Health Policy*, 40 ENDEAVOR 141, 143–44 (2016).

65. Barnes, *supra* note 63, at 58. In 1848, Francis Gray, who observed that more than 4,000 people were held in solitary confinement, explained the national mood as being that “constant confinement, total privation of social intercourse, should form no part of any [penal] system.” GRAY, *supra* note 63, at 2. By the mid-century, physicians continued to echo concerns of psychosis caused by sustained solitary confinement, and “[a]s the evidence accumulated in the medical community, the legal community followed in noting the inhumanity and detrimental psychological impacts of solitary confinement.” David Cloud et al., *Public Health and Solitary Confinement in the United States*, 105 AM. J. PUB. HEALTH 18, 19 (2015).

because he was placed into solitary confinement for four weeks pending his execution without prior legal authorization.⁶⁶

2. 1860–1930: *The Precursors of Modern Death Row*

The spirit of reform in the solitary confinement context extended to capital punishment: Michigan (1846), Rhode Island (1852), and Wisconsin (1854) became the first states to abolish capital punishment.⁶⁷ Many other states reduced the number of capital crimes, empowered juries to extend mercy in sentencing, transferred the authority for executions from local jurisdictions to the state level, and shifted executions out of public view.⁶⁸ While condemned people were usually held in the regular prison or jail population,⁶⁹ several states began codifying requirements that death-sentenced individuals be held in solitary confinement for short periods pending execution.⁷⁰

66. See *In re Medley* 134 U.S. 160, 172 (1890); see also *Ruiz v. Texas*, 137 S. Ct. 1246, 1246 (2017) (Breyer, J., dissenting from denial of a stay of execution) (“This Court long ago, speaking of a period of only four weeks of imprisonment prior to execution, said that a prisoner’s uncertainty before execution is ‘one of the most horrible feelings to which he can be subjected.’”) (quoting *In re Medley*).

67. *Background and Developments*, in *THE DEATH PENALTY IN AMERICA* 3, 8 (Hugo Bedau, ed. 1997) [hereinafter *Bedau*]. In this era, Ohio and Pennsylvania nearly repealed their death penalties. *Id.*

68. *Id.* at 4–7; ROBERT BOHM, *DEATHQUEST* 8 (5th ed. 2016); BANNER, *supra* note 20, at 144–68.

69. In the 1890s, 90% of executions were held by local authorities. BOHM, *supra* note 68, at 13. By 1925, only Louisiana and Mississippi held such executions. *Id.* Localities typically did not operate prisons, as a result most death-sentenced people were held in jails. See, e.g., *Rooney v. North Dakota*, 196 U.S. 319, 320–23 (1905) (describing a shift from keeping condemned people in jails to the state penitentiary).

70. The first solitary-like death rows appear during this period. Several states with short periods between sentencing and execution began codifying requirements that death-sentenced individuals be held in solitary confinement pending execution, including New York, Colorado, Minnesota, and New Jersey. See *McElvaine v. Brush*, 142 U.S. 155 (1891) (describing a New York statute providing one to two months of solitary pending execution); *In re Medley* 134 U.S. 160 (similar, for Colorado); *Holden v. Minnesota*, 137 U.S. 483, 487–90 (1890) (similar, for Minnesota); *State v. Tomassi*, 75 N.J.L. 739, 747 (1908) (similar, for New Jersey). Other states, like Vermont, required a mix of solitary and traditional confinement. See *Rogers v. Peck*, 199 U.S. 425, 432–33 (1905) (describing the Vermont statute which provided for a six-month interim period, with three-months of solitary confinement).

3. 1930–1972: *The First Death Rows*

While it was common in the nineteenth century for people to be executed without any appellate review, by the mid-1900s, states begrudgingly began establishing appellate processes for capital cases.⁷¹ By the 1940s, the Supreme Court began reviewing capital cases in earnest, resulting in expanded procedural safeguards.⁷² The United States also witnessed an increase in death sentences but a steady decline in execution rates.⁷³ Fueled by anxiety over a perceived crime wave generated by Prohibition and the Great Depression, executions peaked in the 1935.⁷⁴ This trend was further fueled by the South's transitioning from lynching to the "legal lynching" of swift show trials followed by executions.⁷⁵ Nationally, between 1880 and 1960, Black Americans represented 10 percent of the population and 61 percent of those executed.⁷⁶

After peaking in 1935, the execution rate sharply declined.⁷⁷ The average execution rate in the 1950s was *half* that of the previous two decades, and the rate continued to plummet in the 1960s.⁷⁸ The following execution numbers clearly demonstrate this trend:

71. Bedau, *supra* note 67, at 11 (Bedau explains that "at least perfunctory review by state appellate courts became almost routine, although very few states went so far as to enact statutes requiring [such review].").

72. *Id.* at 13; *see also* Powell v. Alabama, 287 U.S. 45 (1932) (holding the state must provide counsel to indigent capital defendants); Brown v. Mississippi, 297 U.S. 278 (1936) (prohibiting coerced confessions from being used at trial); Malinski v. New York, 324 U.S. 401 (1945) (requiring convictions based, even in part, on a coerced confession to be set aside); Witherspoon v. Illinois, 391 U.S. 510 (1968) (holding that a juror's mere reservations about capital punishment was an insufficient cause to strike in *voir dire*).

73. *See The Espy File, supra* note 27.

74. Bedau, *supra* note 67, at 8–9.

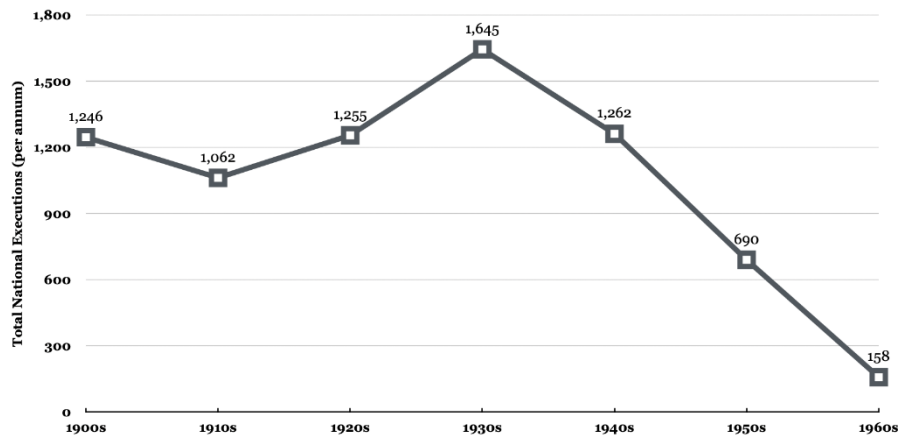
75. PFEIFER, *supra* note 25, at 88; *see also* James Clarke, *Without Fear or Shame: Lynching, Capital Punishment and the Subculture of Violence in the American South*, 28 BRIT. J. POL. SCI. 269, 287 (1998) (explaining that in the early to mid-Twentieth Century, 1,963 of 2,613—or 75%—of recorded executions in the South targeted Black Americans).

76. Clarke, *supra* note 75, at 286.

77. BANNER, *supra* note 20, at 208.

78. Bedau, *supra* note 67, at 13.

GRAPH 1: EXECUTIONS PER DECADE IN THE EARLY TWENTIETH CENTURY⁷⁹



A massive litigation campaign spearheaded by civil rights activists contributed to the sharp decline in executions.⁸⁰ Public support for capital punishment fell to its lowest levels ever: in May 1966, when asked about the death penalty for murder, more Americans were opposed (47 percent) than in favor (42 percent).⁸¹ Hundreds were on death row, but executions reduced to a trickle.⁸² In 1968, the United States witnessed its first year ever without a single execution.⁸³

The concomitant result was a growing death row population spending ever-lengthening amounts of time in conditions that were never intended for such sustained detention.⁸⁴ At the end of 1953, 131 people were under a death sentence, but by 1970, the number quintupled to 631.⁸⁵ In 1972, relying in part on declining execution rates and the soaring condemned population, the

79. Calculated from data in *The Espy File*, *supra* note 28.

80. Bedau, *supra* note 67, at 13; *see also* *Furman v. Georgia*, 808 U.S. 238, 291–92 (Brennan, J., concurring) (discussing the dropping execution rate and soaring death row population).

81. GALLUP, *Death Penalty*, <https://news.gallup.com/poll/1606/death-penalty.aspx> [<https://perma.cc/P5HW-P85M>].

82. Warren Weaver, *Death Penalty: A 300 Year Issue in America*, N.Y. TIMES (July 3, 1976).

83. *The Espy File*, *supra* note 27; BANNER, *supra* note 20, at 208.

84. Bedau, *supra* note 67, at 14.

85. DOJ BUREAU OF JUST. STAT., CAPITAL PUNISHMENT 2020, 21 app. tbl.2 (Sept. 2020).

Supreme Court held in *Furman v. Georgia* that the death penalty as practiced was unconstitutional.⁸⁶

4. 1976–2000: *The Post-Gregg Boom*

But *Furman* was short lived. Four years later, in *Gregg v. Georgia*, the Supreme Court permitted the resumption of capital punishment, provided that expanded procedures were in place to address the Court's concerns in *Furman*.⁸⁷ Between 1973 and 2000, death sentences flooded in—with hundreds of people sentenced to death annually.⁸⁸ In the same period, executions slowed, with an average of 25 annually and a peak of 98 executions in 1999.⁸⁹ From 1973 to 2000, over three thousand more people were added to America's death rows than were removed (through execution, natural death, or exoneration).⁹⁰ By 1995, death-sentenced individuals spent an average of eleven years on death row.⁹¹

This increasing number of individuals on death row accompanied a national shift towards unprecedented reliance on solitary confinement and complete contact deprivation in new “supermax” prisons, in particular with the 1963 advent of the segregation block.⁹² States followed this federal example, building their own segregated units.⁹³ In 1989, Pelican Bay opened as the first “supermax” prison—a facility specifically designed to keep all residents in permanent solitary with no visual or physical contact with anyone, and the states again followed suit.⁹⁴ Pelican Bay and its progeny were controversial from the start, inspiring a wave of critical scientific research and

86. *Furman v. Georgia*, 408 U.S. 238, 239–40 (1972) (*per curiam*); *see also id.* at 291–92 (Brennan, J., concurring) (noting the declining execution rate and soaring death row population as justifications).

87. *Gregg v. Georgia*, 428 U.S. 152 (1976); James Liebman, *Slow Dancing with Death: The Supreme Court and Capital Punishment, 1963–2006*, 107 COLUM. L. REV. 1, 28–37 (2007).

88. DOJ BUREAU OF JUST. STAT., *supra* note 85, at 22 app. tbl.3.

89. *Id.* at 23 app. tbl.4.

90. *See id.* at 22 app. tbl.3.

91. DOJ BUREAU OF JUST. STAT., CAPITAL PUNISHMENT 1995, at 11 tbl.11 (1996). The judiciary carefully examined capital cases and, between 1973 and 1995, the courts found prejudicial error in 68% of the thousands of capital sentences. James Liebman, *A Broken System: Error Rates in Capital Cases, 1973–1995* COLUM. L. SCH., PUB. L. RSCH. PAPER NO. 15, at 4–5 (2000).

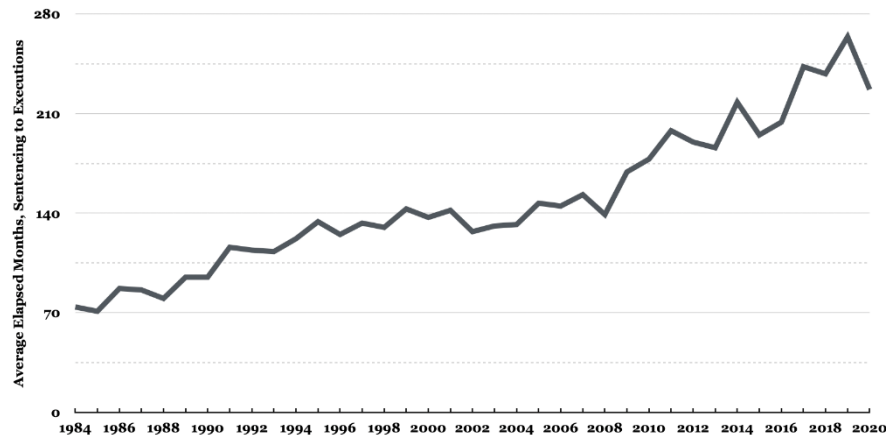
92. Haney & Lynch, *supra* note 62, at 488; Cloud, *supra* note 65, at 19.

93. Cloud, *supra* note 65, at 19.

94. *Id.*

social mobilization, but the use of permanent solitary confinement nevertheless persisted and expanded.⁹⁵ Many current death rows were built during this period, including Alabama’s Holman Prison (1969),⁹⁶ South Carolina’s Broad River (1988),⁹⁷ and Virginia’s Sussex I (1998).⁹⁸ By the late 1980s, advocates began to identify a “Death Row Phenomenon” where the long delays before execution were compounded by harsh conditions to produce previously unseen psychological distress.⁹⁹

GRAPH 2: AVERAGE DELAY BETWEEN SENTENCING AND EXECUTION, 1984–2020¹⁰⁰



95. Haney & Lynch, *supra* note 62, at 488–89.

96. *William C. Holman Correctional Facility: Maximum Custody*, ALA. DEP’T OF CORR., <http://www.doc.state.al.us/facility?loc=33> [<https://perma.cc/4G8M-2PV6>].

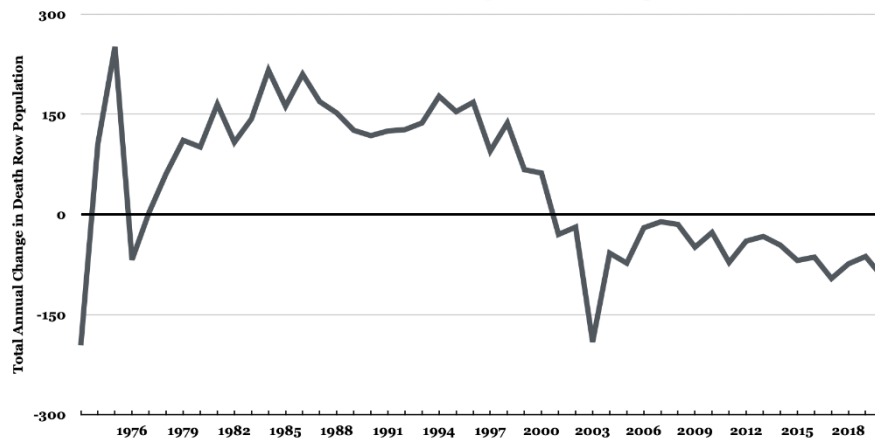
97. *Broad River Correctional Institution*, S.C. DEP’T OF CORR., <http://www.doc.sc.gov/institutions/brci.html> [<https://perma.cc/3TAR-NKA5>].

98. *Press Release: DOC Appoints New Warden at Sussex I State Prison*, VA. DEP’T OF CORR. (Mar. 9, 2006) http://www.vadoc.virginia.gov/resources/news/06mar8_sussexwar.shtm [https://web.archive.org/web/20100108103456/http://www.vadoc.virginia.gov/resources/news/06mar8_sussexwar.shtm].

99. See Smith, *supra* note 7, at 239–41.

100. Calculated from data in CAPITAL PUNISHMENT 2020, *supra* note 83, at 22 appx. tbl.12.

GRAPH 3: GROSS NATIONAL ANNUAL CHANGE IN DEATH ROW POPULATION, 1972–2020¹⁰¹



Reacting to the flood of litigation, growing pre-execution period, and high error-discovery rate, Congress enacted the Anti-Terrorism and Effective Death Penalty Act (AEDPA) of 1996, placing unprecedented barriers between death-sentenced people and post-conviction review.¹⁰² AEDPA codified Supreme Court decisions requiring dismissal of potentially meritorious claims for procedural errors.¹⁰³ AEDPA also created further and created additional obstacles, including requiring federal courts to defer to state court decisions—even “erroneous” ones,¹⁰⁴ imposing a one-year statute of limitations on habeas claims,¹⁰⁵ severely

101. Calculated from data in CAPITAL PUNISHMENT 2020, *supra* note 83, at 22 appx. tbl.3.

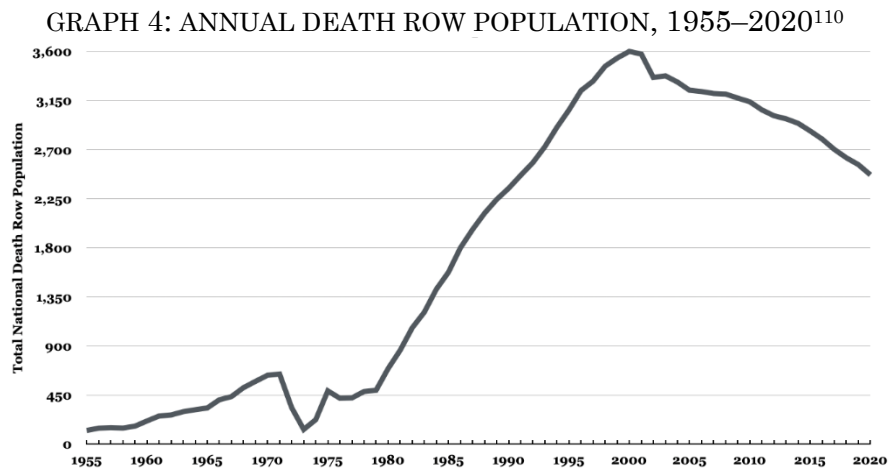
102. See 28 U.S.C. §§ 2244, 2254; see also Lynn Adelman, *Repeal the AntiTerrorism and Effective Death Penalty Act to Restore Habeas Corpus*, AM. BAR ASS’N (Oct. 8, 2020), https://www.americanbar.org/groups/litigation/publications/litigation_journal/2020-21/fall/repeal-antiterrorism-and-effective-death-penalty-act-restore-habeas-corpus/ [<https://perma.cc/E3TX-93NB>] (describing the AEDPA’s effects).

103. For example, 28 U.S.C. § 2254(c) codified the *Wainwright* procedural default rule and 28 U.S.C. § 2254(e)(2)(A)(i) codified the *Teague* non-retroactivity rule. See *Wainwright v. Sykes*, 433 U.S. 72, 86–87 (1977) (holding that, in a state with a contemporary objection rule, a failure to object at trial procedurally defaulted raising that same legal issue later in federal habeas); *Teague v. Lane*, 489 U.S. 288, 306 (1989) (announcing that generally a newly announced rules of criminal procedure would not be available as grounds for habeas review where finality predated the announcement of the rule).

104. 28 U.S.C. § 2254(d).

105. 28 U.S.C. § 2244(d)(1).

restricting the ability to file successive habeas petitions,¹⁰⁶ and largely prohibiting habeas courts from holding evidentiary hearings.¹⁰⁷ AEDPA, the delay between sentencing and execution has continued to climb unabated—from 125 months at AEDPA’s passage to 243 months in 2021.¹⁰⁸ The result was a population boom on death row, peaking in 2000 at 3,601 people.¹⁰⁹



C. CONCLUSION

The contrast between present conditions and the values of the past is sharp. For example, religious visitation of condemned people was so common in the early republic that a day-by-day guide was printed to help death-sentenced persons prepare to “enter the dark valley of death.”¹¹¹ Whether ministers with the guidebook, friends, or family, for the short weeks before their execution, condemned people were rarely alone.¹¹² Today, the

106. *Id.* at § (b)(1).

107. 28 U.S.C. §§ 2254(e)–(f).

108. See *Time on Death Row*, *supra* note 3.

109. From 1973 to 1980, an average of 53 more people were placed on death row than those who left it through execution, clemency, appeal, or other death. DOJ BUREAU OF JUST. STAT., CAPITAL PUNISHMENT—2018 STATISTICAL TABLES, at 22 app. tbl.3 (2018). The rate increased, with 167 more annual additions from 1981 to 1990 and 125 more from 1991 to 2000. By 2000, there were 3,601 people were under a death sentence—nearly 27 times the death row population in 1973. *Id.*

110. Calculated from data in CAPITAL PUNISHMENT 2020, *supra* note 83, at 22 appx. tbl.2.

111. WILLIAM SMITH, *supra* note 26, at 84.

112. See BANNER, *supra* note 20, at 21–22.

journey through the dark path to death has grown from weeks to decades and people sentenced to death are left to walk it alone.¹¹³ People on death row are denied religious support,¹¹⁴ access to sunlight, or even the touch of another human being, except for prison officials during handcuffing.¹¹⁵ As the above discussion detailed, Americans from the early republic to the twentieth century would have been aghast that people on today's death rows are left alone in the valley of the shadow of death.¹¹⁶

II. AMERICA'S DEATH ROWS IN 2021: A DATA-DRIVEN ANALYSIS

The preceding Part explained that decades-long permanent solitary confinement on death rows is a distinctly modern phenomenon that doesn't resemble the penological conceptions and practices of the first two centuries of American history. Part II provides a snapshot of conditions on American death rows today. Across the 29 American jurisdictions with capital punishment, there are 2,436 people living under a death sentence.¹¹⁷ Many will spend, or have spent, decades awaiting execution, isolated for twenty-three hours a day in a tiny concrete cell.¹¹⁸

There is a growing trend, however, toward more humane treatment. At least nine jurisdictions in the past six years have taken significant steps toward ending permanent solitary confinement on their death rows.¹¹⁹ Part II.A outlines the chronology of the largest changes in this trend. Then, Part II.B describes the methodology of this Note's jurisdiction-by-jurisdiction study of death row conditions as they exist in the

113. See *Time on Death Row*, *supra* note 3 (showing the average time on death row extending to decades in the modern era); *infra* Appendix (outlining policies requiring solitary confinement).

114. See, e.g., Matthew S. Schwartz, *Justices Let Alabama Execute Death Row Inmate Who Wanted Imam by His Side*, NPR (Feb. 8, 2019), <https://www.npr.org/2019/02/08/692605056/supreme-court-lets-alabama-execute-muslim-murderer-without-imam-by-his-side> [<https://perma.cc/58WE-XUJX>] (describing Alabama's denial of Dominique Ray's request to be accompanied by his spiritual advisor during execution).

115. See ACLU, *supra* note 17 (detailing these conditions and more).

116. See *Psalms* 23:4.

117. NAACP LEGAL DEF. FUND, *supra* note 3, at 1, 37–59.

118. See *infra* Appendix (detailing conditions); see also ACLU, *supra* note 17, at 4 (finding most death row cells to be the size of an average bathroom).

119. These states are Arizona, California, Louisiana, Nevada, North Carolina, Oregon, Pennsylvania, South Carolina, and Virginia. See *infra* Part II.A (detailing changes).

United States today. Finally, Part II.C reviews this Note's most significant findings regarding present-day death row conditions.

A. RECENT EVENTS INDICATE A GROWING REJECTION
OF FULLY SOLITARY DEATH ROWS

This subpart surveys the circumstances and chronology of a growing consensus against permanent solitary death rows. The trend began in Missouri which, as part of a 1991 consent decree, abolished its death row, moving all death-sentenced people into standard housing.¹²⁰ Soon after, North Carolina began permitting sixteen hours out-of-cell daily.¹²¹ The trend picked up speed, with at least eight states in the last six years reforming their death row living conditions.¹²²

Prior to 2014, Colorado automatically placed death-sentenced people into solitary confinement for twenty-three hours daily.¹²³ As part of a broad reform effort to reduce solitary confinement, the Colorado Department of Corrections began allowing at least four hours out-of-cell, contact visits, and work opportunities.¹²⁴ In 2015, a person incarcerated on Arizona's death row sued the state's corrections department in federal court, claiming that the automatic and unreviewable placement of death-sentenced people in solitary confinement violated the Eighth and Fourteenth Amendments.¹²⁵ Following a 2017 settlement, Arizona ended mandatory solitary confinement, allowed for contact visitation, and provided community social, recreation, and meal time.¹²⁶ The same year, three people on death row in Louisiana's infamous Angola Prison brought a class action suit seeking the end of the state's policy of automatic and unreviewable solitary

120. George Lombardi et al., *Mainstreaming Death Sentenced Inmates: The Missouri Experience and its Legal Significance*, 61 JUNE FED. PROB. 3, 5 (1997); YALE L. SCH., *supra* note 17, at 12.

121. YALE L. SCH., *supra* note 17, at 9–10.

122. These states are Arizona, California, Colorado, Louisiana, Oregon, Pennsylvania, South Carolina, and Virginia. *See infra* Appendix (detailing conditions).

123. YALE L. SCH., *supra* note 17, at 15.

124. YALE L. SCH., *supra* note 17, at 15–17.

125. *Nordstrom v. Ryan*, No. CV15-02176-PHX-DGC, 2019 U.S. Dist. LEXIS 169860, at *1 (D. Ariz. Oct. 1, 2019) *aff'd*, 813 F. App'x 684 (9th Cir. 2020) (Mem.).

126. *See* Michael Kiefer, *Arizona Death Row Comes Out of Solitary, Giving Convicts More Human Contact, Socialization*, ARIZ. CENTRAL (Dec. 19, 2017), <https://www.azcentral.com/story/news/local/arizona-investigations/2017/12/19/arizona-death-row-inmates-moved-giving-more-human-contact-socialization/951808001/> [<https://perma.cc/3KKSU-LVAA>].

confinement for people sentenced to death.¹²⁷ Policy changed weeks later, providing at least four hours out-of-cell daily, during which groups could use a common or non-caged outdoor space.¹²⁸

Similar challenges, and responsive policy changes, percolated across the country.¹²⁹ In May 2019, the Fourth Circuit held that Virginia's death row, which isolated people on death row in-cell for twenty-three or more hours daily and provided no congregate time, constituted cruel and unusual punishment—the first Circuit Court to do so.¹³⁰ The ruling made permanent earlier voluntary reforms that ended indefinite solitary by providing contact visitation, at least three hours out of cell, and congregation time.¹³¹ Six months later, a settlement ended Pennsylvania's solitary death row—and required the state provide more than forty hours weekly out-of-cell.¹³² Following the Fourth Circuit's ruling and similar litigation, South Carolina ended its permanent solitary death row.¹³³

This trend has continued through the present, despite the COVID-19 pandemic creating an unprecedented backlog in the courts, drawing legislative and executive attention, and presenting logistical barriers to prison management, including disincentivizing removing people from isolation.¹³⁴ In January

127. Class Action Complaint & Demand for Jury Trial ¶ 44, *Hamilton v. Vannoy*, No. 3:17-CV-00194-SDD-RLB (M.D. La. Mar. 29, 2017), 2017 WL 1196204.

128. See Julia O'Donoghue, *Louisiana Tests Relaxed Restrictions on Death Row Inmates*, TIMES-PICAYUNE (Oct. 26, 2017), https://www.nola.com/news/politics/article_f83957a5-5021-52ab-9d75-22fb59782509.html [<https://perma.cc/P3SJ-H93U>].

129. See, e.g., *Porter v. Clarke*, 290 F. Supp. 3d 518, 521 (E.D. Va. 2018) (challenging conditions on Virginia's death row); Class Action Complaint for Declaratory & Injunctive Relief, *Reid v. Wetzel*, No. 1:18-CV-00176 (M.D. Pa. Jan. 25, 2018) (similar for Pennsylvania); Pleading, *Davis v. Jones*, No. 3:17-cv-820-J-34PDB, 2019 U.S. Dist. LEXIS 52373 (M.D. Fla. Mar. 28, 2018) (similar for Florida); *Reynolds v. Arnone*, 402 F. Supp. 3d 3 (D. Conn. 2019) (holding formerly condemned people could no longer be held in solitary) *aff'd in part, vacated in part, and remanded*, *Reynolds v. Quiros*, 990 F.3d 286 (2d Cir. 2021).

130. *Porter v. Clarke*, 923 F.3d 348, 353 (4th Cir. 2019).

131. See Rachel Weiner, *Federal Judge Orders Virginia to Retain Death Row Revisions*, WASH. POST (Feb. 22, 2018), https://www.washingtonpost.com/local/public-safety/federal-judge-orders-virginia-to-retain-death-row-reforms/2018/02/22/991f72fc-17e0-11e8-8b08-027a6ccb38eb_story.html [<https://perma.cc/K9A5-JR2B>].

132. Settlement Agreement, *Reid v. Wetzel*, No. 18-CV-0176 (M.D. Pa. 2018).

133. John Monk, *SC Death Row Inmates in New (and Nicer) Home After Quiet, High Security Move*, GREENVILLE NEWS (Jul. 12, 2019), <https://www.greenvilleonline.com/story/news/2019/07/12/sc-death-row-inmates-new-facility-after-quiet-high-security-move-department-corrections/1714794001/> [<https://perma.cc/58F3-EU4B>].

134. See, e.g., Madison Alder et al., *U.S. Courts Close Doors, Cancel Juries as Virus Surges (I)*, BLOOMBERG LAW (Nov. 20, 2020), <https://news.bloomberglaw.com/us-law-week/u-s-courts-close-doors-cancel-juries-as-virus-surges> [<https://perma.cc/D8NS-MAD9>].

2020, before COVID-19 was declared a pandemic, California launched a pilot program to allow the vast majority of people incarcerated on death row to transfer to one of eight non-solitary facilities.¹³⁵ The program was maintained throughout the pandemic and, taking the next step, merging its death row population with the main prison population—closing the nation’s second-largest death row.¹³⁶ In May 2020, during the first wave of the pandemic, Oregon closed its death row and integrated the people on its death row into the general prison population.¹³⁷ Most recently, Florida settled a lawsuit brought by people on its death row challenging their automatic placement into solitary confinement.¹³⁸ The settlement includes provisions for 15–20 weekly congregate hours in facilities for congregation, at least six hours of exercise, and access to mental healthcare.¹³⁹

In short, these nine states are the vanguard in a growing national trend, alongside other states implementing smaller changes¹⁴⁰ and ongoing suits challenging solitary death rows.¹⁴¹

(describing the breakdown of judicial dockets in light of court shut downs and litigation delays from the COVID-19 pandemic); Roni Caryn Rabin, *Prisons Are Covid-19 Hotbeds. When Should Inmates Get the Vaccine?*, N.Y. TIMES (Nov. 30, 2020) (updated Dec. 2, 2020), <https://www.nytimes.com/2020/11/30/health/coronavirus-vaccine-prisons.html> [<https://perma.cc/6V9K-EDVJ>] (describing the failures of the U.S. carceral system in responding to the COVID-19 pandemic).

135. *Condemned Inmate Transfer Pilot Program*, CAL. DEPT OF CORR. & REHAB., <https://www.cdcr.ca.gov/capital-punishment/condemned-inmate-transfer-pilot-program/> [<https://perma.cc/Y52M-KY9Y>].

136. Bob Egelko, *State to Close San Quentin’s Death Row as Newsom Continues ‘Gradually Dismantling California’s Death Penalty’*, S.F. CHRON. (Jan. 31, 2022), <https://www.sfchronicle.com/bayarea/article/State-to-close-San-Quentin-s-death-row-as-16820149.php> [<https://perma.cc/2CHD-PM9P>].

137. Conrad Wilson, *Oregon Department of Corrections to Dissolve Death Row*, OR. PUB. BROAD. (May 15, 2020) <https://www.opb.org/news/article/oregon-death-row-general-population/> [<https://perma.cc/2CHD-PM9P>].

138. *Davis v. Dixon*, No. 3:17-CV-820-MMH-PDB, 2022 WL 1267602, at *1–2 (M.D. Fla. Apr. 28, 2022).

139. *Id.* at *3; see also Dan Sullivan, *Florida Death Row Inmates Promised More Humane Treatment After Lawsuit Settlement*, TAMPA BAY TIMES (May 16, 2022), <https://www.tampabay.com/news/florida/2022/05/16/florida-death-row-inmates-promised-more-humane-treatment-after-lawsuit-settlement/> [<https://perma.cc/42SE-VHG6>] (noting additional details about the settlement).

140. See, e.g., Elizabeth Weill-Greenberg, *Oklahoma Department of Corrections Agrees to Move ‘Qualifying’ Death Row Prisoners Out of Tomblike Unit*, APPEAL (Sept. 28, 2019), <https://theappeal.org/oklahoma-department-of-corrections-agrees-to-move-qualifying-death-row-prisoners-out-of-tomb-like-unit/> [<https://perma.cc/2CHD-PM9P>] (describing Oklahoma providing access to sunlight and contact visitation).

141. See, e.g., Complaint for Declaratory & Injunctive Relief, *Cheever v. Zmuda*, No. 2:20-CV-2555 (D. Kan. filed Nov. 6, 2020) (challenging permanent solitary confinement on Kansas’ death row).

This trend is striking in its growing scope and clear direction: several states are quickly moving away from and no state is moving towards solitary death rows. Compared with the period of hardening conditions from the 1970s to the 2000s, the tide has shifted—and fast.

B. NATIONAL SURVEY METHODOLOGY

This Note gathers the most up-to-date publicly available sources on death row conditions in each of the 27 jurisdictions that maintain capital punishment. The author surveyed and compiled case law, statutes, administrative regulations, news articles, videos, photographs, blog entries, and book chapters related to death row conditions.¹⁴² The Appendix *infra* presents this information, collated and supported with citations.

Definitions of solitary confinement vary and generally employ non-specific terms.¹⁴³ For this reason, this Note will use the definition used in the Mandela Rules, unanimously adopted by the United Nations General Assembly.¹⁴⁴ Under the Mandela Rules, solitary confinement is “confinement of prisoners for twenty-two hours or more daily without meaningful human contact.”¹⁴⁵ Though the practices in the jurisdictions studied are diverse and shifting, this study is organized around five broad categories, arranged in the following tiers, from most to least restrictive:

142. For each state a variety of relevant searches were made in LexisNexis, Westlaw, and Google. The Internet Archive and reverse image searching was also relied on to find original sources.

143. A variety of possible definitions have been used. See, e.g., SOLITARY CONFINEMENT, Black’s Law Dictionary (11th ed. 2019) (“Separate confinement that gives a prisoner extremely limited access to other people. . . .”); Stuart Grassian, *Psychiatric Effects of Solitary Confinement*, 22 WASH. U. J.L. & POL’Y 325, 325 (2006) (“confinement of a prisoner alone in a cell for all, or nearly all, of the day with minimal environmental stimulation and minimal opportunity for social interaction. . . .”); *Solitary Confinement (Isolation): Definition*, NAT’L COMM. ON CORR. HEALTH CARE, <https://www.ncchc.org/solitary-confinement> [<https://perma.cc/DAK6-HEK9>] (“Solitary confinement is the housing . . . with minimal to rare meaningful contact with other individuals.”).

144. G.A. Res. 70/175 (Dec. 17, 2015) [hereinafter Mandela Rules]. The United States was present for the session when the Mandela Rules were adopted. U.N. GAOR, 70th Sess. 80th plen. mtg. *passim*, U.N. Doc. A/70/PV.80 (Dec. 17, 2015).

145. Mandela Rules, *supra* note 144, at annex r.44.

- **Permanent Solitary Confinement:** requires 22 or more hours alone, in-cell daily.
- **Semi-Solitary Death Row:** requires 20–22 hours alone, in-cell daily.
- **Non-Solitary Death Row:** requires less than 20 hours alone, in-cell daily.
- **Semi-Reformed Death Row:** requires less than 20 hours alone, in-cell daily and extends the same or substantially similar privileges to death-sentenced people as enjoyed by the general prison population.
- **Reformed Death Row:** houses death-sentenced people in general population.

In a few jurisdictions, a privilege system permits better conditions for some people on death row who qualify. In these jurisdictions, the regulation applicable to a majority of the population was chosen. Where the majority was unclear, the more restrictive category was chosen. For clarity, the terms male/men and female/woman are used in line with the local jurisdictions' usage.

C. FINDINGS

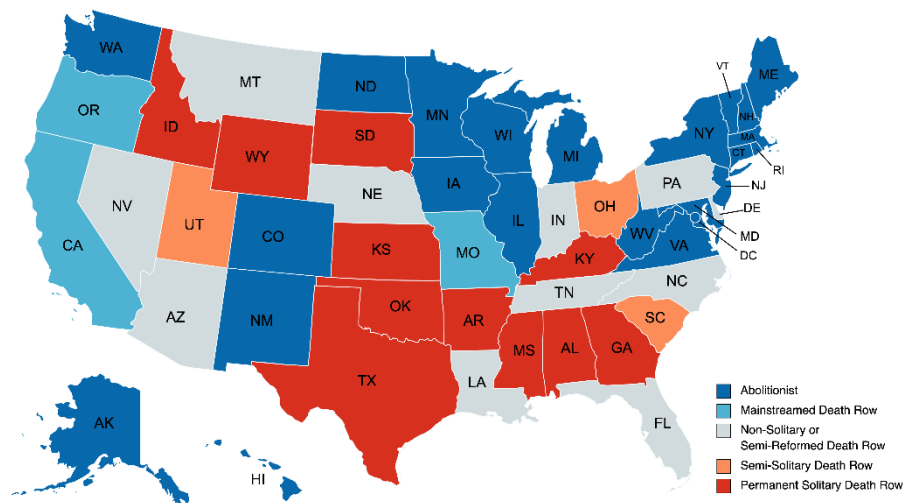
Of the twenty-seven¹⁴⁶ state jurisdictions currently operating death rows, approximately half (fourteen) impose either permanent or semi-solitary confinement (i.e., an average of at least twenty hours of solitary confinement per day) on people sentenced to death. Of these states, eleven keep death row population in permanent solitary confinement.¹⁴⁷ Ten states have

146. The federal government, military, and 27 states have functional capital regimes. Though one of these 27 states, Wyoming, has a death row that is currently empty. See Appendix. In theory, American Samoa permits first-degree murder to be punished by death, but the territory has no valid method of execution and has not carried out an execution since attaining self-governance. See *American Samoa Governor Moves to Repeal Death Penalty*, HONOLULU STAR ADVERTISER (Sept. 13, 2012), <https://www.staradvertiser.com/2012/09/13/breaking-news/american-samoa-governor-moves-to-repeal-death-penalty/> [https://perma.cc/Q6QD-7CSM]. On the other side, 23 states plus Guam, the Northern Mariana Islands, Puerto Rico, and the U.S. Virgin Islands have abolished capital punishment. See COUNCIL OF STATE GOV'TS, THE BOOK OF THE STATES tbl9.26 (2019).

147. These eleven states are Alabama, Arkansas, Georgia, Idaho, Kansas, Kentucky, Mississippi, Oklahoma, South Dakota, Texas, and Wyoming. In addition, the federal government and military opt for Permanent Solitary Confinement.

a non-solitary death row.¹⁴⁸ Three states have integrated their death-sentenced population into the general prison population.¹⁴⁹ Douglas Ray Stankewitz of California's death row is the living person who has been on death row the longest, with more than 43 years elapsing since his sentence. The national average for the longest stay of a current death row resident is more than 36 years.

MAP 1: UNITED STATES JURISDICTIONS COLORED BY DEATH ROW CONDITIONS



Typical cells are approximately 8 feet by 12 feet—smaller than the average American full bathroom—have solid steel doors, and are furnished with a steel bed, table, and combined sink-toilet.¹⁵⁰ Virtually every jurisdiction assigns one person to one cell. In the majority of jurisdictions, out-of-cell time to shower or exercise is done alone, except for the guards. Every permanent solitary death row requires inmates to eat meals alone, in-cell. In the vast majority of jurisdictions, death-sentenced individuals cannot even the touch of their family or lawyer. Many jurisdictions deny inmates access to group religious service and several deny religious visitation.

148. These ten states are Arizona, Florida, Indiana, Louisiana, Montana, Nebraska, Nevada, North Carolina, Pennsylvania, and Tennessee.

149. These three states are California, Missouri, and Oregon.

150. ACLU, *supra* note 17, at 3–4.

The findings also confirm the growing trend towards humane treatment described in Part II.A. At least nine jurisdictions in the past six years have taken significant steps to end permanent solitary confinement on their death rows.¹⁵¹ Additional states have taken smaller steps towards ending permanent solitary death rows.¹⁵² Many death rows have reintroduced contact visitation and several have begun permitting group meals out-of-cell. Most strikingly, no jurisdiction has imposed a more restrictive form of solitary confinement. Senior corrections officials in jurisdictions that have reformed or semi-reformed death rows universally praised the change.¹⁵³

III. THE FALTERING CONSTITUTIONALITY OF THE “MODERN” DEATH ROW

This Note earlier demonstrated that solitary confinement and capital punishment developed as opposing systems that only combined in the years following *Gregg v. Georgia*,¹⁵⁴ with the brutality of each exacerbated by the other.¹⁵⁵ Nevertheless, Part II showed that there are indications that the post-*Gregg* cruelty is beginning to ebb, as politically and socially diverse states are shifting away from solitary confinement and death rows.¹⁵⁶ This

151. These states are Arizona, California, Louisiana, Nevada, North Carolina, Oregon, Pennsylvania, South Carolina, and Virginia.

152. For example, Tennessee’s three-tiered system of privileges ranges from permanent solitary confinement to a comparatively relaxed regime similar to that in the rest of the prison. See *Death Penalty in Tennessee*, *supra* note 13.

153. See, e.g., Rick Raemisch, *Why We Ended Long-Term Solitary Confinement in Colorado*, N.Y. TIMES (Oct. 12, 2017), <https://www.nytimes.com/2017/10/12/opinion/solitary-confinement-colorado-prison.html> [<https://perma.cc/XNY5-85BP>] (describing the aftermath of Colorado’s transition from solitary death row from the perspective of the Executive Director of the state’s Department of Corrections); DAVID CLOUD ET AL., THE SAFE ALTERNATIVE TO SEGREGATION INITIATIVES, VERA INST. OF JUSTICE 71–72 (May 2019), <https://href.li/?https://www.vera.org/downloads/publications/safe-alternatives-segregation-initiative-findings-recommendations-ldps.pdf> [<https://perma.cc/M626-2JCT>] [hereinafter THE SAFE ALTERNATIVE].

154. 428 U.S. 153 (1976) (permitting the resumption of capital punishment).

155. For one view of the impact of permanent solitary death row, see David Lester & Christine Tartaro, *Suicide on Death Row*, 47 J. FORENSIC SCI. 1108, 1111 (2002) (finding a median of 1.13 death row suicides per 1,000 people in 1977–99 compared to a 1980–83 baseline average of .24 male suicides per 1,000 people across all prisons); see also Robert Johnson, *Under Sentence of Death: The Psychology of Death Row Confinement*, 5 L. & PSYCH. REV. 141 (1979) (“Just under one-half of the prisoners, in fact, consider the possibility of suicide in lieu of execution. . .”).

156. In recent years, Arizona, California, Louisiana, Nevada, North Carolina, Oregon, Pennsylvania, South Carolina, and Virginia have significantly reduced or eliminated their reliance on automatic solitary confinement on death row. See *infra* Appendix. Other

Part addresses the question of whether the practice remains constitutional in the 12 states¹⁵⁷ that retain permanent solitary death rows (hereinafter “retentionist states”).¹⁵⁸

The Eighth Amendment prohibits states and the federal government from subjecting individuals to “cruel and unusual” punishment.¹⁵⁹ The Amendment expresses “the ‘cry of horror’ against man’s inhumanity to his fellow man”¹⁶⁰ and affirms the duty of the government to respect the dignity of all persons “by protecting even those convicted of heinous crimes.”¹⁶¹ To that end, courts identify such violations of the Amendment by reference to the “evolving standards of decency that mark the progress of a maturing society.”¹⁶² A punishment that runs so contrary to contemporary public values, as tempered by judicial discretion, fails to accord with the dignity of man and, thus, with the requirements of the Eighth Amendment.¹⁶³

Contemporary values are measured by “a review of objective indicia of consensus.”¹⁶⁴ These objective indicators are: (1) legislative and executive repudiation of a punishment; (2) the number of jurisdictions authorizing a punishment; (3) evidence of social repudiation of the practice; (4) historical development; and (5) international legal opinions.¹⁶⁵ This Part reviews each of these five indicia in turn and argues that they reveal an accelerating trend away from permanent solitary death rows.

states implemented smaller changes or launched pilot programs to ameliorate conditions. *See, e.g., Death Penalty in Tennessee, supra* note 13.

157. These are Alabama, Arkansas, Georgia, Idaho, Kansas, Kentucky, Mississippi, Montana, Oklahoma, Texas, South Dakota, Wyoming. *See infra* Appendix.

158. Defined earlier as jurisdictions that “require 22+ hours alone, in-cell daily.” *See supra* Part II.

159. U.S. CONST. amend. VIII; *see also* *Trop v. Dulles*, 356 U.S. 86, 100 (1958) (plurality) (applying the Amendment); *Robinson v. California*, 370 U.S. 660 (1962) (incorporating the “cruel and usual punishments” clause against the states).

160. *Robinson*, 370 U.S. at 676 (Douglas, J., concurring).

161. *Roper v. Simmons*, 543 U.S. 551, 560 (2005).

162. *Id.* at 561 (quoting *Trop*, 356 U.S. at 100–01).

163. *See* *Gregg v. Georgia*, 428 U.S. 153, 173 (1976) (holding objective indicia that reflect the public attitude towards a sanction is the measure for *Trop* purposes); *Ford v. Wainwright*, 477 U.S. 399, 417 (1986) (relying on penological justification); *Panetti v. Quarterman*, 551 U.S. 230 (2007) (same).

164. *Roper*, 543 U.S. at 564.

165. *See, e.g., id.* at 564, 595–96 (emphasizing the importance of legislative enactments and relying on the number of jurisdictions practicing the punishment); *Enmund v. Florida*, 458 U.S. 782, 788–89 (1982) (indicating historical development of the punishment, legislative judgments, international opinion and the sentencing decisions of juries have bearing on the evolving standards analysis); *Coker v. Georgia*, 433 U.S. 584, 596 n.10 (1977) (relying on international opinion).

This Part focuses solely on the constitutionality of permanent solitary confinement on death rows. Permanent solitary death rows necessarily combine two punishments that are more pernicious than the sum of their parts: capital punishment and perpetual solitary confinement.¹⁶⁶ Since rejecting either or both constituent practices is necessarily a rejection of the combined practice of solitary death row itself, the following subparts consider evidence of rejecting either or both practices. As such, while addressing evidence of shifting social consensus against capital punishment and permanent solitary confinement, the constitutionality of either as a stand-alone punishment is not addressed. This Part will argue, however, that the tides of social consensus have shifted against permanent solitary death rows by considering each of the five indicators in turn.

A. STATE LEGISLATURES AND EXECUTIVES ARE INCREASINGLY REPUDIATING PERMANENT SOLITARY DEATH ROW

Among the objective indicia, the laws enacted by states are the “clearest and most reliable objective evidence of contemporary values.”¹⁶⁷ This subpart describes the significant evidence that state legislatures are moving to end either or both capital punishment or long-term solitary. Twenty-three states and the District of Columbia have abolished the death penalty, with nearly half repealing their capital statutes since 2000.¹⁶⁸ Further, in the last decade, three governors have instituted execution moratoriums for political or moral reasons.¹⁶⁹ All three moratorium-supporting governors have won reelection since.¹⁷⁰

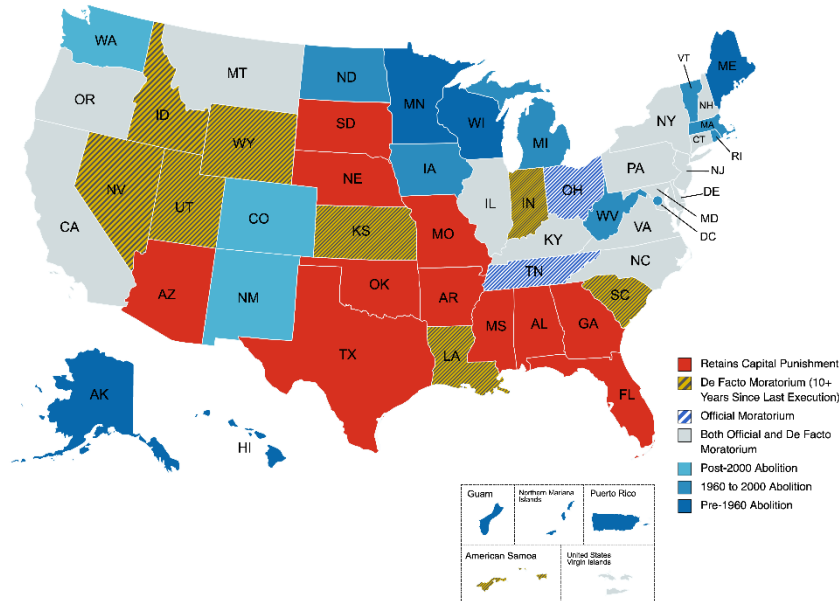
166. See Marah McLeod, *Does the Death Penalty Require Death Row? The Harm of Legislative Silence*, 77 OHIO ST. L.J. 525 (2016) (McLeod argues that solitary confinement is more than an inevitable administrative aspect of a death sentence and that because its only penological purpose could be retribution, only a legislature could authorize such additional punishment.).

167. *Penry v. Lynaugh* 492 U.S. 302, 331 (1989); see also *Roper v. Simmons*, 543 U.S. 551, 564 (2005) (noting legislative enactments addressing the question are particularly expressive of consensus).

168. *State by State*, DPIC, <https://deathpenaltyinfo.org/state-and-federal-info/state-by-state> (last visited Aug. 8, 2022).

169. These states are California, Cal. Exec. Order. No. 09-19 (Mar. 13, 2019); Pennsylvania, Bill Chappell, *Governor Puts Moratorium on Pennsylvania's Death Penalty*, NPR (Feb. 13, 2015), <https://www.npr.org/sections/thetwo-way/2015/02/13/386023003/governor-puts-moratorium-on-pennsylvanias-death-penalty> [<https://perma.cc/28MN-BQ6B>]; and Oregon, Shelby Sebens, *New Oregon Governor Kate Brown to Extend Death Penalty Moratorium*, REUTERS (Feb. 20, 2015), <https://www.reuters.com/article/us-usa->

MAP 2: UNITED STATES JURISDICTIONS COLORED BY DATE OF ABOLITION OR TYPE OF MORATORIUM



Legislatures have largely left regulation of the specifics of conditions on death rows to executive officials.¹⁷¹ Nevertheless, legislatures are debating and states are implementing—at record levels—statutes and regulations to reduce solitary confinement.¹⁷² In 2019 alone, twelve states enacted laws to

politics-oregon/new-oregon-governor-kate-brown-to-extend-death-penalty-moratorium-idUSKBN0LO2E420150220 [https://perma.cc/KM3J-5BG4]. Tennessee has also instituted a moratorium to investigate failures in its lethal injection protocol. Nicholas Bogel-Burroughs, *Tennessee Halts Executions After Failing to Test Lethal Injection Drugs*, N.Y. TIMES (May 2, 2022), <https://www.nytimes.com/2022/05/02/us/tennessee-executions-lethal-injection.html> [https://perma.cc/5NSX-9JC2].

170. See Dylan Segelbaum & Candy Woodall, *'Back to Work': Pa. Gov. Tom Wolf Easily Wins Re-Election Over Republican Scott Wagner*, YORK DAILY REC. (Nov. 7, 2018), <https://www.ydr.com/story/news/politics/elections/2018/11/06/2018-pennsylvania-governor-race-results-tom-wolf-democrat-scott-wagner-republican-york-county-winner/1852874002> [https://perma.cc/G5AU-2AUC]; Sebens, *supra* note 169; Sharon Bernstein, *California Governor Newsom Easily Retains Job, Sweeps Election*, REUTERS (Sept. 15, 2021), <https://www.reuters.com/world/us/californians-decide-governors-fate-republican-backed-recall-2021-09-14/> [https://perma.cc/W7T8-SR9B].

171. See YALE L. SCH., *supra* note 17, at app. A (listing statutes, administrative regulations, and caselaw related to death row living conditions by jurisdiction).

172. Amy Fettig, *2019 Was a Watershed Year in the Movement to Stop Solitary Confinement*, ACLU (Dec. 16, 2019), <https://www.aclu.org/news/prisoners-rights/2019-was>

outright ban solitary confinement or otherwise severely restrict its use.¹⁷³ Most recently, in 2021, New York prohibited solitary confinement for longer than 15 days.¹⁷⁴ At the federal level, the 2018 First Step Act limited long-term solitary confinement for juveniles in federal prisons.¹⁷⁵

State executive officials have also taken significant steps to curtail or end long-term solitary confinement. The Oregon Department of Corrections eliminated its death row and integrated the remaining death-sentenced people into standard housing.¹⁷⁶ California launched a two-year pilot program to enable nearly all the 737 people on its death row to transfer to non-segregated housing.¹⁷⁷ That program was since made permanent.¹⁷⁸ Beyond death row, many states are effectively ending their reliance on perpetual solitary confinement. Colorado has reduced the aggregate time spent in solitary by 85 percent.¹⁷⁹ Mississippi removed as many as 1,000 incarcerated people from solitary confinement.¹⁸⁰ Ten more states partnered with the Vera Institute, a non-profit focused on ending mass-incarceration, to enact significant measures to end their reliance on solitary segregation blocks—including for death rows.¹⁸¹

In short, at least twenty-eight states have recently reconsidered solitary confinement or capital punishment (or both). Moreover, the direction of change has unanimously been away from permanent solitary confinement: no state has introduced a more restrictive form of solitary confinement since

a-watershed-year-in-the-movement-to-stop-solitary-confinement/ [https://perma.cc/N3UD-WKYL].

173. The twelve states who passed reforms are Arkansas, Connecticut, Georgia, Maryland, Minnesota, Montana, Nebraska, New Jersey, New Mexico, Texas, Washington, and Virginia. *Id.*

174. Troy Closson, *New York Will End Long-Term Solitary Confinement in Prisons and Jails*, N.Y. TIMES (Apr. 24, 2021), <https://www.nytimes.com/2021/04/01/nyregion/solitary-confinement-restricted.html> [https://perma.cc/935X-4RZV].

175. CONG. RSCH. SERV., THE FIRST STEP ACT OF 2018: AN OVERVIEW 21 (2019).

176. Conrad Wilson, *Oregon Department of Corrections to Dissolve Death Row*, OR. PUB. RADIO (May 15, 2020), <https://www.opb.org/news/article/oregon-death-row-general-population> [https://perma.cc/N5C3-7F5M].

177. *Condemned Inmate Transfer Pilot Program*, *supra* note 135.

178. *Id.*

179. S. POVERTY L. CTR., SOLITARY CONFINEMENT: INHUMANE, INEFFECTIVE, AND WASTEFUL 13 (2019), https://www.splcenter.org/sites/default/files/com_solitary_confinement_0.pdf [https://perma.cc/XKP3-NSVU].

180. *Id.* at 14.

181. Sara Sullivan et al., *Safe Alternatives to Segregation Initiative*, VERA (May 2019), <https://www.vera.org/publications/safe-alternatives-segregation-initiative-findings-recommendations> [https://perma.cc/5LJQ-JN4T].

at least 2000. The first indicator points towards a growing consensus against permanent solitary death rows.

B. A SIGNIFICANT MAJORITY OF PENAL SYSTEMS HAVE SHIFTED
AWAY FROM PERMANENT SOLITARY CONFINEMENT

This subpart considers the second indicator of evolving social standards: the prevalence of the punishment in practice. The Supreme Court looks to a practice's prevalence, including the pace and consistency of change away from that practice, to determine standards of decency.¹⁸² In *Roper v. Simmons*, the Court found that there was broad social consensus against juvenile executions, based largely on the fact that thirty states had rejected the juvenile death penalty and the infrequency of such executions in the remaining states.¹⁸³ The *Roper* Court explained that “it is not so much the number of these States that is significant, but the *consistency of the direction of change*.”¹⁸⁴ In *Atkins v. Virginia*, the Court held that the rapidity and consistency of change—seventeen states passing laws ending the execution of the intellectually disabled within a 12 year period—suggested a new social consensus.¹⁸⁵

Permanent solitary death rows are rapidly disappearing in practice; more than two-thirds of states have either abolished capital punishment (23) or have not carried out an execution in the last decade (12) and, of the remaining states, seven ended solitary confinement on their death rows.¹⁸⁶ The remaining eight

182. See *Roper v. Simmons*, 543 U.S. 551, 555 (2005) (looking to the number of states with juvenile execution); *Atkins v. Virginia*, 536 U.S. 304, 315 (2002) (similar).

183. *Roper*, 543 U.S. at 555.

184. *Atkins*, 536 U.S. at 315 (emphasis added).

185. *Id.* at 315–16.

186. For an overview of the abolitionist movement, see DEATH PENALTY INFO. CTR., THE DEATH PENALTY IN 2020: YEAR END REPORT 2 (Dec. 16, 2020), <https://reports.deathpenaltyinfo.org/year-end/YearEndReport2020.pdf> [<https://perma.cc/Y4U9-4FXC>]. The seven states that ended solitary confinement are Missouri, Nebraska, Ohio, Virginia, Arizona, Florida, and South Carolina, see *infra* Appendix. There is a growing trend between states that have ended permanent solitary death rows and their subsequent abolition of capital punishment. Compare *Colorado Moves Death-Row Inmates so They Can Exercise Outdoors*, DENVER POST (May 3, 2016), <https://www.denverpost.com/2011/07/27/colorado-moves-death-row-inmates-so-they-can-exercise-outdoors/> [<https://perma.cc/TB8B-ZQXQ>] (reporting the end of Colorado's permanent solitary death row) and Trip Gabriel, *Virginia, Shifting Left Fast, Moves Closer to Abolishing Death Penalty*, N.Y. TIMES (Feb. 4, 2021), <https://www.nytimes.com/2021/02/04/us/politics/virginia-death-penalty-northam.html> [<https://perma.cc/CW35-AAAB>] with Neil Vigdor, *Colorado Abolishes Death Penalty and Commutes Sentences of Death Row*

states are Alabama, Georgia, Idaho, Kentucky, Mississippi, Oklahoma, Tennessee, and Texas. If one accepts that, *arguendo*, jurisdictions without an execution in a decade have *de facto* rejected capital punishment, then 42 of 50 states have rejected the “modern” death row.¹⁸⁷ Most importantly, not one state has taken steps to change from a non-solitary death row toward a solitary one.¹⁸⁸

In light of what the *Atkins* Court described as the “well-known fact that anticrime legislation is far more popular than legislation providing protections for persons guilty of violent crimes,” the uniform direction of change makes “complete absence of States passing legislation reinstating the [practice]” exceptionally compelling evidence.¹⁸⁹ Considering that the practice of decades-long solitary confinement on death row developed largely without explicit intention or authorization, the affirmative decision to shift practice is even more noticeable.¹⁹⁰ In recent years, states have gone to great lengths to shield death rows and executions from the public eye, limiting chances to spur discourse and

Inmates, N.Y. TIMES (Mar. 23, 2020), <https://www.nytimes.com/2020/03/23/us/colorado-death-penalty-repeal.html> [<https://perma.cc/MJB4-5FHR>] and Hailey Fuchs, *Virginia Becomes the First Southern State to Abolish the Death Penalty*, N.Y. TIMES (Mar. 24, 2021), <https://www.nytimes.com/2021/03/24/us/politics/virginia-death-penalty.html> [<https://perma.cc/2XF4-RAEG>]; Dan Sullivan, *supra* note 139.

187. There is a strong correlation between states with a long pause in executions and abolition of their death penalty. *See, e.g.*, Vigdor, *supra* note 186 (noting Colorado abolished its death penalty after a 23-year gap in executions); Bill Chappell, *New Hampshire Abolishes Death Penalty as Lawmakers Override Governor’s Veto*, NPR (May 30, 2019), <https://www.npr.org/2019/05/30/728288240/new-hampshire-abolishes-death-penalty-as-lawmakers-override-governors-veto>, [<https://perma.cc/SNM9-EARL>] (noting an 80-year gap); Ian Simpson, *Maryland Becomes Latest U.S. State to Abolish Death Penalty*, REUTERS (May 2, 2013), <https://www.reuters.com/article/us-usa-maryland-deathpenalty/maryland-becomes-latest-u-s-state-to-abolish-death-penalty-idUSBRE9410TQ20130502> [<https://perma.cc/5KQN-TVNA>] (noting a 7-year gap); *Illinois Abolishes Death Penalty*, GUARDIAN (Mar. 9, 2011), <https://www.theguardian.com/world/2011/mar/10/illinois-abolishes-death-penalty> [<https://perma.cc/3FDS-KN7H>] (noting 11 gap); *contra* Hailey Fuchs, *Federal Executions to Resume Amid a Pandemic and Protests*, N.Y. TIMES (June 30, 2020) (updated Nov. 26, 2020), <https://www.nytimes.com/2020/06/30/us/politics/federal-executions-pandemic.html> [<https://perma.cc/CUR9-ND3C>] (noting a return to federal executions after a 17-year hiatus).

188. *See infra* Appendix. Though some jurisdictions have periodically taken measures to lock-down death rows, for example to contain the spread of COVID-19. *See, e.g.*, Steven Hale, *COVID-19 Breaks Out on Tennessee’s Death Row*, NASHVILLE SCENE (Nov. 16, 2020), https://www.nashvillescene.com/news/pithinthewind/covid-19-breaks-out-on-tennessees-death-row/article_431d7a2d-20fe-59c4-88e8-51ea15bf8bce.html.

189. *Atkins v. Virginia*, 536 U.S. 304, 315–16 (2002) (emphasis added).

190. McLeod, *supra* note 166 (explaining how legislatures never authorized such solitary death rows); *see also supra* Part I.B.4 (outlining the unintentional development of permanent solitary death rows).

reformation.¹⁹¹ Nevertheless, both execution and sentencing rates are at historic lows, with fewer than fifty death sentences imposed and fewer than thirty executions carried out in each of the past six years.¹⁹²

There are a growing number of states, with a clear direction of change, that are rejecting either or both the death penalty and solitary death row in practice. The second indicator points to a growing consensus against permanent solitary death rows.

C. THE PUBLIC INCREASINGLY HAS REJECTED PERMANENT SOLITARY DEATH ROWS

Polling, social scientific evidence, and the opinions of organizations with relevant expertise can carry some, albeit limited, weight in the evolving standards analysis.¹⁹³ In recent decades, public support for the death penalty has consistently waned.¹⁹⁴ In 1995, 80 percent of Americans were in favor of the death penalty in the case of murder, but support declined to 64 percent in 2010 and to just 54 percent in 2021.¹⁹⁵ There is little-to-no polling available for popular support for permanent solitary confinement on death row, but some subset of the 54% in favor of capital punishment may believe the death penalty, compounded by endless years on death row in permanent solitary confinement, is nevertheless too cruel.¹⁹⁶ This could explain why a 60 percent

191. See, e.g., *Owens v. Hill*, 758 S.E.2d 794 (Ga. 2014) (upholding a “secrecy law” making information related to the source of Georgia’s lethal injection drugs a state secret); Anna Kaul and Sarah Lamsifer, *Executions Shouldn’t be Shrouded in Secrecy. Media Witnesses Help Hold Government Accountable*, USA TODAY (Jan. 25, 2021), <https://www.usatoday.com/story/opinion/policing/2021/01/25/media-execution-witnesses-help-hold-government-accountable/4220798001/> [<https://perma.cc/JN2V-GPGY>] (detailing prison official’s efforts to limit effective access to media witnesses).

192. DEATH PENALTY INFO. CTR., *supra* note 186, at 2.

193. See *Atkins v. Virginia*, 536 U.S. at 316 n.21 (2002) (relying on *inter alia* polling as additional evidence of social consensus); *id.* (using evidence that “several organizations with germane expertise have adopted official positions opposing the [punishment.]”); cf. *Kennedy v. Louisiana*, 554 U.S. 407, 433 (2008) (finding that statistics about the number of executions may help measure consensus against a punishment); *contra id.* at 348 (Rehnquist, C.J., dissenting) (describing opinion polling as irrelevant).

194. GALLUP, *supra* note 81.

195. *Id.*

196. For example, a recent opinion piece by Wyoming Representative Olsen argues to end the death penalty not because it is inherently wrong but because “few conservatives trust the government to get it right.” Jared Olsen, *I’m a Republican and I Oppose Restarting Federal Executions*, N.Y. TIMES (July 29, 2019), <https://www.nytimes.com/2019/07/29/opinion/death-penalty-federal.html> [<https://perma.cc/5ETQ-7TFM>]. Others have argued that the “high costs and rare results,” not any opposition to executions themselves,

majority say that life imprisonment without parole is a better punishment for murder than execution.¹⁹⁷

Moreover, there are signs that the national electorate has shifted against capital punishment as part of a national rethinking of criminal law generally. President Biden campaigned and was elected as the first openly anti-death penalty president.¹⁹⁸ Anti-death penalty prosecutors are increasingly being elected in counties where capital punishment has historically been heavily used.¹⁹⁹ In the last five years, Los Angeles county was responsible for more people on death row than Georgia, Louisiana, Mississippi, Tennessee and Virginia combined; currently, more than 200 people on death row were tried and sentenced in Los Angeles.²⁰⁰ After a campaign where capital punishment was a central issue, Los Angeles elected anti-death penalty challenger George Gascón over the incumbent Jackie Lacey.²⁰¹ The 2020 electoral shift away from the death penalty in Los Angeles and three other counties, which combined accounted for nearly ten percent of the national death row population, marks yet another turning point away from capital punishment.

are the reason enough to abandon the practice. David von Drehle, *The Death Penalty Makes a Mockery of Our Justice System. Abolish It.*, WASH. POST. (Mar. 15, 2019), https://www.washingtonpost.com/opinions/the-death-penalty-makes-a-mockery-of-our-justice-system-abolish-it/2019/03/15/fc6bcf66-4670-11e9-aaf8-4512a6fe3439_story.html [<https://perma.cc/78MN-NJTP>].

197. Jeffrey Jones, *Americans Now Support Life in Prison Over Death Penalty*, GALLUP (Nov. 25, 2019), <https://news.gallup.com/poll/268514/americans-support-life-prison-death-penalty.aspx> [<https://perma.cc/J9R5-JRPB>].

198. Michael Tarm, *Big Challenge: Biden is Pressed to End Federal Death Penalty*, AP NEWS (Feb. 7, 2021), <https://apnews.com/article/joe-biden-us-news-pandemics-health-coronavirus-pandemic-ad6b1681aaf4128aa5e3ca0e94672e45> [<https://perma.cc/7A24-2BET>].

199. Daniel Nichanian, *Newly Elected Prosecutors are Challenging the Death Penalty*, APPEAL (Dec. 9, 2020), <https://theappeal.org/politicalreport/new-prosecutors-challenging-death-penalty/> [<https://perma.cc/JT69-QKPQ>]; DEATH PENALTY INFO. CTR., *supra* note 186, at 2–4 (“[There is a] continued [] long-term national trend away from capital punishment, as . . . more reform prosecutors gained footholds in formerly heavy-use counties.”).

200. Sam Levin, *In Los Angeles, Only People of Color are Sentenced to Death*, L.A. TIMES (June 18, 2019), <https://www.theguardian.com/us-news/2019/jun/18/los-angeles-death-penalty-sentences-jackie-lacey> [<https://perma.cc/EVC6-CYPG>] (citing findings from the ACLU); ACLU, *THE CALIFORNIA DEATH PENALTY IS DISCRIMINATORY, UNFAIR, AND OFFICIALLY SUSPENDED: SO WHY DOES LOS ANGELES DISTRICT ATTORNEY JACKIE LACEY STILL SEEK TO USE IT?* (2020).

201. Annika Russel, *What the 2020 Elections Mean for the Death Penalty*, AM. BAR ASS’N (Nov. 22, 2020), https://www.americanbar.org/groups/committees/death_penalty_representation/publications/project_blog/2020-election-results-on-death-penalty/ [<https://perma.cc/2HSN-5FH2>].

Finally, professional organizations have rejected permanent solitary confinement, with the American Psychological Association condemning the practice as useless.²⁰² The professional ethical code of doctors, anesthesiologists, nurses, and pharmacists all prohibit any participation in executions has resulted in significant delays and difficulties for states trying to administer the death penalty.²⁰³ Some states have been caught illegally smuggling execution drugs into the United States; Georgia, for example, was discovered to have been buying a sedative, sodium thiopental, from a supplier operating out of the back of a London driving school.²⁰⁴

The third indicator, then, acts as a confirmation of the growing American rejection of the permanent solitary death row.

202. AM. PSYCH. ASS'N, *THE DEATH PENALTY IN THE UNITED STATES* (2001), <https://www.apa.org/about/policy/death-penalty> [<https://perma.cc/KVJ2-479W>] (outlining the American Psychological Association's long-standing opposition to capital punishment); *see also* Press Release, Am. Inst. of Architects, AIA Board of Directors Commits to Advancing Justice Through Design (Dec. 11, 2020), <https://www.aia.org/press-releases/6356669-aia-board-of-directors-commits-to-advancing-justice-through-design> [<https://perma.cc/465T-5D9Y>] (approving a new ethics rule for Architects prohibiting the design of spaces for execution, torture, or prolonged solitary confinement). The Supreme Court has explained such organizational opinion serves a confirmatory role. *See Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002) (using evidence that "several organizations with germane expertise have adopted official positions opposing the [punishment].").

203. *See* Monica Davey, *Missouri Says it Can't Hire Doctor for Executions*, N.Y. TIMES (July 15, 2006), <https://www.nytimes.com/2006/07/15/us/15lethal.html> [<https://perma.cc/74FG-CA4G>]. For a selection of recent policy statements by these groups, *see, e.g.*, AM. MED. ASS'N, *CODE OF MEDICAL ETHICS OPINION § 9.7.3* ("[A]s a member of a profession dedicated to preserving life when there is hope of doing so, a physician must not participate in a legally authorized execution."), <https://www.ama-assn.org/delivering-care/ethics/capital-punishment> [<https://perma.cc/APJ9-Q4NQ>]; AM. SOC'Y OF ANESTHESIOLOGISTS, *STATEMENT ON PHYSICIAN NON-PARTICIPATION IN LEGALLY AUTHORIZED EXECUTIONS* (Oct. 13, 2021), <https://www.asahq.org/standards-and-guidelines/statement-on-physician-nonparticipation-in-legally-authorized-executions> [<https://perma.cc/3YGG-3K8A>]; AM. NURSES ASS'N, *CAPITAL PUNISHMENT AND NURSES' PARTICIPATION IN CAPITAL PUNISHMENT* (2016), https://www.nursingworld.org/~4906a3/globalassets/docs/ana/practice/official-position-statements/capital-punishment-position-statement_2017.pdf [<https://perma.cc/9QA2-PLVX>]; AM. PHARMS. ASS'N, *APHA HOUSE OF DELEGATES ADOPTS POLICY DISCOURAGING PHARMACIST PARTICIPATION IN EXECUTION* (March 30, 2015), <https://files.deathpenaltyinfo.org/legacy/documents/APhAResolution.pdf> [<https://perma.cc/3ZB2-D6UD>].

204. *See* Interview with Anna Arceneaux, *supra* note 203; Ed Pilkington, *Revealed: Republican-Led States Secretly Spending Huge Sums on Execution Drugs*, GUARDIAN (April 9, 2021), <https://www.theguardian.com/world/2021/apr/09/revealed-republican-led-states-secretly-spending-huge-sums-on-execution-drugs> [<https://perma.cc/8F9G-KYLB>]; Kathy Lohr, *Georgia May Have Broken Law by Importing Drug*, NAT'L PUB. RADIO (Mar. 17, 2011), <https://www.npr.org/2011/03/17/134604308/dea-georgia-may-have-broken-law-by-importing-lethal-injection-drug> [<https://perma.cc/HV7Z-BVB3>].

D. THE HISTORICAL EVIDENCE REVEALS A LONG TRADITION OF AMERICANS REJECTING PERMANENT SOLITARY DEATH ROWS

Tracing the evolution of American standards of decency involves looking to the historical link between the past and the present.²⁰⁵ As described above, American attitudes toward permanent solitary death rows can be understood as spanning seven broad phases: (1) the early republic period saw the advent of short-term, carefully-managed solitary confinement as a replacement for capital punishment; (2) the Antebellum penal reform movement led to the rejection of permanent solitary confinement and, in some instances, even the death penalty itself; (3) the dwindling of the reform momentum in the Reconstruction era; (4) the swift and more frequent executions and hardening prison conditions of the mid-twentieth century; (5) the dramatic worsening of conditions in the post-*Gregg* era; (6) the stagnation of the early 2000s; and (7) the growing contemporary rejection of permanent solitary death row.²⁰⁶ This history, the fourth indicator, establishes that permanent solitary death rows are not a long-standing practice but a distinct modernism; indeed, one that would have been rejected through much of American history as counterproductive and barbaric.²⁰⁷

E. THE INTERNATIONAL COMMUNITY HAS REJECTED PERMANENT SOLITARY DEATH ROW

The climate of international opinion can serve a confirmatory role in determining the evolution of American standards of decency.²⁰⁸ This subpart first reviews the practices of the

205. See Heffernan, *supra* note 18, at 1364 (“Modern judicial interpretation of [cruel and unusual punishment] posits a connection between past and present that . . . incorporates eighteenth century notions of cruelty but expands on these by including subsequent changes in sentiments about punishment.”); see also *Trop v. Dulles*, 356 U.S. 86, 99, 100 (1958) (plurality opinion) (looking to “our history” and the “Anglo-American tradition of criminal justice” in measuring the “concept of cruelty”).

206. See *supra* Part I (detailing the first six phases); *supra* Part II.A (detailing the modern rejection).

207. See Shapiro, *supra* note 43, at 594 (“The prison reformers of the 1790s would be dismayed by what solitary confinement has become. . . . They restrained the cruelty of isolation with a system of checks and balances . . . but little remains of that [protective] regime.”).

208. See, e.g., *Atkins v. Virginia*, 536 U.S. 304, 325 (2002) (indicating international opinion serves a confirmatory role though not a replacement for American values of decency); *Roper v. Simmons*, 543 U.S. 551, 575 (2005) (relying on international practice

international community as a whole, before turning to the practices in other jurisdictions, with a focus on foreign states with the death penalty and comparable political, judicial, or penal systems.

1. *Both the Laws and Practices of the International Community Show a Clear Rejection of Permanent Solitary Death Rows*

The United States stands nearly alone in a world that has turned its back on permanent solitary confinement and the death penalty.²⁰⁹ The death penalty has been abolished in 108 countries.²¹⁰ According to the United Nations High Commissioner for Human Rights, 170 member states of the United Nations with a variety of legal systems, traditions, cultures and religious backgrounds, have either abolished the death penalty or do not practice it.²¹¹ The United States is the only country in Europe and the Americas to have had a recent execution, and is one of only eighteen nations that currently employ capital punishment.²¹² Japan is the only other developed democracy with the death penalty.²¹³

Another source of international consensus is international legal authorities.²¹⁴ Regarding capital punishment generally, the *Second Protocol to the International Covenant on Civil & Political Rights*, which binds states to abolish capital punishment, has eighty-nine state parties.²¹⁵ More recently, 123 of 193 United

and international authorities as instructive during the Eighth Amendment analysis); *Coker v. Georgia*, 433 U.S. 584, 596 n.10 (1977) (relying on international opinion related to a practice).

209. See *Roper*, 543 U.S. at 577 (“In sum, it is fair to say that the United States now stands alone in a world that has turned its face against the juvenile death penalty.”).

210. See *Death Penalty: What is Amnesty Doing to Abolish the Death Penalty?*, AMNESTY INT’L (Sept. 19, 2021), <https://www.amnesty.org/en/what-we-do/death-penalty> [<https://perma.cc/DH8L-7QTD>].

211. See Michelle Bachelet, Keynote Before the 75th Session of the UN General Assembly (Sept. 24, 2020), <https://www.ohchr.org/en/speeches/2020/09/75th-session-un-general-assembly-virtual-high-level-side-event-death-penalty-and> [<https://perma.cc/24LP-LGWV>]; see also *International*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/policy-issues/international> [<https://perma.cc/3694-4PGH>] (stating that some 70% of countries have abolished or do not practice capital punishment).

212. AMNESTY INT’L, *DEATH SENTENCES AND EXECUTIONS: 2020* at 10, 34 (2021).

213. DAVID JOHNSON, *THE CULTURE OF CAPITAL PUNISHMENT IN JAPAN* 5 (2020).

214. *Roper*, 543 U.S. at 575–76.

215. G.A. Res. 44/128, *Second Optional Protocol to the International Covenant on Civil & Political Rights, Aiming at Abolition of the Death Penalty* (Dec. 15, 1989).

Nations member states voted for a resolution calling for a global moratorium on executions.²¹⁶

For solitary confinement, the Mandela Rules are the primary source of international standards and custom.²¹⁷ The Rules prohibit “confinement of prisoners for twenty-two hours or more daily without meaningful human contact.”²¹⁸ The United States played an active role in both drafting and securing the votes for the Mandela Rules.²¹⁹ Yet, the U.N. Special Rapporteur on Torture recently expressed alarm at the excessive use of solitary confinement in the United States.²²⁰ The Rapporteur classifies solitary confinement for more than 15 days as torture.²²¹

The United States stands out even among the few retentionist countries for the brutality of the distinctly American practice of decades-long solitary confinement for those sentenced to death. Taiwan,²²² Ghana,²²³ and China²²⁴ reject the practice. Besides the United States, only Japan, Jordan, and Malaysia require that death-sentenced individuals be placed in solitary confinement for more than fifteen days.²²⁵ Of these, Japan is the only other

216. G.A. Res. 75/183, U.N. GAOR, 75th Sess., Sup. 49, UN. Doc A/44/49 (Dec. 28, 2020).

217. *UN Nelson Mandela Rules*, PENAL REFORM INT’L, <https://www.penalreform.org/issues/prison-conditions/standard-minimum-rules/> [<https://perma.cc/4PFW-WBTQJ>].

218. *Id.* at annex rule 44.

219. See U.N. GAOR, 70th sess. 80th plen. mtg. *passim*, U.N. Doc. A/70/PV.80 (Dec. 17, 2015) (listing the United States as present during the session). The American delegation worked to rename the rules in honor of Nelson Mandela, resisted efforts to allow countries to disregard the rules for cultural or religious reasons, and facilitated a panel with American prison officials to inform the working group. See David Fathi, *Victory! UN Crime Commission Approves Mandela Rules on Treatment of Prisoners*, ACLU (May 27, 2015), <https://www.aclu.org/blog/prisoners-rights/solitary-confinement/victory-un-crime-commission-approves-mandela-rules> [<https://perma.cc/Q4JZ-U765>].

220. *United States: Prolonged Solitary Confinement Amounts to Psychological Torture, Says UN Expert*, U.N. HUM. RIGHTS (Feb. 28, 2020), <https://www.ohchr.org/en/press-releases/2020/02/united-states-prolonged-solitary-confinement-amounts-psychological-torture?LangID=E&NewsID=25633> [<https://perma.cc/WUV6-5EHP>].

221. U.N. GAOR, 66th sess. ¶ 26, U.N. Doc. A/66/268 (Aug. 5, 2011).

222. *Id.* at 30.

223. AMNESTY INT’L, *LOCKED UP AND FORGOTTEN: THE NEED TO ABOLISH THE DEATH PENALTY IN GHANA* 16 (2017) (describing group celling).

224. David Johnson, *Japan’s Secretive Death Penalty Policy: Contours, Origins, Justifications, and Meanings*, 7 *ASIAN-PACIFIC L. & POL’Y J.* 62, 101 (2006); Manfred Nowark, *Foreword to REENA MARY GEORGE, PRISONER VOICES FROM DEATH ROW: INDIAN EXPERIENCES* at x (2015). Though, there are reports of China imposing prolonged solitary confinement, that is greater than 15 days, in at least some instances. CORNELL L. SCH. ET AL., *FACT SHEET: PRISON CONDITIONS FOR WOMEN FACING THE DEATH PENALTY* 3 (2018).

225. According to one 2018 report, prolonged solitary confinement has been reported in China, Indonesia, Jordan, India, and the United States. *Id.* at 3. India has since rejected the practice. See Saurabh Malik, *HC Abolishes Solitary Confinement for Prisoners Facing*

country where solitary confinement can stretch into decades.²²⁶ Again, *Roper* is highly analogous; the Supreme Court found “confirmation in the stark reality” that since 1990 only seven other countries had officially sanctioned juvenile execution, all of which had since halted or pledged to halt the practice.²²⁷ Like in *Roper*, the stark reality is that the United States is virtually alone on the world stage.

2. *Extranational Jurists are Decisively Against Permanent Solitary Death Rows*

Beyond the measure of international consensus, the writings of international jurists can be instructive.²²⁸ According to former Justice Breyer, the value of referencing extranational decisions lies in the fact that:

[A] judge, with similar training [applies] similar language (“cruel and unusual punishment” or the like), in a society that is somewhat similarly democratic and protective of basic human rights. England is not the moon, nor is India. Neither is a question of “cruel and unusual punishment” an arcane matter of contract law where differences in legal systems are more likely to make a major difference. . . . If in a “cruel and unusual punishment” case the fact that everyone in the world thinks one thing is at least worth finding out,

Death Penalty, TRIBUNE (Dec. 15, 2018), <https://www.tribuneindia.com/news/archive/punjab/hc-abolishes-solitary-confinement-for-prisoners-facing-death-penalty-699020> [<https://perma.cc/4N66-C46E>]; see also *Batra v. Delhi Admin.*, AIR 1980 SC 1579 (Sup. Ct. Dec. 20, 1979) (India) (describing permanent solitary confinement on death row as unconstitutional torture). In addition, Malaysia, while actively considering abolition, does hold death sentenced people in solitary. See Kate Mayberry, *Malaysia Says No ‘U-Turn’ in Death Penalty Abolition*, AL JAZEERA (Nov. 16, 2018), <https://www.aljazeera.com/news/2018/11/16/malaysia-says-no-u-turn-in-death-penalty-abolition> [<https://perma.cc/9GNK-8QGK>].

226. JOHNSON, *supra* note 213 (detailing Japan’s use of permanent decades-long solitary confinement); see also Emiko Jozuka & Yoko Wakatsuki, *This Japanese Man Spent Almost Five Decades on Death Row. He Could go Back*, CNN (Mar. 21, 2020), <https://www.cnn.com/2020/03/21/asia/japan-death-penalty-hakamada-hnk-intl/index.html> [<https://perma.cc/E9L9-RRBS>] (telling one story).

227. *Roper v. Simmons*, 543 U.S. 551, 575 (2005).

228. See *Atkins v. Virginia*, 536 U.S. 304, 325 (2002) (indicating international opinion serves a confirmatory role though not a replacement for American values of decency); see also *Enmund v. Florida*, 458 U.S. 782, 796 (1982) (citing international cases).

for I doubt that Americans are so very different from people elsewhere in the world in respect to such matters.²²⁹

The Supreme Court references foreign and international law as non-binding, instructive sources, which began in earnest following *Roper*, is a return to traditional methods of Eighth Amendment analysis.²³⁰ The Court has relied on foreign legal practice to help resolve the meaning of “cruel and unusual” since 1879.²³¹

While the British Parliament abolished its death penalty in 1965, British jurists have continued to consider capital punishment and solitary confinement.²³² For example, in *Pratt*, two appellants were convicted of capital murder in 1979 and, over fourteen years of imprisonment on death row, faced possible execution three times.²³³ On appeal from Jamaica, the UK Privy Council explained “these bare facts [are] 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 . . . facing the gallows.”²³⁴ The Council held that “unconscionable delay” was unlawful inhuman and degrading punishment unless that delay was the appellant’s fault (e.g., a delay or time-wasting appeals).²³⁵ Delays resulting from legitimate appeals, however, could not justify delaying the sentence:

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. If the appellate procedure enables the

229. Norman Dorsen, *The Relevance of Foreign Legal Materials in U.S. Constitutional Cases: A Conversation Between Justice Antonin Scalia and Justice Stephen Breyer*, 3 INT’L J. CONST. L. 519, 529 (Oct. 2005) (quoting J. Breyer).

230. Vicki Jackson, *Constitutional Comparisons: Convergence, Resistance, Engagement*, 119 HARV. L. REV. 109, 109 (2005).

231. *Id.*; see also *Wilkerson v. Utah*, 99 U.S. 130, 134 (1879) (“Corresponding rules prevail in other countries, of which the following [cited] authorities will afford sufficient proof.”).

232. See Murder (Abolition of Death Penalty) Act 1965, c. 71, § 1 (UK).

233. *Pratt v. Att’y Gen. of Jam.* [1993] UKPC 1, ¶ 1 (appeal taken from Jam.); see also *Riley v. Att’y Gen. of Jam.* [1982] 3 All ER 469 (Scarman, L., dissenting) (arguing that “prolonged delay when it arises from factors outside the control of the condemned man can render a decision to carry out the sentence of death an [unlawful] inhuman and degrading punishment”).

234. *Id.*

235. *Id.* at ¶ 60, 61, 73.

prisoner to prolong . . . over a period of years, the fault is to be attributed to the appellate system that permits such delay and not to the prisoner who takes advantage of it. Appellate procedures that echo down the years are not compatible with capital punishment. The death row phenomenon must not become established as part of our jurisprudence.²³⁶

The Council held that a delay of more than five years was *prima facie* evidence of unlawful punishment, commuting the petitioner's sentences to life imprisonment.²³⁷ Today, more than 1,385 people are eligible for execution in the United States, having exhausted their appeals years ago, yet remain on death row.²³⁸ *Pratt* is not unusual, the British House of Lords and the Supreme Court that replaced it have issued several decisions curbing capital punishment²³⁹ and solitary confinement.²⁴⁰

The Supreme Court of India has long recognized that the "excruciation of a long pendency of [a] death sentence, with the prisoner languishing in near solitary confinement suffering all the time may make the death sentence unconstitutionally cruel and agonizing."²⁴¹ The Indian judiciary has regularly voided death sentences after delays of two or three years.²⁴² A recent

236. *Id.* at ¶ 73.

237. *Id.* at ¶ 85, 87.

238. NAACP LEGAL DEF. FUND, *supra* note 3, at 1.

239. Since *Pratt*, the common law prohibition on execution after long delay has continued to be affirmed in different contexts. See *Guerra v. Baptiste*, [1995] UKPC 3 (appeal taken from Trin. & Tobago) (holding that *Pratt's* prohibition is "consonant with the tradition of the common law."); *Henfield v. Att'y Gen.*, [1996] UKPC 36 (appeal taken from the Bahamas) (finding a three-and-a-half-year delay unconstitutional). The UK Supreme Court has held that the British government cannot provide legal assistance to American prosecutors without assurances the death penalty will not be sought. *Elgizouli v. Sec'y*, [2020] UKSC 10. In a series of decisions, the Privy Council ended the mandatory death penalty in the Caribbean. See, e.g., *Roodal v. State*, [2003] UKPC 78 (appeal taken from Trin. & Tobago) (reading Trinidad's mandatory death penalty statute as having implicit discretion to avoid unconstitutional cruel punishment); *Reyes v. The Queen*, [2002] UKPC 11 (appeal taken from Belize) (similar); *Regina v. Hughes*, [2002] UKPC 13 (appeal taken from St. Kitts & Nevis) (similar).

240. See, e.g., *Regina v. Sec'y*, [2015] UKSC 54 (affirming that solitary confinement beyond 72 hours requires special safeguards, including approval by the Secretary of State).

241. *Anamma v. Andhra Pradesh*, 1974 SCR (3) 329, 335 n.29 (India); see also *Singh v. Punjab*, 1983 SCR (2) 583, 591 n.31 (India) ("[T]he prolonged anguish of alternating hope and despair, the agony of uncertainty, the consequences of such suffering on the mental, emotional and physical integrity and health of the individual can render the decision to execute the sentence of death an inhuman or degrading punishment. . .").

242. See, e.g., *Chauhan v. Union of India*, 1 Writ Petition (Criminal) No. 55 of 2013, decided on Jan. 21, 2014 (SC) (India); *Mannan v. Bihar*, Criminal Appeal No. 379 of 2009,

opinion by the High Court of Punjab and Haryana held that the practice of holding death-sentenced people in solitary confinement pending execution was unconstitutional.²⁴³ Keeping “the convict in custodial segregation/solitary confinement before the exhaustion of [all legal appeals] is without authority of law;” the Court reasoned, “[i]t will amount to additional punishment. It also amounts to torture and [is] violative of his basic human rights.”²⁴⁴ Regardless, Indian law has long restricted solitary confinement to no more than fourteen-day consecutive periods.²⁴⁵

In Kenya, where nobody has remained on death row longer than four years, a Supreme Court commission found a “growing consensus that extended time on death row, if not the death penalty itself, constitutes inhuman punishment in violation of international law, regional law and most modern constitutions.”²⁴⁶ Similarly, in one of its first decisions, the South African Constitutional Court found it “intolerable” that “approximately half [of the three to four hundred people] on [Death] Row were sentenced more than two years ago.”²⁴⁷ Immediate action was required.²⁴⁸ The Court held that capital punishment was “cruel, inhuman, or degrading treatment or punishment,”²⁴⁹ in part because of the well-documented “mental anguish suffered by convicted persons awaiting the death sentence.”²⁵⁰ In recent years, similar decisions have been issued by *inter alia* the European Court of Human Rights,²⁵¹ the Inter-American Commission of Human Rights,²⁵² and the Ugandan

decided on Feb. 14, 2019 (SC) (India) (commuting a death sentence after a decade in solitary); *Vatheeswaran v. Tamil Nadu*, 1983 SCR (2) 348 (India) (“[W]e think that delay exceeding two years in the execution of a sentence of [entitles] the person [to] demand the quashing of the sentence of death.”); *Singh v. Uttar Pradesh*, AIR 1978 SC 59 (Aug. 18, 1977) (India) (commuting a death sentence because of a delay of two-and-a-half years).

243. *Haryana v. Arun*, CRM. No. M-1276, ¶ 92, decided on Nov. 17, 2014 (SC) (India).

244. *Id.* at ¶ 92.

245. Indian Penal Code, 1860, § 74.

246. AMNESTY INT’L, DEATH SENTENCES AND EXECUTIONS: 2019 at 48 (2020).

247. *In the matter of the State v. Makwanyane*, 1995 (3) SA 391 at ¶ 6 (S. Afr.).

248. *Id.*

249. S. AFR. CONST. ch. 2, art. 12.

250. *Makwanyane* 1995 (3) SA 391 n.3 (S. Afr.), *supra* note 247.

251. *See, e.g.*, *A.L. (X.W.) v. Russia*, Eur. Ct. H.R. (2015) ¶ 76 (holding that any use of solitary confinement requires a particularized justification, exceptional circumstances, and monitoring); *Sanchez v. France*, 2006-IX Eur. Ct. H.R. 171, 217 ¶ 120 (July 4, 2006) (holding complete sensory isolation, coupled with total social isolation, can destroy the personality and constitutes a form of inhuman treatment which cannot be justified by the requirements of security or any other reason).

252. *See, e.g.*, *Djamel Ameziane v. United States*, Case 12.865, Inter-Am. Comm’n H.R., Report No. 29/20, OEAA/Seer.L/V/II, doc. 39 ¶ 152 (Apr. 22, 2020) (holding extended

Supreme Court.²⁵³ In short, international and foreign courts have rejected permanent solitary death rows.

F. TAKEN TOGETHER, ALL FIVE OBJECTIVE INDICIA SUGGEST THAT AMERICAN STANDARDS OF DECENCY HAVE DECISIVELY TURNED AGAINST PERMANENT SOLITARY DEATH ROWS

The objective indicia are used to determine whether there is a consensus against a certain penalty.²⁵⁴ Just like the imposition of death for the crime of raping an adult woman,²⁵⁵ for felony murder,²⁵⁶ for people who are “mentally retarded,”²⁵⁷ and for juveniles,²⁵⁸ state legislation and practice have clearly and uniformly moved against permanent solitary death rows.²⁵⁹ The available evidence of public opinion, historical development, and extranational opinion all confirm the conclusion that society’s standards of decency have indeed evolved past tolerating permanent solitary death rows. Considering the weight of the objective factors, the retentionist states find themselves drifting onto the wrong side of American history.

or indeterminate solitary confinement is CIDT (unlawful cruel, inhuman, or degrading treatment)); INTER-AM. COMM’N H.R., PRINCIPLES AND BEST PRACTICES ON THE PROTECTION OF PERSONS DEPRIVED OF LIBERTY IN THE AMERICAS at principle XXII.3 ¶ 3, 4 (2008) (requiring solitary *inter alia* be strictly time limited and subject to judicial oversight since prolonged or unnecessary solitary would be torture or CIDT).

253. *Attorney General v. Kigula*, Const. App. No. 03 of 2006 (Sup. Ct. Jan. 21, 2009) (Uganda).

254. See *Atkins v. Virginia*, 536 U.S. 304, 317–21 (2002); *Thompson v. Oklahoma*, 487 U.S. 815, 849 (1988) (O’Connor, J., concurring) (mentioning “national consensus” for the first time).

255. *Coker v. Georgia*, 433 U.S. 584, 593–97 (1977) (relying on only Georgia using the punishment).

256. *Enmund v. Florida*, 458 U.S. 782, 787 (1982) (relying on 46 states prohibiting the punishment).

257. *Atkins*, 536 U.S. at 321 (relying on six states abandoning the practice in 12 years).

258. *Roper v. Simmons*, 543 U.S. 551, 565–66 (2005) (ruling on five states abandoning the practice in 15 years due to the “counter-balance” of the clear, consistent direction of change).

259. As discussed above, only 12 states maintain the practice and this is substantially strengthened by the fact that ten states in the last six years have abandoned permanent solitary death rows or the capital punishment entirely—more than four times the *Atkins* rate of change and more than six times the *Roper* rate of change. See *Atkins*, 546 U.S. at 321 (relying on one state per two years); *Roper*, 543 U.S. at 565–66 (relying on one state per three years). The rate of change has been both uniform and consistent, further enhancing the weight of the social change. *Id.*

CONCLUSION

Following *Gregg v. Georgia*, the compounding cruelty of capital punishment combined with endless years of permanent solitary confinement came to death row. However, American standards of decency have evolved. State legislatures and executive officials are increasingly and uniformly moving against permanent solitary death rows. The number of jurisdictions operating solitary death rows, already a serious minority, are shrinking at an escalating rate. The American public is increasingly expressing an intolerance of solitary confinement and capital punishment. Moreover, permanent solitary death rows are a modernism that—for much of American history—the public would view as cruel and unusual punishment. This clear trend away from tolerating permanent solitary death rows in the United States is in accord with the overwhelming direction of the international community.

It is clear that society would not tolerate a state intermittently waterboarding those on death row or engaging in intentional psychological torture. Indeed, the Constitution would not bear it.²⁶⁰ There is little difference when the torturer is four concrete walls, perpetual silence, and unbounded time. Human decency demands better. As such, states retaining permanent solitary death rows continue to violate the Eighth Amendment's prohibition on cruel and unusual punishment. Courts, lawyers, politicians, and activists should quickly work towards ending the unconstitutional stain of permanent solitary death rows.²⁶¹ In short, American decency must come full circle.

260. *In re Kemmler*, 136 U.S. 436, 447 (1890) (“Punishments are cruel when they involve torture or a lingering death.”).

261. As evolving American standards of decency turn against permanent solitary death row, many jurisdictions are falling into a legal twilight of capital punishment. Judges, legislators, officials, lawyers, academics, activists can take several steps to facilitate the change. First, several states have shifted away from permanent solitary death row via executive or judicial order. *See, e.g.*, CAL. DEP'T OF CORR. & REHAB, *supra* note 135. Legislators and political activists should encourage the statutory codification of executive and judicial decisions shifting to both preserve the change while also clarifying the evolving standards analysis. *See Roper*, 543 U.S. at 564 (noting legislative enactments addressing the question are particularly expressive of consensus). Second, several states voluntarily piloted and introduced reforms to end permanent solitary confinement on their death rows. *See* DEATH PENALTY INFO. CTR., THE DEATH PENALTY IN 2019: YEAR END REPORT 23–24 (Dec. 17, 2019) (describing multiple reforms implemented in 2019). For the last decade, the Vera Institute of Justice has worked to reduce reliance on solitary in jails and prisons, and encouraging similar partnerships going forward may speed the way

APPENDIX:
FINDINGS OF THE NATIONAL SURVEY OF CONDITIONS ON
DEATH ROWS

Note: Within this appendix the term “male” / “men” and “female” / “woman” are used in line with the local jurisdiction’s usage. Such usage is not an endorsement or intended to minimize the discrimination faced by transgender or non-binary people on death row or within the carceral system more generally.²⁶² Similarly, the failure to mention facilities designated for women is not meant to minimize their particular challenges²⁶³ but, rather, reflects a lack of clarity in local policy.

For purposes of this study, “incarceration” and “confinement” are measured from the date of sentencing. The value of “average time in-cell” is computed using the information in the synopsis.

The data presented below is current as of August 7, 2022.

toward change. See Sara Sullivan et al., *Rethinking Restrictive Housing*, VERA (May 2018) <https://www.vera.org/publications/rethinking-restrictive-housing> [https://perma.cc/66JS-MPK8]. Third, there is a dearth of information related to the needs and desires of the people on death row related to the conditions of their confinement; it is unclear that simply mainstreaming death row residents is desirable. See Interview with Bernard Harcourt, Professor of L., Colum. L. Sch. (Feb. 2, 2021) (describing the importance of a community of shared experience and the privacy of single cells to many death-sentenced people). Finally, litigation challenging death row conditions has been remarkably successful. See, e.g., *Porter v. Clarke*, 923 F.3d 348, 353 (4th Cir. 2019). New suits are being filed. See, e.g., *Kansas Death-Row Prisoners File Suit Challenging Conditions of Confinement*, DEATH PENALTY INFO. CTR. (Nov. 16, 2020), <https://deathpenaltyinfo.org/news/kansas-death-row-prisoners-file-suit-challenging-conditions-of-confinement> [https://perma.cc/RXR8-6MZ9]. New challenges will not only provide tangible relief from unconstitutional conditions of confinement, but also will pressure reform and bolster the evolving standards argument.

262. PRIMER ON TRANSGENDER INDIVIDUALS FACING THE DEATH PENALTY, WORLD COAL. AGAINST DEATH PENALTY 1 (July 2021), https://worldcoalition.org/wp-content/uploads/2021/06/Trans-Rights-and-Death-Penalty-Factsheet_V1.0.pdf [https://perma.cc/NYA9-Z2PM].

263. Tamar Sarai Davis, *Conditions on Death Row Are Horrible, But Women Have It Especially Hard*, PRISM (Jan. 11, 2021), <https://prismreports.org/2021/01/11/conditions-on-death-row-are-horrible-but-women-have-it-especially-hard/> [https://perma.cc/V3QE-T8ZV] (describing the particular solitude, sexual violence, harassment, and assault that women face on death row).

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| Fed. | <p>Status: <i>Permanent Solitary Confinement</i> Total Incarcerated: 44 people²⁶⁴ Longest Current Incarceration: 29 years (since June 1, 1993)²⁶⁵ Average Time In-Cell: 22+ hours daily</p> <p>Synopsis: Death-sentenced people are housed at the Special Confinement Unit (SCU) of the Terre Haute United States Penitentiary in Indiana, which is rated for 50 single cells.²⁶⁶ For 22+ hours daily, SCU residents are isolated behind solid steel doors in small cells where they eat, shower, and sleep.²⁶⁷ Residents are chained anytime they are out-of-cell and, three times a week, can exercise alone in a tiny cage with a small skylight.²⁶⁸ Visitation is non-contact and limited to four hours a month.²⁶⁹</p> |
| Mil. | <p>Status: <i>Permanent Solitary Confinement</i> Total Incarcerated: 4 people²⁷⁰ Longest Current Incarceration: 34 years (since April 12, 1988)²⁷¹ Average Time In-Cell: 23+ hours daily</p> <p>Synopsis: Members of the military who are sentenced to death are housed in a segregated area of the United</p> |

264. NAACP LEGAL DEF. FUND, *supra* note 3, at 38.

265. The person incarcerated the longest on Federal death row is James Roane, Jr., who was sentenced in June 1993. *See* United States v. Roane, No. 3:92CR68 (DJN), 2020 WL 6370984, at *2 (E.D. Va. Oct. 29, 2020) (listing Roane's sentencing date).

266. Kadamovas v. Caraway, 2018 U.S. Dist. LEXIS 206013, at *6 (S.D. Ind. 2018) ("The SCU is the only 'death row' in the federal prison system."); *see also* PRISON RAPE ELIMINATION ACT (PREA) AUDIT REPORT: FCC TERRE HAUTE 7 (2019) (noting the SCU has a rated capacity of 50 single housing cells).

267. Michael Tarm, *On Federal Death Row, Inmates Talk About Biden, Executions*, AP NEWS (Mar. 22, 2021), <https://apnews.com/article/federal-death-row-inmates-talk-biden-executions-6381ed8b3e821a34a6b6ade6bb3375c0> [<https://perma.cc/L7TA-93AL>] (noting residents are "let out of their 12-by-7 foot single-inmate cells" for two hours daily); *but see* Editorial Staff, *Inside 'Guantánamo North,'* WEEK (July 18, 2015), <https://www.theweek.com/articles/566649/inside-guantnamo-north> [<https://perma.cc/F7NP-QJ26>] (quoting an advocate who said SCU residents are out-of-cell for just five hours weekly).

268. Editorial Staff, *supra* note 267.

269. *Id.*; Terre Haute Institutional Supplement, THX-5267.08E, Visiting Regulations 4-5 (2014).

270. NAACP LEGAL DEF. FUND, *supra* note 3, at 38.

271. The person incarcerated the longest in the Disciplinary Barracks is Ronald Gray, who was sentenced by the military in April 1988. *See* United States v. Gray, 51 M.J. 1, 9 (C.A.A.F. 1999) (listing Gray's sentencing date).

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| | States Disciplinary Barracks (DB) in Kansas. ²⁷² Isolation is maintained for 23 hours per day, with one hour reserved for exercising and showering. ²⁷³ |
| Ala. | <p>Status: <i>Permanent Solitary Confinement</i></p> <p>Total Incarcerated: 165 people²⁷⁴</p> <p>Longest Current Incarceration: 40 years (since January 29, 1982)²⁷⁵</p> <p>Average Time In-Cell: 23+ hours daily</p> <p>Synopsis: Death-sentenced people are housed in a segregated area of Holman Prison and Tutwiler Prison (for five women).²⁷⁶ Holman Prison has been partially shut down after a scathing DOJ report found unconstitutionally unsafe conditions.²⁷⁷ Holman residents are isolated in 5×8 foot cells for 23 hours daily, with solo showers and religious and legal visits permitted.²⁷⁸ Solitary conditions are believed to have contributed the recent death row suicides of Jamal Jackson and Jeffery Borden.²⁷⁹</p> |

272. Army Reg. 190-47, The Army Corrections System § 12-6(b) (2006) (*as revised* 2014).

273. *Military Battle is Fought on Death Row*, TAMPA BAY TIMES (Oct. 17, 2005), <https://www.tampabay.com/archive/1990/08/30/military-battle-is-fought-on-death-row/> [<https://perma.cc/6PDY-LCZ4>].

274. *Alabama Inmates Currently on Death Row*, ALA. DEP'T OF CORR., <http://www.doc.state.al.us/deathrow> [<https://perma.cc/65Q2-B4DP>].

275. *Id.* (listing this date as when William Bush moved to death row).

276. ALA. DEP'T OF CORR., *supra* note 96.

277. See DOJ C.R. DIV., INVESTIGATION OF ALABAMA'S STATE PRISONS FOR MEN (Apr. 2, 2019), <https://www.justice.gov/opa/press-release/file/1150276/download> [<https://perma.cc/4CD3-M7SG>].

278. Ala. Admin. Reg., 462, Chaplin Services 3 (2015) (providing for limited religious visitation); Kathy Reed, *Life on Death Row in Alabama*, YAHOO NEWS (June 23, 2010), [<https://web.archive.org/web/20140729025013/http://voices.yahoo.com/life-death-row-alabama-6246444.html>]; Steven Kurtz, *Thoughts on the Day of One's Execution*, STEVEN KURTZ'S BLOG (Apr. 7, 2011), <https://stevendkurtz.wordpress.com/2011/04/> [<https://perma.cc/5496-W9H7>].

279. Plaintiff's Notice to the Court of Recent Suicides 5, *Braggs v. Dunn*, No. 2:14-cv-00601-MHT-JTA (M.D. Ala. 2020).

Ariz.

Status: *Semi-Reformed Death Row***Total Incarcerated:** 111 people²⁸⁰**Longest Current Incarceration:** 44 years (since August 31, 1977)²⁸¹**Average Time In-Cell:** <20 hours daily

Synopsis: Death-sentenced men are housed primarily at the Central Unit of the Arizona State Prison Complex-Florence, with a minority at Arizona State Prison Complex-Eyman, and the three death-sentenced women are housed in the Lumley Unit at the Arizona State Prison Complex-Perryville.²⁸² Cells at Eyman are 11 feet 7 inches by 7 feet 9 inches (89.8 square feet) and cells at Lumley are 12 feet by 7 feet 2 inches (86 square feet).²⁸³ Since a 2017 settlement, death-sentenced people are no longer automatically maximum security based merely on their sentence, and are eligible for security review based on the criteria used generally.²⁸⁴ In 2017, approximately 80% of death-sentenced males were moved to the Central Unit, where group meals are in the common room, contact visitation is allowed, cells are left open three hours a day, and three times a week access to recreation fields is available in three-hour and fifteen minute blocks.²⁸⁵

280. *Death Row*, ARIZ. DEP'T OF CORR., <https://corrections.az.gov/public-resources/death-row> [https://perma.cc/4MV6-ZC9V].

281. Joe Clarence Smith is the person longest on Arizona death row, he was sentenced in August 1977. *Criminal Court Case Information—Case History, Joe Clarence Smith Jr.*, JUD. BRANCH OF ARIZ.: MARICOPA CNTY., <http://www.superiorcourt.maricopa.gov/docket/CriminalCourtCases/caseInfo.asp?caseNumber=CR0000-095116> [https://perma.cc/3G67-7N7R].

282. Kiefer, *supra* note 126.

283. *Death Row Information and Frequently Asked Questions*, ARIZ. DEP'T OF CORR., <https://corrections.az.gov/public-resources/death-row/death-row-information-and-frequently-asked-questions> [https://perma.cc/HR68-F392].

284. Ariz. Dep't of Corr. Orders, 801.3.3.1.1 (2017) (*as amended* 2019); Nordstrom v. Ryan, No. CV15-02176-PHX-DGC, 2019 U.S. Dist. LEXIS 169860, at *1 (D. Ariz. Oct. 1, 2019) *aff'd*, 813 Fed. App'x 684 (9th Cir. 2020).

285. *Death Row Information and Frequently Asked Questions*, ARIZ. DEP'T OF CORR. <https://corrections.az.gov/public-resources/death-row/death-row-information-and-frequently-asked-questions> [https://perma.cc/CBZ5-7JY7]; Kiefer, *supra* note 126.

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| Ark. | <p>Status: <i>Permanent Solitary Confinement</i> Total Incarcerated: 30 people²⁸⁶ Longest Current Incarceration: 31 years (since October 18, 1990)²⁸⁷ Average Time In-Cell: 23+ hours daily</p> <p>Synopsis: Death-sentenced people are housed in segregated areas of the Varner Unit. Death row cells are single-occupancy 6×9 foot cells with solid steel doors and in-unit showering.²⁸⁸ Lights-off lasts only four hours, between 10:30pm and 2:30am, when breakfast is served.²⁸⁹ Yard time is solitary, spent in a tiny concrete cell, with a single mesh panel allowing sunlight into the room, though not permitting a view outside.²⁹⁰</p> |
| Cal. | <p>Status: <i>Mainstreamed Death Row</i> Total Incarcerated: 684 people²⁹¹ Longest Current Incarceration: 44 years (since September 7, 1977)²⁹² Average Time In-Cell: >22 hours daily (transfer program) 23+ hours daily (San Quentin: restricted) 22 hours daily (San Quentin: privileged)</p> <p>Synopsis: A pilot program was announced in February 2020 to permit some death row residents to voluntarily transfer to one of eight other non-permanent solitary facilities, where they will be housed with non-condemned incarcerated people and, through the program, death-sentenced individuals will be eligible for work details.²⁹³</p> |

286. *Death Row*, ARK. DEPT OF CORR., <https://doc.arkansas.gov/correction/inmates/death-row/> [https://perma.cc/7UHT-E4NK].

287. *Id.*

288. *Escaping the Reality of Solitary Through Stories*, PROCLAIM JUSTICE (Sept. 19, 2013), <http://proclaimjustice.org/blog/escaping-the-reality-of-solitary-through-stories/> [https://perma.cc/ESL5-DY2M].

289. Emma John, Damien Echols: How I Survived Death Row, *GUARDIAN* (May 25, 2013).

290. *Id.*

291. *Condemned Inmate List*, CAL. DEPT OF CORR. & REHAB., <https://www.cdcr.ca.gov/capital-punishment/condemned-inmate-list-secure-request/> [https://perma.cc/B2YD-7QT2].

292. *Id.*

293. CAL. DEPT OF CORR. & REHAB., *supra* note 135; see also Donald Ray Young, *The Condemned: Transferring Out of San Quentin*, *CMTY. ALL.* (Apr. 1, 2020), <https://fresnoalliance.com/the-condemned-transferring-out-of-san-quentin/>

This program was made permanent in January 2022 and had generated \$49,000 in restitution payments through the work program by that date.²⁹⁴

Before the program, death-sentenced people were housed primarily at San Quentin State Prison for men, and Central California Women’s Facility for the 23 women, and were automatically classified as maximum security.²⁹⁵ Death-sentenced males are housed in three units at San Quentin: the Adjustment Center, where death-sentenced prisoners were initially housed, and to which they were returned “if they behave badly;” North Segregation, for prisoners “who have behaved well for years;” and East Block, which housed “everyone else.”²⁹⁶ Prisoners housed in the Adjustment Center are in single cells, behind solid steel doors for 23 1/2 hours daily, denied natural light and religious services.²⁹⁷ A recent lawsuit argues the review process, which occurs every 90 days, is perfunctory and random—leaving several seemingly well-behaved residents in the Adjustment Center for decades.²⁹⁸ Residents of East Block live in conditions similar to the general population.²⁹⁹

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| Fla. | <p>Status: <i>Non-Solitary Death Row</i> Total Incarcerated: 307 people³⁰⁰ Longest Current Incarceration: 46 years (since July 16, 1976)³⁰¹ Average Time In-Cell: >22 hours daily</p> <p>Synopsis: Death-sentenced people are housed in segregated areas of Florida State Prison, Union Correctional Institute Prison, and the Lowell Annex (for</p> |
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[<https://perma.cc/S8QP-S7Z3>] (describing the transfer program from the perspective of a current death row resident).

294. Bob Egelko, *supra* note 136.

295. CAL. DEPT OF CORR. & REHAB., *supra* note 291; CAL. DEPT OF CORR. & REHAB., OPERATION MANUAL § 61010.11.5 (Jan. 1, 2020).

296. Nancy Mullane, *One Reporter on California’s Death Row*, LIFE OF THE LAW (July 17, 2014), <https://www.lifeofthelaw.org/2014/07/reporter-on-death-row-2/> [<https://perma.cc/U4SU-JTA4>].

297. Complaint at 3, Lopez v. Brown, No. 15-cv-02725 (N.D. Cal. June 17, 2015).

298. *Id.*

299. *Id.* at 11.

300. *Death Row Roster*, FLA. DEPT OF CORR., <http://www.dc.state.fl.us/OffenderSearch/deathrowroster.aspx> [<https://perma.cc/S2FC-43YQ>].

301. *Id.*

the three women).³⁰² A May 2022 settlement of a 2017 case ended solitary confinement on Florida’s death row.³⁰³ Changes include up to 20 hours a week of congregate access to a day room, six hours of recreation a week, and access to jobs within the death row unit.³⁰⁴ Prior to the settlement, residents spent at least 23 hours daily in-cell, where they ate meals.³⁰⁵ Showers were offered every other day, and up to six hours of outdoor exercise was provided weekly, and one contact visitation was allowed per week.³⁰⁶ Residents granted privileges were allowed group recreation and access to a kiosk to email family.³⁰⁷ Typical cells have bars, though a few “heightened security” cells have solid steel doors.³⁰⁸ Non-security cells have television access.³⁰⁹

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| Ga. | <p>Status: <i>Permanent Solitary Confinement</i> Total Incarcerated: 48 people³¹⁰ Longest Current Incarceration: 46 years (since May 1976)³¹¹ Average Time In-Cell: 23+ hours daily</p> <p>Synopsis: Death-sentenced people are housed in a segregated area of the Georgia Diagnostic and Classification Center (GDCC) and Arrendale State Prison (for the sole woman).³¹² Death row at the GDCC is an administrative segregation (solitary confinement) unit.³¹³ Death-sentenced individuals are automatically assigned to “close security” (Georgia’s highest) and cannot be</p> |
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302. *Death Row*, FLA. DEP’T OF CORR, <http://www.dc.state.fl.us/ci/deathrow.html> [<https://perma.cc/8XGN-S57P>].

303. *Davis v. Dixon*, No. 3:17-CV-820-MMH-PDB, 2022 WL 1267602, at *3 (M.D. Fla. Apr. 28, 2022).

304. *Id.*; see also Dan Sullivan, *supra* note 139 (providing additional details about the settlement).

305. Dan Sullivan, *supra* note 139 (describing previous conditions).

306. *Id.*; Fla. Admin. Code, 33-601-830, Death Row (2016).

307. *Hall v. Palmer*, No. 15-cv-824, 2020 U.S. Dist. LEXIS 5212, at *12–13 (M.D. Fla. Jan 13, 2020).

308. *Id.* at *6–7.

309. *Id.* at *7.

310. CLAYTON HAMPTON, INMATES UNDER DEATH SENTENCE, GA. DEP’T OF CORR. (June 30, 2022), https://gdc.ga.gov/sites/default/files/pdf/Roster_death_row_CY_2022.pdf [<https://perma.cc/XH6C-WJZE>].

311. *Id.* at 4.

312. *Id.*

313. Ga. Dep’t of Corr., Prison Rape Elimination Act Audit Report 15 (2017).

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| | reclassified to a lower level. ³¹⁴ Residents are locked in 6.5×9 foot cells for at least 23 hours daily, with a small common room and yard accessible to small groups. ³¹⁵ |
| Idaho | <p>Status: <i>Permanent Solitary Confinement</i></p> <p>Total Incarcerated: 8 people³¹⁶</p> <p>Longest Current Incarceration: 39 years (since January 1983)³¹⁷</p> <p>Average Time In-Cell: 23+ hours daily</p> <p>Synopsis: Death-sentenced individuals are automatically placed into administrative segregation (solitary confinement) and are housed at Idaho Maximum Security Institution and Pocatello Women’s Correctional Center (for the sole woman).³¹⁸ Residents are isolated in 12×7 foot cells for 23 hours daily, and only permitted to be out-of-cell for a single hour of outdoor solo recreation, to shower, for legal visits, or for medical care.³¹⁹ A mental health professional reviews residents every 90 days and may recommend a temporary placement in somewhat less restricted housing.³²⁰</p> |

314. Ga. Dep’t of Corr., Standard Operating Procedure, IIC02-0002(220.02), Security Classification 4 (2008) (as revised 2014).

315. *Digging Deeper: GA’s Death Row*, WALB NEWS 10 (Oct. 3, 2011), <https://www.walb.com/story/15607323/digging-deeper-gas-death-row/> [https://perma.cc/77TV-BD3C]; *Georgia’s Largest Prison Last Stop for Some*, CHATTANOOGA TIMES FREE PRESS (Jan. 3, 2016), <https://www.timesfreepress.com/news/local/story/2016/jan/03/georgias-largest-prislast-stop-some/342930/> [https://perma.cc/7E7B-VHQV].

316. *Death Row*, IDAHO DEP’T OF CORR., https://www.idoc.idaho.gov/content/prisons/death_row [https://perma.cc/5JFZ-TTJ8] [hereinafter IDAHO DEP’T OF CORR., *Death Row*].

317. Thomas Creech is the person longest on Idaho death row. *Id.* Note that the Idaho Department of Correction’s listed “received” date for Thomas Creech is used here, *id.*, rather than Creech’s sentencing date due to an unusual clerical error affecting his effective sentencing date. See *State v. Creech*, 105 Idaho 362, 365 n.1 (1983).

318. Idaho Dep’t of Corr., Standard Operating Procedure, 319.02.01.002, Inmates Under Sentence of Death (1995) [hereinafter Idaho Dep’t of Corr., Operating Proc.].

319. IDAHO DEP’T OF CORR., *Death Row*, *supra* note 318.

320. IDAHO DEP’T OF CORR., STANDARD OPERATING PROC., *supra* note 318.

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| Ind. | <p>Status: <i>Non-Solitary Death Row</i> Total Incarcerated: 8 people³²¹ Longest Current Incarceration: 29 years (since March 26, 1993)³²² Average Time In-Cell: <20 hours daily</p> <p>Synopsis: Death-sentenced people are housed at the Indiana State Prison (X-Row) and automatically placed in maximum security single-cells, though the sole female sentenced to death currently is incarcerated in Ohio.³²³ X-Row cells are 12×9 feet, windowless, have bar-doors, permit personal decorations, and are lit 24 hours a day.³²⁴ One resident has been permitted to have a cat.³²⁵ Residents have four hours out-of-cell per day, including up to an hour in a caged outdoor area.³²⁶ There are religious services and visitation.³²⁷</p> |
| Kan. | <p>Status: <i>Permanent Solitary Confinement</i> Total Incarcerated: 9 people³²⁸ Longest Current Incarceration: 19 years (since November 15, 2002)³²⁹ Average Time In-Cell: 23+ hours daily</p> <p>Synopsis: Death-sentenced individuals are typically housed at El Dorado Correctional Facility as a part of an administrative segregation (solitary confinement) unit,</p> |

321. NAACP LEGAL DEF. FUND, *supra* note 3, at 37; *No Longer on Death Row*, IND. PUB. DEF. COUNCIL, <https://www.in.gov/ipdc/files/No-Longer-on-Indianas-Death-Row.pdf> [<https://perma.cc/JE6G-9WXE>].

322. Tim Evans, *Indiana 'Death Row' Holds 8 Killers, No Executions Are Scheduled*, INDYSTAR (July 8, 2020), <https://www.indystar.com/story/news/investigations/2020/07/08/indiana-death-row-eight-killers-await-death-penalty/5383268002/> [<https://perma.cc/U4EK-MK5V>].

323. Ind. Dep't of Corr., Policy & Administrative Procedures, 02-03-115, High Risk Offenders (Dec. 1, 2014).

324. Vic Ryckaert, *This is What a Condemned Inmates' Last Hours are Like on Indiana's Death Row*, INDYSTAR (Dec. 11, 2019), <https://www.indystar.com/story/news/crime/2019/12/11/death-penalty-indiana-inmates-last-hours/2607497001> [<https://perma.cc/P5BF-9VU9>]; *see also* INSIDE DEATH ROW WITH TREVOR McDONALD (ITV1 2013) (depicting several cells).

325. *Id.* at 24:25.

326. Ryckaert, *supra* note 324.

327. *Wrinkles v. Davis*, 311 F. Supp. 2d 735, 738 (N.D. Ind. 2004).

328. Nancy Burghart, *Capital Punishment Information*, KAN. DEP'T OF CORR., <https://www.doc.ks.gov/newsroom/capital> [<https://perma.cc/PD9E-EF5T>].

329. *Id.*

though females would be assigned to the Topeka Correctional Facility.³³⁰ Residents are automatically held in solitary confinement for 23 hours per day behind a solid steel door in their 83-square-foot concrete cells, where they eat.³³¹ Human interaction is rare: four or five days a week, residents are allowed to exercise alone in a 10×20 foot cage (often scheduled in the middle of the night), three days a week they shower, and non-contact visits are infrequent.³³² There are no religious or other programs.³³³

Ky.

Status: *Permanent Solitary Confinement*

Total Incarcerated: 26 people³³⁴

Longest Current Incarceration: 42 years (March 29, 1980)³³⁵

Average Time In-Cell: 22–23 hours daily

Synopsis: Death-sentenced people are housed in segregated areas of Kentucky State Penitentiary and Kentucky Correctional Institute for Women (for the sole woman).³³⁶ Three times the number of residents executed (3) have died instead from suicide or natural causes (9).³³⁷ Residents are automatically placed into long-term solitary confinement, with at least three showers and limited exercise weekly.³³⁸ Residents are entitled to at

330. *Id.*

331. Karen Dillon, *A Look at the 10 Kansas Inmates on Death Row*, LAWRENCE JOURNAL-WORLD (June 11, 2016), www2.ljworld.com/news/2016/jun/11/lives-10-kansas-inmates-death-row-quiet-solitary [<https://perma.cc/8ZV6-ELQF>]; Complaint at 2–3, *Cheever v. Zmuda*, No. 20-cv-2555, 2021 WL 1854198 (D. Kan. May 10, 2021).

332. Dillon, *supra* note 331; Complaint at 3, *Cheever*, 2021 WL 1854198.

333. *Id.*

334. *Death Row Inmates*, KY. DEPT OF CORR., <https://corrections.ky.gov/Facilities/AI/Pages/deathrowinmates.aspx> [<https://perma.cc/7SGJ-HDEG>]; *see also Adult Institutions*, KY. DEPT OF CORR., <https://corrections.ky.gov/facilities/ai/pages/default.aspx> [<https://perma.cc/GDC7-WNFR>].

335. *Id.*

336. *Id.*

337. A REVIEW AND REPORT ON THE STATUS OF THE RECOMMENDATIONS MADE BY THE KENTUCKY DEATH PENALTY ASSESSMENT TEAM 12 (Feb. 2020), <https://dpa.ky.gov/News-and-Public-Information/Documents/Status%20Report%20on%20Death%20Penalty%20AssessmentFINAL.pdf>

[<https://web.archive.org/web/20210427092652/https://dpa.ky.gov/News-and-Public-Information/Documents/Status%20Report%20on%20Death%20Penalty%20AssessmentFINAL.pdf>].

[<https://web.archive.org/web/20210427092652/https://dpa.ky.gov/News-and-Public-Information/Documents/Status%20Report%20on%20Death%20Penalty%20AssessmentFINAL.pdf>].

338. KY. DEPT OF CORR., POLICIES AND PROCEDURES, 10.2, SPECIAL MANAGEMENT HOUSING & RESTRICTIVE HOUSING 6, 19 (June 3, 2021), <https://corrections.ky.gov/About/>

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| | <p>least 10 hours of recreation time weekly.³³⁹ At least 22 hours per day are spent confined alone in 6.5×13 cells.³⁴⁰ Death row residents are able to congregate for religious observance.³⁴¹ Death row cells have open bars and face an interior room, permitting conversation between some cells.³⁴²</p> |
| La. | <p>Status: <i>Non-Solitary Death Row</i> Total Incarcerated: 62 people³⁴³ Longest Current Incarceration: 36 years (since December 25, 1985)³⁴⁴ Average Time In-Cell: 20 hours daily</p> <p>Synopsis: Death-sentenced people are housed in segregated areas of Louisiana State Penitentiary (known as “Angola”) and the Louisiana Correctional Institute for Women (for the sole woman).³⁴⁵ Since 2017, Angola’s death row permits four hours of out-of-cell time per day, during which groups of up to 12 can use a common room or, twice a week, use a non-caged outdoor area.³⁴⁶ Residents can hold jobs and can use JPAY machines to email or download music; the warden has noted improved</p> |

cpp/Documents/10/PPP%2010.2%20-%20Revised%205-25-2021%20-%20Iss%206-3-21%20-%20EBM%206-3-2021.pdf [https://perma.cc/8EY6-48K3].

339. *Id.* at 19.

340. *Age-Related Illness Catching Up with Death Row*, DESERET NEWS (Jan. 28, 2012), <https://www.deseret.com/2012/1/28/20248000/age-related-illness-catching-up-with-death-row> [https://perma.cc/X4SR-WKRQ]; *Death Row Inmate: ‘I’m Ready and I’m Sorry’*, NBC NEWS (May 9, 2008), <https://www.nbcnews.com/id/wbna24543525> [https://perma.cc/3HQH-6T3Y].

341. *See Meece v. Commonwealth*, 2013 WL 132638 (C.O.A. Ky. 2013).

342. *Lockup: Inside Kentucky State Penitentiary* (MSNBC television broadcast July 9, 2005) (depicting several cells).

343. NAACP LEGAL DEF. FUND, *supra* note 3, at 37; *but see* William Taylor Potter, *How Much Does Louisiana Spend on the Death Penalty? Here’s What You Should Know*, DAILY ADV. (April 11, 2022), <https://www.theadvertiser.com/story/news/2022/04/11/louisiana-death-penalty-how-much-state-spend-facts-capital-punishment/9468737002/> [https://perma.cc/3U23-JBUY] (listing the total as 31 people).

344. *Date Received Death Row Offenders*, (Nov. 25, 2020), https://townsquare.media/site/180/files/2020/12/11.25.20-Death-Row-List_KEEL-Request_pdf-1.pdf [https://perma.cc/L7LM-GX32] (listing receipt dates); *Man Faces Death Penalty in Slaying of Five Relatives*, AP NEWS (Nov. 1, 1985), <https://apnews.com/article/746e32c9f644a8f8c62a4594324c8f35> [https://perma.cc/5M69-YZLN] (noting the sentencing date was set for December 25).

345. *See Why Louisiana Executions Have Stalled for a Decade with 68 Remaining on Death Row*, ADVOCATE (Feb. 3, 2020), https://www.theadvocate.com/baton_rouge/news/politics/legislature/article_a802a5f6-46d1-11ea-9f51-eff2fa808090.html [https://perma.cc/H8UH-GCB6].

346. O’Donoghue, *supra* note 128.

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| | behavior since these changes were implemented. ³⁴⁷ Prior to 2017, Angola’s death row was locked-down roughly 23 hours per day. ³⁴⁸ |
| Miss. | <p>Status: <i>Permanent Solitary Confinement</i></p> <p>Total Incarcerated: 36³⁴⁹</p> <p>Longest Current Incarceration: 45 years (since March 2, 1977)³⁵⁰</p> <p>Average Time In-Cell: 23 hours daily</p> <p>Synopsis: Death-sentenced people are housed in segregated Unit 29 of Louisiana State Penitentiary (“Parchman”) and automatically categorized as the highest security group.³⁵¹ For residents, at least 23 hours per day are spent in their 12×8 foot single-cells, which are designed to prevent inhabitants from seeing another resident.³⁵² One hour per day, small groups are allowed to congregate out-of-cell or use an enclosed basketball court.³⁵³ Visitation is non-contact and religious services are allowed, but only between individuals and the chaplain.³⁵⁴</p> |

347. Class Action Complaint & Demand for Jury Trial, *Hamilton v. Vannoy*, No. 17-CV-00194-SDD-RLB (M.D. La. filed Mar. 29, 2017); VERA, *supra* note 153, at 71–73.

348. See Liam Stack, *3 Men on Death Row in Louisiana Sue over Solitary Confinement*, N.Y. TIMES (Mar. 30, 2017), <https://www.nytimes.com/2017/03/30/us/3-men-on-death-row-in-louisiana-sue-over-solitary-confinement.html> [<https://perma.cc/7GND-NM7B>].

349. *Death Row Inmates*, MISS. DEP’T OF CORR., <https://www.mdoc.ms.gov/Death-Row/Pages/Death-Row-Inmates.aspx> [<https://perma.cc/3TBD-4FRM>].

350. Richard Jordan is the person longest on Mississippi death row. *Id.* Note that the Mississippi Department of Correction’s listed “entry” date for Jordan is used here, *Id.*, rather than Jordan’s sentencing date due to a run of several resentencing, see *Jordan v. Fisher*, 576 U.S. 1071, 1071–74 (2015) (Sotomayor, J., dissenting from denial of certiorari).

351. MISS. DEP’T OF CORR., INMATE HANDBOOK 3 (2016); *Death Row Inmates*, MISS. DEP’T OF CORR., <https://www.mdoc.ms.gov/Death-Row/Pages/Death-Row-Inmates.aspx> [<https://perma.cc/472W-VCVX>]; Michelle Liu, *Mississippi’s Death Row Inmates Weren’t Involved with Recent Prison Violence, But Are Suffering Because of it, Lawyers Say*, MISS. TODAY (Feb. 14, 2021), <https://mississippitoday.org/2020/01/20/mississippi-death-row-inmates-weren-involved-with-recent-prison-violence-but-are-suffering-because-of-it-lawyers-say/> [<https://perma.cc/6WXS-JN46>].

352. Parker Yesko, *Letter from Parchman: Inside Mississippi’s Notorious Prison*, AM. PUB. MEDIA REPORTS (May 29, 2018), <https://www.apmreports.org/story/2018/05/29/inside-parchman-mississippi-notorious-prison> [<https://perma.cc/2XCQ-8CAF>].

353. *Id.*

354. *Id.*; INMATE HANDBOOK, *supra* note 351, at 5.

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| Mo. | <p>Status: <i>Mainstreamed Death Row</i> Total Incarcerated: 19 people³⁵⁵ Longest Current Incarceration: 37 years (since December 12, 1984)³⁵⁶ Average Time In-Cell: <20 hours daily</p> <p>Synopsis: Death-sentenced individuals are housed at Potosi Correctional Center for males and the WERDCC for women. Since January 8, 1991, people sentenced to death in Missouri have been assigned to housing using the same methods as the general inmate population.³⁵⁷ The majority of death row residents have actually been assigned to the low-security “honors dorm” and often share cells with non-death row inmates—and are able to access regular work and prison religious services.³⁵⁸ Six years into the program, a report described the program as producing “benefits not only for [death sentenced] inmates, but also for general population prisoners, staff, inmate’s families, corrections personnel, attorneys for both the state and the inmates, and Missouri citizens.”³⁵⁹</p> |
| Mont. | <p>Status: <i>Non-Solitary Death Row</i> Total Incarcerated: 2 people³⁶⁰ Longest Current Incarceration: 39 years (since March 22, 1983)³⁶¹ Average Time In-Cell: 22+ hours daily (restricted) < 22 hours daily (privileged)</p> |

355. The NAACP reported 20 people as of January 1, 2022, and Carman Deck was executed in May 2022. NAACP LEGAL DEF. FUND, *supra* note 3, at 37; Andy Rose, *Missouri executes man convicted of murdering and robbing an elderly couple in 1996*, CNN (May 3, 2022), <https://www.cnn.com/2022/05/03/us/carman-deck-missouri-execution/index.html> [<https://perma.cc/6JRX-WKAB>].

356. The person sentenced to death in Missouri longest is William Boliek, Jr., who was sentenced to death on December 12, 1984. *William Boliek*, PHILLIPS BLACK, <https://www.phillipsblack.org/boliek-william> [<https://perma.cc/SN24-24ET>].

357. Lombardi, *supra* note 120, at 3.

358. *Id.* at 4–5.

359. *Id.*

360. NAACP LEGAL DEF. FUND, *supra* note 3, at 37.

361. Ronald Smith has been on Montana death row since March 22, 1983. *Offender Search*, MONT. DEP’T OF CORR. (navigate to Ronald Smith’s page by entering his first and last name into the search), <https://app.mt.gov/conweb/> [<https://perma.cc/3H59-BXFX>]; see also *Smith v. Mahoney*, 2007 WL 869624, *3 (D. Mont. 2007). The only other person on Montana death row, William Gollehon, has been on death row since March 16, 1992. *Offender Search, supra* (navigate to William Gollehon’s page by entering his first and last name into the search); see also *Gollehon v. State*, 296 Mont. 6, 8 (1999).

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| | <p>Synopsis: Montana has no formal “death row,” but people under death sentence in Montana are housed in the maximum security unit at Montana State Prison.³⁶² Persons sentenced to death are automatically and permanently placed into administrative segregation (solitary confinement).³⁶³ All persons subject to administrative segregation, including death-sentenced inmates, are confined to their cell for at least 22 hours daily and permitted religious programs, three showers, and five hours of outdoor exercise weekly.³⁶⁴ Cells are 8×10, closed by a solid steel door, have a concrete bed with a mattress, a concrete desk, a toilet, and a sink.³⁶⁵ However, over time, certain basic privileges can be re-earned, such as time out of the cell in the “day room,” phone calls, and possession of books or magazines.³⁶⁶</p> |
| Neb. | <p>Status: <i>Non-Solitary Death Row</i> Total Incarcerated: 12 people³⁶⁷ Longest Current Incarceration: 26 years (since February 21, 1996)³⁶⁸ Average Time In-Cell: <20 hours daily</p> <p>Synopsis: Death-sentenced people are housed in the segregated, solid steel door Cell Block F of Tecumseh State Correctional Institution, though females would be assigned to the Nebraska Correctional Center for</p> |

362. THE GOVERNOR’S OFF. OF BUDGET AND PROGRAM PLANNING, FISCAL NOTE 2019 BIENNIIUM 1 (2019) https://leg.mt.gov/bills/2019/FNP/DF/HB0350_1.pdf [<https://perma.cc/3S36-AA8C>].

363. Mont. Dep’t of Corr., Montana State Prison Operational Procedure, 4.2.1 Inmate Classification 6 (1998) (*as revised* 2020).

364. Mont. Dep’t of Corr., Montana. State Prison Operational Procedure, 3.5.1, Restrictive Housing 2, 5 (1997) (*as revised* 2020).

365. John Adams, *Isolation Nation*, MOUNTAIN OUTLAW MAG (2016), <https://www.mtoutlaw.com/isolation-nation/> [<https://perma.cc/3PPC-SQY8>].

366. *Id.*

367. NAACP LEGAL DEF. FUND, *supra* note 3, at 37; *see also The Inmates on Nebraska’s Death Row and Their Crimes*, OMAHA WORLD HERALD (July 1, 2022), https://omaha.com/the-inmates-on-nebraska-s-death-row-and-their-crimes/collection_097542fd-fde7-501f-bed4-755fa540637f.html#10 [<https://perma.cc/JUX2-HV74>].

368. The person on Nebraska death row the longest is John Lotter, sentenced in February 21, 1996. *Incarceration Records*, NEB. DEPT OF CORR., https://dcs-inmatesearch.ne.gov/Corrections/COR_input.html [<https://perma.cc/4H2B-TE72>] (navigate to John Lotter’s page by searching his identity number: 47903); *see also* Lotter v. Houston, 771 F. Supp. 2d 1074, 1086 (D. Neb. 2011).

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| | Women. ³⁶⁹ Cells have small windows and TV access can be provided. ³⁷⁰ |
| Nev. | <p>Status: <i>Non-Solitary Death Row</i> Total Incarcerated: 64 people³⁷¹ Longest Current Incarceration: 42 years (since June 25, 1979)³⁷² Average Time In-Cell: 23+ hours daily (restricted) < 19 hours daily (privileged)</p> <p>Synopsis: Death-sentenced individuals are housed at Ely State Prison and Florence McClure Women’s Correctional Center, and are automatically placed under maximum custody (“Restrictive Housing”), requiring strip searches when exiting or entering their single-cells.³⁷³ In restrictive housing, Ely death row residents can spend 23 or more hours in their cells, but residents can earn “cross-over privileges” which gives at least five hours out of cell daily and allows group activities in the common area or during exercise.³⁷⁴ As of 2019, 57 of 65 men on death row had cross-over privileges, and the cross-over privilege system has produced positive results, leading to Ely death row being “by far [the] best behaved” according to unit staff.³⁷⁵</p> |

369. See *Tecumseh State Correctional Institution*, NEB. DEPT OF CORR. SERV., <https://corrections.nebraska.gov/facilities/tecumseh-state-correctional-institution> [<https://perma.cc/J3QH-XFBL>]; see also WQWT 6 News, *Death Row at Tecumseh State Prison*, at 1:06–16, 1:32–35 YOUTUBE (May 19, 2015), <https://youtu.be/GLgJlYKfDqw?t=66> [<https://perma.cc/5PMR-TLGV>] (depicting Cell Block F)

370. KETV NewsWatch7, *Life Inside Death Row*, YOUTUBE (May 13, 2013), https://www.youtube.com/watch?v=J5wR_ixiMec [<https://perma.cc/4KT6-N378>] (showing Cell Block F, including inside cells, and describing general living conditions).

371. The NAACP reported 65 people as of January 1, 2022, and Timothy Webber died of natural causes in May 2022. NAACP LEGAL DEF. FUND, *supra* note 3, at 37; *Nevada Killer Held on Death Row Since 2003 Dies at Hospital*, AP NEWS (May 23, 2022), <https://apnews.com/article/nevada-las-vegas-sexual-assault-40afb5899264ea7caf7dfbe27f0d9cb7> [<https://perma.cc/D7GZ-7HYS>].

372. The person on Nevada death row the longest is Edward Wilson, sentenced June 25, 1979. *Search by Offender ID*, NEV. DEPT OF CORR., <https://ofdsearch.doc.nv.gov/> [<https://perma.cc/493D-NHES>] (navigate to Edward Wilson’s page using his identity number: 14805).

373. Nev. Dep’t of Corr. Admin. Reg., 521, Custody Categories and Criteria (2015).

374. Matthew Lowen et al., *The Safe Alternatives to Segregation Initiative: Findings and Recommendations for the Nevada Department of Corrections*, Vera (2019), <https://www.vera.org/downloads/publications/safe-alternatives-segregation-initiative-findings-recommendations-ndoc.pdf> [<https://perma.cc/YXW6-ZUTZ>].

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| N.C. | <p>Status: <i>Semi-Reformed Death Row</i> Total Incarcerated: 135 people³⁷⁶ Longest Current Incarceration: 36 years (since January 29, 1997)³⁷⁷ Average Time In-Cell: 8 hours daily</p> <p>Synopsis: Death-sentenced people are housed in Central Prison and the North Carolina Correctional Institution for Women (for the two women).³⁷⁸ Central death row is 24 solid-door cell blocks centered on a common dayroom accessible 7am to 11pm. Residents are permitted group meals, one contactless visit per week, may work paying jobs, participate in group exercise twice a week, shower three times per week, and participate in group Christian or Islamic worship.³⁷⁹</p> |
| Ohio | <p>Status: <i>Semi-Solitary Death Row</i> Total Incarcerated: 130 People³⁸⁰ Longest Current Incarceration: 36 years (since May 6, 1986)³⁸¹ Average Time In-Cell: < 22 hours daily</p> <p>Synopsis: Death-sentenced individuals are primarily</p> |

375. *Id.*; see also Bill Leonard (Bill on Death Row), *Let Out of Solitary Confinement*, TUMBLR (Aug. 2, 2015), <https://williamleonarddeathrow.tumblr.com/post/127465988427/let-out-of-solitary-confinement> [<https://perma.cc/6Y6S-3TWW>] (“I have just found out that my crossover privileges have been granted. Next week I will be let out of solitary confinement after 22 years of isolation.”).

376. *Death Row Roster*, N.C. DEPT PUB. SAFETY, <https://www.ncdps.gov/adult-corrections/prisons/death-penalty/death-row-roster> [<https://perma.cc/KR7X-7PR5>].

377. *Id.* (click on Henry Wallace’s DOC # to see his sentence date).

378. *Death Penalty*, N.C. DEPT PUB. SAFETY, <https://www.ncdps.gov/our-organization/adult-correction/prisons/death-penalty> [<https://perma.cc/RU95-X38K>].

379. N.C. DEPT PUB. SAFETY, POLICY AND PROCEDURE, C.1200, CONDITIONS OF CONFINEMENT (Sept. 6, 2018); *Death Penalty*, N.C. DEPT PUB. SAFETY, <https://www.ncdps.gov/adult-corrections/prisons/death-penalty> [<https://perma.cc/P46P-85NC>]; see also JESSA WILCOX ET AL., THE SAFE ALTERNATIVE TO SEGREGATION INITIATIVE: FINDINGS AND RECOMMENDATIONS FOR THE NORTH CAROLINA DEPARTMENT OF PUBLIC SAFETY, VERA 71–73 (Dec. 2016), <https://www.vera.org/downloads/publications/safe-alternatives-segregation-initiative-findings-recommendations-ncdps.pdf> [<https://perma.cc/BRX9-JDLL>] (noting Death Row, while segregated, does not place greater restrictions on residents).

380. *Death Row*, OHIO DEPT OF REHAB. & CORR. (June 6, 2022), <https://drc.ohio.gov/death-row> [<https://perma.cc/45ED-3DSJ>].

381. The person on Ohio death row the longest is Samuel Moreland, whose sentence began on May 6, 1986. *Offender Search*, OHIO DEPT OF REHAB. & CORR., <https://appgateway.drc.ohio.gov/OffenderSearch> [<https://perma.cc/5FYN-9NSJ>] (navigate to Samuel Moreland’s page using his identity number: A190490).

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| | <p>housed at the Chillicothe Correctional Institution and the Ohio Reformatory for Women (for the sole female).³⁸² The Chillicothe death row has three units—DR1, DR2, and DR3—which are composed of two tiers of single-cells centered on common rooms with tables and recreation equipment (including TV, books, and board games).³⁸³ Unless specially classified, death row residents are afforded five hours of out-of-cell recreation and five showers per week and one contactless visit per month.³⁸⁴ At least two hours must be spent out-of-cell daily, unless residents are classified as a security threat, in which case they can spend 23–24 hours a day isolated.³⁸⁵</p> |
| Okla. | <p>Status: <i>Permanent Solitary Confinement</i> Total Incarcerated: 41 people³⁸⁶ Longest Current Incarceration: 37 years (since July 15, 1985)³⁸⁷ Average Time In-Cell: 22–23 hours daily Synopsis: Death-sentenced people are housed in Oklahoma State Penitentiary (OSP) A-Unit and H-Unit and the Mabel Basset Correctional Center (for the sole woman).³⁸⁸ H-Unit is an underground facility where “yard time” is in a small underground area with a skylight and 23 or more hours per day are spent in-cell.³⁸⁹ The majority of OSP residents have “qualified” to move to</p> |

382. *Death Row*, *supra* note 380.

383. Carol Robinson, Report on the Inspection and Evaluation of Chillicothe Correctional Institution 32, Leg. Corr. Institution Insp. Comm. (2014), <https://www.ciic.state.oh.us/assets/reports/122.pdf> [<https://perma.cc/N8TA-PYAA>].

384. Ohio Admin. Code 5120-9-12, Inmates Sentenced to Death (2014); ROBINSON, *supra* note 383, at 100–05 (including responses indicating 5 hours of recreation weekly).

385. Ohio Dep’t Rehab. & Corr. Policy, 53-CLS-01, Security Classification for Incarcerated Persons 3, 4, 12, 13 (2020).

386. *Inmates Sentenced to Death*, OKLA. DEP’T OF CORR., <https://oklahoma.gov/doc/offender-info/death-row/inmates-sentenced-to-death.html> [<https://perma.cc/AN8J-JPBV>] (noting that while 43 people are under Oklahoma death sentences, two are currently held in other jurisdictions).

387. The person on Oklahoma death row the longest is Richard Rojem, received on July 15, 1985. *OK Offender*, OKLA. DEP’T OF CORR., <https://okoffender.doc.ok.gov/> [<https://perma.cc/9UT3-MAFK>] (navigate to Richard Rojem’s page using his identity number: 146688).

388. *See Death Row*, OKLA. DEP’T OF CORR., <https://oklahoma.gov/doc/offender-info/death-row.html> [<https://perma.cc/YCP9-7Q2P>].

389. Dylan Goforth, *Struggle Continues Over Solitary for Okla. Death Row Inmates*, ENID NEWS & EAGLE (Dec. 2, 2019), https://www.enidnews.com/news/state/struggle-continues-over-solitary-for-okla-death-row-inmates/article_bf032287-0e3e-569b-811f-87660346406d.html [<https://perma.cc/SUM6-AMJN>].

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| | <p>A-Unit, where they have access to yard time in an outdoor cage and some cells are double-cells, though 22–23 hours are still spend in-cell daily.³⁹⁰ There are no active religious services.³⁹¹</p> |
| Or. | <p>Status: <i>Mainstreamed Death Row</i> Total Incarcerated: 25 people³⁹² Longest Current Incarceration: 32 years (since May 1988)³⁹³ Average Time In-Cell: n/a</p> <p>Synopsis: The Oregon Department of Corrections has announced that death row will be closed and current residents will be distributed throughout the Oregon Prison System.³⁹⁴ The current death row at Oregon State Penitentiary will be converted to disciplinary segregation units.³⁹⁵</p> |
| Pa. | <p>Status: <i>Semi-Reformed Death Row</i> Total Incarcerated: 106 people³⁹⁶ Longest Current Incarceration: 36 years (since November 22, 1985)³⁹⁷ Average Time In-Cell: <18 hours daily</p> <p>Synopsis: Death-sentenced men are housed at either State Correctional Institution Greene or Phoenix, while the Commonwealth’s sole woman sentenced to death is housed at State Correctional Institution Muncy. Recent changes as a result of a settlement agreement guarantee people on death row at least 42.5 hours a week out of their cells, 15 minutes of phone access each day, contact</p> |

390. *Id.*

391. *Id.*

392. *Oregon Death Penalty*, OR. DEP’T OF CORR., <https://www.oregon.gov/doc/about/Pages/oregon-death-penalty.aspx> [<https://perma.cc/2RTN-Z5CL>].

393. The person on Oregon death row the longest is Randy Lee Guzek, sentenced in May 1988. *See State v. Guzek*, 342 Or. 345, 347 (2007) (listing Guzek’s original sentencing date).

394. Conrad Wilson, *Oregon Department of Corrections to Dissolve Death Row*, OR. PUB. RADIO (May 15, 2020), <https://www.opb.org/news/article/oregon-death-row-general-population> [<https://perma.cc/HY5C-LXKA>].

395. *Id.*

396. *Execution List*, PENN. DEP’T OF CORR. (Aug. 2, 2022) (on file with the Columbia Journal of Law & Social Problems). For the current report, visit <https://www.cor.pa.gov/About%20Us/Initiatives/Pages/Death%20Penalty.aspx> and click “Execution List.”

397. *Id.*

visits, outdoor exercise, daily showers, group religious services, jobs, and access to educational programs.³⁹⁸ The Commonwealth ended its previous practices of subjecting death-row prisoners to body cavity searches whenever they leave their cells and requiring 24-hour illumination of the prisoners' cells.³⁹⁹ Previously, death-sentenced people automatically were placed into isolation for 22–24 hours a day inside a cell about 8×12 feet.⁴⁰⁰ Nearly 80 percent of those sentenced to death in Pennsylvania spent more than a decade in this form of solitary confinement.⁴⁰¹

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| S.C. | <p>Status: <i>Semi-Solitary Confinement</i> Total Incarcerated: 34 people⁴⁰² Longest Current Incarceration: 38 years (since September 17, 1983)⁴⁰³ Average Time In-Cell: <22 hours daily</p> <p>Synopsis: Death-sentenced individuals are housed in a segregated area of Broad River Correctional Institution.⁴⁰⁴ In 2019, in the midst of a lawsuit, South Carolina ended its practice of confining death-sentenced people to 23 hours per day in windowless cells.⁴⁰⁵ Now, at least one hour per day may be spent in a common room socializing, group exercise is permitted, and eight non-contact visits per month are allowed.⁴⁰⁶</p> |
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398. Settlement Agreement, *Reid v. Wetzel*, 2015 U.S. Dist. LEXIS 81138, No. 18-CV-0176 (M.D. Penn. Apr. 9, 2020).

399. *Id.*

400. *Reid et al. v. Wetzel*, ACLU PENN., <https://www.aclupa.org/en/cases/reid-et-al-v-wetzel> [<https://perma.cc/W66Q-WMK3>].

401. *Id.*

402. *Death Row List*, S.C. DEP'T OF CORR. (Aug. 7, 2022) (noting 35 incarcerated people in South Carolina with death sentences, one of which is not housed on death row) (on file with the Columbia Journal of Law & Social Problems). For the current report, visit <https://www.doc.sc.gov/news/deathrow.html> and click "Death Row Roster."

403. The person on South Carolina death row the longest is Fred Singleton, sentenced September 17, 1983. *Incarcerated Inmate Search*, S.C. DEP'T OF CORR., <https://public.doc.state.sc.us/scdc-public/> [<https://perma.cc/J6PP-KKWC>] (navigate to Fred Singleton's page using his identity number: 00004336).

404. S.C. Dep't of Corr., Policy OP-22.16, *Death Row* (2020).

405. Monk, *supra* note 133.

406. S.C. Dep't of Corr., *supra* note 404.

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| S.D. | <p>Status: <i>Permanent Solitary Confinement</i> Total Incarcerated: 1 person⁴⁰⁷ Longest Current Incarceration: 21 years (since January 19, 2001)⁴⁰⁸ Average Time In-Cell: 23+ hours daily</p> <p>Synopsis: Death-sentenced persons are housed at the maximum-security Jameson Annex of the South Dakota State Penitentiary, though the South Dakota Women's Prison would house any females. Death Row is a segregated unit.⁴⁰⁹ At Jamison, residents remain in their cells 23 or more hours daily—45 minutes of recreation, which includes any time to use the phone or a tablet, and a fifteen-minute shower are the only time out-of-cell.⁴¹⁰ Residents must eat in-cell, may not hold prison jobs, nor have direct contact with anyone other than prison officials.⁴¹¹</p> |
| Tenn. | <p>Status: <i>Non-Solitary Death Row</i> Total Incarcerated: 47 people⁴¹² Longest Current Incarceration: 39 years (since February 7, 1983)⁴¹³ Average Time In-Cell: 22–23 hours daily (restricted) < 16 hours daily (privileged)</p> <p>Synopsis: Death-sentenced individuals are housed in a segregated area of the Riverbend Maximum Security Institution and an unsegregated area of the Tennessee</p> |

407. *Frequent Questions: Capital Punishment*, S.D. DEP'T OF CORR., <https://doc.sd.gov/about/faq/capitalpunishment.aspx> [<https://perma.cc/G2SN-JX79>].

408. The only person on South Dakota death row, Briley Piper, was sentenced in January 2001. *Offender Locator*, S.D. DEP'T OF CORR., <https://doc.sd.gov/adult/lookup/> [<https://perma.cc/KUQ7-V3AT>]; see also Piper v. Young, 2019 S.D. 65, ¶ 3 (2019).

409. S.D. Codified L. 23A-27A-31.1.

410. *South Dakota to Execute Inmate on Monday for Guard's Slaying*, MPR NEWS (Oct. 27, 2018), <https://www.mprnews.org/story/2018/10/27/south-dakota-to-execute-inmate-on-monday-for-guards-slaying> [<https://perma.cc/WHC3-SZCQ>]; Arielle Zions, *Rapid City Man Slated for Execution Knows the End is Near, Deacon Says*, RAPID CITY J. (Nov. 3 2019), https://rapidcityjournal.com/news/local/crime-and-courts/rapid-city-man-slated-for-execution-knows-the-end-is-near-deacon-says/article_97e7d6e1-98e3-519b-beef-7442ebcfa6cb.html [<https://perma.cc/R52T-R5KA>].

411. S.D. Dep't of Corr., Policy L. 1.3.D.2, Capital Punishment Housing (2019).

412. *Death Row Offenders*, TENN. DEP'T OF CORR., <https://www.tn.gov/correction/statistics-and-information/death-row-facts/death-row-offenders.html> [<https://perma.cc/9HGK-J9PB>].

413. *Id.*

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| | <p>Prison for Women (for the sole female), though residents are automatically maximum security.⁴¹⁴ Riverbend death row operates with a three-tier system of behavior classification for residents—A, B, and C (from most to least privileged)—with “C” and “B” residents spending upwards of 22 hours locked in their cells and “A” residents spending up to eight hours a day out of their cell.⁴¹⁵ Arrivals are automatically assigned to C. Every 18 months, they may be reclassified up or down.⁴¹⁶</p> |
| Tex. | <p>Status: <i>Permanent Solitary Confinement</i> Total Incarcerated: 195 people⁴¹⁷ Longest Current Incarceration: 44 years (since October 26, 1977)⁴¹⁸ Average Time In-Cell: 22–23 hours daily</p> <p>Synopsis: Death-sentenced people are housed in segregated areas of the Polunsky Unit and the Mountain View Unit (for the six women).⁴¹⁹ The average Death Row cell is no bigger than 8×12 feet, with the majority having a small window high on the wall.⁴²⁰ Polunsky death row residents remain in their cells 22–23 hours a day and receive the same security treatment as administrative segregation (solitary).⁴²¹ Death row residents are the only population permanently subjected</p> |

414. See Tenn. Dep’t of Corr., Administrative Policies & Procedures, 506.16, Living Conditions for Segregated Inmates (2019); *Death Penalty in Tennessee*, TENN. DEPT OF CORR., <https://www.tn.gov/correction/statistics-and-information/executions/death-penalty-in-tennessee.html> [<https://perma.cc/ZN9K-JA9P>]; *Death Row Facts*, TENN. DEPT OF CORR., <https://www.tn.gov/content/tn/correction/statistics-and-information/death-row-facts.html> [<https://perma.cc/GP3K-JN8F>].

415. *Id.*; Andrew Krinks, *Soulful Resistance*, 23 OTHER J. 41, 47–48 n.13 (2014).

416. See *supra* note 414.

417. *Death Row Information*, TEX. DEP’T OF CRIM. JUST., https://www.tdcj.texas.gov/death_row/dr_offenders_on_dr.html [<https://perma.cc/C382-49YG>].

418. *Id.*

419. David Mann, *Solitary Men*, TEX. OBSERVER (Nov. 10, 2010), <https://www.texasobserver.org/solitary-men> [<https://perma.cc/7J2R-2X8W>]; *Death Row Information: Offenders on Death Row*, TEX. DEP’T OF CRIM. JUST., https://www.tdcj.texas.gov/death_row/dr_offenders_on_dr.htm [<https://perma.cc/2PZH-7KMT>].

420. UNIV. TEX. HUM. RIGHTS CLINIC, DESIGNED TO BREAK YOU: HUMAN RIGHTS VIOLATIONS ON TEXAS’ DEATH ROW 14 (2017) <https://law.utexas.edu/wp-content/uploads/sites/11/2017/04/2017-HRC-DesignedToBreakYou-Report.pdf> [<https://perma.cc/3NE3-TXGM>].

421. *Id.*; *Young v. Stephens*, No. MO-07-CA-002, 2014 U.S. Dist. LEXIS 16007, at *66 n.88 (W.D. Tex. Feb. 10, 2014).

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| | <p>to administrative segregation conditions.⁴²² Showers and outdoor exercise (where residents <i>may</i> be able to speak to each other from separate cages) are to be offered twice a week, but interviews suggest this is often not met.⁴²³ Meals are eaten in-cell, some radios are permitted in-cell, and contact visitation is forbidden.⁴²⁴ While they are locked behind solid steel doors, prison officials are able to directly observe the toilets.⁴²⁵ For 94% of their lives on Texas' death row, residents are kept in total isolation.⁴²⁶</p> |
| Utah | <p>Status: <i>Semi-Solitary Confinement</i> Total Incarcerated: 7 people⁴²⁷ Longest Current Incarceration: 36 years (since December 27, 1985)⁴²⁸ Average Time In-Cell: 21+ hours daily</p> <p>Synopsis: Death-sentenced individuals are housed at the Utah State Prison (USP) for men, though women would be housed at the Central Utah Correctional Facility for women.⁴²⁹ People sentenced to death are automatically designated as maximum security and cannot be reevaluated.⁴³⁰ At USP death row, residents are isolated in a 14×7 foot single-cell for 21 hours daily, where meals are eaten⁴³¹ They are allowed up to three electrical appliances (e.g. fans or televisions) in-cell, non-contact visits are available on weekends, and residents may work</p> |

422. *Id.* at *106 n.94.

423. Mann, *supra* note 419; UNIV. TEX. HUM. RIGHTS CLINIC, *supra* note 420, at 17; TEX. CIV. RIGHTS PROJ. & ACLU, A SOLITARY FAILURE: THE WASTE, COST AND HARM OF SOLITARY CONFINEMENT IN TEXAS 7 (2015), https://www.aclutx.org/sites/default/files/field_documents/SolitaryReport_2015.pdf [<https://perma.cc/47XQ-4XLH>].

424. TEX. DEP'T OF CRIM. JUST., OFFENDER ORIENTATION HANDBOOK 103 (2017); *Death Row Information: Death Row Facts*, TEX. DEP'T OF CRIM. JUST., https://www.tdcj.texas.gov/death_row/dr_facts.html; Mann, *supra* note 419 html [<https://perma.cc/89MR-XES8>].

425. Mann, *supra* note 419; UNIV. TEX. HUM. RIGHTS CLINIC, *supra* note 420, at 16.

426. Mann, *supra* note 419.

427. UTAH DEP'T OF CORR., UTAH STATE PRISON: DEATH SENTENCE INMATES 2–4 (Mar. 2022), <https://corrections.utah.gov/wp-content/uploads/2021/08/Utah.deathsentence.March2022.pdf> [<https://perma.cc/U2FB-HM4P>].

428. *Id.*

429. Joe Dorman, Utah State Prison: Inmate Friends and Family Orientation Booklet, Utah Dep't of Corr. (2013).

430. *Last Chance for a Life Out of Max: How Some Utah Death Penalty Inmates Made it to Medium Security*, KSL News, (Mar. 12, 2022), <https://ksltv.com/486799/last-chance-for-a-life-out-of-max-how-some-utah-death-penalty-inmates-made-it-to-medium-security/> [<https://perma.cc/C8Z4-NZZ5>].

431. Steve Gehrke, Utah State Prison: Death Row Inmates, Utah Dep't of Corr. (2011).

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| | for 40¢ an hour. ⁴³² A 10×12 foot concrete enclosure may be used during out-of-cell time. ⁴³³ |
| Wy. | <p>Status: <i>Permanent Solitary Confinement</i> Total Incarcerated: 0 people Longest Current Incarceration: n/a Average Time In-Cell: 23+ hours daily</p> <p>Synopsis: Nobody is sentenced to death in Wyoming.⁴³⁴ Any future death-sentenced individuals would be housed at the Wyoming State Penitentiary or the Wyoming Women’s Center.⁴³⁵ By statute, people sentenced to death must be kept in solitary confinement, with the exception of legal, religious, family, and physician visits.⁴³⁶</p> |

432. *Id.*

433. *Id.*

434. Dale Eaton was resentenced from death to life without parole recently, *Convicted Murderer Dale Wayne Eaton Re-Sentenced 30 Years After Disappearance of Lisa Marie Kimmel*, OIL CITY NEWS (Mar. 25, 2022), <https://oilcity.news/crime/2022/03/25/convicted-murderer-dale-wayne-eaton-re-sentenced-30-years-after-disappearance-of-lisa-marie-kimmel/> [https://perma.cc/S43A-4AD5], Eaton was the sole person on Wyoming’s death row prior to his resentencing. *Wyoming’s Lone Death Row Inmate Has Death Sentence Overturned*, GUARDIAN (Nov. 20, 2014), <https://www.theguardian.com/us-news/2014/nov/20/death-sentence-wyoming-killer-overtuned> [https://perma.cc/RR5P-Q33H]; Ellen Gerst, *Death Row Off the Table for Wyoming Man Who Killed Woman Bound for Billings in 1988*, KRDO (Jan. 25, 2022), <https://krdo.com/news/2022/01/25/death-penalty-off-the-table-for-wyoming-man-who-killed-woman-bound-for-billings-in-1988/> [https://perma.cc/446R-TLPX].

435. See WYO. LEG. RSCH. SERV., RSCH MEMO: 19 RM 001, at 1 (Jan. 7, 2019), <https://wyoleg.gov/LSOResearch/2019/19RM001.pdf> [https://perma.cc/5PBH-S7MM] (estimating the costs of incarcerating death-sentenced people at each of these two facilities); see also WYO. DEP’T OF CORR., WYOMING WOMEN’S CENTER HANDBOOK 18 (Sept. 2012), <https://www.law.umich.edu/special/policyclearinghouse/Documents/Wyoming%20Womens%20Center%20Inmate%20Handbook.pdf> [https://perma.cc/5R4W-2PRF] (referencing hypothetical people under death sentence at the Wyoming Women’s Center).

436. WYO. STAT. § 7-13-907 (2011).