

NOTES

“LIFE WITH THE IMPOSITION OR EXACERBATION OF SEVERE MENTAL ILLNESS AND CHANCE OF DEATH”: WHY THIS DISTINCT PUNISHMENT VIOLATES THE EIGHTH AMENDMENT

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INTRODUCTION

When he was ten years old, Andre Thomas began telling classmates about the voices he heard in his head.¹ He claimed that he could hear angels and demons arguing with one another, and he sometimes shouted back at the demons.² He was still in elementary school when he first attempted suicide³—he was still a kid. He tried to kill himself again when he was thirteen, and was put on suicide watch in a juvenile facility when he was fifteen.⁴ Thomas married Laura Boren when he was eighteen, though they separated after four months.⁵ After the separation, the voices in his head only got worse and he suffered from psychotic delusions.⁶ Thomas never received the adequate mental health care he so desperately needed.⁷ In 2004, he stormed into Laura’s apartment where she lived with her two children.⁸ He was holding three knives, one for each of his intended victims.⁹ He first stabbed Laura in the chest and pulled out what he believed was her heart (it was, in fact, part of her lung).¹⁰ He then moved towards the children’s room and stabbed his four-year-old son, Andre Jr., before stabbing her one-year-old daughter, Leyha.¹¹ He carved out each of their hearts before trying

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1. Brandi Grissom, *Trouble in Mind*, TEX. MONTHLY (March 1, 2013) <http://www.texasmonthly.com/articles/trouble-in-mind/>.

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

to kill himself and failing.¹² Thomas was confused as to why he did not die and turned himself in, asking if he would be forgiven.¹³ He later told investigators that he “thought it was what God wanted [him] to do.”¹⁴

After undergoing life-saving surgery, Thomas was moved to the Grayson County jail, where his behavior became only more psychotic.¹⁵ He claimed to be “the thirteenth warrior on the dollar bill,” and said that Laura and the children were not dead, but that “their hearts had been freed from evil.”¹⁶ Within a week of the murder, he read Matthew 5:29: “If your right eye causes you to stumble, gouge it out and throw it away. It is better for you to lose one part of your body than for your whole body to be thrown into hell.”¹⁷ He took this quite literally and pulled out his eyeball.¹⁸ When he arrived at the hospital, he repeatedly asked to see Laura and to ask for her forgiveness.¹⁹

Initially, state district Judge James Fry declared Thomas incompetent to stand trial, and sent him to North Texas State Hospital, where he was medicated.²⁰ At the end of his time at North Texas State (47 days), doctors concluded that substance abuse caused most of Thomas’ hallucinations.²¹ Prosecutors alleged that Thomas gouging his eyes out was impulsive, and that Thomas “grossly exaggerated his symptoms” to avoid punishment.²² Thereafter, Judge Fry found Thomas competent to stand trial.²³ The jury rejected his insanity plea and returned a guilty verdict.²⁴ After another hour of deliberation, the jury decided to sentence Thomas to death, where he would deteriorate on death row.²⁵ This man has attempted suicide no fewer than five times. Still, the state is pursuing his execution.²⁶

Does issuing a sentence that will likely result in the imposition or exacerbation of severe mental illnesses violate the Eighth Amendment? When the death penalty was first administered in the United States, individuals typically spent, at most,

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.* The constitutionality of forcibly medicating an individual in order to render him competent is outside the scope of this Note.

21. See Marc Bookman, *How Crazy is Too Crazy to Be Executed?* MOTHER JONES (Feb. 12, 2013, 7:02 AM), <http://www.motherjones.com/politics/2013/02/andre-thomas-death-penalty-mental-illness-texas>.

22. Grissom, *supra* note 1.

23. *Id.*

24. *Id.*

25. *Id.*

26. See *Thomas v. Davis*, No. 17-70002, 2018 U.S. App. LEXIS 15313 (5th Cir. June 7, 2018) (granting Thomas’ motion for certificate of appealability, but denying a certificate of appealability on the issue of whether executing the severely mentally ill violates the Eighth Amendment).

months on death row.²⁷ In 1960, the average delay between sentencing and execution was two years.²⁸ As of 2013, individuals on death row spend an average of fifteen and a half years there.²⁹ Of course, some delay between sentencing and execution is necessary, even desirable, due to the various procedural protections states currently have in place.³⁰ However, today, most capital defendants will spend over a decade on death row in restrictive confinement before they are, if ever, executed.³¹ In fact, between 1973 and 2013, only 24.8% of individuals on death row were executed.³²

As a result of spending over a decade on death row, the majority of individuals on death row are subject to another type of punishment: solitary confinement with the chance of death.³³ This is a phenomenon separate from traditional death sentences, where the inmate knows that he or she will be executed within months. It is also distinct from life without the possibility of parole (hereinafter “LWOP”), as those inmates know that they will spend the rest of their days alive in prison. The punishment associated with solitary confinement with the chance of death is a distinct syndrome.³⁴ Conditions in prolonged solitary confinement can not only cause individuals who have had no prior history of mental illness to develop a mental illness, but have also exacerbated preexisting mental illnesses in other individuals.³⁵ This Note treats the imposition or exacerbation of severe mental illness as a punishment in and of itself that should be evaluated independently, instead of characterizing it as “mental pain . . . inseparable” from the death penalty.³⁶ This type of punishment is distinctly different from the death penalty as traditionally imposed. Independent evaluation of this punishment suggests that it would be unconstitutionally cruel, and therefore barred by the Eighth Amendment.

This Note will trace the development of this unique type of punishment in five parts. Part I describes common death row conditions across the United States and the mental health conditions of individuals on death row. Part II explains why this

27. See, e.g., JOHN D. BESSLER, *CRUEL AND UNUSUAL: THE AMERICAN DEATH PENALTY AND THE FOUNDERS' EIGHTH AMENDMENT* 226 (2012).

28. Dwight Aarons, *Can Inordinate Delay Between a Death Sentence and Execution Constitute Cruel and Unusual Punishment?*, 29 SETON HALL L. REV. 147, 181 (1998).

29. See Tracy L. Snell, *Capital Punishment, 2013—Statistical Tables*, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE 14 (2014), <https://www.bjs.gov/content/pub/pdf/cp13st.pdf>.

30. See *Glossip v. Gross*, 135 S. Ct. 2726, 2771 (2015) (Breyer, J., dissenting) (describing procedural protections for individuals sentenced to death, such as: the ability to present mitigating factors to the jury; that the State provide adequate counsel, and where necessary, adequate expert assistance; due process protections; the right to seek a writ of habeas corpus in federal court for defendants claiming constitutional violations).

31. Snell, *supra* note 29, at 14, 18.

32. *Death Row Inmates, 1953-2013*, PROCON.ORG (June 30, 2015, 2:54 PM), <http://deathpenalty.procon.org/view.resource.php?resourceID=004433#II>.

33. See Gabriella Robles, *Condemned to Death—And Solitary Confinement*, THE MARSHALL PROJECT (July 23, 2017, 10:00 PM), <https://www.themarshallproject.org/2017/07/23/condemned-to-death-and-solitary-confinement> (“Of the 2,802 state prisoners currently condemned to death, 61 percent are isolated for 20 hours or more a day.”).

34. Stuart Grassian, *Psychiatric Effects of Solitary Confinement*, 22 WASH. U. J.L. & POL'Y 325, 338 (2006).

35. *Id.* at 328–29.

36. *Furman v. Georgia*, 408 U.S. 238, 288 (1972) (Brennan, J., concurring).

distinct form of punishment should be evaluated under the Eighth Amendment. Part III argues that the imposition or exacerbation of severe mental illness for an extended period of time on death row is unconstitutional under the Eighth Amendment. Part IV discusses how the Court evaluates Eighth Amendment challenges under evolving standards of decency and analyzes how the imposition or exacerbation of severe mental illness does not comport with that standard. Finally, Part V discusses reforms and solutions.

I. CONDITIONS OF CONFINEMENT ASSOCIATED WITH DEATH SENTENCES ARE LINKED WITH INDIVIDUALS' DETERIORATING MENTAL HEALTH

A. *Death Row Inmates Are Confined in Isolating Conditions with Little to No Human Interaction, Which Results in Psychological and Physical Trauma*

In 2013, the American Civil Liberties Union (“ACLU”) conducted a nationwide survey exploring death row conditions and the legal and human implications of death row inmates locked in solitary confinement for an extended time period.³⁷ Nearly all death penalty states keep death row inmates in isolation in small cells—typically ranging from thirty-six square feet to about 100 square feet—for at least twenty-two hours a day, with little human contact, little to no natural light, and “severe constraints on visitation, including the inability to ever touch friends or loved ones.”³⁸ These cells contain a steel bed or concrete slab, a steel toilet, and a small writing table.³⁹ Individuals on death row receive food and medical and mental health care through the slots of their doors; “face-to-face contact with another human being is rare.”⁴⁰ Eighty-one percent of states with the death penalty allow only one hour or less of exercise daily, which is far below the amount required to maintain physical or mental health.⁴¹ A majority of states forbid death row inmates from accessing work, employment, educational, or vocational programming.⁴²

Aside from being confined to their cells at almost all times, every step inmates take is monitored. Constant monitoring causes individuals to lose the ability to control their own behavior or to organize their own lives.⁴³ This is especially problematic for death row inmates, whose symptoms can and do prevent them from having meaningful discussions with defense counsel, which could potentially impact their sentences.⁴⁴ More broadly, the effects of solitary confinement are similar to the acute reactions suffered by torture and trauma victims, including PTSD,

37. AM. CIVIL LIBERTIES UNION, A DEATH BEFORE DYING: SOLITARY CONFINEMENT AND DEATH ROW 4 (2013), https://www.aclu.org/sites/default/files/field_document/deathbeforedying-report.pdf (hereinafter “ACLU”).

38. *Id.* at 2, 4.

39. *Id.* at 4.

40. *Id.*

41. *Id.* at 5.

42. *Id.*

43. Craig Haney, *Mental Health Issues in Long-Term Solitary and “Supermax” Confinement*, 49 CRIME AND DELINQUENCY 124, 138–9 (2003).

44. *See id.* at 139.

and “the kind of psychiatric sequelae that plague victims of what are called ‘deprivation and constraint’ torture techniques.”⁴⁵ Besides extreme psychological effects, researchers have also suggested that the clinical effects of extreme and prolonged isolation mirror those of physical torture.⁴⁶

B. Death Row Conditions Cause Some Inmates to Develop Severe Mental Illnesses and Exacerbate Pre-Existing Mental Illnesses

The American Psychiatric Association’s Diagnostic and Statistical Manual of Mental Disorders (hereinafter “DSM-V”) defines a mental disorder as: “a syndrome characterized by clinically significant disturbance in an individual’s cognition, emotion regulation, or behavior that reflects a dysfunction in the psychological, biological, or developmental processes underlying mental functioning . . . usually associated with significant distress in social, occupational, or other important activities.”⁴⁷ An individual may lack a diagnosable mental illness at the time an offense was committed, but may later develop one.⁴⁸ Mental illness can manifest at any age, with many more severe mental illnesses (e.g., bipolar disorder and schizophrenia) first appearing in adulthood.⁴⁹ It can be a temporary condition, be experienced in cycles, or episodes may recur throughout life.⁵⁰ Genetics, environment, and lifestyle combine to influence whether an individual develops a mental illness.⁵¹ Environmental and lifestyle contributors are especially problematic for death row inmates, since these individuals experience little to no human interaction, physical contact, mental stimulation, exposure to natural light, and are locked away in isolation for at least twenty-two hours a day.⁵² Perpetual monitoring prevents individuals on death row from controlling their own behavior and organizing their own lives.⁵³ In effect, being subject to those conditions on death row for decades can exacerbate or even trigger mental illnesses.

Mental Health America estimates that at least twenty percent of death row inmates have a severe mental illness.⁵⁴ Those who do not suffer from a preexisting mental illness still psychologically deteriorate due to the extreme situational stress they face.⁵⁵ About one-third of individuals kept in in solitary confinement develop

45. *Id.* at 132 (citing Finn E. Somnier & Inge K. Genefke., *Psychotherapy for Victims of Torture*, 149 BRITISH JOURNAL OF PSYCHIATRY 323–29 (1986)).

46. ACLU, *supra* note 37, at 2 (citing Hernán Reyes, *The Worst Scars Are in the Mind: Psychological Torture*, 89 INT’L REV. RED CROSS 591 (2007)).

47. A.B.A., DEATH PENALTY DUE PROCESS REVIEW PROJECT, SEVERE MENTAL ILLNESS AND THE DEATH PENALTY 1 (December 2016) (hereinafter “ABA Death Penalty Due Process Review Project”).

48. *Id.* at 29.

49. *Id.*

50. *Id.* at 29.

51. *Id.* at 9.

52. ACLU, *supra* note 37, at 2.

53. Haney, *supra* note 43 at 139.

54. *Position Statement 54: Death Penalty and People with Mental Illness*, MENTAL HEALTH AMERICA (June 14, 2016), <http://www.mentalhealthamerica.net/positions/death-penalty>.

55. Haney, *supra* note 43 at 143.

some form of severe mental illness.⁵⁶ Death row confinement may produce psychopathology in certain persons who otherwise would not have suffered it.⁵⁷ At least one court has recognized this phenomenon. In *Ruiz v. Johnson*, the judge concluded that “more than mere deprivation,” the individuals in these units “suffer actual psychological harm from the almost total deprivation of human contact, mental stimulus, personal property and human dignity.”⁵⁸ The judge also recognized that the psychological harm inflicted by long-term supermax confinement could result in mental illness, even among those individuals who the prison did not identify as mentally ill when they first began their sentences.⁵⁹

The court concluded, “Texas’ administrative segregation units are virtual incubators of psychoses-seeding illness in otherwise healthy inmates and exacerbating illness in those already suffering from mental infirmities.”⁶⁰

Psychology professor Craig Haney has examined the presence of mental and psychological deterioration at California’s Pelican Bay “security housing unit,” which he categorizes as a prototypical supermax facility.⁶¹ Like death row inmates, individuals kept in supermax facilities are kept in isolation for about twenty-three hours a day.⁶² In this study, 100 secure housing unit inmates were randomly selected and evaluated.⁶³ Professor Haney examined both symptoms of psychological and emotional trauma, and psychological effects of prolonged isolation.⁶⁴

Symptoms of psychological and emotional trauma included: anxiety, nervousness, headaches, lethargy, chronic tiredness, trouble sleeping, impending nervous breakdown, perspiring hands, heart palpitations, loss of appetite, dizziness, nightmares, hands trembling, and fainting.⁶⁵ Symptoms of psychopathological effects of prolonged isolation included: ruminations, irrational anger, oversensitivity to stimuli, confused thought process, social withdrawal, chronic depression, emotional flatness, mood and emotional swings, overall deterioration, talking to self, violent fantasies, perceptual distortions, hallucinations, and suicidal thoughts.⁶⁶

Dr. Stuart Grassian has summarized these symptoms and has provided a description of this discreet and unique syndrome.⁶⁷ The most common symptoms included

56. HUMAN RIGHTS CLINIC, UNIV. OF TEX. SCH. OF LAW, DESIGNED TO BREAK YOU: HUMAN RIGHTS VIOLATIONS ON TEXAS’ DEATH ROW 1, 21 (Apr. 2017) (citing Dave Mann, *Solitary Men: Does Prolonged Isolation Drive Death Row Inmates Insane?*, TEXAS OBSERVER (Nov. 10, 2010), <https://www.texasobserver.org/solitary-men/>).

57. Haney, *supra* note 43, at 135.

58. *Ruiz v. Johnson*, 37 F. Supp. 2d 855, 913 (S.D. Tex. 1999), *rev’d on other grounds*, 243 F.3d 941, 953 (5th Cir. 2001).

59. *Id.* at 912.

60. *Id.* at 907.

61. Haney, *supra* note 43, at 132.

62. *Id.* at 126.

63. *Id.* at 132.

64. *Id.* at 134.

65. *Id.* at 133.

66. *Id.* at 134.

67. Grassian, *supra* note 34, at 337.

“confusional state[s] which, in more severe cases, had the characteristics of a florid delirium, characterized by severe confusional, paranoid, and hallucinatory features, and also by intense agitation and random, impulsive, often self-directed violence.”⁶⁸ The common acute dissociative, confusional psychoses are a rare phenomenon in psychiatry.⁶⁹ Additionally, cases of random, impulsive violence in the context of such confusional states are extremely rare.⁷⁰ Dr. Grassian categorized the “striking and dramatically extensive perceptual disturbances” as the most distinct symptoms of this syndrome.⁷¹ These same perceptual symptoms are rare; when they are found, they are more commonly associated with neurological illness, rather than with psychiatric illness.⁷² When seen in psychiatric illness, these perceptual symptoms are characteristic of “especially severe, insidious, early onset schizophrenia”⁷³

Dr. Grassian concluded that the symptoms of this syndrome, taken together, are characteristic of an acute organic brain syndrome: delirium.⁷⁴ Delirium is characterized by a decreased level of alertness and electroencephalogram (“EEG”) abnormalities, the same perceptual and cognitive disturbances, fearfulness, paranoia, and agitation, and random, impulsive, and self-destructive behavior that he observed at maximum security facilities.⁷⁵ Tellingly, delirium is a syndrome known to result from types of conditions, including restricted environmental stimulation,⁷⁶ which are characteristic of solitary confinement.⁷⁷ Unlike the natural development of mental and neurological illnesses, Dr. Grassian found that these symptoms were both observed in individuals who had no prior history of mental illness, and shown to exacerbate preexisting mental conditions in other individuals.⁷⁸ The rarity and the combination in which these symptoms occur suggest that this is a discreet syndrome posed by the conditions of death row.

Professor Haney’s comparisons of inmates in general population with inmates in supermax facilities at Pelican Bay corroborate Dr. Grassian’s findings. Of the previously discussed symptoms of psychological and emotional trauma (anxiety, nervousness, headaches, lethargy, chronic tiredness, trouble sleeping, impending nervous breakdown, perspiring hands, heart palpitations, loss of appetite, dizziness, nightmares, hands trembling, and fainting), Professor Haney found that over half of the representative sample of supermax inmates demonstrated every

68. *Id.* at 328.

69. *Id.* at 337.

70. *Id.* at 337.

71. *Id.*

72. *Id.*

73. *Id.* at 337 n.17.

74. *Id.* at 338.

75. *Id.*

76. *Id.*

77. ACLU, *supra* note 37, at 2.

78. Grassian, *supra* note 34, at 329.

symptom but fainting.⁷⁹ Furthermore, Professor Haney found that almost all of the supermax inmates he examined suffered from ruminations or intrusive thoughts, oversensitivity to external stimuli, irrational anger and irritability, confused thought processes, difficulties with attention and often with memory, and a tendency to withdraw socially.⁸⁰ Additionally, “sizable” minorities of individuals in supermax displayed symptoms that are typically only associated with more extreme forms of psychopathology: hallucinations (41%), perceptual distortions (44%), and thoughts of suicide (27%).⁸¹

To put both data sets in perspective, Professor Haney then compared his findings to a multistate study that assessed the prevalence of psychiatric symptoms among general population inmates. Unsurprisingly, the prevalence rates for indices of psychological distress and psychopathology in the samples are consistently lower for those in general population than for those in supermax.⁸² The most extreme discrepancies between the general population and those incarcerated in supermax facilities were: 16.8% of general population had trouble sleeping, compared to 84% in the supermax sample; 7.7% of general population suffered impending breakdowns, compared to 70% of those in supermax; 3.7% of general population experienced heart palpitations, compared to 68% of those in supermax.⁸³ With respect to psychopathological effects of isolation, in the general population only 2.9% experienced irrational anger, 10.8% had confused thought processes, 23.5% suffered from chronic depression, and a mere 1.7% experienced hallucinations.⁸⁴ Of those in supermax, 88% experienced irrational anger, 84% had confused thought processes, 77% faced chronic depression, and 41% experienced hallucinations.⁸⁵

These symptoms do not completely disappear upon release from solitary confinement. Although many of the acute symptoms suffered by individuals in solitary likely diminish upon termination of solitary confinement, many individuals—including some who did not become overtly ill during their solitary confinement—will likely suffer permanent harm because of such confinement.⁸⁶ According to Dr. Grassian, these long-lasting symptoms include persistent symptoms of post-traumatic stress (such as flashbacks, chronic hypervigilance, and a pervasive sense of hopelessness).⁸⁷ Experiencing long-term periods of solitary confinement also results in lasting personality changes, especially continuing patterns of intolerance of social interaction, which leave the individual socially impoverished and withdrawn, subtly angry and fearful when forced into social interaction.⁸⁸ This is

79. See Haney, *supra* note 43, at 133.

80. *Id.*

81. *Id.*

82. See *id.* at 136.

83. *Id.*

84. *Id.*

85. *Id.*

86. See Grassian, *supra* note 34, at 332–33.

87. *Id.*

88. *Id.*

especially problematic because about 58.2% of death row inmates have their sentences or convictions overturned, and about 7.1% of death row inmates have had their sentences commuted since 1973.⁸⁹ Individuals are released into an unfamiliar, and sometimes frightening world, after their tolerance of social interaction has been depleted.

These studies demonstrate that individuals confined in conditions of supermax prisons and solitary confinement are far more likely to experience psychological and emotional trauma, as well as symptoms of psychological distress and psychopathology, when compared to individuals housed in the general prison population. When taken together, these symptoms are characteristic of a distinct organic brain syndrome: delirium. The unique syndrome individuals on death row experience, along with discrepancies between individuals on death row and individuals in general population suggest that conditions on death row cause can impose or exacerbate severe mental illnesses.

II. THE IMPOSITION OR EXACERBATION OF MENTAL ILLNESS FOR AN EXTENDED PERIOD OF TIME ON DEATH ROW SHOULD BE EVALUATED UNDER THE EIGHTH AMENDMENT

The Eighth Amendment's ban on the infliction of "cruel and unusual punishments"⁹⁰ provides the relevant standard for evaluating these claims. The Court has held that "[c]onfinement in a prison or in an isolation cell is a form of punishment subject to scrutiny under Eighth Amendment standards."⁹¹

Historically, courts have applied the Eighth Amendment to protect prisoners from harm.⁹² The Court has relied on the Cruel and Unusual Punishment Clause to bar subjecting individuals to inhumane conditions of confinement.⁹³ In *Brown v. Plata*, the Court concluded: "Just as a prisoner may starve if not fed, he or she may suffer or die if not provided adequate medical care. A prison that deprives prisoners of basic sustenance, including adequate medical care, is incompatible with the concept of human dignity and has no place in civilized society."⁹⁴ Additionally, in *Farmer v. Brennan*, the Court found that "[t]he [Eighth] Amendment also imposes duties on [prison] officials, who must provide humane conditions of confinement; prison officials must ensure that inmates receive adequate food, clothing, shelter, and medical care, and must 'take reasonable measures to guarantee the safety of

89. *Death Row Inmates*, *supra* note 32.

90. U.S. CONST. amend. VIII.

91. *Hutto v. Finney*, 437 U.S. 678, 685 (1978).

92. *See, e.g.*, John D. Bessler, *Tinkering Around the Edges: The Supreme Court's Death Penalty Jurisprudence*, 49 AM. CRIM. L. REV. 1913, 1922 n.71 (2012) (citing *Farmer v. Brennan*, 511 U.S. 825, 828 (1994) ("A prison official's 'deliberate indifference' to a substantial risk of serious harm to an inmate violates the Eighth Amendment.")).

93. *See, e.g.*, *Brown v. Plata*, 563 U.S. 493, 510–11 (2011).

94. *Id.*

the inmates.”⁹⁵

Psychiatric care is a necessary component of medical care. Often, individuals suffering from severe mental illnesses require immediate medical attention. The lack of adequate medical care thus runs afoul of both *Brown v. Plata* and *Farmer v. Brennan*. The “civilized society” language has implications for the “evolving standards of decency,” discussed in Part IV.

Courts have found Eighth Amendment violations based on psychological or emotional distress. In *Estelle v. Gamble*, the Court concluded that the Eighth Amendment bars more than “physically barbarous punishments.”⁹⁶ The Court went on to characterize the Eighth Amendment as emphasizing “broad and idealistic concepts of dignity, civilized standards, humanity, and decency”⁹⁷ The Court compares lack of receiving treatment to “torture or a lingering death . . . the evils of most immediate concern to the drafters of the [Eighth] Amendment.”⁹⁸ A few Justices have also suggested that “inflictions of psychological harm . . . without corresponding physical harm . . . might prove to be cruel and unusual punishment.”⁹⁹

III. THE IMPOSITION OR EXACERBATION OF MENTAL ILLNESS FOR AN EXTENDED PERIOD OF TIME ON DEATH ROW IS UNCONSTITUTIONAL UNDER THE EIGHTH AMENDMENT

Throughout his experience, Dr. Grassian observed that “incarceration in solitary caused either severe exacerbation or recurrence of preexisting illness, or the appearance of an acute mental illness in individuals who had previously been free of any such illness.”¹⁰⁰ This imposition or exacerbation of mental illness for an extensive period of time on death row should be treated as a punishment in and of itself. At least one court has found this imposition or exacerbation to constitute psychological torture. In *Madrid v. Gomez*, a California court found that: “if the particular conditions of segregation being challenged are such that they inflict a serious mental illness, greatly exacerbate mental illness, or deprive inmates of their sanity, then defendants have deprived inmates of a basic necessity of human existence—indeed, they have crossed into the realm of psychological torture.”¹⁰¹ Prolonged

95. *Farmer v. Brennan*, 511 U.S. 825, 832 (1994) (quoting *Hudson v. Palmer*, 468 U.S. 517, 526–27 (1984)).

96. *Estelle v. Gamble*, 429 U.S. 97, 102 (1976).

97. *Id.*

98. *Id.* at 103.

99. *Hudson v. McMillan*, 503 U.S. 1, 16 (Blackmun, J., concurring); see also *Glossip v. Gross*, 135 S. Ct. 2726, 2765 (2015) (Breyer, J., dissenting) (citing the Haney and Grassian studies discussed, *supra* note 43, 34, in Part I.B); *Davis v. Ayala*, 135 S. Ct. 2187, 2210 (2015) (Kennedy, J., concurring) (highlighting that a terrible “human toll” is “wrought by extended terms of isolation” and that “[y]ears on end of near-total isolation exact a terrible [psychiatric] price”); *Gomez v. Fierro*, 519 U.S. 918, 918 (1996) (Stevens, J., dissenting) (explaining that excessive delays from sentencing to execution can themselves “constitute cruel and unusual punishment prohibited by the Eighth Amendment”); *Hutto v. Finney*, 437 U.S. 678, 685 (1978) (“Confinement in a prison or in an isolation cell is a form of punishment subject to scrutiny under [the] Eighth Amendment.”).

100. Grassian, *supra* note 34, at 333.

101. *Madrid v. Gomez*, 889 F. Supp. 1146, 1264 (N.D. Cal. 1995).

confinement on death row can inflict and exacerbate mental illness, deprive individuals of their sanity, and deprive individuals of a basic necessity of human existence. As such, and for the additional reasons that follow, courts should adopt this reasoning and find this distinct punishment unconstitutional under the Eighth Amendment.

A. The Imposition or Exacerbation of Mental Illness for an Extensive Period of Time on Death Row Lacks Support from the Framers' Era

When one incorporates the extensive delays individuals on death row now face, it becomes harder to justify the death penalty in terms of its prevalence when the Framers drafted the Eighth Amendment. When the Framers drafted the Eighth Amendment, executions took place soon after sentencing, typically within months.¹⁰² Even when contested legal issues arose, most were resolved within six months of the convictions.¹⁰³ In contrast, in response to an individual spending decades on death row, Justice Breyer has pointed out that “[f]orty years is more time than an average person could expect to live his entire life when America constitutionally forbade the ‘inflict[ion]’ of ‘cruel and unusual punishments.’”¹⁰⁴

In an article focusing on the original meaning of “cruel,” Professor John Stinneford examines the “original, publicly understood criteria” in the late eighteenth century for determining whether a punishment was cruel within the meaning of the Cruel and Unusual Punishments Clause.¹⁰⁵ Professor Stinneford argues that the “linguistic and historical evidence demonstrates that a punishment is cruel and unusual within the original meaning of the Cruel and Unusual Punishments Clause if its *effects* are unjustly harsh in light of longstanding prior punishment practice.”¹⁰⁶ For instance, in a case decided in 1799 under the Virginia Declaration of Rights, a court held that a punishment that caused a greater risk of unjust suffering than was permissible at common law was cruel and unusual, even though there was no showing that the jury intended this result.¹⁰⁷ Additionally, William Blackstone’s *Commentaries on the Laws of England*, “makes clear” that the “focus of this provision is cruel effect, not cruel intent.”¹⁰⁸ He characterized the “Cruel and Unusuall Punishments Clause” as “regulat[ing] the size of fines and length of prison sentences, not the intent that lays behind them.”¹⁰⁹

Arguments against the imposition of the death penalty for persons with mental illnesses also find support from both Enlightenment thinkers and early American jurists. With respect to Enlightenment thinkers who greatly influenced the

102. See BESSLER, *supra* note 27, at 226.

103. *Id.*

104. *Sireci v. Florida*, 137 S. Ct. 470, 470 (2016) (Breyer, J., dissenting from denial of certiorari).

105. John F. Stinneford, *The Original Meaning of “Cruel”*, 105 GEO. L. J. 441, 463 (2017).

106. *Id.* at 464 (emphasis added).

107. See *id.* at 474 (discussing *Jones v. Commonwealth*, 5 Va. (1 Call) 555, 557–58 (1799)).

108. *Id.* at 478.

109. *Id.*

Framers, Cesare Beccaria opposed all executions unless the state itself was endangered.¹¹⁰ Voltaire, on the other hand, believed only in limiting the death penalty as applied to particular groups; one such application included limiting the execution of the “mentally disturbed.”¹¹¹ In his 1833 treatise, *Commentaries on the Constitution of the United States*, Justice Joseph Story wrote, “[b]arbarous nations are generally inclined to severe and vindictive punishments, and, where they punish with death, to aggravate it by prolonging the sufferings of the victim with ingenious devices in cruelty.”¹¹² More specifically, as early as the 1830s, statistical comparisons began to demonstrate that “[i]t was unnatural . . . to leave men in solitary, day after day, year after year; indeed, it was so unnatural that it bred insanity.”¹¹³

Individuals frequently rely on the Framers’ intent when evaluating application of constitutional principles. Individuals from the Framers’ era keenly focused on the cruel effect of punishment, rather than the cruel intent. Additionally, those who influenced the Framers understood the cruelty behind the death penalty—especially for those with severe mental illnesses—and prolonged conditions of solitary confinement.

B. Death Sentences Uniquely Render the Imposition or Exacerbation of Mental Illnesses More Likely Than Do Other Sentences for Similar Crimes

Death sentences uniquely subject individuals to the imposition or exacerbation of mental illnesses. This is a distinct punishment, which violates the Eighth Amendment. “Punishments are cruel when they involve torture or a lingering death It implies there something inhuman and barbarous, something more than the mere extinguishment of life.”¹¹⁴ The current conditions on death row that individuals experience for an excessive period of time, especially with respect to mental deterioration, suggest that the current practices of death row constitute a lingering, or “living” death.¹¹⁵

1. Individuals on Death Row Live in an Environment of Uncertainty and Helplessness

Prolonged periods on death row do not just inflict a different amount of pain; they also inflict a different measure of pain by actively placing inmates in a

110. BESSLER, *supra* note 27, at 42.

111. *Id.*

112. *Id.* at 191 (quoting 2 Joseph Story, *Commentaries on the Constitution of the United States* 651 (5th ed. 1994)); see also Joseph Story and the *Encyclopedia Americana* 47–51 (2006) (reprinting the text of the 1844 edition of the *Encyclopedia Americana*).

113. Grassian, *supra* note 34, at 342 (quoting DAVID J. ROTHMAN, *THE DISCOVERY OF THE ASYLUM: SOCIAL ORDER AND DISORDER IN THE NEW REPUBLIC* 81, 87 (1971)).

114. *In re Kemmler*, 136 U.S. 436, 447 (1890).

115. See BESSLER, *supra* note 27, at 226.

constant state of uncertainty about the duration and character of their punishment.¹¹⁶ This phenomenon is unique to persons on death row. It differs from traditional death sentences from the Framers' era, where the inmate knew he would be executed within months. It is also distinct from LWOP, as those inmates know that they will spend the rest of their days alive in prison. The punishment associated with solitary confinement with the chance of imminent death causes a distinct syndrome and should be held unconstitutional as a distinct form of punishment under the Eighth Amendment.

As early as 1890, the Court in *Medley* recognized, “[W]hen a prisoner sentenced by a court to death is confined in the penitentiary awaiting the execution of the sentence, one of the most horrible feelings to which he can be subjected during that time is the uncertainty during the whole of it”¹¹⁷ In *Medley*, the Court was describing a delay of four weeks.¹¹⁸ *Medley*'s characterization of the uncertainties associated with death row still carries weight today. For instance, in his dissent from the Court's denial of certiorari in *Ruiz v. Texas*,¹¹⁹ Justice Breyer cited to the *Medley* opinion, where the Court previously found: “[a] considerable number of the prisoners fell, after even a short confinement, into a semi-fatuous condition, from which it was next to impossible to arouse them, and others became violently insane; others still, committed suicide”¹²⁰ The presence of destructive stimulation—such as the uncertainty surrounding pending execution—and longer duration of the sensory deprivation have all been associated with increased risk of adverse psychiatric consequences.¹²¹ At times, these same individuals may be exposed to situations that impair the functioning of the central nervous system.¹²² Virtually everyone in these units suffers, but prisoners with preexisting mental illnesses are at greater risk of developing something more permanent and disabling.¹²³

2. *Individuals on Death Row Are Uniquely Subject to Continuous Imminent Threat of Death*

The continuous exposure to an imminent threat of death can result in the imposition or exacerbation of severe mental illness. Individuals on death row are uniquely subjected to the continuous imminent threat of death, and, as such, this distinct punishment does not pass constitutional muster under the Eighth Amendment. According to the Diagnostic and Statistical Manual of Mental Disorders (“DSM-

116. See Angela April Sun, Note, “Killing Time” in the Valley of the Shadow of Death: Why Systematic Preexecution Delays on Death Row Are Cruel and Unusual, 113 COLUM. L. REV. 1585, 1617 (2013).

117. In re *Medley*, 134 U.S. 160, 172 (1890).

118. *Id.*

119. 137 S. Ct. 1246, 1246 (2017) (Breyer, J., dissenting).

120. *Medley*, 134 U.S. at 168.

121. Grassian, *supra* note 34, at 348.

122. See *id.*

123. Haney, *supra* note 43, at 142.

IV”), posttraumatic stress disorder (“PTSD”) involves the development of characteristic following exposure to:

[E]xtreme traumatic stressor[s] involving personal experience of an event that involves actual or threatened death or serious injury, or other threat to one’s physical integrity . . . or learning about unexpected or violent death, serious harm, or threat of death or injury experienced by a family member or other close associate.¹²⁴

The individual’s response to the event must involve “intense fear, helplessness, or horror.”¹²⁵ For example, features of the Vietnam War, in particular, increased the likelihood that soldiers would develop PTSD.¹²⁶ Specifically, the new kind of guerrilla warfare expanded the number of combatants placed in danger.¹²⁷ In guerrilla warfare, there are no front and rear lines, and the combat zone surrounded soldiers virtually at all times.¹²⁸ Soldiers were forced to be hyper-vigilant, as they faced incessant uncertainty and threats of imminent death or bodily harm.¹²⁹

Individuals on death row face these same acute conditions in two ways. First, in addition to living in solitary confinement, individuals on death row must prepare for execution multiple times. It is not uncommon for judicial officials to issue and revoke death warrants repeatedly.¹³⁰ In his dissenting opinion in *Glossip v. Gross*,¹³¹ Justice Breyer cites to a petition for certiorari in *Suarez Medina v. Texas*, which stated: “On fourteen separate occasions since Mr. Suárez Medina’s death sentence was imposed, he has been informed of the time, date, and manner of his death. At least eleven times, he has been asked to describe the disposal of his bodily remains”¹³² Expert witness psychiatrists have described this process as a “roller coaster: first they prepare for imminent death, then they put hope in an appeal.”¹³³ Some logistical aspects of the preparation process include: choosing up to five family members and friends who will be present at the execution; instructing family members that they must request the body within forty-eight hours of execution to bury; and last minute spiritual advising with spiritual advisors, family members, and lawyers.¹³⁴

124. Elizabeth Beck, et. al., *Seeking Sanctuary: Interviews with Family Members of Capital Defendants*, 88 CORNELL L. REV. 382, 392 n.52 (2003).

125. *Id.*

126. Thomas L. Hafemeister & Nicole A. Stockey, *Last Stand? The Criminal Responsibility of War Veterans Returning from Iraq and Afghanistan with Posttraumatic Stress Disorder*, 85 IND. L.J. 87, 99 (2010).

127. *Id.*

128. *Id.*

129. *Id.* at 100.

130. *Glossip v. Gross*, 135 S. Ct. 2726, 2766 (2015) (Breyer, J., dissenting).

131. *Id.* at 2755.

132. *Id.* at 2766 (quoting *Suarez Medina v. Texas*, O.T. 2001, No. 02-5752, pp. 35–36 (filed Aug. 13, 2002)).

133. *Designed to Break You*, *supra* note 56, at 34 (citation omitted).

134. *Id.*

In some states, like Texas, this is due, in part, to certain statutory measures. According to Texas' Code of Criminal Procedure, there is no prohibition on scheduling an individual for execution when post-conviction measures are still pending, including federal habeas petitions.¹³⁵ Another major flaw in Texas' procedural rule is that an individual's defense attorney is not required to be notified of scheduling requests for executions.¹³⁶ This leads to scheduling executions prematurely, which unnecessarily burdens individuals by forcing them to prepare for execution multiple times. In other words, states like Texas sentence individuals to death knowing that it will likely be subjecting them to constant imminent threats of death, and the accompanying mental deterioration. The psychological trauma and the resulting mental deterioration does not withstand Eighth Amendment scrutiny.

Second, because individuals on death row can often hear what is going on in other cells, they can hear other inmates repeatedly preparing for executions. In fact, individuals on death row have complained that one of the major barriers preventing more adequate psychological evaluation is the ability of other inmates to hear what is going on inside.¹³⁷ Individuals on death row may be aware of when others are given multiple execution dates, or when others are actually executed, and such knowledge may constitute exposure to an extreme traumatic stressor.¹³⁸ Individuals can hear what other individuals are screaming, when other individuals are screaming, and, ultimately, when they are not screaming anymore.

The continuous threat of imminent death or bodily harm results in a distinct form of mental deterioration unique to individuals on death row, which does not withstand Eighth Amendment scrutiny. Dr. Grassian's research also demonstrates the detrimental effects of threats of imminent death or bodily harm. In Appendix C to his article on the psychiatric effects of solitary confinement, Dr. Grassian discusses experimental research conducted by Martin Orne and Karl Scheibe concerning the psychiatric effect of profound sensory deprivation and factors influencing vulnerability to psychiatric harm.¹³⁹ In the experiment, researchers exposed two

135. See TEX. CODE CRIM. PROC. ANN. art. 43.141 (West 2015).

136. See TEX. CODE CRIM. PROC. ANN. art. 43.141(b-1) (West 2015).

137. Grassian, *supra* note 34, at 333.

138. See generally Beck, *supra* note 124, at 393 (discussing the traumatic impact that can result from awareness of another's execution).

139. Grassian, *supra* note 34, at 374 (citing Martin T. Orne & Karl E. Scheibe, *The Contribution of Nondeprivation Factors in the Production of Sensory Deprivation Effects: The Psychology of the "Panic Button,"* 68 J. ABNORMAL & SOC. PSYCHOL. 3, 4 (1964) (citations omitted)).

groups to identical conditions of sensory deprivation.¹⁴⁰ The experimental group's introduction to the experiment included the presence of a medical "Emergency Tray" and instructions about a "Panic Button."¹⁴¹ Unsurprisingly, the experimental group became significantly more symptomatic with respect to cognitive impairment and restlessness, as well as more symptomatic in perceptual aberrations, anxiety, and spatial disorientations.¹⁴² The use of "panic buttons" increases the subject's expectation that something intolerable may occur, and such uncertainty of imminent harm triggered greater mental deterioration within the experimental group.¹⁴³

Courts have already recognized Eighth Amendment violations for the imposition of psychological harm on inmates in general population.¹⁴⁴ Here, however, the state is imposing a sentence that uniquely subjects individuals to both a constant uncertainty and constant imminent threat of death. This is in addition to the previously demonstrated mental and psychological effects of solitary confinement in general. There is no reason that courts' recognition of Eighth Amendment violations for mental and psychological harm of individuals held in general population should not extend to individuals on death row. In fact, due to the overwhelming uncertainty and imminent threat of death, it more aptly applies to individuals on death row.

C. Current Procedural Protections Are Inadequate with Respect to Protecting Mentally Ill Death Row Inmates

Current practices do not do enough to protect mentally ill offenders from being sentenced to death, and therefore from being subject to prolonged death row conditions. After he was originally deemed incompetent to stand trial, Andre Thomas was diagnosed with paranoid schizophrenia.¹⁴⁵ After he was medicated, the judge found him competent to stand trial.¹⁴⁶ A judge concluded that a man with paranoid schizophrenia, who had previously pulled out one of his eyes, was competent enough to participate in a capital murder trial, before being sentenced to death.¹⁴⁷

140. *Id.* at 374.

141. *Id.*

142. *Id.*

143. *See id.* at 373–74.

144. *See* Bessler, *supra* note 27, at 1921–22 (citing *Estelle v. Gamble*, 429 U.S. 97, 102 (1976) ("Our more recent cases . . . have held that the [Eighth] Amendment proscribes more than physically barbarous punishments. The Amendment embodies 'broad and idealistic concepts of dignity, civilized standards, humanity, and decency'"); *see also* *Brown v. Plata*, 131 S. Ct. 1910, 1928 (2011) ("A prison that deprives prisoners of basic sustenance, including adequate medical care, is incompatible with the concept of human dignity and has no place in civilized society."); *Jordan v. Gardner*, 986 F.2d 1521, 1522–31 (9th Cir. 1993) (en banc) (stating that severe "psychological" pain and trauma can violate the Eighth Amendment)).

145. *See* Grissom, *supra* note 1.

146. *Id.*

147. *See id.*

This section will discuss competency to stand trial, as well as other existing procedural protections, such as the insanity defense, mitigating factors, *Lackey* claims, and competency to be executed. Each of the current legal mechanisms that attempt to account for a defendant's mental illness at various stages in the criminal justice process is limited in scope and applicability. Even taken together, these mechanisms do not and cannot provide meaningful protection against death sentences and executions for individuals with severe mental illness. Once on death row, the only other procedural safeguard is evaluating the defendant's competence to be executed. Therefore, the existing procedures are inadequate both pre- and post-conviction.

The competency to stand trial standard determines whether a defendant can adequately participate in his own defense.¹⁴⁸ It focuses on the defendant's present mental abilities at the time of the trial and does not address the defendant's state of mind at the time of the alleged offense.¹⁴⁹ The standard for competency is very low and merely requires a defendant to have "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" and a "rational as well as factual understanding of the proceedings against him."¹⁵⁰ While mental illness often plays a role in a court's determination of a defendant's competence to stand trial, a history of mental illness "does not render the defendant mentally incompetent per se."¹⁵¹ Therefore, it is quite possible for a person to have a severe mental illness, like paranoid schizophrenia, yet still possess the necessary attributes to be considered legally competent to stand trial. In other words, an individual can display symptoms of confused and disordered thinking, hallucinations, and delusions,¹⁵² yet still have the present ability to consult with a lawyer and understand the proceedings against him.

While the competency standard focuses on the defendant's mental state at the time of trial, the insanity defense focuses on the defendant's mental capacity at the time of the events for which he or she is being tried. The current standard for the insanity defense in the majority of states is based on the *M'Naghten* Rule, which holds that a person is not criminally liable if:

[A]t the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong.¹⁵³

148. See, e.g., ABA Death Penalty Due Process Review Project, *supra* note 47, at 2.

149. *Id.*

150. *Dusky v. United States*, 362 U.S. 402, 402 (1960).

151. ABA Death Penalty Due Process Review Project, *supra* note 47, at 2.

152. See generally Marco M. Picchioni & Robin M. Murray, *Schizophrenia*, 335 BRIT. MED. J. 91, 92 (2007) (offering a clinical review of schizophrenia).

153. ABA Death Penalty Due Process Review Project, *supra* note 47, at 20 (quoting *M'Naghten's Case*, 10 Cl. & Fin. 200, 210, 8 Eng. Rep. 718, 722 (1843)).

In other words, even if a defendant indisputably suffered from severe mental illness at the time of the crime, a defendant still does not qualify as legally insane in a jurisdiction that adheres to the *M'Naghten* standard unless his mental illness also rendered him completely unable to appreciate that what he was doing was wrong.¹⁵⁴ The *M'Naghten* standard would exclude from the insanity defense people “who have a mood disorder with psychotic features [and who] might understand the wrongfulness of their acts, but nonetheless feel impervious to punishment because of delusion-inspired grandiosity.”¹⁵⁵ Andre Thomas, a man with paranoid schizophrenia, who had previously pulled one of his eyes out, did not meet the *M'Naghten* standard for insanity.¹⁵⁶

Capital defendants also receive an opportunity at trial to present mitigating factors,¹⁵⁷ which paint a picture of defendant as a human being, in an effort to find the defendant less culpable for his crime. Although some have argued that this sufficiently protects those with severe mental illness from receiving a death sentence, practice has shown that this is untrue, and that individuals with severe mental illness are still regularly sentenced to death.¹⁵⁸ Unfortunately, jurors often treat mental illness as an aggravating factor rather than a mitigating factor in capital cases.¹⁵⁹

Hundreds of individuals on death row have brought *Lackey*¹⁶⁰ claims, which assert that their individual periods of delay are unconstitutional. Although lower courts have rejected these claims or have found ways to avoid adjudicating them, and the Court has continued to deny certiorari, Justice Stevens and Justice Breyer have repeatedly asserted that *Lackey* claims have merit.¹⁶¹

Once the defendant is convicted and sentenced to death, his or her mental health is not seriously evaluated again until execution is “impending.”¹⁶² The “competency to be executed” standard requires an assessment of an individual’s mental state at the time of impending execution, rather than at the time of the offense

154. *Id.* at 21.

155. *Id.* (citation omitted).

156. Grissom, *supra* note 1.

157. See 18 U.S.C. § 3592 (2012).

158. ABA Death Penalty Due Process Review Project, *supra* note 47, at 22.

159. *Id.*; see also Stephen P. Garvey, *The Emotional Economy of Capital Sentencing*, 75 N.Y.U. L. REV. 26, 57 (2000); Ellen F. Berkman, *Mental Illness as an Aggravating Circumstance in Capital Sentencing*, 89 COLUM. L. REV. 291, 299 (1989).

160. *Lackey v. Texas*, 514 U.S. 1045 (1995).

161. *Id.* at 1047 (noting that *Lackey*’s claim was not without foundation and characterizing the claim as an issue which should receive further study before it is addressed by the Court); see also *Valle v. Florida*, 564 U.S. 1067 (2011) (Breyer, J., dissenting from denial of stay) (stating that he has “little doubt about the cruelty of so long a period of incarceration under sentence of death,” and concluding that he would consider the *Lackey* claim); *Elledge v. Florida*, 525 U.S. 944 (1998) (Breyer, J., dissenting from denial of certiorari) (citing *Lackey v. Texas*, 514 U.S. 1045 (1995)) (“Executions carried out after delays of this magnitude may prove particularly cruel.”).

162. ABA Death Penalty Due Process Review Project, *supra* note 47, at 24.

(insanity defense) or at the time of trial (competency standard).¹⁶³ In *Ford v. Wainwright*, the Court held that the Eighth Amendment forbids states from executing individuals if they are “insane.”¹⁶⁴ In 2007, the Court clarified that the determination of whether an inmate is “insane,” such that he or she is incompetent to be executed, requires an analysis of whether the inmate has a rational understanding of the government’s reason for executing him or her, noting, “[a] prisoner’s awareness of the State’s rationale for an execution is not the same as a rational understanding of it.”¹⁶⁵ Like competency to stand trial and the insanity defense, inmates can often be severely mentally ill, yet still understand why they are being executed. In other words, an individual can display symptoms of confused and disordered thinking, hallucinations, and delusions,¹⁶⁶ yet still have a rational understanding of why the government is executing him or her.

The competency to be executed standard thus proves problematic in two ways: (1) severely mentally ill inmates may still be deemed competent; (2) an evaluation of this kind does not occur until “impending death,”¹⁶⁷ therefore leaving an inmate on death row for decades without an adequate chance to argue that they are mentally unfit for death row. For instance, in Texas, only inmates who are already taking psychiatric medicine are able to meet regularly with psychiatrists.¹⁶⁸ Of those inmates who are eventually given access to psychological care, they are generally only prescribed some form of medication, thus exacerbating the unmet need for any form of counseling or non-pharmaceutical therapy.¹⁶⁹

Inmates with mental illnesses who do not want or need prescription drugs are essentially provided with two options: take unwanted medication or forgo psychological care entirely.¹⁷⁰ When inmates do have the opportunity to speak with someone, interviews are conducted at the cell front, rather than in a private setting.¹⁷¹ According to a prior death row inmate in Texas, psychiatrists are accompanied by two escort officers when they conduct mental health checkups, and “the officers will gossip about anything you say, so no one will discuss real problems with them.”¹⁷² Individuals are generally reluctant to disclose symptoms of psychological distress in the context of such an interview, since other individuals on death row would inevitably hear the conversation, exposing the individual seeking help to possible stigma and humiliation.¹⁷³

163. *Id.*

164. *Ford v. Wainwright*, 477 U.S. 399 (1986).

165. *Panetti v. Quarterman*, 551 U.S. 930, 933 (2007).

166. Marco M. Picchioni & Robin M. Murray, *Schizophrenia*, 335 *BMJ* 91, 92 (2007).

167. ABA Death Penalty Due Process Review Project, *supra* note 47, at 24.

168. *Designed to Break You*, *supra* note 56, at 5.

169. *Id.*

170. *Id.* at 5–6.

171. Grassian, *supra* note 34, at 333.

172. *Designed to Break You*, *supra* note 56, at 42.

173. Grassian, *supra* note 34, at 333.

Courts have relied on the Eighth Amendment's Cruel and Unusual Punishment Clause to bar subjecting inmates to inhumane conditions of confinement. When the Framers drafted the Eighth Amendment, executions took place soon after sentencing, typically within months.¹⁷⁴ As Justice Breyer has pointed out, forty years exceeded average life expectancy when the Framers constitutionally forbade the "inflict[ion]" of "cruel and unusual punishments."¹⁷⁵ Spending decades on death row inflicts both a different amount and a distinct type of pain, by actively placing inmates in a constant state of uncertainty about the character of their punishment. Additionally, individuals on death row are uniquely subject to continuous imminent threat of death. The current procedural safeguards our system has in place are not nearly sufficient prevent the imposition or exacerbation of severe mental illnesses on death row. As such, this distinct punishment—the imposition or exacerbation of mental illness on death row—is unconstitutional under the Eighth Amendment,

IV. THE IMPOSITION OR EXACERBATION OF MENTAL ILLNESS DOES NOT COMPORT WITH CURRENT SOCIETAL NORMS AND EVOLVING STANDARDS OF DECENCY

In 1910, the Court held that the Eighth Amendment is "progressive, and . . . may acquire meaning as public opinion becomes enlightened by humane justice."¹⁷⁶ In *Trop v. Dulles*, the Court reaffirmed that the scope of the Eighth Amendment is "not static."¹⁷⁷ The definition of cruel and unusual punishment was to be determined from "the evolving standards of decency that mark the progress of a maturing society."¹⁷⁸ The Court concluded that "[t]he basic concept underlying the Eighth Amendment is nothing less than the dignity of man."¹⁷⁹ When determining what constituted "the progress of a maturing society," the Court tipped its hat to international law, and cited the practices of "civilized nations of the world" as persuasive.¹⁸⁰

There is already an extensive body of literature on both the deleterious effects of death row on inmates with preexisting mental illnesses and the ways in which such conditions could lead persons who had not previously had mental illnesses to develop them.¹⁸¹ As the fields of neurology, psychiatry, and psychology develop, it seems inevitable that this type of research will continue. Legal and medical organizations, as well as state legislatures, have already taken steps towards reform. The American Bar Association, the American Psychiatric Association, the American Psychological Association, and the National Alliance for the Mentally Ill have all

174. BESSLER, *supra* note 27, at 226.

175. *Sireci v. Florida*, 137 S. Ct. 470, 470 (2016) (Breyer, J., dissenting from denial of certiorari).

176. *Weems v. United States*, 217 U.S. 349, 378 (1910).

177. *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

178. *Id.*

179. *Id.* at 100.

180. *Id.* at 102.

181. *See infra* Part I.

called for a stop to the executions of inmates who suffer from severe mental illnesses.¹⁸² With respect to solitary confinement more specifically, the American Psychiatric Association recently issued a formal position statement that individuals with serious mental illness should almost never be subjected to such treatment, and, in the rare event that isolation is necessary, they must be given extra clinical support.¹⁸³

Additionally, legislators in Idaho, Indiana, Kentucky, Missouri, North Carolina, Ohio, South Dakota, Tennessee, Texas, and Virginia have either introduced legislation or announced plans to introduce such legislation before the end of 2018 that would limit or prohibit sentencing to death an individual who had a severe mental illness at the time of the offense.¹⁸⁴ At the grassroots level, a multi-state poll conducted in 2015 found that 66% of participants opposed the death penalty for people with mental illness; after hearing more details about how a severe mental illness exception would apply in practice that percentage rose to 72%.¹⁸⁵ The poll also shows that support for the exemption is consistent across party lines: indeed, 62% of Republicans, 72% of Democrats and 67% of Independents oppose the use of the death penalty for persons with mental illness.¹⁸⁶

Other nations' treatment of the death penalty also suggests that the United States' administration of the death penalty to those with severe mental illnesses does not comport with evolving standards of decency.¹⁸⁷ Professor Bessler points out that the Framers themselves frequently looked to the laws and practices of other nations for guidance.¹⁸⁸ In fact, the Eighth Amendment itself was derived from the English Declaration of Rights of 1689, which provided: "[t]hat excessive Baile ought not to be required nor excessive Fines imposed nor cruell and unusuall Punishments inflicted."¹⁸⁹ Additionally, *The Federalist Papers* include references to more than fifty foreign sources, included countries in Africa, Asia and Europe, and the Constitution even references "the Law of Nations."¹⁹⁰

More recently, the UN Commission on Human Rights specifically asked all countries that still use the death penalty "not to impose it on a person suffering

182. See BESSLER, *supra* note 27, at 261.

183. AM. PSYCH. ASSOC., POSITION STATEMENTS ON SEGREGATION OF PRISONERS WITH MENTAL ILLNESS 35 (2013), http://www.dhcs.ca.gov/services/MH/Documents/2013_04_AC_06c_APA_ps2012_PrizSeg.pdf.

184. See Death Penalty Information Center, *At Least Seven States Introduce Legislation Banning Death Penalty for People with Severe Mental Illness* (2017), <http://www.deathpenaltyinfo.org/node/6673>; Death Penalty Information Center, *Recent Legislative Activity* (2018), <https://deathpenaltyinfo.org/recent-legislative-activity>.

185. ABA Death Penalty Due Process Review Project, *supra* note 47, at 6.

186. *Id.* at 36.

187. A comparison with other countries shows that the United States' administration of the death penalty in general does not comport with evolving standards of decency, but that is outside the scope of this note. See generally Death Penalty Information Center, *The Death Penalty: An International Perspective* (2018), <https://deathpenaltyinfo.org/death-penalty-international-perspective>.

188. BESSLER, *supra* note 27, at 198.

189. Sun, *supra* note 116, at 1621 n.221 (quoting Bill of Rights, 1 W. & M., c. 2 (1689) (Eng.)).

190. BESSLER, *supra* note 27, at 198 n.63.

from any form of mental disorder”¹⁹¹ The European Court of Human Rights (“ECHR”) has ruled that the UK would violate Article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms if it extradited a fugitive to Virginia to face capital murder charges.¹⁹² In its reasoning, the ECHR emphasized evidence that capital defendants in Virginia typically spend between six and eight years on death row before they are executed.¹⁹³ The ECHR noted that capital inmates are kept under strict conditions of confinement and experience “extreme stress [and] psychological deterioration”¹⁹⁴ Additionally, the UN Special Rapporteur on Torture has recognized the significant harms of solitary confinement, writing: “Segregation, isolation, separation, cellular, lockdown, Supermax, the hole, Secure Housing Unit . . . whatever the name, solitary confinement should be banned by States as a punishment or extortion technique . . . Solitary confinement is a harsh measure which is contrary to rehabilitation, the aim of the penitentiary system.”¹⁹⁵ Here, the Special Rapporteur emphasized that any placement in solitary confinement for longer than fifteen days should be prohibited.¹⁹⁶

The United States is also a party to the Convention Against Torture.¹⁹⁷ The Convention Against Torture states that it is a violation to intentionally inflict “severe pain or suffering, whether physical or mental . . . for such purposes as . . . punishing [a person] for an act he . . . has committed”¹⁹⁸ The Convention also provides that each signatory “shall keep under systematic review . . . arrangements for the custody and treatment of persons subject to any form of arrest, detention or imprisonment in any territory under its jurisdiction, with a view to preventing any cases of torture[.]”¹⁹⁹ and that “[e]ach State Party shall . . . prevent . . . other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture”²⁰⁰ One such example of torture, used more sporadically than systematically, is the “sham execution,” where individuals are led out to what they believe is their execution.²⁰¹ As previously discussed in Part III.B.2, individuals on death row are often subject to multiple execution dates, and have to go through the process of preparing for their death and regaining hope multiple times. If the Convention Against Torture prohibits sham executions, its same logic should extend to an individual preparing for multiple real executions.

191. ABA Death Penalty Due Process Review Project, *supra* note 47, at 35.

192. *Soering v. United Kingdom*, 161 Eur. Ct. H.R. (ser. A) (1989).

193. *Id.* at 36.

194. *Id.* at 20.

195. *Solitary Confinement Should Be Banned in Most Cases, UN Expert Says*, UN NEWS CENTRE (Oct. 18, 2011), <http://www.un.org/apps/news/story.asp?NewsID=40097#.WCyEc3eZPVo>.

196. *Id.*

197. See 1465 U.N.T.S. 85 (1996).

198. See G.A. Res. 39/46, Convention Against Torture and Other Cruel, Unhuman or Degrading Treatment or Punishment art. 1 (June 26, 1987).

199. *Id.* at art. 11.

200. *Id.* at art. 16.

201. Hernán Reyes, *The Worst Scars Are in the Mind: Psychological Torture*, 89 INT’L REV. RED CROSS 591, 611–612 (2007).

Taken together, the growing consensus among legal, medical, and psychiatric organizations, various states, public opinion, and international law suggests that the current death row incarceration of mentally ill individuals does not comport with evolving standards of decency.

V. STATES AND PRISONS CAN UNDERTAKE REFORM IN WAYS THAT INCREASE PROTECTIONS FOR INDIVIDUALS WITH MENTAL ILLNESSES, WHILE ALSO MAINTAINING SECURITY

The prevalence of mental illness on death row, the lack of current, widespread, adequate protections for individuals with severe mental illnesses on death row, and the growing consensus with respect to solitary confinement and mental illnesses indicate that the current American system must be reformed. Reforms could be broad and comprehensive, or they could be incremental. This Note begins with a discussion of the most sweeping solutions and then narrows to more incremental ones.

Organizations such as the ABA have called for a categorical severe mental illness exemption from the death penalty.²⁰² The ABA has also called for a ban on solitary confinement for mentally ill offenders, where confinement should only be used for brief periods for reasons related to security.²⁰³ The Organization of American States (“OAS”) and other organizations and states have mirrored this approach, and called for permitting solitary confinement only as a “disposition of last resort and for a strictly limited time, when it is evident that it is necessary to ensure legitimate interests relating to the institution’s internal security, and to protect fundamental rights, such as the right to life and integrity of persons deprived of liberty or the personnel.”²⁰⁴

Moving individuals from solitary confinement to less restrictive housing can improve security, whereas “long-term administrative segregation—especially if individual inmates perceive it as being unfair and indefinite—will . . . exacerbate misconduct and psychiatric dysfunction.”²⁰⁵ In California, individuals on death row are classified into different security levels based on their behavior.²⁰⁶ Inmates who “demonstrate good behavior have greater privileges, including group recreation, contact visits, communal religious programming, and the ability to purchase televisions.”²⁰⁷ Jeanne Woodford, former Warden of San Quentin and former

202. ABA Death Penalty Due Process Review Project, *supra* note 47, at 3. This exemption is outside the scope of this paper, as this paper focuses on the conditions of death row.

203. *See Designed to Break You*, *supra* note 56, at 14.

204. *Id.* (quoting Inter-Am. Comm’n H.R., *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas*, <http://www.oas.org/en/iachr/mandate/Basics/principlesdeprived.asp>).

205. Terry A. Kupers et al., *Beyond Supermax Administrative Segregation: Mississippi’s Experience Rethinking Prison Classification and Creating Alternative Mental Health Programs*, *Crim. Just. & Behav.* 1037, 1048 (2009).

206. *See* Letter from Jeanne Woodford, Former Warden of San Quentin and Former Director of California Department of Corrections (Jan. 27, 2014) (on file with Solitary Watch).

207. *Id.*

Director of the California Department of Corrections discussed how giving inmates privileges based on good behavior “enhances security because it creates incentives for inmates to comply with prison regulations.”²⁰⁸ On the other hand, when inmates are housed in permanent solitary confinement, it may be more difficult to control their behavior. In other words, death row inmates have no incentive to behave well.

Mississippi has implemented a handful of reforms with respect to supermax administrative segregation.²⁰⁹ Though individuals on death row remained in segregation, similar types of reforms can be accommodated for death row. For example, Unit 32 in Mississippi has developed a “step-down unit” for individuals with severe mental illnesses.²¹⁰ Individuals who require an intermediate level of mental health treatment are candidates for the step-down unit, which is likened to a half-way house.²¹¹ Those who require inpatient psychiatric services are transferred to another facility.²¹² Individuals begin in the closed or segregated tier, progress through the open tier, and then “graduate” and transfer from the step-down unit into the general population.²¹³ The step-down unit employs an “assertive community treatment approach . . .”²¹⁴ Under this approach, intensive mental health treatment is provided to the place where patients live and work, and staff works as a team to be assertive in gaining the patients’ cooperation in the treatment.²¹⁵ The approach utilizes positive psychology, removes the focus from mental illness, and instead focuses on “persons’ intact faculties, ambitions, positive life experiences, and strengths of character, and how those buffer against disorder.”²¹⁶ Confidentiality is an issue, and staff agree to respect the individual participants’ confidentiality while also attending to security needs.²¹⁷

Participants are considered ready for discharge from the program when their treatment plans have been accomplished and they become stable.²¹⁸ After being discharged, individuals may be readmitted if they “relapse.”²¹⁹ The number of incidents requiring use of force “plummeted” after a large proportion of individuals were transferred to the general population.²²⁰ After the step-down program was implemented in Unit 32 in Mississippi, there was a decrease in the number of rule violation reports by individuals with severe mental illnesses after they were

208. *Id.*

209. Kupers et al., *supra* note 205, at 1048.

210. *Id.* at 1042.

211. *Id.*

212. *Id.*

213. *Id.*

214. *Id.*

215. *Id.*

216. *Id.* at 1042 (quoting Angela Lee Duckworth et al., *Positive Psychology in Clinical Practice*, 1 ANN. REV. CLINICAL PSYCH. 629, 631 (2005)).

217. *Id.* at 1043.

218. *Id.*

219. *Id.*

220. *Id.*

transferred to the step-down unit.²²¹ This decrease corroborates the assertions that individuals with severe mental illnesses are more prone to suffering psychiatric deterioration and getting into trouble in supermax administrative segregation, and that they fare better in a treatment environment.²²²

Often, however, many individuals on death row do not develop severe mental illnesses until they remain in solitary confinement for a prolonged period of time.²²³ Some individuals are not evaluated again until execution is imminent.²²⁴ If individuals are not evaluated throughout their time on death row, the psychological deterioration that ensues during the period in between those two hearings is essentially unmonitored. Prisons must implement more thorough mental health evaluations, which carefully monitor the psychiatric and mental health of all death row inmates during their confinement. Periodic severe mental illness hearings would help reduce the number of individuals with severe mental illnesses on death row.

Privacy remains a major concern and impediment to individuals on death row receiving adequate psychiatric care. Currently in solitary confinement units, mental health screening interviews are often conducted at the cell front, rather than in a private setting.²²⁵ Under these circumstances, individuals are generally reluctant to disclose symptoms of psychological distress, since other inmates and guards would inevitably hear the conversation, which could subject the individual seeking care to stigma and humiliation.²²⁶ Thus, more frequent mental health evaluations would be ineffective without increased privacy. Scheduling all the individual evaluations on one day would reduce targeting an individual inmate, and would remove some of the pressure from inmates having to seek out their own care. Scheduling all the individual evaluations in one day would also make it more difficult for other inmates and guards to know who specifically is seeking help, which also removes stigma and privacy concerns. Those diagnosed with a severe mental illness would be removed to proper psychological facility to receive the attention they need. There should be procedures in place for removal of any individual to a more appropriate facility for rehabilitation, once the first sign of deterioration shows.

If these more incremental solutions are not feasible, it gives weight to the fact that the death penalty in general may not be a constitutionally viable option for mentally ill offenders, or for those individuals who become mentally ill while on death row.

221. *Id.* at 1047.

222. *Id.*

223. See Haney, *supra* note 43, at 135.

224. ABA Death Penalty Due Process Review Project, *supra* note 47, at 24.

225. Grassian, *supra* note 34, at 333.

226. *Id.*

CONCLUSION

Andre Thomas deteriorated on death row. Within his first three years, Thomas continued hearing voices in his head, and attempted to cut himself again.²²⁷ In July 2008, Thomas managed to obtain a sharp object and slashed a seven-centimeter gash in his throat.²²⁸ After he received eight stitches, he remained on death row.²²⁹ A few months later, he ripped out his one remaining eye, and ate it.²³⁰ His explanation? He did not want the government to read his thoughts, so he ate his eye to make sure the government could not find a way to put his eye back in.²³¹ Only after Thomas' second eye removal was he finally sent to a psychiatric unit at Jester IV.²³² The current protections our legal system has in place to protect individuals with mental illnesses certainly did not do enough for Andre Thomas, who is still awaiting execution.

Though Thomas is still locked in a small cell for twenty-three hours a day, Jester IV is quieter. Thomas seemed more comfortable around other mentally ill individuals at the facility, and does not believe, as he did while on death row, that everyone is scheming against him.²³³ Someone should not have to resort to harming himself—no less eating his own eye—in order to finally receive appropriate medical attention. A categorical exemption from the death penalty for individuals with severe mental illnesses would have certainly covered Thomas, as would a ban on solitary confinement for mentally ill individuals. Though he might have needed more attention than California's multi-tiered approach or Mississippi's step-down program could have given him, at least with the latter, he could be hospitalized much earlier. Increased mental health evaluations in private settings could have increased his trust in the guards and other individuals at the prison, which could have mitigated his belief that everyone was out to get him. Andre Thomas' end is not necessary. It is shameful.

The United States is an outlier when it comes to its use of the death penalty and solitary confinement, and its treatment of individuals with mental illness experiencing incarceration. Its practices do not comport with "evolving standards of decency." Death row conditions are deplorable, and more and more inmates are developing mental illnesses and experiencing exacerbation of their existing mental illnesses. The imposition or exacerbation of severe mental illness is a punishment in and of itself, separate from the death penalty. As such, it should be evaluated under the Eighth Amendment. Ultimately, the imposition or exacerbation of severe mental illness for an extended period of time on death row should be held unconstitutional under the Eighth Amendment.

227. Bookman, *supra* note 21.

228. *Id.*

229. *Id.*

230. *Id.*

231. *Id.*

232. *Id.*

233. *Id.*