

“THE CONSTITUTIONALITY OF LIFE UNDER THE
CREDIBLE THREAT OF DEATH BY EXECUTION: THE
VIEW FROM DEATH ROW”

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DEATH ROW, CENTRAL PRISON
NORTH CAROLINA

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“ . . . death guards this place.
 death is the spirit of this place;
 its character or atmosphere is death —
 death is the impression it makes
 on the mind: death
 death
 death
 death”

—George Wilkerson,
 Death Row Prisoner
 North Carolina²

When I first got to death row, I wouldn’t look out the window
 because I didn’t want to see the razor wire announcing my

2. GEORGE T. WILKERSON & ROBERT JOHNSON, BONE ORCHARD: REFLECTIONS ON LIFE UNDER SENTENCE OF DEATH 94 (2022).

captivity. When I did look, it was nighttime. I saw an ambulance drive away with the corpse of a condemned man who had just been executed. It drove at a parade speed, creeping down the road to ensure we saw it and absorbed its meaning for us. So, I stopped looking out the window. I didn't want to see one of my friends being carried away. I didn't want to be reminded that I was in prison and that I was here to die a painful death. That I was caught up in a spectacle of punishment. That I might one day be day be the man in the ambulance.

—Lyle May,
Death Row Prisoner
North Carolina

I.
PRINCIPAL THEMES

This article builds upon John Bessler's argument that living under the credible threat of death by execution necessarily constitutes psychological torture.³ Bessler maintains that "twenty-first-century jurists need, at long last, to take psychological torture seriously. And in the death penalty context, that means recognizing capital prosecutions and death sentences for what they are: torturous threats of death."⁴ Importantly, we contend Bessler's argument is truly independent of the conditions of confinement imposed on condemned individuals,⁵ including congregate death rows with comparatively relaxed regimes, such as North Carolina's death row, the

3. *See generally* JOHN D. BESSLER, *THE DEATH PENALTY AS TORTURE: FROM THE DARK AGES TO ABOLITION* (2017) [hereinafter BESSLER, *THE DEATH PENALTY AS TORTURE*]; John Bessler, *Taking Psychological Torture Seriously: The Torturous Nature of Credible Death Threats and the Collateral Consequences for Capital Punishment*, 11 NE. U. L. REV. 1 (2019) [hereinafter Bessler, *Taking Psychological Torture Seriously*]; John Bessler, *Torture and Trauma: Why the Death Penalty Is Wrong and Should Be Strictly Prohibited by American and International Law*, 58 WASHBURN L.J. 1 (2019) [hereinafter *Torture and Trauma*].

4. Bessler, *Taking Psychological Torture Seriously*, *supra* note 3, at 11–12.

5. BESSLER, *THE DEATH PENALTY AS TORTURE*, *supra* note 3, at xxiv ("But capital punishment is torturous notwithstanding what particular conditions exist in specific locales or how much time an inmate actually spends on death row."); ROBERT JOHNSON, *CONDEMNED TO DIE: LIFE UNDER SENTENCE OF DEATH* 113, 125 (Routledge 2d ed. 2019) (1981) [hereinafter JOHNSON, *CONDEMNED TO DIE* (2d ed. 2019)] ("Death rows, I contend, even the best of them, are human warehouses that impose a regime of confinement that amounts to torture."). Note that a torture argument by Johnson was first developed in Robert Johnson, *Under Sentence of Death: The Psychology of Death Row Confinement*, 5 LAW & PSYCH. REV. 141 (1979) and in the first edition of *CONDEMNED TO DIE* 129–130 (Elsevier 1981), and further developed in each edition of *DEATH WORK: A STUDY OF THE MODERN EXECUTION PROCESS* (1990 & 1998) [hereinafter *DEATH WORK* (2d ed. 1998)]. See especially the section entitled "Defining Torture" in the second edition of *DEATH WORK* 196–203 (1998), *supra*, and the related discussion of dehumanization at the heart of all forms of torture. *Id.* at 204–10.

involuntary home of the main author, Lyle May,⁶ and the inspiration for the first frontispiece to this article from May's neighbor on death row, George Wilkerson.

For simplicity's sake, we use the term "death row" to encompass all regimes of confinement applied to condemned prisoners.⁷ All individuals living under a death sentence in American prisons, we contend, are stored for death under the credible threat of execution; that threat is embodied in the sentence itself and is reflected in the daily experience of living under the threat of execution.⁸ An execution is a homicide; death-sentenced prisoners are slated to be killed, not simply to die in captivity, as is the case for life-without-parole prisoners who face "perpetual confinement."⁹ Confinement under the threat of state-sanctioned homicide is inherently and objectively dehumanizing.¹⁰ The execution protocol and associated regimes of confinement presuppose that the condemned prisoner is, first and foremost, an object that exists solely to be executed.¹¹ Living under the threat of the violence of execution entails psychological torture as well as a host of physical degradations that comprise an assault on the human dignity of the condemned.¹² The death penalty thus violates both the United States and North Carolina Constitutions, which prohibit torture.¹³ We support this argument with first-hand accounts of life on death row from author Lyle May, a resident of North Carolina's death row, as well as additional accounts from individuals on this and other death rows. These observations provide a grounding in the elemental experience of the death penalty as a punishment, a perspective on the death-penalty-in-practice that adds a valuable context from which to understand and assess abstract legal or policy arguments.

6. Any assertions made without citation should be assumed to be the lived experience of Lyle May.

7. These regimes include individual solitary confinement, congregate solitary confinement, and varying degrees of mainstreaming into the general populations of high-security prisons. See Robert Johnson, *Solitary Confinement Until Death by State-Sponsored Homicide: An Eighth Amendment Assessment of the Modern Execution Process*, 73 WASH. & LEE L. REV. 1213, 1216 (2016).

8. Bessler, *Taking Psychological Torture Seriously*, *supra* note 3, at 54.

9. See generally CHRISTOPHER SEEDS, DEATH BY PRISON: THE EMERGENCE OF LIFE WITHOUT PAROLE AND PERPETUAL CONFINEMENT (2022). The lived experience of this terminal sanction is explored in Robert Johnson & Sandra McGunigall-Smith, *Life Without Parole, America's Other Death Penalty: Notes on Life under Sentence of Death by Incarceration*, 88 PRISON J. 328 (2008).

10. See JOHNSON, CONDEMNED TO DIE (2d ed. 2019), *supra* note 5, at 88–103; see generally Robert Johnson & Gabe Whitbread, *Lessons in Living and Dying in the Shadow of the Death House: A Review of Ethnographic Research on Death Row Confinement*, in LIVING ON DEATH ROW: THE PSYCHOLOGY OF WAITING TO DIE 71 (Hans Toch, James R. Acker & Vincent Martin Bonventre eds., 2018).

11. See JOHNSON, CONDEMNED TO DIE (2d ed. 2019), *supra* note 5, at 88–103; see also JOHNSON, DEATH WORK (2d ed. 1998), *supra* note 5; Johnson & Whitbread, *supra* note 10.

12. Bessler, *Taking Psychological Torture Seriously*, *supra* note 2; JOHNSON, CONDEMNED TO DIE (2d ed. 2019), *supra* note 5; See generally Robert Johnson, *Reflections on the Death Penalty: Human Rights, Human Dignity, and Dehumanization in the Death House*, 13 SEATTLE J. FOR SOC. JUST. 583, 587 (2014).

13. Bessler, *Taking Psychological Torture Seriously*, *supra* note 3; JOHNSON, CONDEMNED TO DIE (2d ed. 2019), *supra* note 5 at 116, 119–122.

Legal scholars and other academics generally contend that a less restrictive death row environment—a regime that includes more opportunities for movement, social interaction, and constructive activities—reduces the negative psychological effects of a death sentence and thus makes the sanction less cruel.¹⁴ This article disputes that claim. Less restrictive confinement conditions may well reduce some psychological effects of the death penalty and are worth pursuing on purely humanitarian grounds,¹⁵ but the essential cruelty of the death penalty remains. The bottom line, we contend, echoing observations by Sharon Dolovich,¹⁶ is that the experience of punishment—here, life in the shadow of the looming threat of execution—is the punishment. The essential experience of the death penalty is captured in the notion of a credible death threat that hangs over the heads of all condemned individuals, independent of the conditions of confinement under which they are stored awaiting execution.¹⁷

Below, we conduct a thorough examination of the congregate death row housed at Central Prison in Raleigh, North Carolina. We focus on this death penalty state, which has executed 43 people since *Gregg v. Georgia* (1976),¹⁸ because author Lyle May has been confined there since March 18th, 1999. Since his incarceration at the age of 19 and death sentence at the age of 21, May has lived through the threat and consummation of 33 executions on death row before a *de facto* moratorium went into place after four executions in 2006.¹⁹ May provides over twenty-four years of insight into the threat of the death penalty as an active feature of his daily life and the lives of his fellow condemned prisoners. Further, his experiences and observations document life under the threat of execution on a congregate death row—what is sometimes called a reformed or humane death row—a setting not ordinarily explored in academic or legal publications, which have focused on

14. Mark D. Cunningham, Thomas J. Reidy & Jon R. Sorensen, *Is Death Row Obsolete? A Decade of Mainstreaming Death-Sentenced Inmates in Missouri*, 23 BEHAV. SCI. & L. 307, 307–310, 319 (2005); George Lombardi, Richard D. Sluder & Donald Wallace, *Mainstreaming Death-Sentenced Inmates: The Missouri Experience and its Legal Significance*, FED. PROB., June 1997, at 3; Brandon Vines, *Decency Comes Full Circle: The Constitutional Demand to End Permanent Solitary Confinement on Death Row*, 55 COLUM. J.L. & SOC. PROBS. 591, 595 (2022).

15. See JOHNSON, CONDEMNED TO DIE (2nd ed. 2019), *supra* note 5, at 109.

16. Sharon Dolovich, *Cruelty, Prison Conditions, and the Eighth Amendment*, 84 N.Y.U. L. REV. 881, 893 (2009).

17. See generally BESSLER, THE DEATH PENALTY AS TORTURE, *supra* note 3.

18. *State and Federal Info: North Carolina*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/north-carolina> [<https://perma.cc/5RZV-M58Y>] (last visited Jan. 20, 2024).

19. *Id.*

solitary-confinement death rows.²⁰ May's experience, then, allows us to examine life under the threat of execution in an active death penalty state in which the condemned are housed on an arguably 'good' or 'liberal' or 'humane' death row. This experience, we will establish, is inherently torturous, violating the Eighth Amendment prohibition against cruel and unusual punishment and making a prima facie case for the unconstitutionality of the death penalty in the United States. Secondly, we aim to establish that living under a sentence of death violates the North Carolina Constitution, which offers a lower bar for unconstitutional sentences, prohibiting cruel or unusual punishment.

II.

THE DEATH PENALTY CONFINEMENT IN NORTH CAROLINA

Executions in North Carolina have been halted since 2006 because of litigatory claims against the state's execution protocol and objections to medical personnel participation in executions.²¹ Many incarcerated individuals on North Carolina's death row are also fighting their convictions pursuant to North Carolina's Racial Justice Act, which allowed for appeals if individuals could claim their conviction was due to their race.²² These challenges, in addition to individual capital post-conviction appeals, offer hope but do not change the fact that the threat of execution hangs over the heads of condemned prisoners like a modern sword of Damocles—arbitrary, uncertain, and deadly, producing an agonizing anxiety that

20. See, e.g., A.C.L.U., A DEATH BEFORE DYING: SOLITARY CONFINEMENT ON DEATH ROW (July 22, 2013), <https://www.aclu.org/report/death-dying-solitary-confinement-death-row?perma.cc/K68Y-22KF>; CONDEMNED TO DIE (2d ed. 2019), *supra* note 5; Johnson, *supra* note 7. The research on solitary-confinement death rows encompasses a wide range of studies, including the following, listed by date: Robert Johnson, *Under Sentence of Death: The Psychology of Death Row Confinement*, 5 LAW & PSYCH. REV. 141 (1979); STEPHEN GETTINGER, SENTENCED TO DIE: THE PEOPLE, THE CRIMES, AND THE CONTROVERSY (1979); BRUCE JACKSON & DIANE CHRISTIAN, DEATH ROW (1980); DOUG MAGEE, SLOW COMING DARK: INTERVIEWS ON DEATH ROW (1980); MARIO HECTOR, DEATH ROW: JAMAICAN PRISON DIARY (1984); Lloyd Vogelmann, *The Living Dead: Living on Death Row*, 5 S. AFR. J. ON HUM. RTS. 183 (1989); KEN LIGHT & SUZANNE DONOVAN, TEXAS DEATH ROW (1997); RICHARD MICHAEL ROSSI, WAITING TO DIE: LIFE ON DEATH ROW (2004). See generally, LIVING ON DEATH ROW, *supra* note 10.

21. MATTHEW ROBINSON, THE DEATH PENALTY IN NORTH CAROLINA, 2021: A SUMMARY OF THE DATA AND SCIENTIFIC STUDIES 2, 5–8, https://gjs.appstate.edu/sites/default/files/asu_profile_files/nc_death_penalty_2021_by_dr_matthew_robinson_final.pdf [<https://perma.cc/QPY8-5Y6Y>] (last visited Jan 21, 2024); see, e.g., N.C. Dep't of Corr. v. N.C. Med. Bd., 675 S.E.2d 641 (N.C. 2009); *Robinson v. Shanahan*, 755 S.E.2d 398 (N.C. Ct. App. 2014).

22. North Carolina Racial Justice Act, 2009 N.C. Sess. Laws 1213 (codified at N.C. GEN. STAT. § 15A-2010 (2009)) (repealed 2013). In 2013, lawmakers sought to eliminate appellants' ability to pursue challenges to their convictions by repealing the Racial Justice Act. Act of June 13, 2013, S.L. 2013-154, § 5(a), 2013 N.C. Sess. Laws 368. However, the North Carolina Supreme Court held that the retroactive repeal was unconstitutional, as it was considered an *ex post facto* law. *State v. Ramseur*, 843 S.E.2d 106, 107–08 (N.C. 2020); *State v. Burke*, 843 S.E.2d 246, 248 (N.C. 2020). Thus, individuals who appealed their cases under the Racial Justice Act prior to its repeal can continue to litigate their cases.

rules one's life.²³ This pernicious reality—life under the arbitrary and uncertain prospect of execution, hanging by a thread of legalities—applies to all condemned prisoners today. As such, we contend that the imposition of a death sentence in North Carolina, and every other state, is unconstitutional.

III.

DEATH PENALTY CONFINEMENT IN OTHER STATES

Of the remaining twenty-seven states with death penalty statutes, fourteen states have solitary-confinement death rows.²⁴ Not too long ago, the majority of death-penalty states held condemned prisoners in solitary confinement.²⁵ Ten states maintain some form of congregate death row, where capitally sentenced individuals have limited out-of-cell movement and interact with other prisoners on the cell block.²⁶ Three states—Missouri, Oregon, and most recently, California—house a portion of their death-sentenced individuals in general high-security prison populations.²⁷ Regardless of the type of confinement, life in prison for condemned people is an existence in a sharply constrained, stressful environment,²⁸ an isolated world that, for them, turns on desperate court battles and is slated to end at the execution chamber.

Solitary confinement death rows are by far the most harrowing forms of confinement. On Alabama's solitary confinement death row, executions have been carried out within sight, sound, and smell of individuals housed there.²⁹ Exoneree Anthony Ray Hinton recounted such an experience that occurred during his confinement on Alabama's death row from 1987 to 2015:

23. One version of the story of the sword of Damocles is attributed to Cicero. In the story, Damocles had the choice to stay in the king's palace and enjoy an opulent life under the threat of a sword hanging over his head by a thread of horsehair or to leave and return to poverty. He left. The threat of the sword above Damocles' head crippled him with anxiety and dread, taking away the pleasures of life. Evan Andrews, *What Was the Sword of Damocles?*, HISTORY (Aug. 10, 2023), <https://www.history.com/news/what-was-the-sword-of-damocles> [<https://perma.cc/D3BL-7S3G>]. Prisoners do not have the opportunity to depart from death row and thereby escape the anxiety and dread of execution that hangs over their heads, depriving them of the pleasures of life.

24. Vines, *supra* note 14, at 620.

25. A.C.L.U., *supra* note 20, at 4.

26. Vines, *supra* note 14, at 620–21.

27. *Id.* at 621; 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. ON C.L. & C.R. 117, 136–39 (2020).

28. “Maximum-security prisons offer more options for living than can be found on death rows, but these prisons, like death rows, offer no meaningful preparation for the threat of execution under which condemned prisoners live. Most maximum-security prisons, not unlike death rows, are human warehouses in their own right, though less repressive and dehumanizing human warehouses than those typically found on death row.” Johnson, *supra* note 7, at 1218 n.23. *See generally*, ROBERT JOHNSON, ANN MARIE ROCHELEAU & ALISON B. MARTIN, *HARD TIME: A FRESH LOOK AT UNDERSTANDING AND REFORMING THE PRISON*, 79–103 (4th ed. 2016).

29. ANTHONY RAY HINTON WITH LARA LOVE HARDIN, *THE SUN DOES SHINE: HOW I FOUND LIFE AND FREEDOM ON DEATH ROW* 98–100 (2018).

[T]here was the sound of a generator kicking on and then hissing and popping, and the lights in the hall outside my cell flickered on and off. And then through the night, the smell came. It's hard to explain what death smells like, but it burned my nose and stung my throat and made my eyes water and my stomach turn over . . . All up and down the row, you could hear men blowing their noses, trying to get the smell away . . . I heard one of the guys complain to the guard about the smell. "You'll get used to it." The guard laughed. "Next year or one of these days, somebody's going to be smelling you just the same" ³⁰

Other solitary confinement death rows, like Oklahoma's H-Unit, are cold, sterile, subterranean tombs devoid of human contact.³¹ Guards do not patrol the cell block area, and most communication between incarcerated individuals and prison staff occurs through an intercom in individual cells, which is operated from a central control room.³² When prisoners are let out for showers or recreation, staff monitor from behind a barrier.³³ Recent changes to Oklahoma's death row have created an additional unit that allows limited human contact and outdoor recreation in groups of three rather than in an "underground bunker."³⁴ Most individuals on Oklahoma's death row now reside in this new unit, however, they still must endure twenty-three hours of cell time per day.³⁵

In Oklahoma, Arizona, Florida, Kansas, Louisiana, Pennsylvania, and South Carolina, recent legal challenges to the use of automatic solitary confinement for death-sentenced prisoners resulted in substantial changes to conditions of confinement in six of these states.³⁶ Individuals incarcerated on death row challenged their confinement on Eighth Amendment and Fourteenth Amendment due process grounds.³⁷ As a result of settlement agreements with state departments of

30. *Id.* at 98.

31. ROY D. KING, CONDITIONS FOR DEATH ROW PRISONERS IN H-UNIT, OKLAHOMA STATE PENITENTIARY: REPORT ON A VISIT ON 3-4 MARCH 1994, FOR AMNESTY INTERNATIONAL 8-9 (1994), <https://www.amnesty.org/en/wp-content/uploads/2021/06/amr510351994en.pdf> [<https://perma.cc/SDR7-LEFV>].

32. *Id.* at 13.

33. *Id.*

34. Pontier, *supra* note 27, at 159-60.

35. *Id.* at 160.

36. *Id.* at 165-66.

37. Complaint for Declaratory & Injunctive Relief at 8, *Cheever v. Zmuda*, No. 2:20-cv-02555-JAR-KGG, 2021 WL 1854198 (D. Kan. May 10, 2021); Complaint-Class Action at 5, *Reid v. Wetzel*, No. 1:18-cv-00176-JEJ, 2020 WL 8184695 (M.D. Pa., Apr. 9, 2020); Complaint & Demand for Jury Trial at 1, *Northcutt v. S.C. Dep't of Corr.*, No. 4:17-cv-03301-BHH-TER, 2018 WL 3802100 (D.S.C., June 26, 2018); Class Action Complaint & Demand for Jury Trial at 3, *Davis v. Inch*, No. 3:17-cv-820-J-34PDB, 2019 WL 1400465 (M.D. Fla. March 28, 2019); Class Action Complaint & Demand for Jury Trial at 3, *Hamilton v. Vannoy*, No. 3:17-cv-00194-SDD-RLB, 2017 WL 1196204 (M.D. La. Mar. 29, 2017); Pontier, *supra* note 27, at 1-13; Letter from A.C.L.U. of Okla. to Scott Crow, Interim Dir. of Okla. Dep't of Corr. (July 29, 2019), https://www.acluok.org/sites/default/files/field_documents/demand_letter_re_conditions_for_death-sentenced_people_incarcerated_at_h-unit.pdf [<https://perma.cc/P67M-5UND>].

corrections, Arizona, Pennsylvania, and South Carolina now have congregate death rows, while Florida and Louisiana now offer more out-of-cell time.³⁸

IV.

LIFE ON NORTH CAROLINA'S CONGREGATE DEATH ROW

A. *Housing and Community*

Most of what has been written about North Carolina's congregate death row pertains to the form and function of capital punishment in the state. However, legal nuances, statistics, and execution protocols do not convey the lived experience of a death sentence. Long-term confinement at any maximum-security facility is a difficult circumstance, but under the threat of execution, it can only be described as torture. Daily, the residents of North Carolina's death row endure this life of psychological torture.

In January 1983, the first prisoners occupied the reconstructed Central Prison in Raleigh, North Carolina.³⁹ Unit-Two, a wing of the reconstructed facility, had two floors of six double-tiered cell blocks that provided a secure location to house prisoners sentenced to death.⁴⁰ Each block held sixteen 7'x10' cells with solid steel doors coated in beige paint and a five-inch-wide vertical window at the back of the cell for natural light, with a view of an access road and railroad tracks.⁴¹ Down this access road, a silent, unlit ambulance left Central Prison with bodies of men and women put to death in the state's execution chamber by gas until 1998, then by lethal injection.⁴² The ambulance could be seen by anyone looking out from Unit-Two's cell windows.⁴³

Each of the death row cell blocks filled by the early 1990s.⁴⁴ The rate of executions—two or three each year—was outpaced by new death sentences, due in part because of a state law mandating prosecutors to pursue the death penalty in aggravated first-degree murder cases.⁴⁵ A flurry of reforms in the early 2000s

38. Pontier, *supra* note 27, at 155–63. *Florida Becomes Latest State to End Permanent Death-Row Solitary Confinement After Settlement of Conditions Lawsuit*, DEATH PENALTY INFO. CTR. (May 24, 2022), <https://deathpenaltyinfo.org/news/florida-becomes-latest-state-to-end-permanent-death-row-solitary-confinement-after-settlement-of-conditions-lawsuit> [<https://perma.cc/TD8L-LDSA>].

39. GREGORY S. TAYLOR, *CENTRAL PRISON: A HISTORY OF NORTH CAROLINA'S STATE PENITENTIARY 192–196* (2021).

40. *Id.* at 195.

41. Personal experience of Lyle May.

42. *Id.*

43. *Id.*

44. *Id.*

45. THE CTR. FOR DEATH PENALTY LITIG., *UNEQUAL JUSTICE: HOW OBSOLETE LAWS AND UNFAIR TRIALS CREATED NORTH CAROLINA'S OUTSIZED DEATH ROW 10* (2018), https://is-suu.com/cdpl123/docs/7_17_cdpl_deathrowreport_final_oneu?utm_medium=referral&utm_source=www.cdpl.org [<https://perma.cc/3EYL-J7RE>].

slowed the number of new death sentences, but not before North Carolina became home to the nation's sixth-largest death row.⁴⁶

By 1999, a year when twenty-four people were sentenced to death, over two hundred people were housed on Unit-Two's death row.⁴⁷ To handle the overflow, four steel-framed double bunks were placed in the dayroom of every cellblock.⁴⁸ Conditions grew cramped, with eight people sharing one toilet and twenty-three sharing two showers.⁴⁹ With cell doors open from 7 am until 10:30 pm, prisoners had little space to maneuver and no privacy.⁵⁰ A television blared all day in the background of ordinary prison life rife with war stories, arguments, card games, music from radios, and occasionally, laughter.⁵¹ The din of noise and pall of cigarette smoke enveloped everyone.⁵²

Newly death-sentenced men entering this crowded, smoky environment expecting silent, tomb-like solitary confinement were surprised to find otherwise.⁵³ Pop culture knowledge about death row is based on solitary confinement and sensationalized depictions of executions that obscure the reality of a congregate setting and long-term incarceration under sentence of death. Rather than automatically isolate death-sentenced prisoners, the state of North Carolina chose to house them like other maximum-security prisoners by creating a cell block for those sentenced to death.⁵⁴ Critically, however, death-sentenced prisoners were granted less freedom of movement when they were off the death-row cell blocks than was available to other maximum-security prisoners.⁵⁵ They also were not offered meaningful activities or programs and were eligible for only a few menial jobs.⁵⁶

Once on death row in North Carolina, there is no formal orientation by prison staff and no explanation of the post-conviction capital appeals process. If a trial attorney fails to explain it, one must wait until appellate counsel is appointed and visits or writes a letter. This can take months, during which the prisoner is left to wonder when they will be executed, a source of considerable anxiety.

If there is an advantage to congregate confinement on death row, other than freedom from the torments of solitary confinement, it is that all individuals housed

46. *Id.*

47. Personal experience of Lyle May.

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. Personal experience of Lyle May; Daniel C. Hoover, *New Central Prison is Modern but Tough*, NEWS & OBSERVER (Raleigh, N.C.), Sept. 5, 1982, at 7D.

55. Personal experience of Lyle May.

56. Personal experience of Lyle May; Elizabeth Leland, *Sleep, Exercise Stifles Boredom on Death Row*, NEWS & OBSERVER (Raleigh, N.C.), Mar. 11, 1984, at 32A. Exclusion from prison programming is commonplace for individuals housed on death rows. See *Time on Death Row*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/death-row/death-row-time-on-death-row> [<https://perma.cc/D7ZX-EFJB>] (last visited Jan. 20, 2024).

there have experienced a capital trial. All have gone through a period of ignorance about the appellate process and can, to some degree, guide newcomers in a way that eases the transition to death row. The ordinary jockeying for social status and bonding occurs, but replacing stratification by crime is a series of basic questions: 1) Is the newcomer a threat? 2) Is he a target of opportunity? 3) Has this person been in prison before? Once these have been answered, the newcomer is generally accepted.

A lack of space makes it difficult to avoid trouble and impossible not to learn intimate details of another's past life. Asking about a person's crimes is usually taboo, but it does not prevent knowledge gained through news coverage, court rulings, legal digests, shared attorneys, and gossip. The problem with proximity in prison is that it breeds hatred just as easily as friendships. Intolerance, backbiting, prejudice, and aggression are intensified on the congregate death row, enough so that during executions, an extra guard was stationed on each of Unit-Two's cellblocks to maintain order. He or she would sit quietly in a chair, ensuring no fights, protests, or organized activities.

Corrections officials knew an expanding death row would need either more space or more executions. In 2002, Central Prison opened a new multi-million-dollar death row building segregated from the rest of the facility.⁵⁷ It was self-contained, with death-sentenced prisoners working fourteen available jobs as janitors, canteen operators, barbers, and clothes house personnel. There would be no more prisoners on bunks in the dayroom. Unit-Three has two floors with four cellblocks (called pods) of twenty-four cells each. At the center of this panoptic design, there is a control booth on each floor with two guards manning the cameras, doors, and intercom. Compared to the housing in Unit-Two (the old death row), the new death row in Unit-Three offers capacious, mostly vermin-free, brightly lit pods and cells. The building provided more space, which was welcomed, but at a cost to prisoners: it allows guards to be more invasive and implement random lockdowns that are disruptive to daily life. Light and sound reverberate off concrete and steel without reprieve; between frequently opening and closing cell doors, brilliant fluorescent lights, and orders shouted over an intercom, sleep can be more difficult. The only color in this warehouse-like environment is red-lacquered paint coating doors, rails, stairs, window frames, and bunks. Like the crimson jumpsuits worn by North Carolina's condemned, the physical

57. Wade Rawlins, *Rules Could Free Prison Beds*, NEWS & OBSERVER (Raleigh, N.C.), Feb. 12, 2002, at A1.

environment is seen as a not-so-subtle reminder of blood, which leaves no question in the minds of the residents about the purpose of Unit-Three.⁵⁸

B. Psychological Consequences

After the opening of Unit-Three under Democratic Governor Mike Easley in 2002, executions increased.⁵⁹ Several dynamics fostered instability on death row: twenty-five executions were carried out over four years, nearly as many death-sentenced individuals were removed from death row due to having been resentenced or having their sentences overturned, the exoneration of Alan Gell, and two major U.S. Supreme Court rulings.⁶⁰ During this time, the Court banned the execution of intellectually disabled individuals in *Atkins v. Virginia* (2002).⁶¹ Later, in *Roper v. Simmons* (2005),⁶² the Court banned the execution of individuals who were under eighteen at the time they committed a crime.

In North Carolina, between the executions and sentence reversals, anxiety ran high. The pervasive threat of death, compounded by the arbitrariness of who lived and who died, created near-crippling anxiety and doubt: “Who will be next?” “What comes next?” “Death by execution, life in prison without hope of release, or the limbo of death row?” Uncertainty about one’s fate left individuals in a state of doubt and despair. Living in a constant state of indefiniteness, coupled with false hope and misinformation (because even attorneys can fail to accurately predict one’s legal prospects), destroys any sense of safety or well-being; pervasive

58. Personal experience of Lyle May; George Wilkerson, also a resident of North Carolina’s death row, comments on “the only color in this warehouse-like environment.” Wilkerson notes that the red paint found on death row is both unique (other colors are found in other units) and powerfully symbolic:

The hundreds of doorways throughout the prison are painted in plastic-playground colors – pastel shades of blue, marshmallow cream (soft and forgiving colors). But on the row, the doors are painted a congealed red, like an implicit threat. Other than the walls, it seems that *all* the painted surfaces on death row are red. The bunks, the railings, the steps, windowsills. Even our jumpsuits are red. Over time, red canvas jumpsuits fade to a “sickly” pink and their once-stiff fabric “softens” and wears with time, revealing “threadbare knees and seats.” On death row for years, even decades, prisoners seem to fade along with their clothes. “Most look sort of sickly. It’s like the fading jumpsuits are a wearable metaphor for the eroding humanity here.” WILKERSON & JOHNSON, *supra* note 2, at 3.

59. *Notable Exonerations*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/north-carolina> [<https://perma.cc/NN5M-76UW>] (last visited Jan. 20, 2024) (showing that in 2003 there were seven executions in North Carolina, up from two the previous year).

60. *Roper v. Simmons*, 543 U.S. 551 (2005); *Atkins v. Virginia*, 536 U.S. 304 (2002); *Notable Exonerations*, *supra* note 59; *Alan Gell of North Carolina Is Nation’s 113th Death Row Exoneree*, DEATH PENALTY INFO. CTR. (Feb. 18, 2004), <https://deathpenaltyinfo.org/news/alan-gell-of-north-carolina-is-nations-113th-death-row-exoneree> [<https://perma.cc/4H47-RK65>]; *List – Removed from Death Row*, N.C. DEP’T OF CORR. <https://www.dac.nc.gov/divisions-and-sections/prisons/death-penalty/list-removed-death-row> [<https://perma.cc/ZS9G-VJU9>] (last visited Jan. 22, 2024); *North Carolina Execution Totals*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/north-carolina> [<https://perma.cc/7DCY-BLCN>] (last visited Jan. 22, 2024).

61. *Atkins v. Virginia*, 536 U.S. 304, 321 (2002).

62. *Roper v. Simmons*, 543 U.S. 551, 578 (2005).

insecurity, in turn, strips away meaning from everything else in the environment, and leaves the prisoner emotionally dead and zombie-like.⁶³ It does not even require an imminent execution to experience this vulnerability, just a moderate possibility of such a fate.

There are similar psychological effects on solitary confinement death rows and congregate death rows like North Carolina's. Social isolation, no new or varied environmental stimuli, little to no meaningful activity, chronic uncertainty, and loss of control over most aspects of daily life produce a number of psychological pathologies.⁶⁴ Confinement on death row, whatever the details of that confinement, means a sense of abandonment by society and a conditioned worldview that the individual is "less than" others, maybe less than human, and certainly unfit for life or liberty. This can create feelings of unreality and depersonalization as if there is no world beyond the profound isolation of death row.⁶⁵ Social withdrawal weakens interpersonal skills, impairs the ability to interact, and reinforces more social withdrawal.⁶⁶ In regard to the psychological effects of solitary confinement, correctional psychologist Craig Haney stated: "in extreme cases . . . this environment is so painful, so bizarre and impossible to make sense of, that some prisoners create their own reality—they live in a world of fantasy instead."⁶⁷

McGunigall-Smith and Johnson refer to a coping mechanism used by people on solitary confinement death rows, called "visualizing" or "tripping."⁶⁸ The practice is described as "active imaginings that allowed them to take unauthorized 'trips' out of the prison and into the free world..."⁶⁹ More than the kind of escapism found in a book, "tripping" helps tortured prisoners take psychological breaks from a punitive reality. Several men on North Carolina's death row, author Lyle May reports, have taken permanent trips and are lost in their own psychoses.

The absence of autonomy on death row forces prisoners to be dependent upon guards for all their needs. The prison and unit scheduling organizes prisoners' daily existence.⁷⁰ When that schedule is disrupted for any reason, it causes frustration and deep insecurity. In the words of Richard Rossi, an individual housed on Arizona's death row:

63. Kate McMahon, *Dead Man Waiting: Death Row Delays, the Eighth Amendment, and What Courts and Legislatures Can Do*, 25 BUFF. PUB. INT. L.J. 43, 44-45 (2006).

64. SHARON SHALEV, A SOURCEBOOK ON SOLITARY CONFINEMENT 15-17 (2008).

65. *Id.*

66. Symposium, *Dying Twice: Incarceration on Death Row*, 31 CAP. U. L. REV. 853, 869-70 (2003).

67. *Id.*

68. Sandra McGunigall-Smith & Robert Johnson, *Escape from Death Row: A Study of "Tripping" as an Individual Adjustment Strategy Among Death Row Prisoners*, 6 PIERCE L. REV. 533, 533-45 (2008).

69. *Id.* at 536.

70. Craig Haney, *Mental Health Issues in Long-Term Solitary and Supermax Confinement*, 49 CRIME & DELINQ. 124, 139 (2003).

It is amazing to observe how conditioned we become after being treated like this for years on end. Occasionally, when the meals are delayed by as little as a few minutes, our bodies and minds go through changes. We start worrying if we are to be fed at all, or if our entire world is coming to an end. Perhaps World War III has started and orders have been given to kill the prisoners. Maybe the death squads are coming.⁷¹

The schedule is the scaffolding around which prisoners build their lives. Accordingly, it is troubling to learn that guards sometimes intentionally disrupt the schedule, haphazardly changing the time at which key events like meals—called “feeding times” in the dehumanizing parlance of prison officers—as well as outdoor recreation periods, showers, mail, and visits occur. This amounts to a unique form of torment specific to people who lack control over their lives and hunger for a stable routine as a shelter from the larger threat of execution that looms in the background of daily life on death row.⁷² Like individuals subjected to solitary confinement, prisoners confined in congregate death rows suffer the anger and even rage over their dependency, as well as sharp pangs of anxiety about one’s security that add to the pressures of life under sentence of death.

The psychological effects of solitary confinement are well known and widely reported, yet usually thought of as exclusive to solitary confinement. However, the congregate confinement environment of Central Prison’s Unit-Three does not eliminate these effects. Nor does it prevent the negative psychological impact of executions or the threat of death that pervades death rows. On Unit-Three, the low population turnover and inactivity create a stagnant environment full of desperate people under the prolonged threat of death. After decades of living around the idiosyncratic and mentally ill behaviors of others, meaningful social interaction, and any benefit derived from it, is limited. Many of the emotional and behavioral responses found on solitary confinement death rows—*anxiety, panic attacks, clinical depression, apathy, fear of impending death, anger, rage, violent assaults, an inability to concentrate, memory lapses, self-mutilation, and suicide*⁷³—are common on North Carolina’s congregate death row environments as well. As one’s mental health and one’s sense of oneself as a full-blooded human being deteriorates over time, on solitary and congregate death rows like North Carolina’s, *paranoia, mood swings, hallucinations, and schizophrenia* often occur.⁷⁴

A survey of forty-three individuals living on North Carolina’s death row revealed that all exhibit symptoms associated with what has been termed “the death row syndrome” or “the death row phenomenon,” such as anxiety, panic

71. RICHARD M. ROSSI, *WAITING TO DIE: LIFE ON DEATH ROW* 27 (2004).

72. Haney, *supra* note 70, at 138-140.

73. Shalev, *supra* note 64, at 15-16.

74. Personal experience of Lyle May; *Id.*

attacks, and fear of impending death.⁷⁵ In response to the question, “Do you think your long-term confinement on death row is a form of psychological torture?,” all respondents answered in the affirmative.⁷⁶ Alarming, four individuals reported they would volunteer to be executed if they could be killed immediately, thus putting an end to the torture of their daily lives on death row.⁷⁷ Much like attempts to make state-sanctioned murder more “aesthetically pleasing” to the public by the use of lethal injection, congregate confinement may be better (and more palatable) than solitary confinement, but the threat of death remains. As long as that threat remains—and one is invited, if not induced, to contemplate execution on a daily basis—the death penalty is fundamentally torturous, and hence a cruel and unusual punishment.

Regardless of how the prisoner is confined, the prolonged delay between receipt of a death sentence and execution or reversal on appeal substantially contributes to psychological trauma. With few exceptions, executions are rarely carried out less than ten years after the crime; “as of 2015 the average delay from crime to execution was more than 18 years, and delays of 30 years or more are not unusual.”⁷⁸ Executions are exceedingly infrequent as prisoners exhaust their appeals, the state engages in dilatory tactics that lengthen the resolution of those appeals (especially when defendants have claims of innocence), or the prisoner’s attorneys “abuse the right to appeal” in pursuit of what courts refer to as “frivolous” eleventh hour litigation.⁷⁹ These court processes increase the length of stay on death row by an average of 125 days per year.⁸⁰

The emotional toll of living under a sentence of death, a time filled with fear, uncertainty, frustration, and helplessness is a special kind of agony⁸¹ that causes some people to drop their appeals in favor of state-sponsored suicide. Colloquially called “volunteers,” the Death Penalty Information Center has identified 150 people who dropped or waived their appeals in order to be executed.⁸² In North Carolina, four people have volunteered for execution.⁸³ More may have tried, only to

75. Lyle C. May, *A Preliminary Case Study About the Psychological Effects of the Death Penalty*, TACENDA LITERARY MAG.: AN ARTS & SOC. JUST. J. (2022), <https://www.bleakhousepublishing.org/new-page-2> [<https://perma.cc/NL2D-2XC5>].

76. *Id.*

77. *Id.*

78. FRANK R. BAUMGARTNER, MARTY DAVIDSON, KANEESHA R. JOHNSON, ARVIND KRISHNAMURTHY & COLIN P. WILSON, *DEADLY JUSTICE: A STATISTICAL PORTRAIT OF THE DEATH PENALTY* 157 (2017).

79. *Id.* at 159.

80. *Id.* at 161, 164.

81. Kathleen M. Flynn, *The “Agony of Suspense”: How Protracted Death Row Confinement Gives Rise to an Eighth Amendment Claim of Cruel and Unusual Punishment*, 54 WASH. & LEE L. REV. 291, 294–97 (1997).

82. *Execution Volunteers*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/executions/executions-overview/execution-volunteers> [<https://perma.cc/85WL-7R63>] (last updated Aug. 4, 2023).

83. *Id.*

be prevented by their attorneys.⁸⁴ Procedural safeguards may prove onerous to prisoners who seek to expedite their executions. In order to drop their appeals, death row prisoners have to pass a psychological competency evaluation.⁸⁵ If they are deemed incompetent, it does not mean they can avoid execution, only that they can no longer make valid legal decisions. Most people who drop their appeals and agree to an early and possibly preventable execution do so after more than ten years of waiting, driven to commit state-assisted suicide rather than continue suffering long-term confinement on death row.⁸⁶

C. Executions

Contemplating execution, the primary author knows from experience and from his daily life and conversations on death row, begins the moment a district attorney pursues a capital trial. That contemplation increases when the judge reads a jury's "death" verdict and seems to peak with a prisoner's arrival on death row. Then come executions of fellow condemned prisoners, each of which compounds terror, horror, and anxiety, eroding psychological well-being and making prisoners more vulnerable to the trauma of their death sentence. On death row, gossip and conjecture about botched executions, unfair appellate decisions, ineffective attorneys, and the lingering collective trauma of previous executions (going back

84. See generally John H. Blume, *Killing the Willing: "Volunteers," Suicide and Competency*, 103 MICH. L. REV. 939 (2005); Robert Johnson, Sandra McGunigall-Smith, Christopher Miller & Aubrey Rose, *Autonomy in Extremis: An Intelligent Waiver of Appeals on Death Row*, 39 AM. J. CRIM. JUST. 787 (2014).

85. Blume, *supra* note 84 at 942.

86. BAUMGARTNER, DAVIDSON, JOHNSON, KRISHNAMURTHY & WILSON, *supra* note 78, at 163. Given the hard realities facing these 'volunteers,' dropping appeals and submitting to execution may be a rational choice for some individuals. For a case study, see Johnson, McGunigall-Smith, Miller & Rose, *supra* note 84. A case in point can be found in the experience of a man named Joseph Parsons, a Utah prisoner who had to pursue dropping his appeals with persistence:

Getting executed, Parsons learned, is not as easy as it would appear. It seemed to him that the judicial system was doing all it could to prevent the execution from taking place. Parsons filed his handwritten motion dropping his appeals on April 22, 1999 and was required to attend court on several occasions to apply for permission to withdraw from the appeals process. This struck Parsons as arbitrary and, ultimately, a waste of time. On May 12, Parsons appeared before a federal magistrate who delayed the execution because he wanted him to have one last conference with his co-counsel. The judge wanted to be sure that Parsons had the full benefit of all possible legal advice before he granted his wish. He ordered Parsons' attorney to confer. Parsons told the judge he did not need this and that it would not change his mind. The meeting took place the following week and Parsons, indeed, did not change his mind. His attorney was an opponent of the death penalty and Parsons perceived him to be unwilling to aggressively argue in favor of dropping appeals. Parsons told his attorney, "this has nothing to do with you. Nothing to do with the judge. It has to do with me. I want to go because it's my decision that I want to go. I'm tired of the mind games. I'm tired of waiting on the judge. I'm tired of these people's [prison staff] mind games. Is that good enough for you?"

...

When the judge was satisfied that all was in order, he granted Parsons' request to withdraw from the appeals process. Parsons was then required to attend the court where the death sentence was originally issued, at which time he would be served with the death warrant and, finally, given a firm date of execution.

See *id.* at 795–96 (internal citations omitted).

years) combine to create more fear. Guards amplify this catastrophic train of thought about executions by treating the condemned as “less than” other prisoners and as explicitly held for the death penalty, not rehabilitation or even possible release (a fate the condemned share with life-term prisoners).⁸⁷

Between 1910 and 1961, North Carolina executed 361 men, women, and adolescents, seventy-eight percent of whom were Black men.⁸⁸ Until 1936, the sole method of execution was the electric chair, then the gas chamber was introduced and by 1938 became the only method used.⁸⁹ Those unfortunates put in the gas chamber were first strapped into a chair in an air-tight steel chamber.⁹⁰ Once the door was sealed shut, the warden pulled a lever, and cotton-wrapped cyanide capsules were dropped into a box beneath the chair, “dissolving in a mixture of sulfuric acid and water to create a deadly gas” the condemned⁹¹ was then forced to breathe in.⁹² In the beginning, to test the effectiveness of the gas chamber, prison officials gassed two dogs.⁹³ Witnesses watched the animals howl, squirm, and scream as they died.⁹⁴ Some prison officials commented that they hoped the “first human victim” would die “without howling, without squirming.”⁹⁵ Death row prisoners would have seen these quotes of prison officials in the *News & Observer*, a local newspaper provided at Central Prison (if not overhear them—execution rehearsals are often done in close proximity to death row.)⁹⁶

The first person put to death in North Carolina’s gas chamber was 20-year-old Jimmy Lee “Allen” Foster, a Black youth sentenced to death for allegedly raping a white woman.⁹⁷ While on death watch, where the person sentenced to death is closely monitored in solitary confinement in the days leading up to execution, Foster pled his innocence to a *News & Observer* journalist:

If I had done it I would say right now I done it, ‘cause I know Friday’s my day and I got to die then for something I never done. I know I ain’t got a [chance], no matter what I tell, so I’d [just] go on and tell it if it was [the truth].⁹⁸

87. WILKERSON & JOHNSON, *supra* note 2, at 66. (George Wilkerson, a death row prisoner in North Carolina, seconds this observation. Death row prisoners are “told many times point-blank, ‘You are not here to be rehabilitated.’ We are here to be executed.”) *Id.*

88. TAYLOR, *supra* note 39, at 228.

89. *Id.* at 128; SETH KOTCH, *LETHAL STATE: A HISTORY OF THE DEATH PENALTY IN NORTH CAROLINA* 57–83 (2019).

90. Kotch, *supra* note 89, at 73–74.

91. *Id.* at 74.

92. *Id.* at 75.

93. *Id.*

94. *Id.* (citing *Under the Dome*, *NEWS & OBSERVER* (Raleigh, N.C.), Jan. 21, 1936, at 1).

95. *Id.* (citing *Under the Dome*, *NEWS & OBSERVER* (Raleigh, N.C.), Jan. 21, 1935, at 1).

96. Personal experience of Lyle May.

97. KOTCH, *supra* note 89, at 74 (citing *New Lethal Cell to Begin Career*, *NEWS & OBSERVER* (Raleigh, N.C.), Jan 21, 1936, at 16).

98. *Id.* (citing *First Gas Death Set for Friday*, *NEWS & OBSERVER* (Raleigh, N.C.), Jan. 22, 1936, at 9).

Fellow condemned men on death row contemplated Foster's fate in the gas chamber and what it meant for them. A reporter who received permission to observe death row the night of Foster's execution reflected, "I stayed last night with the living dead."⁹⁹ He wrote: "The tenseness of death hung over these men who are about to die. There was that feeling of something going to happen — something that couldn't be stopped."¹⁰⁰ Foster entered the gas chamber wearing only his underwear to ensure no gas was trapped in his clothes when the guards removed his body and sat in the chair without prompting.¹⁰¹ When the door sealed shut behind the guards, the executioner pulled a lever and within minutes gas wafted up from beneath the chair.¹⁰² Foster took a breath and immediately began to convulse.¹⁰³ "No man could look squarely into his eyes and fail to perceive that they were registering pain," wrote a journalist.¹⁰⁴ Foster "suffered obviously and consciously" for at least three minutes before he passed out and died eight minutes later.¹⁰⁵ "This was one of the most terrible and horrible things I ever looked at," said the Wake County Coroner.¹⁰⁶ "First Lethal Gas Victim Dies in Torture as Witnesses Quail," was the Monday headline after Foster's execution, with the description that Foster "writhed and retched in the straps which held him in the chair."¹⁰⁷

Foster entered the gas chamber without knowing what was coming, but the nearly two hundred people who died in North Carolina's gas chamber after Foster would have known what awaited them, if not from reading the newspaper, then from stories and rumors passed around death row by prisoners or by guards.¹⁰⁸ Those stories would have generated terror on death row, drawn out by the amount of time one had to wait for execution, appellate relief, or clemency.

Growing national debate over the death penalty and a decline in support halted executions in North Carolina in 1961. Then in 1972, the United States Supreme Court, in *Furman v. Georgia*, determined the death penalty was unconstitutionally cruel and usual punishment, clearing out death rows around the country.¹⁰⁹ However, in *Gregg v. Georgia* (1977), the Court outlined conditions under which the federal government and states could have a constitutionally effective death penalty.¹¹⁰ North Carolina's General Assembly adopted those

99. *Id.*

100. *Id.* at 75–75 (citing John A. Parris, Jr., *Death Row Upset on Execution Eve*, NEWS & OBSERVER (Raleigh, N.C.), Jan. 24, 1936, at 2).

101. *Id.* at 75 (citing *First Lethal Gas Victim Dies in Torture as Witnesses Quail*, NEWS & OBSERVER (Raleigh, N.C.), Jan. 25, 1936, at 1).

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.* at 75–76.

107. *Id.* at 76.

108. TAYLOR, *supra* note 39, at 229.

109. *Furman v. Georgia*, 408 U.S. 238, 239–40 (1972).

110. *Gregg v. Georgia*, 428 U.S. 153, 195–207 (1976).

conditions in 1977, and before carrying out its first execution in 1984, sentenced 120 people to death, 65 percent of whom were Black.¹¹¹

In preparation for resuming executions, the General Assembly adopted the method of lethal injection, giving the condemned a choice between it or the gas chamber.¹¹² Lethal injection was adopted in 1977 by Oklahoma acting medical examiner Dr. Jay Chapman, who developed a three-drug cocktail: sodium thiopental to sedate the prisoner, pancuronium bromide to paralyze and prevent any outward signs of suffering, and potassium chloride to stop the heart.¹¹³ Making the death penalty a parody of a medical procedure meant no burning flesh from the chair, excessive blood from a firing squad, or historical stigma associated with hanging or gas, but it also complicated executions with ethical concerns around medical personnel participation and drug procurement and eventually proved to be a method prone to painful, even excruciating errors in administration.¹¹⁴

After North Carolina reinstated the death penalty, only two people — David Lawson (1994) and Ricky Lee Sanderson (1998) — chose the gas chamber over the lethal injection.¹¹⁵ The state ended its use of the gas chamber after Sanderson's execution, forcing everyone else on North Carolina's death row to accept lethal injection and its "aesthetically pleasing appearance" for the public.¹¹⁶ It would not take long before gasping and jerking on the gurney—despite being "fully sedated" by sodium thiopental and numerous botched executions—belied the claim that lethal injection is as humane as euthanizing animals.¹¹⁷

In addition to anxiety and dread among condemned prisoners that comes from their historical knowledge of executions and the ever-present possibility of botched executions, there is also gossip and feverish imaginings about why three drugs are needed for the lethal injection instead of a single overdose of anesthetic, and about why people on death row must contend with a lengthy, convoluted appellate process as arbitrary in providing relief as it is uncertain. Laypeople, academics, and maybe some lawyers as well, wonder at the arcane elements of the

111. TAYLOR, *supra* note 39, at 229.

112. *Id.*

113. BAUMGARTNER DAVIDSON, JOHNSON, KRISHNAMURTHY & WILSON, *supra* note 78, at 206–07.

114. *Id.* at 209–11; AUSTIN SARAT, GRUESOME SPECTACLES: BOTCHED EXECUTIONS AND AMERICA'S DEATH PENALTY (2014).

115. KOTCH, *supra* note 89, at 175. University of North Carolina University Libraries, *Method, Facing Controversy: Struggling with Capital Punishment in North Carolina*, <https://exhibits.lib.unc.edu/exhibits/show/capital-punishment/controversies/method> [<https://perma.cc/L4QR-BMZJ>] (last visited Sept. 9, 2024); Jim Schlosser, *The Final Day Nears for David Lawson / Victim's Family Will Witness Execution*, NEWS & RECORD (Raleigh, N.C.), June 11, 1994), https://greensboro.com/the-final-day-nears-for-david-lawson-victims-family-will-witness-execution/article_b717e5dc-bf84-5be8-b71b-44b3ea796373.html [<https://perma.cc/2DVX-MP2Q>].

116. BAUMGARTNER, DAVIDSON, JOHNSON, KRISHNAMURTHY & WILSON, *supra* note 78, at 210.

117. Noah Caldwell, Ailsa Chang & Jolie Myers, *Gasping For Air: Autopsies Reveal Troubling Effects Of Lethal Injection*, N.P.R. (Sept. 21, 2020, 7:00 AM), <https://www.npr.org/2020/09/21/793177589/gasping-for-air-autopsies-reveal-troubling-effects-of-lethal-injection> [<https://perma.cc/F9GV-RU8M>].

death penalty, which accentuates helplessness, anxiety, suspicion, and fear among the condemned. Though guards typically tell death row prisoners they are just “following orders” when they carry out executions, it is an empty statement as devoid of empathy as it is responsibility.

D. Death Row Staff

Within the interminable period of fear and anxiety that is the modern capital appellate process, the condemned must also contend with guards day and night. These interactions, both on an individual basis and collectively, are a constant reminder of place and purpose. Staff on North Carolina’s death row differ from staff in solitary confinement settings. While their control over death row is absolute and they manage the minutiae of a segregated unit in Central Prison, they are not overtly brutal as described in accounts from other facilities.¹¹⁸ Proximity and regular interaction between staff and prisoners diffuse most of the strife that occurs in solitary confinement settings. Prison staff walk amongst death row prisoners to make rounds, deliver mail, conduct outside recreation, facilitate prison appointments to the hospital or visits, and monitor religious services. Staff also supervise meals, where at any one time up to 48 prisoners eat together in a chow hall. During and after the pandemic, there are only four guards for all of North Carolina’s death row.

Staff assigned to death row do not have a particular demeanor or background. Like other units in Central Prison, death row has a high staff turnover rate, little job satisfaction, and limited training.¹¹⁹ Low pay and poor management have translated into less cohesion and more backbiting among guards, as well as an inconsistent application of policy. Unlike the California Corrections Peace Officer Association, which is a dominant law enforcement entity that doubles as a political action committee, North Carolina prison guards have no union or political power and their paltry annual salary of \$37,000 reflects it.¹²⁰

Wages below the national average, systemic dysfunction, and the availability of better-paying, less dangerous employment¹²¹ give staff fewer reasons to invest

118. Nor are they fearful, as far as the prisoners can tell. It is worth noting that interviews with officers on one congregate death row revealed pervasive fears that officers went to lengths to hide. Tension and fear were rife among these death row officers. *See* JOHNSON, *DEATH WORK* (2d ed. 1998), *supra* note 5, at 109.

119. Personal experience of Lyle May; CAITLIN SAUNDERS, JOEL ROSCH, SUSAN KATZENELSON, MICHELLE LI & SYDNEY CURTIS, *IMPROVING STAFFING AND SECURITY IN NORTH CAROLINA PRISONS* (N.C. Governor’s Crime Comm’n for the N.C. Dep’t of Pub. Safety 2017), https://files.nc.gov/ncdps/documents/files/17.12.07%20FINAL_Crime%20Commission%20Prison%20Report.pdf [<https://perma.cc/9YPN-E8EK>].

120. Ames Alexander & Gavin Off, *Staff Shortages Leave NC Prisons ‘Stretched Very Thin,’* NEWS & OBSERVER (Raleigh, N.C.), Jan. 24, 2022 at 1A, 2A; Nigel Duara, Jeremia Kimelman, *Why California’s Prison Guard Union is Spending Like Never Before on Gavin Newsom*, CALMATTERS (July 15, 2024), <https://calmatters.org/justice/2024/07/ccpoa-gavin-newsom/> [<https://perma.cc/ZTE8-SYW2>].

121. *See id.*

in any particular beliefs about crime and punishment, even when it comes to executions. This lends to a great deal of variation in attitude toward the death penalty amongst ordinary and lower ranking guards. Executions are more uniformly supported by prison administrators, the warden, and unit management, from whose ranks the executioners are drawn.

The prison employees responsible for executing individuals on death row are called the “death squad.” In North Carolina, the death squad is comprised of Central Prison’s warden, deputy warden, support services manager (a captain who handles legal matters for Central Prison), death row’s unit manager, and a shift sergeant.¹²² They represent the state, sent to carry out the death warrant. The day a prisoner is removed from death row to be put on death watch, it is the death squad’s duty to escort the condemned. The act is largely symbolic — the warden and immediate subordinates might have fleeting interactions with a condemned prisoner, but never as a unified front where they represent the state government’s control over life and death. Symbols aside, these are North Carolina’s executioners, and when seen together evoke both fear and hatred amongst people on death row. Before taking away the condemned, the death squad allows time for good-byes. During this intimate moment, the prison staff stand aside, as if granting indulgences, an inescapable reminder they are carrying out the death sentence.

Death watch is a period when the condemned is confined in-cell for all but a 15-minute shower and final visits with attorneys and family. It typically lasts 72 hours prior to execution but can be longer. During this time the condemned wait in solitary confinement for a stay of execution, clemency, or their execution.¹²³ For people on death row, death watch days are periods of deep contemplation over their own uncertain fate. They envisage their own death squad escort, final visits, and tense conversations with loved ones. They voice disgust with courts and lawyers, and vow not to beg the governor — often a former attorney general — for clemency. Some will be relieved when the time comes, glad to be done with the fear, anxiety, uncertainty, and waiting. Others vow to go kicking, screaming, and fighting—though, demoralized by their ordeal, almost none resist. Many believe in the merits of their appeal but doubt the integrity of judges, many of whom are former prosecutors who are seen as congenitally unsympathetic to

122. Personal experience of Lyle May; N.C. DEP’T OF PUB. SAFETY, EXECUTION PROCEDURE MANUAL FOR SINGLE DRUG PROTOCOL (PENTOBARBITAL), <https://www.ncdps.gov/documents/files/execution-procedure-manual-single-drug-protocol-pentobarbital/open> [https://perma.cc/6BCP-L3RG] (last visited Mar. 18, 2024).

123. “[A] rigid, solitary-confinement regimen is imposed [on *all* condemned prisoners] during the death watch, **torturous punishments, not the arbitrariness of which** takes place in the final days and hours before an execution.[Thus, it can be said with confidence that] ‘it is *universally* the case that condemned prisoners on the threshold of execution live under conditions of close and restrictive solitary confinement, conditions that have changed little, if at all, from years past.’” Robert Johnson & Harmony Jovet, *Life Under Sentence of Death: Historical and Contemporary Perspectives*, in AMERICA’S EXPERIMENT WITH CAPITAL PUNISHMENT: REFLECTIONS ON THE PAST, PRESENT, AND FUTURE OF THE ULTIMATE PENAL SANCTION, 661, 669 (J. R. Acker, R. M. Bohm, & C. S. Lanier eds., 3rd ed. 2014).

defense claims. For those who medicate themselves to endure their daily confinement and to block out the threat of execution that hangs over their lives, there will always be some reminder of doom: thoughts of executed friends, stories in the media, conversations with appellate attorneys, failed appeals, questions from friends or family, comments from guards, and even the plethora of crime dramas on TV. The most inevitable, inescapable aspect of a death sentence is the contemplation of one's own execution and the subsequent mental anguish it causes.

The day of an execution, the primary author knows firsthand, is heavy on death row, fraught with anxiety and dread.¹²⁴ Many prisoners remain in their cells, though it is not required. Others seek out company and attempt to engage in ordinary activities. Some constantly monitor the TV and radio for news of a rare stay of execution or an even rarer grant of clemency. It is difficult to concentrate on anything, or eat, especially because of the executioner's meal, a dark ritual all its own. This meal, easily visible to many prisoners on death row, is seen as a collective psychological assault by staff that plays on the torment of an imminent execution by commemorating it with a celebratory public meal, open to all staff involved in any way with executions. The meal is held in the break room across from the sergeant's office. Two large plexiglass windows allow enough light into the room for passersby to see two long folding tables arranged with a picnic-like feast: paper plates, solo cups, plastic eating utensils, a variety of two-liter sodas, family-sized bags of chips, trays of plastic-wrapped cheese, crackers, and cookies, and in the middle of this display, a large, colorfully decorated sheet cake. The spread of food, reminiscent of a party is better than anything served in the prison chow hall and can be seen by everyone on death row. Every execution has a different spread of food with another colorfully frosted cake. Claims that this is not a celebratory meal, just food for extra guards working the execution shift, are transparently false in the eyes of the prisoners.

V.

THE DEATH PENALTY VIOLATES HUMAN DIGNITY BECAUSE IT IS OBJECTIVELY DEHUMANIZING

A close examination of the execution process—from death row through to the death house—lays the groundwork to support the claim that the death penalty is an objectively dehumanizing punishment. This argument finds support in legal opinions and social science research. In his concurring opinion in *Furman v. Georgia*, Justice Brennan wrote:

124. Time on death row, as one condemned prisoner explained, has a heaviness unknown to civilians. “[W]hen you go through life out there, time is like air to you. You breathe it in, and you breathe it out; it passes through you, and you sort of pass through time. But when you’re here and it’s final . . . time doesn’t go anywhere. It comes and it stops. It builds up inside, and it’s actually like a weight after a while . . . you almost literally feel it crushing you when you wake up.” LIGHT & DONOVAN, *supra* note 20, at 14.

[T]he Cruel and Unusual Punishments Clause prohibits the infliction of uncivilized and inhuman punishments. The State, even as it punishes, must treat its members with respect for their intrinsic worth as human beings. A punishment is ‘cruel and unusual,’ therefore, if it does not comport with human dignity.¹²⁵

Brennan concluded that the death penalty does not comport with human dignity because “Death is an unusually severe and degrading punishment.”¹²⁶ The severity of the death penalty is self-evident. In death, we are reduced to inert bodies, inanimate objects in the full sense of the term. A death sentence violates the “intrinsic worth” of condemned prisoners by reducing them to objects in the execution process, a notion captured in the widespread view shared by death row inmates that they are “the living dead”—alive as bodies but dead as persons as a result of the pressures of living under the threat of execution.¹²⁷ Condemned prisoners are dehumanized by their sentence and characterization on death row as no more than chattel awaiting disposal. In their experience, confinement on death row amounts to a “living death” that, as Brennan anticipated, violates their intrinsic worth and human dignity.

For our purposes, respecting the intrinsic worth of condemned prisoners means treating them like human beings and not like animals or objects. Treating condemned prisoners like human beings means respecting their bodily and personal integrity. Our bodies are the physical vessels for us as persons. In the case of the death penalty, where bodies are stored in secure environments awaiting execution, condemned prisoners retain the right to conditions of storage that do not harm or compromise their physical or personal integrity. Conditions like solitary confinement impose stresses that typically result in psychological harm, as we have noted; these stresses also entail physical harm.¹²⁸ The threat of

125. *Furman v. Georgia*, 408 U.S. 238, 270 (1972)(Brennan, J., concurring).

126. *Id.* at 305 (Brennan, J., concurring).

127. See JOHNSON, CONDEMNED TO DIE (2d ed. 2019), *supra* note 5, at 88–103; see generally Johnson & Whitbread, *supra* note 10.

128. See Johnson, *supra* note 7, at 1228.

Any experience of torment—or indeed, stress—will necessarily merge physical and psychological elements: emotional pain (sometimes called ‘social’ or ‘psychological’ pain), such as occurs in the wake of social exclusion or personal rejection, ‘activates the same brain regions as physical pain.’ Physical pain brings with it a psychological component and indeed the reverse is true as well: psychological pain brings with it a physical component.

Id. (internal citations omitted). That said, it is nevertheless true that:

Some of the elements of life on death row that highlight one’s vulnerability are physical. The prisoner is alone in a cage, physically constrained and, like the proverbial sitting duck, defenseless against insult or attack in an environment in which they are under the total control of officers, some of whom, in the words of one condemned prisoner,

execution, separate and apart from conditions of confinement, produces anxiety and fear, which entail stresses that undermine bodily and personal integrity. Our personhood, which gives human beings intrinsic worth, hinges on the uniquely human capacity for autonomy, which in turn marks us as moral beings whose capacity for choice is unique and must be respected within the limits of the prison context. Likewise, essential to personhood is some modicum of security in our daily lives and some level of connection to other human beings (given our intrinsically social natures). Normally, the exercise of autonomy and connection in hospitable environments promotes efforts to grow as a person, to find meaning in one's existence, and to maintain hope for a life worth living. By contrast, placing people in harmful physical and psychological conditions like those found on death row—featuring profound and unavoidable personal coercion, the credible threat of lethal violence in the form of execution, all of this endured in relative isolation from others—impedes and often prevents personal growth. Thus, life under the sentence of death, following Brennan, necessarily entails conditions and experiences that violate the intrinsic worth that marks us as human beings. Punishments like the death penalty, which degrade bodies and disregard or disrespect personal integrity, are cruel, as Justice Brennan has noted, because they undermine, and in many cases obviate human dignity.

Johnson's interviews with individuals on Alabama's solitary confinement death row support the claim that living under a sentence of death is a concerted threat to human dignity.¹²⁹ Those living under a sentence of death are stripped of the normal supports for personal identity and, as fears of execution grow, "rob[bed] . . . of the ability to function in any reasoned or self-possessed way."¹³⁰ Feelings of dehumanization, powerlessness, and emotional emptiness or emotional death were widespread among Alabama's condemned. These themes, derived from Johnson's interviews, are the antithesis of autonomy, security, and relatedness to other human beings, core elements of human dignity. In Johnson's research, it was clear that living under a sentence of death was a threat to the conditions necessary to support and preserve human dignity.¹³¹

Johnson contends that regardless of whether they are housed in a solitary or congregate death row, "all condemned prisoners are warehoused for death under conditions that are objectively dehumanizing."¹³² He writes, "The death row confinement regime, whatever its details, offers no life to speak of, only an

'take it upon themselves to be your judge and your jury and your executioner.' When moved from that cage, the prisoner is typically stripped and searched, then heavily (and often painfully) restrained in handcuffs and leg irons that chaff and bruise and cut the skin in varying degrees. Even medical care can be a painful and degrading routine for condemned prisoners.

Id. at 1229–30 (internal citations omitted).

129. See generally JOHNSON, CONDEMNED TO DIE (2d ed. 2019), *supra* note 5.

130. Dolovich, *supra* note 16, at 916.

131. See generally JOHNSON, CONDEMNED TO DIE (2d ed. 2019), *supra* note 5.

132. *Id.* at 114.

isolated world largely devoid of purpose or meaning other than waiting for the executioner.”¹³³ Note that, in existential philosophy, a life of waiting with no capacity for action is an exercise in meaninglessness in which one is the plaything of time and fate.¹³⁴ In his *Furman* opinion, Brennan explained why certain punishments violate the Eighth Amendment in a way that touches on these themes. He wrote:

The true significance of these punishments is that they treat members of the human race as nonhumans, as **objects to be toyed with and discarded**. They are thus inconsistent with the fundamental premise of the Clause that even the vilest criminal remains a human being possessed of common human dignity.¹³⁵ (emphasis added)

People on death row are, indeed, treated like objects or animals—mere entities to be “toyed with and discarded”—not human beings “possessed of common human dignity.”¹³⁶ They are toyed with to the point that they emerge, almost without exception, as shells of human beings who go to their executions passively, described by one experienced executioner as “humble men,” which is to say, men humbled by the dehumanizing forces at work on death row and in the death house.¹³⁷

Death row prisoners in Johnson’s study of Alabama’s death row described their existence as a “living death”¹³⁸ rendering them alive as bodies but dead or dying as persons.¹³⁹ To be sure, some resist these pernicious pressures, and others grow in the face of this adversity; witness the adaptation of the primary author of this essay. That said, growth in the face of lethal threat can be found even in the extreme situation of the Nazi death camp, an undisputedly torturous regime of confinement utterly incompatible with the “intrinsic worth” and “human dignity” of their inhabitants.¹⁴⁰ Nevertheless, exceptions aside, the great majority of men and women on death row are worn down to the point of feeling as if they are dead or dying as human beings. Willie Turner, a former resident of Virginia’s death row describes his experience:

I’ve spent over 5000 days on death row. Not a single waking hour of any of those days has gone by without me thinking about my

133. *Id.*

134. This is the central theme of Samuel Beckett’s iconic play, *Waiting for Godot*.

135. JOHNSON, CONDEMNED TO DIE (2d ed. 2019), *supra* note 5, at 272–73.

136. *See generally* Johnson, *supra* note 10.

137. JOHNSON, DEATH WORK (2d ed. 1998), *supra* note 5.

138. JOHNSON, CONDEMNED TO DIE (2d ed. 2019), *supra* note 5.

139. *Id.*

140. *See generally*, TERRENCE DES PRES, THE SURVIVOR: AN ANATOMY OF LIFE IN THE DEATH CAMPS (1976).

date with the executioner All that thinking about it is like a little dying, even if you're on the best death row on earth.¹⁴¹

Thus, regardless of specific conditions of confinement, a slow death, unfolding day by day, gradually threatens to dehumanize condemned prisoners. The objectively dehumanizing conditions of life under the threat of death are an inevitable part of living under a sentence of death, making the death penalty unconstitutional.

The ongoing crucible of dehumanization in the face of the death penalty is a product of regimes that embody the threat of death and are imposed on death row prisoners year after year. Individuals spend decades on death row waiting to die, yet they are not provided with any resources or guidance to help them prepare for their death, let alone prepare for a death by what is, quite simply, a homicide perpetrated by the state.¹⁴² The sheer, unadorned fact of storage for death by homicide makes the death penalty a dehumanizing punishment.¹⁴³

The notion of storage for death reaches its zenith in the death watch, an intense period of solitary confinement leading up to the executions. It is our understanding that all executions are preceded by a death watch marked by intense solitary confinement, even on death rows that otherwise offer congregate confinement for the daily death row regime. Johnson describes the death watch he observed as “A rigid, solitary confinement regimen marked by constant and unremitting surveillance.”¹⁴⁴ Condemned prisoners, he observed, are by this juncture “more dead than alive; they offer no resistance, instead following the execution script in every morbid detail.”¹⁴⁵ Many prisoners on the threshold of execution thank their executioners—who are ready and willing to kill them in the next few hours—for serving them a last meal; here we see “sheer, unadulterated, servile submissiveness” and a mortifying lack of human dignity as the true nature of the death penalty—the killing of a now-helpless person—becomes clear.¹⁴⁶ The stark dehumanization of prisoners on the edge of their personal extinction can rightly be seen “as the culmination of instruments of authority acting within stipulated routines on condemned prisoners rendered as dehumanized entities to be stored and ultimately dispatched in the execution chamber”¹⁴⁷

VI.

LIVING UNDER A SENTENCE OF DEATH IS PSYCHOLOGICAL TORTURE

In common parlance, torture is often thought of as limited to an assault on the body, entailing physical harms of great cruelty. However, in his article,

141. JOHNSON, CONDEMNED TO DIE (2d ed. 2019), *supra* note 5, at 37.

142. *Id.* at 124–126.

143. JOHNSON, CONDEMNED TO DIE (2d ed. 2019), *supra* note 5, at 126.

144. *Id.* at 126–27.

145. JOHNSON, *supra* note 10, at 591.

146. *Id.*

147. JOHNSON, CONDEMNED TO DIE (2d ed. 2019), *supra* note 5, at 123.

Taking Psychological Torture Seriously, John Bessler explains that “[t]he modern definition of torture makes clear that torture can be either physical or psychological in nature.”¹⁴⁸ We agree with John Bessler’s argument that the dehumanization inherent in living under the threat of death by execution is necessarily a case of psychological torture.¹⁴⁹ Torture reflects not only the enormity of mistreatment in itself—here, the fact that one is slated to be killed in cold blood—but by the added anxiety created by uncertainty and dread. An anxious anticipation eats away at condemned prisoners. Will I be killed? When will I be killed? What will I experience? How will I comport myself? How will my loved ones be affected by my shameful demise, strapped to a gurney or chair, helpless, for all witnesses to see? These fears are but the beginning of the “relentless anticipation of death” accumulated over the course of years of confinement under sentence of death, the result of “countless degradations big and small” that erode the sanity and will to live of condemned prisoners, ultimately “rendering them docile objects of execution.”¹⁵⁰ One individual in Jackson and Christian’s study described this phenomenon: “You know, day by day, regardless of what you do, it’s always there in the back of your mind: ‘Hey, you on death row. You could be executed. They could kill you.’”¹⁵¹ Johnson and Whitbread explain that “[s]imply being sent to death row is arguably like ‘suffering a small death’ in the face of ‘the awesome omnipresence’ of cold-blooded executions.”¹⁵²

Ethnographic research on death row suggests that “[t]o live under the threat of death by execution is more painful to many than death itself.”¹⁵³ This is apparent in the words of one long-term death row prisoner:

It’s the unending, uninterrupted immersion in death that wears on you so much. It’s the parade of friends and acquaintances who leave for the death house and never come back, while your own desperate and lonely time drains away. It’s the boring routine of claustrophobic confinement, punctuated by eye-opening dates with death that you helplessly hope will be averted. It’s watching yourself die over the years in the eyes of family and friends, who, with every lost appeal, add to the emotional scar tissue that protects them . . . from your death, long before you’re gone.¹⁵⁴

148. Bessler, *Taking Psychological Torture Seriously*, *supra* note 3, at 3 (emphasis omitted); *see also* JOHNSON, *CONDEMNED TO DIE* (2d ed. 2019), *supra* note 5, at 116 (arguing that there is no meaningful difference between psychological and physical torment).

149. Bessler, *Taking Psychological Torture Seriously*, *supra* note 3, at 63–64.

150. Johnson & Whitbread, *supra* note 10, at 86.

151. BRUCE JACKSON & DIANE CHRISTIAN, *IN THIS TIMELESS TIME: LIVING AND DYING ON DEATH ROW IN AMERICA* 74 (2012).

152. Johnson & Whitbread, *supra* note 10, at 84 (quoting JOHNSON, *DEATH WORK* (2d ed. 1998), *supra* note 5, at 10).

153. *Id.*

154. *Id.* (quoting Petition for Writ of Habeas Corpus at 58, *Turner v. Jabe*, 58 F.3d 924 (4th Cir. 1995) (No. 95-4005)).

This “unending, uninterrupted immersion in death,” Johnson and Whitbread tell us, “means that every day on death row is a nightmare version of the day before and the day to come [...] a ‘redundant experience of failure and rejection—of being powerless to effect change, cut off from supportive human contact, vulnerable to others in a world where people want you dead.’”¹⁵⁵ This led Johnson to the conclusion that “each day the condemned are a little more dead—more like passive objects and less like autonomous beings—than the day before.”¹⁵⁶ Suffering magnified by pervasive daily uncertainty is arguably “inhuman and barbarous,” making a death sentence unconstitutional and in violation of international law.

A. *Uncertainty of Death*

The Supreme Court held decades ago in *Trop v. Dulles* that the punishment of taking away an individual’s citizenship constitutes cruel and unusual punishment.¹⁵⁷ In explaining why this punishment is unconstitutional, the Court stated:

This punishment is offensive to cardinal principles for which the Constitution stands. It subjects the individual to a fate of ever-increasing fear and distress. He knows not what discriminations may be established against him, what proscriptions may be directed against him, and when and for what cause his existence in his native land may be terminated.¹⁵⁸

Indeed, Justice Brennan cited *Trop* in his concurrence in *Furman*, stating, “The ‘fate of ever-increasing fear and distress’ to which the expatriate is subjected can only exist to a greater degree for a person confined in prison awaiting death.”¹⁵⁹ Brennan’s point is especially true today due to the arbitrariness of the appellate process, which results in a high rate of re-sentencing of condemned prisoners to life or other lesser sentences,¹⁶⁰ and the length of time between sentence

155. *Id.* (citing JOHNSON, *DEATH WORK* (2d ed. 1998), *supra* note 5, at 85).

156. JOHNSON, *DEATH WORK* (2d ed. 1998), *supra* note 5, at 96.

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

158. *Id.* at 103.

159. *Furman v. Georgia*, 408 U.S. 238, 289 (1972) (Brennan, J., concurring) (citing *Trop v. Dulles*, 356 U.S. 86 (1958)).

160. In the U.S., 16 to 25 percent of death sentenced prisoners from 1973 to 2013 were executed (depending on the population examined). BAUMGARTNER, DAVIDSON, JOHNSON, KRISHNAMURTHY & WILSON, *DEADLY JUSTICE*, *supra* note 78, at 145. In North Carolina, from 1977 to 2014, 401 people were sentenced to death, with 249 sentences being final. Out of those individuals whose sentences were finalized, most were later resentenced to life in prison (153), terms of confinement less than life in prison (10), or were exonerated (8). Of those who remained on death row, 43 were executed (17%), 24 died of natural causes, and six committed suicide. *Id.*

declaration and actual execution in cases in which executions are carried out.¹⁶¹ From the point of view of condemned prisoners, the appellate process resembles a lottery; people are selected for different outcomes—execution, life, a term of years—for reasons that seem completely arbitrary to their non-legal minds (and perhaps to legal minds as well), as if the names of cases and associated outcomes are drawn out of a hat. For them, the uncertain yet persistent reality of the threat of execution is the source of substantial pain and suffering that adds to the experience of psychological torture.

It is not uncommon for an execution to occur decades after a prisoner was sentenced. In *Lackey v. Texas*, the U.S. Supreme Court denied certiorari where the defendant claimed that his uncertain fate and prolonged wait on death row violated the Eighth Amendment.¹⁶² Lackey argued that, after a 16-year delay, executing him held no deterrent value, served no penological interest, and would be cruel and unusual punishment because of the extended psychological agony such delays entail.¹⁶³ He added that it was necessary to consider responsibility for the delay when, even as he exercised his right to appeal, the State engaged in purposeful delay.¹⁶⁴ The Court denied Lackey's claim and he was executed two years later.¹⁶⁵

Lackey was unsuccessful, but the issues raised in that case are still in play. Justice Stephen Breyer, in his dissent in *Glossip v. Gross*,¹⁶⁶ cited to Justice John Paul Stevens's denial of certiorari in *Lackey*,¹⁶⁷ and other cases such as *Baze v. Rees*.¹⁶⁸ Justice Breyer pointed out the inhumane conditions of confinement faced by people on death row were not just about the suffering produced by harsh conditions of confinement but also the suffering brought on by the duration of confinement.¹⁶⁹ Breyer wrote:

In 1890, this Court recognized that “when 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.” The Court was there *describing a delay of a mere four weeks*. In the past century and a quarter, little has changed in this respect—except for duration. Today we must describe delays measure not in weeks but in decades.¹⁷⁰

161. *Time on Death Row*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/death-row/death-row-time-on-death-row> [<https://perma.cc/A8PK-L3FE>] (last visited Mar. 19, 2024).

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

163. BAUMGARTNER DAVIDSON, JOHNSON, KRISHNAMURTHY & WILSON, *supra* note 78, at 158.

164. *Id.*

165. *Id.*

166. *Glossip v. Gross*, 576 U.S. 863, 908–46 (2015)(Breyer, J., dissenting).

167. *Id.* at 925.

168. *Id.* at 931 (Breyer, J., dissenting).

169. *Id.* at 925–29 (Breyer, J., dissenting).

170. *Id.* at 926–27 (Breyer, J., dissenting)(quoting *In re Medley*, 134 U.S. 160,172 (1890)).

Prolonged confinement under the harsh conditions on death row resulting in psychological trauma are the core elements composing the “death row phenomenon,” a conceptualization of life under sentence of death that concludes there is a human right to not be “subjected to torture.”¹⁷¹ Introduced by the European Court of Human Rights in *Soering v. United Kingdom*, where the Court denied an extradition order from the United States because of the likelihood the man sought would experience the “death row phenomenon” in the prolonged and uncertain wait for his execution while in solitary confinement.¹⁷² The term death row phenomenon would later become interchangeably used with the term death row syndrome, which exclusively focuses on the psychological trauma of solitary confinement of condemned prisoners. The European Court of Human Rights, United Nations Human Rights Committee, and Judicial Committee of the Privy Council of the United Kingdom hold that the death row phenomenon and associated psychological trauma are a breach of the human right not to be tortured or subjected to inhuman treatment.¹⁷³

In *Jones v. Chappell*, Judge Cormac Carney of California found the state’s death penalty system to be unconstitutional.¹⁷⁴ Judge Carney “ruled that if a legislature passed a law specifying first a 20-year wait on death row, and second a small percentage of inmates to be selected randomly for execution, that this would be ruled unconstitutional on its face.”¹⁷⁵ According to Judge Carney, “[T]he dysfunctional administration of California’s death penalty system has resulted, and will continue to result, in an inordinate and unpredictable period of delay,” and such “delay has made their execution so unlikely that the death sentence carefully and deliberately imposed by the jury has been quietly transformed into one no rational jury could ever impose: *life in prison, with the remote possibility of death*” by execution.¹⁷⁶ Though the U.S. Supreme Court reversed Jones on procedural grounds, it did not “disavow the thrust of the district court [Judge Carney’s] reasoning.”¹⁷⁷ This reasoning, we hasten to add, would apply with equal force to all death penalty jurisdictions, not just that of California.

In fact, California Governor Gavin Newsom is moving some death row residents to other maximum-security facilities where they will live and work like

171. *Soering v. United Kingdom*, 161 Eur. Ct. H.R. (1989).

172. *Id.*

173. Olga Hempel, *Death Row Phenomenon: A Fate Worse than Death: Torture on Death Row from Psychological and Legal Perspective* 37–39 (2016) (Master’s thesis, University of Vienna).

174. *Jones v. Chappell*, 31 F. Supp. 3d. 1050, 1069 (C.D. Cal. 2014).

175. BAUMGARTNER, DAVIDSON, JOHNSON, KRISHNAMURTHY & WILSON, *supra* note 78, at 160.

176. *Jones v. Chappell*, 31 F. Supp. 3d. at 1053.

177. CAROL S. STEIKER & JORDAN M. STEIKER, *COURTING DEATH: THE SUPREME COURT AND CAPITAL PUNISHMENT* 151 (2016).

other prisoners.¹⁷⁸ California, like North Carolina, has not executed anyone since 2006.¹⁷⁹ Also, like North Carolina, the state still has the death penalty on the books and warehouses people sentenced to die (now in maximum-security prisons rather than a formal death row setting).¹⁸⁰ For individuals sentenced to die in North Carolina and California prisons, their death sentences remain a lingering threat that may or may not be carried out and a constant source of anxiety and dread.

Accounts from Alabama's death row demonstrate how constant the threat of death is on individuals housed on death row. One individual on death row stated, "My main worry is about being here and not knowing if I'm going to come out of it alive."¹⁸¹ Another provided a harrowing account of the psychological turmoil he endures whenever he thinks about his fate:

When that sentence comes across my mind, that brings quite a bit of fear. It brings quite a bit of fear and worry, you know . . . [c]auses the person to pace back and forth, become nervous, you know. Can't sit down. It's hard for such a person to sleep. This happens to me at times. . . . [T]he fact that my sentence might not be commuted or the death penalty might not be thrown out. This causes me to grow nervous. Can't sleep. You are full of anxiety and really it's insanity.¹⁸²

Sister Helen Prejean has described the nightmares endured by individuals she counseled on several death rows. She explained:

Now imagine anticipating your scheduled appointment to be put to death. The six people that I've accompanied onto death row all had the same nightmare. The guards were dragging them from their cells. They cry for help and struggle. Then they wake up and realize that they are still in their cells. They realize it's just a dream. But they know that one day the guards are really going to come for them, and it won't be a dream.¹⁸³

178. Eric Westervelt, *California Says it Will Dismantle Death Row. The Move Brings Cheers and Anger*, N.P.R. (Jan. 13, 2023, 5:01 AM), <https://www.npr.org/2023/01/13/1148846720/california-says-it-will-dismantle-death-row-the-move-brings-cheers-and-anger> [<https://perma.cc/TQ9H-JDRF>].

179. *Id.*

180. *Id.*

181. JOHNSON, CONDEMNED TO DIE (2d ed. 2019), *supra* note 5, at 84.

182. *Id.* at 72.

183. Phillip Morris, *Sentenced to Death, but Innocent: These are Stories of Justice Gone Wrong*, NAT'L GEOGRAPHIC (Feb. 18, 2021), <https://www.nationalgeographic.com/history/article/sentenced-to-death-but-innocent-these-are-stories-of-justice-gone-wrong> [<https://perma.cc/A8KK-HD8V>].

Likewise, accounts from a wide range of confinement regimes reveal the presence of a pernicious anxiety and dread in the face of uncertain executions, referred to by North Carolina death row prisoner George Wilkerson as “the rumblings of our own death sentences” in the background of everyday activities on death row, “sealed in / by concrete, steel, and Plexiglass.”¹⁸⁴ First-hand accounts of life under sentence of death leave no doubt in one’s mind that the uncertainty of the time of death permeates the minds of condemned individuals, independent of the specific conditions of their confinement and associated fears for one’s daily safety,¹⁸⁵ and thus makes torture a continuing part of the modern death sentence.¹⁸⁶

B. Death Sentences as Death Threats

Condemned prisoners live with “continuing and substantial fear and anxiety” from the threat of execution; this entails mental and emotional pain specific to a death sentence and not found with any other type of prison term.¹⁸⁷ Whereas solitary confinement carries the additional pains of acute isolation and physical deterioration, and execution methods each threaten a specific form of physical torment, all forms of confinement and methods of execution bring in their wake the psychological torture created by the threat of state-sanctioned homicide.¹⁸⁸

There is substantial neuropsychiatric evidence that the prolonged threat of death is deeply traumatic and damages the ability to resist stress, anxiety, or suicidal ideation. In fact, suicide rates on death row are higher than suicide rates in the general prison population.¹⁸⁹ Possibly the greatest indicator of psychological torture outside of behavioral dysfunction and cognitive decay is when a prisoner who claims innocence pursues execution when hope of relief dwindles. Justice Breyer’s dissent in *Glossip* mentioned one death row prisoner, who was eventually exonerated, “would have preferred to die rather than spend years on death row pursuing exoneration.”¹⁹⁰

When a death sentence is pronounced, it is the promise of a state-sanctioned homicide. A death sentence announces the State’s intent to see the defendant dead at the hands of state actors. A death sentence is a statement of an

184. WILKERSON & JOHNSON, *supra* note 2, at 73.

185. See KATYA LEZIN, FINDING LIFE ON DEATH ROW: PROFILES OF SIX INMATES 151 (1999) (“[E]very death row inmate lives each day wondering how much longer he has to live.”); Johnson & Whitbread, *supra* note 10, at 82 (“On death row, offenders fear for their sanity, safety, and everything in between.”).

186. See generally Robert Johnson & Jacqueline Lantsman, *A Qualitative Analysis of Mental Health Issues Found in Death Row Inmate Blog Entries*, 101 PRISON J. 147 (2021).

187. JOHNSON, CONDEMNED TO DIE (2d ed. 2019), *supra* note 5, at 6, 117.

188. *Id.* at 6.

189. Christine Tartaro & David Lester, *Suicide on Death Row*, 61 J. FORENSIC SCI. 1656, 1657 (2016).

190. *Glossip v. Gross*, 576 U.S. 863, 928 (2015) (Breyer, J., dissenting).

intention to kill that is chillingly comparable to a statement by a citizen who makes a death threat announcing his or her intention to commit premeditated murder. In his article, *Taking Psychological Torture Seriously*, John Bessler explains that killings that involve death threats and a lingering death are aggravating circumstances that can turn a homicide offense into a capital crime.¹⁹¹ Under North Carolina’s capital sentencing statute, a murder that is “especially heinous, atrocious, or cruel”¹⁹² is an aggravating circumstance that can warrant a death sentence. Indeed, in *State of North Carolina v. Mancuso* (1988), the North Carolina Supreme Court found a murder to be “especially heinous, atrocious, and cruel” due to the delay between the threat of death and length of time it took the victim to die.¹⁹³ The Court has also held that a murder can be “especially heinous, atrocious, and cruel” if it “involve[s] infliction of psychological torture by leaving the victim in his last moments aware of but helpless to prevent impending death.”¹⁹⁴ If the threat of death and subsequent psychological torture is sufficient for a finding that an act is “especially heinous, atrocious, and cruel” when handing down a death sentence for first-degree murder, then the threat of execution and the subsequent psychological torture on death row as a result of delay should be sufficient for a finding of cruel and unusual in violation of the Eighth Amendment.¹⁹⁵

Death threats become even more real when prison officials perform tests on execution equipment, or even worse—when individuals on death row become witnesses to executions. Many individuals on death row have been in proximity to the testing of electric chairs, some in preparation for their own execution.¹⁹⁶ Jeremy Busby, who is imprisoned at the Texas prison where executions take place, and not himself sentenced to death, describes the nightmares he experienced the days leading up to one of many executions he has lived through during his confinement: “But the past three nights, I’d endured nightmares of being snatched from my cell by a goon squad and unceremoniously strapped to the

191. Bessler, *Taking Psychological Torture Seriously*, *supra* note 3, at 72–78.

192. N.C. GEN. STAT. § 15A-2000(e)(9) (West 2023).

193. *State v. Mancuso*, 364 S.E.2d 359, 361–62 (N.C. 1988).

194. *State v. Hamlet*, 321 S.E.2d 837, 846 (N.C. 1984) (citing *State v. Oliver*, 307 S.E.2d 304 (N.C. 1983)); see Bessler, *Taking Psychological Torture Seriously*, *supra* note 3, at 72–78 (discussing findings of psychological torture in state court cases, including “especially heinous, atrocious, and cruel” homicides.).

195. See Bessler, *Taking Psychological Torture Seriously*, *supra* note 3, at 78.

196. Sydney P. Freedburg, ‘Yes, I’m angry...Yes, I’m bitter. I’m Frustrated,’ ST. PETERSBURG TIMES (July 4, 1999), <https://deathpenaltyinfo.org/stories/yes-im-angry-yes-im-bitter-im-frustrated> [<https://perma.cc/PBY9-K465>] (Discussing death row exoneree Joseph Green Brown’s experiences with executions on Florida’s death row and testing of the electric chair for his own execution: “technicians in Florida’s death house made him listen as they tested the electric chair in which they were about to kill him. Twice a day, he heard the lightning-like noise from his death watch cell, 30 feet away.”).

death gurney.”¹⁹⁷ Busby also explains the psychological repercussions of where he is housed: “Being incarcerated at the prison that carried out the death penalty had clearly penetrated my soul. It was as though a small part me died with each execution”¹⁹⁸ Bearing witness to several executions left Bugsby dying psychologically, even though he was not legally serving a death sentence. Note that psychological trauma is a consideration with all persons associated with executions, from witnesses to members of the execution team.¹⁹⁹

The most imminent death threat occurs when an individual is actually strapped into an electric chair or onto a gurney. Several individuals on death row have made it this far into the killing process, only to survive it. For example, in Georgia, a stay of execution was granted for Warren Hill as he laid on a gurney, awaiting a lethal injection.²⁰⁰ Imagine such a torturous experience: an individual has an execution date set, is moved to death watch for a last meal and final visit with family and friends, then receives a stay of execution, has another execution date set, and goes through the process again in what amounts to a mock execution because the prisoner has exercised his or her right to due process.²⁰¹ In 2022, Alabama failed in its attempts to execute Alan Miller and Kenny Smith.²⁰² Both individuals were strapped on a gurney while multiple needles were inserted into their bodies in an attempt to kill them, but executioners ultimately could not find suitable veins.²⁰³ After these failed executions, one man on Alabama’s death row stated “You have the same officers that have botched these executions – the same ones that’s on the death squad – walk around us every day, smiling in our faces. It’s emotional. It’s overwhelming.”²⁰⁴ It is undisputable that these

197. Jeremy Busby, *The Death Chamber Next Door*, MARSHALL PROJECT (Apr. 25, 2019), <https://www.themarshallproject.org/2019/04/25/the-death-chamber-next-door> [<https://perma.cc/4XWK-9N55>].

198. *Id.*

199. See generally Casey Chiappetta & Robert Johnson, “*It’s Not Gonna Leave Any Scars*”: *Trauma and Coping Among Execution Team Members*, 101 PRISON J. 379 (2021).

200. Rania Khalek, *The Death Row Torture of Warren Hill*, NATION (Aug. 14, 2013), <https://www.thenation.com/article/archive/death-row-torture-warren-hill/> [<https://perma.cc/PL6V-BLZ3>].

201. BAUMGARTNER, DAVIDSON, JOHNSON, KRISHNAMURTHY & WILSON, *supra* note 78, at 216. Last minute stays are seen by some condemned prisoners such as Lambrix as “an undeniable psychological trauma inflicted upon the condemned through a process that only too often brings us to that very edge of death’s door, only to then ‘stay’ the execution and put you in indefinite limbo as you await word of whether you will live or die.” (emphasis added). Why, he wonders, is this “psychological torture” ignored? Michael Lambrix, *Death Watch Journal (part 13)*, DEATH ROW JOURNALS (Mar. 16, 2016), <http://deathrowjournals.blogspot.com/2016/03/> [<https://perma.cc/GM46-5BVB>]; See generally Johnson & Lantsman, *supra* note 186.

202. Lee Hedgepeth, *Almost Thanksgiving: Men on Death Row Reflect on Alabama Execution Moratorium*, CBS42 (Nov. 25, 2022), <https://www.cbs42.com/news/death-penalty/almost-thanksgiving-death-row-inmates-reflect-on-alabama-execution-moratorium/> [<https://perma.cc/U555-KRSC>].

203. *Id.*

204. *Id.*

attempted killings and the mental anguish endured afterward are instances of extreme psychological torture.

In 2014, a Senate report revealed the United States engaged in psychological torture and mock executions overseas.²⁰⁵ The report stated that “The CIA led several detainees to believe they would never be allowed to leave CIA custody alive, suggesting to one detainee that he would only leave in a coffin-shaped box.”²⁰⁶ These actions by the CIA were condemned, but the same actions take place on a regular basis on America’s death rows.

VII.

THE TORTUROUS NATURE OF THE MODERN DEATH PENALTY

In *Glossip v. Gross*, the United States Supreme Court ruled on the constitutionality of using certain lethal injection drugs.²⁰⁷ Justice Antonin Scalia’s concurring opinion contended that the Eighth Amendment “was understood to bar only those punishments that added ‘terror, pain, or disgrace’ to an otherwise permissible capital sentence.”²⁰⁸ This view is central to the originalist support for the constitutionality of the death penalty. However, terror, pain, and disgrace are indeed characteristics of modern death sentences, as we have established here. Justice Scalia once stated the Eighth Amendment is meant to address “‘cruel’ punishments, such as the rack and the thumbscrew.”²⁰⁹ The Eighth Amendment, in other words, should address physically torturous punishments, not the arbitrariness of who receives the sentence, the time it takes to carry out an execution, or the rarity of the sentence (concerns raised by Justice Breyer in his *Glossip* dissent).²¹⁰ But, in *Furman*, Chief Justice Burger explained that “[t]he standard of extreme cruelty is not merely descriptive, but necessarily embodies a moral judgment. The standard itself remains the same, but its applicability must change as the basic mores of society change.”²¹¹ Today, “the rack and the thumbscrew” have been replaced with years of painful contemplation of one’s demise by way of modern but painfully flawed technology, as best illustrated today in recurring botched executions by lethal injection.²¹² Botched executions, however, are merely a portion of submerged pain. Pain, even great pain, is likely present in the very experience of the lethal injection itself—an extended experience of

205. S. Rep. No. 113–288 (2014), at 56.

206. *Id.* at xiii.

207. *Glossip v. Gross*, 576 U.S. 863 (2015).

208. *Id.* at 894 (Scalia, J., concurring) (internal citations omitted).

209. *Atkins v. Virginia*, 536 U.S. 304, 349 (2002) (Scalia, J., dissenting).

210. Critiquing Justice Breyer’s dissenting opinion, Justice Scalia asserted, “Rather than bother with this troubling detail, Justice Breyer elects to contort the constitutional text. Redefining ‘cruel’ to mean ‘unreliable,’ ‘arbitrary’ or causing ‘excessive delays, and ‘unusual’ to include a ‘decline in use.’” *Glossip*, 576 U.S. at 895 (Scalia, J., concurring).

211. *Furman*, 408 U.S. at 382 (Burger, C.J., dissenting).

212. SARAT, *supra* note 114, at 128 (2014).

suffocation—obscured from view by paralytic drugs and contained by the straps used to firmly affix bodies to the gurney.²¹³

As a centuries-old document, the U.S. Constitution is bound to change with judicial and legislative interpretation. The Bill of Rights and later amendments were written after the original document to interpret the function and organization of American society. As such, claims to “originalist” interpretations of the Constitution should support an evolved understanding of the law since they are rooted in a Constitution that was itself, from the beginning, an evolving understanding of the law. However, even if the United States Supreme Court does not declare the death penalty unconstitutional, state courts such as North Carolina can provide relief.

VIII.

NORTH CAROLINA’S PROHIBITION ON CRUEL OR UNUSUAL PUNISHMENT

The North Carolina Supreme Court’s decisions in two recent cases, *State v. Kelliher* (2022) and *State v. Conner* (2022), provide an avenue for a constitutional challenge to North Carolina’s death penalty.²¹⁴ In these cases, the North Carolina Supreme Court held that non-incorrigible juveniles serving life sentences must have an opportunity for parole after serving no more than forty years, pursuant to both the Eighth Amendment and article I, section 27 of the North Carolina Constitution.²¹⁵ Writing for the majority in *Kelliher*, Justice Earls explains that “article I, section 27 of the North Carolina Constitution offers protections distinct from, and in this context broader than, those provided under the Eighth Amendment.”²¹⁶ In support of its holding, the Court relied on the disjunctive language of article I, section 27 of the North Carolina Constitution.²¹⁷ Article I, section 27 prohibits punishment that is “cruel *or* unusual,” whereas the Eighth Amendment prohibits punishment that is “cruel and unusual.”²¹⁸ In *Conner*, Justice Morgan explains what exactly broader protection means:

[T]he Constitution of North Carolina appears to offer criminal defendants—such as juvenile offenders—more protection against extreme punishments than the Federal Constitution’s Eighth Amendment, because the Federal Constitution requires two

213. Given the documented difficulties of providing properly calibrated doses of anesthesia, it is arguably the case “that all prisoners subjected to lethal injection experience what amounts to a burning at the stake or, more apt for the modern world, an electrocution, which itself has been termed a modern burning at the stake.” Robert Johnson & Rachel Ternes, *Time on the Cross: A Meditation on Lethal Injection*, 13 SEATTLE J. FOR SOC. JUST. 103, 109 (2014).

214. See *State v. Conner*, 873 S.E.2d 339 (N.C. 2022); *State v. Kelliher*, 873 S.E.2d 366 (N.C. 2022).

215. *Conner*, 873 S.E.2d at 341; *Kelliher*, 873 S.E.2d at 370.

216. *Kelliher*, 873 S.E.2d at 382.

217. *Id.* at 382–83.

218. *Id.* at 382.

elements of the punishment to be present for the punishment to be declared unconstitutional (“cruel and unusual”), while the state constitution only requires one of the two elements (“cruel or unusual”).²¹⁹

In interpreting article I, section 27, the Court in *Kelliher* concluded that it need not “depart from the basic Eighth Amendment analytical framework as articulated in cases like *Trop*”²²⁰ Instead, the Court writes:

We draw the meaning of article I, section 27 “from the evolving standards of decency that mark the progress of a maturing society,” and we consider “objective indicia of society’s standards” when we “exercise [our] own independent judgment [to decide] whether the punishment in question violates the Constitution.”²²¹

Drawing meaning from evolving standards of decency allowed the Court in *Kelliher* and *Connor* to hold that non-incorrigible juveniles must become parole-eligible no later than forty years into their sentences.²²² The Court can now apply this same reasoning, grounded in *Trop*, to claims that find capital punishment unconstitutional under North Carolina’s constitution. The *Trop* analytical framework is important because the founders of the U.S. Constitution knew nothing about neuroscience and would have been unable to make an informed decision about how age affects culpability in crime and punishment. Similarly, the founders did not possess scientific evidence about the psychological effects of a death sentence. They did, however, design the Constitution with an evolving standard of decency in mind, one where excessive punishment is determined “not by the standards that prevailed in 1685 when Lord Jeffreys presided over the ‘Bloody Assizes’ or when the Bill of Rights was adopted, but rather by those that currently prevail.”²²³

In *Kelliher*, the North Carolina Supreme Court reiterates that “interpreting constitutional provisions is a quintessential judicial function.”²²⁴ This is demonstrated in its conclusion that article 1, section 27 of the state constitution “need not be interpreted in lockstep with the Eighth Amendment to the United States Constitution.” The North Carolina Supreme Court further concludes that, in regard to article I, section 27, the U.S. Supreme Court decisions are “persuasive” in authority, rather than controlling.²²⁵ Therefore, because article I, section 27 the North Carolina Constitution provides broader protections than the Eighth Amendment, the North Carolina Supreme Court can declare the death penalty unconstitutional, even if the United States Supreme Court does not.

219. *Conner*, 873 S.E.2d at 355.

220. *Kelliher*, 873 S.E.2d at 385.

221. *Id.* (internal citations omitted).

222. *Id.* at 370.

223. *Atkins v. Virginia*, 536 U.S. 304, 311 (2002).

224. *Kelliher*, 873 S.E.2d at 385.

225. *Id.* (citing *State v. Jackson*, 503 S.E.2d 101 (N.C. 1998)).

IX. CONCLUSION

Since the North Carolina Supreme Court holds article I, section 27 of the state Constitution provides greater protection than the Eighth Amendment by way of the disjunctive phrase “cruel *or* unusual punishment,” and because this court is the final arbiter of the law as it applies to incarcerated people in North Carolina’s prisons, jails, and confinement facilities, the North Carolina Supreme Court should find the state’s death penalty unconstitutionally cruel because the threat of death is a form of psychological torture, as illustrated in this article and by the first-hand accounts of author Lyle May and other incarcerated individuals. Many individuals on North Carolina’s death row are experiencing symptoms of the “death row syndrome” and affirm that the death penalty is psychological torture.²²⁶ The fact that several individuals surveyed by May reported they would volunteer to be executed immediately rather than continue living under the threat of death makes it clear that the death penalty is a psychological burden that amounts to torture.²²⁷

Other reasons can be marshaled to affirm the unconstitutional cruelty of the North Carolina death penalty. We offer the following:

- 1) Death sentences lack reliability. From 1977 to 2014, over 71% of all finalized death sentences in North Carolina have been overturned on appeal.²²⁸ A total of twelve people sentenced to death in North Carolina have been exonerated.²²⁹
- 2) Prosecutors pursue capital convictions in an arbitrary manner that is used to leverage plea bargains of life without parole or punish those who exercise their right to trial. In fact, prosecutions in three North Carolina counties are responsible for about one-fourth of North Carolina’s death row population.²³⁰ Moreover, geography, race, gender, and political considerations are predictors of whether a defendant is sentenced to death; whereas the egregiousness of the crime may not be a predictor of who is sentenced to death, even though the death penalty is supposed to be reserved for “worst of the worst.”²³¹

226. Lyle C. May, *A Preliminary Case Study About the Psychological Effects of the Death Penalty*, TACENDA LITERARY MAG.: AN ARTS AND SOC. JUST. J. (2022) <https://www.bleakhousepublishing.org/new-page-2> [<https://perma.cc/5YQ6-SEQC>].

227. *Id.*

228. BAUMGARTNER, DAVIDSON, JOHNSON, KRISHNAMURTHY & WILSON, *supra* note 78, at 148.

229. *Policy Issues: Innocence*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/policy-issues/innocence> [<https://perma.cc/UT7T-WSJ9>] (last visited Mar. 20, 2024).

230. William W. Berry III, *Unusual State Capital Punishments*, 72 FLA. L. REV. 1, 38 (2020); for more information on the geography of death sentences, see *The 2% Death Penalty: The Geographic Arbitrariness of Capital Punishment in the United States*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/stories/the-clustering-of-the-death-penalty#DR> [<https://perma.cc/RU2E-EZKM>] (last visited Mar. 20, 2024).

231. *Glossip v. Gross*, 576 U.S. 863, 917–20 (2015).

- 3) There is a prolonged amount of time between an individual's sentencing date and execution date that cannot be resolved by shortening a prisoner's right to appellate due process. The average length of time prisoners have lived on North Carolina's death row now exceeds 20 years, with over 100 prisoners sentenced to death for crimes that occurred in the 1990s.²³² A capital sentence in North Carolina has become life imprisonment with the remote possibility of execution.
- 4) The death penalty is cruel because it is discriminatorily applied. A disproportionate number of black and brown people are sentenced to death.²³³

Under the “evolving standards of decency” outlined in *Trop*, we argue there is sufficient evidence for a finding that North Carolina's death penalty violates the state constitution as an especially cruel punishment and as such must be abolished.

It is our contention that the death penalty is a death threat, that living under the threat of death by execution is a case of torture, and that the death threat at the heart of the death penalty applies to all condemned prisoners, independent of the conditions of confinement under which they live.²³⁴ Accordingly, the death penalty violates the United States Constitution's Eighth Amendment prohibition on cruel and unusual punishment, as well as article I, section 27 of North Carolina's Constitution, which bans cruel *or* unusual punishment.

232. Kristin Collins, *Unequal Justice: How Obsolete Laws and Unfair Trials Created North Carolina's Outsized Death Row*, THE CTR. FOR DEATH PENALTY LITIG. (Oct. 1, 2018), <https://www.cdpl.org/unequal-justice/> [<https://perma.cc/GLC8-QT8Y>].

233. Cassia Spohn, *Race and Sentencing Disparity*, in REFORMING CRIMINAL JUSTICE 169, 172 (Erik Luna ed., 2017); *Executions by Race and Race of Victim*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/executions/executions-overview/executions-by-race-and-race-of-victim> [<https://perma.cc/M42G-NQY7>] (last visited Jan. 19, 2024). For information on how the race of the victim impact's a defendant's likelihood of receiving a death sentence, see Scott Phillips & Justin Marceau, *Whom the State Kills*, 55 HARV. C.R.-C.L. L. REV. 585 (2020).

234. JOHNSON, CONDEMNED TO DIE (2d ed. 2019), *supra* note 5, at 125; BESSLER, THE DEATH PENALTY AS TORTURE, *supra* note 3; Bessler, *Taking Psychological Torture Seriously*, *supra* note 3; Bessler, *Torture and Trauma*, *supra* note 3.