DEFINING DIGNITY BY WHAT PRESERVES DIGNITY: WHY PRESERVING A DEATH ROW INMATE'S EIGHTH AMENDMENT RIGHTS BEFORE EXECUTION MEANS PRESERVING THEIR DIGNITY DURING CONFINEMENT

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A. BACKGROUND

Although the term "Death Row Syndrome" refers to a pattern of behavior acknowledged by the Supreme Court among death row prisoners as early as 1890,[1] it has only been used for the last forty years.[2] The term describes the effects that an extended stay in

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[1] *See In re* Medley, 134 U.S. 160, 168 (1890) (Miller, J.) ("A considerable number of the [death row] prisoners fell, after even a short confinement, into a semi-fatuous condition, from which it was next to impossible to arouse them, and others became violently insane; others, still, committed suicide; which those who stood the ordeal better were not generally reformed, and in most cases did not recover sufficient mental activity to be of any subsequent service to the community.") (describing early solitary confinement prison plans used by states such as Massachusetts and Maryland prior to 1787). *See also* Ruiz v. Texas, 137 S. Ct. 1246, 1246 (2017) (Breyer, J., dissenting) (citing the same).

[2] *See* Soering v. United Kingdom, 161 Eur. Ct. H.R. (ser. A) at 38 (1989) ("However, in the Court's view, having regard to the very long period of time spent on death row in such extreme conditions, with the ever present and mounting anguish of awaiting execution of the death penalty, and to the personal circumstances of the applicant, especially his age and mental state at the time of the offence, the applicant's extradition to the United States would expose him to a real risk of treatment going beyond the threshold set by Article 3 [of the European Convention on Human Rights].") (quoting the European Court of

solitary confinement has on a death row prisoner. Judges and medical professionals alike recognize the group of psychological issues that the term "Death Row Syndrome" refers to,[3] but the Supreme Court refuses time and time again to answer the question of whether a lengthy stay in solitary confinement awaiting execution violates the Eighth Amendment.[4] This silence gives prisons license to house death row inmates however prison administrators see fit. The question quickly becomes: why is the Court's silence on the issue so bad?

While conditions of confinement vary from state to state, the majority of death row prisoners in the United States are held in solitary confinement.[5] In solitary confinement, prisoners are held in windowless cells measuring between four by nine to eight by ten

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Human Rights, who did not want to extradite a Soering, who murdered his roommate/friend while on a student visa attending University of Virginia because the long delay Soering would inevitably experience if he were sentenced to death will constitute "cruel and unusual" treatment.), https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-57619%22]}; Mary Elizabeth Tongue, *Omnes Vulnerant, Postuma Necat: All the Hours Wound, the Last One Kills: The Lengthy Stay on Death Row in America*, 80 MO. L. REV. 897, 902–03 (2015).

[3] *Compare* Davis v. Ayala, 135 S. Ct. 2187, 2209 (2015) (Kennedy, J., concurring) ("[I]t is as if a judge had no choice but to say: 'In imposing this capital sentence, the court is well aware that during the many years you will serve in prison before your execution, the penal system has a solitary confinement regime that will bring you to the edge of madness, perhaps to madness itself.'") *and* Ruiz v. Texas, 137 S. Ct. 1246, 1247 (2017) (Breyer, J., dissenting) ("Mr. Ruiz has developed symptoms long associated with solitary confinement, namely severe anxiety and depression, suicidal thoughts, hallucinations, disorientation, memory loss, and sleep difficulty.") *with* Tongue, *supra* note 2, at 903 (2015) ("[T]he combination of confinement and anxiety concerning an impending execution can still leave inmates in a state of psychosis. A problem lies with whether to diagnose Death Row Syndrome as a mental illness. . . ." (citing Harold I. Schwartz, *Death Row Syndrome and Demoralization: Psychiatric Means to Social Policy Ends*, 33 J. AM. ACAD. PSYCHIATRY & L. 150, 153–55 (2005)).

[4] In *Davis v. Ayala*, Justice Kennedy states that this question is a question that courts should answer. Davis v. Ayala, 135 S. Ct. 2187, 2210 (2015) (Kennedy, J., concurring) ("In a case that presented the issue, the judiciary may be required, within its proper jurisdiction and authority, to determine whether workable alternative systems for long-term confinement exist, and, if so, whether a correctional system should be required to adopt them."). The only case so far that acknowledges a *Lackey* claim is Jones v. Davis, 806 F.3d 538 (9th Cir. 2015).

[5] *See* AM. CIVIL LIBERTIES UNION, A DEATH BEFORE DYING: SOLITARY CONFINEMENT ON DEATH ROW, 4 (2013), https://www.aclu.org/sites/default/files/field_document/deathbeforedying-report.pdf.

[6] for at least twenty two hours a day.[7] Any visits, excluding contact with correction officers, are typically restricted to a prisoner's physician, lawyer, spiritual advisors, and family.[8] Recreation and exercise are extremely limited, making up maybe an hour or two of an inmate's daily routine.[9] Exposure to sunshine and fresh air is rare.[10]

Determining whether an individual inmate is competent takes time, but regardless of an inmate's competence, he is still entitled to exercise his right of appeal.[11] However[CJ1], exercising that right contributes to extensive delays because strongly crafting, and diligently reviewing, an appeal in light of the stakes at risk takes time.[12] Time taken at the death row inmate's expense. One should not be punished for exercising the rights afforded to them lest we render those rights meaningless.

Placing a death row inmate in solitary confinement as the default confinement method is a mockery of those rights. Prolonged solitary confinement's effect on prisoners has been anecdotally observed for over 100 years,[13] and confirmed by numerous psychological studies conducted over the last century.[14]

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[6] *Id.* at 5.

[7] *Id.* at 5.

[8] *Id.*; THE ARTHUR LIMAN PUB. INTEREST PROGRAM, YALE LAW SCH., RETHINKING DEATH ROW: VARIATIONS IN THE HOUSING OF INDIVIDUALS SENTENCED TO DEATH 5–6 (2016).

[9] THE ARTHUR LIMAN PUB. INTEREST PROGRAM, YALE LAW SCH., RETHINKING DEATH ROW: VARIATIONS IN THE HOUSING OF INDIVIDUALS SENTENCED TO DEATH 6 (2016). *See also* AM. CIVIL LIBERTIES UNION, A DEATH BEFORE DYING: SOLITARY CONFINEMENT ON DEATH ROW 5 (2013), https://www.aclu.org/sites/default/files/field_document /deathbeforedying-report.pdf.

[10] *See* AM. CIVIL LIBERTIES UNION, A DEATH BEFORE DYING: SOLITARY CONFINEMENT ON DEATH ROW 5 (2013), https://www.aclu.org/sites/default/files/field_document/deathbeforedying-report.pdf. *But see* THE ARTHUR LIMAN PUB. INTEREST PROGRAM, YALE LAW SCH., RETHINKING DEATH ROW: VARIATIONS IN THE HOUSING OF INDIVIDUALS SENTENCED TO DEATH 6 (2016) ("For example, Florida's regulations provide for a minimum of six hours per week of *outdoor* exercise." (emphasis added)).

[11] Glossip v. Gross, 135 S. Ct. 2726, 2764 (2015) ("Those who face 'that most severe sanction must have a fair opportunity to show that the Constitution prohibits their execution.'") (citing Hall v. Florida, 134 S. Ct. 1986, 2001 (2014)).

[12] *Id.* (Breyer, J., dissenting) ("[D]elay is in part a problem that the Constitution's own demands create."). *See* Thompson v. McNeil, 556 U.S. 1114, 1116 (2009) (Stevens, J. *denial of cert.*) ("Some respond that delays in carrying out executions are the result of this Court's insistence on excessive process. But delays have multiple causes[.]").

[13] *Id.* at 2765.

[14] *Id.* (citing Craig Haney, *Mental Health Issues in Long-Term Solitary and "Supermax" Confinement*, 49 CRIME & DELINQ. 124, 130 (2003)).

These effects include, but are not limited to, anxiety, rage, loss of control, paranoia, hyperresponsivity to external stimuli, difficulties with thinking, concentration, and memory; intrusive, obsessional thoughts, hallucinations, difficulty with impulse control, self-harm, and abnormal sleep cycles.[15] In fact, one study reported a list of symptoms so uniformly associated with solitary confinement that the study's author refers to the group of symptoms as a "syndrome," standing out among other mental and/or emotional issues because of the delirium and other symptoms that prisoners experience, which resemble neurological defects more than anything.[16] These studies have concluded that even relatively small amounts of time in solitary confinement can affect a prisoner's brain activity.[17] Prisoners with pre-existing mental and/or emotional conditions are generally more susceptible to the harms associated with solitary confinement.[18]

However, prisoners without any history of mental or emotion health issues still risk experiencing harms similar to their mentally ill counterparts,[19] and sustaining irreparable damage to their mental and emotional well-being that will likely prevent that prisoner from reintegration into the prison's general population and free society.[20] Given the death row population's common demographics,[21] the death row population is especially at risk of experiencing the torturous effects of solitary confinement because some may have undiagnosed mental illness or other impairments that make them highly vulnerable to the risks associated with long term solitary confinement.[22]

The importance of the answer of whether an inmate is competent to be executed is amplified by the death row population's demographics as shown by the Death Penalty

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15 Stuart Grassian, *Psychiatric Effects of Solitary Confinement*, 22 WASH. U. J.L. & POL'Y 325, 332–33, 335–36 (2006).

16 *Id.* at 334–37.

17 *Id.* at 331, 345.

18 *Id.* at 332, 348.

19 *Id.* at 332, 352–54

20 *Id.* at 332–33, 353–55.

21 *Troubling Death Penalty Cases Across the Country Throughout* 2016,THE DEATH PENALTY IN 2016: YEAR END REPORT, https://deathpenaltyinfo.org/documents/2016YrEnd.pdf (last visited Sept. 5, 2018), (finding as many as 60% of death row inmates executed in 2016 showing "significant evidence" of mental impairment).

22 *See id.*

Information Center's review of 2016 executions.[23] The review states that a majority of prisoners executed in 2016 "showed significant evidence of mental illness, brain impairment, and/or low intellectual functioning,"[24] This statistic alone could sound the death knell for the death penalty because of the Court's prohibition against executing the mentally incompetent,[25] but the juxtaposition of that statistic and death row syndrome's effects at the very least muddies constitutional and penological waters[26] by raising a possible "chicken-or-the-egg" question that may present an unacceptable risk of executing someone whose intellectual disability constitutionally excludes them from the death penalty.[27]

Placing death row inmates in general population side-steps issues caused by excessive delays, regardless of who or what is responsible for the delay, by neutralizing any Eighth Amendment claims based on excessive delay and possible "dignity offenses" at their inception by taking cruel and unusual punishment out of the equation.

In Section B, this Note will examine the Eighth Amendment's prohibition on cruel and unusual punishment and briefly explain why the death penalty is excluded from it. There, this Note will examine deterrence and retribution, the two penological purposes behind the death penalty, in turn. Specifically, the two respective sections on each purpose will present arguments on why excessive delays while the inmate is in solitary confinement defeat penological purposes, and respond to these arguments by explaining why the mere passage of time, if the inmate is in general population, does not necessarily defeat either penological purpose. The third section briefly discusses how excessive delays spent in prolonged solitary confinement potentially violate a

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[23] *Id.*

[24] *Id.*

[25] Atkins v. Virginia, 536 U.S. 304 (2002) (holding that executing intellectually disabled prisoners violates the Eighth Amendment's prohibition against cruel and unusual punishment). *See* Ford v. Wainwright, 477 U.S. 399 (1986). *See also* Hall v. Florida, 134 S. Ct. 1986, 1990 (2014) (rejecting Florida's 70 I.Q. point threshold requirement for considering intellectual disability a bar to a prisoner's execution as creating an unacceptable risk that an intellectually disabled individual would be executed, violating the Eighth Amendment's prohibition against cruel and unusual punishment).

[26] *See* Megan Elizabeth Tongue, *Omnes Vulnerant, Postuma Necat: All the Hours Wound, the Last One Kills: The Lengthy Stay on Death Row in America*, 80 MO. L. REV. 897, 902–03 (2015) ("A problem lies with whether to diagnose Death Row Syndrome as a mental illness that may leave an inmate incompetent and, therefore, insane and ineligible for execution . . . ").

[27] *Hall*, 134 S. Ct. at 1990.

prisoner's Eighth Amendment protections because prolonged solitary confinement as the default method of confinement is a punishment that fails to meet society's "evolving standards of decency," in addition to being offensive to a prisoner's dignity.

Section C discusses dignity using Kristen Loveland's formulation of what dignity consists of in the respective contexts of physician assisted suicide and the death penalty, contexts which both center on the purposeful extinguishment of a life before it would have ended naturally, to suggest that the changing views of our society in the physician assisted suicide context may influence dignity in the death penalty context. Because dignity in each context is thought to be preserved by avoiding undue, purposeless suffering, allowing a prisoner to undergo suffering in that form is offensive to his dignity and is antagonistic to the "evolving standards that mark a maturing society." After discussing Loveland's formulation, the next part acknowledges Loveland's possible reasons why we do not focus on the dignity of death row inmates like we do on terminally-ill patients and argues why these possible reasons do not justify the unconstitutional method of confinement that death row inmates are subject to as a default of their punishment.

The next part explains why the practices and concepts from the physician assisted suicide context that Loveland suggests should inform the death penalty context do not address prolonged solitary confinement's continuing offense to an inmate's dignity and Eighth Amendment rights. This part is organized into two parts: Actual Execution; and Pre-Execution.

The next part ties the earlier discussions on penological purpose and dignity together, explaining why prolonged solitary confinement is an issue now more than ever against the backdrop of society's increasingly dim view of purposeless suffering in other contexts. That part suggests that states would be wise to change confinement conditions on death row in an effort to preserve their choice to impose the death penalty

Section D explains why taking death row inmates out of solitary confinement would preserve the dignity of death row inmates, allow the inmates to freely exercise their right of appeal and not suffer for it, comply with the Eighth Amendment's prohibition on cruel and unusual punishment, create a safer prison environment for both prisoners and staff, and avoid the cost associated with

future litigation over prison conditions.

B. EIGHTH AMENDMENT

The Eighth Amendment's prohibition of cruel and unusual punishment was borne from the drafters' wish to outlaw "'torture[s]' and other 'barbar[ous]' methods of punishment."[28] Early Supreme Court cases applying the Eighth Amendment determined that it forbid unnecessarily cruel punishments, such as those "involv[ing] torture or a lingering death. . . ."[29] while holding that "the punishment of death is not cruel, within the meaning of that word as used in the Constitution. It [the word "cruel"] implies there is something inhuman and barbarous, something more than the mere extinguishment of life"[30] This, the fact that state and federal government may lawfully extinguish a convict's life does not give the government carte blanche to inflict whatever punishment it wishes on that convict.[31] A punishment is cruel and unusual if it is antagonistic to "the evolving standards of decency that mark the progress of a maturing society,"[32] or "involve[s] the unnecessary and wanton infliction of pain."[33] This restriction applies to both physical and non-physical punishments.[34] In short, the punishment must have some sort of legitimate penological purpose if the punishment expects to pass Eighth Amendment muster.[35]

Justice Breyer argues that the excessive delays on death row create two specific constitutional issues: (1) excessive delays weakening the death penalty's penological purpose; and (2) subjecting inmates to "severe, dehumanizing conditions of confinement" for extended periods of time.[36] This note will examine each in turn.

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

29 Baze v. Rees, 553 U.S. 35, 49 (2008) (quoting *In re* Kemmler, 136 U.S. 436, 447 (1890)).

30 *Baze*, 553 U.S. at 49 (quoting *In re* Kemmler, 136 U.S. at 447).

31 Trop v. Dulles, 356 U.S. 86, 99 (1958).

32 *Estelle*, 429 U.S. at 102 (quoting *Trop*, 356 U.S. at 101).

33 *Id.* at 103 (quoting Gregg v. Georgia, 428 U.S. 153, 173 (1976)).

34 *See, e.g.*, *Trop*, 356 U.S. at 103 (holding that the Government may not use denationalization as punishment for desertion during wartime). *See also In re* Medley, 134 U.S. 160,170, 173 (1890) (holding that additional punishment not permitted was to withhold the time of execution from the prisoner in solitary confinement).

35 *Baze*, 553 U.S. at 78 (citing *Gregg*, 428 U.S. at 183).

36 Glossip v. Gross, 135 S. Ct. 2726, 2765 (2015) (quoting Johnson v. Bredesen, 558 U.S. 1067, 1069 (2009)).

1. The Effect of Death Penalty Delays on Penological Purpose

a. Deterrence

The penological rationales that justify punishment are deterrence, incapacitation, retribution, and rehabilitation.[37] The death penalty's main penological purposes are deterrence and retribution.[38]

Justice Breyer points out, like Justice Stevens has previously,[39] that 30 years of studies have not firmly determined that the death penalty has a deterrent effect.[40] Justice Breyer concedes that this inconclusive body of evidence does not support the absence (or the existence) of the death penalty's deterrent effect.[41] However, Justice Breyer mentions that a hypothetical criminal pondering his potential punishment would know that he may be sentenced to death, but only receive life in prison without the possibility of parole,[42] thus nullifying the deterrent effect of the death penalty. This may be true to a certain extent. The hypothetical criminal who knows the odds[43] of being executed may be tempted to take the gamble of death. However, there are some would-be criminals who decide not to test fate.[44] Thus: what effect does life in prison with the possibility of early death have on deterrence? The deterrent effect may be small, but there is evidence that it does exist to some degree.[45]

There is a possible deterrent effect in knowing that a de facto life sentence that you receive may be spent in dehumanizing

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37 *Id.* at 2767.

38 *Id.* (explaining "[c]apital punishment by definition does not rehabilitate. It does, of course, incapacitate the offender," but so does a life sentence without the possibility of parole) (Breyer, J., dissenting).

39 Baze v. Rees, 553 U.S 35, 79 (2008) (Stevens, J., concurring in judgment) ("Despite 30 years of empirical research in the area, there remains no reliable statistical evidence that capital punishment in fact deters potential offenders.").

40 *See Glossip*, 135 S. Ct. at 2767–69.

41 *See id.* at 2768.

42 *Id*.

43 *Id.* ("[A]n offender who is sentenced to death is two or three times more likely to find his sentence overturned or commuted than to be executed; and he has a good chance of dying from natural causes before any execution (or exoneration) can take place.").

44 *Id.* at 2748–49.

45 *Id.* at 2748.

conditions as opposed to general population.[46] However, this is not a good reason to keep long term solitary confinement as a standard means of confinement. The deterrent effect attributable to knowing about the dehumanizing nature of the confinement leading up to actual execution is a deterrent effect achieved by improper means. For example, a town's criminals may be deterred from committing a crime because they know that the local police department tortures criminals in their custody before sending the criminals off to prison for long term confinement. While that town has less crime than other towns around it, the price paid for the effect is a general mistrust of the institution vested with the authority to protect and serve.

b. Retribution

i. Changing Community

Justice Breyer also argues that, in some cases, death penalty delays weaken the punishment's goal of retribution.[47] However, there are no studies to support the conclusion that retribution diminishes over time.[48] Retribution, as a nonphysical concept, does not have a set half-life like a radioactive element, or a shelf life like a canned good. Over time, the community and emotions do change, but that does not mean that the retribution cannot be achieved. The fact that a community is not the same community that it was when an inmate was sentenced does not change that the particular version of the community existed at the time the inmate was sentenced. Nor does it diminish the obligation that the law and government took upon itself to prosecute and punish that inmate. Just because the community, exactly as it was known at the time the inmate was convicted, has changed does not mean that an obligation to that community has vanished.

Another way to conceptualize this obligation and how it is affected by a changing community is to think about the difference between partnerships based on either aggregate or entity theories.[49] Breyer and Stevens seem to think about community

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[46] *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 (2016).

[47] *Glossip*, 135 S. Ct. at 2748–49.

[48] *Id.* at 2765 (citing supportive cases but none that cite any studies to support the argument that retribution diminishes over time).

[49] *See* MELVIN ARON EISENBERG & JAMES D. COX, CORPORATIONS AND OTHER

under an aggregate theory because the community can never be the same community once someone has moved out; while I am thinking of the community under an entity theory to the extent that a community is still a community as it changes throughout time.[50] The difference in result is that, under my application of "entity theory" here, the obligation that government made to prosecute and punish someone convicted of a crime does not change just because some have moved away, others have died, or new members have joined the community. Applying "aggregate theory" in this situation would mean that retribution generally would fail as a penological purpose every time the community underwent change.

ii. Retribution Measured in Pain

In *Baze v. Rees*,[51] a case very similar to *Glossip v. Gross,*[52] Justice Stevens attacked retribution as the only standing penological purpose attached to the death penalty.[53] Both *Baze* and *Glossip* revolved around challenges by death row inmates to the method of execution that would be used in their punishment's disposition.[54]

The inmates in each case claimed that the respective methods of execution used would violate the Eight Amendment's prohibition against cruel and unusual punishment.[55] Each majority opinion decided against the inmates.[56] In *Baze*, Stevens seems to measure retribution by comparing the pain an inmate experiences from execution to the suffering the inmate's victim feels at death.[57] However, retribution arguably stems from the fact that the inmate's life is ending before it would have naturally, a fate similar

BUSINESS ORGANIZATIONS CASES AND MATERIALS 58–59, 69, 113 (10th ed., 2011) (explaining the basics of aggregate and entity concepts of association).

50 *Id.*

51 553 U.S. 35 (2008).

52 135 S. Ct. 2726, 2728 (2015) (citing *Baze* to support a main holding).

53 *Baze*, 553 U.S. at 79–80 (Stevens, J., concurring) ("We are left, then, with retribution as the primary rationale for imposing the death penalty. And indeed, it is the retribution rationale that animates much of the remaining enthusiasm for the death penalty.").

54 553 U.S. 35, 41 (2008); 135 S. Ct. 2726, 2728–30 (2015).

55 Baze v. Rees, 553 U.S. 35, 41 (2008); Glossip v. Gross, 135 S. Ct. 2726, 2729 (2015).

56 *Baze* 553 U.S. at 41; *Glossip* 135 S. Ct. at 2729.

57 *Baze* 553 U.S. at 80–81.

to the inmate's victim. Retribution is not solely about vengeance, but vengeance is always about retribution. In other words, the death penalty's retributive effect comes from the extinguishing of a life before it would have otherwise ended, not the physical pain felt by the inmate from the extinguishment. If retribution can only be achieved by the infliction of physical pain, then finding where the gratuitous infliction of suffering begins and retribution ends would present problems for retribution as a penological goal generally.[58] Justice Stevens would be right that the evolving standards of decency that mark the progress of our maturing society would run contrary to achieving retribution if physical pain is the metric by which retribution is measured.[59] Finding limits, proportionality, and minimums for physical pain would be based on subjective metrics. We are outside observers to the phenomenon that is a prisoner's (or any other human being's) physical pain. Absent medical science and technology,[60] we can only measure what we observe unless we are actually that person experiencing that particular infliction of physical pain because people have different thresholds and valuations of pain. Our observations are subjective and lack precision, as well as a standard unit of measurement.[61] Moreover, we do not have an accurate, objective measurement of physical pain.[62] How can we say that action X inflicts just the right amount of pain so that it walks the fine line between satisfying retribution and not indulging in primitive, anachronistic vengeance? Because Stevens' approach pivots on subjective experiences, I am inclined to believe retribution in death penalty cases operates on extinguishment of a life before it would have naturally ended; similar to how a victim's life is extinguished, as a result of murder, before it would have naturally ended.

Long term solitary confinement before execution may deny

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[58] How do we measure pain and suffering? We run into issues like "what is our limit on how much pain we may inflict so that we can make ourselves whole?" or "can I beat this person to death, or just near death?"

[59] *Baze* 553 U.S. at 80–81.

[60] If there is an accurate, objective scientific method through which medical professionals can measure pain, then it should be brought into these situations and many others, such as the current opioid crisis afflicting the United States. What about measuring vital signs? But people still react differently to pain.

[61] When discussing utilitarianism in philosophy, a "hedon" are typically referred to as a unit of pleasure. A "dolor" is referred to as a unit of displeasure/pain. LAWRENCE M. HINMAN, ETHICS: A PLURALISTIC APPROACH TO MORAL THEORY 135 (5th ed. 2013).

[62] *See supra* text accompanying footnote 58.

victims the retribution they seek by giving them retribution of lesser value. If a community seeks retribution in the sense that they wish to see the murderer's life cut short, then long term solitary confinement would interfere with this wish because the community would have gained retribution in a way that possibly satisfies that penological goal, but in a manner that the community did not want.[63] Obtaining retribution through dehumanizing confinement conditions would also lead to issues in determining whether retribution is truly obtained. Obtaining retribution through the pain felt by an inmate is already difficult because measuring any sort of pain is difficult; given that each inmate's individual temperament and reaction to long term solitary confinement is different during their extreme confinement. There would be some inmates who would feel the pain that others may feel over the course of forty years in just four years. Not being able to determine at what point enough long term solitary confinement is enough presents the risk that some would receive a gratuitous infliction of some pain, which directly violates the inmate's Eighth Amendment Rights.[64] Retribution may also be diminished by the prisoner's declining mental ability.[65]

There is little to no justification for making an in-prison punishment reserved for non-death penalty inmates[66] the default, long term confinement method for inmates who commit similar crimes. A death row inmate should not be subject to long term solitary confinement just by way of his sentence because, on top of

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[63] A morbid analogy is the common issue when you return an item you purchased and request your money back. There are some businesses that, instead of giving you your money back, will refund you store credit equal to the price you originally paid for the returned item.

[64] *See Baze* 553 U.S. at 90–91.

[65] *See* Dunn v. Madison, 138 S. Ct. 9, 11–12 (2017) (explaining that executing someone who is intellectually disabled does not satisfy retribution well).

[66] Calhoun v. Detella, 319 F.3d 936, 939 (7th Cir. 2003) (citing Hudson v. McMillian, 503 U.S. 1, 9 (1992)). *See* Craig Haney & Mona Lynch, *Regulating Prisons of the Future: A Psychological Analysis of Supermax and Solitary Confinement*, 23 N.Y.U. REV. L. & SOC. CHANGE 477, 487 (1997). Solitary confinement is normally used to punish general population inmates who misbehave while incarcerated. *See, e.g.*, Estelle v. Gamble, 429 U.S. 97, 100 (1976) ("Gamble then went to a Major Muddox and told him that he was in too much pain to work. Muddox had respondent moved to 'administrative segregation.' On December 5, Gamble was taken before the prison disciplinary committee, apparently because of his refusal to work.").

long term solitary confinement being cruel and unusual in and of itself, execution at a later point in the future could amount to a "double" punishment or a "gratuitous infliction of pain;" both in violation of the Eighth Amendment.[67] At that point, the penological goal of retribution may have even been satisfied before the actual execution. There is a difference between knowing you are going to die in prison and knowing that the prison is going to end your life before it naturally would have ended. This is arguably one of the reasons why the death penalty is a punishment different in kind from life in prison without parole.[68] Life in prison is not, in and of itself, a gratuitous infliction of suffering, making it a permissible punishment while awaiting for the appeals process to move. However, needlessly keeping a prisoner in severe, dehumanizing conditions without any provocation from the prisoner is not permissible because it inflicts unnecessary suffering. The use of long term solitary confinement must abide by the same Eighth Amendment requirement as the death penalty itself: there must be a legitimate penological rationale. In situations where a prisoner disregards prison rules, the use of long term solitary confinement is justified because the penological goal of long term solitary confinement in that situation is to deter the prisoner from acting out again in the future.[69]

2. "Evolving Standards of Decency" and Prolonged Solitary Confinement

Holding prisoners in "severe, dehumanizing conditions of confinement" over long periods of time creates constitutional problems because the Eighth Amendment prohibits cruel and unusual punishment on its face.[70]

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[67] *See* AM. CIVIL LIBERTIES UNION, A DEATH BEFORE DYING: SOLITARY CONFINEMENT ON DEATH ROW, 4 (2013), https://www.aclu.org/sites/default/files/field_document/deathbeforedying-report.pdf.

[68] *See* Jamie Cameron, *The Death Penalty, Mandatory Prison Sentences, and the Eighth Amendment's Rule against Cruel and Unusual Punishments*, 39 OSGOODE HALL L.J. 427, 441 (2001).

[69] *See Glossip*, 135 S. Ct. at 2767. The other penological purpose behind long term solitary confinement in response to prisoner misconduct is incapacitation because solitary confinement places the inmate in a position where they cannot (or at least have a greater difficulty with) acting out again. Tung Yin, *The Death Penalty Spectacle*, 3 U. DENV. CRIM. L. REV. 165, 175–77 (2013) (discussing how solitary confinement is an option to incapacitate a prison inmate murder for the safety of other inmates).

[70] U.S. CONST. amend. VIII.

Keeping someone in prison until the end of their life is not unconstitutional because courts regularly sentence criminals,[71] who commit similar crimes to death row inmates, to life in prison for what some may consider more heinous crimes than what a death row inmate may have been convicted for. There are also legitimate penological reasons that a prisoner may be sentenced to life in prison without parole, such as deterrence and incapacitation.[72] Responding to Justice Breyer's dissent, Justice Scalia echoes the basic premise of this paper: change confinement conditions rather than abolish the death penalty.[73]

C. LONG DELAYS VIOLATE A PRISONER'S DIGNITY

1. Defining Dignity Loveland Formulation

Dignity is not exactly a right,[74] but that does not discount the persistent role that dignity plays in Supreme Court decision making.[75] The concept of dignity has been textually present in constitutional jurisprudence for over 200 years[76] in cases dealing with issues such as same-sex marriage, civil rights, cruel and unusual punishment, abortion, and physician-assisted suicide.[77] Only recently are scholars parsing out its possible presence as a "doctrine."[78] This is probably because the term dignity is

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71 As of 2016, about one in every nine prisoners is sentenced to life in prison. ASHLEY NELLIS, THE SENTENCING PROJECT, STILL LIFE: AMERICA'S INCREASING USE OF LIFE AND LONG-TERM SENTENCES 5 (2017), https://www.sentencingproject.org/wp-content/uploads/2017/05/Still-Life.pdf.

72 *Glossip*, 135 S. Ct. at 2767.

73 *Id.* at 2748.

74 *See* Maxine D. Goodman, *Human Dignity in Supreme Court Constitutional Jurisprudence*, 84 NEB. L. REV. 740, 743 (2006) ("This Article does not advocate establishing dignity as a new right or value, like the 'penumbra' idea of Justice Douglas in *Griswold v. Connecticut*, but rather shows that the Court has repeatedly treated human dignity as a value underlying, or giving meaning to, existing constitutional rights and guarantees." (footnote omitted)) (implying that dignity is not established as a right in constitutional jurisprudence).

75 *See, e.g.*, Obergfell v. Hodges, 135 S. Ct. 2584, 2597 (2015); Lawrence v. Texas, 539 U.S. 558, 567, 574 (2003); Planned Parenthood v. Casey, 505 U.S. 833, 851 (1992); Furman v. Georgia, 408 U.S. 238, 270 (1972).

76 Leslie Meltzer Henry, *The Jurisprudence of Dignity*, 160 U. PA. L. REV. 169, 178–79 (2011).

77 *See id.* at 172–73.

78 Kevin Barry, *The Death Penalty & The Dignity Clauses*, 102 IOWA L. REV. 383, 394 (2017).

notoriously hard to describe and define,[79] both as a philosophical and legal concept. There are many formulations of dignity and what it is supposed to be, but for present purposes, this note will focus on one specific formulation by Kristen Loveland that helps describe dignity in the physician-assisted suicide (PAS) and death penalty contexts.[80] The juxtaposition of PAS and death penalty cases highlights the inconsistencies in what dignity means in constitutional jurisprudence and why we should care about death row inmates in long term solitary confinement.[81]

Before discussing Loveland's formulation, it is important to address why dignity is involved in both PAS and the death penalty contexts. Dignity is involved in both contexts because there is shared concern for undue, purposeless suffering. Most constitutional conceptions of dignity have hinged on the idea that undue, purposeless suffering is an affront to the dignity of the individual experiencing that suffering because that suffering debases who the individual is as a human being.[82] The problem is that while dignity is mentioned in each context, there is a seemingly stark contrast between the way that courts and society handle that undue suffering.[83] While dignity in each context may involve different consideration unique to that context, there should still be a degree of consistency at the very least if we insist on using the same word in two different contexts, especially if notions of dignity are used to support current and future legal arguments on which constitutional protections and liberties may rest.

The anguish felt by death row inmates eerily resembles a right-to-die case involving a patient's deteriorating mental faculties (subjectively defined integrity). What I mean is that in both death penalty and right-to-die contexts, you have a person facing an impending death who may wish to hurry death because he wishes to end the suffering that he is experiencing in anticipation of that looming death. Certain jurisdictions claim individuals are entitled to die in order to preserve that dignity, but death row inmates, who will lose their lives at the hands of the state, are held in such a way and for such a time that they may look forward to death in the

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79 *See id.* at 392. *See also* Kristen Loveland, *Death and its Dignities*, 91 N.Y.U. L. REV. 1279, 1283 (2016).

80 *See* Kristen Loveland, *Death and its Dignities*, 91 N.Y.U. L. REV. 1279, 1288 (2016).

81 *See* Kristen Loveland, *Death and its Dignities*, 91 N.Y.U. L. REV. 1279, 1308–09 (2016).

82 *See id.* at 1287–88.

83 *See id.* at 1288–89.

same way.

Loveland Formulation

Comparisons of the roles that dignity plays in both right-to-die and death penalty contexts are not relatively new.[84] Loveland's explanation of dignity and death in both death penalty and physician assisted suicide contexts highlights the incongruity between the two contexts. Loveland, and other scholars,[85] explain that dignity and death have a peculiar relationship to each other in constitutional law that it is never fully explained. Loveland's Formulation of Dignity for each respective context discusses dignity according to who or what the subject of dignity[86] is and whether the dignity is construed as objective or subjective.[87] The "subject" of dignity refers to the person(s) or institution(s) about whom (or what) we are talking. For example, the main subject of dignity in physician-assisted suicide cases is the patient. To that patient, dignity means the ability to exercise subjective self-determination, and retain subjectively defined existential and bodily integrity. However, both the way in which subjective self-determination is exercised and the degree to which subjectively defined existential and bodily integrity must be retained by an individual in order to satisfy that individual's personal beliefs result in extremely diverse notions of what dignity means practically for physician-assisted suicide patients generally. This is why what dignity means generally for physician-assisted suicide patients is specified (narrowed) by an objective component (objective individual dignity) that considers what dignity means practically for an individual according to societal norms. This is explained more below.

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84 *See, e.g.*, Julie Levinsohn Milner, *Dignity or Death Row: Are Death Row Rights to Die Diminished? A Comparison of the Right to Die for the Terminally Ill and the Terminally Sentenced*, 24 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 279 (1998).

85 *See, e.g.*, *id.*

86 The "subject of dignity" refers to the person(s) whom or institution(s) which is/are the subject(s) of a dignity interest.

87 A useful way to think about objective and subjective constructions of dignity is to think about them like you would objective and subjective expectations of privacy in determining whether an individual has a constitutionally protected right to privacy under *Katz v. United States*, 389 U.S. 347 (1967).

a. Dignity & Physician Assisted Suicide

Loveland describes dignity in the physician-assisted suicide context in three different, interrelated ways: (1) Subjective Self-Determination; (2) Subjectively Defined Existential and Bodily Integrity; and (3) Objective Individual Dignity.[88]

Loveland defines what dignity means in physician-assisted suicide cases generally by what beliefs a patient has about subjective self-determination, and subjectively defined existential and bodily integrity and whether those beliefs fit within the scope of objective individual dignity.[89]

i. Subjective self-determination

Physician Assisted Suicide starts and ends with the terminally ill patient, her choice, and her beliefs on what a dignified death is.[90]

The patient determines, based on her notions of what a dignified death is, when she would like to die and what happens during the time leading up to the moment of her death.[91] Progressing toward that moment may mean spending time with her loved ones before passing, or crossing items off of her "bucket list." Progressing toward that final moment also includes deciding the means by which the patient extinguishes her life. These decisions, while completely personal, may require dependence on others for one reason or another.[92]

ii. Subjectively Defined Integrity

I. Existential Integrity

Existential Integrity involves identity, shaping your final days to correspond with the life that you have lived, and how others will

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[88] *See* Kristen Loveland, *Death and its Dignities*, 91 N.Y.U. L. REV. 1279, 1290 (2016).

[89] *See id.* at 1289–90.

[90] *See id.* at 1291.

[91] *See* Kristen Loveland, *Death and Its Dignities*, 91 N.Y.U. L. REV. 1279, 1291 (2016).

[92] *See, e.g.*, *Frontline: The Suicide Tourist*, PBS (Mar. 2, 2010), https://www.pbs.org/wgbh/frontline/film/suicidetourist/ (explaining at the twelve minute mark that PAS procedures sometimes require the PAS candidate to perform the concluding action).

remember you.[93] Dignity asks that we write every chapter of our lives how we want it, including the last chapter and ending, because it is important to how we are remembered by our loved ones and the image that we built over the course of our lives.[94]

II. Bodily Integrity

Bodily integrity concerns the degradation of our physical bodies, our mental being, and associated suffering.[95] Avoiding unnecessary suffering is said to be at the epicenter of a dignified death. Many people fear losing bodily function and mobility because they will be rendered virtually helpless, and thus a burden on their family and loved ones.[96] This sort of suffering undermines the patient's dignity because (1) physical abilities that may define who the patient is disappear as sickness progresses and suffering increases; and (2) losing physical abilities also interferes with how each of us write the final chapter of the story called our life.[97]

iii. Objective Individual Dignity

Conceptions of Dignity exist independent of our subjective beliefs, meaning that there are certain societal norms that help define what is dignified or undignified.[98] Objective individual dignity refers to what dignity means for an individual according to those societal norms. Subjective Self-Determination and Subjectively Defined Existential and Bodily Integrity operate within objective individual dignity. In other words, objective individual dignity restricts how expansive our subjective self-determination and subjectively defined integrity is, marking the space within which someone could exercise the option of Physician-Assisted Suicide to achieve a dignified death.[99] For example, an

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93 *See* Kristen Loveland, *Death and Its Dignities*, 91 N.Y.U. L. REV. 1279, 1293, 1294, 1295 (2016).

94 *See id.* at 1294.

95 *See id.* at 1295.

96 *See id.* at 1291, 1293, 1296.

97 *See id.* at 1294, 1295.

98 An example Loveland uses is how our lives and image are treated and perceived after our death. *See id.* at 1296. Funny enough, an Ancient Roman interpretation of immortality is achieving glory and being remembered for it. *See* RAYMOND ANGELO BELLIOTTI, ROMAN PHILOSOPHY AND THE GOOD LIFE 39 (2009).

99 *See* Kristen Loveland, *Death and Its Dignities*, 91 N.Y.U. L. REV. 1279, 1296

objective conception of a dignified death is dying in your sleep peacefully at home,[100] where as an objective conception of an undignified death is suicide by police fire.[101] Despite satisfying the first two subjective requirements, it can still be said that the person who committed suicide by police fire had, according to Loveland's formulation, an undignified death because that suicide goes against objective individual dignity.[102]

b. Dignity & Death Penalty

Loveland describes the dignities involved in the death penalty context in two parts: (1) dignity of the procedure; and (2) objective dignity of the individual.[103] She then argues that the subject of dignity in the death penalty context is generally collective society.[104] The dignity of the procedure, according to Loveland, is actually "a proxy for collective dignity[,]" which refers to the dignity of collective society.[105] The problem that she brings to light is that "collective dignity in turn overdetermines the definition of individual dignity in the death penalty[,]"[106] thereby squeezing the death row inmate's subjective considerations conveniently out of the equation.[107] The problem with focusing all current judicial considerations of dignity on the procedure itself presents is that the stages before the procedure in which prisoners are suffering possible constitutional violations and dignity offenses receive little to no attention, leaving the problems to fester and purposeless, undue suffering to continue.[108]

i. Dignity of the Procedure

Dignity of the Procedure refers to the actual method of execution and its associated aesthetics. Justices have noted that dignity demands that prisons curtail the negative aesthetics associated

(2016).

100 *See id.* at 1296.

101 *See, e.g.*, *id.* at 1297.

102 *See id.*

103 *See id.* at 1299.

104 *See id.*

105 *See* Kristen Loveland, *Death and Its Dignities*, 91 N.Y.U. L. REV. 1279, 1304 (2016).

106 *Id.* at 1299.

107 *See id.* at 1300, 1301

108 *See id.*

with each execution,[109] irrespective of the risk of physical harm or pain the prisoner may be feeling. The dignity of the procedure is all about keeping up appearances, shaping perceptions, and satisfying expectation. If witnesses to the execution think that the execution is going fine, then the dignity of the procedure is intact. The dignity of the procedure is measured against the "perspectives of the state, witnesses, and society."[110]

I feel it is important to note, as Loveland does, here that legislatures usually beat the courts to the punch in phasing out certain execution methods when a more visually acceptable method is presented.[111] For example, hanging was abandoned in favor of execution by electrocution. Then, execution by electrocution was left in the past in favor of lethal injection, which results in an execution so minimally graphic that some may think the inmate is simply going to sleep. However, with this new execution method, we are seeing states defending the use of a drug that creates a peaceful, paralytic appearance that potentially leaves the prisoner vulnerable to pain felt by the final lethal drug, by claiming that administering the paralyzing drug preserves the dignity of the procedure despite the fact that an inmate may still feel pain from the execution without displaying outward signs of pain.[112] I feel that these trends are important because the solution offered at the end of this Note could be set into motion by legislatures before courts make rulings on the matter that resemble *Furman* in the sense that "the imposition and carrying out of the death penalty in these cases constitute cruel and usual punishment in violation of the Eighth [or] Fourteenth Amendments."[113]

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109 Campbell v. Wood, 511 U.S. 1119, 1122 (1994). (Blackmun, J., dissenting from *denial of certiorari*) (retelling the gory details of what a witness to a hanging experienced when the convict received his punishment).

110 Kristen Loveland, *Death and its Dignities*, 91 N.Y.U. L. REV. 1279, 1301 (2016).

111 *See id.* at 1300.

112 *See id.* at 1280.

113 Furman v. Georgia, 408 U.S. 238, 239–40 (1972) (*Per curiam*) (alteration from the original). The reason for the alteration in the quote is that any decision that the courts make may not be on *both* grounds, but may only be on one of those grounds. U.S. CONST. amend. VIII, XIV.

ii. Objective Dignity of the Individual

The inmate's dignity, because it is construed objectively, is not based on the inmate's individual thoughts and feelings.[114] Inmates do not lose all constitutional protections and rights upon conviction, they may retain certain small comforts before death like choosing their last meal and words.[115] Some inmates may even have the option to choose the method by which they are executed.[116] Importantly, prisoners also have the option to waive their appeals while on death row.[117] These small comforts are indicative of slight concern for the prisoner's subjective dignity. Aside from the small comforts described above, the only time an inmate's subjective beliefs are entertained in the death penalty context is when discussing pain. But even then, restricting the graphic nature of the execution to the farthest extent possible, and thus maintaining the dignity of all those involved in the execution, typically outweighs the prisoner's interest in minimizing pain from execution.[118] The inmate's individual dignity is seemingly limited to the most bare-bones rights that the Constitution protects, perhaps intentionally.[119] Coincidentally, Loveland points out that the inmate's individual dignity in this context bears resemblance to procedural dignity to the extent that procedural dignity seems to make short work of any questions pertaining to the inmate's individual dignity.[120] We will discuss this point further.

However, it is important to note that while dignity may

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114 Kristen Loveland, *Death and its Dignities*, 91 N.Y.U. L. REV. 1279, 1302 (2016).

115 *See id.* at 1302–03.

116 *See Methods of Execution*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/methods-execution (last visited Sept. 7, 2018). *But see* Arthur v. Dunn, 137 S. Ct. 725, 734 (Mem.) (2017) (Sotomayor, J., dissenting) (explaining that why the Court should hear petitioner's challenge to the State's method of execution and carry out the sentence using the petitioner's preferred method of execution).

117 Stephen Blank, Notes and Comments, *Killing Time: The Process of Waiving Appeal The Michael Ross Death Penalty Cases*, 14 J. L & POL'Y, 735, 736, 737 (2006).

118 Glass v. Louisiana, 471 U.S. 1080, 1085 (1985).

119 Which is not an inconceivable presumption considering the inmate is incarcerated for committing a violent crime. *See also* Hung Yin, *The Death Penalty Spectacle*, 3 U. DENV. CRIM. L. REV. 165, 175, 176, 177 (2013) (discussing how solitary confinement is an option to incapacitate a prison inmate murder for the safety of other inmates). However, the later sections of this note show why this change to a certain degree.

120 Kristen Loveland, *Death and its Dignities*, 91 N.Y.U. L. REV. 1279, 1301 (2016).

generally be equated with autonomy in certain instances, dignity is more than just autonomy. While an inmate's autonomy will be limited against his wishes in certain ways by his incarceration,[121] I think an inmate's subjective dignity can still be preserved because dignity can be thought of as involving a freedom from purposeless suffering. In other words, dignity may include choice of how to be free from purposeless pain, which is undignifying, but dignity is actually being free from purposeless pain despite whether the inmate chooses how to be free from purposeless pain.

iii. Collective Dignity

Collective Dignity "addresses how members of civilized societies ought to behave and ought to be treated in order to respect the collective dignity of humanity."[122] Collective Dignity deals with how a particular action reflects upon a society's humanity.[123] Different from objective individual dignity mentioned above, collective dignity asks what dignity means for a society. Collective dignity seems to be what we worry about when thinking about *Trop v. Dulles*'s "evolving standards of decency."[124] In *Trop*, the Court held that a court martialed solider did not lose his rights as an American citizen through his dishonorable discharge and conviction for desertion from the United States Army during wartime.[125]

The Court explains that the "fundamental rights of citizenship [are] secure" so long as the person does not "voluntarily renounce or abandon his citizenship."[126] Significantly, the Court states that "the deprivation of citizenship is not a weapon that the Government may use to express its displeasure at a citizen's conduct, however reprehensible that conduct may be."[127] The Court even uses the death penalty as "an index of the

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121 Hung Yin, *The Death Penalty Spectacle*, 3 U. DENV. CRIM. L. REV. 165, 165 (2013)

122 Kristen Loveland, *Death and its Dignities*, 91 N.Y.U. L. REV. 1279, 1304 (2016).

123 *See id.* at 1304.

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

125 *Id.* at 114.

126 *Id.* at 93. (altered from the original).

127 *Id.* at 92–93.

constitutional limit on punishment,"[128] saying that "the existence of the death penalty is not a license to the Government to devise any punishment short of death within the limit of its imagination."[129] When discussing the Eighth Amendment, the Court states that the "basic concept underlying the Eighth Amendment is nothing less than the dignity of man."[130]

When discussing what the phrase "cruel and unusual" means in terms of constitutional limits, the majority opinion states that the meaning of the phrase "is not static.[131] The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[132] The Court found that denationalization was cruel and unusual because the petitioner would be subject to perpetually escalating fear and possible peril,[133] by way of his statelessness, likening the punishment to torture.[134]

The Court summarized statelessness, a condition unanimously deplored by the civilized nations of the world as a criminal punishment,[135] because it terminates "for the individual the political existence that was centuries in the development."[136] This termination occurs on both national and international levels, as the taking of the petitioner's "right to have rights."[137]

Collective dignity is also arguably what the Court worried about when it considered the constitutionality of executing the intellectually disabled. In *Atkins v. Virginia*,[138] the Court held that executing the "intellectually disabled" is cruel and unusual punishment in violation of the Eighth Amendment.[139] Writing for the majority, Justice Stevens states that a punishment must be in proportion to the crime for which it is imposed.[140] Disproportionate punishment is violative of the Eighth Amendment's prohibition on cruel and usual punishment because it is excessive punishment.[141]

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128 *Id.* at 99.
129 *Id.*
130 *Trop*, 356 U.S. at 100.
131 *Id.* at 100–01.
132 *Id.* at 101.
133 *Id.* at 102.
134 *Id.* at 101.
135 *Id.* at 102.
136 *Trop*, 356 U.S. at 102.
137 *Id.* at 102.
138 Atkins v. Virginia, 536 U.S. 304 (2002).
139 *Id.* at 321.
140 *Id.* at 311.
141 *Id.* at 311 ("We explained 'that it is a precept of justice that punishment for

"Proportionality review under those evolving standards [in *Trop*] should be informed by "'objective factors to the maximum possible extent[.]'"[142] He goes on to point out that the "clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures."[143] This evidence is only part of the equation as Stevens points out that "in cases involving a consensus, our [the Court's] own judgment is 'brought to bear,' by asking whether there is reason to disagree with the judgment reached by the citizenry and its legislators.".[144] The Court found that there was a consistent direction among the states that prohibited the execution of the intellectually challenged, and states that did not have a similar prohibition rarely executed intellectually disabled convicts.[145] Just like subjective self-determination, subjectively defined existential and bodily integrity operate within objective individual dignity; dignity of the procedure and objective individual dignity operate within collective dignity.[146] Cases like *Atkins* and *Trop* demonstrate how we reference collective dignity to deduce what we find to be "cruel and unusual."[147]

Loveland argues that the subject of procedural dignity is collective society because courts and prisons care more about how witnesses feel emotionally during the execution than how the prisoner feels physically and mentally.[148] It is also made clear that the prisoner's wishes are held in low regard. It also explains why

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crime should be graduated and proportioned to [the] offense." (quoting Weems v. United States, 217 U.S. 349, 367 (1910)).

142 *Id.* at 312 (citing Harmelin v. Michigan, 501 U.S. 957, 1000 (1991)). (alteration to the original quote as presented in the case).

143 Atkins v. Virginia, 536 U.S. 304, 312 (2002) (quoting Penry v. Lynaugh, 492 U.S. 302, 331 (1989)).

144 *Id.* at 313 ("This is the judgment of most of the legislatures that have recently addressed the matter, and we have no reason to disagree with that judgment for purposes of construing and applying the Eighth Amendment. . . . We also acknowledged in *Coker* that the objective evidence, though of great importance, did not 'wholly determine' the controversy, 'for the Constitution contemplates that in the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment.'").

145 *See id.* at 315–16.

146 *See* Kristen Loveland, *Death and its Dignities,* 91 N.Y.U.L. REV. 1279, 1282 (2016).

147 *See Trop*, 356 U.S. at 99. *See also, Atkins*, 536 U.S. at 307.

148 Loveland, *supra* note 146, at 1288–89.

prosecutors argue for the inmate's dignity with certain forms of execution and why we care so much about aesthetics during execution. We seek to make the abyss more pleasing so that after staring at it long enough, we are accepting of what we have become.[149] Loveland suggests that objective individual dignity is merely an offshoot of procedural dignity,[150] which explains why attorneys and courts even consider the inmate in any part of the equation. States may invoke dignity arguments due to fear of citizens perceiving the state improperly executing prisoners. We want to believe that we are working to preserve the inmate's dignity for the sake of our collective dignity, but the only reason that we consider the inmate's dignity is so that we can keep up the illusion, and make sure we preserve the inmate's minimal constitutional rights and protections. If this is true, then we do very little to consider the inmate's subjective dignity in the death penalty context, which is inconsistent with notions of dignity in the physician-assisted suicide context.

2. Long-Term Solitary Confinement's Effect on Dignity

In the death penalty context, if the inmate's dignity is only examined through the dignity of the procedure, the dignity of the procedure's subject is collective society, then we really do not consider nor preserve the individual's subjective dignity; the exception being a last meal, last words, and rarely, how an inmate prefers to be executed. While not considering the individual's dignity does not seem like an issue, it may pose Eighth Amendment problems since the practice which causes dignity to suffer is the same practice that creates purposeless and undue suffering, violative of the Eighth Amendment.

We could use dignity determinations to predict and prevent Eighth Amendment violations because, although the Eighth Amendment may not be violated when dignity is violated, dignity is violated whenever the Eighth Amendment is violated.

a. Preliminary Reasons Why an Inmate's Subjective Individual

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149 FRIEDRICH NIETZSCHE, BEYOND GOOD AND EVIL: PRELUDE TO A PHILOSOPHY OF THE FUTURE 69 (Rolf-Peter Horstmann & Judith Norman eds., Cambridge University Press 2002) (1886) ("He who fights with monsters should look to it that he himself does not become a monster. And if you gaze long into an abyss, the abyss also gazes into you.").

150 *See* Loveland, *supra* note 146, at 1308.

Dignity is Not Considered

Why do we have different dignity concerns in the Physician-Assisted Suicide and Death Penalty contexts if both situations involve a unnecessary suffering, an untimely and assumingly inevitable death and purposeless? Loveland mentions two immediate, hypothetical reasons that death row inmate's dignity interests may not be considered as much as a terminally-ill patient's dignity interests, the first is that the inmate's actions stripped him of whatever liberty interest he *may*[151] have had in the matter of his death, and the second is that the inmate's actions should cause us to reject the preservation of his subjective dignity.[152] Both of these reasons do not change the disdain with which the Court looks at unnecessary, purposeless suffering in each context.

Even if we assume that an inmate's actions stripped him of whatever liberty interest he hypothetically has, *Tropes* tells us that Eighth Amendment protections an inmate receives cannot be surrendered or denied.[153] The government is still under an obligation to insulate an inmate from any cruel and unusual punishment. Long-term solitary confinement arguably is cruel and unusual punishment because it causes purposeless suffering that is not part of an inmate's original court determined sentence. As we discussed above, while the death penalty is considered to satisfy the penological goal of retribution, and possibly deterrence, long-term solitary confinement has little to no purpose. Executing an inmate after long-term solitary confinement violate the Eighth Amendment's prohibition on excessive punishment because the punishments taken together are disproportional to the crime(s) committed.[154] The long-term solitary confinement, plus the execution, is essentially a double punishment that is dissonant

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151 *See* Washington v. Glucksberg, 521 U.S. 702, 706 (1997) (emphasizing "may" because the Supreme Court has already held there is no constitutionally protected liberty interest in Physician-Assisted Suicide.) However, that case was decided on 14th Amendment grounds. *Id.*

152 *See* Loveland, *supra* note 150, at 1312. ("Dying with dignity in the assisted suicide context has been framed as a liberty interest, whereas executions are almost always unwilling and therefore deprive the inmate of liberty."). *Id*.

153 *See Trope* 356 U.S. at 100.

154 *See* AM. CIVIL LIBERTIES UNION, A DEATH BEFORE DYING: SOLITARY CONFINEMENT ON DEATH ROW 3 (2013).

with the Eighth Amendment's basic concept: the dignity of man.[155] Precedent exists where states, while condoning the death penalty, have taken issue with long-term solitary confinement, condemning the practice as early as 1890.[156]

These arguments apply with the same force even if you assume that the inmate's actions cause us to properly reject his subjective dignity considerations by replacing them with the objective individual dignity considerations. The Eighth Amendment is what protects the inmate from undue, purposeless suffering, the offender to his dignity.[157] By protecting the inmate from long-term solitary confinement and the purposeless, unnecessary suffering associated with it, we abide by the Eighth Amendment's requirements[158] and preserve both the inmate's subjective and objective individual dignity to a greater extent.

As explained earlier in discussing *Trop* and *Atkins*, the Court examines at "evolving standards of decency," and asks, "whether there is reason to disagree with the judgment reached by the citizenry and its legislators."[159]

Presently, more states are passing laws against the use of long-term solitary confinement.[160] States like Hawaii are also approving of physician-assisted suicide through either legislation or case law.[161] These movements suggest that society is showing

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155 *See Trope* 356 U.S. at 100.

156 *See In re* Medley, 134 U.S. 160, 168, 171 (1890). However, the time period at issue in that case was four weeks. *Id.* at 172 (referencing the state of Colorado that held long-term solitary confinement was an additional punishment and thus forbidden).

157 *See* Kristen Loveland, *Death and its Dignities*, 91 N.Y.U.L. REV. 1280–1305 (2016) (stating that "[n]ot only does the Eighth Amendment 'reaffirm the duty of the government to respect the dignity of all persons,' but its 'protection of dignity reflects the Nation we have been, the Nation we are, and the Nation we aspire to be.'" (citing Hall v. Florida, 134 S. Ct. 1986, 2001 (2014))).

158 *See* Rhodes v. Chapman, 452 U.S. 337, 372 (1981) (Marshall, J., dissenting) ("The Eighth Amendment embodies broad and idealistic concepts of dignity, civilized standards, humanity and decency, against which conditions of confinement must be judged.") (citing Estelle v. Gamble, 429 U.S. 97, 102 (1976) (internal quotation omitted)).

159 Atkins v. Virginia, 536 U.S. 304, 312–13 (2002).

160 Teresa Wiltz, *Is Solitary Confinement on the Way Out?*, THE PEW CHARITABLE TR.: STATELINE (Nov. 21, 2016), http://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2016/11/21/is-solitary-confinement-on-the-way-out.

161 Sophia Yan, *Medically assisted suicide becomes legal in Hawaii*, AP NEWS (Apr. 5, 2018), https://www.apnews.com/91a066e44af64b538eaa7472bf6a9cb2/Medically-

its disapproval of the use of long-term solitary confinement, and their concern for those enduring purposeless, undue suffering.[162]

b. Considering Loveland's Application of Physician-Assisted Suicide Dignity to Death Penalty

Loveland states that dignity in the death penalty context could benefit from dignity in the physician-assisted suicide context.[163] She raises the issue of how society's focus on the aesthetic aspects of the death penalty may be detrimental to the death row inmate's subjective dignity and "frustrate more than reflect an accounting of collective values."[164] Her suggestions focus on importing "considerations of subjective dignity . . . into the death penalty [context]."[165] Otherwise, collective society will be forced to reevaluate its standards in order to comport with the realities of execution, displeasing visuals and all. Ways in which prisons can import considerations of subjective dignity include considering the inmate's pain as an element in determining whether an inmate's execution comports with collective dignity, and giving the inmates more choice in how to end their lives and the "protocols" involved with their demise.[166] In the latter suggestion, the inmate's choice would involve "a *balance* between respecting collective dignity and respecting the inmate's interest in a death reflecting her self-determination and integrity."[167] While these suggestions may help preserve an inmate's dignity to some extent, they do not address the offense to dignity that long-term solitary confinement creates.[168]

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assisted-suicide-becomes-legal-in-Hawaii; Baxter v. State of Montana, 224 P.3d, 1211, 1222 (Mont. 2009); Bradford Richardson, *D.C. physician-assisted suicide law goes into effect*, WASH. TIMES (Feb. 18, 2017), http://www.washingtontimes.com/news/2017/feb/18/dc-physician-assisted-suicide-law-goes-effect/.

[162] *See* Davis v. Ayala, 135 S. Ct. 2187, 2210 (2015) (Kennedy, J., concurring).

[163] Kristen Loveland, *Death and its Dignities*, 91 N.Y.U.L. REV. 1279, 1308–09 (2016).

[164] *Id.* at 1312.

[165] *Id.* at 1311.

[166] *Id.* 1311–13.

[167] *Id.* at 1313. (alteration in original)

[168] *See Davis*,135 S. Ct. at 2209–10.

i. Actual Execution

Why Choosing the Method of Execution Does Not Fix the Issue

Adding a subjective dignity component that allows the inmate to choose the method by which they are executed or who witnesses their execution may help the inmate feel better about the prospect of death, but after such a long stay in solitary confinement, this would not change the unnecessary suffering that the inmate experiences as a result of the confinement conditions. The choice may allow for some subjective self-determination by the inmate toward the end of his sentence, and may possibly preserve the inmate's subjectively defined existential integrity,[169] but this ignores the issue presented immediately after conviction–the conditions of confinement. Any sort of ground gained by letting inmates choose their own method of execution, the protocols associated with the execution, or who witnesses the execution would be lost because long-term solitary confinement is offensive to dignity in that we would still allow the inmate to sustain unnecessary mental and emotional suffering leading up to his execution. While some consideration and preservation of the inmate's subjective self-determination, and individual subjective dignity in turn, by letting the inmate choose his preferred method of execution would be better than no consideration or preservation of the inmate's subjective self-determination or individual subjective dignity at all, we would essentially be trying to make an inmate whole after losing something during long-term solitary confinement instead of trying to prevent the loss in the first place. This note will offer a solution that prevents this loss of dignity.

Further, letting an inmate choose his preferred method of execution only minimizes pain felt during the actual execution at best, which still does not address the purposeless suffering caused by the pre-execution conditions. While a death row inmate cannot pick and choose every detail about their sentence in order to obtain subjective self-determination, or individual subjective dignity, to the same extent physician-assisted suicide candidate may be able

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[169] *See* Loveland, *supra* note 163, at 1293. (Subjectively Defined Bodily Integrity is not as much of an issue for death row inmate compared to the risk and subsequent mental anguish and injury they face because an inmate's physical being is not in as much danger as the inmate's mental and emotional being. However, physical injury may be linked to or caused by the mental and emotional distress.) *Id.* at 1295.

to, the inmate has an Eighth Amendment right to be free from unnecessary, purposeless suffering while awaiting his execution.

Giving Inmates the Option of When They Are Executed

Giving inmates the option to pick when they are to be executed without changing confinement conditions would render the inmate's choices over how they die meaningless because the choice is not exactly free. To say that there is a death row inmate held under current standards who, given the opportunity, freely chooses an earlier execution is akin to saying that I chose the color of my Ford Model T when Mr. Ford tells me "you can have it in any color you want as long as it is black."[170]

The situation is similar to how philosopher Raymond Angelo Belliotti explains Lucius Annaeus Seneca's suicide.[171] The terminally ill patient and the death row inmate face the same "truncating alternatives" as Seneca.[172] Aside from whether the lawyer is, or is not acting in her client's best interest, the inmate cannot make a rational decision given the circumstances in the same way a confession extracted through torture is not constitutionally proper. A choice between "truncating alternatives" may be considered a choice by some, however it is an illusory choice. The choice between dying sooner to save yourself from being exposed to unnecessary suffering and effectively waiving your right of appeal or subjecting yourself to dehumanizing conditions to exercise your rights with the hope that things change.

i. Pre-Execution Confinement Issues

When we think of the prospect of being locked away in dehumanizing conditions which cause severe mental anguish, we may see death as a welcome occasion. Similar to a terminally-ill

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170 *See* Initial Brief of Appellant at 80–85, Valle v. Florida, 564 U.S. 1067 (2011) (No. SC11-1387), 2011 WL 12473628.

171 RAYMOND A. BELLIOTTI, ROMAN PHILOSOPHY AND THE GOOD LIFE 194–95 (Lexington Books, 2009) (Seneca's suicide was not a voluntary taking of his own life because the decision was suicide or execution. The act was voluntary but only because Seneca was faced with truncated alternatives.).

172 *Id.* at 195 (including interminable disease, loss of limbs, relentless pain and the like were reasonable causes for suicide).

patient seeking a physician-assisted suicide, death eliminates the purposeless suffering caused by the circumstances.[173] However, a stark difference between the terminally-ill patient and the death row inmate is that a "terminally-sentenced" inmate does not need to purposelessly suffer for the time between their final appeal and moment of death by being kept in conditions that are known to cause mental harm unless the inmate's punishment specifically includes being kept in those conditions.[174] Even if the inmate's punishment specifically includes being kept in those conditions, there is still an argument that long-term solitary confinement is cruel and unusual in and of itself and without penological purpose. Even with penological purpose, the eventual execution would make the punishment exacted upon the inmate disproportionate to the crime he is being punished for making his punishment excessive according to Eighth Amendment standards.[175] When a medical patient is diagnosed as terminal, we provide palliative care in an effort to make them as comfortable as possible. If a terminally-ill patient spent the time between final treatment and the moment of death in pain, many would see the situation as undignified. In contrast, there is a chance an inmate's terminal sentence will be overturned on appeal but appeals take time and the convicted may receive a life sentence after escaping the death penalty.[176] The inmate awaiting appeal or death can be confined to the same conditions as other inmates who have committed similar crimes. The only difference between a death row inmate and an inmate serving life without parole is their sentence.[177] Because the inmate's confinement conditions are determined by the prison, then it follows that the prison could modify confinement conditions in a way that confines without crazing, thus relieving the inmate of unnecessary pain and suffering.

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173 *See* Tongue, *supra* note 26, at 902 (discussing Death Row Syndrome, where the physical aspects include cramped cells, limited human contact, and constant surveillance; the experimental aspect includes the constant fear of impending death; and the temporal aspect includes the length of time a prisoner spends on death row.).

174 *See* AMERICAN CIVIL LIBERTIES UNION, *supra* note 5 at 2–4. Many death row inmates are placed in solitary confinement based solely on their sentence alone. Solitary confinement compromises both physical and mental health of inmates, and needlessly inflicts pain and suffering equivalent to physical torture. *Id.*

175 *See id.*, *supra* note 5, at 3, 8.

176 *See id.* at 8.

177 THE ARTHUR LIMAN PUB. INTEREST PROGRAM, YALE LAW SCH., *supra* note 8, at 15–16.

ii. Tying Dignity and Penological Purpose together

Nor do Loveland's suggestions give long term solitary confinement the penological purpose required to make any punishment more than a wanton infliction of pain that the Eighth Amendment protects against.[178]

Loveland does not address long term solitary confinement and the distinct issues it poses to an individual inmate's dignity or constitutional rights, as well as the lack of penological purpose in the death penalty context.[179] However, Loveland's dignity formulation provides a good framework to discuss dignity within the context of the death penalty because it addresses how the individual inmate's subjective considerations are squeezed out of the equation in favor of society's collective interest in the process. This may help explain why these issues are so often overlooked by courts. The problem this presents is if dignity is used more frequently in constitutional jurisprudence, then we need to explain the disconnect between what dignity means in one context and another.

However, the bigger issue is a lack of penological purpose. This is what defines whether a punishment is cruel and unusual. Cases like *Glucksberg* and *Vacco* show us that dignity does not always win the day, at least not for Fourteenth Amendment purposes. This note's focus on dignity is to show that society generally believes undergoing purposeless, undue suffering is offensive to the dignity of the individual experiencing the suffering in one context, but in another, we allow individuals to undergo purposeless, undue suffering while in long term government custody. In that context, our inattention is perpetuating something we find abhorrent in addition to creating constitutional issues involving a vulnerable population. This is true to the extent that some states have passed laws permitting physician-assisted suicide when someone's life will be extinguished by a terminal illness before it would have ended naturally (without the illness)

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178 *See* Loveland, *supra* note 91, at 1285 (explaining that in Eighth Amendment jurisprudence, courts seek to "stop or limit activities that do not comport with how a decent society should respect the dignity of human life.").

179 *See* Hall v. Florida, 134 S. Ct. 1986, 1990 (2014) (stating penological purpose or punishment is justified "under three principal rationales: rehabilitation, deterrence, and retribution").

in order to avoid the purposeless, undue suffering associated with the terminal illness.

If we feel it is deplorable to allow terminally ill patients to endure purposeless, undue suffering, then we should feel similarly (if not worse) about allowing death row inmates to undergo the same purposeless, undue suffering associated with long term solitary confinement. Perhaps even more so because that suffering, unlike a terminal illness like amyotrophic lateral sclerosis (ALS), is avoidable by simply allowing death row inmates to interact with each other; this would improve the prisoners' quality of life at little to no cost to the prison.

This is alarming on a constitutional level because it leaves the death penalty open to constitutional attack.. States in favor of the death penalty would be wise to sever the unconstitutional practice of long term solitary confinement as the default confinement method for death row inmates. Unless this facially purposeless, undue suffering has some sort of penological purpose, its infliction can be considered unconstitutional. The other problem is an unacceptable risk, similar to that discussed by Justice Kennedy in *Hall v. Florida*,[180] may be present in executing members of this population. In that case, the Supreme Court rejected Florida's rule that an inquiry into whether a death row inmate is mentally competent to be executed stops if the inmate is found to have an IQ score of seventy or more.[181] The Court held that Florida's determinative reliance on IQ test scores disregarded medical science and created "an unacceptable risk that persons with intellectual disabilities will be executed."[182] This kind of execution has been held to serve no legitimate penological purpose.[183] Whether or not there is an unacceptable inherent risk in capital punishment's enactment, similar to that of *Hall*, cutting out possible variables like long-term solitary confinement's effect on death row inmates will make analyzing the issue simpler.[184]

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[180] *Hall*, 134 S. Ct. at 1990 ("If, from test scores, a prisoner is deemed to have an IQ above 70, all further exploration of intellectual disability is foreclosed. This rigid rule, the Court now holds, creates an unacceptable risk that persons with intellectual disability will be executed, and thus is unconstitutional.").

[181] *Id.* at 2001.

[182] *Id.* at 1990.

[183] *Id.* at 1992. *See also*, Atkins. v. Virginia, 536 U.S. 304, 317 (2002).

[184] MEGAN E. TONGUE, *supra* note 26, at 903 ("Dr. Harold I. Schwartz, Psychiatrist-in-Chief at Hartford Hospital in Hartford, Connecticut, found that if Death Row Syndrome can be used to find an inmate incompetent, then this would lead to the abolition of the death penalty via psychiatry." (citing Harold I. Schwartz, *Death Row Syndrome and Demoralization: Psychiatric Means to Social*

iii. Solutions

1. Why Putting Death Row Inmates into the General Population is the Only Way to Satisfy Eighth Amendment Restrictions on Cruel and Unusual Punishment and Preserve an Inmate Dignity

One solution to the delay, Eighth Amendment, dignity, and cost issues associated with the institution of the death penalty is to put death row inmates in general population, or at the very least, take them out of solitary confinement;[185] especially if there is little to no justification for putting death row inmates in long term solitary confinement in the first place.

Taking inmates out of long term solitary confinement would eliminate the damage to an inmate's dignity by taking him out of the conditions that cause damage. By taking inmates out of long term solitary confinement, Eighth Amendment issue would be solved because it would end the undue suffering for which there is no legitimate penological rationale.[186] Inmates who are not subject to those conditions would not feel compelled to give up their right of appeal. Both the inmate and the government can take the time to diligently and carefully build their case without the fear of unrealistic deadline looming over their heads. The entire process can be given the attention and care that the Constitution requires.

Prisons in some states, such as Missouri, are using their discretion to stray from using long term solitary confinement as the default confinement method for death row inmates.[187] Other states, specifically North Carolina and Colorado, have taken their death row inmates out of long term solitary confinement and

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Policy Ends, 33 J. AM. ACAD. PSYCHIATRY & L. 150, 153-155 (2005))).

185 *See* Death Penalty Info. Ctr., *Costs of the Death Penalty*, DEATH PENALTY INFO. CTR. ("[O]n average, Oklahoma capital cases cost 3.2 times more than non-capital cases.") (last visited Aug. 22, 2018), https://deathpenaltyinfo.org/costs-death-penalty; David Cole, *Justice Breyer v. the Death Penalty*, THE NEW YORKER (June 30, 2015), https://www.newyorker.com/news-desk/justice-breyer-against-the-death-penalty; THE ARTHUR LIMAN PUB. INTEREST PROGRAM, YALE L. SCH., RETHINKING DEATH ROW: VARIATIONS IN THE HOUSING OF INDIVIDUALS SENTENCED TO DEATH 4 (2016).

186 *See* Cole, *supra* note 185 ("[W]hen held in isolation, 'a considerable number of the prisoners fell, after even a short confinement, into a semi-fatuous condition . . . and others became violently insane; others, still, committed suicide.'").

187 *See* THE ARTHUR LIMAN PUB. INTEREST PROGRAM, *supra* note 185, at 2.

exposed them to varying degrees of contact with other inmates.[188]

A 2016 report by the Arthur Liman Public Interest Program at Yale Law School found, after reviewing relevant case law, statutory, and regulatory authority, that most jurisdictions with death row inmates gave their prisons substantial discretion in how the prison housed death row inmates.[189] If true, then prisons housing death row inmates should proactively make changes; which take each facility's unique population and its needs into account; before changes are forced upon them.

One possible reason why prisons subject death row inmates to long term solitary confinement is for the safety of their officers and personnel, because death row inmates are thought to be more violent than other prisoners.[190] However, prison directors from various states have reported that, after taking death row inmates out of solitary confinement, rates of violence decreased. This includes prisoner-on-prisoner violence, and violence between guards/staff and prisoners.[191] Ironically, one director even perceived long-term solitary confinement for death row inmates in and of itself as "an issue for the well-being of the prison community and its safety."[192] The same director went on to state his belief that, "in the long run this policy will lead to a safer facility. . . . [A]ll the evidence is pointing in that direction."[193] Another director had a similar feeling, suggesting that because of the adverse effects long term solitary confinement has on inmates, continuing that mode of confinement would "lead to more problems with violence and discipline than isolation solved."[194] In some prisons inmates even "'police themselves within their own community.'"[195] Cultivating a prison culture like this could lead to a decreased need for guards, or other staff members if the prison allows its death row inmates to hold a prison job. Each result has the added of benefit of improving fiscal efficiency.

While the cost of changes in confinement methods and

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188 *See id.* at 2–3.

189 *Id.* at 4. This review of statutes and regulations documents that most jurisdictions do not require isolation of death-sentenced prisoners and leave correctional officials substantial discretion to determine housing conditions. *See id.*

190 *See id.* at 5.

191 *See id.* at 12–17.

192 *Id.* at 15.

193 *Id.* at 17.

194 *Id.* at 11.

195 *Id.*

conditions can presumably add up quickly, there may be another cost that always carries a high price tag: litigation. It goes without saying that litigating and adjudicating issues costs money, the only variables are the dollar figure and who is paying. If prisons changed their policies on the default confinement method for death penalty inmates, then the prison could potentially sidestep a large wave of impending litigation. Policy changes involving death row inmate housing in Missouri, Colorado,[196] and recently Virginia,[197] ignited litigation by prisoners. Prisoners from each state experiencing varying degrees of long-term solitary confinement filed respective suits in an effort to change the conditions of their confinement. The fact that these suits caused prison officials to change their policies speaks to the magnitude of the threat that potential litigation poses on other prisons that still employ long term solitary confinement as the default method of confinement for death row inmates. Even if changing confinement methods or conditions would impose a financial burden, those changes may be miniscule compared to the cost of litigation. With this in mind, no state or prison should see themselves as immune to recent policy changes for death row confinement because similar movements are taking place in other jurisdictions such as California, Louisiana, Nevada, and Tennessee.[198]

States need to realize that these suits can be successful. Other courts and jurisdictions are starting to take notice, realizing that long-term solitary confinement as the default method of confinement for death row prisoners is cruel and usual. Recently, a district court in Virginia granted an injunction that would keep the plaintiffs from returning to conditions that the court found to be violative of the Eighth Amendment.[199] Those conditions mainly consisted of 23 hours a day in a cell, an hour of recreation five days a week in an "outdoor cell" lacking exercise equipment, and noncontact visitation on weekends and certain holidays.[200]

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196 *See id.* at 16.

197 Death Penalty Info. Ctr., *Virginia Death-Row Prisoners Win "Landmark" Prison Conditions Lawsuit*, DEATH PENALTY INFO. CTR. (last visited Apr. 21, 2018), https://deathpenaltyinfo.org/node/7027.

198 Death Penalty Info. Ctr., *In Lawsuit Settlement, Arizona to End Automatic Solitary Confinement for Death-Row Prisoners*, DEATH PENALTY INFO. CTR., (last visited Apr. 21, 2018), https://deathpenaltyinfo.org/node/6824.

199 Porter v. Clark, 290 F. Supp. 3d 518 (E.D. Va. 2018).

200 *Id.* at 523; Rachel Weiner, *Federal judge orders Virginia to retain death*

Another success story for suit of this kind is a 2017 opinion from the U.S. Court of Appeals for the Third Circuit that discussed the issue of solitary confinement.[201] Despite limiting its opinion to circumstances in which solitary confinement is used after an inmate's death sentence is vacated, the opinion is still revealing.[202] The opinion states that, "scientific research and the evolving jurisprudence has made the harms of solitary confinement clear: Mental well-being and one's sense of self are at risk. We can think of few values more worthy of constitutional protection than these core facets of human dignity."[203]

Taking death row inmates out of solitary confinement would also help reduce future *Lackey* claims.[204] The petitioner, Clarence Lackey, filed a petition for a writ of certiorari on the basis that his seventeen year stay on death row violated his Eighth Amendment protection against cruel and unusual punishment.[205] While the Court denied his petition, Justice John Paul Stevens issued a memorandum respecting the denial in which he states, "the importance and novelty of the question presented"[206] are sufficient to warrant review, as well as, the effect that excessive delays have on the permissibility of the punishment according the Framers and its penological purposes.[207] In the years following, the question reached the Supreme Court multiple times in one way or another,[208] but has yet to be answered. By taking prisoners out of the cruel and unusual conditions that constantly remind them that they are going to be executed, we allow them to spend their time as any other prisoner sentenced to life in prison would. While this may not give a prisoner the exact date on which their punishment will be carried out, letting the prisoner spend his time engaging in

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row revisions, THE WASH. POST (Feb. 22, 2018), https://www.washingtonpost.com/local/public-safety/federal-judge-orders-virginia-to-retain-death-row-reforms/2018/02/22/991f72fc-17e0-11e8-8b08-027a6ccb38eb_story.html?utm_term=.b9f7dbb74f2f.

201 Williams v. Sec'y Pennsylvania Dep't of Corr., 848 F.3d 549, 543 (3d Cir. Feb. 9, 2017).

202 *Id.* at 552 n.2.

203 *Id.* at 574.

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

205 *Id.* at 1045.

206 *Id.*

207 *Id.*

208 *See* Knight v. Florida, 528 U.S. 990, 997– 98 (1999) (Breyer, J., dissenting). *See also*, Johnson v. Bredesen, 558 U.S. 1067 (2009) (considering the procedural methods used to bring a *Lackey* claim); Lackey v. Texas, 514 U.S. 1045 (1995) (considering whether long term stays on death row are a violation of the Eighth Amendment).

other activities would let him take his mind off when that date might be. Letting the prisoner live a relatively more normal life will reduce the Sword of Damocles hanging over the prisoner's head to the periodic realization that he will probably live his last day incarcerated. In some cases, that realization could reflect how every other human subconsciously perceives and handles their own mortality.

D. CONCLUSION

Despite differing opinions on whether the death penalty is constitutionally or morally permissible, there are definite upsides to taking death row inmates out of solitary confinement. There are constitutional, moral, legislative, and fiscal advantages to such a move that make the proposition hard to argue against. These advantages are not going unnoticed, especially by prison administrators who have seen the positive results firsthand.[209] Current trends suggest that courts are starting to notice the advantages as well, along with the draconian problems that long term solitary confinement creates.[210] State legislatures that would like to retain the death penalty should seek to pass laws in sync with the current trends sweeping the Nation regarding the death penalty and physician assisted suicide to the extent that prisoners of that state are insulated from unnecessary, purposeless suffering. Laws like this would protect a prisoner's Eighth Amendment rights and dignity. Not only is dignity becoming a valued concept in law-making and our everyday lives, but it is part of what gives meaning to the Eighth Amendment's prohibition against cruel and unusual punishment. Practices violative of a person's dignity and right to be free from cruel and unusual punishment are practices that are going to be phased out at one point or another, which is what we are seeing now.[211]

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209 *See supra* text accompanying notes 124–30.
210 *See supra* text accompanying notes 131–36.
211 *Williams*, 848 F.3d at 574.