COMMENTS

Unraveling Death Row's Torture Paradox: A State-Informed Standard for Eighth Amendment Violations on Death Row

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The Eighth Amendment prohibition on cruel and unusual punishment has long been understood to bar state-inflicted torture. In fact, torture is so morally abhorrent that fourteen states allow torture of a victim to elevate a murder into a death-eligible offense. Yet a fundamental paradox persists: The same circumstances that constitute torture sufficient to authorize an individual's capital sentence are routinely present on death row.

Drawing on a systematic analysis of state definitions of torture utilized in capital proceedings, this Comment proposes a resolution to this paradox, arguing for the creation of a new, state-informed standard to address Eighth Amendment violations on death row. This Comment identifies two key principles: that psychological pain, including the anticipatory terror of an impending execution, constitutes torture, and that torture does not require proof of specific intent to harm. Together, these principles form a new evaluative metric consistent with the Supreme Court's evolving standards of decency framework and better suited to address the diffuse, structural nature of death row conditions than the Court's existing Eighth Amendment criteria.

Applying this standard to conditions on death row, this Comment argues that three categories of pre-execution conditions permitted under current law should constitute torture prohibited under the Eighth Amendment: rescheduled botched executions, prolonged solitary confinement, and inordinate pre-execution delays. A new Eighth Amendment standard grounded in state definitions of torture brings coherence to a body of law defined by contradiction—and provides a path to meaningful constitutional protection for the thousands of individuals currently on death row.

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INTRODUCTION

> *For over two years, inmate Henry Arsenault "lived on death row feeling as if the Court's sentence were slowly being carried out." Arsenault could not stop thinking about death. Despite several stays, he never believed he could escape execution. "There was a day to day choking, tremulous fear that quickly became suffocating." If he slept at all, fear of death snapped him awake sweating. His throat was clenched so tight he often could not eat. His belly cramped, and he could not move his bowels. He urinated uncontrollably. He could not keep still. And all the while a guard watched him, so he would not commit suicide.*[1]

On the day of his execution, Henry Arsenault was seated for death while witnesses filed in on the other side of a one-way mirror.[2] The executioner tested the electric chair—"the lights dimmed" and "Arsenault heard other prisoners scream."[3] The

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[1] Dist. Att'y for Suffolk Dist. v. Watson, 411 N.E.2d 1274, 1290 (Mass. 1980) (Liacos, J., concurring) (quoting Arsenault's brief pro se as amicus curiae in support of the defendants).

[2] *Id.*

[3] *Id.*

chaplain administered his last rites. "Arsenault heard the door slam shut and the noise echoing, the clock ticking. He wet his pants."[4]

Arsenault's death sentence was commuted by the Lieutenant Governor of Massachusetts less than half an hour before Arsenault's execution was scheduled to be carried out.[5] He was carried back to his cell trembling uncontrollably, sedated, and moved into the general population.[6] Arsenault had spent two years on death row—a fraction of the average time inmates endure today.[7]

Quoting Arsenault's story, Massachusetts Supreme Judicial Court Justice Paul Liacos affirmed that the fear of waiting for death is the "king of terrors."[8] Justice Liacos cited Arsenault's experience alongside the book of Job, Aristotle's *Nicomachean Ethics*, a statement from the NAACP, psychological journals, and Supreme Court case law in his concurring opinion striking down capital punishment in Massachusetts.[9]

In the near half century since Arsenault was moved off death row, more than 7,400 individuals have been condemned to decades in the same torturous conditions[10]: subject to almost total isolation, exposed to round-the-clock surveillance, and forced to endure the uniquely corrosive uncertainty that accompanies living under a sentence of death.[11] The experience can be agonizing. Some of the 2,100 individuals[12] currently on death row will be moved to the even more extreme isolation of "death watch" prior to their scheduled executions; some will be strapped to gurneys for hours while prison officials try, and fail, to find the means to kill them.[13]

These horrific circumstances, and the harms they generate, are well documented. Courts and scholars have long recognized the devastating psychological and physical effects of confinement

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4 *Id.*

5 *Id.*

6 *Watson*, 411 N.E.2d at 1290 (Liacos, J., concurring).

7 As of 2020, the average time between sentencing and execution for death row inmates was 18.9 years. Jaclyn Diaz, *U.S. Inmates Condemned to Die Are Spending More Time on Death Row*, NPR (May 12, 2022), https://perma.cc/B248-AMXK.

8 *Watson*, 411 N.E.2d at 1290–91 (Liacos, J., concurring) (quoting *Job* 18:14).

9 *Id.* at 1290–93.

10 *See Death Sentences in the United States Since 1973*, DEATH PENALTY INFO. CTR., https://perma.cc/ST79-UGLA (summing the total number of death sentences issued in the United States since 1980).

11 *See infra* Part IV.

12 *See Death Row Overview*, DEATH PENALTY INFO. CTR., https://perma.cc/9Z8F-P9T2.

13 *See infra* Part IV.A.

on death row, noting the "unique stresses"[14] of living under a sentence of death.[15] But even as a growing body of case law and academic articles has equated the conditions on death row with torture, courts have failed to properly confront this reality.

This inaction reveals a fundamental incoherence in Eighth Amendment jurisprudence. The same conduct that can elevate a murder into a capital offense is routinely authorized by the state when perpetrated against individuals on death row. The Eighth Amendment was drafted precisely to prevent punishments that amount to torture.[16] Half of the states that continue to impose capital punishment have deemed torture so morally abhorrent that they justify imposing the death penalty through a statutory torture aggravator.[17] These states classify torture—defined as imposing pain beyond that necessary to cause death—as one factor that, if found by a jury, will make a murder death-eligible.[18]

Yet the Supreme Court has failed to articulate a meaningful framework for identifying when incarcerated individuals on death row are tortured themselves. The result is a constitutionally intolerable double standard: Acts labeled torture when committed by defendants are nevertheless permitted when committed by the state.

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[14] Emily Gray, *Decades in Death's Twilight: Cruel and Unusual Punishment on Texas's Death Row*, 22 NEW CRIM. L. REV. 140, 146 (2019) (quotation marks omitted) (quoting Karen Harrison & Anouska Tamony, *Death Row Phenomenon, Death Row Syndrome and Their Affect on Capital Cases in the US*, INTERNET J. CRIMINOLOGY 1, 2 (2010)).

[15] *See In re* Medley, 134 U.S. 160, 170–71 (1890) (explaining that solitary confinement while waiting for an execution has long been considered a "further terror and peculiar mark of infamy" and calling it "an additional punishment of the most important and painful character" (quotation marks omitted) (quoting Murder Act 1751, 25 Geo. 2 c. 37 (Gr. Brit.))); Furman v. Georgia, 408 U.S. 238, 288 (1972) (Brennan, J., concurring) ("[M]ental pain is an inseparable part of our practice of punishing criminals by death, for the prospect of pending execution exacts a frightful toll during the inevitable long wait between the imposition of sentence and the actual infliction of death."); *Watson*, 411 N.E.2d at 1283 ("The mental agony [of death row] is, simply and beyond question, a horror."); People v. Anderson, 493 P.2d 880, 894 (Cal. 1972) ("[T]he process of carrying out a verdict of death is often so degrading and brutalizing to the human spirit as to constitute psychological torture."); Burns v. State, 2005 WL 3504990, at *20 (Tenn. Crim. App. Dec. 21, 2005) ("[B]eing on death row, in itself, is a traumatic situation."); *see also* Kathleen M. Flynn, *The "Agony of Suspense": How Protracted Death Row Confinement Gives Rise to an Eighth Amendment Claim of Cruel and Unusual Punishment*, 54 WASH. & LEE L. REV. 291, 297 (1997) ("[D]eath row prisoners suffer extreme psychological anguish in anticipation of death.").

[16] *See infra* Part I.

[17] *See* Appendix Table A.

[18] For a more complete discussion of statutory aggravating factors, see *infra* Part II.

Using state definitions of conduct that triggers the torture aggravator to inform our understanding of the Eighth Amendment prohibition provides a pathway to justice. States that continue to employ capital punishment are required to limit which crimes are eligible for the death penalty through the enumeration of statutory aggravating factors.[19] In fourteen states, torture is among these factors. How states define torture for the purpose of imposing the torture aggravator provides a set of critical data points for assessing "the evolving standards of decency"—the metric through which Eighth Amendment violations are evaluated.[20] These definitions represent democratically endorsed, domestically grounded understandings of what constitutes unacceptable cruelty. They map cleanly onto the realities of death row, where individuals are subjected to conditions far more closely resembling state-defined torture than any legitimate form of punishment.[21]

This Comment draws upon these definitions to propose a new standard for evaluating Eighth Amendment violations on death row. Termed in this Comment the "state-informed torture standard," this proposal rectifies the torture paradox through the Supreme Court's validated methods of evaluating the Eighth Amendment. In doing so, this standard also provides critical vindication for the rights of incarcerated individuals.

Part I examines the history of the Eighth Amendment, which elucidates its proscription on torture. Part II discusses the legislatively and judicially constructed definitions of torture developed by states that utilize the torture aggravator to impose capital sentences. Considering how states have analyzed torture for the purpose of imposing the aggravator reveals two key findings. First, psychological pain—including the specific psychological torment of waiting for an impending death—can constitute torture. Second, torture does not require malicious intent. Part III explains the state-informed torture standard and outlines its positive and normative justifications. That Part argues that the state-informed torture standard aligns with the Court's existing Eighth Amendment methodology while providing critical recourse for individuals on death row. Part IV applies this standard to existing conditions on death row, arguing that the state-informed torture

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19 *See infra* Part II.A.

20 Trop v. Dulles, 356 U.S. 86, 101 (1958); *see also infra* Part III.A.

21 *See infra* Part IV. Crucially, actions by death row inmates that implicate state torture aggravators have the same ultimate result as the state-created conditions on death row: The individuals subject to their imposition will, at the end, be killed.

standard would prohibit rescheduled executions after a botch, extended periods of solitary confinement, or pre-execution delays. Specifically, this Comment contends that these acts, once completed, trigger an Eighth Amendment violation sufficient to justify moving an individual off of death row completely.

I. THE EIGHTH AMENDMENT PROHIBITION ON TORTURE

> *I go to sleep and I dream of me sitting down in that chair. I mean it's such a fearful thought. Me walking down the tier, sitting down in it, them hooking it up and turning it on . . . . I can wake up, my heart's beating fast, I'm sweating like hell, just like I'd rinsed my head in water . . . I feel I'm gonna have a heart attack.*[22]

Both the intentions of the Framers and the Supreme Court's ongoing jurisprudence affirm that the Eighth Amendment prohibits state-inflicted torture. Yet for numerous reasons, this prohibition can be difficult to vindicate, and the Supreme Court has failed to articulate a definitive standard for torture that applies to individuals on death row.

This Part provides a brief overview of this phenomenon. Part I.A explains the Eighth Amendment prohibition on torture, considering the intention of the Framers and the Supreme Court's consistent affirmation of this principle. Part I.B outlines the Court's current Eighth Amendment jurisprudence, noting the ongoing struggle to vindicate the prohibition on torture when claims are brought by individuals on death row. Part I.C widens the scope, explaining why governments consistently struggle to meaningfully regulate torture—and evincing the utility of relying on an existing judicial standard.

A. The History of the Eighth Amendment

The Eighth Amendment provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[23] The language of the Eighth Amendment is lifted almost directly from the English Bill of Rights of 1689.[24] A matching clause was originally included in the

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22 ROBERT JOHNSON, CONDEMNED TO DIE: LIFE UNDER A SENTENCE OF DEATH 88 (1981) (second alteration in original).

23 U.S. CONST. amend. VIII.

24 Anthony F. Granucci, *"Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning*, 57 CALIF. L. REV. 839, 840, 853 (1969) (explaining that the English Bill of Rights

Virginia Constitution's Declaration of Rights, which was extremely influential on the Framers;[25] "[James] Madison had leaned heavily on the Virginia Declaration of Rights" in drafting the eventual Bill of Rights.[26]

Virginia's Declaration, like its eventual federal counterpart, prohibited torture.[27] In discussing the language as included in the Virginia Constitution, delegate George Mason explained that the Commonwealth's prohibitions against the use of cruel and unusual punishment (and self-incrimination) barred the use of torture.[28]

Similarly, proscribing torture was "the primary concern of the drafters" of the Eighth Amendment.[29] Madison's suggested reading list for the delegates to the Constitutional Convention included both pieces by philosopher Cesare Beccaria, whose work was influential in "arous[ing] Europe to the monstrous nature of torture,"[30] and William Blackstone's *Commentaries on the Laws of England*, which included torture in its definition of punishment.[31] Evidence from states' ratification debates "confirms that the Eighth Amendment was intended to disable Congress from imposing torturous punishments."[32] At the Virginia debate, for example, delegate Patrick Henry objected to the lack of a bill of rights in the original Constitution, emphasizing the need for (among other things) a proscription on the congressional authorization of torture.[33]

Doctrinally, a punishment's similarity to torture was the original criterion for identifying an Eighth Amendment violation.[34] Courts have explained that the Eighth Amendment's

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and Virginia Constitution spoke of punishments that "ought" not to be inflicted, while the Eighth Amendment declares that they "shall" not be inflicted); *see also* Harmelin v. Michigan, 501 U.S. 957, 966–67 (1991).

25 Granucci, *supra* note 24, at 840; *Harmelin*, 501 U.S. at 966–67.

26 ROBERT ALLEN RUTLAND, THE BIRTH OF THE BILL OF RIGHTS, 1776–1791, at 202 (1955).

27 *See* Granucci, *supra* note 24, at 841–42.

28 *Id.*

29 Estelle v. Gamble, 429 U.S. 97, 102 (1976) (citing Granucci, *supra* note 24, at 842).

30 Celia Rumann, *Tortured History: Finding Our Way Back to the Lost Origins of the Eighth Amendment*, 31 PEPP. L. REV. 661, 674 (2004) (quotation marks omitted) (quoting IRVING BRANT, THE BILL OF RIGHTS: ITS ORIGIN AND MEANING 32–33 (1965)). Beccaria's treatise *On Crimes and Punishments* is one of the first modern texts opposing both capital punishment and torture. Bernard E. Harcourt, *Beccaria's* On Crimes and Punishments*: A Mirror on the History of the Foundations of Modern Criminal Law*, *in* FOUNDATIONAL TEXTS IN MODERN CRIMINAL LAW 39, 39 (Markus D. Dubber ed., 2014).

31 Rumann, *supra* note 30, at 674–75.

32 Baze v. Rees, 553 U.S. 35, 97–98 (2008) (Thomas, J., concurring in the judgment).

33 *See* Granucci, *supra* note 24, at 841.

34 Gregg v. Georgia, 428 U.S. 153, 170 (1976).

prohibitions "evolved primarily from the concern for the manner in which individuals would be put to death."[35] In early cases considering the constitutionality of methods of execution, the U.S. Supreme Court evaluated a method's similarity to "torture" and other "barbarous methods" to determine if the method posed an Eighth Amendment violation.[36] The Court subsequently affirmed that the Framers "were primarily concerned . . . with proscribing" these methods of punishment.[37]

This understanding of the Eighth Amendment as prohibiting torture persists. For nearly 150 years, the Supreme Court has affirmed that the language of the Eighth Amendment includes a prohibition against torture.[38] Scholarship considering the Eighth Amendment's language, history, and purpose further supports reading it to prohibit torture.[39] As Professor Seth Kreimer explained, "If anything is clear in constitutional law, it seems to be that the Eighth Amendment's prohibition against 'cruel and unusual punishment' bars 'torture.'"[40]

B. Existing Eighth Amendment Jurisprudence

Despite this clear prohibition, the Supreme Court has failed to articulate a definition of when, exactly, conditions accompanying the imposition of capital punishment become impermissibly torturous.[41] The Court has specifically noted the "difficulty of

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[35] Groseclose v. Dutton, 609 F. Supp. 1432, 1440 (M.D. Tenn. 1985).

[36] *Gregg*, 428 U.S. at 170 (first citing Wilkerson v. Utah, 99 U.S. 130, 136 (1879); then citing *In re* Kemmler, 136 U.S. 436, 447 (1890); then citing Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459, 464 (1947)).

[37] *Id.* at 170.

[38] *Wilkerson*, 99 U.S. at 136 ("[I]t is safe to affirm that punishments of torture . . . are forbidden by [the Eighth Amendment] to the Constitution."); *see also Kemmler*, 136 U.S. at 446–47; *Estelle*, 429 U.S. at 102; *Baze*, 553 U.S. at 48; Graham v. Florida, 560 U.S. 48, 59 (2010).

[39] *See, e.g.*, Rumann, *supra* note 30, at 673–74; Owen Fiss, *The Example of America*, 119 YALE L.J. POCKET PART 1, 2 (2009); William W. Berry III, *Following the Yellow Brick Road of Evolving Standards of Decency: The Ironic Consequences of "Death-Is-Different" Jurisprudence*, 28 PACE L. REV. 15, 20 (2007); Martin H. Pritikin, *Punishment, Prisons, and the Bible: Does "Old Testament Justice" Justify Our Retributive Culture?*, 28 CARDOZO L. REV. 715, 719 (2006). *But see* Meghan J. Ryan, *Does the Eighth Amendment Punishments Clause Prohibit Only Punishments That Are Both Cruel* and *Unusual*, 87 WASH. U. L. REV. 567, 621–23 (2010) (arguing for a narrow interpretation of the Eighth Amendment).

[40] Seth F. Kreimer, *Too Close to the Rack and the Screw: Constitutional Constraints on Torture in the War on Terror*, 6 U. PA. J. CONST. L. 278, 283 (2003).

[41] *Kemmler*, 136 U.S. at 447 (noting that in making this holding, the Court did not provide a specific definition of torture); *see also* Kreimer, *supra* note 40 at 294 (stating that the Court "does not answer the question of exactly what level or type of brutality will shock the judicial conscience").

'defin[ing] with exactness'" the boundaries of the Eighth Amendment.[42] The result of this undefined metric is, in practice, a consistent undervindication of the Eighth Amendment rights of death row litigants—even for acts that, when perpetrated by private individuals, would be extreme enough to justify the imposition of capital punishment.

Despite this lack of helpful precedent, incarcerated individuals have brought Eighth Amendment challenges to various aspects of the capital system.[43] The most prevalent of these challenges to death row conditions takes the form of *Lackey* claims,[44] which specifically challenge executions after inordinate delays on death row.[45] *Lackey* claims are based entirely on the amount of time an individual has spent on death row, asserting that, past a certain threshold, a pre-execution delay constitutes cruel and unusual punishment in violation of the Eighth Amendment.[46] Despite numerous efforts over several decades, the Supreme Court has never granted certiorari to a petitioner asserting a *Lackey* claim.[47] In withholding relief, the Court has permitted states to keep individuals locked in solitary confinement, under the threat of impending death, for decades.

Other claims have been brought under the Court's broader two-prong framework for Eighth Amendment violations within prisons, which covers claims brought by both capital and noncapital litigants.[48] The existing Eighth Amendment standard requires that "a prison official's act or omission must result in the denial of 'the minimal civilized measure of life's necessities'" and

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[42] *Baze*, 553 U.S. at 48 (alteration in original) (quoting *Wilkerson*, 99 U.S. at 135–36).

[43] *See generally, e.g.*, *id.* (challenging executions by lethal injection); Porter v. Clarke, 923 F.3d 348 (4th Cir. 2019) (challenging solitary confinement on death row).

[44] *See generally* Lackey v. Texas, 514 U.S. 1045 (1995). These claims take their name from the original plaintiff, Clarence Lackey, who was executed in 1997 after spending fifteen years on death row.

[45] *See* Brent E. Newton, *The Slow Wheels of* Furman*'s Machinery of Death*, 13 J. APP. PRAC. & PROCESS 41, 54–55 (2012). Newton served as Lackey's attorney.

[46] *See id.*

[47] Kara Sharkey, Comment, *Delay in Considering the Constitutionality of Inordinate Delay: The Death Row Phenomenon and the Eighth Amendment*, 161 U. PA. L. REV. 861, 864 (2013). For cases denying certiorari on attempted *Lackey* claims, see generally, for example, Buntion v. Lumpkin, 142 S. Ct. 1464 (2022); Smith v. Ryan, 581 U.S. 954 (2017); Ruiz v. Texas, 580 U.S. 1191 (2017); Sireci v. Florida, 580 U.S. 1036 (2016); Valle v. Florida, 564 U.S. 1067 (2011) (mem.); Thompson v. McNeil, 556 U.S. 1114 (2009); Knight v. Florida, 528 U.S. 990 (1999).

[48] *See infra* Part IV.B.

that the official shows "deliberate indifference" to inmate health or safety.[49]

Courts have, in limited cases, found death row conditions to violate this standard.[50] In *Gates v. Cook*,[51] for example, the Fifth Circuit found an Eighth Amendment violation when individuals on death row were subject to "filthy cell conditions,"[52] excessive heat,[53] "pest infestation[s],"[54] plumbing issues,[55] "grossly inadequate" lighting,[56] and inadequate mental health treatment.[57]

However, these cases are the exception, rather than the rule. Courts have declined to find Eighth Amendment violations on death row based on other conditions of suffering (or more minor instantiations of the conditions found to create liability in *Gates*, *Ball v. LeBlanc*,[58] and *Groseclose v. Dutton*[59]) that are common to the experience of individuals sentenced to death, including prolonged solitary confinement[60] and repeated placement on death watch.[61] Even in combination, courts may fail to find Eighth Amendment violations based on these conditions unless they "have a mutually enforcing effect that produces the deprivation of a single, identifiable human need."[62]

The specific challenges of meeting the Eighth Amendment requirements within the carceral context leave thousands of individuals on death row without a meaningful route to protect

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49 Farmer v. Brennan, 511 U.S. 825, 834 (1994) (quotation marks omitted) (first quoting Rhodes v. Chapman, 452 U.S. 337, 347 (1981); then quoting Wilson v. Seiter, 501 U.S. 294, 302–03 (1991)).

50 *See, e.g.*, Ball v. LeBlanc, 792 F.3d 584, 596 (5th Cir. 2015) (holding that housing death row inmates who were vulnerable to heat-related injury in extremely hot cells violated the Eighth Amendment); *Groseclose*, 609 F. Supp. at 1435, 1446 (holding that subjecting death row inmates to prolonged confinement in small, unventilated cells that were like "cages in a zoo" violated the Eighth Amendment).

51 376 F.3d 323 (5th Cir. 2004).

52 *Id.* at 338. According to the court, the cells were crusted with "fecal matter, urine, dried ejaculate, peeling and chipping paint, and old food particles on the walls." *Id.*

53 *Id.* at 334.

54 *Id.* at 340.

55 *Gates*, 376 F.3d at 334. When the toilets were not flushed simultaneously, "[f]ecal and other matter flushed by a toilet in one cell [would] bubble up in the adjoining cell." *Id.*

56 *Id.*

57 *Id.* at 338–43.

58 792 F.3d 584 (5th Cir. 2015).

59 609 F. Supp. 1432 (M.D. Tenn. 1985).

60 *See* Porter v. Pa. Dep't of Corr., 974 F.3d 431, 440–47 (3d Cir. 2020). Precedent on whether the Eighth Amendment prohibits solitary confinement is mixed. *See infra* Part IV.B.

61 *See* Songer v. State, 463 So. 2d 229, 231 (Fla. 1985). For a further discussion of death watch, see *infra* Part IV.A.

62 *Wilson*, 501 U.S. at 304.

their Eighth Amendment rights.[63] But the standard itself is also methodologically flawed. Existing Eighth Amendment jurisprudence fails to explicitly identify these conditions for what they are: torture.

C. Government Obfuscation of Torture

The Supreme Court is not alone in struggling to define government-sanctioned torture. Indeed, scholars have explained that torture is notoriously hard to define and regulate;[64] as a result, state-sanctioned torture often goes unchecked and uncontrolled. This Section explains why the lack of a uniform definition of torture contributes to the proliferation of state-sanctioned torture. This analysis offers further support for transposing the existing state-level definitions of private torturous conduct to a new federal standard regulating torture on death row. As this Section explains, government actors have tremendous power—and significant incentives—to underregulate torture. Transposing a standard derived from the regulation of individual criminal conduct both addresses these concerns and protects against the gamesmanship concerns.

First, government actors can purposefully obfuscate the definition of torture, constraining it to the extremes. Following the attacks on September 11, 2001, "[t]he Bush administration consistently attempted to move the law in the direction of permitting torture, in part by blurring the lines between torture and cruel, inhuman, and degrading treatment" and thus providing "legal cover" for those who had engaged in both.[65] This definitional line blurring served to provide cover for those engaged in government-sanctioned torture.[66] In the 2002 Bybee Memo, for example, Office of Legal Counsel Deputy Assistant Attorney General John Yoo offered a definition of torture constrained to its extremes. On Yoo's account, the infliction of pain "rises to the level of torture only if the pain is as severe as that accompanying 'death, organ

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63 For a further discussion of this point, see *infra* Part III.B.

64 *See* Ronald L. Nelson, *Torture in the Law of the Fifty American States: Searching for Definition*, 4 WAR CRIMES, GENOCIDE, & CRIMES AGAINST HUM. 1, 34–38 (2010). For additional context on the difficult of defining torture, see generally David Sussman, *What's Wrong With Torture?*, 33 PHIL. & PUB. AFFS. 1 (2005).

65 Alan W. Clarke, *De-Cloaking Torture:* Boumediene *and the Military Commissions Act*, 11 SAN DIEGO INT'L L.J. 59, 66 (2009).

66 *Id.*

failure, or serious impairment of body functions.'"[67] Psychological pain, while cognizable as torture, "rises to the level of torture only if the interrogator specifically intended it to cause 'lasting . . . damage' such as post-traumatic stress disorder."[68] The memo legitimized "harsh interrogational tactics," even those that would otherwise violate international law, for interrogative and military purposes.[69]

While the Justice Department has formally denounced the Bybee Memo's definition of torture,[70] its updated understanding of the *conduct* that constitutes torture remains limited to torture's upper bounds. The 2004 Levin Memo, written by Acting Assistant Attorney General Daniel Levin, repudiated and replaced the Bybee Memo.[71] However, even while altering the *definition* of torture, its examples maintain Bybee's extremes. The Levin Memo provides examples of torture, such as "severe beatings to the genitals, head, and other parts of the body with metal pipes, brass knuckles, batons, a baseball bat, and various other items; removal of teeth with pliers . . . cutting off . . . fingers, [and] pulling out . . . fingernails" that fall "on the upper end of the scale of barbarism."[72] This evolution illustrates an important point, discussed further at the end of Part IV: Even a potentially broad definition of torture can become limited if applied to only the narrowest and most extreme behaviors. As the Bybee and Levin Memos elucidate, the state's power to obfuscate its use of torture, when it has the incentive to do so, is tremendous.[73] Relying on the state to define its own

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67 David Luban, *Liberalism, Torture, and the Ticking Bomb*, 91 VA. L. REV. 1425, 1454 (2005) (quoting Letter from John C. Yoo, Deputy Assistant Att'y Gen., U.S. Dep't of Just. Off. of Legal Couns., to Alberto R. Gonzales, Couns. to the President (Aug. 1, 2002) [hereinafter Yoo Letter]).

68 *Id.* (alteration in original) (quoting Yoo Letter, *supra* note 67).

69 *Id.*

70 *See id.* at 1456.

71 *See* Memorandum from Daniel Levin, Acting Assistant Att'y Gen., U.S. Dep't of Just. Off. of Legal Couns., to James B. Comey, Deputy Att'y Gen. (Dec. 30, 2004), at 1 [hereinafter Levin Memo]. The Levin Memo specifically repudiated the Bybee Memo's stringent classification of torture. For example, the Levin Memo explains that, while torture required "conduct specifically intended to cause 'severe' pain or suffering," it did not require "'excruciating and agonizing' pain and suffering." *Id.* at 5 (quoting 18 U.S.C. §§ 2340–2340A).

72 Luban, *supra* note 67, at 1457 (first, second, and fourth alterations in original) (quotation marks omitted) (quoting Levin Memo, *supra* note 71).

73 Professor Darius Rejali has also theorized about democracies' creation of "clean torture"—methods of punishment that simply moved underground, reducing the visibility but not the presence of torture. *See* DARIUS REJALI, TORTURE AND DEMOCRACY 405–07 (2007).

conduct as torturous risks constraining the definition of torture to only its extremes.

Government-sanctioned torture can also be difficult to regulate because it may begin as lawful conduct. Professor Darius Rejali has explained that government-sanctioned torture can be created by the gradual progression of interrogative or punitive tactics from lawful to unlawful.[74] In essence, government-sanctioned torture can mirror the proverbial frog boiled alive in water that starts cold: Violations increase gradually, precluding effective relief. The state's ability to undermine legal protections for torture illuminates the critical need for a new standard.

Torture may also be underregulated for pragmatic reasons. Individuals subject to what might constitute state-sanctioned torture may not be protected under the Eighth Amendment.[75] Civil rights more generally are also often subject to restraints that frequently undermine the ability of existing structures to vindicate them.[76] The overarching difficulty of regulating government-sanctioned torture further supports transposing a definition of torture from the domain of private criminal regulation, a definition that is more removed from the possibly corrupting influence of government actors regulating themselves.

II. A TAXONOMY OF STATE TORTURE AGGRAVATORS

> *How soon before I am talking to the walls and they actually answer back? I have heard it stated that if you question your own sanity then you are not insane. I am beginning to doubt that statement. I am spiraling down into darkness. I know this and cannot do anything to stop that downward spiral. Knowing helps not at all.*[77]

State definitions of conduct that triggers the torture aggravator can provide this missing standard. This Comment utilizes state definitions of behavior classified as torturous to identify a standard for exactly when death row conditions violate the Eighth

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74 *See id*. at 530.

75 *See, e.g.*, Rasul v. Myers, 563 F.3d 527, 530 (D.C. Cir. 2009) (noting a lack of Eighth Amendment rights for "aliens captured on foreign soil and detained beyond sovereign U.S. territory").

76 For a more detailed explanation of this phenomenon, see Joanna C. Schwartz, *Civil Rights Ecosystems*, 118 MICH. L. REV. 1539, 1547–63 (2020).

77 Robert Johnson & Jacqueline Lantsman, *Death Row Narratives: A Qualitative Analysis of Mental Health Issues Found in Death Row Inmate Blog Entries*, 101 PRISON J. 147, 151 (2021).

Amendment. These state examples serve as a critical data point in understanding how states have both defined and evaluated torture.

This Part first offers a brief overview of statutory aggravating factors and the role of torture as an aggravator in capital sentencing. It then analyzes the definitions of torture in states with torture as an aggravating factor to develop a state-informed standard for torture. Specifically, this Part considers two key findings from a survey of state definitions of conduct that meets the torture aggravator: that psychological pain is cognizable as torture, and that intent is not necessarily a prerequisite for a finding of torture.

This Part is not intended to select a particular state's existing standard to transpose to the Eighth Amendment context. Rather, this aggregation of state standards illuminates how states conceive of torture, specifically in addressing conditions that arise prior to the death of an individual. This Comment draws on these definitions to help create a new, state-informed definition of torture, available for courts to apply universally in evaluating Eighth Amendment claims.[78] The conclusions outlined in Part III.B, however, are ultimately normative.

A. Statutory Torture Aggravators

The Supreme Court has interpreted the Eighth Amendment as requiring that the death penalty be reserved for a "narrow category of the most serious crimes."[79] Capital sentencing schemes "must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder."[80]

To accomplish this requisite narrowing, states must define a specific subset of crimes that are eligible for the imposition of capital punishment. There are two methods of accomplishing this narrowing. First, a state legislature may enact a statute criminalizing specific forms of "capital" murder, defined as the state's

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[78] It bears noting at the outset that the application of this proposed Eighth Amendment standard must be universal across all states, rather than an intrastate evaluation of each jurisdiction's individual standards. An individualized account risks creating a perverse reality where the Eighth Amendment differs across jurisdictions. These state torture aggravator standards must instead be used to create a unified definition of torture.

[79] Roper v. Simmons, 543 U.S. 551, 568 (2005) (quotation marks omitted) (quoting Atkins v. Virginia, 536 U.S. 304, 319 (2002)).

[80] Zant v. Stephens, 462 U.S. 862, 877 (1983).

highest form of murder (usually first degree) plus an additional specified factor.[81] In these states, only this specific category of murder is a death-eligible offense.[82] Alternatively, "the legislature may more broadly define capital offenses and provide for narrowing by [requiring] jury findings of aggravating circumstances at the penalty phase."[83] In either case, states are required to enumerate specific conditions or factors that make a murder death-eligible.

Fourteen states have defined the commission of torture against the deceased as one of these factors.[84] Through decades of capital trials, these states have crystallized their own definitions of torture, developing a taxonomy of torturous conduct. Considering how these fourteen states have defined torture by private criminal defendants serves as a critical data point for creating a definition of state-imposed torture imposed against individuals on death row.

As a predicate matter, common to all state definitions of torture is the requirement that the victim be subject to some form of extraneous pain.[85] State definitions of torture emphasize that, to constitute torture, pain must be imposed "beyond that necessary to produce death."[86] Notably, this portion of the definition of torture has been recognized by sitting Justices. In his concurrence in *Baze v. Rees*,[87] Justice Clarence Thomas explained that the Eighth Amendment was meant to prohibit forms of capital punishment that were "designed to inflict pain and suffering beyond that necessary to cause death."[88]

The evaluation of whether or not behavior amounts to torture can include "the entire course of conduct" involved in the killing, not simply the moment of killing itself.[89] In taking this broad view of when behavior may constitute torture, some states have gone so far as to find pervasive abuse—for example, "prolonged child

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81 *See* Lowenfield v. Phelps, 484 U.S. 231, 246 (1988); *see also* Sunayna Nair, Comment, *Double Counting in Capital Sentencing Statutes*, 56 COLUM. HUM. RTS. L. REV. 252, 266–73 (2024).

82 *Lowenfield*, 484 U.S. at 246.

83 *Id.*

84 For a list of states with torture as an enumerated factor for death eligibility, see Appendix Table A.

85 *See* Appendix Table B.

86 State v. Willis, 496 S.W.3d 653, 730 (Tenn. 2016).

87 553 U.S. 35 (2008).

88 *Id.* at 96 (Thomas, J., concurring) (discussing 4 WILLIAM BLACKSTONE, COMMENTARIES *376).

89 Commonwealth v. Chambers, 980 A.2d 35, 53 (Pa. 2009).

abuse that eventually caused the victim's death"[90]—to meet the torture aggravator.

B. Psychological Pain as Torture

Seven states—Idaho, Indiana, Kansas, Missouri, Pennsylvania, South Dakota, and Tennessee—allow psychological pain to constitute torture.[91] Rather than defining torture to require physical pain or abuse, these states acknowledge that "psychological harm is just as harmful as physical harm."[92]

Of particular relevance are the specific factors that these states define as constituting psychological pain. State courts have repeatedly held that "'[t]he anticipation of physical harm to oneself is torturous' so as to establish [the torture aggravator],"[93] and affirmed a finding of torture when the victim "had ample opportunity to anticipate her death."[94] While death itself "with little or no forewarning does not involve torture,"[95] the anticipation of physical harm to oneself—or to others nearby—establishes torture.[96]

State courts' position on the psychological torment of an impending execution supports the conclusion drawn by several scholars that the credible, ever-present threat of execution that exists on death row should, itself, be classified as a form of torture.[97] This Comment adds state definitions of torture to this existing scholarship, supporting the contention that pre-execution fear of death is torturous. The psychological harm created by an anticipated execution would serve to establish the torture aggravator.

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90 *Id.* (discussing Commonwealth v. Powell, 956 A.2d 406 (Pa. 2008)); *see also* Commonwealth v. Woodard, 129 A.3d 480, 491 (Pa. 2015) (evaluating the "defendant's entire course of conduct" in determining intent).

91 *See* Appendix Table B.

92 Henness v. Jenkins, 2017 WL 749198, at *3 (S.D. Ohio Feb. 27, 2017) (quotation marks omitted) (quoting Adams v. Bradshaw, 826 F.3d 306, 319 (6th Cir. 2016)).

93 State v. Keen, 31 S.W.3d 196, 206 (Tenn. 2000) (quoting State v. Carter, 988 S.W.2d 145, 150 (Tenn. 1999) (collecting cases)).

94 State v. LaRette, 648 S.W.2d 96, 102 (Mo. 1983).

95 Dampier v. State, 268 S.E.2d 349, 350 (Ga. 1980).

96 *See Carter*, 988 S.W.2d at 150–51 (collecting cases).

97 *See, e.g.*, John D. Bessler, *Taking Psychological Torture Seriously: The Torturous Nature of Credible Death Threats and the Collateral Consequences for Capital Punishment*, 11 NE. U. L. REV. 1, 49–60 (2019); Angela April Sun, Comment, *"Killing Time" in the Valley of the Shadow of Death: Why Systematic Preexecution Delays on Death Row are Cruel and Unusual*, 113 COLUM. L. REV. 1585, 1615–16 (2013).

C. Torture Without Specific Intent

Five states—Georgia, Kansas, Missouri, South Carolina, and Tennessee—do not impose an intent requirement for a finding of torture.[98] In these states, torture requires *only* that the torturer "inflicted extreme, intense or severe pain upon the victim."[99] While intent may be an element in a multifactor analysis to consider whether behavior constitutes torture, it is not an independent predicate for the imposition of the torture aggravator.[100] Even states with an intent requirement may have a low threshold for establishing intent. Pennsylvania, for example, has held that a pattern of abuse can be sufficient to establish the intent requirement;[101] California permits a finding of intent when the defendant "deliberately exposed the victim to prolonged suffering."[102]

These state findings break with several existing definitions of torture, including the international standard, which *do* require specific intent to cause extraneous pain by the torturer.[103] Instead, several of the states with a statutory torture aggravator predicate a finding of torture only on the experience of the victim, not the intent of the perpetrator.[104]

III. A STATE-INFORMED STANDARD FOR TORTURE

> *I find it incredible that nobody wants to talk about the undeniable psychological trauma inflicted upon the condemned through a process that only too often brings us to that very edge of death's door, only to then "stay" the execution and put you in indefinite limbo as you await word of whether you will live or die. I really just don't get it. Why is that undeniable*

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98 *See* Appendix Table B. I include in this calculation states in which intent is not one of the enumerated factors in courts' definitions of torture.

99 Mason v. Commonwealth, 331 S.W.3d 610, 623 (Ky. 2011) (quotation marks omitted) (quoting People v. Porterfield, 420 N.W.2d 853, 854 (Mich. Ct. App. 1988)). The fact that intent is almost always present in these cases does not change the fact that it is not explicitly required to be proved.

100 Missouri, for example, considers the mental state of the defendant as one factor to evaluate when determining whether or not to impose the torture aggravator. *See* State v. Griffin, 756 S.W.2d 475, 489 (Mo. 1988) (en banc).

101 *Chambers*, 980 A.2d at 46.

102 People v. Fernandez, 88 Cal. App. 5th 26, 33 (Cal. Ct. App. 2023) (quotation marks omitted) (quoting People v. Mungia, 189 P.3d 880, 906 (Cal. 2008)).

103 *See, e.g.*, U.N. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 1, Dec. 10, 1984, 1465 U.N.T.S. 85, 113–14.

104 *See* Appendix Table B.

> *trauma amounting to psychological torture [ ] not even being discussed?*[105]

These state-level definitions of the torture aggravator offer a solution to death row's torture paradox. This Comment proposes a new national standard, informed by state definitions of conduct that meets the torture aggravator, for violations of the Eighth Amendment on death row: one that permits the finding of a violation based on psychological pain and does not require proof of specific intent.

This Part considers both the positive and normative benefits of the state-informed standard. First, the state-level standards align with the requirement that the Eighth Amendment be evaluated according to the evolving standards of decency.[106] Relying on state-level standards and developing a death row–specific definition of torture mirrors the Court's existing application of the evolving standards of decency test. Second, this state-informed standard further improves upon the existing Eighth Amendment framework by taking into consideration the specific circumstances individuals face on death row, ensuring proper vindication of their Eighth Amendment rights.

A. The Evolving Standards of Decency

The Supreme Court has explained that the meaning of the Eighth Amendment is not static. In *Trop v. Dulles*,[107] the Court held that violating conduct is assessed based on the "evolving standards of decency."[108] The Court has explained that the Eighth Amendment should be interpreted in a "flexible and dynamic manner," with its meaning adapting to the changing times.[109]

The evolving standards of decency are measured based on "objective indicia" of "the public attitude towards a given sanction."[110] "First among these indicia are the decisions of state

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105 Johnson & Lantsman, *supra* note 77, at 150.

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

107 356 U.S. 86 (1958).

108 *Id.* at 101.

109 Gregg v. Georgia, 428 U.S. 153, 171 (1976). The Court has used the evolving standards of decency metric to prohibit the death penalty for certain classes of individuals and offenses. *See* Atkins v. Virginia, 536 U.S. 304, 321 (2002) (individuals with severe mental disabilities); Roper v. Simmons, 543 U.S. 551, 575 (2005) (individuals who committed crimes under the age of 18); Kennedy v. Louisiana, 554 U.S. 407, 413 (2008) (individuals who committed crimes that did not result in the death of the victim).

110 *Gregg*, 428 U.S. at 173.

legislatures."[111] In *Atkins v. Virginia*[112] and *Roper v. Simmons*,[113] the Court enumerated each state's death penalty laws in forming its Eighth Amendment judgment. Next, the Court is "guided by the sentencing decisions of juries, because they are 'a significant and reliable objective index of contemporary values.'"[114] In *Gregg v. Georgia*,[115] for example, the Court cited the fact that juries were still willing to impose death sentences as a justification for maintaining the legality of the death penalty.

This Comment mirrors the Court's approach. State definitions of conduct that meets the death penalty torture aggravator reflect the pronouncements of both state legislatures and state juries. State legislatures define torture as warranting capital punishment by enumerating it as an aggravating factor. State juries then consider whether a defendant's specific conduct constitutes torture sufficient to impose a capital sentence. Drawing on these standards for the new state-informed torture standard ensures courts fulfill their Eighth Amendment duty to address the evolving standards of decency. Utilizing the state definitions of conduct that meets the torture aggravator serves to create a cognizable Eighth Amendment standard within the framework of the Court's existing Eighth Amendment methodology.

Meeting the evolving standards of decency test does not require unanimity. In determining the contours of the Eighth Amendment, the Court has never required states to speak with a single voice.[116] Instead, state definitions of torture serve as a touchpoint to begin the analysis. These definitions elucidate that torture is not clearly limited to physical harm imposed with specific malicious intent. Assessing the disparity in these definitions of torture is sufficient to determine that the evolving standards of decency do not require physical harm and specific intent; given this predicate, courts then bring their own judgment to bear on the Eighth Amendment question.[117]

Applying the state-informed torture standard also gives proper weight to the Court's longstanding acknowledgement that

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111 McCleskey v. Kemp, 481 U.S. 279, 300 (1987).

112 536 U.S. 304 (2002).

113 543 U.S. 551 (2005).

114 *McCleskey*, 481 U.S. at 300 (quoting *Gregg*, 428 U.S. at 181).

115 428 U.S. 153 (1976).

116 *Cf.* Hall v. Florida, 572 U.S. 701, 727–28 (2014) (Alito, J., dissenting) (criticizing the majority opinion for failing to find a consensus among the states).

117 *See supra* Part III.B.

"death is different."[118] Numerous aspects of death penalty jurisprudence—from the bifurcated trial structure to the automatic right to appeal—realize this understanding. Courts' ongoing willingness to differentiate standards for capital and noncapital cases affirms the propriety of a death row–specific standard.

Indeed, the Supreme Court's death penalty jurisprudence specifically affirms deference to the judgment of the states. Under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA),[119] which governs capital appeals, federal courts afford tremendous deference to state courts.[120] AEDPA requires, among other things, that federal courts "carefully consider all the reasons . . . supporting [a] state court's decision."[121] This Comment advocates for a similar deference to the judgment of state legislatures and state juries. Given the Court's explicit approval of deference to state court judgments in the death penalty context, deference to these states' torture definitions is particularly appropriate.

The evolving standards of decency test further precludes the Court, by its own standard, from relying primarily on the historical meaning of the Eighth Amendment. In *Atkins*, the Court explained that "[a] claim that punishment is excessive is judged not by the standards that prevailed in 1685 when Lord Jeffreys presided over the 'Bloody Assizes' or when the Bill of Rights was adopted, but rather by those that currently prevail."[122] Even as the Eighth Amendment standard "remains the same, [ ] its applicability must change as the basic mores of society change."[123] In short, the Court *requires* the definition of conduct that violates

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118 *Baze*, 553 U.S. at 84 (Stevens, J., concurring) (collecting cases).

119 Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified as amended in scattered sections of 8, 15, 18, 22, 28, 42, and 50 U.S.C.).

120 *See* Harrington v. Richter, 562 U.S. 86, 100–04 (2011). This deference is not unique to capital cases. The Court has noted its willingness to consider state legislative proscriptions (or lack thereof) in assessing whether conduct should be constitutionally prohibited. *Cf.* Atwater v. City of Lago Vista, 532 U.S. 318, 345–46 n.14 (2001) (explaining that courts should be reluctant to view the Fourth Amendment as proscribing practices that "continue[ ] to receive the support of many state legislatures" (quotation marks omitted) (quoting Tennessee v. Garner, 471 U.S. 1, 26 (1985) (O'Connor, J., dissenting))).

121 Klein v. Martin, 146 S. Ct. 589, 596 (2026) (quoting Mays v. Hines, 141 S. Ct. 1145, 1149 (2021)).

122 *Atkins*, 536 U.S. at 311.

123 Furman v. Georgia, 408 U.S. 238, 382 (1972) (Burger, C.J., dissenting); *see also Hall*, 572 U.S. at 708 ("The Eighth Amendment 'is not fastened to the obsolete, but may acquire meaning as public opinion becomes enlightened by a humane justice.'" (quoting Weems v. United States, 217 U.S. 349, 378 (1910))).

the Eighth Amendment to evolve, rather than remain rooted in the understanding of the Framers.

Applying state courts' definitions of conduct that meets the torture aggravator also avoids embroiling courts in considerations of international law when determining the evolving standards of decency. Numerous scholars have suggested utilizing the international standard for torture to define torture on death row or, more frequently, to call for the abolition of the death penalty altogether.[124] While the Supreme Court has, in limited circumstances, considered international standards in resolving Eighth Amendment challenges,[125] the Court has continuously affirmed that "[t]he opinion of the world community" does not control the Eighth Amendment outcome.[126] Indeed, some Justices have squarely rejected the use of international standards altogether.[127] Rather than requiring an international inquiry, the use of state-level torture definitions provides a purely domestic metric for evaluating the evolving standards of decency.

The Court's opposition to internationalism does not exist in a vacuum. By utilizing domestically crafted standards, courts have recourse not only to what constitutes torture, but why these definitions have been developed. In defining torture, state courts have utilized traditional methods of statutory interpretation that are cognizable to, and have been condoned by, the Supreme Court. Analyses of plain language,[128] dictionary definitions,[129] and

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[124] *See, e.g.*, Florencio J. Yuzon, *Conditions and Circumstances of Living on Death Row—Violative of Individual Rights and Fundamental Freedoms?: Divergent Trends of Judicial Review in Evaluating the "Death Row Phenomenon"*, 30 GEO. WASH. J. INT'L L. & ECON. 39, 71–73 (1996); John D. Bessler, *Torture and Trauma: Why the Death Penalty Is Wrong and Should Be Strictly Prohibited by American and International Law*, 58 WASHBURN L.J. 1, 8, 26–29 (2019); Regina C. Donnelly, Soering v. United Kingdom*: Whether the Continued Use of the Death Penalty in the United States Contradicts International Thinking?*, 16 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 339, 353–54 (1990).

[125] *See Roper*, 543 U.S. at 578 ("It is proper that we acknowledge the overwhelming weight of international opinion against the juvenile death penalty.").

[126] *Id.*

[127] *See, e.g.*, Stanford v. Kentucky, 492 U.S. 361, 369 n.1 (1989) ("We emphasize that it is *American* conceptions of decency that are dispositive, rejecting the contention . . . that the sentencing practices of other countries are relevant." (emphasis in original)); *cf. Atkins*, 536 U.S. at 325 (Rehnquist, C.J., dissenting) ("[I]f it is evidence of a *national* consensus for which we are looking, then the viewpoints of other countries simply are not relevant." (emphasis in original)).

[128] *See* Commonwealth v. Chambers, 980 A.2d 35, 51 (Pa. 2009) (considering "the plain language of the statute").

[129] Nicholson v. State, 768 N.E.2d 443, 447 (Ind. 2002) (considering the *Webster's Dictionary* definition of torture); Mason v. Commonwealth, 331 S.W.3d 610, 622 (Ky.

common law construction,[130] all of which have been used to define torture, ground state court analyses in familiar and approved rationales.

B. Vindication of Incarcerated Individuals' Eighth Amendment Rights

Analysis of objective, state-level metrics is not the end of the Eighth Amendment inquiry. The Court has explained "that public perceptions of standards of decency with respect to criminal sanctions are not conclusive."[131] Instead, ultimately, the Court's own judgment should also be "brought to bear" on the Eighth Amendment standard.[132] Specifically, the Court may conduct an "independent evaluation" and consider additional rationales in determining the Eighth Amendment's standards.[133]

To that end, normative considerations weigh in favor of utilizing the state-informed torture standard as defined by this Comment. By eliminating the intent requirement and permitting violations based on psychological pain, this new standard will ensure that courts can properly vindicate the Eighth Amendment rights of incarcerated litigants.

Eliminating the intent requirement has clear advantages for evaluating conditions on death row. Removing the intent requirement properly captures the fact that, as Justice Byron White elucidated in *Wilson v. Seiter*,[134] "[i]nhumane prison conditions often are the result of cumulative actions and inactions by numerous officials inside and outside a prison, sometimes over a long period of time. In those circumstances, it is far from clear whose intent should be examined."[135] This cumulative effect is of particular concern in the death row context, in which the very nature of the confinement, and its ever-present impending end, constitute punishment of an entirely separate nature. The nature of confinement on death row itself, absent the actions of any individual,

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2011) ("We, therefore, turn to the dictionary to determine what kind of behavior constitutes torture.").

130 State v. Griffin, 756 S.W.2d 475, 489–91 (Mo. 1988) (en banc) (discussing the common law evolution of factors the court has considered).

131 *Gregg*, 428 U.S. at 173.

132 *Atkins*, 536 U.S. at 313 (quotation marks omitted) (quoting Coker v. Georgia, 433 U.S. 584, 597 (1977)).

133 *See id.* at 318–21.

134 501 U.S. 294 (1991).

135 *Id.* at 310 (White, J., concurring).

creates the conditions for torture.[136] The existing standard, however, focuses not on the Eighth Amendment's moral commitments to protecting the rights of American citizens (including those who are incarcerated), but on "what defendants did or did not know about the risk of harm to prisoners."[137] The practical effect of this standard is to preclude proper Eighth Amendment relief. Bringing an Eighth Amendment challenge requires bringing proof of deliberate indifference—no matter how harmful the conditions of confinement, prison officials may be shielded from liability by lack of knowledge.[138] In practice, this onerous standard has prevented relief in cases in which incarcerated individuals were sexually abused[139] or denied access to a working bathroom for a month.[140]

Removing the intent requirement also avoids the pitfall of obfuscating responsibility that is prevalent in the current standard. The deliberate indifference standard "allows prison officials to escape liability because they can argue that they were simply following prison protocol and were unaware of the harm" their actions could cause.[141] Perversely, the deliberate indifference standard—and, indeed, any standard with an intent requirement—risks permitting the official sanction of torture and incentivizing prison officials to "turn a blind eye to severe human suffering."[142] Removing the intent requirement eliminates this concern.

This shift would align with existing Supreme Court precedent suggesting that the intent requirement may not apply to all Eighth Amendment violations.[143] This reasoning may, in fact, have historical underpinnings; at least one author has suggested that "cruel" in the language of the Eighth Amendment was intended to refer to the *effect*, rather than the *intent*, of

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136 *See infra* Part IV.B.

137 Sharon Dolovich, *Evading the Eighth Amendment: Prison Conditions and the Courts*, *in* THE EIGHTH AMENDMENT AND ITS FUTURE IN A NEW AGE OF PUNISHMENT 133, 137 (Meghan J. Ryan & William W. Berry III eds., 2020).

138 *See* Farmer v. Brennan, 511 U.S. 825, 834 (1994) (citing Rhodes v. Chapman, 452 U.S. 337, 347 (1981)); *see also* Elizabeth Bennion, *Banning the Bing: Why Extreme Solitary Confinement is Cruel and Far Too Usual*, 90 IND. L.J. 741, 770 (2015).

139 *See, e.g.*, Beers-Capitol v. Whetzel, 256 F.3d 120, 125 (3d Cir. 2001).

140 *See, e.g.*, Gills v. Hamilton, 164 F.4th 640, 643 (7th Cir. 2026).

141 Merin Cherian, *Cruel, Unusual, and Unconstitutional: An Originalist Argument for Ending Long-Term Solitary Confinement*, 56 AM. CRIM. L. REV. 1759, 1782 (2019).

142 Bennion, *supra* note 138, at 770.

143 *See* Whitley v. Albers, 475 U.S. 312, 319 (1986) (stating that "[a]n express intent to inflict unnecessary pain is not required" (citing Estelle v. Gamble, 429 U.S. 97, 104 (1976))). *But see Wilson*, 501 U.S. at 300 ("The source of the intent requirement is not the predilections of this Court, but the Eighth Amendment itself.").

punishment.[144] Using an analysis of contemporaneous dictionaries, ratification debates, and early legal treatises, this scholarship has contended that omitting the intent requirement is the proper reading of the Eighth Amendment.[145]

Like removing the intent requirement, allowing psychological harm to constitute torture has significant normative benefits. Specifically, allowing the psychological harm of impending executions to be actionable under the Eighth Amendment serves to provide proper vindication for a set of existing judicial conclusions. Courts have repeatedly affirmed the well-documented harms of an impending execution.[146] Incarcerated individuals on death row experience a psychological phenomenon known as "death row syndrome," used to describe the "hopelessness and situational depression experienced by people facing execution."[147] These effects mirror the effects of recognized state-sanctioned torture; individuals suffering from death row syndrome experience the same rapidly deteriorating mental health and suicidal ideation as individuals who have been tortured by more traditional means.[148]

Notably, there is a wide consensus across several circuits that psychological harm is cognizable under the Eighth Amendment.[149]

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144 Cherian, *supra* note 141, at 1770–71.

145 *Id.* Professor Judith Resnik offers an alternate, conceptual justification for the removal of the intent requirement. In her book *Impermissible Punishments*, Resnik argues for a shift in the evaluation of punishment under the Eighth Amendment "from what governments *aim* to do to the experiences of the people *subjected* to that punishment." *See* JUDITH RESNIK, IMPERMISSIBLE PUNISHMENTS: HOW PRISON BECAME A PROBLEM FOR DEMOCRACY 16–18 (2025) (ebook) (emphasis in original). Punishment is characterized as "a political act that entails accepting the distinctive and expensive obligations a democratic polity *takes on* if it *takes away* people's liberties." *Id.* (emphasis in original). On Resnik's account, the act of punishment creates a moral obligation from the state to the punished; the punishment cannot create ruinous harm, regardless of the intent of the perpetrator. *Id.*

146 *See supra* text accompanying note 14.

147 Leah Roemer, *New Analysis: Death-Sentenced Prisoners "Volunteer" for Execution at Ten Times Civilian Suicide Rate*, DEATH PENALTY INFO. CTR. (Mar. 14, 2025), https://perma.cc/67L9-MXD4. For a more extensive discussion of death row syndrome, see Kelly K. Holder, *Confined to a Concrete Cave*, 7 ELON L. REV. 591, 594–601 (2015).

148 *See* Alan Clarke, *Creating a Torture Culture*, 32 SUFFOLK TRANSNAT'L L. REV. 1, 8–9 (2008) [hereinafter Clarke, *Creating a Torture Culture*].

149 *See, e.g.*, Creech v. Tewalt, 84 F.4th 777, 792 (9th Cir. 2023) ("We have held that subjecting a prisoner to the unnecessary and wanton infliction of psychological pain constitutes cruel and unusual punishment under the Eighth Amendment." (citing Jordan v. Gardner, 986 F.2d 1521, 1525–30 (9th Cir. 1993))); Clark v. Coupe, 55 F.4th 167, 184 (3d Cir. 2022) ("[A]llegations of inflicting a serious mental injury are sufficient to state a claim under the Eighth Amendment."); Thomas v. Bryant, 614 F.3d 1288, 1307 (11th Cir. 2010) (holding that "lasting psychological injuries" are sufficient to establish an Eighth Amendment violation); Benefield v. McDowall, 241 F.3d 1267, 1272 (10th Cir. 2001) (holding psychological

Yet existing Eighth Amendment jurisprudence has largely failed to vindicate the Eighth Amendment right to be free from psychological torture on death row. Specifically, courts have failed to draw the essential connection between these two assertions, consistently prohibiting Eighth Amendment causes of action due to the psychological harm created by an impending execution.[150] By holding psychological pain cognizable, and explicitly defining impending executions as creating that pain, the state-informed torture standard connects these two judicial findings, providing clear recourse for incarcerated individuals.

C. Suitability of the State-Informed Torture Standard

To argue for this standard is not to suggest that individuals and states must universally be subject to the same requirements—there are numerous actions, such as murder itself, that can legally be carried out by states but not by private citizens.[151] Instead, this analysis is predicated on the fact that the Eighth Amendment has been specifically construed by the Supreme Court to proscribe state-imposed torture.[152] Until now, this judicial prohibition has been unvindicated.

The Supreme Court has affirmed utilizing standards for regulating individual conduct in the Eighth Amendment context. In *Farmer v. Brennan*,[153] the Court applied the criminal law definition of recklessness to create the standard for Eighth Amendment deliberate indifference by prison guards.[154] In *Farmer*, the state's ability to engage in the authorized use of force was not dispositive—

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harm actionable under the Eighth Amendment); Scher v. Engelke, 943 F.2d 921, 924 (8th Cir. 1981) ("[T]he scope of eighth amendment protection is broader than the mere infliction of physical pain."). While outside the scope of this Comment, international studies support this finding. *See* Clarke, *Creating a Torture Culture*, *supra* note 148, at 9 ("[T]he degree of stress reported by those who suffered [psychological] torture did not differ from that of those subjected to physical torture.").

150 In *Peterkin v. Jeffes*, 855 F.2d 1021 (3d Cir. 1988), for example, the Third Circuit separated actionable "psychological disturbances" due to "the conditions of confinement" from those that were inactionable as caused by "impending death by execution." *Id.* at 1030.

151 It bears noting that the state is nowhere near universally exempt from compliance with the law. *See, e.g.*, Mesa v. California, 489 U.S. 121, 133 (1989) (limiting immunities that would have placed government officials "beyond the reach of the criminal law" in a traffic case (quotation marks omitted) (quoting Imbler v. Pachtman, 424 U.S. 409, 429 (1976))); Reno v. Condon, 528 U.S. 141, 150–51 (2000) (applying a regulation equally to state and private actors); Murphy v. Nat'l Coll. Athletic Ass'n, 584 U.S. 453, 475–76 (2018) (generally permitting the "evenhanded[ ]" regulation of state and private actors).

152 *See Estelle*, 429 U.S. at 102.

153 511 U.S. 825 (1994).

154 *Id.* at 836–37.

rather, the Court applied an existing framework from individual criminal law to the institutions of punishment.[155] The Court acknowledged that while the rationale for each of these standards differed based on the underlying context, it was appropriate to apply a concept from private criminal law to a state actor.[156]

This is also not the only setting in which private or individual standards are imposed on the state or state actors. State actors may, for example, be subject to a standard of reasonableness transposed from the expectations of individual private actors,[157] a standard of care created by private companies,[158] or the common law understanding of trespass.[159] Each of these examples reflects the wisdom of subjecting state actors to the same regulations as individuals.

Conceptually, nothing in the Eighth Amendment context justifies departing from the private criminal standard for torture. In defending against Eighth Amendment claims, state actors often justify their activity by appealing to its penological function.[160] The state's monopoly on the legitimate use of force, and on the instrumentalities of punishment, must be tied to the purposes of and justifications for this punishment: namely, incapacitation, deterrence, rehabilitation, and retribution.[161] Punishments without penological justification violate the Eighth Amendment.[162]

State-sanctioned torture serves no legitimate penological function. The torturous conditions on death row provide no additional incapacitation beyond incarceration, which can be equivalently gained from less severe methods of incarceration (such as

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155 *Id.* at 837.

156 *Id.* at 839.

157 *See, e.g.*, Florida v. Bostick, 501 U.S. 429, 435–36 (1991) (considering whether a reasonable person would feel free to leave a police encounter); Terry v. Ohio, 392 U.S. 1, 9 (1968) (reiterating that a person has a reasonable expectation of privacy).

158 *See, e.g.*, Indian Towing Co. v. United States, 350 U.S. 61, 68–69 (1955). The Court emphasized the importance of compensating victims "in the conduct of governmental activities in circumstances like unto those in which a private person would be liable." *Id.* at 68.

159 *See, e.g.*, United States v. Jones, 565 U.S. 400, 404–11 (2012) (discussing the Fourth Amendment's prohibition on state actors).

160 *See Rhodes*, 452 U.S. at 346 (holding that the Eighth Amendment prohibits punishments that are "totally without penological justification" (quotation marks omitted) (quoting *Gregg*, 428 U.S. at 183)); *see also, e.g.*, Ricks v. Shover, 891 F.3d 468, 475 (3d Cir. 2018); Wood v. Beauclair, 692 F.3d 1041, 1050 (9th Cir. 2012).

161 *Cf.* United States v. Brown, 381 U.S. 437, 458 (1965) ("Punishment serves several purposes; retributive, rehabilitative, deterrent—and preventive. One of the reasons society imprisons those convicted of crimes is to keep them from inflicting future harm, but that does not make imprisonment any the less punishment.").

162 *Rhodes*, 452 U.S. at 346 ("[T]he Eighth Amendment prohibits punishments which . . . are 'totally without penological justification.'" (quoting *Gregg*, 428 U.S. at 183)).

incarceration without solitary confinement). Torture does not serve as a deterrent; scholarship has explained that torture is ineffective as a means of crime prevention.[163] In fact, numerous studies have indicated that torture actually has the opposite effect: State-sanctioned torture frequently produces more, rather than less, violence.[164] As Professor David Sussman explained, "Torture is usually a counterproductive strategy of political control, undermining respect for legal authority and in the long run leaving a subject population more alienated and radicalized than cowed."[165] Regarding rehabilitation, scholars have found that the "severe isolation and possible abuse" of death row confinement serve to make rehabilitation almost impossible.[166]

The only goal torture may accomplish is retributive—but as the Eighth Amendment makes clear, the state's authority to use tactics for penological ends is not boundless.[167] Certain actions, like the excessive use of force, can *never* be penologically justified, even in the prison context.[168] Indeed, recent case law affirms courts' willingness to reject any assertion of penal justification as sufficient to violate the rights of incarcerated individuals.[169] A penological interest in retribution cannot serve to authorize this conduct.

In *Weems v. United States*,[170] the Court explained that the "motive" behind the Eighth Amendment was the "belie[f] that power might be tempted to cruelty."[171] The broad power of the legislature to both criminalize conduct and "fix terms of imprisonment with what accompaniments they might" generated a "potent instrument of cruelty."[172] The purpose of the Eighth Amendment is to do exactly what this Comment advocates: curb the state's power to punish. The state as torturer cannot

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163 *See* Eric M. Kearns, *The Study of Torture: Why It Persists, Why Perceptions of It Are Malleable, and Why It Is Difficult to Eradicate*, 4 LAWS 1, 4 (2015).

164 *See id.*

165 Sussman, *supra* note 64, at 12.

166 Andrew Clark, *Prison Isolation Is Torture, Ineffective, and Illogical*, RACE, POL., JUST. (Aug. 21, 2017), https://perma.cc/WKZ7-VWSQ. For a further discussion of the harmful conditions of confinement on death row, see *infra* Part IV.B.

167 *See supra* Part I.

168 *See Whitley*, 475 U.S. at 326–27.

169 *See, e.g.*, Holt v. Hobbs, 574 U.S. 352, 366 (2015) (holding an assertion of penological justification insufficient to justify an Arkansas Department of Correction grooming policy that substantially burdened an incarcerated individual's free exercise of religion).

170 217 U.S. 349 (1910).

171 *Id.* at 373.

172 *Id.* at 372.

exculpate itself from responsibility by citing the purposes of punishment. In the case of torture, it has exceeded its constitutional authority.[173]

IV. PREVENTING TORTURE ON DEATH ROW: APPLICATION OF THE NEW STANDARD

> *The stress was so bad I attempted to help them end my life. I was ready to die, because of the trauma and pain, knowing that these people was not going to stop until I die.*[174]

The experience of life on death row is an "objectively dehumanizing" one.[175] Individuals on death row sit "alone in a cage, physically constrained and, like the proverbial sitting duck, defenseless against insult or attack in an environment in which they are under the total control of officers, some of whom . . . 'take it upon themselves to be your judge and your jury and your executioner.'"[176] The dynamics of death row, combined with the ever-present threat of impending death, create psychological torture, even without the specific intent to create harm.

States' application of the torture aggravator creates a determinable Eighth Amendment standard to prohibit death row's most harmful circumstances. This Part considers three specific pre-execution phenomena that would equate to torture under the new standard: (1) near and botched executions, (2) harmful conditions on death row including solitary confinement, and (3) excessive time spent incarcerated ahead of an execution. Under the existing framework, federal courts have found only a subset of these conditions to constitute violations of the Eighth Amendment.[177] Yet testimony and evidence from the lived experiences of individuals on death row make clear that each of these categories causes the victim to experience torturous psychological pain in advance of a scheduled execution. Under the new standard, each of these acts should be prohibited.

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[173] For a philosophical defense of this position, see Sussman, *supra* note 64, at 11–16.

[174] Romell Broom, *Until I die*, MOURNING OUR LOSSES, https://perma.cc/F5UC-GDUF.

[175] 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, 1227 (2016).

[176] *Id.* at 1229 (quoting JOHNSON, *supra* note 22, at 66)).

[177] *See supra* note 50 and accompanying text.

A. Near and Botched Executions

> *[L]ast night they moved Paul off death watch on Q-wing and put him in the lone empty cell on my floor. . . . I've seen a number of guys go through this over the years, one of whom was just twenty minutes from execution in the electric chair when he got his unexpected stay. They moved him next to me and I was startled to see that his hair had turned almost entirely white during the six weeks he was on death watch.*[178]

Ahead of their executions, individuals on death row may be placed on death watch, a restrictive housing section "for those Death Row inmates whose appeals have run out and have received their execution date."[179] Located directly adjacent to the execution chamber,[180] incarcerated individuals on death watch are under constant surveillance and afforded no privacy.[181] Individuals may spend several months in these particularly harmful, punitive conditions.[182] In some states, such as Texas, it has been suggested that placement on death watch may also be used to achieve the "maximum amount of suffering";[183] individuals report being placed on death watch even before their execution dates are set, "so they are surrounded by men . . . just days from death, constantly reminded of their doom and constantly suffering the loss of friends."[184] Descriptions of death watch reveal its painful isolation: One individual on death watch compared himself to "a leper from the Old Testament."[185]

Individuals on death row may experience the torturous pre-death rituals, including the move to death watch, multiple times. Prior to his actual execution, death row inmate Warren Lee Hill "came within hours of death" three times, including being "strapped to the gurney and sedated only to have his execution

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[178] William Van Poyck, *February 27, 2013*, DEATH ROW DIARY (Mar. 4, 2013), https://perma.cc/4S4L-ST5U.

[179] Voices from Solitary, *Voice from Solitary: Living on Death Watch*, SOLITARY WATCH (Sept. 24, 2019), https://perma.cc/4KTH-57UM (reproducing Billy Joel Tracy's account of his experiences on death row).

[180] *See Groseclose*, 609 F. Supp. at 1434.

[181] Voices from Solitary, *supra* note 179.

[182] *See id.*

[183] *Id.*

[184] *Id.*

[185] Johnson & Lantsman, *supra* note 77, at 157 (quoting Kevin Varga, *Death Watch Journal for Kevin Varga—Day 23*, MINUTES BEFORE SIX (Mar. 5, 2010), https://perma.cc/4FAJ-RDKD).

stayed."[186] In his twenty-six years on death row, death row inmate Richard Glossip has had "nine execution dates" and "three last meals."[187] Last year, the Supreme Court stayed the execution of death row inmate Ruben Gutierrez "just 20 minutes before he was scheduled to be executed by lethal injection."[188]

Those who are denied stays may receive another form of torture: attempted, but botched, executions. Since 2017, there have been five documented cases of failed executions: instances when an individual was subject to an actual attempt to complete a lethal injection.[189] In each of these cases, the victim experienced the full panoply of predeath trauma—the isolation of death watch, administration of last rites, and psychological pain of direct preparation for death—combined with hours of repeated stabbing with needles, generally in an effort to find a vein.[190]

Courts have consistently permitted an individual's execution to be rescheduled, even after a botch.[191] In a recent botched execution case, *Creech v. State*,[192] the Idaho Supreme Court held that a plaintiff had no right to Eighth Amendment relief from a second scheduled execution because the initial failed execution did not have the *purpose* of inflicting pain.[193]

Under an Eighth Amendment standard that eliminates the intent requirement, postbotch rescheduled executions would be impermissible. Subjecting someone to all the steps of an execution

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[186] Holder, *supra* note 147, at 593.

[187] Brynn Gingras, Lihn Tran & Dakin Andone, *Before His 9th Scheduled Execution, Now on Hold, Richard Glossip Said He Hoped His Fate "Can Never Happen to Anybody Else Again"*, CNN (May 5, 2023), https://www.cnn.com/2023/05/04/us/richard-glossip-oklahoma-execution.

[188] *United States Supreme Court Issues Rare Last-Minute Stay for Ruben Gutierrez*, DEATH PENALTY INFO. CTR. (Mar. 14, 2025), https://perma.cc/8RGD-245V.

[189] *See Botched Executions*, DEATH PENALTY INFO. CENTER (last updated Oct. 26, 2025), https://perma.cc/H8QB-UX3R [hereinafter *Botched Executions*]. For a more detailed account of these executions, see Liliana Segura, *Another Failed Execution: The Torture of Doyle Lee Hamm*, THE INTERCEPT (Mar. 3, 2018), https://theintercept.com/2018/03/03/doyle-hamm-alabama-execution-lethal-injection/.

[190] *See, e.g.*, *Botched Executions*, *supra* note 189 (reporting that the attempt to find the vein of Romell Broom lasted more than two hours; Alva Campbell, eighty minutes; Doyle Lee Hamm, two-and-a-half hours; Alan Eugene Miller, ninety minutes; and Thomas Creech, fifty-eight minutes).

[191] *See, e.g.*, Creech v. State, 558 P.3d 723, 726 (Idaho 2024) (holding that "[a] second execution attempt in this case does not amount to cruel and unusual punishment"); *Romell Broom, Who Survived Botched Execution, Dies of COVID-19 on Ohio Death Row*, DEATH PENALTY INFO. CTR. (Mar. 14, 2025), https://perma.cc/64W2-563W. Despite the botch, Broom's execution was rescheduled for March 16, 2022; he passed away before this date. *Id.*

[192] 558 P.3d 723 (Idaho 2024).

[193] *Id.* at 732–33.

most surely and directly creates the psychological torture caused by the fear of an impending death, which would be sufficient to impose the statutory torture aggravator.[194] Subjecting someone to a subsequent execution would thus clearly meet the criteria for an Eighth Amendment violation under the new standard: death following an experience of psychological torture. The state-informed torture standard would prohibit an execution following a botch.

This mirrors state courts' finding that anticipating death after a near-fatal act can constitute torture for the purposes of applying the torture aggravator. In *Banks v. State*,[195] the Georgia Supreme Court upheld a jury finding of torture when the victims were killed with two shots, but the defendant used a shotgun that required time to reload between each shot.[196] The court affirmed the jury's finding that the victims' experience of waiting for the second shot after the first one had been fired, knowing death was near certain, constituted "torture to the victim."[197] As *Banks* demonstrates, the circumstances of remaining on death row following a botched execution—anticipation of near-certain death after a near-fatal act—mirror those found to be torturous by state courts when applying the torture aggravator to a defendant's case.

B. Conditions of Incarceration and Solitary Confinement

> *I describe the physical and mental torture that inmates in solitary confinement suffer. The diet is horrible. The heat and cold are often unbearable. And normal physical and mental activity, human contact, and access to health care are severely limited.*
>
> *As harmful as these conditions are, life in solitary is made all the worse because it is often a hopeless existence. . . .*
>
> *Years on end in solitary, particularly on death row, will drain that hope from anyone because in solitary there is nothing to live for.*
>
> *I know this because I lost my hope after realizing what my existence would be like for years on end until I was either executed or exonerated.*[198]

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194 *See supra* Part II.A.

195 227 S.E.2d 380 (Ga. 1976).

196 *Id.* at 382.

197 *Id.*

198 *Reassessing Solitary Confinement II: The Human Rights, Fiscal, and Public Safety Consequences: Hearing Before the Subcomm. on the Const., C.R. & Hum. Rts. of the S. Comm.*

Courts have, on occasion, used the existing Eighth Amendment framework to invalidate specific conditions of confinement on death row.[199] Dirty and dimly lit cells, oscillating temperatures, and inadequate medical treatment would continue to be prohibited under the new state-informed torture standard. Subjecting individuals to these kinds of conditions clearly creates the kind of predeath harm prohibited under the new standard. State court decisions affirm this conclusion; in *Commonwealth v. Chambers*,[200] the Pennsylvania Supreme Court found the defendant eligible for the torture aggravator in part because he subjected the victim to a life in "deplorable conditions," including living in an apartment that was "filthy and infested with flies and cockroaches."[201] However, the state-informed torture standard would also expand Eighth Amendment protections to a condition many federal courts have upheld: solitary confinement.

The vast majority of individuals incarcerated on death row face extended periods of solitary confinement. "Most death row prisoners in the United States are locked alone in small cells for 22 to 24 hours a day with little human contact or interaction; reduced or no natural light; and severe constraints on visitation, including the inability to ever touch friends or loved ones."[202] According to a report by the American Civil Liberties Union, forty-seven states isolate their death row prisoners for twenty-two or more hours per day.[203]

The detrimental effects of solitary confinement have been well documented. Studies spanning three decades and conducted across several continents reveal a consistent panoply of negative psychological effects: "insomnia, anxiety, panic, withdrawal, hypersensitivity, ruminations, cognitive dysfunction, hallucinations, loss of control, aggression, rage, paranoia, hopelessness, lethargy, depression, emotional breakdowns, self-mutilation, and suicidal impulses."[204] Individuals incarcerated in solitary confinement show much higher rates of suicide and self-harm than the

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on the Judiciary, 113th Cong. 27 (2014) [hereinafter *Reassessing Solitary Confinement II*] (statement of Damon Thibodeaux, exonerated death row inmate).

199 *See supra* Part I.B.

200 980 A.2d 35 (Pa. 2009).

201 *Id.* at 39–40.

202 ACLU, A DEATH BEFORE DYING: SOLITARY CONFINEMENT ON DEATH ROW 2 (2013).

203 *Id.* at 5.

204 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, 530 (1997).

general public;[205] a California study found that, despite accounting for just 10% of the state's prison population, individuals in solitary confinement made up 73% of all prison suicides.[206]

Applying the state-informed torture standard can resolve the ongoing circuit split on whether the Eighth Amendment prohibits pre-execution solitary confinement.[207] Under the new standard, the answer is clear: Prolonged solitary confinement on death row violates the Eighth Amendment. Prolonged solitary confinement ahead of an execution clearly creates psychological harm.[208] By removing the intent requirement, the new state-informed torture standard allows this violation to be properly vindicated.

This result closely tracks the state-level application of the torture aggravator. State courts have found that subjecting a victim to solitary confinement ahead of a pending murder constitutes torture sufficient for the imposition of the death penalty. In *State v. Cauthern*,[209] for example, the court found torture when the victim "was placed [alone] in a closet" and forced to "endur[e] the mental anguish" of hearing another murder (in this case, that of her husband) in the next room.[210] Similarly, in *Commonwealth v. Smyrnes*,[211] the court found torture when the victim was "held hostage [alone] for days" prior to being killed.[212] Here, the nature of states' existing findings clarifies that the Eighth Amendment should prohibit solitary confinement ahead of a pending execution as torturous.

C. *Lackey*, Revisited

> *The years drag by—life or death? I no longer know. Perhaps both—perhaps neither. Painful thoughts flow into lost memories. Is this life at which I'm gazing? Or just a hopeless stretch of time?*[213]

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[205] ACLU, *supra* note 202, at 7.

[206] *Reassessing Solitary Confinement II*, *supra* note 198, at 394.

[207] For a summary of the existing circuit split on the permissibility of solitary confinement under the Eighth Amendment, see Erin Owen, Comment, *No Hope in Sight: Rethinking the Constitutionality of Solitary Confinement with* Hope v. Harris, 58 UIC L. REV. 747, 756–61 (2025).

[208] *See supra* Part II.B.

[209] 967 S.W.2d 726 (Tenn. 1998).

[210] *Id.* at 732.

[211] 2016 Pa. Dist. & Cnty. Dec. LEXIS 430 (C.P. Ct. Westmoreland Mar. 4, 2016).

[212] *Id.* at *41.

[213] SHIRLEY DICKS, DEATH ROW: INTERVIEWS WITH INMATES, THEIR FAMILIES AND OPPONENTS OF CAPITAL PUNISHMENT 98 (1990) (quotation marks omitted) (quoting an interview with Byron Parker).

Finally, an application of the state-informed torture standard could be used to reinvigorate failed *Lackey* claims brought to challenge the duration of time spent on death row.[214] Scholarship has previously argued that *Lackey* claims, rather than reflecting individual circumstances, reflect a "state's systematic implementation of a torturous punishment."[215] These arguments, however, have been based exclusively on the more general framework of cruel and unusual punishment, instead of a specific definition of torture.[216]

The state-informed torture standard lends credence to reading the Eighth Amendment as prohibiting lengthy pre-execution delays. Mirroring cases in which the court found that the torture aggravator applied due to a lengthy period of child abuse, for example,[217] this application would consider the entire duration of confinement to establish torture. By recognizing psychological harm—including that generated by time spent waiting for a pending execution—and removing the intent requirement, the state-informed torture standard provides a new route to support the granting of *Lackey* claims.

It is worth briefly addressing Justice Thomas's ongoing objection to *Lackey* claims: that the Eighth Amendment could not contemplate prohibiting executions after delays caused by litigants' efforts to pursue their full range of constitutional rights.[218] Under this view, removing the intent requirement risks increasing the possibility of Eighth Amendment gamesmanship—if delay alone is sufficient, nothing prevents an individual from utilizing the robust post-conviction appellate process to essentially manufacture an Eighth Amendment violation.[219]

There are several possible responses. First, at least one court has rejected the premise of this argument. In granting a *Lackey* claim, a district court in California found that pre-execution delays were the result of the state's death penalty system itself, not the outcome of individual efforts.[220] Courts could also draw a

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214 *See supra* Part I.

215 Sun, *supra* note 97, at 1593.

216 *Id.* at 1614.

217 *See supra* note 90 and accompanying text.

218 *See, e.g.*, Thompson v. McNeil, 556 U.S. 1114, 1118 (2009) (Thomas, J., concurring in denial of certiorari).

219 Capital cases are subject to mandatory appellate review. This is not just a checkbox for the lower court—in one study, more than one-quarter of cases were reversed on appeal. BARRY LATZER & JAMES N.G. CAUTHEN, JUSTICE DELAYED? TIME CONSUMPTION IN CAPITAL APPEALS: A MULTISTATE STUDY 3 (2007).

220 *See* Jones v. Chappell, 31 F. Supp. 3d 1050, 1065–67 (C.D. Cal. 2014).

dividing line for when this factor meets the constitutional threshold by requiring a pre-execution delay of a set period of time to bring a claim.[221] And courts could choose to require something in addition to the anticipation of execution to constitute an Eighth Amendment violation.[222] The standard, in these cases, would be something resembling "anticipation plus"; a bare showing of just pre-execution fear would be insufficient. This reading would have the added effect of forcing prisons to improve general conditions on death row to avoid compounding pre-execution delays into Eighth Amendment violations.[223]

One additional counterargument may be raised here. If torture is constrained, as both the Supreme Court and the state definitions understand it to be, to *extraneous* pain, perhaps any pain that occurs while an individual is exercising their constitutional rights to the appellate process is not, in fact, extraneous. However, this misunderstands the nature of the extraneous pain requirement. Extraneous pain should be read as any pain beyond that strictly necessary to cause death. The appellate process, while constitutionally guaranteed, is not itself a component of the punishment—it is a procedural safeguard designed to ensure the lawfulness of the sentence.[224] Thus, any suffering inflicted during that period cannot be characterized as intrinsic to the execution itself. To hold otherwise would effectively permit the state to impose unlimited additional pain so long as a defendant continued to pursue legally available remedies, thereby conditioning the right to be free from torture on the forfeiture of the right to appeal. Such a construction would render the constitutional prohibition against cruel and unusual punishment largely meaningless for those who exercise their due process rights.

It bears considering whether, based on this new standard, capital punishment is ever permissible. Taken to its logical conclusion, properly vindicating the right to be free from the torture created by the psychological pain of an impending execution

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[221] For a collection of proposed standards, see Sun, *supra* note 97, at 1609.

[222] In this hypothetical case, an individual who was subject to an impending sentence but permitted to return to the world, for example, likely would not have a cognizable Eighth Amendment claim.

[223] Scholarship has previously argued that improving conditions on death row is a solution to Justice Thomas's concern regarding litigant-created delays. *See, e.g.*, Sharkey, *supra* note 47, at 890–92.

[224] *Cf.* Clemons v. Mississippi, 494 U.S. 738, 749 (1990) ("[T]his Court has repeatedly emphasized that meaningful appellate review of death sentences promotes reliability and consistency.").

would not permit the death penalty at all.[225] The Supreme Court has affirmed that, even if capital punishment itself is permitted, the Eighth Amendment may still prohibit specific methods of execution.[226] This analysis applies when considering the Eighth Amendment proscription on torture. While the death penalty imposed by the state may not be impermissible in and of itself, the methods and conditions of its administration may independently violate the Eighth Amendment's prohibition on torture.[227] Taken to their conclusion, these principles may justify getting rid of capital punishment altogether. Critically, however, this Comment's approach does not require going that far. The Court has made clear that the constitutionality of the methods of execution and of the death penalty itself are separate inquiries. While the case for abolition of capital punishment is strong—and made stronger by the implementation of the new state-informed torture standard—this Comment's proposal is in no way contingent on abolition.

Finally, a brief note on process. This Part highlights circumstances in which the state torture aggravator applied as a point of comparison to conditions on death row. However, this is not to suggest that pleading an Eighth Amendment claim under the state-informed torture standard requires finding such an analog. Indeed, constraining the application of the state-informed standard to just those examples would be a mistake; scholarship has explained the relatively common phenomenon of otherwise broad standards being applied only in limited circumstances.[228] Limited prosecutorial resources, the requirement of juror unanimity, and the breadth of prosecutorial discretion provide clear reasons why only an artificially limited selection of examples of conduct earns the torture aggravator—a selection that, like the examples noted in the Levin Memo, skews dramatically toward the most extreme. These right-tailed applications, however, serve only as an elucidation of the standard, rather than changing the standard itself.

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[225] It bears noting here that the state torture standards do not require a long period of anticipation. *See, e.g.*, *Banks*, 227 S.E.2d at 382 (affirming a jury's finding of the aggravating circumstance of torture when the period of anticipation was only long enough for the defendant to reload his shotgun).

[226] *See Baze*, 553 U.S. at 48–49.

[227] Scholarship has also made this argument. *See* Sharkey, *supra* note 47, at 886–88.

[228] For an explanation of this phenomenon, see generally Schwartz, *supra* note 76, at 1563 (explaining how the enforcement of civil rights is limited, only occurring in narrow circumstances depending on what Professor Joanna Schwartz has termed "the civil rights ecosystem").

The analysis in this Part operates only as a partial overview of the new standard's applicability.

CONCLUSION

> *I have seen the first man on death watch die today. . . . For the first time since coming to death row I feel like that was me dying today.*[229]

Until now, death row has operated in a constitutional blind spot. While courts have acknowledged the torturous conditions individuals on death row experience, they have failed to translate these findings into a workable Eighth Amendment standard. In the absence of a clear framework, individuals on death row remain exposed to conditions that would otherwise be recognized as torture.

State torture aggravators provide a resolution to this paradox. These aggravators reflect contemporary moral judgments, expressed by legislatures, juries, and courts, about what forms of violence and suffering constitute torture. Critically, these state definitions of torture recognize the ongoing psychological abuse of death row and do not necessitate subjective intent, an element ill-suited to the prison context. Together, these principles form a new evaluative metric consistent with the Supreme Court's evolving standards of decency framework and better suited to address the diffuse, structural nature of death row conditions than the Court's existing Eighth Amendment criteria.

Reorienting Eighth Amendment analysis around these state-level definitions would bring coherence to an area of law defined by contradiction: The same conduct that can elevate a murder to a capital offense currently exists, unchecked, within the very institution that administers capital punishment. The Eighth Amendment's prohibition on cruel and unusual punishment was designed to prevent precisely this kind of excess. If courts are to take seriously the Amendment's mandate—and its historical purpose to guard against the abuses of concentrated state power—then they must recognize death row conditions for what they long have been: torture.

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[229] Johnson & Lantsman, *supra* note 77, at 159 (quoting Kevin Varga, *Death Watch Journal for Kevin Varga—Day 20*, MINUTES BEFORE SIX (Mar. 3, 2010), https://perma.cc/6RPV-EFCX).

APPENDIX

TABLE A: STATE DEATH PENALTY PROCEDURES[230]

State	Torture Aggravator
Alabama	No specific torture aggravator
Alaska	No death penalty
Arizona	No specific torture aggravator
Arkansas	No specific torture aggravator
California	Specific torture aggravator
Colorado	No death penalty
Connecticut	No death penalty*
Delaware	No death penalty*
Florida	No specific torture aggravator
Georgia	Specific torture aggravator
Hawaii	No death penalty
Idaho	Specific torture aggravator
Illinois	No death penalty
Indiana	Specific torture aggravator
Iowa	No death penalty
Kansas	Specific torture aggravator
Kentucky	No specific torture aggravator
Louisiana	No specific torture aggravator
Maine	No death penalty
Maryland	No death penalty
Massachusetts	No death penalty
Michigan	No death penalty
Minnesota	No death penalty
Mississippi	No specific torture aggravator
Missouri	Specific torture aggravator
Montana	Specific torture aggravator
Nebraska	No specific torture aggravator
Nevada	Specific torture aggravator
New Hampshire	No death penalty
New Jersey	No death penalty*
New Mexico	No death penalty

230 For a list of all state torture aggravators, see *Aggravating Factors by State*, DEATH PENALTY INFO. CTR., https://perma.cc/TR5K-HY79.

New York	No death penalty*[231]
North Carolina	No specific torture aggravator
North Dakota	No death penalty
Ohio	No specific torture aggravator
Oklahoma	No specific torture aggravator
Oregon	Specific torture aggravator
Pennsylvania	Specific torture aggravator
Rhode Island	No death penalty
South Carolina	Specific torture aggravator
South Dakota	Specific torture aggravator
Tennessee	Specific torture aggravator
Texas	No specific torture aggravator
Utah	Specific torture aggravator
Vermont	No death penalty
Virginia	No death penalty
Washington	No death penalty
West Virginia	No death penalty
Wisconsin	No death penalty
Wyoming	No specific torture aggravator

*These states had a statutory torture aggravator prior to the abolition of the death penalty. I have not included these states in the analysis.

TABLE B: STATE DEFINITIONS OF TORTURE AGGRAVATOR

State	Statute	Physical Abuse Requirement	Intent Requirement
California	CAL. PENAL CODE § 190.2(a)(18) (West 2026)	Yes. *See* People v. Smith, 347 P.3d 530, 555–56 (Cal. 2015).	Yes. *See* People v. Smith, 347 P.3d 530, 555–56 (Cal. 2015).
Georgia	GA. CODE ANN. § 17-10-30(b)(7) (2026)	Yes. *See* Hance v. State, 268 S.E.2d 339, 345 (Ga. 1980).	No. *See* Hance v. State, 268 S.E.2d 339, 345 (Ga. 1980).
Idaho	IDAHO CODE §§ 18-4001, -4004 (2026)	No. *See* IDAHO CODE § 18-4001 (2026).	Yes (to constitute first-degree murder). *See* IDAHO CODE § 18-4003 (2026).

[231] New York's death penalty statute was declared unconstitutional by the New York Court of Appeals, although the statute remains on the books. People v. LaVelle, 817 N.E.2d 341, 365 (N.Y. 2004).

Indiana	IND. CODE § 35-50-2-9(b)(11) (2026)	No. *See* Nicholson v. State, 768 N.E.2d 443, 447 (Ind. 2002).	Yes. *See* Nicholson v. State, 768 N.E.2d 443, 447 (Ind. 2002).
Kansas	KAN. STAT. ANN. § 21-6624(f)(4) (2025)	No. *See* State v. McKinney, 961 P.2d 1, 11–12 (Kan. 1998).	No. *See* State v. McKinney, 961 P.2d 1, 11–12 (Kan. 1998).
Missouri	MO. ANN. STAT. § 565.032.2(7) (West 2026)	No. *See* State v. Preston, 673 S.W.2d 1, 10–12 (Mo. 1984) (en banc).	No. *See* State v. Preston, 673 S.W.2d 1, 10–12 (Mo. 1984) (en banc).
Montana (torture murder)	MONT. CODE ANN. § 46-18-303(1)(a)(iii) (2025)	Yes. *See* Vernon Kills On Top v. State, 928 P.2d 182, 196 (Mont. 1996).	Yes. *See* McKenzie v. Osborne, 640 P.2d 368, 400–01 (Mont. 1981).
Nevada	NEV. REV. STAT. § 200.033.8 (2025)	Yes. *See* Robins v. State, 798 P.2d 558, 570 (Nev. 1990).	Yes. *See* Robins v. State, 798 P.2d 558, 570 n.4 (Nev. 1990).
Oregon	OR. REV. STAT. § 163.107(1)(e) (2025)	Yes. *See* State v. Compton, 39 P.3d 833, 837 (Or. 2002) (en banc).	Yes. *See* State v. Compton, 39 P.3d 833, 837 (Or. 2002) (en banc).
Pennsylvania	42 PA. STAT. AND CONS. STAT. ANN. § 9711(d)(8) (West 2026)	No. *See* Commonwealth v. Cox, 686 A.2d 1279, 1289 (Pa. 1996).	Yes. *See* Commonwealth v. Cox, 686 A.2d 1279, 1289 (Pa. 1996).
South Carolina	S.C. CODE ANN. § 16-3-20(C)(a)(1)(i) (2026)	Yes. *See* S.C. CODE ANN. § 16-3-20(C)(a)(1)(i) (2026).	No. *See* State v. Johnson, 525 S.E.2d 519, 525–26 (S.C. 2000).
South Dakota	S.D. COD. LAWS § 23A-27A-1(6) (2026)	No. *See* State v. Rhines, 548 N.W.2d 415, 451–52 (S.D. 1996).	Yes. *See* State v. Rhines, 548 N.W.2d 415, 451–52 (S.D. 1996).
Tennessee	TENN. CODE ANN. § 39-13-204(h)(2)(i)(5) (2026)	No. *See* State v. Keen, 31 S.W.3d 196, 206–10 (Tenn. 2000).	No. *See* State v. Keen, 31 S.W.3d 196, 210 (Tenn. 2000).
Utah	UTAH CODE ANN. § 76-5-202(2)(a)(xviii) (LexisNexis 2026)	Yes. *See* UTAH CODE ANN. § 76-5-202(2)(a)(xviii) (LexisNexis 2026).	Yes. *See* Archuleta v. Galetka, 267 P.3d 232, 255 (Utah 2011).