SUFFERING BEFORE EXECUTION

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Before their executions, condemned people suffer intensely, in solitude, and at great length. But that suffering is not punishment*—especially not the suffering on American-style death rows. In this Article, I show that American institutions administer pre-execution confinement as nonpunitive detention, and I explain the consequences of that counterintuitive status. A nonpunitive paradigm curbs, at least to some degree, the dehumanization, neglect, and isolation that now dominate life on death row. It is also the doctrinal solution to a longstanding puzzle involving confinement, execution, and the Eighth Amendment.*

To understand why pre-execution confinement is nonpunitive, readers need a basic understanding of the experience itself. Most death-sentenced people will lead lives marked by some substantial combination of inadequate nutrition, deficient health care, substandard sanitation and ventilation, restricted movement, and excessive isolation. By the time the state executes its condemned prisoners, they will have spent about two decades in such conditions—up from two years in 1960. The state distributes suffering across this prisoner cohort in ways that bear little relationship to criminal blameworthiness. Almost without exception, however, scholarship and decisional law continue to treat confinement before execution as punishment.

Virtually everyone makes the punitive assumption, but there are two reasons rooted in penal theory why they should not. First, confinement before execution does not meet consensus criteria for punishment. It is instead suffering collateral to the state's interest in incapacitating those who face execution. Second, if pre-execution confinement were to be taken seriously as a punitive practice, then it would be normatively unjustified. More specifically, punitive confinement would represent

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punishment beyond the legally specified maximum (an execution), and it would be distributed across the death-sentenced prisoner cohort arbitrarily.

There is a well-developed body of constitutional law capable of absorbing a nonpunitive version of pre-execution confinement. Under that law, when the state detains people primarily to incapacitate them, that detention is regulatory—not punitive. Due process, rather than the Eighth Amendment, constrains regulatory detention. A nonpunitive approach would reduce unnecessary suffering because due process rules more stringently constrain the state's treatment of its prisoners. Such an approach would also give the U.S. Supreme Court better answers to the difficult Eighth Amendment questions that have vexed the Justices for decades.

INTRODUCTION

People living on American death rows will die eventually, but first they will *wait*. And when death does come, it is more likely to be suicide or natural causes than the executioner's hand.[1] Those whom the state manages to execute will spend, on average, about twenty years in pre-execution confinement[2] —often in squalor and almost always alone.[3] In other words, the condemned suffer intensely, in solitude, and at great length.

Almost every death penalty jurisdiction in the United States maintains a death row—a segregated living arrangement reserved for death-sentenced prisoners.[4] Pre-execution confinement might be a central feature of the modern death penalty, but it is theoretically neglected. Most jurists and scholars reflexively conceptualize it as an extreme form of punitive suffering.[5] Even in corners of the legal academy more attentive to the theoretical question, people treat pre-execution confinement as punishment.[6]

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[1] See Tracy L. Snell, Bureau of Just. Stat., U.S. Dep't of Just., Capital Punishment, 2020—Statistical Tables 16 tbl.11 (2021) [hereinafter 2020 BJS Data], https://bjs.ojp.gov/content/pub/pdf/cp20st.pdf [https://perma.cc/R85Q-KZDJ].

[2] See id. at 15 tbl.10.

[3] See generally ACLU, A Death Before Dying: Solitary Confinement on Death Row 1–7 (2013) [hereinafter 26-State Report], https://www.aclu.org/sites/default/files/field_document/deathbeforedying-report.pdf [https://perma.cc/ZHW5-EFCL] (reporting inhumane confinement conditions on death rows in the United States based on a twenty-six-state survey); John H. Blume, Killing the Willing: "Volunteers," Suicide and Competency, 103 Mich. L. Rev. 939, 964–66 (2005) (analyzing the link between harsh death-row conditions and execution volunteers); 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, 1213–15, 1227–32, 1234 (2016) (explaining why death row incarceration is dehumanizing and arguing that it amounts to torture); Marah Stith McLeod, Does the Death Penalty Require Death Row? The Harm of Legislative Silence, 77 Ohio St. L.J. 525, 537–39 (2016) (summarizing death-row practices and conditions across all capital punishment states).

[4] The protocols for pre-execution confinement vary by jurisdiction, and I use the term "death row" to include any living arrangement for condemned people that does not integrate them into broader prisoner living arrangements. Cf. Merel Pontier, Cruel but Not Unusual the Automatic Use of Indefinite Solitary Confinement on Death Row: A Comparison of the Housing Policies of Death-Sentenced Prisoners and Other Prisoners Throughout the United States, 26 Tex. J. C.L. & C.R. 117, 141–42 (2020) (presenting findings on relationship between solitary confinement and death row throughout the country); Brandon Vines, Decency Comes Full Circle: The Constitutional Demand to End Permanent Solitary Confinement on Death Row, 55 Colum. J.L. & Soc. Probs. 591, 620–21 (2022) (same).

[5] See infra Section I.B.

[6] To take a recent example, Professor Marah Stith McLeod published an encyclopedic account of death-row practices across the country, and she did so in service of an argument

I have a different view: that pre-execution confinement is a form of *nonpunitive* custody. The execution is the penalty, and the prior confinement is the administrative detention necessary to carry that punishment out. After all, if death is the ultimate penalty, then what could the moral justification for adding *punitive* detention be? None of this is to say that pre-execution confinement is morally or legally unjustifiable. But if the confinement is nonpunitive, then it ought to be subject to moral and constitutional constraints that differ from those that limit punishment.

I proceed in three parts. In Part I, I set forth the punitive framework that dominates the modern understanding of pre-execution confinement. In so doing, I present the associated suffering along two dimensions. The first involves the duration of confinement, and the second involves its conditions. Most people sentenced to die will lead lives marked by some substantial combination of malnutrition, inadequate health care, substandard sanitation and ventilation, restricted movement, and excessive isolation.[7] The distribution of this suffering *within* the cohort of death-sentenced people, moreover, has almost nothing to do with moral blameworthiness.[8] Nevertheless, and as debates rage over justifications for such suffering, almost everyone is engaged in a similar project: to evaluate whether pre-execution confinement can be justified as punishment.[9]

In Part II, I make the theoretical claim that pre-execution confinement is *not* punishment. That is, the state does not subject condemned people to harsh pre-execution treatment in order to counterbalance blameworthy conduct or for other punitive reasons.[10] Most death rows exist because correctional administrators have decided to establish and populate them, and the suffering that condemned people experience there is typically justified by reference to incapacitation—an objective that the Supreme Court and most of the theoretical literature treat as nonpunitive.[11] The problems with a punitive view of pre-execution confinement are more than just definitional. Any punitive treatment imposed by the state would

that, because death-row incarceration is punishment, the legislature must provide for it specifically. See McLeod, supra note 3, at 531, 537–39; see also infra notes 114, 135 and accompanying text (collecting sources) (highlighting professors who, despite carefully selecting terminology, nevertheless analyze death-row confinement as punishment).

[7] See infra Subsection I.A.2.

[8] See infra Subsection I.A.1.

[9] See infra Section I.B.

[10] See infra Section II.A.

[11] See infra notes 150–51, 242–53, 266–83 and accompanying text.

violate core justificatory tenets of punishing. The state ought not impose punishment beyond the punitive treatment that the offending person *deserves*, so pre-execution confinement cannot be punishment added to the legislatively specified and jury-imposed maximum, which is an execution.[12]

In Part III, I tackle constitutional doctrine. The constitutional law of nonpunitive detention can comfortably absorb confinement before execution.[13] I also consider how that doctrinal change would affect pre-execution practices. First, it would change the procedures by which the state may permissibly isolate people in a segregated facility, and the most meaningful change would require periodic review for dangerousness.[14] Second, it would mean that conditions of pre-execution confinement would be subject to analysis under stricter due process tests, rather than less stringent Eighth Amendment ones.[15] Finally, it would give the Supreme Court a way to resolve a doctrinal impasse for which the Justices have offered only unconvincing answers: If lengthy pre-execution confinement entails decades of suffering, then how can the Eighth Amendment permit the state to add an execution?[16]

In sum, pre-execution confinement should be treated as nonpunitive detention—an administrative arrangement necessary to incapacitate risks. On such an understanding, jurisdictions must reform pre-execution practices to avoid the pervasive neglect and dehumanizing treatment permitted under more punitive approaches. Readers should understand that, when I dispute the status of pre-execution confinement as punishment, I neither deny the existence of extraordinary pre-execution suffering nor suggest that it lies beyond law's reach. Quite the opposite, in fact. Suffering before execution is cause for profound concern, both moral and legal. When the state inflicts that suffering for nonpunitive reasons, it ought to be substantially constrained, and there is constitutional doctrine capable of meaningfully constraining it.

I. THE STATUS QUO: A PUNISHMENT FRAMEWORK

Virtually everyone treats confinement before execution as punishment. To best capture the dominance of that view, I map the suffering that pre-

[12] See infra Subsection II.B.1.
[13] See infra Section III.A.
[14] See infra Subsection III.B.1.
[15] See infra Subsection III.B.2.
[16] See infra Section III.C.

execution confinement entails. One aspect of the experience involves its duration, and another is the set of conditions that mark daily life. An important point should emerge from Part I: jurisdictions distribute harsh treatment across the condemned prisoner cohort without reference to variables that typically explain punishment.

A. Pre-Execution Suffering

In *Reflections on the Guillotine*, Albert Camus penned what might be western civilization's most famous passage on pre-execution confinement: "[A] man is undone by waiting for capital punishment well before he dies. Two deaths are inflicted on him, the first being worse than the second . . . ."[17] Camus's humanistic abolitionism carried the day in Europe.[18] Sixty-six years later, however, pre-execution confinement in the United States remains "lonely and barren," and people serving capital sentences still "die a slow psychic death."[19] I use "suffering" to capture the experiential unpleasantness that punishments produce—although punishment itself is actually the state-imposed harshness or disability that produces the negative experience.[20] Pre-execution confinement entails enormous suffering, the dominant sources of which are (1) the delay between the moments of sentencing and execution and (2) the conditions of pre-execution confinement.[21]

1. Suffering by Delay

Much of the suffering during pre-execution confinement comes from its duration—the delay between the moment a court announces a capital sentence and the moment the execution takes place. As explained below, decades-long delay is a newer, idiosyncratic feature of capital punishment in the United States, and the distribution of delay across the capitally sentenced prisoner cohort is disconnected from the salient features of

[17] Albert Camus, Réflexions sur La Guillotine, *in* Réflexions sur La Peine Capitale 123, 153 (Arthur Koestler ed., 1957).

[18] See Carol S. Steiker & Jordan M. Steiker, Lessons for Law Reform from the American Experiment with Capital Punishment, 87 S. Cal. L. Rev. 733, 753–54 (2014) (explaining divergence between capital punishment practices in the United States and Europe).

[19] Robert Johnson, Death Work: A Study of Modern Execution Process 21 (Cynthia S. Stormer, Penelope Sky, Lynne Y. Fletcher & Mary K. Hancharick eds., 1990).

[20] See David Gray, Punishment as Suffering, 63 Vand. L. Rev. 1619, 1625 (2010) (providing the theoretical distinction between objective punishment and subjective suffering).

[21] See infra Subsections I.A.1 (delay), I.A.2 (conditions).

punishment, such as criminal blameworthiness. The delay is instead the result of both the baroque constitutional law that constrains capital trials and the unusual institutional consensus that governments require to implement capital sentences.[22]

For much of human history, pre-execution confinement wasn't significant enough to require theoretical justification. Through at least the Middle Ages, public executions rode the violent passions of aggrieved regimes and communities. As a result, the state carried capital sentences out almost immediately.[23] Even as executions became more solemn and civilized, delay was minimal. In 1752, English Parliament passed a statute entitled "An Act for better preventing the horrid Crime of Murder," requiring that executions take place on the day after sentencing.[24] A pregnant woman could "plead her belly,"[25] but executions were otherwise swiftly implemented affairs.

American executions used to be quickly implemented too.[26] Appellate review of criminal sentences was limited.[27] Certain crimes carried mandatory death sentences and so there was often no discrete sentencing-phase proceeding to scrutinize.[28] When there was some delay, it was to facilitate repentance and religious settlement.[29] In the American South, executions remained swift and public spectacles for another reason: they

[22] See Lee Kovarsky, The American Execution Queue, 71 Stan. L. Rev. 1163, 1176–81 (2019) (explaining failure to execute condemnees as a coordination problem); Carol S. Steiker & Jordan M. Steiker, A Tale of Two Nations: Implementation of the Death Penalty in "Executing" Versus "Symbolic" States in the United States, 84 Tex. L. Rev. 1869, 1873 (2006) (describing the possible link between execution rates and political will).

[23] See generally Johnson, supra note 19, at 1–11 (describing sentence-to-execution process through the Middle Ages).

[24] 25 Geo. 2, c. 37 (UK); Jeffrey Omar Usman, The Twenty-First Century Death Penalty and Paths Forward, 37 Miss. Coll. L. Rev. 80, 86 (2019). Much of the information in the next five footnotes can be found in Usman, supra.

[25] See Valerie P. Hans, Jury Systems Around the World, 4 Ann. Rev. L. & Soc. Sci. 275, 279 (2008).

[26] See Stuart Banner, The Death Penalty: An American History 16 (2002).

[27] Specifically, there were few grounds for error in a guilt determination, and mandatory capital sentencing meant that there was no punishment-phase determination to review. See Woodson v. North Carolina, 428 U.S. 280, 289–91 (1976) (plurality opinion) (discussing implications of mandatory sentencing); Avid Rossman, "Were There No Appeal": The History of Review in American Criminal Courts, 81 J. Crim. L. & Criminology 518, 543–50 (1990) (describing criminal case review during the eighteenth century).

[28] See *Woodson*, 428 U.S. at 289 (plurality opinion).

[29] See Banner, supra note 26, at 16–22; Robert M. Bohm, Deathquest: An Introduction to the Theory and Practice of Capital Punishment in the United States 2 (4th ed. 2012).

were central to stratified racial power.[30] Those with slaving interests used the brutal pageantry of swift executions to deter insurgencies.[31] Even after the Thirteenth Amendment formally abolished slavery, swift executions were an instrument of racial subordination in the South.[32] One of the main reasons that lynching decreased precipitously between the 1890s and the 1930s was that a swift death penalty was a suitable substitute for mob "justice."[33]

Around the 1930s, however, things started to change. American institutions began to civilize (and bureaucratize) the death penalty, and that process partially explains the need for pre-execution confinement.[34] In *Powell v. Alabama*, the Supreme Court held that indigent defendants facing the death penalty were entitled to an attorney.[35] States began to treat executions as solemn moments to deliver deserved suffering. Executions became less public and visible,[36] and so their speed was less central to their function. Still, the delay was generally a matter of weeks or months—not years.[37] When capital punishment activity flatlined near zero in the 1960s,[38] the average length of pre-execution confinement was

[30] See Kovarsky, supra note 22, at 1171–72.

[31] See id. at 1170–71.

[32] See id. at 1171–72.

[33] See Eric M. Freedman, Habeas Corpus: Rethinking the Great Writ of Liberty 74 (2001); Steward E. Tolnay & E.M. Beck, A Festival of Violence: An Analysis of Southern Lynchings, 1882–1930, at 202 (1995) (explaining that lynchings fell ninety percent over this period); Carol S. Steiker & Jordan M. Steiker, The Racial Origins of the Supreme Court's Death Penalty Oversight, 42 Hum. Rts. 14, 16 (2017) ("During this period of flux, one of the primary considerations in favor of retention (and of reinstatement after abolition) was the need to maintain capital punishment to reduce the incidence of lynch mob violence.").

[34] See Kovarsky, supra note 22, at 1172.

[35] See 287 U.S. 45, 72–73 (1932).

[36] See David Garland, Peculiar Institution: America's Death Penalty in an Age of Abolition 135 (2010).

[37] See id. at 46. And when the delays increased, they were nothing like what we experience today. In Texas, for example, the average time to execution grew from one-and-a-half to five months between the 1930s and the 1950s. See Banner, supra note 26, at 216.

[38] See Chris Wilson, Every Execution in U.S. History in a Single Chart, TIME, https://time.com/82375/every-execution-in-u-s-history-in-a-single-chart/ [https://perma.cc/2MKD-BZKM] (Apr. 25, 2017, 8:00 AM).

two years.[39] Then, in 1972, the Supreme Court decided *Furman v. Georgia*,[40] invalidating every American death sentence.

In 1976, the Supreme Court decided five cases that lifted the *Furman* moratorium, marking the beginning of the American death penalty's modern era.[41] Features of the 1976 cases drove a giant wedge between the moments of sentencing and execution. They required that every capital trial have discrete guilt and sentencing phases, giving rise to a new world of sentencing-phase Eighth Amendment law.[42] And unlike earlier periods of robust capital punishment practice, the modern death penalty era matured alongside a thick habeas remedy.[43] More habeas process enforced more substantive law, giving rise to lengthy post-conviction litigation.[44] Given norms against setting execution dates while that litigation remained pending,[45] the length of pre-execution confinement grew considerably.[46]

More energetic enforcement of modern constitutional law, however, is only part of the story. The increasing length of pre-execution confinement also reflects a collective action problem. A modern execution requires extensive institutional coordination,[47] at least insofar as a single abstentionist official can often disable sentence implementation. Take some easy examples. Local district attorneys can veto executions in states

[39] See Dwight Aarons, Can Inordinate Delay Between a Death Sentence and Execution Constitute Cruel and Unusual Punishment?, 29 Seton Hall L. Rev. 147, 181 (1998); see also Elizabeth Rapaport, A Modest Proposal: The Aged of Death Row Should Be Deemed Too Old to Execute, 77 Brook. L. Rev. 1089, 1104 n.65 (2012) (collecting sources on executions taking place around this time); U.N. Dep't of Econ. & Soc. Affs., Capital Punishment: Part I—Report, 1960, ¶ 170, U.N. Doc. ST/SOA/SD/9, at 48 (1968).

[40] 408 U.S. 238, 239–40 (1972) (per curiam).

[41] See Roberts v. Louisiana, 428 U.S. 325 (1976) (plurality opinion); Woodson v. North Carolina, 428 U.S. 280 (1976) (plurality opinion); Jurek v. Texas, 428 U.S. 262 (1976) (plurality opinion); Proffitt v. Florida, 428 U.S. 242 (1976) (plurality opinion); Gregg v. Georgia, 428 U.S. 153 (1976) (plurality opinion).

[42] See generally Brandon L. Garrett & Lee B. Kovarsky, The Death Penalty 38–62 (2018) (sketching the universe of post-1976 constitutional law).

[43] See Marc M. Arkin, Rethinking the Constitutional Right to a Criminal Appeal, 39 UCLA L. Rev. 503, 563 (1992).

[44] See Jonathan S. Masur & Lisa Larrimore Ouellette, Deference Mistakes, 82 U. Chi. L. Rev. 643, 708 n.314 (2015).

[45] See Frank R. Baumgartner, Marty Davidson, Kaneesha R. Johnson, Arvind Krishnamurthy & Colin P. Wilson, Deadly Justice: A Statistical Portrait of the Death Penalty 42 (2018).

[46] See Johnson, supra note 19, at 21.

[47] See Kovarsky, supra note 22, at 1176–81.

that require prosecutors to move for execution dates,[48] and governors can do the same thing in states with legislation that assigns that power to them.[49] At the federal level, delay can depend on the presidential administration—President Biden froze executions as soon as he took office in 2021.[50]

The coordination problem runs deeper still. Executions require not just political initiative at the top, but also bureaucratic zeal underneath. Correctional departments must use lawful execution protocols, which usually require bureaucratic commitments to obtaining (usable) lethal injection drugs. Lethal drug shortages have therefore delayed executions for years, even decades.[51] The federal government did not execute anyone between 2003 and 2020, largely because of deficits in lethal injection supply.[52] California no longer executes anyone because it cannot implement a lawful execution protocol.[53]

Substantially mobilized political and bureaucratic capital can overcome these collective action problems, but motivation to execute condemned people wanes over time. The institutional stakeholders most responsible for producing death sentences are largely local, and they obtain death verdicts in the aftermath of murders that traumatize the affected communities.[54] The crimes often receive extensive media coverage, and capital trials run hot. Elected prosecutors have acute professional incentives to convert community outrage into death verdicts at that moment.[55] But executions will take place many years later, after those incentives dissipate, and at greater institutional remove from the

[48] See, e.g., Tex. Code Crim. Proc. Ann. art. 43.141 (West 2023) (prosecutor-driven process in Texas).

[49] See, e.g., Fla. Stat. § 922.052 (2018) (governor-driven process in Florida).

[50] See Hailey Fuchs, A Pause in Federal Executions, but Uncertainty About What's Next, N.Y. Times, https://www.nytimes.com/2021/07/16/us/politics/biden-death-penalty.html [https://perma.cc/VA9W-C9UK] (July 22, 2021).

[51] See Eric Berger, Courts, Culture, and the Lethal Injection Stalemate, 62 Wm. & Mary L. Rev. 1, 17 (2020); Kovarsky, supra note 22, at 1175–76.

[52] See Jay Clayton, Willfully Blind to the Machinery of Death: The State of Execution Challenges After *Barr v. Lee*, U. Chi. L. Rev. Online 2 (Feb. 1, 2021), https://lawreviewblog.uchicago.edu/2021/02/01/clayton-lee/ [https://perma.cc/E2QJ-9T79].

[53] See James Gibson & Corinna Barrett Lain, Death Penalty Drugs and the International Moral Marketplace, 103 Geo. L.J. 1215, 1270 (2015).

[54] See Garland, supra note 36, at 288–93.

[55] Id. at 290; James S. Liebman, Opting for Real Death Penalty Reform, 63 Ohio St. L.J. 315, 321–22 (2002).

aggrieved community.[56] Post-conviction litigation will frequently produce narratives that are more favorable to death-sentenced people. Because the motivation necessary to overcome the collective action problems falls when the salience of the problems rises, those people spend more time in pre-execution confinement.

How much time? The Bureau of Justice Statistics ("BJS") now publishes annual statistical tables profiling the people serving death sentences in American jurisdictions.[57] According to the BJS data, there were 2,469 death-sentenced prisoners at the end of 2020.[58] The average such person was 52 years old and had been in pre-execution confinement for 19.4 years.[59] People who were executed in 2020 had been confined for an average of 18.9 years.[60] The length of confinement varied a little bit by jurisdiction, but not by much. The following are the states with the most death-sentenced people, with the average length of confinement provided parenthetically: California (21.2 years), Florida (20.2 years), Texas (16.6 years), Alabama (17.2 years), North Carolina (21.3 years), Ohio (19.1 years), Pennsylvania (19.3 years), and Arizona (17.2 years).[61] No matter how you slice the data, someone receiving a death sentence can probably expect to spend about twenty years in solitary or semi-solitary confinement.[62] That figure is up from two years in 1960, and it has been on a steady upward trajectory since modern-era executions started in 1984.[63]

2. Suffering under Conditions

Pre-execution confinement generally, and death row specifically, is a notorious architecture of human suffering.[64] Twenty-seven states and the federal government retain the death penalty, and only three of those jurisdictions "mainstream" people serving capital sentences into living

[56] See Carol S. Steiker & Jordan M. Steiker, Courting Death: The Supreme Court and Capital Punishment 146 (2016).

[57] See, e.g., 2020 BJS Data, supra note 1 (representing the most recent data).

[58] See id. at 1.

[59] See id. at 11 tbl.6 (average age); id. at 15 tbl.10 (average duration).

[60] See id. at 2.

[61] See id. at 15 tbl.10.

[62] See infra notes 73–80 and accompanying text.

[63] See 2020 BJS Data, supra note 1, at 17 tbl.12. In terms of the length of confinement prior to execution, the number peaked at twenty-two years in 2019. See id.

[64] See infra note 88 (collecting authority regarding the effects of solitary confinement); see also Johnson, supra note 19, at 48–57 (extensively discussing life on modern death rows).

arrangements for the noncapital population.[65] The quality of death-row facilities varies across jurisdictions, as do the limits on movement and contact.[66] Nevertheless, discovery in high-stakes cases and most studies—including a broadly cited 2013 review of twenty-six death rows[67]—reveal pre-execution confinement to be a site of substantial neglect, isolation, pain, and indignity.[68]

Even as compared to sites of noncapital detention, pre-execution confinement tends to be decrepit and unsafe. Correctional bureaucracies treat people in pre-execution confinement differently than they treat people serving noncapital sentences.[69] Criminologist Mona Lynch describes pre-execution confinement as a "post-rehabilitative" system of "waste management."[70] The unique precarities include substandard sanitation, ventilation, heating and cooling, pest management, laundry service, plumbing, sewage systems, and nutritional intake.[71] Given the disproportionate use of the death penalty in the American South, many death rows are in places that are extraordinarily hot and humid. These facilities are therefore breeding grounds for mosquitos and other pests, making the lack of adequate air treatment especially perilous.[72]

Perhaps the best-known pre-execution practice is solitary confinement,[73] which is sometimes called "administrative segregation." Solitary confinement of death-sentenced people became the norm around the turn of the twenty-first century.[74] Until California and Florida adjusted

[65] These three jurisdictions are California, Missouri, and Oregon. See Vines, supra note 4, at 621 n.149.

[66] For reporting of findings about living conditions on death row, see Pontier, supra note 4, at 140 (presenting findings on the relationship between solitary confinement and death row throughout the country); Vines, supra note 4, at 620–22.

[67] See 26-State Report, supra note 3.

[68] See infra notes 71–93 and accompanying text. But see Vines, supra note 4, at 594 (noting some recent movement away from the harshest conceivable treatment on death rows).

[69] See Johnson, supra note 19, at 38.

[70] Mona Lynch, Supermax Meets Death Row: Legal Struggles Around the New Punitiveness in the US, *in* The New Punitiveness: Trends, Theories, Perspectives 66, 79 (John Pratt, David Brown, Mark Brown, Simon Hallsworth & Wayne Morrison eds., 2005).

[71] See, e.g., Russell v. Johnson, No. 02-cv-00261, 2003 WL 22208029, at *2–4 (N.D. Miss. May 21, 2003) (describing filthy cells and pest infestations), *aff'd in part, vacated in part on other grounds sub nom.* Gates v. Cook, 376 F.3d 323 (5th Cir. 2004).

[72] See, e.g., id. at *3 (describing death row confinement on the Mississippi Delta).

[73] In reporting the operation of solitary confinement across American jurisdictions, I use the "Nelson Mandela Rules," which are the rules adopted by the United Nations General Assembly. See G.A. Res. 70/175, Nelson Mandela Rules (Dec. 17, 2015).

[74] See McLeod, supra note 3, at 539; see also Johnson, supra note 19, at 36–38 (providing a more detailed historical account of segregated living for death-sentenced prisoners).

their death-row practices in 2022,[75] almost everyone condemned to die in the United States spent between twenty-two and twenty-four hours a day in permanent solitary confinement, with little human contact.[76] Eleven states (including Texas) and the federal government still keep all capitally sentenced people in permanent solitary confinement.[77] Another three states mandate semi-solitary confinement, consisting of somewhere between twenty and twenty-two hours per day of in-cell isolation.[78] Although there is no official tally, it is almost certain that most capitally sentenced people living in solitary or semi-solitary confinement are not there because of their conduct in prison or because of some individualized determination that they pose danger; their status as death-row prisoners *alone* dictates their segregation.[79] And in jurisdictions where solitary confinement is not automatic, the need to incapacitate generally dictates custody level, not criminal blameworthiness.[80]

Solitary pre-execution confinement necessarily precludes human contact available to other incarcerated people. The condemned mostly live without sunlight in single-person cells, and those small cells often consist of solid walls and doors to inhibit communication.[81] People serving death sentences usually eat meals alone.[82] Jurisdictions severely restrict vocational and educational opportunities, as well as exercise.[83] Access to clergy and the ability to commune for religious purposes is less restricted, but still quite limited.[84] Most jurisdictions permit only limited social visitation and otherwise restrict human contact to correctional officers and necessary communication with health care providers and attorneys.[85] Even social visitation is limited—two-thirds of American

[75] See Vines, supra note 4, at 618.

[76] See 26-State Report, supra note 3, at 2; see also id. at 5 (explaining that ninety-three percent of retentionist states place their death-row prisoners in this form of custody).

[77] These states are Alabama, Arkansas, Georgia, Idaho, Kansas, Kentucky, Mississippi, Oklahoma, South Dakota, Texas, and Wyoming. See Vines, supra note 4, at 620 n.147.

[78] These states are Ohio, South Carolina, and Utah. See id. at app. at 656–57, 659, 662–63. Arizona, North Carolina, and Pennsylvania qualify as semi-reformed death row states, meaning those condemned to death spend less than twenty hours in a solitary cell. See id. at app. at 644, 656, 658–59.

[79] See 26-State Report, supra note 3, at 4.

[80] See Pontier, supra note 4, at 136–40.

[81] See McLeod, supra note 3, at 538.

[82] See 26-State Report, supra note 3, at 4.

[83] See id. at 5.

[84] See id. at 6.

[85] See id. at 5.

death penalty states require that family visitation be without physical contact.[86]

Extreme isolation creates (and aggravates) many physiological and psychological problems. A non-exhaustive list includes: suppressed brain function, anxiety, self-mutilation, delusions and hallucinations, weight loss, headaches, dizziness, heart palpitations, severe and chronic depression, fear of persecution, reduced impulse control, nightmares, and hypersensitivity to external stimuli.[87] Approximately half of prison suicides take place in isolation cells.[88] Sixty-five years ago—when the length of pre-execution confinement was less than one-tenth of what it is now[89]—Justice Felix Frankfurter observed that the "onset of insanity while awaiting execution of a death sentence is not a rare phenomenon."[90] The harsher treatment of people in pre-execution confinement results in unique suffering that exceeds the suffering of someone in otherwise comparable conditions who is not sentenced to death. Terms like "death row phenomenon" and "death row syndrome" refer to these physiological effects,[91] although they are not clinical concepts appearing in, for example, the American Psychiatric Association's diagnostic manual. Usage therefore tends to be imprecise,[92] but the terms refer generally to some mixture of anxiety and anguish that death-sentenced people experience as they await execution at some uncertain time in the future.[93]

[86] See id.; see also, e.g., Prieto v. Clarke, No. 12-cv-01199, 2013 WL 6019215, at *6–7 (E.D. Va. Nov. 12, 2013), *rev'd on other grounds*, 780 F.3d 245 (4th Cir. 2015) (describing Virginia's isolation policies, including rules requiring that a prisoner be locked alone in cells preventing communication for twenty-three hours per day, eat alone, and be denied contact visits and educational opportunities).

[87] See 26-State Report, supra note 3, at 6–7.

[88] See Reassessing Solitary Confinement: The Human Rights, Fiscal and Public Safety Consequences: Hearing Before the Subcomm. on the Const., C.R. & Hum. Rts. of the S. Judiciary Comm., 112th Cong. 79 (2012) (written testimony of Professor Craig Haney) (footnote omitted).

[89] See supra note 39 and accompanying text (noting that average time-to-execution was then two years).

[90] Solesbee v. Balkcom, 339 U.S. 9, 14 (1950) (Frankfurter, J., dissenting).

[91] See, e.g., Nkem Adeleye, The Death Row Phenomenon: A Prohibition Against Torture, Cruel, Inhuman and Degrading Treatment or Punishment, 58 San Diego L. Rev. 875, 876 (2021); Kara Sharkey, Delay in Considering the Constitutionality of Inordinate Delay: The Death Row Phenomenon and the Eighth Amendment, 161 U. Pa. L. Rev. 861, 874 (2013).

[92] See David A. Sadoff, International Law and the Mortal Precipice: A Legal Policy Critique of the Death Row Phenomenon, 17 Tul. J. Int'l & Compar. L. 77, 79 (2008).

[93] Although the concept appeared much earlier, many trace the usage to a famous 1989 decision by the European Court of Human Rights, *Soering v. United Kingdom*, 161 Eur. Ct. H.R. at ¶ 81 (ser. A) (1989). See Amy Smith, Not "Waiving" but Drowning: The Anatomy of

There is so little reliable research into the physiological elements of the waiting-for-death experience in part because it is difficult to disentangle the effects of this phenomenon from the adverse effects of others, including prolonged solitary confinement.[94] Nevertheless, one can draw some inferences from research done in other contexts.[95] For example, studies of other scenarios in which people wait for a premature death at an unknown time—such as those with terminal illness—show substantially increased desire for suicide.[96]

Simply put, most people who have studied pre-execution confinement have concluded that it is brutal.[97] I join that consensus.

Death Row Syndrome and Volunteering for Execution, 17 B.U. Pub. Int. L.J. 237, 239 (2008). In *Soering*, the court enjoined the extradition of a convicted killer from England to Virginia, on the ground that such extradition for Virginia death row violated Article 3 of the European Convention on Human Rights. See *Soering*, 161 Eur. Ct. H.R. at 44.

[94] See Smith, supra note 93, at 242–44.

[95] These examples are identified in Smith, id. at 251–52.

[96] See id. at 251 n.91.

[97] See, e.g., 26-State Report, supra note 3 (documenting extreme conditions); Int'l Fed'n for Hum. Rts. & Ctr. for Const. Rts., Discrimination, Torture, and Execution: A Human Rights Analysis of the Death Penalty in California and Louisiana 4 (Oct. 2013), http://ccrjustice.org/files/2013-Death-Penalty-Report.pdf [https://perma.cc/NF9T-8S4H] (same); Mark D. Cunningham & Mark P. Vigen, Death Row Inmate Characteristics, Adjustment, and Confinement: A Critical Review of the Literature, 20 Behav. Sci. & L. 191, 204–06 (2002) (summarizing existing literature); Robert Johnson & John L. Carroll, Litigating Death-Row Conditions: The Case for Reform, *in* Prisoners and the Law 8-3, 8-3 to 8-4 (Ira P. Robbins ed., 1985) (surveying field); George Lombardi, Richard D. Sluder & Donald Wallace, Mainstreaming Death-Sentenced Inmates: The Missouri Experience and Its Legal Significance, 61 Fed. Prob. 3, 3 (1997) (reviewing Missouri data). There is one conspicuous exception. New York Law School Professor Robert Blecker visited facilities many years ago, and he complained that the facilities he visited gave lenient treatment to people convicted of murder. See Robert Blecker, The Death of Punishment: Searching for Justice Among the Worst of the Worst 78, 130, 161–62 (2013) [hereinafter Blecker, The Death of Punishment]; see also Robert Blecker, Haven or Hell? Inside Lorton Central Prison: Experiences of Punishment Justified, 42 Stan. L. Rev. 1149, 1154 (1990) (reviewing Professor Blecker's time spent with people incarcerated in Lorton Central Prison); Robert Blecker, But Did They Listen? The New Jersey Death Penalty Commission's Exercise in Abolitionism: A Reply, 5 Rutgers J.L. & Pub. Pol'y 9, 38 (2007) ("How about the cost to parents who realize their child's rapist murderer now lives in prison playing basketball or watching the New Jersey Nets play on a color TV? What does it cost to contemplate the person who tortured your child to death now lying on a prison bed, lost in a first run movie or good book?"); Robert Blecker, Killing Them Softly: Meditations on a Painful Punishment of Death, 35 Fordham Urb. L.J. 969, 970 (2008) ("Deeper reflection, and two decades documenting daily life inside prisons and on death rows in four states, however, convinces me [that death row incarceration is an insufficient source of suffering]."). Blecker, however, did not visit modern death rows that house prisoners in solitary confinement, his reports are at odds with the stated policies at some facilities from which he reported, and there is enormous selection bias in his reporting. See

B. Pre-Execution Confinement as Punishment

People may suffer at the hands of the state for many reasons. Judges and the academic community, however, conceptualize confinement before execution in a specific way: as *punishment*. That is—and largely without respect to how pre-execution confinement is configured institutionally—virtually everyone who analyzes it tends to ask punishment-oriented questions about whether the harsh treatment is punitively deserved. I subdivide my discussion of this phenomenon into two familiar threads about (1) the duration of pre-execution confinement and (2) associated prison conditions.

1. Delay as Punishment

A person in pre-execution confinement experiences not only daily hardship common to all incarcerated people, but also a uniquely damaging delay between sentencing and execution—as explained before, something like what terminally ill patients experience as they await certain death.[98] As with more traditional questions about conditions of confinement, the issue of delay is almost universally analyzed as a question of punishment.[99] It is the punishment-inflected analysis of delay that

McLeod, supra note 3, at 558. I concur with others across the ideological and criminal justice spectrum who have described his assessment as "startling and inconsistent with" the broad consensus. Id. I should add that I have regularly visited Texas death row since 2006, and Professor Blecker's account is wildly inconsistent with death row incarceration there. A slightly different break with consensus comes from those who embrace the idea that the process of hedonic adaptation will reduce incremental suffering of death-sentenced prisoners over time. See, e.g., Jeremy A. Blumenthal, Law and the Emotions: The Problems of Affective Forecasting, 80 Ind. L.J. 155, 195 (2005) ("Likewise, it is conceivable that death row inmates experience a similar sort of hedonic adaptation, engaging in psychological coping mechanisms that help them adapt to clearly unnatural circumstances."). The hedonic adaptation argument is not necessarily inconsistent with the prevailing view that death-row conditions are extremely harsh.

[98] See generally J.C. Oleson, Swilling Hemlock: The Legal Ethics of Defending a Client Who Wishes to Volunteer for Execution, 63 Wash. & Lee L. Rev. 147, 203–07 (2006) (discussing the analogy).

[99] The judicial assumption that length-of-pre-execution-confinement issues are questions of punishment transcends national borders, although foreign institutions are more careful not to entirely exclude nonpunitive frameworks. Consider the most significant decision touching on the legality of pre-execution confinement to date, *Soering v. United Kingdom*, 161 Eur. Ct. H.R. (ser. A) (1989). *Soering* was a case in which the European Court of Human Rights held that the European Convention on Human Rights barred extradition to Virginia of a prisoner bound for death row. See id. at ¶ 111. *Soering* appeared to analyze pre-execution confinement as a question of criminal punishment. For example, it alluded to the fact that the U.S. Supreme Court had not yet decided whether it violated Eighth Amendment rules against cruel and

produces some of the least satisfying decisional law in the field and that has academics tying themselves in knots. After all, legislators do not write statutes to calibrate pre-execution delay to anything, juries do not make findings that rationalize it, and judges do not impose it as part of a criminal sentence.[100]

As far as American decisional law is concerned, the idea that pre-execution confinement is punishment dates back at least to 1890, when the Supreme Court decided *In re Medley*.[101] *Medley* involved a Colorado statute requiring solitary confinement for those awaiting execution, and Colorado enacted it after the court entered Medley's judgment. Remarking that solitary confinement was treatment "of the most important and painful character,"[102] *Medley* determined that the change amounted to a new punishment violating the constitutional rule against ex post facto laws—and that the Ex Post Facto Clause bars new laws that "inflict[] a greater punishment than the law annexed to the crime at the time it was committed."[103]

Medley notwithstanding, most of the decisional law on pre-execution confinement traces to *Lackey v. Texas*, a 1995 case in which Justice Stevens used a dissent from the denial of certiorari to address the issue.[104] Lackey argued that the Eighth Amendment barred his execution because he had already spent roughly seventeen years on death row. Justice Stevens's *Lackey* opinion seeds the time-based objection to pre-execution confinement that persists to this day, and it expressly positions that

unusual punishment. See id. at ¶ 56. Nevertheless, the operative treaty provision referred to "*treatment or* punishment," id. at ¶ 80 (emphasis added), and the opinion is careful not to jettison the idea that pre-execution-confinement issues are encompassed as suffered "treatment." Id. at ¶ 122. When Jamaica imposed constraints on pre-execution confinement, it relied on authority using the same disjunctive formulation—referring to "punishment or treatment." Pratt v. Att'y Gen. for Jam., [1994] 2 AC 1 (PC), 5 (appeal taken from the Court of Appeal of Jam.). Finally, Canada held that it would extradite those accused of murder to the United States only if it received "assurances" that the receiving jurisdiction would not impose the death penalty. United States v. Burns, 2001 SCC 7, [2001] 1 S.C.R. 283 (Can.). Although not dispositive, the Supreme Court of Canada held that extended pre-execution confinement compromised the "life, liberty, and security of the person." Id. at 321. There was no more specific mention of punishment. In India, excessive delay between the death sentence and the execution may form the basis of a decision to preclude the execution. See Usman, supra note 24, at 96.

[100] This argument is generally the content appearing *infra* Part II.

[101] 134 U.S. 160 (1890).

[102] Id. at 171.

[103] Id.

[104] 514 U.S. 1045 (1995) (Stevens, J., memorandum respecting denial of certiorari).

experience as punishment. It begins by observing that the traditional justifications for the death penalty are (1) retribution and (2) deterrence.[105] With respect to the first, Justice Stevens wrote that "the acceptable state interest in retribution has arguably been satisfied by the *severe punishment already inflicted*."[106] And with respect to the second, Justice Stevens doubted the incremental deterrence of substantially delayed execution and thereafter reasoned that a penalty with "such negligible returns . . . would be . . . *cruel and unusual punishment* violative of the Eighth Amendment."[107] Though not formally joining Justice Stevens's dissent, Justice Breyer "agree[d] . . . that the issue is an important undecided one."[108]

Justices Stevens and Breyer were the only Justices who seemed very interested in exploring *Lackey* claims, usually (but not always) making their arguments in dissents from orders denying certiorari or last-minute stays.[109] There are also some instances when Justice Ginsburg joined Justice Breyer as he lodged concerns about the length of pre-execution confinement without formally addressing *Lackey* claims.[110] Justice

[105] See id. at 1045.

[106] Id. (emphasis added).

[107] Id. at 1046 (emphasis added) (quoting Furman v. Georgia, 408 U.S. 238, 312 (1972) (White, J., concurring)).

[108] See id. at 1047.

[109] See, e.g., Jordan v. Mississippi, 138 S. Ct. 2567, 2658 (2018) (Breyer, J., dissenting from denial of certiorari); Dunn v. Madison, 138 S. Ct. 9, 12 (2017) (Breyer, J., concurring); Ruiz v. Texas, 137 S. Ct. 1246, 1246 (2017) (Breyer, J., dissenting from denial of stay); Conner v. Sellers, 579 U.S. 957, 958 (2016) (Breyer, J., dissenting from denial of certiorari); Sireci v. Florida, 137 S. Ct. 470, 470–71 (2016) (Breyer, J., dissenting from denial of certiorari); Boyer v. Davis, 578 U.S. 965, 965 (2016) (Breyer, J., dissenting from denial of certiorari); Correll v. Florida, 577 U.S. 948, 948 (2015) (Breyer, J., dissenting from denial of certiorari); Muhammad v. Florida, 571 U.S. 1117, 1117 (2014) (Breyer, J., dissenting from denial of certiorari); Valle v. Florida, 564 U.S. 1067, 1067–68 (2011) (Breyer, J., dissenting from denial of stay); Thompson v. McNeil, 556 U.S. 1114, 1115 (2009) (Stevens, J., statement respecting denial of certiorari); Baze v. Rees, 553 U.S. 35, 80–81 (2008) (Stevens, J., concurring); Smith v. Arizona, 552 U.S. 985, 985 (2007) (Breyer, J., dissenting from denial of certiorari); Allen v. Ornoski, 546 U.S. 1136, 1136 (2006) (Breyer, J., dissenting); Foster v. Florida, 537 U.S. 990, 992 (2002) (Breyer, J., dissenting from denial of certiorari); Knight v. Florida, 528 U.S. 990, 993 (1999) (Breyer, J., dissenting from denial of certiorari); Elledge v. Florida, 525 U.S. 944, 944 (1998) (Breyer, J., dissenting from denial of certiorari).

[110] See, e.g., Barr v. Purkey, 140 S. Ct. 2594, 2595 (2020) (Breyer, J., dissenting, joined by Ginsburg, J.) ("The delay itself undermines the penological rationales for the death penalty: deterrence and retribution."); Barr v. Lee, 140 S. Ct. 2590, 2592 (2020) (Breyer, J., dissenting, joined by Ginsburg, J.) ("Such lengthy delays inflict severe psychological suffering on inmates and undermine the penological rationale for the death penalty."); Glossip v. Gross, 576 U.S. 863, 933 (2015) (Breyer, J., dissenting, joined by Ginsburg, J.) ("The upshot is that lengthy

Kennedy shocked the courtroom when he asked the Florida Solicitor General an oral argument question, in *Hall v. Florida*, about the penological justifications for lengthy pre-execution confinement.[111] (*Hall* was a case about the IQ cutoff for the constitutional rule against executing people with intellectual disabilities.[112]) The important point is that in each instance, either expressly or by implication, the assumption was that the lawfulness of pre-execution confinement was a question about punishment. As Professor Elizabeth Rappaport has framed the question, the "*Lackey* issue" is "whether it is cruel and unusual *punishment* to convert a sentence of death into a sentence of decades on death row followed by execution."[113]

Legal scholarship tracks the judicial framing.[114] It universally treats the question of pre-execution delay as an issue of punishment, suggesting that the Eighth Amendment would be the source of any constitutional constraint.[115] One originalist scholar, for example, concluded that any

delays both aggravate the cruelty of the death penalty and undermine its jurisprudential rationale.").

[111] Transcript of Oral Argument at 46–47, Hall v. Florida, 572 U.S. 701 (2014) (No. 12-10882).

[112] See *Hall*, 572 U.S. at 704.

[113] Rapaport, supra note 39, at 1112 (emphasis added).

[114] See Mihailis E. Diamantis, Limiting Identity in Criminal Law, 60 B.C. L. Rev. 2011, 2093–94 (2019) ("The dominant concern among courts and scholars has been whether such delays are cruel and unusual.").

[115] See, e.g., Dwight Aarons, Getting Out of This Mess: Steps Toward Addressing and Avoiding Inordinate Delay in Capital Cases, 89 J. Crim. L. & Criminology 1, 40 (1998) ("[A] capital defendant who has spent an inordinate period on death row awaiting execution, and now faces a serious execution date, should have the opportunity to establish that his or her pending execution violates the Eighth Amendment."); Peter Baumann, "Waiting on Death": Nathan Dunlap and the Cruel Effect of Uncertainty, 106 Geo. L.J. 871, 889 (2018) ("Together, these narratives show that the uncertainty imposed by a capital punishment system fraught with delays and uncertainty adds a substantial punishment to that imposed by the jury."); Carl Raffa, Defining Dignity by What Preserves Dignity: Why Preserving a Death Row Inmate's Eighth Amendment Rights Before Execution Means Preserving Their Dignity During Confinement, 12 Alb. Gov't L. Rev. 86, 110 (2018) (arguing that extended death row incarceration deprives prisoners of dignity in violation of the Eighth Amendment); Adam M. Samaha, Undue Process, 59 Stan. L. Rev. 601, 668 (2006) ("Incarceration pending execution is undoubtedly a component of punishment and, for some inmates, the psychological stress might be unnecessarily cruel and atypical."); Richard E. Shugrue, "A Fate Worse Than Death"—An Essay on Whether Long Times on Death Row Are Cruel Times, 29 Creighton L. Rev. 1, 18 (1995) ("[T]he central problem of Eighth Amendment jurisprudence—Is extended confinement in anticipation of imposition of death cruel or inhumane?"); Angela April Sun, "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, 1593 (2013) (analyzing pre-execution delay as an Eighth Amendment question); Recent Cases, 114 Harv. L. Rev. 648,

pre-execution detention longer than three months would have been considered "unusual" at the Founding moment.[116] Judge Arthur Alarcón of the U.S. Court of Appeals for the Ninth Circuit wrote a widely cited article in which he noted that "extraordinary delay in reaching a final disposition lends troubling support to the argument that death row prisoners are being subjected to cruel and unusual punishment."[117]

The references to pre-execution confinement as punishment in some of these articles might be credibly discounted as incidental, or as the product of less-than-careful consideration of the question. But even those scholars who select terminology more deliberately conclude that pre-execution confinement is punishment. In perhaps the most thorough article on the relationship between pre-execution suffering and retribution, Professor Russell Christopher refuses to "make the legally unsubstantiated assumption that [death-row incarceration] is necessarily punishment."[118] Christopher carefully attends to the question, but ultimately insists that pre-execution confinement belongs in the retributive economy of punishment. To conclude otherwise—in Christopher's words, to treat it as "legally and retributively nothing"[119]—would yield an absurdity. It would mean, says Christopher, that a death-row prisoner who dies before the scheduled execution is not punished. A paradigm that yields that result, he reasons, must be rejected.[120]

2. Conditions as Punishment

Lackey issues are distinct from the framework used to analyze more familiar conditions-of-confinement claims about incarceration prior to execution. All courts and most academic commentary reflexively assume

652 (2000) ("Second, by increasing the amount of punishment that a prisoner endures, unpredictably long delays on death row violate the Eighth Amendment requirement that punishment be proportionate to the offense."). At least one person has argued that, because pre-execution confinement and an execution are punishments for the same crime, the stacked imposition of those two penalties might implicate double jeopardy. See Michael Johnson, Fifteen Years and Death: Double Jeopardy, Multiple Punishments, and Extended Stays on Death Row, 23 B.U. Pub. Int. L.J. 85, 91 (2014).

[116] See Jacob Leon, *Bucklew v. Precythe*'s Return to the Original Meaning of "Unusual": Prohibiting Extensive Delays on Death Row, 68 Clev. St. L. Rev. 485, 488 (2020).

[117] Arthur L. Alarcón, Remedies for California's Death Row Deadlock, 80 S. Cal. L. Rev. 697, 725 (2007).

[118] Russell L. Christopher, Death Delayed Is Retribution Denied, 99 Minn. L. Rev. 421, 428 (2014) (internal quotations omitted).

[119] Id. at 452.

[120] See id. at 469–70.

that conditions of pre-execution confinement are punishment.[121] The Supreme Court is no exception.[122] Judges and academics therefore skip directly to questions about whether those conditions are punitively justified. And questions about whether a person deserves punitive hardship are very different than questions that one might ask about nonpunitive detention.

Consider the decisional law first. Even cases that find death row conditions unconstitutional treat the issue as a question of punishment. *Gates v. Cook*, a 2004 decision from the Fifth Circuit about Mississippi's death row, is representative of the approach that courts typically take to death-row conditions.[123] *Gates* invoked the Eighth Amendment's bar on cruel and unusual punishment, explained that it was the constitutional constraint on prison conditions, and recited the "deliberate indifference" test used to adjudicate conditions-of-punitive-confinement challenges.[124] *Ball v. LeBlanc* was the Fifth Circuit decision about death row at Louisiana's Angola prison, and it did the same things.[125] And so too did *Porter v. Clarke*, a Fourth Circuit case involving a challenge to Virginia's death row.[126] A January 2023 suit filed on the basis of federal death-row isolation invoked only the Eighth Amendment as an invalidating theory.[127] And although a January 2023 suit over conditions on Texas death row included Sixth and Fourteenth Amendment claims,[128] the plaintiffs still treated death-row incarceration as a form of punitive detention. In fact, I have been able to locate no significant conditions-of-pre-execution-confinement decision that treats the death-row experience as something other than a form of punishment.

[121] See infra notes 123–40 and accompanying text.

[122] Cf. John F. Stinneford, Is Solitary Confinement a Punishment?, 115 Nw. U. L. Rev. 9, 14 (2020) ("The Court has implied that once a prisoner is incarcerated, changes to prison conditions will not be considered punishments unless they are cruel and unusual under the Eighth Amendment . . . .").

[123] See 376 F.3d 323, 327 (5th Cir. 2004).

[124] See id. at 332–33.

[125] See 792 F.3d 584, 592–96 (5th Cir. 2015).

[126] 923 F.3d 348, 355–64 (4th Cir. 2019).

[127] See Class Action Complaint for Declaratory & Injunctive Relief & Damages at 12, Kadamovas v. Kallis, No. 23-cv-00022 (S.D. Ind. Jan. 12, 2023).

[128] See Original Complaint at 5, Robertson v. Collier, No. 23-cv-00283 (S.D. Tex. Jan. 26, 2023). *Robertson* includes a Sixth Amendment challenge based on interference with the right to counsel. See id. at 37, 43. It also includes a Fourteenth Amendment claim associated with a failure to conduct procedurally sufficient review. See id. at 35, 37, 42, 43. These Sixth and Fourteenth Amendment claims, however, continue to treat the confinement as punishment.

The choice to use the deliberate indifference framework to mark constitutional boundaries is quite significant. Under that framework, an Eighth Amendment violation has objective and subjective prongs.[129] The objective component of the inquiry simply requires sufficiently substantial suffering—"deprivation," in the language of some case law.[130] The subjective component, however, requires a showing that prison officials acted with "deliberate indifference."[131] Before a court can determine that there was deliberate indifference, it must find that prison officials were both "aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and . . . also [drew] the inference."[132] The deliberate indifference standard is extraordinarily tolerant of prisoner suffering,[133] and is almost certainly higher than the admittedly under-specified standard applicable to nonpunitive detention.[134] (I will turn later to questions about whether the constitutional constraints on nonpunitive detention are any less tolerant of pain and hardship.)

Academic work from both ends of the criminal justice spectrum also tends overwhelmingly to treat conditions of pre-execution confinement as punishment.[135] Professor Marah Stith McLeod's comprehensive account

[129] See Wilson v. Seiter, 501 U.S. 294, 298 (1991).

[130] Id.

[131] Farmer v. Brennan, 511 U.S. 825, 834 (1994).

[132] Id. at 837.

[133] See Sharon Dolovich, The Coherence of Prison Law, 135 Harv. L. Rev. F. 302, 310 (2022).

[134] In *Bell v. Wolfish*, for example, the Supreme Court specifically rejected an Eighth Amendment rule for nonpunitive detention. 441 U.S. 520, 531–32 (1979). *Wolfish* held that what separates constitutionally permissible and impermissible treatment is not an Eighth Amendment line marking cruel and unusual punishment, but is instead a Fourteenth Amendment line marking all punishment. See id. at 538. *Wolfish* was about conditions of pretrial detention, and the Court explained that conditions were constitutional if they were not intended as punishment and if they were "reasonably related to a legitimate governmental objective." Id. at 538–39.

[135] In addition to the authorities collected in notes 136–40, infra, see also, e.g., Elizabeth Brilliant, Unjustified Punishment: The Eighth Amendment and Death Sentences in States that Fail to Execute, 11 Calif. L. Rev. Online 530, 544 (2020) (analyzing death-row conditions as an Eighth Amendment question); Elena De Santis, "Life with the Imposition or Exacerbation of Severe Mental Illness and Chance of Death": Why This Distinct Punishment Violates the Eighth Amendment, 56 Am. Crim. L. Rev. 235, 238 (2019) (same); David S. Hammer et al., Dying Twice: Conditions on New York's Death Row, 22 Pace L. Rev. 347, 380 (2002) (same); Vines, supra note 4, at 594 (same); 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, 63 (1996) (same).

of American death row considers generally whether the death-row experience can be justified as punishment.[136] Professor Robert Blecker seeks harsher pre-execution confinement on the theory that it is punishment.[137] Professor Robert Johnson, who once called for death rows to be treated as a form of hospice care,[138] considers questions about conditions of pre-execution confinement to be issues of punishment under the Eighth Amendment.[139] Even the two academics who wrote the leading paper examining Missouri's decision to mainstream condemned prisoners assume that the insights they glean bear on a question about the constitutionality of punishment.[140]

* * *

Going into the balance of the Article, several things from Part I bear repeating. First, tremendous suffering marks pre-execution confinement. Second, within the cohort of death-sentenced people, the distribution of hardship bears little relationship to criminal blameworthiness. Finally, the prevailing analytic framework used to consider that hardship is a punitive one.

II. THE THEORETICAL CASE

Part II makes a non-doctrinal argument that confinement before execution should be conceptualized as nonpunitive detention. I make the argument on two theoretical fronts. First, pre-execution confinement does not meet consensus criteria for punishment; it is hardship collateral to an interest in incapacitation. Second, if pre-execution confinement were to be taken seriously as a punitive practice, then it would be normatively unjustified.[141]

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[136] See McLeod, supra note 3, at 566 (arguing that legislatures must specify death-row practices because only legislatures can prescribe punishment).

[137] See Blecker, The Death of Punishment, supra note 97, at 279, 282.

[138] See Robert Johnson, Death Work: A Study of the Modern Execution Process 213 (Sabra Horne & Claire Masson eds., 2d ed. 1998).

[139] See Johnson, supra note 3, at 1227.

[140] Andrea D. Lyon & Mark D. Cunningham, "Reason Not the Need": Does the Lack of Compelling State Interest in Maintaining a Separate Death Row Make It Unlawful?, 33 Am. J. Crim. L. 1, 12 (2005).

[141] Mitchell N. Berman, Proportionality, Constraint, and Culpability, 15 Crim. L. & Phil. 373, 374 (2021) ("Philosophers and theorists of the criminal law agree, almost without exception, that criminal punishment should be 'proportional' to the offense, and that 'disproportionate' punishment is unjust."). Even the theories that justify the global institution of punishment consequentially recognize that blameworthiness is a constraint on punishment

A. The Definitional Argument

Confinement before execution fits standard definitions of punishment poorly. Specifically, pre-execution confinement is primarily a collection of administrative practices used to incapacitate people; it is legislatively specified hardship imposed after sentencing that a person deserves to suffer. The intensity of the hardship that the state imposes, moreover, is not sufficiently individualized by reference to blame.

1. Defining Punishment

My position requires a working definition of punishment. I use the concept developed in the work of Antony Flew, Stanley Benn, and H.L.A. Hart, which is sometimes called the Flew-Benn-Hart definition.[142] On that definition, a practice represents punishment if it satisfies five criteria: (1) it must involve hardship (that causes people to suffer); (2) the hardship must be in virtue of an offense against legal rules; (3) the hardship must be imposed on the putative offender; (4) the hardship must be intentionally administered by people other than the offender; and (5) an authority constituted by the legal system defining the offense must impose, and its agents must administer, the hardship itself.[143] Other influential definitions of punishment subdivide differently, but generally include the same basic ideas.[144] I will say a little bit more about this definition before I explain why pre-execution confinement does not

in individual cases. See, e.g., H.L.A. Hart, Punishment and Responsibility: Essays in the Philosophy of Law 4–5 (2d ed. 2008) (arguing that retributive desert should set the ceiling for permissible punishment); John Rawls, Two Concepts of Rules, 64 Phil. Rev. 3, 7–12 (1955) (favoring retributivist constraints); see also Igor Primoratz, Justifying Legal Punishment 111–14 (1989) (discussing synthetic theories generally). Variation in synthetic theory tends to center on how to fix the lower bounds of sentence ranges. See Russell L. Christopher, Time and Punishment, 66 Ohio St. L.J. 269, 308 (2005).

[142] The Flew-Hart-Benn definition is widely used in the theoretical literature. See Martin R. Gardner, The Mens Rea Enigma: Observations on the Role of Motive in the Criminal Law Past and Present, 1993 Utah L. Rev. 635, 644 n.26.

[143] See Hart, supra note 141, at 4–5. Hart drew his canonical definition of punishment from the works of Antony Flew and Stanley Benn. See id.

[144] See, e.g., Sandra G. Mayson, Collateral Consequences and the Preventive State, 91 Notre Dame L. Rev. 301, 318 (2015) (describing as a "consensus point" the idea that "[t]he state that punishes claims normative authority to inflict suffering on the basis of the punished person's culpable behavior"). I do not discuss it here because it does not substantially implicate my argument, but Joel Feinberg famously insisted that punishment also had to include a measure of expressive condemnation. See Joel Feinberg, The Expressive Function of Punishment, 49 Monist 397, 401 (1965).

satisfy the criteria. First, punishment is a practice that effectuates a state's intent to inflict hardship of any sort.[145] Punishment is not limited to the infliction of acute pain or emotional loss. It theoretically includes practices that subject people to any experience that they do not want. It therefore includes banishing, excommunicating, and fining, and it certainly includes prison and execution.

Second, punishment must be hardship inflicted on a person because that person has offended against criminal law.[146] Professor Benn (of Flew-Benn-Hart fame) emphasized that the hardship "should be an essential part of what is intended and not merely incidental to some other aim."[147] Punishment does not include hardship that the state inflicts to prevent future transgression,[148] or hardship inflicted on one person for the sins of another. Hardship that a person experiences at the hands of the state must be *the point*, and not collateral to some other objective.[149] Hardship imposed when the state incapacitates a dangerous person is not punishment; it is collateral to preventative detention.[150] I reject incapacitation as a punitive purpose for that reason, even though Congress and the Model Penal Code both indicate that the need to protect the public

[145] See Dan M. Kahan, What Do Alternative Sanctions Mean?, 63 U. Chi. L. Rev. 591, 598 (1996).

[146] See A.M. Quinton, On Punishment, 14 Analysis 133, 136–37 (1954).

[147] S.I. Benn & R.S. Peters, The Principles of Political Thought 202 (1959); see also Mitchell N. Berman, The Justification of Punishment, *in* The Routledge Companion to Philosophy of Law 141, 143 (Andrei Marmor ed., 2012) (limiting the definition of punishment to suffering inflicted for its own sake).

[148] See Carol S. Steiker, Punishment and Procedure: Punishment Theory and the Criminal-Civil Procedural Divide, 85 Geo. L.J. 775, 812 (1997).

[149] One might object that discerning the state's "intent" is impossible, given the problems of specifying intent based on the behavior and preferences of multimember systems. Some scholars operating with the Flew-Benn-Hart definition attempt to escape this problem by classifying as punishment any state action that is hardship imposed by a state actor with an intent to punish. See Hugo Adam Bedau, Feinberg's Liberal Theory of Punishment, 5 Buff. Crim. L. Rev. 103, 111–12 (2001) (collecting academic sources). Without wading into the depths of social choice theory, suffice it to say that while I am sympathetic to those who struggle to extract purpose from group decisions, the single-person's-intent rule is unworkable because it "strips the intent requirement of any meaningful bite." John Bronsteen, Christopher Buccafusco & Johnathan S. Masur, Retribution and the Experience of Punishment, 98 Calif. L. Rev. 1463, 1489 (2010).

[150] See Mayson, supra note 144, at 321; Paul H. Robinson, Punishing Dangerousness: Cloaking Preventive Detention as Criminal Justice, 114 Harv. L. Rev. 1429, 1446 (2001); cf. John F. Stinneford, Punishment Without Culpability, 102 J. Crim. L. & Criminology 653, 683 (2012) ("Although other purposes, such as deterrence or incapacitation, are often associated with punishment, these purposes are also compatible with civil regulatory statutes and so cannot serve to distinguish criminal from civil laws.").

from a defendant's future criminality is a permissible consideration when a judge exercises sentencing discretion.[151]

Finally, punishment deals only with hardship imposed by specific state institutional practices.[152] Hardship and associated suffering result from punishment only when it is inflicted on a defendant after some legitimate entity, usually a court system that relies on jury verdicts, determines that the accused is guilty of a legislatively specified crime.[153] The questions of punishment here are not issues about how, for example, schools treat students, parents treat children, or private avengers treat their aggrievers. Standard usage might be broad enough to reach things like school suspensions, parental groundings, or vigilantism, but those responses are not generally within the scope of penal theory that matters here.

Again, the principles discussed above are reasonably well-settled ideas associated with mainline punishment theory. Now consider an additional criterion, which commands less consensus in the pertinent literature. On this view, punishment also requires that the punisher scale punishment to blameworthiness.[154] That is, state-imposed hardship resulting from a criminal conviction is not punishment unless the state attempts to impose it in some rough proportion to culpability. Some dispute this criterion, objecting that it is less an element of punishment than it is a criterion for determining whether punishment is *justified*.[155] I flag this additional punishment criterion, and set it off from the consensus elements, for reasons that should become clear shortly.

[151] The U.S. Code is clearer on this score. See 28 U.S.C. § 3553(a)(2)(C) (permitting sentencing judge to consider need to "to protect the public from further crimes of the defendant"). The Model Penal Code indicates that one purpose of defining criminal offenses is "to subject to public control persons whose conduct indicates that they are disposed to commit crimes" and that one purpose of "sentencing and treatment" is "to prevent the commission of offenses." Model Penal Code § 1.02 (Am. L. Inst., Proposed Official Draft 1962).

[152] See R.A. Duff, Trials and Punishments 151 (1986); Daniel McDermott, A Retributivist Argument Against Capital Punishment, 32 J. Soc. Phil. 317, 322 (2001); Dan Markel, Chad Flanders & David Gray, Beyond Experience: Getting Retributive Justice Right, 99 Calif. L. Rev. 605, 619–20 (2011).

[153] See Duff, supra note 152, at 152–54.

[154] See Primoratz, supra note 141, at 6; see also, e.g., Sidney Gendin, The Meaning of "Punishment," 28 Phil. & Phenomenological Rsch. 235, 237 (1967) ("[F]or punishment *to be* punishment it must be just—the suffering or deprivation must fit the crime.").

[155] See, e.g., Primoratz, supra note 141, at 6. In the interest of candor, I should disclose that I believe this criterion to be more pertinent to the justification of punishment than to its definition.

2. Definitional Fit

The institutional structure of pre-execution confinement fits these punishment criteria poorly. It is difficult to square with the fifth element of the Flew-Benn-Hart definition, at least insofar as *legislatures* ought to specify the state's authorized punishment. It is also inconsistent with the second element of the definition, which requires that the state impose the suffering to counterbalance prior offending.[156] More specifically, it violates the Benn-emphasized principle that the suffering must be imposed *for the sake of a punitive purpose*, and not be ancillary to a nonpunitive one.[157] And it certainly flouts definitions of punishment requiring that suffering be proportioned to blameworthiness.[158] If pre-execution confinement were really punishment, then it would be specified *statutorily* as a hardship that a sentencer imposes because a defendant deserves an incremental period of solitary confinement randomly distributed around a mean of twenty years.

Start with the institution that must generally authorize punishment: legislatures. The principle that legislatures authorize punitive suffering is present in legal doctrine, but it is also consistent with basic rule of law, separation of powers, and legitimacy-based accounts of state punishment.[159] As Professors Robert Weisberg and Marc Miller put it, "Neither legal scholars nor judges question the centrality of Congress and other legislatures in determining what behavior may be punished criminally *or what those punishments will be*."[160] Penal theory is

[156] See supra note 143 and accompanying text.

[157] See supra note 149 and accompanying text.

[158] See supra note 154 and accompanying text.

[159] See McLeod, supra note 3, at 568–70; Stinneford, supra note 122, at 13; see also Gregg v. Georgia, 428 U.S. 153, 176 (1976) ("The deference we owe to the decisions of the state legislatures under our federal system is enhanced where the specification of punishments is concerned, for these are peculiarly questions of legislative policy." (internal quotation marks omitted) (citations omitted)).

[160] Robert Weisberg & Marc L. Miller, Sentencing Lessons, 58 Stan. L. Rev. 1, 6 (2005) (emphasis added); see also Louis D. Bilionis, Process, the Constitution, and Substantive Criminal Law, 96 Mich. L. Rev. 1269, 1301 (1998) ("We begin with the central and dominant theme of the process account: legislative primacy over criminal law choices. . . . It reflects deeper understandings that should not be taken for granted."); Frank O. Bowman, III, Mr. Madison Meets a Time Machine: The Political Science of Federal Sentencing Reform, 58 Stan. L. Rev. 235, 239–40 (2005) ("[A]t present, legislatures also have virtually plenary power to set the punishments attendant upon conviction of a crime. . . . [W]hen we speak of the legislative power to define a crime, we mean that the legislature's specification of a set of facts which must be proven for criminal liability to attach and its specification of the punishment attendant upon proof of that set of facts are inextricably linked components of the single

particularly cool towards arguments that the legislature may delegate the power to punish at all, given the central importance that legislation plays in linking community judgment to suffering.[161] "No punishment without law," as the principle goes.[162]

Jurisdiction-by-jurisdiction accounting reveals that few (if any) American jurisdictions legislatively specify pre-execution confinement as punishment.[163] Correctional officials are entirely responsible for arranging pre-execution confinement in every capital punishment jurisdiction[164] except for the seven states that have meaningful statutory references to special treatment for people serving death sentences: California, Indiana, Louisiana, Mississippi, South Dakota, Texas, and Wyoming.[165] Even in these seven states, moreover, *death rows* are largely

legislative act of crime definition."); F. Andrew Hessick & Carissa Byrne Hessick, Nondelegation and Criminal Law, 107 Va. L. Rev. 281, 300 (2021) ("This need for community condemnation has led criminal theorists to conclude that only laws which were enacted by a democratically accountable body may form the basis of criminal punishment."); J. Harvie Wilkinson, III, In Defense of American Criminal Justice, 67 Vand. L. Rev. 1099, 1145 (2014) ("The practice of entrusting legislatures with control over crime and punishment . . . may seem so commonplace today that its basic features may be taken for granted.").

[161] See generally Hessick & Hessick, supra note 160, at 292–95 (canvassing history of constitutional law on criminal delegations); id. at 306–21 (surveying normative cases for a rule against delegation of criminal lawmaking). See also Brenner M. Fissell, When Agencies Make Criminal Law, 10 U.C. Irvine L. Rev. 855, 893 (2020) ("Because elected officials do not directly control the content of administrative law, it is possible that administrative crimes can communicate a condemnatory message that is not faithful to the larger viewpoint of the community."); id. at 900 ("[S]ophisticated attempts to legitimize state punishment in a liberal state appear to presuppose that a democratic legislature is the institution that is determining what conduct is to be criminalized."); Stinneford, supra note 122, at 14 ("[E]xecutive officials' exercise of undue discretion over punishment has been recognized for centuries as a central attribute of arbitrary and tyrannical government.").

[162] See Jerome Hall, Nulla Poena Sine Lege, 47 Yale L.J. 165, 165–70 (1937) (setting forth history of the principle).

[163] See McLeod, supra note 3, at 539–43; see also Garland, supra note 36, at 46 (nominally referring to pre-execution confinement as punishment but describing it as "an administrative arrangement with no specific legal authority").

[164] Virginia had been in this category prior to 2021 legislation abolishing the death penalty. See McLeod, supra note 3, at 541–42 nn.69–72, and accompanying text (describing institutional arrangement); see also Hailey Fuchs, Virginia Becomes First Southern State to Abolish the Death Penalty, N.Y. Times (Mar. 24, 2021), https://www.nytimes.com/2021/03/24/us/politics/virginia-death-penalty.html [https://perma.cc/C29E-3KUV] (describing abolition).

[165] See Cal. Penal Code § 3600 (West 2016); Ind. Code Ann. § 35-38-6-4 (West 2002); La. Stat. Ann. § 15:568 (2012); Miss. Code Ann. § 99-19-55(1)–(2) (West 2022); S.D. Codified Laws § 23A-27A-33 (2023); Tex. Gov't Code Ann. § 501.113(b) (West 1991); Wyo. Stat. Ann. § 7-13-907 (West 1992). These findings largely track the findings of Professor McLeod. See McLeod, supra note 3, at 540–41. The differences are easily explained. For example,

the product of correctional initiative, and the relevant statutory provisions are mostly inconsistent with legislatively specified punishment. California recently decided to close the death-row facility mentioned in its statute.[166] The Indiana and Louisiana provisions make clear that the goal of pre-execution confinement is incapacitation.[167] Mississippi's provision requires maximum security treatment only for death-sentenced *men*—gender-differentiated treatment that is only justified administratively.[168] The Texas provision was part of legislation increasing prison capacity; it required single-occupancy cells for "inmates confined in death row segregation" but did not statutorily designate all capitally sentenced people for such treatment.[169] In fact, the only states with statutory provisions that are even potentially consistent with punitive confinement are South Dakota and Wyoming, although there is no statutory language affirmatively indicating punitive purpose.[170]

Washington had statutorily provided for segregated confinement prior to a 2018 decision declaring capital punishment invalid. See Wash. Rev. Code Ann. § 10.95.170 (West 1983); see also State v. Gregory, 427 P.3d 621, 626 (Wash. 2018) (holding the Washington death penalty to be unconstitutional). The Delaware Supreme Court struck down the state's death penalty statute in 2016, the year McLeod's article was published. See Rauf v. State, 145 A.3d 430, 434 (Del. 2016).

[166] See Vines, supra note 4, at 594, 618.

[167] See Ind. Code Ann. § 35-38-6-4(a) (West 2002) (permitting maximum security confinement "for security purposes" other than for renovations); La. Stat. Ann. § 15:568 (2012) (providing for pre-execution confinement "in a manner affording maximum protection to the general public, the employees of the department, and the security of the institution"); see also McLeod, supra note 3, at 540 nn.64–65, and accompanying text (listing Indiana and Louisiana among states that had established death rows at the discretion of correctional officials).

[168] See Miss. Code Ann. § 99-19-55(1) (West 2023) ("All male persons convicted of a capital offense wherein the death sentence has been imposed shall be immediately committed to the Department of Corrections and transported to the maximum security cell block."); see also McLeod, supra note 3, at 540–41 nn.64–68, and accompanying text (listing Mississippi among states that had established death rows at the discretion of correctional officials).

[169] See Tex. Gov't Code § 501.113(b) (West 2023) (containing statutory language); McLeod, supra note 3, at 540 n.61 (detailing legislative history). For this reason, many Texas death row prisoners lived at Ellis Unit before a high-profile prison escape caused correctional officials to decide to move all such prisoners to permanent solitary confinement at the Polunsky Unit. See Emily Gray, Decades in Death's Twilight: Cruel and Unusual Punishment on Texas's Death Row, 22 New Crim. L. Rev. 140, 148 (2019).

[170] See S.D. Codified Laws § 23A-27A-33 (2023) (stating that from sentence to death the prisoner shall be "segregated from other inmates"); Wyo. Stat. Ann. § 7-13-907 (2023). In fact, Wyoming death row is an administrative creation. See McLeod, supra note 3, at 540–41 nn.66–68, and accompanying text.

(Wyoming's death row is now empty anyways.[171]) In many of the states that leave capital sentence implementation to the discretion of correctional officials, the power to punish is not even delegable.[172]

The behavior of other criminal justice decision-makers—judges, juries, and law enforcement—is also consistent with the idea of pre-execution confinement as punishment.[173] For example, verdict sheets generally omit references to lengthy prison terms before executions. Nor do American correctional officials self-perceive as punishers. It is precisely this state of affairs that infuriates Professor Blecker, the academic most associated with the argument that death row should be a site of intense suffering.[174] In his view, correctional officials should want to treat death-row prisoners harshly and punitively.[175] Instead, correctional officers self-regard as performing an incapacitating function to which punitive suffering is incidental.[176] Correctional officers tend to view death row "not [as] a place *for* punishment but a place to be housed *until* punished with death."[177]

The people that make up these criminal justice institutions treat detention before execution primarily as a way to incapacitate prisoners and secondarily as a way to prevent them from absconding before the state carries their sentences out.[178] That institutional behavior is broadly consistent with the tenor of the academic literature, which emphasizes incapacitation as the primary rationale for pre-execution confinement.[179]

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[171] See State and Federal Info: Wyoming, Death Penalty Information Center, https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/wyoming [https://perma.cc/8FUK-XQSQ] (last visited Jan. 13, 2023).

[172] See McLeod, supra note 3, at 533; cf. Fissell, supra note 161, at 885 (explaining that state-level governance has much thicker separation of powers norms than does the federal government).

[173] See Aarons, supra note 39, at 163, 189; Sun, supra note 115, at 1627–28.

[174] See, e.g., Blecker, The Death of Punishment, supra note 97, at 162–63 (accusing correctional officials who do not intentionally inflict punitive suffering as being "numbed to injustice").

[175] See id. at 210–11.

[176] See Mark D. Cunningham, Thomas J. Reidy & Jon R. Sorensen, Wasted Resources and Gratuitous Suffering: The Failure of a Security Rationale for Death Row, 22 Psych., Pub. Pol'y & L. 185, 185 (2016) ("[H]ighly restrictive death row housing of [capital punishment] inmates are intuitively appealing and apparently widely accepted by corrections administrators and public policymakers . . . .").

[177] Blecker, The Death of Punishment, supra note 97, at 100.

[178] See McLeod, supra note 3, at 543–45.

[179] See Lynch, supra note 70, at 68 ("Penal administrators justify the use of Supermax as necessary to maintain internal security [for those] inmates who are defined as 'the worst of the worst.'"); McLeod, supra note 3, at 531 ("The first of these, incapacitation, closely tracks

Perhaps because it is so intuitive, less discussed in the academic literature is the fact that pre-execution confinement prevents the condemned from escaping their executions.[180] In any event, the story of hardship on death row is less a story about suffering inflicted for a punitive purpose than it is a story about indifference to suffering incident to other objectives.

Indeed, the primary purpose of pre-execution confinement—incapacitation—is common to many forms of nonpunitive detention. American pre-execution practices fit these incapacitation models far better than the punitive ones. Punitive detention is legislatively specified punishment that is based on a determination that so-and-so is guilty because they transgressed such-and-such legislatively specified rule with the requisite level of culpability. Requiring proof "beyond a reasonable doubt" makes sense for inquiry into the existence of the historical facts that predicate punishment.[181] The community sets the basic parameters for imposing punitive hardship, and it expresses them through legislation. For nonpunitive detention, however, the hardship and the associated suffering is justified in view of future risk. Justification turns not on findings of historical fact, but on more technocratic estimates of probability and harm, on tradeoffs between security and liberty, and on suffering associated with other means.[182] The theoretical status of incapacitation therefore bears repeating: even though Congress and the Model Penal Code have gestured at incapacitation as a permissible sentencing consideration, the weight of academic literature and the Supreme Court substantially reject the idea that incapacitation is punishment.[183]

Thus far I have confined my argument to the Flew-Benn-Hart definition of punishment, but the argument gets stronger if punishment includes only suffering that the state grades to blameworthiness.[184] Recall

the primary administrative rationale for death row, which is prison security."). Introducing what remains some of the best empirical work on the danger posed by death-sentenced prisoners, Professor Andrea Lyon and Dr. Mark Cunningham emphasize that "[c]entral" to the rationale for death row incarceration "are assumptions that the nature of capital offenses renders death-sentenced inmates more likely to assault and injure correctional personnel and other inmates in prison, and that this risk is amplified by their having nothing to lose." Lyon & Cunningham, supra note 140, at 2 (internal quotation marks omitted).

[180] See Lynch, supra note 70, at 68.

[181] See Mayson, supra note 144, at 324.

[182] See id. at 324–27.

[183] See supra notes 146–51 and accompanying text (theory); infra notes 225–55 and accompanying text (doctrine).

[184] See supra note 154 and accompanying text.

the distribution of suffering on death row, both in terms of duration and conditions.[185] Those things are not determined by reference to punitive purposes like criminal blameworthiness, or even deterrence. The length of pre-execution suffering is almost always determined by arbitrary things such as how long courts take to process post-conviction litigation, whether and the pace at which elected prosecutors push for execution dates, and whether jurisdictions have lethal injection drugs.[186] And even if the distribution of pre-execution hardship reflected an incapacitation interest, it could never meet a punishment definition that includes a proportionality criterion.

The point here is not that pre-execution confinement is pleasant, or that suffering cannot take place on death row. The crucial point is that, as a matter of theory, the state practices pre-execution confinement in ways that do not amount to punishment. People confined before execution neither experience hardship nor suffer for punitive purposes. Their hardship and suffering is instead collateral to a primary interest in incapacitation and a secondary interest in preventing escape.

B. Punishment Beyond Death Would Be Unjustified

Another reason to favor a nonpunitive framework for pre-execution confinement is that it is difficult to *justify* the treatment—at the state's hands—as punishment. The problem of punitive justification is twofold. First, if the prevailing practices are punitive, then they violate the moral principle that people convicted of crimes ought not to suffer undeserved punishment. Second, if those practices are punitive, then the distribution of that punishment violates a nonarbitrariness principle.

1. Undeserved Punishment

The legal community should conceptualize pre-execution suffering as nonpunitive because, in conjunction with the execution itself, punitive suffering would be unjustified. I do not want to idle on the esoterica of retributive theory,[187] and there is much non-retributive theory about why, as a global matter, we have punishment as an institution.[188] Whatever the justification for punishment generally, however, there is a separate

[185] See supra Section III.A.
[186] See supra notes 47–56 and accompanying text.
[187] For a wonderful survey of retributivist work, see Gray, supra note 20, at 1659–72.
[188] See, e.g., the synthetic theory collected at note 141, supra.

justificatory question about how punishment is *distributed*. On the distributive question, a basic premise of most punishment theories is that punishment is retributively constrained.[189] The limiting role of desert (blameworthiness) underlies all retributive theories of punishment, and almost all synthetic punishment theories that combine retributivist principles with other moral argument.[190] Once one moves from justificatory accounts for punishing *at all* to questions about *how much* to punish, the limiting principle is always desert.[191]

If one takes the retributive constraint seriously, then there is no justification for using detention to impose additional punishment.[192]

[189] See Mayson, supra note 144, at 319 n.89 (reviewing theoretical literature to support claim of consensus).

[190] See Michael S. Moore, Causation Revisited, 42 Rutgers L.J. 451, 489 (2011); see also, e.g., Herbert L. Packer, The Limits of the Criminal Sanction 66–67 (1968) (rejecting retribution as justification for punishment but accepting blameworthiness as a limit). On the purest retributive theories, punishment is both justified and limited by blameworthiness. Professor Moore is typically associated with this type of "justifying retributivism." See Michael S. Moore, Justifying Retributivism, 27 Isr. L. Rev. 15, 21–23 (1993). On those theories, the state punishes because, and to the extent that, punishment is deserved. See Russell L. Christopher, Deterring Retributivism: The Injustice of "Just" Punishment, 96 Nw. U. L. Rev. 843, 865–67 (2002). The justification for punishing might vary by retributive theory—on some accounts, the justification might be to recognize the free will of the offender, and, on others, the justification might be to restore equality between a community and an offender who has wrongly asserted a right to transgress its norms. See, e.g., Jean Hampton, Retribution and the Liberal State, 1994 J. Contemp. Legal Issues 117, 141 (free will); George P. Fletcher, Domination in Wrongdoing, 76 B.U. L. Rev. 347, 354 (1996) (equality). All but the most extreme utilitarians believe that desert should at least constrain punishment. See Alice Ristroph, How (Not) to Think Like a Punisher, 61 Fla. L. Rev. 727, 731–32 (2009). Indeed, the Achilles' heel of pure utilitarian theory is that it would allow morally offensive punishment in excess of desert. If desert did not limit punishment, then the state could scapegoat innocent people or impose exemplary suffering as long as those things enhanced social welfare. See Guyora Binder & Nicholas J. Smith, Framed: Utilitarianism and Punishment of the Innocent, 32 Rutgers L.J. 115, 123–27 (2000) (scapegoating); Andrew von Hirsch, Hybrid Principles in Allocating Sanctions: A Response to Professor Robinson, 82 Nw. U. L. Rev. 64, 65 (1987) (exemplary punishment).

[191] See sources collected in notes 141 and 190, supra. That desert limits punishment does not mean that punishment might be an eye for an eye, tooth for tooth, or tit for tat. On retributive accounts of punishment, it simply means that more blameworthy offenses trigger greater punishment, and less blameworthy offenses requite less punishment. Desert plays a limiting role that dictates the severity of punishment, but only in an ordinal sense. A murderer is more blameworthy than a shoplifter, and so the state may punish murdering more severely than shoplifting. Although desert is theoretically capable of ordering the severity of offenses, it does not itself dictate the punishment ceiling. Ordinally speaking, a desert constraint means that murdering requites more punishment than shoplifting, but it does not dictate the absolute value of the two punishments.

[192] See Christopher, supra note 118, at 460–61.

Legislatures in the United States fix the execution itself—not pre-execution confinement—as the deserved response to maximally culpable murders.[193] The "worst of the worst," as the saying goes, get the death penalty.

The ways one might seek to escape the retributive constraint are unsatisfactory, and perhaps deeply so. The first way is to reason backwards from an intuited premise that society *simply must* permit suffering before execution and to a conclusion that there is a one-off exception to desert-capped punishment. But this Article explains that the state can accommodate the premise without a conclusion that any suffering is punitive. The second way involves a more controversial prior: that the state *may* impose punitive suffering that exceeds a legislatively fixed death sentence. And to justify that assumption, one would have to believe (1) that the state could punish in excess of legislatively fixed desert;[194] (2) that, if legislatively fixed, the state can permissibly impose punishment greater than death in any individual case;[195] and (3) that, if legislatively fixed and permissible in individual cases, the state could distribute that punishment across cases without meaningful respect to criminal blameworthiness.

That is, even if one could find a way to argue that the state would be permitted to legislatively specify something like a life of solitary confinement before death in a single case, another justificatory complication lurks. As I explain in the following Subsection, among those eligible for worse-than-death treatment, the state metes out pre-execution hardship in arbitrary ways that make the practice punitively unjustifiable.

2. Arbitrary Punishment

Many theories of punishment generate principled opposition to arbitrary application, although the thickest such principles probably come from the retributive tradition.[196] On most accounts of justified

[193] See supra notes 163–72 and accompanying text.

[194] See Christopher, supra note 118, at 459.

[195] Whether asserted as a matter of positive law or moral theory, there are long-recognized rules and norms against state-imposed torture. See, e.g., Jesner v. Arab Bank, PLC, 138 S. Ct. 1386, 1401 (2018) ("International human-rights norms prohibit acts repugnant to all civilized peoples—crimes like genocide, torture, and slavery . . . .").

[196] See Dan Markel, State, Be Not Proud: A Retributivist Defense of the Commutation of Death Row and the Abolition of the Death Penalty, 40 Harv. C.R.-C.L. L. Rev. 407, 458 (2005) ("[A] concern with accuracy and the desire to avoid arbitrariness in the distribution of the death penalty are core commitments of a liberal legal conception of retributivism.").

punishment, the state may not impose punishment arbitrarily—that is, in ways that are insensitive to criminal blameworthiness, or to some other punitively significant variable.[197] Pre-execution confinement, however, is far from a system of blame-based punishing.[198] In fact, the length of confinement prior to execution bears little relationship to blameworthiness at all.[199] Sometimes the most blameworthy murderers are executed quickly, and sometimes they languish on death row until they expire naturally.

There are many reasons that the length of pre-execution confinement is insensitive to punitive goals. First, and most importantly, the length of that detention often reflects the time it takes to complete direct appeal, state post-conviction, and federal habeas proceedings. The time it takes to complete those proceedings, in turn, relates little to culpability, or even to the deterrent value of the detention. There is rarely rhyme or reason to why some cases go faster, and others more slowly.[200]

Second, the length of pre-execution confinement often reflects the preferences of an executive decision-maker, like a local district attorney. It is often these officers who ask courts to set execution dates, and so there is no execution without their initiative.[201] Some of those decision-makers will want to make heavy use of the death penalty, and others will refuse to use it all. For example, in Texas, prosecutors in several urban cities have indicated that they will not ask state courts for execution dates.[202] In states where executions are queued by strong reference to prosecutor preference, the length of pre-execution confinement is more sensitive to prosecutor identity than it is to desert. And at a national level, President Joe Biden announced a moratorium on executions as soon as he took over

[197] See Primoratz, supra note 141, at 6 (emphasizing that "unjust[ified] and morally unacceptable *punishments*" include "punishing people without regard to the gravity of their offenses and without thinking of desert and justice").

[198] See Christopher, supra note 118, at 461 ("But there does not seem to be any correlation between extra years on death row and greater desert."); Dan Markel, Executing Retributivism: *Panetti* and the Future of the Eighth Amendment, 103 Nw. U. L. Rev. 1163, 1196–97 (2009) (observing that the length of time on death row is disconnected from desert).

[199] See supra notes 47–56 and accompanying text.

[200] See id.

[201] See supra note 48 and accompanying text.

[202] See, e.g., Ruth Graham, Days After Setting an Execution Date, a Texas Prosecutor Reverses Course, N.Y. Times (Apr. 16, 2022), https://www.nytimes.com/2022/04/16/us/texas-execution-john-henry-ramirez.html [https://perma.cc/KHH8-LRT5] (reporting that a district attorney in Nueces County, Texas, filed a motion to withdraw an existing death warrant against a defendant and stated his office will no longer seek the death penalty).

the presidency.[203] Finally, and as explained in Subsection I.A.1, the length of pre-execution confinement often reflects something as blame-disconnected as the supply of lethal injection drugs. California remains in an extended moratorium because it is unable to acquire the drugs necessary to implement a lawful execution protocol.[204] Federal executions went dark in 2003, until the Bureau of Prisons ("BOP") executed thirteen prisoners during the last six months of the Donald Trump administration—only after the BOP acquired pentobarbital sufficient to implement a federal protocol.[205] Whether condemned prisoners in those jurisdictions lived or died depended largely on the timing of drug supply, not on some punitive value.

I do not mean to suggest that blameworthiness never exerts any influence on the duration of pre-execution confinement. For example, district attorneys might prioritize executions for death-row prisoners whose post-conviction proceedings have concluded and who committed the most gruesome murders.[206] My point is instead that other drivers of pre-execution confinement swamp punitive variables. And if the relationship between punitive goals and pre-execution hardship is that attenuated, then the hardship cannot be justified punishment.

C. Objections

Notwithstanding the superior fit between pre-execution practices and nonpunitive confinement, I want to briefly respond to those tempted to characterize hardship as punishment whenever a criminal sentence sufficiently causes it. My position entitles readers to a word as to why I refuse definitions of punishment that traffic too heavily in sentence-causation and, by extension, why I do not believe pre-execution confinement to be punishment simply because a capital sentence causes it.

All conviction-caused suffering is not punishment, at least on mainstream theories about the term's meaning. Collateral consequences and prisoner-on-prisoner violence are acute social problems worthy of intense moral condemnation, and they might also implicate important constitutional questions—yet they are insufficiently connected to

[203] See supra note 50 and accompanying text.

[204] See supra note 53 and accompanying text.

[205] See Lee Kovarsky, The Trump Executions, 100 Tex. L. Rev. 621, 633–36 (2022).

[206] Attentive readers will note that such an approach creates an inverse relationship between blameworthiness and post-execution confinement.

suffering that the state imposes for punitive reasons.[207] Prisoner-on-prisoner violence is, after all, a *crime*; it cannot be *punishment*.[208] Punishment is a legislatively specified hardship that the state's agents impose to counterbalance criminal wrongdoing (or maybe to deter it).[209] The state can impose hardship for lots of other reasons, and some of that hardship might even effectuate the punishment itself. The ancillary suffering, however, is not punishment. After all, how could the state possibly abide by equal-treatment norms if the experience to be equalized is the subjective experience of sentence-caused suffering? A version of this position is what prompted Professor David Gray to observe that questions about methods of execution are probably miscast as issues of punishment.[210] Confinement-based suffering is auxiliary to execution in the same way that the experiential effects of execution drugs are, and it is not punishment for the same reasons.

Professor Russell Christopher makes another objection. Per Christopher, if pre-execution confinement is nonpunitive, then an absurdity results when capitally sentenced people die before their executions. If their detention was nonpunitive, he argues, then death-row incarceration "is legally and retributively nothing."[211] But there is no absurdity here. First, it is not true that the confinement is "legally" nothing; this Article recites the substantial constraints, both legal and moral, on nonpunitive detention. Second, there is nothing absurd about saying that someone who dies before a discrete sentencing event has gone

[207] See supra notes 146–50 and accompanying text (summarizing pertinent parts of punishment definition, requiring that the experience be intended to further a punitive goal).

[208] See Gray, supra note 20, at 1649–50; see also id. at 1645–56 (discussing variants of this position with appropriate citation). But cf., e.g., Sharon Dolovich, Cruelty, Prison Conditions, and the Eighth Amendment, 84 N.Y.U. L. Rev. 881, 899 (2009) ("In the most concrete sense, whatever conditions a prisoner is subjected to while incarcerated, whatever treatment he receives from the officials charged with administering his sentence, *is* the punishment the state has imposed."); Adam J. Kolber, The Subjective Experience of Punishment, 109 Colum. L. Rev. 182, 213–14 (2009) ("Of course, not all experiential suffering in prison is imposed in a knowing or intentional way. But even if some experiential suffering should not count, we must still consider the suffering that does."); Sandra G. Mayson, Dangerous Defendants, 127 Yale L.J. 490, 539 (2018) ("Nor is it entirely clear that any deprivation imposed by virtue of guilt should be classified as punishment."); Alice Ristroph, State Intentions and the Law of Punishment, 98 J. Crim. L. & Criminology 1353, 1395 (2008) (defining definitional spectrum by degree of state intentionality for experiential suffering to count as punishment).

[209] See supra note 147 and accompanying text.

[210] See Gray, supra note 20, at 1692.

[211] See Christopher, supra note 118, at 429; see also Matthew Kramer, The Ethics of Capital Punishment 108 (2011) (taking the same position).

unpunished. If immigration removal or banishment were a permissible criminal sentence, and if someone died in detention before the state removed or banished them, then one would reasonably say that they died before they experienced punishment. Third, American jurisdictions re-prosecute and resentence people who have spent years on death row, a practice consistent with the idea that the pre-execution confinement is not the punishment. Finally, someone who died after years in pretrial custody might have suffered greatly, but there is no definitional problem in saying that they were unpunished. Much deserved punishment will go unrealized; people die before completing sentences all the time.[212]

Treating pre-execution confinement as a form of nonpunitive custody makes considerably *more sense* than treating it as punishment, at least in the following respect. Courts do not resolve all challenges to convictions and sentences instantaneously; such resolution takes time. How should we think of the additional time that prisoners must suffer on death row, during the pendency of their post-conviction challenges? It certainly seems odd to say that prisoners suffer *more punishment* simply because they have decided to contest the constitutional validity of their convictions and sentences. Far more intelligible, it seems, to have a theory of that suffering without making punishment the price of judicial remedies.

III. CONSTITUTIONAL DOCTRINE

In Part III, I move from the theoretical to the doctrinal. Constitutional law is reasonably capable of accommodating a change in pre-execution confinement status, from punitive to nonpunitive detention. First, it would impose different and potentially thicker constraints on pre-execution confinement. Second, it would give the Supreme Court a way out of the Eighth Amendment bind that the punitive detention paradigm creates. The constitutional law of nonpunitive detention does not vibrate in great sympathy for the state's prisoners, but it is better for them than the Eighth Amendment alternative.

[212] Yet another example involves a person sentenced to, say, life plus a term of years. By definition, that person will die before their sentence is complete.

A. As Nonpunitive Detention

Like the theoretical literature, constitutional law draws a distinction between two types of state-imposed hardship: punitive and nonpunitive, with the latter sometimes called a "regulatory" power.[213] Regulatory powers include the power to confine people.[214] Regulatory detention might be incident to, among other things, criminal prosecutions,[215] wartime efforts,[216] or immigration proceedings.[217] It also includes confinement of juveniles,[218] material witnesses,[219] incompetent defendants unsuited for trials,[220] other people with mental illness who present a social threat,[221] and those charged or convicted of sexually violent offenses.[222] Under a fairly durable body of constitutional law, detainees in these categories are not being punished; the state detains them and imposes hardship for some nonpunitive reason. (Under these cases,

[213] See, e.g., United States v. Salerno, 481 U.S. 739, 747 (1987) (distinguishing between punitive and "regulatory" detention); Bell v. Wolfish, 441 U.S. 520, 537 (1979) (same); Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168 (1963) (same); Flemming v. Nestor, 363 U.S. 603, 616 (1960) (same).

[214] See, e.g., *Salerno*, 481 U.S. at 748 ("We conclude, therefore, that the pretrial detention contemplated by the Bail Reform Act is regulatory in nature, and does not constitute punishment before trial in violation of the Due Process Clause."); see also Mary M. Cheh, Constitutional Limits on Using Civil Remedies to Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Law Distinction, 42 Hastings L.J. 1325, 1343–44 (1991) (discussing categories of regulatory detention).

[215] See *Salerno*, 481 U.S. at 749.

[216] See, e.g., Hamdi v. Rumsfeld, 542 U.S. 507, 509 (2004) (holding that "due process demands that a citizen held in the United States as an enemy combatant be given a meaningful opportunity to contest the factual basis for that detention before a neutral decisionmaker").

[217] See, e.g., Carlson v. Landon, 342 U.S. 524, 542 (1952) (subjecting detention incident to deportation to Fifth Amendment scrutiny).

[218] See, e.g., Schall v. Martin, 467 U.S. 253, 256–57 (1984) ("We conclude that preventive detention [of a minor accused of delinquency] serves a legitimate state objective, and that the procedural protections afforded pretrial detainees by the New York statute satisfy the requirements of the Due Process Clause of the Fourteenth Amendment to the United States Constitution.").

[219] See Ashcroft v. al-Kidd, 563 U.S. 731, 733 (2011).

[220] See, e.g., Jackson v. Indiana, 406 U.S. 715, 730–31 (1972) (subjecting indefinite detention of person who was incompetent to stand trial to the Equal Protection and Due Process Clauses of the Fourteenth Amendment).

[221] See, e.g., Addington v. Texas, 441 U.S. 418, 419–20 (1979) ("The question in this case is what standard of proof is required by the Fourteenth Amendment to the Constitution in a civil proceeding brought under state law to commit an individual involuntarily for an indefinite period to a state mental hospital.").

[222] See, e.g., Kansas v. Hendricks, 521 U.S. 346, 360 (1997) (analyzing whether civil detention as a "sexually violent predator" included procedures that satisfied due process).

incapacitation is not punishment.[223]) Pre-execution confinement properly belongs on the nonpunitive side of the doctrinal line.[224]

In these cases, the line distinguishing punishment from nonpunitive suffering is salient in two different contexts, and the difference is of explanatory significance. In what one might call the "category cases," the Court used to classify *entire forms of detention* as punitive or nonpunitive. In what one might call "treatment cases," the Court needed to draw the line to distinguish whether *some specific harm to an imprisoned person* amounted to punishment, without respect to whether the category of detention was punitive or not. Treatment cases involve disputes over things like medical care, prison conditions, and use of force. Opinions in the category cases sometimes cite the conditions cases, but the important issue at the heart of Section III.A is a category question: Should courts analyze pre-execution confinement as a form of punishment?

1. The Nonpunitive Category

The space limitations here necessitate an abridged doctrinal account of nonpunitive detention, so I focus on detention adjacent to criminal punishment. The basic doctrinal observation is that the Supreme Court has moved far past *In re Medley*, the 1890 decision subjecting a solitary confinement statute to ex post facto analysis.[225] The Court has since embraced a world of nonpunitive detention, justified by reference to interests other than retribution. In that modern world, whether a category of detention is punitive depends primarily on legislative intent, and secondarily on effect.

My entry point is a 1962 case, *Robinson v. California*.[226] In *Robinson*, the Supreme Court strongly indicated that criminal punishment required

[223] See infra notes 244–55, 268–84 and accompanying text.

[224] I don't want to claim too much clarity in the doctrine, however. Questions about the punitive status of pre-execution confinement nonetheless sit in a doctrinally under-specified area of constitutional law. One explanation for that state of constitutional affairs might be, with respect to prison law, the Supreme Court's preoccupation with certain separation of powers questions at the expense of others. The Court has focused intensely on questions about the remedial appropriateness of judicial relief in prison law cases, yet it has devoted little sustained effort to parallel separation of powers questions about how correctional practices fit into its definitions of punishment. See Stinneford, supra note 122, at 13.

[225] See supra notes 101–03 and accompanying text (discussing *In re Medley*, 134 U.S. 160 (1890)).

[226] 370 U.S. 660, 667 (1962).

something more than a showing of future danger.[227] Confronting a state statute that criminalized the "status" of narcotics addiction, *Robinson* held that a criminal penalty was unconstitutional.[228] It contrasted criminal penalties for narcotics-addicted status with other "compulsory treatment, involving quarantine, confinement, or sequestration."[229] Whatever the prudence of the regulatory (nonpunitive) programs, the Court explained, criminal penalties were out of bounds.[230]

After *Robinson*, the Court got into the part-time business of sorting punitive from nonpunitive detention. *Bell v. Wolfish* was a 1979 treatment case that settled a challenge to detention pending federal trial,[231] but it included language pertinent to category questions. Because pretrial detainees are not (by definition) convicted of a crime, the state cannot *punish* them.[232] And because the state cannot punish people in pretrial detention, the Eighth Amendment restriction on cruel and unusual punishment made little sense as a constitutional constraint.[233] *Wolfish* reaffirmed that due process, rather than the Eighth Amendment, constrains detention prior to conviction.[234]

Without distinguishing between a test for category questions and a test for treatment questions, *Wolfish* incorporated an existing framework for deciding whether "a governmental act [e.g., a condition] is punitive in

[227] See id. at 665–66. Professor Stephen Schulhofer reads *Robinson* this way as well. See Stephen J. Schulhofer, Two Systems of Social Protection: Comments on the Civil-Criminal Distinction, with Particular Reference to Sexually Violent Predator Laws, 7 J. Contemp. Legal Issues 69, 82–83 (1996).

[228] 370 U.S. at 666–67.

[229] Id. at 666.

[230] What is potentially complicating about *Robinson* is that the Court called the penalty "cruel and unusual punishment." Id. at 667. But *Robinson* involved a question of whether a conviction-triggered suffering could be imposed because of that status. The proposition that status cannot trigger punitive suffering does not extinguish the question whether the statute can impose suffering for nonpunitive reasons.

[231] 441 U.S. 520, 523 (1979).

[232] See id. at 545–46.

[233] See id. at 535 n.16.

[234] See id. at 534–35. I discuss the way *Wolfish* analyzed conditions of nonpunitive confinement *infra* Subsection III.B.2. Briefly, however, the line between conditions permissible under due process was not drawn through punishment—that is, it did not subdivide punishment into permissible and impermissible categories. See *Wolfish*, 441 U.S. at 535 n.16. Instead, *Wolfish* held that due process precluded any treatment that qualified as punishment. See id.

nature."[235] *Wolfish* referenced a list of factors from a frequently cited 1963 case, *Kennedy v. Mendoza-Martinez*[236]:

> Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of *scienter*, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned are all relevant to the inquiry, and may often point in differing directions.[237]

Wolfish called the *Mendoza-Martinez* factors "guideposts in determining whether" particular treatment amounts "to punishment in the constitutional sense of that word."[238]

Wolfish, however, flattened the *Mendoza-Martinez* factors considerably—into an inquiry about the purpose of the state-imposed hardship. If the hardship is incident to some nonpunitive purpose, then the "condition or restriction" that causes the suffering is not "punishment," and it is constitutionally permitted only when it is "reasonably related to a legitimate goal."[239] Crucially, interests in preserving "security and order" among "convicted inmates" are "permissible nonpunitive objective[s]."[240] The Court decided *Schall v. Martin* a few years after *Wolfish*, confirming that *Wolfish*'s narrowed inquiry was an important development for category cases too.[241] Under *Schall*, detention is punitive only if it is pursuant to an "express" legislative intent to punish or if there is no "rational" nonpunitive purpose.[242] And so as not to over-burden

[235] Id. at 537.

[236] 372 U.S. 144, 168–69 (1963).

[237] *Wolfish*, 441 U.S. at 537–38 (quoting *Mendoza-Martinez*, 372 U.S. at 168–69).

[238] Id. at 538.

[239] Id. at 538–39.

[240] Id. at 561. Professor Johnson noted that this passage appears to support the argument I now make. See Johnson, supra note 19, at 123.

[241] See Schall v. Martin, 467 U.S. 253, 269 (1984) ("Absent a showing of an express intent to punish on the part of the State, that determination generally will turn on whether an alternative purpose to which the restriction may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned to it." (alterations omitted) (internal quotation marks omitted)).

[242] See id. In situations where the nonpunitive intent of detention is reasonably clear, courts will honor legislative intent unless there is the "clearest proof that the statutory scheme is so

detention with criminal procedure, the Court adopted a broad view of nonpunitive purpose.[243]

A legislative purpose to incapacitate triggers a nonpunitive classification, meaning that due process—rather than the Eighth Amendment—constrains the state's decision to place people in custody. Perhaps the leading category case is *United States v. Salerno*, which approved the nonpunitive, pretrial detention that the Bail Reform Act of 1984 required.[244] Rejecting the argument that the Act authorizes "impermissible punishment before trial,"[245] the Court held that "pretrial detention . . . is regulatory, not penal."[246] In so many words, the Court identified incapacitation as the regulatory interest at issue, because the statute was meant to prevent "danger to the community."[247] And in order to determine what the statute "meant," the Court treated the legislative intent as of paramount significance.[248] *Salerno* emphasized that detention designed to incapacitate is not punishment; it is a valid and nonpunitive regulatory practice because it furthers a "weighty" interest in community safety and because there are individualized procedures that "are specifically designed to further the accuracy" of the dangerousness determination.[249] The Supreme Court, then, has substantially changed the doctrinal inquiry after *Mendoza-Martinez*.[250] Under cases like *Salerno*

punitive in either purpose or effect as to negate the State's intention." Seling v. Young, 531 U.S. 250, 261 (2001); see also Flemming v. Nestor, 363 U.S. 603, 617 (1960) (requiring "clearest proof").

[243] In *United States v. Salerno*, 481 U.S. 739 (1987), the Court invoked the idea of community safety to justify a relatively process-free detention scheme. See id. at 741. In *Schall*, the Court recognized a "legitimate and compelling state interest" in the nonpunitive detention of juveniles. 467 U.S. at 264. That interest was in fact "the combined interest in protecting both the community and the juvenile himself from the consequences of future criminal conduct." Id.

[244] 481 U.S. at 741.

[245] Id. at 746.

[246] Id.

[247] Id. at 747.

[248] See id.

[249] Id. at 750–51.

[250] The move between *Mendoza-Martinez* and *Salerno* / *Schall* is conspicuous enough that it is frequently criticized. See, e.g., Michael J. Eason, Eighth Amendment—Pretrial Detention: What Will Become of the Innocent?, 78 J. Crim. L. & Criminology 1048, 1063–64 (1988) ("The switch from the comprehensive, objective analysis of *Mendoza-Martinez* to the diluted rational relation test espoused in *Wolfish* and applied in *Salerno* is more than a mere modification or narrowing of the original test."); Stinneford, supra note 122, at 19 ("The Supreme Court in recent decades has generally skipped the first step of this inquiry and focused solely on evidence relating to a given sanction's purpose."); The Supreme Court, 1986

and *Schall*, that inquiry now proceeds as follows. The status of a confinement category depends in part on whether there is a clear legislative indication that the detention is supposed to be punitive.[251] If such an indication is there, then the custody is punishment. If there is no such indication, then the detention is presumptively nonpunitive.[252] The presumption will only yield when the punitive *function* of the detention is exceedingly clear, meaning that there is no nonpunitive purpose that rationally explains it.[253] And the Supreme Court has come to regard every purpose other than retribution and deterrence as nonpunitive[254]—even, it seems, incapacitation.[255]

2. Pre-Execution Confinement Is Nonpunitive

For category questions, the doctrinal emphasis on clear statutory intent complicates a punitive account of pre-execution confinement. Evidence that legislatures intend such confinement as punishment is scant. Several jurisdictions have statutes referencing pre-execution confinement, but those references generally don't disclose an intent to punish.[256] In every other capital jurisdiction, decisions about the nature of pre-execution confinement are made by correctional officials who are either exercising delegated authority or acting on their own initiative.[257] In the absence of legislative intent to use pre-execution confinement to punish, there must

Term—Leading Cases, 101 Harv. L. Rev. 169, 176 (1987) (flagging but criticizing emphasis on intent to the exclusion of effect). For a general discussion of the relationship among intent, incapacitation, and punishment, see Ristroph, supra note 208, at 1370–74, 1394–400 (describing inquiry in further detail).

[251] See Schall v. Martin, 467 U.S. 253, 269 (1984) (imposing requirement of "express" purpose to punish). But see Smith v. Doe, 538 U.S. 84, 92–93 (2003) (explaining that a "legislative objective" to punish satisfies an ex post facto challenge "without further inquiry into" the "effects" of custody, but allowing that the objective might be shown by strong implication); United States v. Ward, 448 U.S. 242, 248 (1980) ("First, we have set out to determine whether Congress, in establishing the penalizing mechanism, indicated either expressly or impliedly a preference for one label or the other.").

[252] See Hudson v. United States, 522 U.S. 93, 99–100 (1997).

[253] See id. (emphasizing language from *Mendoza-Martinez*).

[254] See Stinneford, supra note 150, at 679 ("[I]t is becoming increasingly clear that neither a purpose to deter, incapacitate, nor to rehabilitate can transform a putatively civil statute into a criminal one. Only a retributive purpose can."); see, e.g., Seling v. Young, 531 U.S. 250, 261 (2001) (considering whether a statute had retributive or deterrent function).

[255] See infra notes 268–81 and accompanying text; see also *Smith*, 538 U.S. at 93 (rejecting the argument that preventing convicted sex offenders from re-offending by forcing them to register could be invoked as punitive purpose).

[256] See supra notes 163–77 and accompanying text.

[257] See id.

be some overwhelming inference from function—there must be no rational connection between the detention and a nonpunitive objective.[258] Under existing law, such an inference remains unjustified even when some secondary punitive function complements one that is primarily regulatory.[259] The doctrinally significant inquiry, then, is whether detention before execution functions primarily as retribution or deterrence, which are the two purposes that the Supreme Court usually designates as punitive. Pre-execution confinement does neither.[260]

Start with retribution. As I have explained at length, decisions about whether to place prisoners under various conditions of pre-execution confinement generally don't track blameworthiness. Death rows are almost always all-or-nothing affairs, and they do not receive prisoners pursuant to carefully calibrated determinations of risk.[261] Even within the category of pre-execution confinement, correctional officials shuttle condemned people to higher and lower security levels not based on criminal culpability,[262] but on some mix of anticipated danger or disciplinary history.[263] Nor is pre-execution confinement used to deter future wrongdoing, given what we know about the decision-making process of those who commit capital murder.[264] That process is insensitive to marginal increases in expected penalty at the extreme end of the punishment spectrum,[265] the probability of apprehension matters

[258] Schall v. Martin, 467 U.S. 253, 269 (1984).

[259] See, e.g., *Smith*, 538 U.S. at 93–94 (first citing Flemming v. Nestor, 363 U.S. 603, 616 (1960) (citing Hawker v. New York, 170 U.S. 189, 196 (1898)); and then citing United States v. One Assortment of 89 Firearms, 465 U.S. 354, 364 (1984) (quoting Huddleston v. United States, 415 U.S. 814, 824 (1974))); id. ("These precedents instruct us that even if the objective of the Act is consistent with [punitive purposes], the State's pursuit of it in a regulatory scheme does not make the objective punitive.").

[260] In category cases, the inquiry into punitive-versus-nonpunitive purpose is categorical, meaning that the answer does not change on a case-by-case basis. See Seling v. Young, 531 U.S. 250, 263 (2001).

[261] See McLeod, supra note 3, at 572–73.

[262] See, e.g., Pontier, supra note 4, at 135 (identifying "disciplinary sanctions" as the determinant of movement across custody levels in Idaho and Texas death rows).

[263] See, e.g., id. at 139 (describing South Carolina death row).

[264] The more appropriate question might be whether there is evidence that any jurisdiction intends to use suffering before execution as a deterrent. I have seen no such evidence in the same material from which I can infer the absence of a retributive purpose.

[265] See Daniel S. Nagin, Deterrence in the Twenty-First Century, 42 Crime & Just. 199, 219–20 (2013) (calling the assumption that those contemplating capital murder evaluate marginal differences in extreme punishment "preposterous"); id. at 231 ("As a consequence, the deterrent return to increasing an already long sentence is small, possibly zero."); see also

much more than the magnitude of punishment,[266] and even people who might be sensitive to the presence of a death penalty would be unlikely to change behavior based on the anticipated conditions of pre-execution confinement.[267]

I strongly suspect that those who have a punitive vision of pre-execution confinement would say that the confinement is for incapacitation, thereby assuming that incapacitation is a permitted function of punishment.[268] One problem with that logic is the assumption itself—that incapacitation is a constitutionally significant punitive goal. In fact, the Supreme Court has never held that the need to incapacitate is sufficient to justify punishment; it has always insisted that punishment can be imposed only in response to some prior criminal transgression.[269] Even when narrating the purposes of criminal punishment more generally, the Court usually leaves incapacitation out.[270]

Michael Serota, Strict Liability Abolition, 98 N.Y.U. L. Rev. 112, 145–47 (2023) (collecting empirical work on the relationship between deterrence and sentence length).

[266] See John Pfaff, The Forever Bars, Wash. Post (Apr. 10, 2020), https://www.washingtonpost.com/outlook/2020/04/10/prison-violent-offender-jail-coronavirus/?arc404=true [https://perma.cc/98NS-Z6ZT] ("A stack of empirical papers makes it clear, for example, that what deters crime is the certainty of punishment, not its severity—the likelihood of getting caught, not the length of the prison time later imposed.").

[267] One variation on a deterrence account might insist that the threat of incremental suffering coaxes condemned people to abide by prison rules when they otherwise wouldn't. This position, however, is not backed by any empirical research. See McLeod, supra note 3, at 531–32 (discussing study based on elimination of death row in Missouri). It is also inapplicable to any jurisdiction where all people receiving capital sentences must live on death row. Finally, the position's internal logic better supports a less-restrictive housing arrangement in which correctional officials have wider increments of restricted living with which to threaten misbehavior.

[268] See generally Alice Ristroph, Proportionality as a Principle of Limited Government, 55 Duke L.J. 263, 278 (2005) (sketching theory of incapacitation as a goal for punishment); Michael Tonry, Purposes and Functions of Sentencing, 34 Crime & Just. 1, 30–32 (2006) (discussing problems with incapacitation as punishment theory).

[269] See supra notes 226–30 and accompanying text. But see supra note 151 (noting that Congress and the drafters of the Model Penal Code have indicated that incapacitation can be considered as a punitive purpose in imposing sentence).

[270] See, e.g., Kennedy v. Louisiana, 554 U.S. 407, 420 (2008) ("[P]unishment is justified under one or more of three principal rationales: rehabilitation, deterrence, and retribution."); Kansas v. Hendricks, 521 U.S. 346, 361–62 (1997) ("[C]ommitment under the Act does not implicate either of the two primary objectives of criminal punishment: retribution or deterrence."); Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168 (1963) (deciding a related question by reference to "the traditional aims of punishment—retribution and deterrence"). But cf. Harmelin v. Michigan, 501 U.S. 957, 999 (1991) (Kennedy, J., concurring) ("The federal and state criminal systems have accorded different weights at different times to the penological goals of retribution, deterrence, incapacitation, and rehabilitation."). In one very

If one assumes for the sake of argument that incapacitation is a constitutionally permissible objective of punishment, then there are still major problems with the idea that lengthy pre-execution confinement is punitive incapacitation. In instances where the Court has permitted incapacitation to justify detention *on top of* a criminal sentence, it has insisted that such detention be treated as non-punishment.[271] Perhaps the most familiar scenario involves what is sometimes called a sexually violent predator ("SVP") statute. The leading case on SVP detention is *Kansas v. Hendricks*.[272] In *Hendricks*, Kansas petitioned to detain a man after the conclusion of his criminal sentence, under provisions permitting continued detention because a mental health disorder made him likely to engage in predatory acts of sexual violence.[273] *Hendricks* was a category case requiring the Court to decide whether SVP detention was punitive or not, as that status affected several related issues: whether SVP detention was subject to double jeopardy or ex post facto analysis and, if not, whether the detention complied with constitutional constraints on nonpunitive confinement.[274]

Hendricks explained that the first-cut "categorization of a particular *proceeding* as civil or criminal" is based on statutory construction.[275] The Supreme Court held that a civil designation should presumptively control when the detention was not imposed for reasons of retribution or deterrence—there is no mention of incapacitation.[276] In order to determine whether to override the presumptive designation, the Court looked to whether the detention required a finding of intent, whether the conviction was used to predict future danger, and whether the custody was meant to deter the detainee.[277] *Hendricks* held that "[i]f detention for the purpose of protecting the community from harm *necessarily* constituted punishment, then all involuntary civil commitments would

high-profile noncapital case, however, the Supreme Court did hold that a defendant's "sentence is justified by the State's public-safety interest in incapacitating and deterring recidivist felons." Ewing v. California, 538 U.S. 11, 29 (2003). Even *Ewing*, however, was focused on whether incapacitation justified a legislatively specified punishment, and not on a question about whether state-imposed hardship was punishment to begin with. Id. at 30.

[271] See infra notes 272–82 and accompanying text.

[272] 521 U.S. 346, 350 (1997).

[273] See id.

[274] See id. at 369–70 (double jeopardy); id. at 370–71 (ex post facto); id. at 356–60 (complying with constraints on nonpunitive detention).

[275] Id. at 361 (emphasis added).

[276] Id. at 362–63.

[277] See id.

have to be considered punishment."[278] But, *Hendricks* noted, "we have never so held."[279] Because SVP commitment was nonpunitive, *Hendricks* made quick work of the detained person's claims under the Double Jeopardy and Ex Post Facto Clauses.[280] *Hendricks* strongly indicates that incapacitation is not inherently punitive,[281] and it categorically rejects the idea that the Constitution permits incapacitation to carry punitive custody beyond that specified in the sentence.[282]

Distinctions between pre-execution confinement and the *Hendricks*-type SVP detention are immaterial to the question whether pre-execution confinement is punitive. *Hendricks*, after all, followed from a broader rejection of the idea that any post-offense incapacitation represents punishment. The Supreme Court explained that the SVP statute did "not affix culpability for prior criminal conduct."[283] Instead, the Court reasoned, the offending "conduct is used solely for evidentiary purposes"—as a finding of sufficient danger necessary to justify preventative detention.[284] The fact that a person was found to have committed a crime did not transform any subsequent incapacitation into punishment. Nor does the fact that confinement occurs before the sentence—whereas the SVP detention occurs after it—seem material. The question in both instances is whether incapacitation on top of the criminal sentence represents punishment. *Hendricks* said no.

In response to the doctrinal case for treating pre-execution confinement as nonpunitive, someone might make a bootstrapping argument: that any detention necessary to administer punishment is *itself* punishment. After all, the state cannot ensure that an execution takes place without pre-execution confinement. Attentive readers will notice that this argument tracks the more theoretical dispute, discussed in Section II.C, about what sorts of sentence-caused suffering count as punishment.[285]

[278] Id. at 363.

[279] Id.

[280] See id. at 369–71.

[281] See id. at 365–66.

[282] See also Schulhofer, supra note 227, at 83 ("Neither the Eighth Amendment nor the general moral imperative to keep criminal liability proportionate to fault is violated by subjecting more dangerous offenders to longer sentences, *provided that the punishment never exceeds the offender's just deserts*." (emphasis added)).

[283] *Hendricks*, 521 U.S. at 362.

[284] Id.

[285] See supra notes 207–11 and accompanying text.

There are several reasons to reject such bootstrapping. First, treating all detention auxiliary to *primary* punishment (the execution) as some sort of *secondary* punishment (the confinement) would run headlong into Eighth Amendment problems that arise when the state arbitrarily dispenses punishment that can exceed the punitive hardship associated with the death penalty.[286] Second, if one were to take the proposition seriously, then it would call *Salerno* into question because pretrial detention, doctrinally designated as nonpunitive, is often strictly necessary to punishment.[287] And third, there's common sense: Why would courts opt for a punitive understanding at all, thereby rejecting an *administrative* framework for analyzing *administrative* detention?[288] The Supreme Court has repeatedly emphasized that the same conduct can trigger a punitive sanction and a regulatory response.[289]

* * *

Doctrinally, the line between punitive and nonpunitive detention has evolved considerably since the Supreme Court decided *Medley* in 1890.[290] No longer does the status turn primarily on the amount of suffering. The Court has also cast aside most of the *Mendoza-Martinez* factors, opting instead for a test that inevitably classifies huge swaths of detention as nonpunitive. Under the new test, embraced in *Salerno* and *Schall*, courts are to look either for a clear legislative intent to punish or, when there is no such intent, the absence of any rational alternative purpose assignable to detention.[291] On that inquiry, it is difficult to see how pre-execution confinement could be punitive, given that its primary function is neither retribution nor deterrence. Even if punishment could be based on incapacitation, the Court has generally rejected the idea that punitive incapacitation could push punishment beyond the upper retributive limit fixed by reference to desert.[292]

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[286] See supra Section I.B.

[287] See Schulhofer, supra note 227, at 85.

[288] Cf. id. at 87 (documenting doctrinal presence of nonpunitive detention that fills gaps in punitive schemes).

[289] See, e.g., United States v. Ward, 448 U.S. 242, 250 (1980) ("We have noted on a number of occasions that 'Congress may impose both a criminal and a civil sanction in respect to the same act or omission.'" (quoting Helvering v. Mitchell, 303 U.S. 391, 399 (1938))).

[290] See supra notes 101–03 and accompanying text (discussing *Medley*).

[291] See supra notes 239–55 and accompanying text.

[292] But see Ewing v. California, 538 U.S. 11, 29–30 (2003) (permitting a life sentence in a noncapital case for stealing golf clubs on the ground that recidivism concerns justify the extent of punishment).

B. Changed Constitutional Constraints

If pre-execution confinement is nonpunitive, then the constitutional constraints on detention surely change. First, the decision about whether the state may detain someone nonpunitively is procedurally restricted in ways that differ from a decision about whether the state may punish. If nothing else, nonpunitive detention requires ongoing, individualized, and forward-looking assessments of risk. Second, and despite the Supreme Court's confusing approach to treatment cases, there appear to be more stringent constitutional constraints on the conditions of nonpunitive confinement.[293] Thicker restrictions on the harshest treatment would therefore entail different pre-execution practices. For example, a nonpunitive paradigm would make it very difficult for the state to justify mandatory solitary confinement of death-sentenced people—especially confinement of those who are elderly or chronically infirm.[294]

1. Process to Impose Nonpunitive Detention

Most lawyers are familiar with the basic constitutional rules that constrain punitive confinement: prohibitions on cruel and unusual punishment,[295] double jeopardy,[296] and ex post facto laws;[297] the right against self-incrimination; and rights to confront adverse witnesses, indictment by grand juries, speedy trials before peers, and the assistance of defense counsel.[298] Less widely known are the procedural protections against noncriminal custody, often adjudicated in category cases, which vary by custodial form. For example, the state may not commit a mentally ill person on dangerousness grounds unless there is clear and convincing evidence of both mental illness and dangerousness.[299] Although children

[293] In what follows, I focus on constraints imposed by the Federal Constitution. That focus notwithstanding, the treatment and suffering of people on death row is constrained in many other ways. If pre-execution confinement is nonpunitive, then state constitutional constraints on that category of detention kick in, too. And perhaps a change in legal classification triggers a change in correctional norms. The point is this: a system-wide paradigm shift would be mechanistically diverse, but I focus on constitutional law because I suspect strongly that the change starts there.

[294] See Rapaport, supra note 39, at 1106.

[295] See U.S. Const. amend. VIII.

[296] See id. amend. V.

[297] See id. art. I, § 10.

[298] See id. amend. V (self-incrimination and grand juries); id. amend. VI (speedy trial, jury of one's peers, confrontation, and right to counsel).

[299] See Addington v. Texas, 441 U.S. 418, 426, 433 (1979).

in juvenile proceedings have no right to jury trials,[300] they enjoy a right against self-incrimination and the protection of a proof beyond a reasonable doubt requirement.[301] By contrast, there is no constitutional right against self-incrimination when the state seeks to detain someone on the ground that they pose a threat of sexual violence.[302]

The procedural protections against nonpunitive detention might vary, and they might sum to less protection than those afforded to criminal defendants—but there must *always* be an individualized finding that the custody fits the nonpunitive purpose. In *O'Connor v. Donaldson*, for example, the Supreme Court barred the involuntary confinement of a person who was mentally ill but not dangerous, at least in the absence of a finding that detention was necessary to treat or ensure the safety of the detained person.[303] The Court put it this way: "The fact that state law may have authorized confinement of the harmless mentally ill does not itself establish a constitutionally adequate purpose for the confinement."[304] The Court affirmed that ongoing, nonpunitive detention required some individualized finding of fit between the detention and a social purpose.[305]

Several features of the required finding, however, will usually make nonpunitive detention relatively easy to justify. First, the permissible "goals" of the detention can be defined very abstractly. *Addington v. Texas*, for example, cited a compelling governmental interest at a high degree of generality: its *parens patriae* power to "provid[e] care" to citizens unable to care for themselves and the police power to "protect the community from the dangerous tendencies" of people with mental illness.[306] Second, the constitutionally required burden of proof is not especially high. *Addington* itself held that the standard of proof for such confinement was clear and convincing evidence, as the Court rejected a beyond reasonable doubt standard.[307] Third, the Supreme Court has held

[300] See McKeiver v. Pennsylvania, 403 U.S. 528, 550 (1971) (jury trial right).

[301] See In re Gault, 387 U.S. 1, 55 (1967) (self-incrimination); In re Winship, 397 U.S. 358, 368 (1970) (proof beyond reasonable doubt).

[302] See Allen v. Illinois, 478 U.S. 364, 375 (1986).

[303] 422 U.S. 563, 573–75 (1975).

[304] Id. at 574.

[305] See id. at 575.

[306] 441 U.S. 418, 426 (1979).

[307] See id. at 432–33. A few years after *Addington*, in *Jones v. United States*, the Court confronted a federal statute providing that a District of Columbia insanity acquittee be detained indefinitely for treatment and to protect public safety. 463 U.S. 354, 356–57 (1983). *Jones* decided that a not guilty by reason of insanity verdict could justify nonpunitive detention for an acquittee that was both dangerous and insane. See id. at 369. It also endorsed a lower

that the Due Process Clauses permit findings made in criminal cases to do double duty as the initial findings necessary to justify nonpunitive detention. In *Jones v. United States*, for instance, the Court held that an insanity acquittal did double duty as the finding necessary to justify the nonpunitive detention—both as to mental illness and dangerousness.[308] Given that (among other things) the state must generally prove aggravating circumstances to impose a death penalty,[309] I find it inconceivable that the government would be unable to carry a burden necessary to detain a death-sentenced person in some way.

There is one extremely important feature of civil detention, however, that could change the way American jurisdictions approach pre-execution confinement. Preventative confinement has a forward-looking orientation that necessitates ongoing review of the detention's justification. A single individualized finding of fit between nonpunitive purpose and custody would not be enough to sustain the detention indefinitely. The existence of ongoing review figured nontrivially in *Addington*, where the Supreme Court blessed a not particularly exacting standard of proof—clear and convincing evidence—by emphasizing that the commitment could be subject to ongoing review.[310] The Court continues to abide by this principle across categories of nonpunitive custody, whether the context

standard of proof than *Addington* required for mental-health detention in other contexts. See id. at 366–68 (endorsing a preponderance of the evidence standard).

[308] See *Jones*, 463 U.S. at 365–66; cf. Lynch v. Overholser, 369 U.S. 705, 708, 709 n.4 (1962) (collecting statutes permitting civil commitment upon a defendant's decision to pursue the insanity defense at a criminal trial).

[309] See, e.g., Zant v. Stephens, 462 U.S. 862, 875 (1983) (describing Georgia scheme typical of post-*Furman* statutes).

[310] See 441 U.S. at 428–29, 431–33.

involves insanity acquittees,[311] defendants being detained as incompetent to stand trial,[312] or people held under SVP statutes.[313]

If such a rule applied to execution before confinement, then it could significantly curtail pre-execution hardship and suffering. It is true that Texas *requires* trial findings of dangerousness to impose death sentences,[314] and that many other states *permit* trial-phase evidence about dangerousness to prove death-worthiness.[315] But no jurisdiction requiring death-sentenced people to serve their sentences in solitary or semi-solitary confinement conducts anything like the ongoing review of danger necessary to confine people civilly. If the only ongoing showing necessary to trigger permanent solitary confinement is a showing necessary to confine people before execution at all, then the nonpunitive

[311] In *Foucha v. Louisiana*, the Supreme Court invalidated the preventative detention of an insanity acquittee who had later regained mental health. 504 U.S. 71, 80 (1992). Specifically, Louisiana law had required nonpunitive detention of an insanity acquittee without respect to an ongoing state of mental illness; a determination of dangerousness sufficed. See id. at 73. Emphasizing the conjunctive proposition from *Jones*—that nonpunitive detention of an insanity acquittee could continue only if the acquittee was both dangerous and mentally ill—the Court reversed the Louisiana custody order. See id. at 76–78. "[A] convicted felon serving his sentence has a liberty interest, not extinguished by his confinement as a criminal, in not being transferred to a mental institution and hence classified as mentally ill without appropriate procedures to prove that he was mentally ill." Id. at 78–79. Nonpunitive detention, in other words, required ongoing evaluation. *Foucha* distinguished *Salerno* because the pretrial detention at issue in *Salerno* was "sharply focused," emphasizing the time-limited period of potential confinement and describing the requirement of a "full-blown adversary hearing" on dangerousness before a "neutral decisionmaker." Id. at 81.

[312] In *Jackson v. Indiana*, the Supreme Court invalidated indefinite detention for prisoners who were not competent to stand trial. 406 U.S. 715, 720 (1972). Instead of the reduced procedural protections under the applicable state statute, the Court held that the pretrial detainee was entitled to the greater procedural protections for any indefinite civil commitment. Permitting indefinite commitment on something less than the heightened showing would, *Jackson* held, violate both due process and equal protection. See id. at 730–31.

[313] *Kansas v. Hendricks* validated a state statute for the nonpunitive commitment of people accused and convicted of violent sexual offenses. 521 U.S. 346, 371 (1997). The statute formally applied to people who had been convicted of sexually violent crimes, who were charged but not competent to stand trial for such crimes, and who were found not guilty by reason of insanity or mental defect. See id. at 352. But the statute had procedural protections for the potential detainee: the right to counsel, to present and cross witnesses, and so forth. Id. The statute also required annual review, and it permitted the detainee to petition for release at any time. See id. at 353. *Hendricks* reasoned that nonpunitive detention for dangerousness required the dangerousness finding *and* "proof of some additional factor, such as a 'mental illness' or 'mental abnormality.'" Id. at 347.

[314] See Tex. Code Crim. Proc. Ann. art. 37.071, § 2(b)(1) (West 2019).

[315] See McLeod, supra note 3, at 545.

designation would not matter much.[316] But if a jurisdiction that wishes to solitarily confine death-sentenced people must periodically demonstrate that those people pose some meaningful threat, then capital prisoners whose age or functioning makes them nonthreatening would be spared that experience.[317]

2. Conditions of Nonpunitive Confinement

Treatment cases reflect the principle that, when the state confines people against their will, "the Constitution imposes . . . affirmative duties of care and protection"—which means that the state and its agents assume "responsibility for [their] safety and general well-being."[318] More specifically, detained people retain rights to sufficient safety, food, shelter, clothing, medical care, and freedom from bodily restraint.[319] Treatment cases center on things such as isolation time, diet, overcrowding, violence, vandalized cells, and the use of force or lack of professionalism among correctional personnel.[320]

Conditions-of-confinement cases are a subset of treatment cases. The distinction between *punitive* and *nonpunitive* detention is significant because it drives the conditions-of-confinement analysis.[321] Due process constraints on harms ancillary to nonpunitive confinement are at least as

[316] In *Wilkinson v. Austin*, 545 U.S. 209 (2005), the Supreme Court held that a procedural due process right attaches to custody-level determinations when a state correctional bureaucracy assigns its prisoners to different custody levels. See id. at 222–25. Lower courts, however, have generally held that the right does not attach to people who are automatically assigned to solitary confinement because they are on death row. See, e.g., Prieto v. Clarke, 780 F.3d 245, 252 (4th Cir. 2015) (holding that the population that was assigned to mandatory death-row confinement was not to be analyzed the same way as a noncapital prisoner who might be assigned to different custody levels upon entry).

[317] There is case law supporting the notion that "removing [an] inmate from general prison population and confining him to administrative segregation" implicates due process when the relocation "subjects an involuntarily confined individual to deprivations of liberty which are not among those generally authorized by his confinement." DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 200 n.8 (1989) (citing Hughes v. Rowe, 449 U.S. 5, 11 (1980)).

[318] Id. at 198, 200.

[319] See Youngberg v. Romeo, 457 U.S. 307, 315–16 (1982); see also *DeShaney*, 489 U.S. at 200 ("[W]hen the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs—e.g., food, clothing, shelter, medical care, and reasonable safety—it transgresses the substantive limits on state action set by the Eighth Amendment and the Due Process Clause.").

[320] See Hutto v. Finney, 437 U.S. 678, 687 (1978).

[321] See Ristroph, supra note 208, at 1381–82.

stringent as Eighth Amendment constraints on harms ancillary to punishment, and the Supreme Court has indicated that the state should not treat people in nonpunitive confinement like they are being punished.[322] Doctrinally speaking, due process generally requires that there be some reasonable relationship between the treatment and the (nonpunitive) reason for the detention.[323]

The best way to explain the due process bite in conditions-of-*nonpunitive*-confinement cases is to start with the confusion the Supreme Court has created through its conditions-of-*punitive*-confinement opinions. The Court has moved towards a rule that effectively places conditions of punitive confinement beyond the Constitution's reach when they do not qualify as punishment and held that conditions of punitive confinement are not punishment unless some specific correctional official sufficiently intended the condition to cause harm.[324] More colloquially, the argument goes something like this: The Eighth Amendment restricts punishment, and how can harm represent punishment unless the harm is sufficiently intended? For people convicted of crimes, then, the Constitution permits exceptionally harsh punishment because it isn't quite cruel, and it permits cruel treatment because it isn't quite punishment. This thread of Eighth Amendment jurisprudence draws withering criticism,[325] but I omit that discussion here because I want to make a simpler point. The Court has refused to import this conditions-of-

[322] See, e.g., Seling v. Young, 531 U.S. 250, 261–62 (2001) (discussing *Kansas v. Hendricks*, 521 U.S. 346, 363 (1997), in the context of SVP statutes).

[323] See id. at 265.

[324] The most important conditions-of-punitive-confinement decisions are *Estelle v. Gamble*, 429 U.S. 97 (1976), *Wilson v. Seiter*, 501 U.S. 294 (1991), and *Farmer v. Brennan*, 511 U.S. 825 (1994). Each of these cases involved a conditions-of-confinement challenge lodged by a prisoner serving a criminal, noncapital sentence. And in each case, the Court applied the deliberate indifference framework for Eighth Amendment claims. See *Farmer*, 511 U.S. at 828; *Wilson*, 501 U.S. at 303; *Gamble*, 429 U.S. at 104. By the time it decided *Farmer*, the Court seemed to settle on a rule that deliberate indifference marked a difference between punishment and nonpunitive conditions—rather than a difference between permitted and barred punishment. See *Farmer*, 511 U.S. at 838. In cases where a condition of punitive confinement was not punishment because a specific correctional official lacked sufficient intent to impose suffering, the Court seemed to treat the condition itself as constitutionally unrestricted. See id.

[325] See, e.g., Dolovich, supra note 208, at 896 (specifying "two serious conceptual problems" with *Farmer*'s logic); Alice Ristroph, Sexual Punishments, 15 Colum. J. Gender & L. 139, 167 (2006) ("This parsing of the concept of punishment is arbitrary and incoherent."); Margo Schlanger, The Constitutional Law of Incarceration, Reconfigured, 103 Cornell L. Rev. 357, 385 (2018) (describing *Farmer*'s move as a "glaring doctrinal problem").

punitive-confinement problem into the conditions-of-*nonpunitive*-confinement cases.[326]

Start with the first major conditions-of-nonpunitive confinement case, *Bell v. Wolfish*.[327] *Wolfish* contains familiar notes of deference to correctional officials, holding that a custodian "obviously is entitled to employ devices that are calculated to effectuate this detention."[328] Nevertheless, *Wolfish* held that a hardship may be imposed on someone subject to nonpunitive detention only when the hardship "is reasonably related to a legitimate governmental objective."[329] What creates potential tension with the conditions-of-*punitive*-confinement analysis is *Wolfish*'s suggestion that it barred only conditions that amounted to punishment.[330] *Wilson v. Seiter* and *Farmer v. Brennan* later indicated that custodial treatment was not "punishment" unless correctional officials caused harm with sufficient mens rea.[331] If the Court incorporated that definition of punishment into the nonpunitive-detention cases, then the Constitution would permit all systematic neglect unaccompanied by the mens rea of a particular correctional official. But the Court has never insisted that the definition of punishment from *Wilson* and *Farmer*—and its emphasis on the subjective intent of correctional officials—controls in nonpunitive detention inquiries.[332]

[326] See Catherine T. Struve, The Conditions of Pretrial Detention, 161 U. Pa. L. Rev. 1009, 1077 (2013).

[327] 441 U.S. 520, 535–36 (1979).

[328] Id. at 537.

[329] Id. at 539.

[330] See id. at 535.

[331] See, e.g., Farmer v. Brennan, 511 U.S. 825, 837 (1994) ("The Eighth Amendment does not outlaw cruel and unusual 'conditions'; it outlaws cruel and unusual 'punishments.'"); Wilson v. Seiter, 501 U.S. 294, 300 (1991) ("If the pain inflicted is not formally meted out *as punishment* by the statute or the sentencing judge, some mental element must be attributed to the inflicting officer before it can qualify.").

[332] Because the distinction between punitive and nonpunitive confinement remains under-attended, lower courts have been all over the map in their approaches to the constitutional constraints on detention that is not punishment. See Struve, supra note 326, at 1023. I have located decisions from every federal appeals court, other than the U.S. Court of Appeals for the First Circuit, using the reasonable-relationship standard to adjudicate conditions of nonpunitive confinement. See, e.g., Almighty Supreme Born Allah v. Milling, 876 F.3d 48, 55 (2d Cir. 2017); E. D. v. Sharkey, 928 F.3d 299, 307 (3d Cir. 2019); Williamson v. Stirling, 912 F.3d 154, 182 (4th Cir. 2018); Garza v. City of Donna, 922 F.3d 626, 632 (5th Cir. 2019); Malone v. Colyer, 710 F.2d 258, 261–62 (6th Cir. 1983), *abrogated on other grounds by* Neitzke v. Williams, 490 U.S. 319, 324 n.3 (1989); Mulvania v. Sheriff of Rock Island Cnty., 850 F.3d 849, 856 (7th Cir. 2017); Baribeau v. City of Minneapolis, 596 F.3d 465, 483 (8th Cir. 2010); Shorter v. Baca, 895 F.3d 1176, 1184 (9th Cir. 2018); Blackmon v. Sutton, 734

In fact, the Supreme Court moved in the other direction. It went on to recognize *Wolfish* as the source of the rules that, for nonpunitive detention, treatment is subject to the Due Process Clauses and the applicable due process constraints are equal to or greater than Eighth Amendment ones.[333] *Turner v. Safley* synthesized the Court's view of the major conditions-of-confinement cases to date,[334] and it elaborated on the prongs of the reasonable relationship test: the legitimacy and neutrality of the government objective; whether there are alternative, available means of exercising rights; the effect of any accommodation on other guards and prisoners; and the presence or absence of ready alternatives.[335] Sure, the reasonable relationship test applicable in nonpunitive-detention scenarios requires deference to correctional officials, but it requires less when there is strong evidence that the response to security threats is

F.3d 1237, 1241 (10th Cir. 2013); Jacoby v. Baldwin County, 835 F.3d 1338, 1345 (11th Cir. 2016); Jones v. Horne, 634 F.3d 588, 597–98 (D.C. Cir. 2011). The Eighth Amendment inquiry for punitive confinement has nonetheless leaked into the due process test for nonpunitive confinement, with some courts applying the deliberate indifference framework instead of the reasonable-relationship test. See Dolovich, supra note 208, at 886 n.15; see also, e.g., Whitney v. City of St. Louis, 887 F.3d 857, 860 (8th Cir. 2018) (applying deliberate indifference rule to pretrial detention); Dang v. Sheriff, Seminole Cnty. Fla., 871 F.3d 1272, 1279 (11th Cir. 2017) (same); Alderson v. Concordia Par. Corr. Facility, 848 F.3d 415, 419 (5th Cir. 2017) (same).

[333] For example, *Block v. Rutherford*, 468 U.S. 576, 584 (1984), involved challenges to certain pretrial detention practices. It specifically presented the question whether pretrial detainees had a constitutional right to contact visits and to watch cell shakedowns performed by correctional officers. See id. at 577. The Court held that "[t]he principles articulated in *Wolfish* govern resolution of this case" and restated the rule that nonpunitive disability violated due process if it was not reasonably related to a nonpunitive goal. Id. at 585. The Court, however, repeatedly emphasized that, with respect to the relationship between means and ends, correctional officials enjoyed considerable deference. See id. at 584–85. In the end, *Rutherford* permitted blanket bans on contact visits and on observation of cell shakedowns. See id. at 585–92; see also City of Revere v. Mass. Gen. Hosp., 463 U.S. 239, 240–45 (1983) (emphasizing that due process controlled and that those rights "are at least as great as the Eighth Amendment protections available to a convicted prisoner").

[334] 482 U.S. 78, 89–91 (1987). More specifically, *Turner* was styled as synthesis of four cases decided between 1974 and 1984: *Block v. Rutherford*, 468 U.S. 576 (1984); *Bell v. Wolfish*, 441 U.S. 520 (1979); *Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119 (1977); and *Pell v. Procunier*, 417 U.S. 817 (1974). *Turner* formally involved punitive detention, but the Court based the test it announced on its reading of *Wolfish*, which it discussed and cited extensively throughout the opinion.

[335] See *Turner*, 482 U.S. at 89–91; see also Overton v. Bazzetta, 539 U.S. 126, 132 (2003) (reaffirming these factors).

"exaggerated"[336]—including "substantial departure[s] from accepted professional judgment, practice, or standards."[337]

In fact, *Kingsley v. Hendrickson* narrated the post-*Wolfish* cases as having rejected an intentionality-based rule for nonpunitive-detention cases.[338] *Kingsley* was a use of force case intoning the rule that the state cannot impose punitive treatment on people in nonpunitive confinement, but the decision expressly rejects the idea that punishment must be based on "proof of intent (or motive) to punish."[339] Instead, "later precedent affirms" that a person in nonpunitive custody "can prevail by providing only objective evidence that the challenged governmental action is not rationally related to a legitimate governmental objective *or that it is excessive in relation to that purpose*."[340] The Court might have been deciding a use-of-force claim, but the conditions-of-nonpunitive-confinement cases logically predicated *Kingsley*'s holding.[341]

Although the Supreme Court has not been terrifically clear about the due process constraints on treatment in nonpunitive-confinement cases,[342] and even though due process certainly under-protects prisoners in nonpunitive custody,[343] a shift towards that framework is potentially significant for custody prior to execution. The Court has pointedly refused to apply the deliberate indifference framework to conditions-of-

[336] Florence v. Bd. of Chosen Freeholders, 566 U.S. 318, 328 (2012) (quoting *Rutherford*, 468 U.S. at 584–85).

[337] Youngberg v. Romeo, 457 U.S. 307, 323 (1982). *Romeo* was a case involving the involuntary commitment of an intellectually disabled person. See id. at 309.

[338] 576 U.S. 389, 391–92 (2015).

[339] Id. at 398.

[340] Id. (emphasis added) (first citing *Rutherford*, 468 U.S. at 585–86; then citing Schall v. Martin, 467 U.S. 253, 269–71 (1984); and then citing United States v. Salerno, 481 U.S. 739, 747 (1987)).

[341] See Schlanger, supra note 325, at 410 ("Doctrinally, the matter is not complicated: *Kingsley*'s objective standard necessarily governs pretrial conditions-of-confinement cases."). Nor did *Kingsley* refer to the "deliberate indifference" rule that was used to define punishment in some of the punitive detention cases.

[342] See Struve, supra note 326, at 1017; see also, e.g., Daniels v. Williams, 474 U.S. 327, 334 n.3 (1986) (refusing to reach whether objective recklessness would implicate the Due Process Clause in a nonpunitive conditions case).

[343] I am optimistic on margins and those margins matter, but I am not naïve enough to think that the current Supreme Court will develop the constitutional law of nonpunitive detention in ways that are extremely friendly to detained people. After all, the Court seems to have expanded the category of nonpunitive detention not to elevate the treatment of detainees, but so as to avoid constitutional constraints associated with criminal confinement.

nonpunitive-confinement cases,[344] and much of the suffering and systemic neglect of death-sentenced people persists because of a collective intuition that the experience is punishment for criminal transgression.[345] But if the nonpunitive status of the detention means that treatment must bear some meaningful relationship to incapacitation,[346] then prevailing pre-execution practices are on shakier doctrinal footing. For example, data indicating that solitary confinement meaningfully protects detention communities from the threat of death-sentenced people is virtually nonexistent.[347] The same is true about data showing that

[344] See Youngberg v. Romeo, 457 U.S. 307, 312 n.11 (1982) (holding that the district court committed an instructional error when it told the jury to use a deliberate indifference standard in a nonpunitive-conditions case).

[345] See Struve, supra note 326, at 1034; see also Schlanger, supra note 325, at 419 (noting that deliberate indifference standard immunizes culpable ignorance).

[346] In situations where lower courts have used a deliberate indifference standard to adjudicate conditions of nonpunitive confinement, that decision usually results from a prisoner-plaintiff failing to plead a due process standard. See Struve, supra note 326, at 1023–24.

[347] The most useful data on incapacitation probably comes from Missouri, which eliminated its death row in the 1990s and integrated lower-risk prisoners with general population at a maximum-security facility. See Mark D. Cunningham & Mark P. Vigen, Death Row Inmate Characteristics, Adjustment, and Confinement: A Critical Review of the Literature, 20 Behav. Sci. & L. 191, 205–06 (2002). Specifically, correctional officials evaluated each prisoner to determine the appropriate security classification and only two percent were reassigned to a form of administrative segregation based on either a disciplinary infraction or a determination that they posed elevated safety risks to others. See Mark D. Cunningham, Thomas J. Reidy & Jon R. Sorensen, Is Death Row Obsolete? A Decade of Mainstreaming Death-Sentenced Inmates in Missouri, 23 Behav. Sci. & L. 307, 312 (2005). Over twenty percent of prisoners who had been on Missouri death row were assigned to an "honor dorm" for the best-behaved prisoners. See id. at 316. Individuals who were formerly on death row behaved violently at rates that were significantly lower than people within the same facility who served lesser sentences, including those who were parole eligible. See id. at 312–15. And the Missouri-specific data is consistent with a much more robust empirical literature indicating that murder convictions poorly predict prison violence. See also Cunningham et al., supra note 176, at 185, 190 (concluding that "a growing body of data demonstrate these supermaximum procedures to be unwarranted as a violence risk intervention" based on data from Arkansas, Missouri, and Texas); McLeod, supra note 3, at 550–51 (collecting studies). That's the data, but why? The first reason is something like the concept of proportionality in diplomatic relations: the possibility of a higher penalty operates as an incentive to avoid the outer registers of misbehavior. See George Lombardi, Richard D. Sluder & Donald Wallace, Mainstreaming Death-Sentenced Inmates: The Missouri Experience and Its Legal Significance, 61 Fed. Prob. 3, 6 (1997); see also McLeod, supra note 3, at 549–50 (discussing this concept). The possibility of solitary confinement operates as an incentive for the behavior of prisoners in general population. The second reason is that, unlike most convicted of noncapital crimes, death-sentenced prisoners do not expect to leave, and are therefore more reputationally invested in facility life; they do not want to lose small privileges or fall out of favor with correctional leadership because they will be at the facility until they die. See id.

solitary confinement reduces the risk of prison escape.[348] The doctrinal rule against "exaggerated" responses to security threats therefore looms as quite the impediment to jurisdictions insisting that their pre-execution practices reasonably relate to incapacitation or escape prevention.[349]

C. The Doctrinal Impasse

One of the most significant consequences of a nonpunitive framework for pre-execution confinement is that it resolves a doctrinal puzzle. Because courts inevitably decide the constitutional implications of pre-execution confinement just before executions take place, the recurring Eighth Amendment question is whether executions can proceed after the already-experienced punishment. The timing of the Eighth Amendment question puts courts in a bind.

On the assumption that the suffering before execution is punitive, one must accept one of two propositions—either (1) that virtually all death sentences are unconstitutional because adding an execution on top of punitive confinement violates rules against cruel and unusual punishment, or (2) the death sentence is constitutional because arbitrariness and punitive suffering are simply the price that death-sentenced people pay to enforce their rights. Jurists must either abandon capital punishment or ignore well-established constitutional principles. If pre-execution confinement is punishment, then there is no other way.

As discussed in Subsection I.B.1, Supreme Court Justices have clashed over this issue in auxiliary opinions, and every Justice has approached the question as one of punishment.[350] One group of Justices believes that a sufficient increment of pre-execution punishment renders the execution cruel and unusual, and another believes that the state must not permit prisoner-caused delay to jeopardize the sentence.[351] These responses to the dilemma leave much to be desired, for different reasons.

The argument that delay-based hardship is punitive—and that it would therefore bar subsequent executions—runs headlong into the Supreme Court's insistence that questions of sentence implementation not existentially threaten capital punishment. This attitude is evident in the

[348] See McLeod, supra note 3, at 547.

[349] Cf., e.g., Schulhofer, supra note 227, at 84 ("Thus the due process clause imposes at least two requirements—instrumental rationality and a positive balance of benefits over costs, with due regard for the weighty nature of the individual liberty on one side of the scales.").

[350] See supra notes 106–13 and accompanying text.

[351] See id.

Lackey opinions, as well as in the Court's method-of-execution decisions. In *Bucklew v. Precythe*, for example, the Court heard a method-of-execution challenge to a lethal injection drug.[352] *Bucklew* held that, because the Constitution permits the death penalty, there must be at least one permissible method of execution, no matter how painful.[353] If the Court believes deeply in the proposition that the state must be able to implement the death penalty, then it will not condone a rule under which the length of post-conviction litigation can short-circuit executions.

On the other hand, arguments that Justices have made against *Lackey* claims are not strong. If confinement before execution is punitive hardship, then it triggers now-familiar constitutional problems associated with excessive punishment and arbitrary treatment. Justice Thomas is perhaps the jurist who has tackled this issue most directly. He (accurately) attributes the delay in part to the complex and difficult-to-expeditiously-enforce qualities of post-1976 capital punishment law.[354] In *Knight v. Florida*, for example, he wrote that "[i]t is incongruous to arm capital defendants with an arsenal of 'constitutional' claims which they may delay their executions, and simultaneously to complain when executions are inevitably delayed."[355]

But how convincing is the argument that courts can just ignore limits on punitive hardship when such hardship results from a person's attempt to enforce their rights in court? Is there any other context in which the state imposes punishment that way? Moreover, any suggestion that prisoners bear all responsibility for delay relies on a stilted, simplistic view of post-conviction process. The state often bears substantial responsibility for the length of pre-execution confinement because government litigants delay litigation, courts delay adjudication,

[352] 139 S. Ct. 1112, 1122 (2019).

[353] See id. at 1125. This proposition raises vexing theoretical questions. If the only feasible execution methods are torturously barbaric, does *Bucklew* really mean that the Eighth Amendment remains satisfied simply because there are no alternatives? Cf. Glossip v. Gross, 576 U.S. 863, 970–71 (2015) (Sotomayor, J., dissenting) (criticizing the implication in another case). And does the constitutional acknowledgment of capital punishment mean that jurisdictions can impose it without respect to violations of other rights, such as equal protection?

[354] See Garland, supra note 36, at 45.

[355] 528 U.S. 990, 992 (1999) (Thomas, J., concurring); see also, e.g., Johnson v. Bredesen, 558 U.S. 1067, 1072–73 (2009) (Thomas, J., concurring) (making a similar argument); Thompson v. McNeil, 556 U.S. 1114, 1116–17 (2009) (same).

bureaucracies do not seek timely executions, or the state fails to guarantee legal services that would accelerate the process.[356]

A nonpunitive framework for pre-execution confinement—a due process approach that entails improved conditions and reduced hardship—escapes this dilemma. People who find the punitive framework barbaric can make a case that does not depend on the dead-end argument that the modern death penalty is functionally unconstitutional. And those who sympathize with Justice Thomas can insist on the death penalty without taking logically unsound positions about the constitutionality of punishment under the Eighth Amendment. The state can execute people that it has confined for decades, but it must treat them better during their confinement.

CONCLUSION

Is incarceration before execution punishment, or is it nonpunitive confinement? A great deal of hardship and suffering lives in the difference. Academic work and decisional law treat the experience as punitive suffering, but the institutional design and implementation of pre-execution confinement is flatly inconsistent with that understanding. And even if the hardship were punitive, then there would be near-insurmountable problems of justification—why could the state impose more than the maximum allowable punishment, and why could it distribute that punishment arbitrarily? Fortunately, constitutional law can comfortably accommodate a nonpunitive approach to pre-execution confinement, which recognizes that the dominant state interest is incapacitation, not punishment. The results are carceral practices that still provide the necessary social protection, but that could do so with less tolerance for pervasive neglect, dehumanization, and unnecessary suffering.

[356] See Christopher, supra note 118, at 461 n.259 (collecting decisional examples).