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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

Merel Pontier

*"The degree of civilization in a
society can be judged by
entering its prisons."
—Fyodor Dostoyevsky*

Over the past twelve months, I have researched and compared housing policies for death-sentenced and non-death sentenced prisoners throughout the United States. I chose this topic because the death penalty and circumstances on death row have had my interest for many years. I am from the Netherlands, where the death penalty is forbidden by Protocol No. 6 of the European Convention on Human Rights. The use of prolonged and indefinite solitary confinement in European prisons has mostly been banned as well. My seven-year friendship with Clinton Young, a death-sentenced individual in Texas, motivated me to move to Texas to study at the University of Texas School of Law and become an attorney, to help those on death row, and to research conditions on death row. Countless times I visited death-sentenced prisoners in the Polunsky Unit in Livingston, Texas and observed the devastating effects of indefinite solitary confinement on death-sentenced prisoners, their families, and their friends. These prisoners are confined to a small cell for at least twenty-two hours a day and unable to hug their loved ones for years. These confinement conditions add inhumane treatment to the most severe and irreversible punishment that exists.

With this article, I aim to advance the fight against the death penalty and the use of indefinite solitary confinement on death row in the United States. I am thankful and indebted to the attorneys who have shared their

experiences and insights on death row conditions in states where they represent those on death row. Without their help, I would have never been able to gather information in this report on the conditions of death-sentenced prisoners throughout the United States since such information is rarely published. Not only am I grateful for their help, but I admire them for their tireless efforts to fight for those who are among the least valued in society. These attorneys are the ones who are making the real difference.

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INTRODUCTION

In 2016, the United States had a total adult correctional population of 6,613,500.¹ The United States held an estimated 4.4% of its state and federal inmates and 2.7% of jail inmates in administrative segregation or solitary confinement on an average day between 2011-12.² As of April 2020, the 28 states with the death penalty held 2,603 death-sentenced prisoners.³ Of those 28 death penalty states, this research will show that 12 states automatically place death-sentenced prisoners in indefinite solitary confinement—a placement solely based on their death sentence. In 2017, the average time between sentencing and execution was 20.25 years.⁴ Thus, in some states, inmates may spend the entire 20 years between sentencing and execution in solitary confinement.⁵

Several states are facing challenges to the automatic placement of death-sentenced prisoners in indefinite solitary confinement. In 2017, three death-sentenced prisoners filed a lawsuit challenging Florida’s classification procedure, arguing that this type of placement in indefinite solitary confinement violates the Eighth Amendment prohibiting cruel and unusual punishment.⁶ The prisoners also argued that solitary confinement without meaningful opportunity to obtain relief violates the

¹ U.S. DEP’T OF JUST., KEY STATISTIC: TOTAL CORRECTIONAL POPULATION, BUREAU OF JUSTICE STATISTICS (Aug. 2020), <https://www.bjs.gov/content/pub/pdf/cpus1718.pdf> [<https://perma.cc/9LDL-WFYW>].

² U.S. DEP’T OF JUST., USE OF RESTRICTIVE HOUSING IN U.S. PRISONS AND JAILS (Oct. 2015), <https://www.bjs.gov/content/pub/pdf/urhuspj1112.pdf> [<https://perma.cc/UG96-QJP8>].

³ DEATH PENALTY INFORMATION CENTER, *Death Row Prisoners by State* (Oct. 1, 2020), <https://deathpenaltyinfo.org/death-row/overview..>

⁴ *Time on Death Row*, DEATH PENALTY INFORMATION CENTER, <https://deathpenaltyinfo.org/death-row/death-row-time-on-death-row> [<https://perma.cc/45UC-UGHE>].

⁵ *Id.*

⁶ Class Action Complaint and Demand for Jury Trial at 3, *Davis v. Inch*, No. 3:17-cv-820-J-34PDB, 2019 WL 1400465 (M.D. Fla. July 19, 2017) [hereinafter *Complaint Davis*].

Fourteenth Amendment Due Process Clause.⁷ Death-sentenced prisoners in Florida at that time were automatically placed in a unit separate from other prisoners where they spent at least twenty-three hours a day alone in their cells with virtually no human contact.⁸ It is alleged that there was no possibility to have this placement reviewed, and there was no individualized assessment to determine whether these prisoners posed a threat to others that justified their placement in indefinite solitary confinement.⁹

This lawsuit sparked my interest in housing and placement policies for death-sentenced prisoners and, specifically, their confinement conditions. With this in mind, I set out to compare housing policies for death-sentenced prisoners with those for other prisoners in order to understand how placement for death-sentenced and other prisoners varies among the 28 death-penalty states, and subsequently, to determine which states place death-sentenced prisoners automatically in solitary confinement because of their sentences. Relevant to this question is the housing conditions of death-sentenced prisoners and whether policies include possibilities for placement review. Beyond the question of whether death-sentenced prisoners are placed in solitary confinement, this research seeks to build on earlier findings by examining how states determine prisoners' placement, including a comprehensive look at relevant housing policies and procedures. The effects of solitary confinement have already been established through extensive research; this article touches on the psychological harm of solitary confinement, citing international standards and court decisions that reaffirm these findings.¹⁰ In sum, this research seeks to present an accurate and comparative examination of prisoners' lived experiences on death row who await their ultimate punishments in largely un-examined conditions that vary largely state-by-state.

Sources for this article include data from state corrections departments such as regulations and classification manuals. However, some states have kept their procedures or the conditions on death row classified. Therefore, this article also draws on other sources, such as information from defense attorneys and their death-sentenced clients. Their names will remain confidential throughout this article to protect the privacy of these defense attorneys and their clients.

The focus of this research is limited in several ways. First, it focuses exclusively on male prisoners. Of the 2,603 prisoners currently sentenced to death in the United States, only 53, or roughly 2 percent, are female.¹¹ Many states have different classification policies for female

⁷ *Id.* at 29.

⁸ *Id.* at 6.

⁹ *Id.* at 3.

¹⁰ See AMNESTY INTERNATIONAL, SOLITARY CONFINEMENT IN THE USA (2013) [hereinafter SOLITARY CONFINEMENT].

¹¹ *Women*, DEATH PENALTY INFORMATION CENTER, <https://deathpenaltyinfo.org/death->

prisoners and house them in different prisons. In fact, some states place male, but not female, death-sentenced prisoners in solitary confinement.¹² Examining separate policies in each state for female death-sentenced prisoners requires further research. Second, this research focuses on state law and procedures and does not include death-sentenced prisoners convicted under federal law or in military custody. As of April 2020, there were 62 death-sentenced prisoners on federal death row and 4 from the United States military.¹³ Third, as confinement conditions are subject to change, it is good to keep in mind that this article should be seen as a point-in-time examination, October 2020, of policies which may change in subsequent months and years—especially in light of pending legal actions described in this article.¹⁴ Fourth, this research does not take into account any changes in conditions made as a response to the global pandemic as a result of COVID-19, as those changes are meant to be temporary measures. Finally, this article does not consider special overrides of the general housing policies. Several states have special overrides for certain groups of prisoners, meaning these prisoners are not classified in accordance with the standard housing policies. This could be due to medical conditions that require placement in a certain medical unit or prisoners that need to be separated from the general population because of the nature of the crime they were convicted of, such as sex offenders. Thus, while examining all prisoner classification systems, these overrides have not been taken into account. Nonetheless, the information presented here presents a comprehensive comparative analysis of the current state of housing policies for death-sentenced prisoners in 28 states and establishes a foundation for further research. This article offers significant insights into how the treatment of death-sentenced prisoners differs from that of other prisoners among prison systems across the United States.

This article starts by presenting research on international and the United States standards in relation to the use of prolonged and indefinite solitary confinement. The following section presents an overview of the housing policies of death-sentenced and other prisoners, including a close look at the factors taken into account when placing prisoners in certain custody levels and the availability of reclassification. This section also discusses the housing conditions of death-sentenced prisoners in each state. The next section explores the possible constitutional violations

row/women [<https://perma.cc/B7J8-34ZE>].

¹² Texas, for example, only places male death-sentenced prisoners in solitary confinement: Joy Diaz, *Though Texas No Longer Uses Solitary Confinement as Punishment, Many Inmates Still Live Alone*, TEXAS STANDARD (Oct. 12, 2017), <https://www.texasstandard.org/stories/though-texas-no-longer-uses-solitary-confinement-as-punishment-many-inmates-still-live-alone/> [<https://perma.cc/T3WY-MCZY>].

¹³ DEATH PENALTY INFORMATION CENTER, *supra* note 3.

¹⁴ After the writing of this article, in February 2021, the Virginia legislature voted to abolish the death penalty. Denise LaVoie & Sarah Rankin, *Virginia lawmakers vote to abolish the death penalty*, AP NEWS (Feb. 22, 2021), <https://apnews.com/article/virginia-death-penalty-repeal-governor-c98c16a996037a4d1e1d497787b7e6f1> [<https://perma.cc/HY39-DJK9>].

created by the automatic use of prolonged or indefinite solitary confinement, looking closely at the Eighth and Fourteenth Amendments. The following section presents research on recent challenges by death-sentenced prisoners to their automatic placement in solitary confinement. The conclusion summarizes these findings and proposes the next steps for researchers, policymakers, and practitioners. A detailed overview of conditions and housing policies of death-sentenced prisoners and other prisoners can be found at Table 1 and Table 2 at the end of this paper. The information uncovered in this report points to a significant difference in the housing practices of death-sentenced prisoners and other prisoners in death penalty states.

I. INTERNATIONAL AND NATIONAL (U.S.) STANDARDS AND PRACTICES

A. International Standards

The boundaries of solitary confinement, in terms of both its definition and usage, have been clearly enumerated by international standards. In 1955, the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders adopted the Standard Minimum Rules for the Treatment of Prisoners.¹⁵ In December 2015, the UN General Assembly adopted revised rules, which are now also known as the Mandela Rules.¹⁶ Rule 43 of these rules states: “In no circumstances may restrictions or disciplinary sanctions amount to torture or other cruel, inhuman or degrading treatment or punishment.”¹⁷ Rule 43 also explicitly prohibits the use of solitary confinement when it is prolonged or indefinite.¹⁸ Rule 44 defines prolonged solitary confinement as the confinement of prisoners for twenty-two or more hours in a day without meaningful human contact for more than fifteen consecutive days.¹⁹ Amnesty International has further clarified that this standard should not be read as implying that prison authorities can hold prisoners in isolation for 21.5 hours a day—certainly not routinely or for prolonged periods of time—without it being qualified as solitary confinement.²⁰ The mental effects of confinement for just under twenty-two hours a day would be

¹⁵ *Nelson Mandela Rules*, UNITED NATIONS, https://www.un.org/en/events/mandeladay/mandela_rules.shtml [https://perma.cc/P5BH-FCSA].

¹⁶ *Id.*

¹⁷ G.A. Res. 70/175, *Nelson Mandela Rules*, at 16 (Dec. 17, 2015).

¹⁸ *Id.*

¹⁹ *Id.* at 17.

²⁰ AMNESTY INTERNATIONAL, *INHUMAN AND UNNECESSARY: HUMAN RIGHTS VIOLATIONS IN DUTCH HIGH-SECURITY PRISONS IN THE CONTEXT OF COUNTERTERRORISM* 16 (2017) [hereinafter *INHUMAN AND UNNECESSARY*].

similar to those of confinement for a full twenty-two hours or more.²¹ Thus, while the Mandela Rules set the definition of solitary confinement at twenty-two hours, to determine if conditions amount to solitary confinement, all conditions of confinement must be taken into account. Rule 45 of the Mandela Rules states that solitary confinement shall only be used in exceptional cases as a last resort, as short as possible, and be subject to independent review.²² Most importantly, for purposes of this research, Rule 45 further states that the imposition of solitary confinement shall not be imposed by virtue of a prisoner's sentence.²³ Even though the Mandela Rules are considered 'soft law' and therefore not binding, the United States has ratified the binding International Treaty on Civil and Political Rights ("ITCPR"), which requires consideration of the Mandela Rules.²⁴

International policies on solitary confinement reflect a general consensus on certain limitations on its use. In addition to the ITCPR, the United States has ratified the Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment ("CAT").²⁵ Although neither the ITCPR nor the CAT explicitly forbid the use of prolonged solitary confinement, they both prohibit cruel, inhumane, and degrading treatment or punishment.²⁶

Accordingly, the United Nations High Commissioner for Refugees states that prolonged solitary confinement may amount to acts prohibited by articles of the ITCPR and the CAT.²⁷ The United Nations Human Rights Council has implemented several special procedures to promote and monitor human rights.²⁸ One of these procedures is the appointment of individual, independent human rights experts who report and advise on human rights issues, such as the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.²⁹ The Special Rapporteur, in his 2013 interim report, called for a ban on the use of indefinite solitary confinement either as part of a judicially-imposed sentence or as a disciplinary measure.³⁰ The Special Rapporteur's report recognizes that solitary confinement often causes

²¹ *Id.*

²² G.A. Res. 70/175, *supra* note 17, at 17.

²³ *Id.*

²⁴ Merel E. Pontier, *Langdurige eenzame opsluiting onder de loep*, 14 NJB 931, 932 (2018).

²⁵ United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85 [hereinafter *Convention Against Torture*].

²⁶ *Id.*; International Covenant on Civil and Political Rights, art. 7, Dec. 16, 1966, S. Exec. Doc. No. 95-2 (1978), 999 U.N.T.S. 171.

²⁷ U.N. Human Rights Comm., *Compilation of Gen. Comments and Gen. Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.9 (Vol. I), at 178, 200 (May 27, 2008).

²⁸ Juan E. Méndez (Special Rapporteur), U.N. Off. On Drugs and Crime, *Interim Rep. of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, ¶ 61 UN Doc. A/68/295 (Aug. 9, 2013).

²⁹ INTERNATIONAL JUSTICE RESOURCE CENTER, *Special Procedures of the UN Human Rights Council*, <https://ijrcenter.org/un-special-procedures/> [<https://perma.cc/KSK3-L7JZ>].

³⁰ Méndez, *supra* note 28, at ¶ 61.

“mental and physical suffering or humiliation that amounts to cruel, inhuman, and degrading treatment or punishment.”³¹ When intentionally used for purposes such as punishment and resulting in severe pain and suffering, solitary confinement amounts to torture, according to the Special Rapporteur’s report.³² Further, the report expressly mentions that “no prisoner, including those serving life sentences and prisoners on death row, shall be held in solitary confinement merely because of the gravity of the crime.”³³ If solitary confinement is imposed at all, then it should only be imposed in “very exceptional circumstances, as a last resort, for as short as time as possible and with established safeguards in place as after obtaining authorization of a competent authority and an independent review.”³⁴

There are three regional human rights tribunals and subsequent conventions on human rights: the Inter-American Court of Human Rights and the American Convention in Human Rights, the European Court of Human Rights together with the European Convention of Human Rights, and the African Court of Human and Peoples’ Rights together with the African Charter on Human and Peoples’ Rights.³⁵ The American Convention on Human Rights has been ratified in twenty-five countries in North and South America since its adoption in 1969.³⁶ The United States has not ratified this convention.³⁷ Article 5 states that “no one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment.”³⁸ Any person who is deprived of his or her liberty shall be treated with respect for the inherent dignity of the human person.³⁹ The Inter-American Court of Human Rights applies and interprets the American Convention on Human Rights.⁴⁰ The Inter-American Court of Human Rights has stated that the use of solitary confinement for extended periods of time shows a lack of respect for the dignity inherent to all human beings in all circumstances and violates the right not to be subjected to cruel, inhuman, and degrading treatment or punishment.⁴¹ The European Convention on Human Rights is an international human rights treaty between forty-seven member states of the Council of Europe.⁴² Article 3 of the Convention prohibits the use of torture or

³¹ *Id.* at ¶ 60.

³² *Id.*

³³ *Id.* at ¶ 61.

³⁴ *Id.* at ¶ 60.

³⁵ INTER-AMERICAN COURT OF HUMAN RIGHTS, ABC INTER-AMERICAN COURT OF HUMAN RIGHTS 1, 4 (2020).

³⁶ *What is the IACHR?*, INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, <https://www.oas.org/en/iachr/mandate/what.asp> [https://perma.cc/SN6M-RHCE].

³⁷ *Id.*

³⁸ Organization of American States, American Convention on Human Rights, art. 5.2, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123.

³⁹ *Id.*

⁴⁰ INTER-AMERICAN COURT OF HUMAN RIGHTS, *supra* note 35.

⁴¹ *Hilaire v. Trinidad*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 94, §156 (June 21, 2002).

⁴² *What is the European Convention on Human Rights*, AMNESTY INTERNATIONAL, <https://www.amnesty.org.uk/what-is-the-european-convention-on-human-rights>

inhuman or degrading treatment or punishment.⁴³ The European Court of Human Rights interprets and applies the European Convention on Human Rights.⁴⁴ In *Horych v. Poland*, the European Court of Human Rights ruled that the use of solitary confinement for seven years and nine months, without human contact or structured, constructive, out-of-cell activities, and without justification for prolonged continuation, constituted a violation of Article 3 of the Convention.⁴⁵ In *A.B. v. Russia*, the European Court on Human Rights stated that it is essential that prisoners have an independent judicial authority review the merits of and reasons for a prolonged measure of solitary confinement.⁴⁶ In 2006, the Council of Europe introduced the non-binding European Prison Rules as an official policy.⁴⁷ Rule 60.5 states that solitary confinement shall be imposed as a punishment only in exceptional cases and for a specified period of time, which shall be as short as possible.⁴⁸ The Rules also prohibit the use of any inhumane or degrading punishments.⁴⁹ Africa has contributed to international policies restricting the use of prolonged solitary confinement by adopting the African Charter on Human and Peoples' Rights ("African Charter") and establishing the African Court on Human and Peoples' Rights.⁵⁰ Thirty states are party to the African Charter, but only nine have recognized the African Court's competence.⁵¹ Article 5 of the Charter states that all forms of exploitation and degradation of people—specifically "slavery, slave trading, torture, and punishment or treatment that is cruel, inhuman or degrading punishment and treatment"—are prohibited.⁵² In *Achuthan and Amnesty International v. Malawi*, the African Court on Human and Peoples' Rights ruled that the use of "excessive solitary confinement" violated Article 5 of the African Charter.⁵³ Again, in *Malawi African Association v. Mauritania*, 54/91, the Court ruled that the widespread utilization of solitary confinement was torture and a cruel, inhuman, and degrading form of treatment that constituted a violation of Article 5.⁵⁴ Closer to the

[<https://perma.cc/8FAG-SL2K>].

⁴³ Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, Article 3, Nov. 4, 1950, E.T.S. No. 5.

⁴⁴ *Id.*

⁴⁵ *Horych v. Poland*, 13621/08 Eur. Ct. H.R. at 93, 95–103 (2012).

⁴⁶ *A.B. v. Russia*, 1439/06 Eur. Ct. H.R. at 111 (2010).

⁴⁷ Eur. Consult. Ass., *Recommendation Rec(2006)2 of the Committee of Ministers to Member States on the European Prison Rules* (Jan. 11, 2006), <https://www.refworld.org/docid/43f3134810.html> [<https://perma.cc/4F5Z-6JWP>].

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS, <https://www.african-court.org/en/> [<https://perma.cc/FQ5H-86WA>].

⁵¹ *Id.*

⁵² African (Banjul) Charter on Human and People's Rights art. 5, June 27, 1981, OAU Doc. CAB/LEG/67/3.

⁵³ *Achutan and Amnesty International v. Malawi*, Communication 64/92, 68/92, and 78/92, African Commission on Human and Peoples' Rights [Afr. Comm'n H.P.R.], (1995).

⁵⁴ *Malawi African Association v. Mauritania*, Communication 54/91, 61/91, 98/93, 164/97, 196/97, and 210/98, Afr. Comm'n H.P.R., ¶ 115 (2000), <https://www.achpr.org/sessions/descions?id=114>

United States, in Canada, British Columbia's Court of Appeal put an end to the use of prolonged solitary confinement in a recent landmark judgment, ruling that placing an inmate in solitary confinement for more than 15 consecutive days constituted cruel and unusual punishment.⁵⁵ Canada subsequently passed Bill C-83 in December 2019, which ended the practice known as "administrative segregation" in its federal prisons.⁵⁶

The international consensus is that the use of indefinite solitary confinement constitutes cruel, inhuman, and degrading punishment or treatment. The Inter-American Court of Human Rights, the European Court of Human Rights, and the African Court on Human and Peoples' Rights have all ruled that the use of solitary confinement, for extensive periods of time or without meaningful human contact, violates their respective conventions on human rights—specifically bans on cruel, inhuman and degrading treatment or punishment. International treaties and policies agree that solitary confinement should not be imposed solely based on the prisoner's punishment or the crime and should only be used as a last resort, in the least restrictive way possible, and no longer than is deemed necessary. The Mandela Rules explicitly prohibit the use of solitary confinement when it is prolonged or indefinite.⁵⁷ The United States has ratified the CAT and the International Covenant on Civil and Political Rights ("ICCPR"), which require consideration of the Mandela Rules.⁵⁸

B. National (U.S.) Standards

While there is a strong international consensus on the use of prolonged and indefinite solitary confinement, such consensus is not present within the United States. The American Bar Association ("ABA"), in its Standards on Treatment of Prisoners, states that correctional authorities should use long-term segregated housing sparingly and only for reasons related to a very severe disciplinary infraction in which safety and security is seriously threatened or when there is a "continuing and serious threat" to the security of other prisoners or the prison's staff.⁵⁹ Even in segregated housing, prisoners should have meaningful forms of mental, physical, and social

[<https://perma.cc/CU65-PN6V>].

⁵⁵ British Columbia C. L. Ass'n v. Canada (Attorney General), BCJ No 53, 609 (2018 Can. BC S. Ct.).

⁵⁶ An Act to Amend the Corrections and Conditional Release Act and Another Act, S.C. 2019, c 27, (Can.).

⁵⁷ INHUMAN AND UNNECESSARY, *supra* note 20, at 36.

⁵⁸ Convention Against Torture, *supra* note 25; United Nations International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171.

⁵⁹ ABA STANDARDS FOR CRIMINAL JUSTICE: TREATMENT OF PRISONERS, Rule 23-2.7 (AM. BAR ASS'N 2010).

stimulation.⁶⁰ On the other hand, the American Correctional Association (“ACA”) does not reject the use of solitary confinement in prisons.⁶¹ The ACA’s standards for Restrictive Housing, defined as confinement in a cell for at least twenty-two hours a day for more than thirty days, state that the use of restrictive housing “shall be limited to those circumstances that pose a direct threat to the safety of persons or a clear threat to the safe and secure operations of the facility.”⁶² When segregation units exist, the ACA Standards state that written policies and procedures should govern their operation.⁶³ The Standards also state that all segregation housing units should provide living standards that approximate those of the general population.⁶⁴ The Standards do not limit the use of restrictive housing to a certain period of time, but they do state that, when confinement exceeds thirty consecutive days, the inmate should receive regular psychological assessments to ensure behavioral health.⁶⁵ The United States Department of Justice (“DOJ”), however, explicitly rejects the use of prolonged solitary confinement without penological purpose.⁶⁶ In a 2016 report, the DOJ recommended that prisoners be put in the least restrictive settings necessary, that restrictions on an inmate’s housing should serve a specific penological purpose, and that such restrictions should not be imposed for longer than is necessary to achieve that purpose.⁶⁷ Furthermore, according to the DOJ, if inmates need to be segregated from the general population, those inmates should be housed in safe and humane conditions.⁶⁸ Thus, without an explicit rejection of or limitation on the use of solitary confinement, at least some national consensus exists amongst governmental agencies that prolonged solitary confinement should be used to serve specific penological purposes.

The national consensus amongst federal courts within the United States is that there is a general concern about the psychological harm caused by the use of solitary confinement. The Supreme Court of the United States has not yet ruled whether the use of automatic prolonged or indefinite solitary confinement violates the United States Constitution, but several Justices and federal courts have expressed concerns about the constitutionality of these confinement conditions.⁶⁹ Justice Breyer

⁶⁰ *Id.*

⁶¹ See AM. CORRECTIONAL ASS’N, STANDARDS FOR ADULT CORRECTIONAL FACILITIES, STANDARDS SUPPLEMENT, 4-4133 (4th ed. 2017).

⁶² AM. CORRECTIONAL ASS’N, RESTRICTIVE HOUSING EXPECTED PRACTICES, Standard 4-RH-0001 (2018) [hereinafter RESTRICTIVE HOUSING].

⁶³ AM. CORRECTIONAL ASS’N, *supra* note 61, at 4-4249.

⁶⁴ *Id.* at 4-4141.

⁶⁵ *Id.* at 4-4256.

⁶⁶ U.S. DEP’T OF JUST., REPORT AND RECOMMENDATIONS CONCERNING THE USE OF RESTRICTIVE HOUSING, 1 (Jan. 2016).

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ See *Ruiz v. Texas*, 137 S. Ct. 1246, 1247 (2017) (Breyer, J., dissenting); *Davis v. Ayala*, 576 U.S. 257, 289 (2015) (Kennedy, J., concurring); and *Glossip v. Gross*, 576 U.S. 863, 926 (2015)

dissenting in *Ruiz v. Texas* stated: “If extended solitary confinement alone raises serious constitutional questions, then 20 years of solitary confinement, all the while under threat of execution, must raise similar questions, and to a rare degree, and with particular intensity.”⁷⁰ Justice Kennedy, in *Davis v. Ayala*, stated:

Of course, prison officials must have discretion to decide that in some instances temporary, solitary confinement is a useful or necessary means to impose discipline and to protect prison employees and other inmates. But research still confirms what this Court suggested over a century ago: Years on end of near-total isolation exact a terrible price.⁷¹

In *Glossip v. Gross*, Justice Breyer stated that “it is well documented that [] prolonged solitary confinement produces numerous deleterious harms” and that “the dehumanizing effect of solitary confinement is aggravated by uncertainty as to whether a death sentence will in fact be carried out.”⁷² Therefore, Breyer states that he is not surprised that many death row inmates volunteer to be executed, given the uncertainty and the negative effects of solitary confinement.⁷³ Federal courts have also expressed concerns about the psychological harm caused by prolonged solitary confinement. The Fourth Circuit stated that “prolonged solitary confinement exacts a heavy psychological toll that often continues to plague an inmate’s mind even after he is re-socialized.”⁷⁴ The Third Circuit recently reviewed the “robust body of scientific research on the effects of solitary confinement” and found a “scientific consensus” that such confinement “is psychologically painful, can be traumatic and harmful, and puts many of those who have been subjected to it at risk of long-term damage.”⁷⁵ The Third Circuit in *Palakovic v. Wetzel* stated that solitary confinement poses such an objective risk of serious psychological and emotional harm to inmates that it may violate the Eighth Amendment.⁷⁶ In *Wilkerson v. Stalder*, the Middle District of Louisiana stated that “it is obvious that being housed in a tiny cell for twenty-three hours a day for over three decades results in serious deprivations of human needs.”⁷⁷ In *McClary v. Kelly*, a New York District Court observed that it did not need to decide whether a

(Breyer, J., dissenting).

⁷⁰ *Ruiz*, 137 S. Ct. at 1247.

⁷¹ *Ayala*, 576 U.S. at 289.

⁷² *Gross*, 576 U.S. at 926 (Breyer, J., dissenting).

⁷³ *Id.* at 928.

⁷⁴ *Incumaa v. Stirling*, 791 F.3d 517, 534 (4th Cir. 2015).

⁷⁵ *Williams v. Sec’y Penn. Dep’t of Corr.*, 848 F.3d 549, 566–67 (3d Cir. 2017), *cert. denied sub nom.*, 138 S. Ct. 357 (2017).

⁷⁶ *Palakovic v. Wetzel*, 854 F.3d 209, 225–26 (3d Cir. 2017).

⁷⁷ *Wilkerson v. Stalder*, 639 F. Supp. 2d 654, 679 (M.D. La. 2007).

specific psychiatric syndrome exists with respects to the psychopathological effects of prolonged isolation because:

That prolonged isolation from social and environmental stimulation increases the risk of developing mental illness does not strike this court as rocket science. ‘Social science and clinical literature have consistently reported that when human beings are subjected to social isolation and reduced environmental stimulation, they may deteriorate mentally and, in some cases, develop psychiatric disturbances.’⁷⁸

In *Hall v. State*, Justice Keller from the Texas Court of Criminal Appeals acknowledged that adverse circumstances on death row led to depression:

Appellant did say that he had been ‘broken’ by his 24/7 confinement on death row. . . . Being depressed by his circumstances is understandable and is a rational response to adverse conditions. . . . It could be fueled by depression arising from the circumstances of incarceration.⁷⁹

Independent international and domestic reports suggest that the United States is an outlier in its use of prolonged solitary confinement. In a 2013 report, Amnesty International found the United States “stands virtually alone in the world in incarcerating thousands of prisoners in long-term or indefinite solitary confinement.”⁸⁰ In the report, Amnesty International advised all American states to reduce the number of prisoners in isolation or maximum custody confinement and to ensure that only prisoners who pose a serious and continuing threat are held in maximum custody isolation facilities.⁸¹ The report recommends incentive or step-down programs so that prisoners are not held indefinitely in isolation.⁸² The American Civil Liberties Union (“ACLU”) published a report in 2014 about the dangerous overuse of solitary confinement in the United States⁸³ The report states that “the United States uses solitary confinement to an extent unequalled in any other democratic country.”⁸⁴ The ACLU states that, based on decades of research, the enormous costs

⁷⁸ *McClary v. Kelly*, 4 F. Supp. 2d 195, 208 (W.D.N.Y. 1998) (quoting *Madrid v. Gomez*, 889 F. Supp. 1146, 1230 (N.D. Cal. 1995)).

⁷⁹ *Hall v. State*, 569 S.W.3d 646, 661 (Tex. Crim. App. 2019).

⁸⁰ SOLITARY CONFINEMENT, *supra* note 10, at 1.

⁸¹ *Id.* at 11.

⁸² *Id.*

⁸³ ACLU, THE DANGEROUS OVERUSE OF SOLITARY CONFINEMENT WITHIN THE US (Aug. 2014) [hereinafter THE DANGEROUS OVERUSE].

⁸⁴ *Id.* at 14.

such as physiological and psychological suffering incurred by inmates, as well as financial costs incurred by prisons, far outweigh any purported benefits.⁸⁵ The ACLU report strongly urges limiting the use of solitary confinement within the United States overall and, at the very least, ensuring that mentally ill persons and youth are not subject to such treatment.⁸⁶ In a 2013 report on the use of solitary confinement on death row, the ACLU states that “the vast majority of death row prisoners also suffer under conditions of extreme isolation that compromise their physical and mental health and needlessly inflict pain and suffering.”⁸⁷ The ACLU urges reformers on both sides of the death penalty debate to recognize the harms of solitary confinement inflicted on death row prisoners across the United States.⁸⁸ According to the ACLU, solitary confinement is not a part of the sentence, and “in order to build a criminal justice system that accurately reflects our values, we must end the routine use of solitary confinement of death row prisoners.”⁸⁹ These reports all mention the devastating physiological effects of prolonged solitary confinement and strongly urge the United States to limit it and even end its use on death row.⁹⁰

Within the United States, there is some national consensus amongst governmental agencies that prolonged solitary confinement can be used as long as there is a penological purpose. The American Correctional Association mentions a “direct threat to safety” as a justification for the use of prolonged restrictive housing but do not pose any limits on how long an inmate can be placed in restrictive housing.⁹¹ Federal courts, and even certain justices, are more outspoken toward the use of prolonged solitary confinement. The general consensus amongst these courts is that prolonged solitary confinement can cause serious psychological and emotional harm to inmates and may violate the Eighth Amendment protection against cruel and unusual punishment.⁹² Amnesty International and the ACLU strongly urge the United States to limit its use of prolonged solitary confinement, acknowledging the devastating effects it has on prisoners.⁹³

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ ACLU, A DEATH BEFORE DYING: SOLITARY CONFINEMENT ON DEATH ROW, 2 (July 2013) [hereinafter A DEATH BEFORE DYING].

⁸⁸ *Id.* at 3.

⁸⁹ *Id.*

⁹⁰ *Id.* at 6; THE DANGEROUS OVERUSE, *supra* note 83, at 6; INHUMAN AND UNNECESSARY, *supra* note 20, at 36.

⁹¹ RESTRICTIVE HOUSING, *supra* note 62, at Standard 4-RH-0001.

⁹² *Davis v. Ayala*, 576 U.S. 257, 287 (2015); *Glossip v. Gross*, 576 U.S. 863, 926 (2015) (Breyer, J., dissenting); *Hutto v. Finney*, 437 U.S. 678, 685 (1978).

⁹³ A DEATH BEFORE DYING, *supra* note 87, at 6; THE DANGEROUS OVERUSE, *supra* note 83, at 6; SOLITARY CONFINEMENT, *supra* note 10, at 36.

II. HOUSING POLICIES

Twenty-eight U.S. states currently have the death penalty as a legal form of punishment.⁹⁴ In order to effectively compare the differences in housing policies between death-sentenced prisoners and other prisoners, this research will focus only on states with the death penalty. This excludes states that do not currently have the death penalty. All States that have abolished the death penalty as of October 2020 will not be included in this analysis.

This section starts with an overview of the housing policies of prisoners not sentenced to death. The overview includes—per state—the different custody levels in prisons, the factors that are taken into account during the classification process, and the possibilities for reclassification. Next is an overview of the housing policies for death-sentenced prisoners, which includes housing and placement procedures, the conditions in which death-sentenced prisoners are housed, and the possibilities for reclassification. The section concludes by comparing housing policies for death-sentenced prisoners to those for other prisoners.

A. Non-Death Sentenced Prisoners in Death Penalty States⁹⁵

This research compares the housing policies for prisoners not sentenced to death in all twenty-eight death penalty states, including the number of different custody levels, factors that determine the appropriate custody level, and reclassification procedures. Thus, confirming that each state has different custody levels for their prisoners that represent different levels of security. For example, Alabama, Arizona, Florida, Georgia, Idaho, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, Nevada, North Carolina, Oklahoma, South Carolina, South Dakota, Tennessee, Virginia, and Wyoming all have similar custody levels that are divided into a combination of minimum, medium, close, and maximum custody levels. Arkansas, California, Indiana, Ohio, Oregon, Pennsylvania, Texas, and Utah have similar custody levels divided into levels or classes, ranging from Levels 1 through 5. It's important to note that different custody levels provide different levels of security and privileges for non-death-sentenced prisoners.

All twenty-eight states have individualized assessments in place that

⁹⁴ *Death Row Prisoners by State*, DEATH PENALTY INFORMATION CENTER, <https://deathpenaltyinfo.org/death-row/overview> [<https://perma.cc/2NKD-5KSP>].

⁹⁵ All the information in this section is summarized and cited in the two tables inserted at the end of the article.

determine the appropriate custody level for newly arrived prisoners. These assessments are comprised of multiple objective criteria, including: the length of sentence; age, escape history, risk of harm to self or others, the crime for which the prisoner is currently convicted, (past) institutional behavior, present needs and behavior, the potential for rehabilitation, disciplinary violations, medical and mental health status, gender, education, job skills and work history, and social background. The number of criteria which are considered in this process differs from state to state. For example, Missouri determines the appropriate custody level by considering four factors: the length of sentence, type of crime, institutional behavior, and a prisoner's individual needs for specialized programs and services. Ohio, on the other hand, has fifteen criteria that are taken into account: the history of assaultive, violent, or disruptive behavior, age, escape history, enemies of record, gender, gender, medical status, mental and emotional stability, the notoriety of offenses, criminal history, type of sentencing and release eligibility, programming and education history, STG affiliation (prison gangs), and previous adjustment to less restrictive security levels. Some states, such as Arizona, California, Kansas, and Ohio, take a prisoner's gang affiliation status into account. The most common factors considered by states are the crime for which the prisoner is currently incarcerated, the length—or remainder—of the sentence, (prior) institutional behavior, and overall criminal history.

All twenty-eight states also have procedures for reclassification of the initial placement in a certain custody level. Most states—Alabama, California, Florida, Georgia, Idaho, Indiana, Kansas, Kentucky, Montana, Nebraska, Nevada, North Carolina, Ohio, Oklahoma, South Carolina, Tennessee, Utah, Virginia, and Wyoming—conduct classification reviews once every six or twelve months. Some states, such as Arkansas, Arizona, Oregon, and Texas, conduct classification reviews when an inmate requests a review or when events occur that require a change in a prisoner's custody level.

This detailed look at state policies demonstrates that every U.S. death penalty state uses some form of a multi-tiered classification system to determine custody and privilege levels for its non-death-sentenced prisoners. States can place these prisoners in solitary confinement, for example, after a prison rule violation, but these prisoners are not automatically placed in indefinite solitary confinement. All twenty-eight States use individualized assessments consisting of objective criteria to determine the appropriate custody level for newly-arrived prisoners. All States also have reclassification systems that allow for review of the (initial) placement in a certain custody level.

B. Death-Sentenced Prisoners

Housing policies for death-sentenced prisoners in the twenty-eight death penalty states vary based on housing and placement procedures, housing conditions, and possibilities for reclassification. In order to examine death-sentenced prisoners' housing conditions, this research uses widely recognized international standards to determine whether housing conditions qualify as solitary confinement. The Nelson Mandela Rules and Amnesty International Standards define solitary confinement based on the amount of time per day that a prisoner spends in isolation.⁹⁶ These standards will be used as a guide for this research. The Mandela Rules state that solitary confinement is constituted by placement in isolation for twenty-two hours a day or more without meaningful human contact,⁹⁷ such as contact visitation and group recreation. It states that solitary confinement is prolonged when it exceeds fifteen consecutive days.⁹⁸ Amnesty International also qualifies instances where prisoners are confined just under twenty-two hours per day in conditions that give rise to similar negative mental effects as solitary confinement.⁹⁹ Based on these definitions, this article defines both states that automatically confine death-sentenced prisoners in isolation for twenty-two hours a day or more and states that confine death-sentenced prisoners in isolation for just under twenty-two hours a day without meaningful human contact as states with solitary confinement for death-sentenced prisoners.

The twenty-eight death penalty states are divided into two categories for the purpose of this article: states that automatically place death-sentenced prisoners in solitary confinement because of the prisoners' sentence and those that do not. The states with no automatic placement in solitary confinement can be further divided into those that have an automatic placement in a certain custody level not constituting solitary confinement and states that conduct individualized assessments that determine the appropriate custody level for death-sentenced prisoners within death row units. The next three subsections give an overview of these states, their policies, and the conditions in which death-sentenced prisoners are housed.

⁹⁶ See G.A. Res. 70/175, *supra* note 17; INHUMAN AND UNNECESSARY, *supra* note 20.

⁹⁷ G.A. Res. 70/175, *supra* note 17, at 16.

⁹⁸ *Id.*

⁹⁹ INHUMAN AND UNNECESSARY, *supra* note 20, at 16.

1. *States with automatic placement in solitary confinement (12 states¹⁰⁰)*

This research shows that twelve states automatically place death-sentenced prisoners in indefinite solitary confinement. In Alabama, Arkansas, Florida, Georgia, Idaho, Kansas, Mississippi, Nevada, Oklahoma, South Dakota, Texas, and Wyoming, death-sentenced prisoners are automatically housed in restrictive custody levels that qualify as solitary confinement. Of these twelve states, seven states—Arkansas, Florida, Georgia, Nevada, Oklahoma, South Dakota, and Wyoming—all automatically place death-sentenced prisoners in maximum-security custody units. Arkansas, Florida, Mississippi, South Dakota, and Texas have ‘death rows’ for these prisoners, a separate unit designated for death-sentenced prisoners only. Alabama and Idaho automatically place death-sentenced prisoners in a close custody security level, while Kansas automatically houses these prisoners in administrative segregation. All of these states, apart from Nevada, house death-sentenced prisoners in cells for at least twenty-two hours per day without meaningful human contact. In Nevada, death-sentenced prisoners are in their cells for at least twenty-one hours a day; they get three hours of group recreation every day. Although this falls just below the Nelson Mandela standards of twenty-two hours a day, it constitutes solitary confinement for purposes of this paper due to the fact that the three-hour recreation is canceled approximately half of the time, and death-sentenced prisoners in Nevada are, on average, thus in their cells for much longer than 21 hours per day. In Idaho, Kansas and Texas, death-sentenced prisoners are in their cells for at least twenty-two hours a day. Death-sentenced prisoners in Alabama, Arkansas, Georgia, Mississippi, and Oklahoma are confined to cells for twenty-three hours a day. In Florida, South Dakota, and Wyoming, prisoners have even less out-of-cell time. Prisoners in Florida are in their cells for twenty-four hours a day except for two days per week when prisoners have recreation for three hours. Prisoners in South Dakota and Wyoming are in their cells for 23.5 hours a day.¹⁰¹

The conditions in which death-sentenced prisoners are housed differ from state to state in terms of contact with other prisoners, contact with people outside the prison, and other activities that involve human contact. Most states do not allow group recreation or other group activities for death-sentenced prisoners. In Alabama, Arkansas, Georgia, Idaho, Kansas, Mississippi, Texas, and Wyoming, death-sentenced prisoners

¹⁰⁰ Alabama, Arkansas, Florida, Georgia, Idaho, Kansas, Mississippi, Nevada, Oklahoma, South Dakota, Texas, and Wyoming.

¹⁰¹ Wyoming currently does not have any death-sentenced prisoners. The only official death-sentenced prisoner in Wyoming is waiting for resentencing and is not housed in a restrictive custody level.

are not allowed group recreation. Death-sentenced prisoners in Florida, Nevada, and Oklahoma are allowed to have group recreation, mostly in small groups of three or four prisoners. It remains unclear whether death-sentenced prisoners in South Dakota are allowed to have group recreation.¹⁰² Some states allow additional individual privileges. For example, Alabama allows prisoners a one-hour law library visit once a week, and Arkansas allows individual religious services. Surprisingly, in Oklahoma, death-sentenced prisoners have cellmates; two death-sentenced prisoners are housed per cell.

Most states allow death-sentenced prisoners to have contact visitation. Alabama, Arkansas, Florida, Georgia, Nevada, Ohio, and Oklahoma allow contact visitation on a weekly basis with family members or friends. Georgia allows one contact visit per month. Idaho allows contact visitation once per year and allows weekly non-contact visitation with family members or friends. Mississippi, Texas, and South-Dakota do not allow contact visitation for death-sentenced prisoners. A notable outlier, Kansas does not consistently allow any type of visitation for death-sentenced prisoners, apart from extremely infrequent non-contact visits. However, Kansas allows death-sentenced prisoners to have phones in their cells, which they can use to call family members and friends as they see fit. Whether Wyoming allowed contact visitation is unknown. Most states allow death-sentenced prisoners to use the phone to call family members and friends—usually only those who are already on an approved visitation list. Alabama, Arkansas, Florida, Kansas, Mississippi, Nevada, South Dakota, and Texas allow inmates to make phone calls. In Texas, prisoners can make a five-minute phone call once every ninety days, and Florida restricts phone usage to one fifteen-minute call per month.

Only Mississippi and Oklahoma currently allow death-sentenced inmates to hold jobs. However, these states allow jobs only for a limited number of prisoners. In Mississippi, there is the opportunity for one or two death-sentenced prisoners to obtain jobs as ‘hall men.’ In Oklahoma, seven out of almost fifty death-sentenced prisoners currently hold jobs. Thus, even in states that allow death-sentenced prisoners to work, having a job is the exception rather than the rule.

None of the thirteen states which automatically place death-sentenced prisoners in indefinite solitary confinement offer a classification review of the initial placement. In states where prisoners can be placed into even more restrictive custody levels due to disciplinary sanctions, a prisoner’s placement can be reviewed. This is possible, for example, in Idaho and Texas. However, none of the twenty-eight death penalty states allow a reclassification to a custody level that is less restrictive than the initial custody level designation.

¹⁰² The South Dakota policies regarding death-sentenced prisoners does not specify whether these prisoners can have group recreation.

In summary, death-sentenced prisoners in twelve states are automatically placed in indefinite solitary confinement based on their death sentence. These prisoners spend between twenty-one to twenty-four hours per day in their cells with very limited meaningful human contact. There is no possibility in any of these states for death-sentenced prisoners to have their placement reviewed to be placed in a less restrictive custody level.

2. *States with no automatic placement in solitary confinement (16 states¹⁰³)*

Sixteen states do not automatically place death-sentenced prisoners in indefinite solitary confinement. These sixteen states can be divided into two groups. The first group consists of states that automatically place death-sentenced prisoners in a custody level that is not solitary confinement. The second group of states automatically houses death-sentenced prisoners on a so-called death row unit with multiple custody levels and where placement on a particular level is based on an individualized assessment. These states also allow for a reclassification based on prisoners' behavior in prison.

i. *States with automatic placement, not in solitary confinement (13 states¹⁰⁴)*

Arizona, Indiana, Kentucky, Louisiana, Missouri, Montana, Nebraska, North Carolina, Ohio, Oregon, Pennsylvania, Utah, and Virginia have automatic custody designations for death-sentenced prisoners. Still, they do not automatically place these prisoners in solitary confinement. Arizona and Montana automatically place death-sentenced prisoners in a close custody unit. In both states, close custody units are not the strictest custody levels. Indiana, Kentucky, Missouri, and Nebraska automatically house death-sentenced prisoners in maximum custody units. Louisiana, North Carolina, Ohio, and Virginia have death row units where they house prisoners sentenced to death. Pennsylvania houses death-sentenced prisoners in a unit that is separate from other prisoners but functions as a general population unit. In Oregon, death-sentenced prisoners are automatically placed in a medium custody unit. Missouri and Oregon place death-sentenced prisoners in the general

¹⁰³ Arizona, California, Indiana, Kentucky, Louisiana, Missouri, Montana, Nebraska, North Carolina, Ohio, Oregon, Pennsylvania, South Carolina, Tennessee, Utah, and Virginia.

¹⁰⁴ Arizona, Indiana, Kentucky, Louisiana, Missouri, Montana, Nebraska, North Carolina, Ohio, Oregon, Pennsylvania, Utah, and Virginia.

population together with other prisoners.

The amount of out-of-cell time these prisoners have varies widely from state to state. Kentucky is the only state that keeps death-sentenced prisoners in their cells for twenty-two hours a day. For purposes of this research, Kentucky has not been classified as a state with automatic and indefinite solitary confinement because prisoners in Kentucky have a significant amount of meaningful human contact, such as group recreation, contact visitation, and work assignments. Death-sentenced prisoners in Kentucky can also easily communicate with each other because their cells have bars instead of solid doors. In Arizona, Indiana, Montana, Utah, and Virginia death-sentenced prisoners are in their cells for (a maximum of) twenty-one hours a day. These states offer contact visitation and group recreation, except for Montana, which does not allow contact visitation. In Louisiana, prisoners on death row are in their cells for nineteen hours per day. They have group recreation for four hours each day and are allowed contact visitation. In Pennsylvania, death-sentenced prisoners are allowed to have at least four hours per day and a total of at least 42.5 hours per week of out-of-cell activities. Pennsylvania allows contact visits, group recreation, and job assignments. In Missouri, Nebraska, North Carolina, and Oregon, death-sentenced prisoners are outside their cells for most of the day. In Missouri, death-sentenced prisoners can be out of their cells for eight hours each day, and, in North Carolina, prisoners can leave their cells and spend time in the communal dayroom from 7:00 a.m. to 11:00 p.m. North Carolina does not allow contact visitation, but group recreation, work assignments, and certain communal classes are allowed. Prisoners in Ohio can be out of their cells between 6:15 a.m. and 8:30 p.m. and are allowed contact visitation and work assignments.

There is no (known) possibility for these prisoners to get their placement reviewed and to be placed in a less restrictive custody level. However, placement reviews can occur when death-sentenced prisoners are placed in more restrictive custody levels due to rule violations or as punishment for disciplinary infractions. This is, for example, possible in Alabama, Arizona, Georgia, and Oregon.

ii. States with individualized assessments on death row (3 states¹⁰⁵)

California, South Carolina, and Tennessee automatically assign death-sentenced prisoners to a death row with different custody levels; some of these custody levels constitute solitary confinement while others do not. In all states, individualized assessments determine the appropriate

¹⁰⁵ California, South Carolina, and Tennessee.

custody level. These states have reclassification procedures that consist of individualized assessments that allow for changes in custody levels based on their conduct in prison.

In California, death-sentenced prisoners are classified into two categories: Grade A or B. Grade A prisoners are those without high violence or escape potential who are disciplinary-free. Grade B prisoners are those with high violence, escape potential, serious disciplinary or management problems. Grade B prisoners are housed at the Adjustment Center at the San Quentin Prison and are in solitary confinement. Grade A prisoners are divided over multiple units within the San Quentin Prison and are not housed in solitary confinement. Newly arrived death-sentenced prisoners are initially housed in the Adjustment Center for processing. Within thirty days, prisoners appear before an Institution Classification Committee for their initial placement. During the initial classification process, the prisoner's case factors are reviewed to determine whether placement in a Grade A or B is appropriate. Grade A prisoners may later be placed in Grade B if they commit three or more offenses within five years. These offenses include fighting, assault, or possession or use of a controlled substance or cell phone. A prisoner can also be classified as Grade B if he is deemed as posing an ongoing threat. When in the Grade B program, prisoners are reviewed every 180 days for placement in the Grade A program (again).

The differences in conditions between Grade A and Grade B in California are significant. Grade A classified prisoners have out-of-cell time every day from 9:00 a.m. till 2:30 p.m. They are allowed to have group recreation and access a tier area and an outdoor recreation yard for exercising. During recreation time, prisoners are free to walk around their tier, and the doors of their cells are open. Grade A prisoners are allowed out of their cells for legal visits, regular visits, medical visits, dental visits, mental health appointments, group therapy, and chapel visits. They can also make phone calls during the out-of-cell time. Certain jobs within the unit are available for Grade A prisoners, but these are limited. A minimum of five years without any disciplinary sanction is needed to be considered for an assignment as a worker. As of April 2020, fewer than thirty out of over 700 death-sentenced inmates held jobs. Grade A prisoners are allowed to have weekly contact visitation. These visits last for a minimum of two and a half hours. A prisoner can have a contact visit with up to five people at the same time. Attorney visits are contact visits as well. Grade A prisoners can have showers daily during their exercise programs. They are also eligible to participate in music programs. Grade A prisoners are allowed to have up to three electronic appliances such as televisions, radios, and typewriters, and can have games such as cards, chess, dominos, and scrabble. Prisoners qualified as Grade B have far fewer privileges. They have out-of-cell time for recreation purposes for a minimum of ten hours per week. The rest of the time is spent in their cells. They are not allowed to have group recreation. Instead, recreation takes place in separate cages. They are not

allowed to use the phones. They are also not allowed to have contact visitation, not even with their attorneys. These prisoners can have non-contact visits with up to three family members or friends at the same time. Grade B prisoners are allowed to have up to two electronic appliances and can have showers three times a week, but they cannot hold jobs due to disciplinary sanctions. Given these conditions, housing conditions for prisoners in Grade B qualify as solitary confinement. In both Grades A and B, all death-sentenced prisoners are eligible to participate in college courses offered by local state colleges and universities.

In South Carolina, death-sentenced prisoners are separated from all other prisoners and automatically assigned to death row. Death row has three security levels: I, II, and III. Level III is the strictest degree of custody and control. This level includes newly arrived death row prisoners, those who have serious disciplinary charges such as possession of a weapon or contraband or display assaultive behavior, those who pose a serious risk of escape, and those placed on execution status. Prisoners in Level II include those involved in an incident or have received a disciplinary charge. Prisoners in Level I include those who maintain good behavior, demonstrate a positive attitude and adhere to prison procedures. Newly arrived prisoners are automatically placed in Level III until their review is complete. Within forty-eight hours of arrival, inmates will receive an initial custody level assignment after a review of certain factors such as the current offense, prior incarcerations, escapes on record, social history, and the results of a psychological evaluation. Most prisoners are housed in Levels I or II where prisoners are allowed more privileges than prisoners on Level III. There is an annual review for prisoners in Level I, a ninety-day review for prisoners in Level II, and a thirty-day review for prisoners in Level III with the possibility of being placed in a more or less restrictive level.

The differences in conditions between Levels I and II and those of Level III are significant. Prisoners on Levels I and II can be out of their cells from 6:00 a.m. to 6:00 p.m. When out of their cells, they can play cards, play on the handball course, use a computer to do legal research, sit down together at tables, and communicate freely with other prisoners. Prisoners in Levels I and II are allowed to have group recreation. They are allowed to hold jobs that do not require them to leave the unit. These jobs include serving meals, cleaning common areas, doing laundry, or assisting inmates with disabilities. They also have opportunities to worship together in religious services coordinated by the institution's chaplain once a week. Prisoners in Levels I and II can have meals together in a common area on the death row unit. They can use the telephone to call family members or friends for 15 minutes per user. Prisoners in Levels I and II are allowed to have televisions, radios, and typewriters. Prisoners in Level I are allowed more personal property, such as clothing and hygiene products, than those on Level II. They can have eight, two-hour non-contact visits per month. In contrast, prisoners

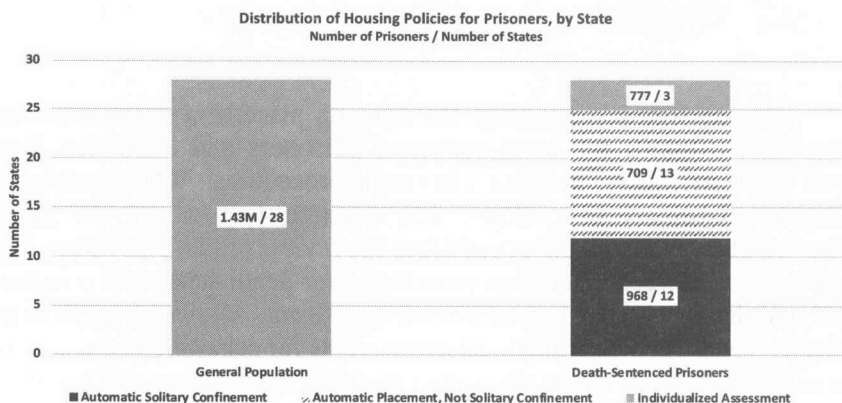
in Level III are in their cells for twenty-three hours a day with one hour of recreation per day. They remain in restraints during recreation and have eight, two-hour, non-contact visits per month. These conditions constitute solitary confinement. None of the death-sentenced prisoners have access to educational programs other than reading and math support offered individually by instructors in cells.

In Tennessee, death-sentenced prisoners are automatically placed on death row, a separate, maximum-security unit at the Riverbend Maximum Security Institution, based on their death sentence. There is no possibility for a review of prisoners' placements on death row. Death row has three security levels: A, B, and C—with C being the most restrictive level. When prisoners first arrive on death row, they are placed in Level C. Prisoners in Level C are locked in their cells for twenty-three hours with one hour of individual recreation per day. Any time they leave their cells, they are shackled and handcuffed. All visits are non-contact visits. Death-sentenced prisoners on Level C cannot hold jobs and do not have access to any educational classes. They have access to books from the law library but cannot enter the library themselves; the books have to be brought to their cells. After prisoners arrive on death row, they are automatically moved to Level B as long as they have not had any disciplinary actions within the past eighteen months. Prisoners in Level B are in their cells for twenty-two and a half hours with one and a half hours of recreation per day. They are allowed to have group recreation and contact visits. Any time they leave their cells, they are shackled and handcuffed. Prisoners on Level B do not have access to educational classes and cannot hold jobs. They have similar access to the law library as prisoners in Level C. Given these conditions, the conditions in Levels C and B constitute solitary confinement. Prisoners in Level B have the possibility of being moved to Level A after twelve months of good behavior. If a prisoner in Level B violates any prison rules in those twelve months, he is either placed back into Level C or remains in Level B but requires an additional twelve months of good behavior before becoming eligible for Level A. Prisoners in Level A are not in solitary confinement. They have recreational time each day from 6:30 a.m. till 9:30 p.m. They have access to group educational activities such as art and GED classes. They can enter the law library at any time during recreation. They are assigned to a job such as cleaning and food preparation. Prisoners on Level A have group recreation during which they can play handball, play cards, and lift weights. They are allowed to have visits on Saturdays or Sundays, and Mondays. All visits are contact visits. They are allowed to have special visits with groups of family members. Prisoners on Level A are even allowed to order 'incentive meals'; meals from outside companies and delivered to the prison. Prisoners in Level A have access to phones all day.

C. Overview

This section has analyzed the housing placement procedures and housing conditions for death-sentenced prisoners and compared those with other prisoners' housing placement procedures. When looking at housing placement procedures, this research focused on the initial housing placement and the possibilities for review of that placement. The differences between placement procedures for death-sentenced prisoners and non-death-sentenced prisoners are significant. All twenty-eight death penalty states have individualized assessments for prisoners in the general population that determine the initial custody level placement based on objective criteria. The number of criteria used in determining the appropriate custody level varies widely from state to state. These criteria include common factors such as the length or remainder of the sentence, escape history and risk, current conviction, (past) institutional behavior, disciplinary convictions, education, job skills, and work history, and social background. There are reclassification assessments in place in all twenty-eight states. Most states conduct reclassifications once every six or twelve months, when a prisoner's change in behavior requires it or when the prisoner requests it.

In addition to the differences in initial housing placement procedures, there are also significant differences in the housing conditions of death-sentenced prisoners and other prisoners. Of twenty-eight death penalty states, twelve states automatically place death-sentenced prisoners in indefinite solitary confinement based on their sentence of death. These twelve states house approximately 40% of all death-sentenced prisoners. Those prisoners cannot have their custody level reviewed unless they are placed in an even more restrictive custody level. The other sixteen states do not, at least not automatically or indefinitely, place death-sentenced prisoners in solitary confinement. Of those sixteen states, thirteen states automatically place their death-sentenced prisoners in a certain custody level that does not constitute solitary confinement. In seven of these thirteen states, death-sentenced



prisoners still spend most of their time—nineteen to twenty-two hours per day— in cells, but they do have ‘meaningful human contact’ and are therefore not in solitary confinement.

The last three states automatically house death-sentenced prisoners on death row with different custody levels. All three states have individualized assessments for death-sentenced prisoners based on objective factors to determine the appropriate custody level within death row. All three states also have reclassification procedures in place that allow for placement in a more or less restrictive custody level based on an individualized assessment that considers their behavior in prison.

This research demonstrates significant differences within death penalty states between housing policies, placement procedures, and housing conditions for death-sentenced and other prisoners. Whereas only three of the twenty-eight death penalty states have individualized assessments for death-sentenced prisoners, all of these states have individualized assessments for other prisoners. Thus, it is clear that death-sentenced prisoners are treated differently specifically because of their sentence.

III. CONSTITUTIONAL VIOLATIONS

In this section, three possible constitutional violations will be reviewed. The first section looks at the Eighth Amendment because the use of prolonged solitary confinement could be considered cruel and unusual punishment. The second section looks at a possible violation of Due Process under the Fourteenth Amendment because of the automatic placement in solitary confinement without any mechanism for review. The third section looks at a possible violation of the Equal Protection Clause under the Fourteenth Amendment because of the unequal application of solitary confinement between death-sentenced prisoners and other prisoners. This section ends with a conclusion on the feasibility

of all three possible claims.

A. Eighth Amendment

The Eighth Amendment of the United States Constitution prohibits the federal government from imposing “cruel and unusual punishments.”¹⁰⁶ The Eighth Amendment also applies to States.¹⁰⁷ In this research, the question under the Eighth Amendment is whether the use of automatic prolonged solitary confinement for prisoners under a sentence of death constitutes cruel and unusual punishment. In *Gregg v. Georgia*, the Supreme Court explained that, in light of the evolving standards of decency, the Eighth Amendment forbids the use of punishment that is excessive either because it involves “the unnecessary and wanton infliction of pain” or because it is “grossly out of proportion to the severity of the crime.”¹⁰⁸ Whether a prisoner’s conditions of confinement constitute, cruel and unusual punishment must be measured against “the evolving standards of decency that mark the progress of a maturing society.”¹⁰⁹

In *Farmer v. Brennan*, the Court stated that both “the treatment a prisoner receives and the conditions under which a prisoner is confined are subject to scrutiny under the Eighth Amendment.”¹¹⁰ The Eighth Amendment does not only place restraints on prison officials but also imposes on their duties.¹¹¹ Prison officials must provide humane conditions of confinement; prison officials must ensure that inmates receive adequate food, clothing, shelter, medical care and take reasonable measures to guarantee the safety of the inmates.¹¹²

When prisoners are not being given humane conditions of confinement, prisoners can claim the Eighth Amendment protection against cruel and unusual punishment.¹¹³ In order to successfully claim an Eighth Amendment violation in relation to the conditions of confinement, a prisoner has to meet a two-prong test: an objective prong

¹⁰⁶ U.S. CONST. amend. VIII.

¹⁰⁷ *Robinson v. California*, 370 U.S. 660, 675 (1962) (Douglas, J., concurring) (“The command of the Eighth Amendment, banning “cruel and unusual punishments,” stems from the Bill of Rights of 1688. And it is applicable to the States by reason of the Due Process Clause of the Fourteenth Amendment.” (citing *State of Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 463 (1947))).

¹⁰⁸ *Gregg v. Georgia*, 428 U.S. 153, 173 (1976).

¹⁰⁹ *Estelle v. Gamble*, 429 U.S. 97, 102 (1976) (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958)).

¹¹⁰ *Farmer v. Brennan*, 511 U.S. 825, 832 (1994) (quoting *Helling v. McKinney*, 509 U.S. 25, 31 (1993)).

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Scinto v. Stansberry*, 841 F.3d 219, 228 (4th Cir. 2016) (citing *Farmer*, 511 U.S.).

and a subjective prong.¹¹⁴ To satisfy the objective prong, a plaintiff must demonstrate that the “deprivation alleged must be, objectively, ‘sufficiently serious.’”¹¹⁵ For a claim to be sufficiently serious, the deprivation must be extreme.¹¹⁶ This means that “it poses ‘a serious or significant physical or emotional injury resulting from the challenged conditions,’ or ‘a substantial risk of such serious harm resulting from . . . exposure to the challenged conditions.’”¹¹⁷ Under the subjective prong, a prisoner “must show that prison officials acted with a ‘sufficiently culpable state of mind.’”¹¹⁸ “[T]he requisite state of mind is deliberate indifference.”¹¹⁹ “To prove deliberate indifference, [prisoners] must show that ‘the official kn[ew] of and disregard[ed] an excessive risk to inmate health or safety.’”¹²⁰ In other words, the prisoner must show that the prison official was “aware of facts from which the inference could be drawn that a substantial risk of serious harm exist[ed],” and that the officials actually drew that inference.¹²¹ “Deliberate indifference is ‘more than just mere negligence,’ but ‘less than acts or omissions [done] for the very purpose of causing harm or knowledge that harm will result.’”¹²² It is “somewhere between negligence and knowledge” and comes closest to recklessness.¹²³ A prisoner who makes an Eighth Amendment claim needs to show “that a substantial risk of [serious harm] was longstanding, pervasive, well-documented, or expressly noted by prison officials in the past.”¹²⁴ The prisoner also needs to show that the “circumstances suggest that [prison] officials had been exposed to information concerning the risk and thus must have known about it”¹²⁵ However, prison officials can be free from liability even if they acted with deliberate indifference as long as the response was reasonable to the risk.¹²⁶

The Supreme Court has addressed the first prong—that the deprivation was “objectively, sufficiently serious”—multiple times, repeatedly reasserting that confinement in isolation over a long period of time can be unconstitutional.¹²⁷ In 1890, the Court found that a prisoner’s

¹¹⁴ *Id.*

¹¹⁵ Farmer, 511 U.S. at 834 (citing *Wilson v. Seiter*, 501 U.S. 294 (1991)).

¹¹⁶ Scinto, 841 F.3d at 225 (quoting *De'Lonta v. Angelone*, 330 F.3d 630, 634 (4th Cir. 2003)).

¹¹⁷ *Id.* (quoting *De'Lonta*, 330 F.3d at 634 (alteration in original)).

¹¹⁸ *Id.* (quoting Farmer, 511 U.S. at 834).

¹¹⁹ *Id.*

¹²⁰ *Id.* (quoting Farmer, 511 U.S. at 837 (alteration in original)).

¹²¹ *Id.* (quoting Farmer, 511 U.S. at 834 (alteration in original)).

¹²² *Id.* (quoting Farmer, 511 U.S. at 835 (alteration in original)).

¹²³ *Id.* (quoting *Brice v. Va. Beach Corr. Ctr.*, 58 F.3d 101, 105 (4th Cir. 1995)).

¹²⁴ *Id.* at 226. (quoting *Parrish ex rel. Lee v. Cleveland*, 372 F.3d 294, 303 (4th Cir. 2004) (alteration in original)).

¹²⁵ *Id.* (quoting *Lee*, 372 F.3d at 303).

¹²⁶ *Id.* (quoting Farmer, 511 U.S. at 844).

¹²⁷ *E.g.*, *In re Medley*, 134 U.S. 160, 171 (1890); *Hutto v. Finney*, 437 U.S. 678, 685–686, (1978).

Eighth Amendment rights were violated due to his subjection to solitary confinement for four weeks leading up to his execution.¹²⁸ The Court recognized the damaging effects of solitary confinement by, amongst other arguments, referencing research on the effects of solitary confinement on prisoners.¹²⁹ This research concluded that, even after a short term of confinement, “[a] considerable number of the prisoners fell . . . into a semi-fatuous condition, from which it was next to impossible to arouse them, [while] others became violently insane,” and some committed suicide.¹³⁰ The Court noted that “the solitary confinement to which the prisoner was subjected . . . was an additional punishment of the most important and painful character. . . .”¹³¹ The use of prolonged solitary confinement in this case was ultimately ruled unconstitutional because the prisoner’s placement in solitary confinement until the day of his execution was based on an ex post facto law—a law that retroactively changes the legal consequences of certain actions.¹³² The Court did not address whether the use of solitary confinement was completely unconstitutional per se.¹³³ In *Hutto v. Finney*, the Court again made it clear that the use of solitary confinement is not constitutional per se when it supported the District Court’s ruling that “punitive isolation ‘is not necessarily unconstitutional, but it may be, depending on the duration of the confinement and the conditions thereof.’”¹³⁴ In *Ruiz v. Texas*, Justice Breyer, in his dissent, considered Ruiz’s argument that his execution violated the Eighth Amendment because it followed his lengthy death row incarceration in traumatic conditions, namely permanent solitary confinement.¹³⁵ Breyer noted that “Mr. Ruiz developed symptoms long associated with solitary confinement,” including “severe anxiety and depression, suicidal thoughts, hallucinations, disorientation, memory loss, and [difficulty sleeping].”¹³⁶ Breyer pointed to Ruiz’s twenty years of solitary confinement as not being based on “any special penological problem,” but simply because Ruiz was awaiting execution.¹³⁷ Breyer concluded his opinion by stating that 20 years of solitary confinement

¹²⁸ Medley, 134 U.S. at 172–73.

¹²⁹ *Id.* at 168.

¹³⁰ *Id.*

¹³¹ *Id.* at 171.

¹³² *Id.* at 171–73 (“Any law passed after the commission of the offence for which the party is being tried is an ex post facto law, when it inflicts a greater punishment than the law annexed to the crime at the time it was committed, or which alters the situation of the accused to his disadvantage.” (citations omitted)).

¹³³ *Id.*

¹³⁴ *Id.* at 685–86 (quoting *Finney v. Hutto*, 410 F. Supp. 251, 275 (E.D. Ark. 1976), *aff’d*, 548 F.2d 740 (8th Cir. 1977), *aff’d*, 437 U.S. 678 (1978)).

¹³⁵ *Ruiz v. Texas*, 137 S. Ct. 1246, 1246 (2017) (Breyer, J. dissenting).

¹³⁶ *Id.* at 1247 (Breyer, J. dissenting).

¹³⁷ *Id.*

under threat of execution raises serious constitutional questions.¹³⁸ In his concurring opinion in *Davis v. Ayala*, Justice Kennedy concluded that “prison officials must have discretion to decide that in some instances temporary, solitary confinement is a useful or necessary means to impose discipline or to protect prison employees and other inmates.”¹³⁹ But research still confirms what this Court suggested over a century ago: “Years on end of near-total isolation exact a terrible price.”¹⁴⁰ In *Palakovic v. Wetzel*, the Third Circuit “acknowledge[d] the robust body of legal and scientific authority recognizing the devastating mental health consequences caused by long-term isolation in solitary confinement.”¹⁴¹ The court “observed a growing [public] consensus . . . that conditions . . . can cause severe and traumatic psychological damage” and physical harm.¹⁴²

The second prong, which requires a prisoner to show that officials acted with sufficiently culpable states of mind, was recently addressed in a Fourth Circuit ruling in a Virginia lawsuit that challenged the automatic application of prolonged solitary confinement for death-sentenced prisoners.¹⁴³ The Court ruled that the plaintiffs sufficiently showed that prison officials acted with “deliberate indifference.”¹⁴⁴ Defendant Davis, the former warden of the prison, testified in a case years earlier that humans do not survive very well when alone and separated from human contact.¹⁴⁵ In a 2013 opinion, a District Court characterized the conditions on Virginia’s death row as “dehumanizing.”¹⁴⁶ The Fourth Circuit looked specifically at the corrections department’s procedures that stated that non-death row prisoners could not be held in segregated confinement for longer than thirty consecutive days.¹⁴⁷ According to the court, this “constitute[d] un rebutted evidence of the State[’s] awareness ‘that extended stays in segregation can have harmful emotional and psychological effects.’”¹⁴⁸

To challenge the automatic use of prolonged solitary confinement on death row as a violation of the Eighth Amendment’s bar on cruel and unusual punishment, prisoners must meet a two-prong test. First, a

¹³⁸ *Id.*

¹³⁹ *Davis v. Ayala*, 576 U.S. 257, 289 (2015) (Kennedy, J. concurring).

¹⁴⁰ *Id.* (Kennedy, J. concurring).

¹⁴¹ *Palakovic v. Wetzel*, 854 F.3d 209, 225 (3d Cir. 2017).

¹⁴² *Id.* at 225–26.

¹⁴³ *Porter v. Clarke*, 923 F.3d 348, 353 (4th Cir. 2019).

¹⁴⁴ *Id.* at 361.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* (quoting *Prieto v. Clarke*, No. 1:12-cv-1199, 2013 WL 6019215 at *6 (E.D. Va. Nov. 12, 2013), *rev’d on other grounds*, 780 F.3d 245, 254–55 (4th Cir. 2015)).

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* (quoting *Porter v. Clarke*, 290 F. Supp.3d 518, 532 (E.D. Va. 2018), *aff’d*, 923 F.3d 348 (4th Cir. 2019)).

substantial risk of serious harm was longstanding, pervasive, well-documented, or expressly noted by prison officials in the past. Second, the circumstances suggest that the prison officials were exposed to information concerning the risk and thus must have known about it. To satisfy the first objective prong, prisoners must show that the challenged conditions pose a serious or significant physical or emotional injury or a substantial risk of such serious harm resulting from exposure to the challenged conditions. To satisfy the second, subjective prong, prisoners must show that officials knew of and disregarded an excessive risk to inmate health or safety.

B. Fourteenth Amendment

Two Fourteenth Amendment claims could be used to challenge the automatic use of prolonged solitary confinement: a Due Process claim and an Equal Protection claim.

1. The Due Process Claim

The Due Process Clause of the Fourteenth Amendment prohibits states from “depriv[ing] any person of life, liberty, or property, without due process of law”¹⁴⁹ In particular, it “forbids [s]tate[s] from convicting any person of crime and depriving him of his liberty without” due process of law.¹⁵⁰ Due process can be a valid conviction; a prisoner has then been “constitutionally deprived of his liberty to the extent that the [s]tate may confine him and subject him to the rules of its prison system so long as the conditions of confinement do not otherwise violate the Constitution.”¹⁵¹ The initial decision of a state to assign a prisoner to a particular institution is not subject to review under the Due Process Clause.¹⁵² “The conviction has sufficiently extinguished the [prisoner]’s liberty interest to empower the [s]tate to confine him in *any* of its prisons.”¹⁵³ However, the prisoner “does not forfeit all constitutional protections by reason of his conviction and confinement in prison.”¹⁵⁴ “[A] prisoner may have a state-created liberty interest in certain prison

¹⁴⁹ U.S. CONST. amend. XIV, § 1.

¹⁵⁰ *Meachum v. Fano*, 427 U.S. 215, 224 (1976).

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 225.

confinement conditions, entitling him to procedural Due Process protections.”¹⁵⁵

To successfully claim a due process violation, a prisoner must first identify a protected liberty or property interest and then “demonstrate deprivation of that interest without due process of law.”¹⁵⁶ A prisoner cannot claim the procedural protections of the Due Process Clause “if no state statute, regulation, or policy creates such a liberty interest.”¹⁵⁷ In deciding whether there is a state-created liberty interest that warrants due process protection, the Supreme Court uses a two-prong test.¹⁵⁸ First, there needs to be a mandatory state directive that creates a state law liberty interest.¹⁵⁹ Any statute, regulation, or policy, such as prison classification regulations that control prison assignment and therefore confinement conditions can create a state law liberty interest that triggers the procedural Due Process protections.¹⁶⁰ Second, while a state statute or policy may create liberty interests, this can only give rise to due process protection if the denial of such an interest “imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life.”¹⁶¹

The Supreme Court applied the two-prong test in *Wilkinson v. Austin*.¹⁶² In this case, petitioners were prisoners confined to the Ohio Supermax Prison (OSP).¹⁶³ Petitioners in the OSP had almost every aspect of their lives controlled and monitored, and they were held in extreme isolation where “[o]pportunities for visitation [were] rare” and “conducted through glass walls”; the prisoners were “deprived of almost any environmental or sensory stimuli and . . . human contact.”¹⁶⁴ The prisoners’ placements were indefinite and limited only by sentence.¹⁶⁵ The state and the prisoners agreed that the first prong was met by formal Ohio prison classification regulations which control prison assignments and thus confinement conditions of all inmates.¹⁶⁶ The more difficult question was whether the second prong was met. The Court noted that it is not the language of the regulations regarding those conditions but whether its application imposed a relatively atypical and significant

¹⁵⁵ *Prieto v. Clarke*, 780 F.3d 245, 248 (4th Cir. 2015) (citing *Meachum*, 427 U.S. 215 (1976)).

¹⁵⁶ *Id.* at 248.

¹⁵⁷ *Id.* (citing *Meachum*, 427 U.S. at 224).

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 227.

¹⁶⁰ *Id.* at 249.

¹⁶¹ *Sandin v. Conner*, 515 U.S. 472, 484 (1995).

¹⁶² *Wilkinson v. Austin*, 545 U.S. 209 (2005).

¹⁶³ *Id.* at 213.

¹⁶⁴ *Id.* at 214.

¹⁶⁵ *Id.* at 214–15.

¹⁶⁶ *Id.* at 215–17, 221.

hardship on the prisoner.¹⁶⁷ The Court stated that the conditions in the supermax prison were like most solitary confinement facilities, except that there were two additional components.¹⁶⁸ First, their placement was indefinite and reviewed just once per year.¹⁶⁹ Second, that the placement “disqualifies an otherwise eligible prisoner for parole consideration.”¹⁷⁰ The Court concluded that “[w]hile any of these conditions standing alone might not be sufficient to create a liberty interest, taken together they impose an atypical and significant hardship within the correctional context.”¹⁷¹ The prisoners, therefore had “a liberty interest in avoiding assignment to the OSP.”¹⁷² The Court also stated that although the conditions “may well [have been] necessary and appropriate in light of the danger that high-risk inmates pose[d] to both prison officials and other prisoners,” it did not diminish the fact that “the conditions gave rise to a liberty interest in their avoidance.”¹⁷³

The Court then turned to the second question in determining whether there was a violation of due process: what process a prisoner in this situation is due.¹⁷⁴ The Court used a framework of three distinct factors to evaluate the efficiency of particular procedures: the private interest that would have been affected by the official action, the risk of an erroneous deprivation and the probable value of additional or substitute procedural safeguards, and the Government’s interest.¹⁷⁵ The Court stated that the significance of the prisoner’s interest in avoiding erroneous placement at the OSP was more limited than in cases where the right at stake is the right to be free from confinement at all because the prisoners held in lawful confinement have their liberty curtailed by definition.¹⁷⁶ Next, the Court found that Ohio provided multiple levels of review for any decision recommending OSP placement and further reduced the risk of erroneous placement by providing for a placement review within thirty days of a prisoner’s initial assignment to OSP.¹⁷⁷ Lastly, the Court concluded that Ohio has an obligation in ensuring the safety of guards, prison personnel, the public and the prisoners themselves.¹⁷⁸ Prolonged confinement in the OSP may have been the

¹⁶⁷ *Id.* at 210.

¹⁶⁸ *Id.* at 224.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.* (citing *Sandin v. Conner*, 515 U.S. 472, 483 (1995)).

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at 224–225 (citing *Mathews v. Eldridge*, 424 U.S. 319 (1976)).

¹⁷⁶ *Id.* at 225.

¹⁷⁷ *Id.* at 227.

¹⁷⁸ *Id.*

State's only option for some prisoners' control.¹⁷⁹ In conclusion, the Court found that, while the Due Process Clause gives rise to a liberty interest in not being placed in a OSP, Ohio's procedures for determining which prisoners should be placed there satisfied the requirements of due process.¹⁸⁰ The Court noted that "if an inmate were to demonstrate that the [challenged policy] did not in practice operate in this fashion, resulting in cognizable injury, that could be the subject of an appropriate future challenge."¹⁸¹

In order to successfully challenge the automatic use of prolonged solitary confinement of death-sentenced prisoners under the Due Process Clause of the Fourteenth Amendment, a prisoner must meet the requirements of a two-prong test.¹⁸² First, the prisoner needs to identify a mandatory state directive that creates a state law liberty interest.¹⁸³ This could come from, for example, prison classification regulations.¹⁸⁴ Second, the prisoner needs to demonstrate a deprivation of that interest without the due process of law.¹⁸⁵ Such could occur when a prisoner is denied classification under a prison policy that regulates all inmate classification and is instead placed indefinitely in solitary confinement.¹⁸⁶ The Court uses a framework of three distinct factors to evaluate the efficiency of particular procedures: the private interest that will be affected by the official action, the risk of an erroneous deprivation and the probable value of additional or substitute procedural safeguards, and the Government's interest.¹⁸⁷

2. *The Equal Protection Claim*

Under the Equal Protection Clause, a state shall not deny the equal protection of the law to any person within its jurisdiction.¹⁸⁸ The purpose of the Equal Protection Clause is to protect "every person within the state's jurisdiction against intentional and arbitrary discrimination,

¹⁷⁹ *Id.* at 229.

¹⁸⁰ *Id.*

¹⁸¹ *Id.* at 230.

¹⁸² *Id.* at 210.

¹⁸³ *Id.*

¹⁸⁴ *Id.* at 215.

¹⁸⁵ *Id.* at 210.

¹⁸⁶ For example, the Tex. Gov. Code § 498.002 states that "each inmate must be classified according to the inmate's conduct, obedience, and industry" which could create a liberty interest in a classification based on (at least) conduct instead of solely on an inmate's sentence. Yet, death-sentenced prisoners in Texas are automatically placed in solitary confinement on death row without such classification, which could pose an atypical hardship on this group of prisoners.

¹⁸⁷ *Wilkinson v. Austin*, 545 U.S. 209, 224–25 (2005).

¹⁸⁸ U.S. CONST. amend. XIV, § 1.

whether occasioned by express terms or a statute or by its improper execution through duly constituted agents.”¹⁸⁹ It is essentially a direction that all persons similarly situated should be treated alike, by a classification that is reasonable, not arbitrary, and “rest[s] upon some ground of difference having a fair and substantial relation to the object of the legislation”¹⁹⁰

In considering whether state legislation violates the Equal Protection Clause, the Court applies one of three levels of scrutiny.¹⁹¹ Classifications that are based on race, national origin, or other fundamental rights are given the most exacting scrutiny,¹⁹² often referred to as strict scrutiny. Such classifications are only constitutional under the strict scrutiny test if they are narrowly tailored measures that further compelling governmental interests.¹⁹³ When discriminatory classifications are based on sex or illegitimacy, a level of intermediate scrutiny is applied.¹⁹⁴ The minimum level of scrutiny applied is the rational basis, i.e., statutory classifications must be rationally related to a legitimate governmental purpose at minimum.¹⁹⁵ The treatment a prisoner receives in prison, including conditions of confinement, is subject to scrutiny under the Eighth Amendment.¹⁹⁶

The Equal Protection Clause is most commonly used to bring claims alleging discrimination based on membership in a protected class.¹⁹⁷ A plaintiff that is not a member of a protected class can still prevail in what is known as a “class of one” claim or class-of-one theory.¹⁹⁸ Since the Equal Protection Clause states that all persons similarly situated should be treated alike, a prisoner claiming an Equal Protection Clause violation must show that prison officials treated the prisoner differently from similarly-situated prisoners.¹⁹⁹ So a prisoner can bring such a claim under the class-of-one theory to challenge his confinement conditions, comparing them to conditions of other prisoners.²⁰⁰ The prisoner must first show that he has been intentionally treated differently from others that are similarly situated in prison.²⁰¹ Second, the prisoner needs to show

¹⁸⁹ *Sunday Lake Iron Co. v. Wakefield Tp.*, 247 U.S. 350, 352 (1918).

¹⁹⁰ *F. S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920).

¹⁹¹ *Clark v. Jeter*, 486 U.S. 456, 461 (1988).

¹⁹² *Id.*; see also *Loving v. Virginia*, 388 U.S. 1, 11, 18 (1967).

¹⁹³ *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995).

¹⁹⁴ *Clark*, 486 U.S. at 461.

¹⁹⁵ *Id.*; see also *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 17, 36 (1973).

¹⁹⁶ *Helling v. McKinney*, 509 U.S. 25, 31 (1993).

¹⁹⁷ *Neilson v. D’Angelis*, 409 F.3d 100, 104 (2d Cir. 2005).

¹⁹⁸ *Id.* (citing *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000)).

¹⁹⁹ *Grissom v. Roberts*, 902 F.3d 1162, 1173 (10th Cir. 2018).

²⁰⁰ *Willowbrook*, 528 U.S. at 564.

²⁰¹ *Id.*

that there is no rational basis for that difference in treatment.²⁰² In order to successfully make a class-of-one claim, a prisoner must allege an extremely high degree of similarity with the person or person to whom he compares himself.²⁰³ A plaintiff in a class-of-one needs to show that:

- (i) no rational person could regard the circumstances of the plaintiff to differ from those of a comparator to a degree that would justify the differential treatment on the basis of a legitimate government policy; and
- (ii) the similarity in circumstances and difference in treatment are sufficient to exclude the possibility that the defendant acted on the basis of a mistake.²⁰⁴

The standard for determining whether another person's circumstances are similar to the plaintiff's is whether they are "prima facie identical" in all relevant respects.²⁰⁵ Only if the prisoners are alike in all relevant respects are they similarly situated.²⁰⁶ The question of whether parties are similarly situated is a fact-intensive inquiry.²⁰⁷ In determining whether two prisoners should be subject to the same conditions of confinement all relevant facts need to be taken into account including their histories of conduct in prison, the criminal offenses that placed them in prison, and the time remaining in their terms of imprisonment.²⁰⁸

A prisoner challenging his confinement conditions under the Equal Protection Clause of the Fourteenth Amendment can do so under a class-of-one theory. Since challenging automatic placement in solitary confinement based on sentence would not place prisoners in a protected class as required by the strict scrutiny and intermediate scrutiny test, a rational basis review will be applied. A prisoner must show that the statutory classifications are not rationally related to a legitimate governmental purpose. The prisoner must first show that he has been intentionally treated differently from others that are similarly situated in prison. Second, the prisoner needs to show that there is no rational basis for that difference in treatment. All challenges require a state-by-state analysis.

²⁰² *Id.*

²⁰³ *Clubside, Inc. v. Valentin*, 468 F.3d 144, 159 (2nd Cir. 2018).

²⁰⁴ *Neilson v. D'Angelis*, 409 F.3d 100, 105 (2d Cir. 2005).

²⁰⁵ *Id.* (citing *Purze v. Village of Winthrop Harbor*, 286 F.3d 452, 455 (7th Cir. 2002)).

²⁰⁶ *Grissom v. Roberts*, 902 F.3d 1162, 1173 (10th Cir. 2018).

²⁰⁷ *Clubside, Inc.*, 468 F.3d at 159.

²⁰⁸ *Grissom*, 902 F.3d at 1172.

C. Overview

Death-sentenced prisoners who wish to challenge automatic placement in prolonged solitary confinement can make claims under either the Eighth or Fourteenth Amendments—in the latter case, under the Due Process or Equal Protection clauses. Prisoners must meet a two-prong test under the Eighth Amendment. First, prisoners must show that a substantial risk of serious harm was longstanding, pervasive, well-documented, or expressly noted by prison officials in the past and that the circumstances suggest that prison officials were exposed to information concerning the risk and thus must have known about it. To satisfy the objective prong, prisoners must show that the challenged conditions pose a serious or significant physical or emotional injury or a substantial risk of such harm resulting from exposure to the challenged conditions. To satisfy the subjective prong, prisoners must show that officials knew of and disregarded an excessive risk to inmate health or safety. A prisoner claiming a Due Process Clause violation under the Fourteenth Amendment must first identify a protected liberty or property interest and secondly demonstrate deprivation of that interest without due process of law. This can be established via a two-prong test. First, the prisoner needs to identify a mandatory state directive that creates a state law liberty interest. This could come from, for example, prison classification regulations. Second, the prisoner needs to demonstrate a deprivation of that interest without the due process of law. Such could occur when a prisoner is denied classification under a prison policy that regulates all inmate classification and is instead placed indefinitely in solitary confinement. A prisoner challenging the confinement conditions under the Equal Protection Clause of the Fourteenth Amendment can do so under a class-of-one theory, i.e. a claim by a petitioner that is not a member of a protected class. Since challenging automatic placement in solitary confinement based on sentencing would not place prisoners in a protected class, a rational basis review will be applied. A prisoner must show that the statutory classifications are not rationally related to a legitimate governmental purpose. The prisoner must first show that the prisoner has been intentionally treated differently from others that are similarly situated in prison. Second, the prisoner needs to show that there is no rational basis for that difference in treatment.

When reviewing these three possible constitutional violations, a prisoner will likely have the lowest chance of success when challenging extreme conditions, such as the automatic placement in prolonged solitary confinement, under an Equal Protection violation since the lowest level of scrutiny would apply to the placement decision. Section 5 will review several recent challenges against the automatic placement

in solitary confinement and the constitutional violations on which they are based. These challenges will give a better understanding of which constitutional violation could best be asserted to achieve the highest chance of success.

IV. CHALLENGES TO THE HOUSING POLICIES

In recent years, death-sentenced prisoners in multiple states have challenged automatic placement in indefinite solitary confinement. Some have been successful, while other lawsuits are still pending. This section discusses eight recent challenges, including the constitutional violations on which they are based, and their outcomes, almost all of which have succeeded at advancing changes in the confinement conditions.

A. Challenges

1. *Arizona*

On October 25, 2015, Arizona death-sentenced prisoner Scott Nordstrom filed a civil complaint in the U.S. District Court for the District of Arizona.²⁰⁹ The complaint challenged automatic placement in maximum custody, the most restrictive custody level.²¹⁰ Nordstrom argued that his Eighth and Fourteenth Amendment rights were violated because he was automatically placed in a maximum custody unit based on his death sentence.²¹¹ Nordstrom and other death-sentenced prisoners were confined in continuously illuminated small cells for up to twenty-four hours per day with reduced visitation opportunities, including a total bar on contact visits and significantly restricted recreation opportunities.²¹² Recreation was allowed only four days a week for 2.5 hours per day in a small cage the size of a prison cell.²¹³ These inmates had no opportunities to participate in communal meals or group religious services and endured other deprivations and adverse conditions.²¹⁴ These conditions were indefinite and mandatory for prisoners under a sentence

²⁰⁹ Complaint at 1, *Nordstrom v. Ryan*, No. CV15-02176-PHX-DGC (JZB) (D. Ariz. Oct. 28, 2015) [hereinafter *Complaint Nordstrom*].

²¹⁰ *Id.* at 2.

²¹¹ *Id.* at 3.

²¹² *Id.* at 2.

²¹³ *Id.* at 7.

²¹⁴ *Id.* at 2.

of death.²¹⁵ Nordstrom argued these conditions violated the Eighth Amendment ban on cruel and unusual punishment.²¹⁶ Moreover, no factors other than a prisoner's death sentence were considered before death-sentenced prisoners were housed as described.²¹⁷ There were no opportunities for inmates to challenge housing assignments, nor did the Arizona Department of Corrections conduct any meaningful review of these placements.²¹⁸ Nordstrom alleged that the failure to provide him any meaningful review or opportunity to challenge his placement violated his right to Due Process under the Fourteenth Amendment.²¹⁹

On March 3, 2017, Nordstrom and the Director of the Arizona Department of Corrections entered into a settlement ending the automatic placement of death-sentenced prisoners in indefinite solitary confinement.²²⁰ Death-sentenced prisoners in Arizona are no longer automatically placed in maximum custody units based on their death sentence.²²¹ They now have the opportunity to seek and obtain reclassification to close custody—a less restrictive custody level—based on the general classification criteria applicable to other inmates.²²² Under the settlement, conditions of confinement for death-sentenced prisoners in close custody have to be equivalent to other prisoners' housing conditions in close custody, thereby ending their solitary confinement.²²³

After the settlement, Nordstrom and several other death-sentenced prisoners were moved to a close custody unit at the Central Unit on July 20, 2017, where they now have three to six hours out-of-cell time per day.²²⁴ Subsequently, the ADOC put into effect a revised version of the classification regulation.²²⁵ However, the revision created an individual and discretionary reclassification procedure for death-sentenced inmates in breach of the settlement's requirement that they be reclassified according to the criteria applicable to other inmates.²²⁶ Thereby, a large number of death-sentenced inmates currently remain housed at the Browning Unit in maximum custody despite never having gone through the process required to place an inmate into maximum custody, even those whose institutional histories suggest they would be eligible for close

²¹⁵ *Id.*

²¹⁶ *Id.* at 3.

²¹⁷ *Id.* at 2.

²¹⁸ *Id.* at 2–3.

²¹⁹ *Id.*

²²⁰ Order at 1, *Nordstrom v. Ryan*, No. CV15-02176-PHX-DGC (JZB) (D. Ariz. July 7, 2017).

²²¹ *Id.* at 3.

²²² *Id.*

²²³ *Id.* at 2.

²²⁴ Motion to Enforce Stipulation of Settlement at 3, *Nordstrom v. Ryan*, No. CV15-02176-PHX-DGC (JZB), 2018 WL 1586754 (D. Ariz. Sep. 14, 2018).

²²⁵ *Id.*

²²⁶ *Id.*

custody.²²⁷ Therefore, in September 2018, Nordstrom filed a motion requesting the court to enforce the settlement, stating that the Department of Corrections had failed to provide conditions of confinement equivalent to the housing conditions of other prisoners in close custody.²²⁸ The court denied Nordstrom's motion, ruling that he could not seek relief on behalf of other inmates because Nordstrom did not bring the case as a class action, and the settlement was only between Nordstrom and the Director of the DOC.²²⁹ However, the number of prisoners at the Browning Unit is shrinking, as death-sentenced prisoners are still being moved to the Central Unit. As of October 2020, only thirty-five death-sentenced prisoners remain in the Browning Unit.²³⁰

2. *Florida*

On July 19, 2017, a class action was filed in federal court on behalf of nine death-sentenced prisoners in Florida challenging their automatic and permanent placement in solitary confinement on Florida's death row.²³¹ The death-sentenced prisoners are housed in windowless cells, often for twenty-four hours a day.²³² There is extremely limited contact with other prisoners and staff, severely restricted access to phone calls, minimal opportunity to exercise, and deprivation of all vocational, recreational, and educational programming.²³³ The complaint states that the policy of automatic, indefinite solitary confinement for death-sentenced prisoners is extreme, debilitating, and inhumane; it violates contemporary standards of decency and deprives plaintiffs of the basic human contact required to maintain their physical and mental health.²³⁴ The conditions on death row impose an atypical and significant hardship, and the Florida Department of Corrections provides the death-sentenced prisoners no meaningful opportunity to review or obtain relief from these conditions.²³⁵ Plaintiffs base their challenge on the Eighth Amendment ban on cruel and unusual punishment and the Fourteenth Amendment right to due process.²³⁶ Florida's Department of Corrections has denied

²²⁷ *Id.*

²²⁸ *Id.* at 4.

²²⁹ Order at 6, 11, Nordstrom v. Ryan, CV-15-02176-PHX-DGC (D. Ariz. Feb. 11, 2019).

²³⁰ *Death Row*, ARIZONA DEP'T OF CORR. REHAB. AND REENTRY, *Death Row*, <https://corrections.az.gov/public-resources/death-row> [<https://perma.cc/BMA9-MHMN>].

²³¹ Complaint Davis, *supra* note 6, at 1.

²³² *Id.* at 2.

²³³ *Id.*

²³⁴ *Id.*

²³⁵ *Id.* at 3, 25.

²³⁶ *Id.* at 3.

any violation and specifically denies that death row conditions constitute solitary confinement.²³⁷ On October 24, 2017, the District Court for the Middle District of Florida referred the case to mediation.²³⁸ The parties continued their discussions and, on October 29, 2019, requested more time for mediation.²³⁹ There were several mediation sessions scheduled in January, April, and September of 2020.²⁴⁰ Parties are coming close to reaching a settlement agreement.²⁴¹ The settlement will include at least more out-of-cell time and more social activities.²⁴² Another mediation session is scheduled for October 27, 2020.²⁴³

3. Louisiana

On March 29, 2017, three prisoners, who had at that time spent twenty-five, thirty, and thirty-one years, respectively, on death row in Louisiana, filed a lawsuit against the Louisiana Department of Public Safety Corrections and the wardens of the Louisiana State Penitentiary (“Angola”) challenging extreme housing conditions on death row.²⁴⁴ The prisoners were confined to their cells for twenty-three hours a day and only permitted to leave their cells one at a time for one hour a day to shower, use the phone, and walk along the tier.²⁴⁵ They were not allowed to have contact visits, group recreation, or hold any type of employment.²⁴⁶ The three death-sentenced prisoners stated that there was no legitimate or valid penological reason to place them in solitary confinement based exclusively on their death sentences.²⁴⁷ They were also not afforded any process or mechanism to challenge their confinement, violating their rights under the Constitution’s Eighth and Fourteenth Amendments.²⁴⁸ In October 2017, six months after the lawsuit

²³⁷ Answer at 2, *Davis v. Inch*, No. 3:17-cv-820-J-34PDB, 2019 WL 1400465 (M.D. Fla. May 6, 2019).

²³⁸ Case Management and Scheduling Order and Referral to Mediation at 1, *Davis v. Inch*, No. 3:17-cv-820-J-34PDB, 2019 WL 1400465 (M.D. Fla. Oct. 17, 2017).

²³⁹ Notice, *Davis v. Inch*, No. 3:17-cv-820-J-34PDB, 2019 WL 1400465 (M.D. Fla. Oct. 30, 2019).

²⁴⁰ *Id.*; Email from unnamed attorney to author (Oct. 22, 2020) (on file with author) [hereinafter October 22 Email].

²⁴¹ Telephone interview with unnamed attorney (Apr. 22, 2020) [hereinafter April 22 Telephone interview]; October 22 Email, *supra* note 240.

²⁴² April 22 Telephone interview, *supra* note 240; October 22 Email, *supra* note 240.

²⁴³ October 22 Email, *supra* note 240.

²⁴⁴ Class Action Complaint and Demand for Jury Trial at 1, *Hamilton v. Vannoy*, No. 3:17-cv-00194-SDD-RLB, (M.D. La. Mar. 29, 2017) [hereinafter Complaint Hamilton].

²⁴⁵ *Id.* at 1–2.

²⁴⁶ *Id.* at 9–11.

²⁴⁷ *Id.* at 3.

²⁴⁸ *Id.*

was filed, the Department of Public Safety Corrections agreed to relax its housing restrictions on death row.²⁴⁹ Instead of one hour per day, death-sentenced prisoners now have five hours per day of out-of-cell time.²⁵⁰ Death-sentenced prisoners have communal out-of-cell time for two hours in the morning and two hours in the afternoon, including lunch together, communal recreation, religious services, and learning opportunities, such as access to several study programs.²⁵¹ Although death-sentenced prisoners in Louisiana are still housed on death row without any classification and without any opportunity to review that placement, there is no more default of solitary confinement.²⁵² The lawsuit is still pending, but settlement negotiations are being finalized, and the case is expected to be resolved soon without having to go to trial.²⁵³

4. *Kansas*

On November 6, 2020, two death-sentenced prisoners filed a lawsuit against the Kansas Department of Corrections, challenging their automatic placement in indefinite solitary confinement based on their death sentence.²⁵⁴ Death-sentenced prisoners in Kansas are confined between twenty-two and twenty-four hours a day in their cells.²⁵⁵ They are out of their cells only for showers on three days a week, are allowed solitary exercise for one hour a day on four or five days a week, and are offered extremely infrequent non-contact visits.²⁵⁶ Death-sentenced prisoners in Kansas cannot obtain review of or challenge their solitary confinement; it can only end if their death sentence is overturned or by their death.²⁵⁷ The two death-sentenced prisoners argue that this procedure of automatic, indefinite solitary confinement is extreme, debilitating, and inhumane and systematically and continuously deprive the plaintiffs of the basic human contact required to maintain mental and

²⁴⁹ Email from unnamed attorney to author (Jan. 13, 2020) [hereinafter January 13 Email] (on file with author).

²⁵⁰ Julia O'Donoghue, *Louisiana tests relaxed restrictions on death row inmates*, NOLA (Oct. 26, 2017), https://www.nola.com/news/-politics/article_f83957a5-5021-52ab-9d75-22fb59782509.html [https://perma.cc/G7TY-XQRS].

²⁵¹ January 13 Email, *supra* note 249.

²⁵² *Id.*

²⁵³ *Id.*; Consent Motion to Continue Status Conference, *Hamilton v. Vannoy*, No. 3:17-cv-00194-SDD-RLB, (M.D. La. Jan. 13, 2020); Telephone interview with unnamed attorney (Oct. 15, 2020) [hereinafter October 15 Telephone interview].

²⁵⁴ Complaint for Declaratory and Injunctive Relief, *Cheever v. Zmuda*, No. 2:20-cv-02555-JAR-KGG, (D.C. Mi. Nov. 6, 2020) [hereinafter Complaint Cheever].

²⁵⁵ *Id.* at 3.

²⁵⁶ *Id.* at 3.

²⁵⁷ *Id.* at 2.

physical health.²⁵⁸ The complaint further describes the risk of substantial physical, mental, and emotional harm of indefinite solitary confinement.²⁵⁹ The complaint also mentions that corrections officials in other states use placement systems based on several objective factors, such as disciplinary history and age.²⁶⁰ The plaintiffs argue that their permanent placement in solitary confinement deprives them of their rights to due process of law, guaranteed under the Fourteenth Amendment, and to be free of cruel and unusual punishment, guaranteed by the Eighth Amendment.²⁶¹ At the time of this report, the Kansas Department of Corrections had not filed an answer to the complaint.

5. *Oklahoma*

On July 29, 2019, the ACLU sent a demand letter to the Oklahoma Department of Corrections (DOC), criticizing the use of automatic and prolonged solitary confinement on Oklahoma's death row.²⁶² In Oklahoma, death-sentenced prisoners were locked in their cells in an underground facility—the H-unit—without any natural light for twenty-two to twenty-four hours a day.²⁶³ There were opportunities for fifteen-minute showers three times a week and an hour of solitary exercise five times a week in an enclosed concrete room that obstructed any view of the sky or sun.²⁶⁴ The prisoners were only allowed to have non-contact visits.²⁶⁵ There were rare opportunities for prisoners to get a job.²⁶⁶ In the H-unit, three prisoners acquired jobs, serving as mailmen or law clerks.²⁶⁷ Prisoners were housed in individual cells.²⁶⁸ In their letter, the ACLU stated that there is no penological reason for automatically segregating all death-sentenced prisoners in solitary confinement.²⁶⁹ The ACLU urged the DOC to resolve the case without having to litigate the matter in federal court.²⁷⁰ In October 2019, the Oklahoma DOC agreed

²⁵⁸ *Id.* at 2.

²⁵⁹ *Id.* at 4.

²⁶⁰ *Id.* at 6.

²⁶¹ *Id.* at 8.

²⁶² Letter from ACLU of Oklahoma to Scott Crow, Interim Dir. of Oklahoma Dep't of Corr. (July 29, 2019) (on file with author) [hereinafter ACLU Letter].

²⁶³ *Id.*

²⁶⁴ *Id.*

²⁶⁵ *Id.*

²⁶⁶ Email from unnamed attorney to author (Sep. 29, 2020) [hereinafter September Email] (on file with author).

²⁶⁷ *Id.*

²⁶⁸ Interoffice Memorandum, Oklahoma State Penitentiary (Oct. 23, 2019), at 2-4 [hereinafter Interoffice Memorandum]

²⁶⁹ ACLU Letter, *supra* note 262.

²⁷⁰ *Id.*

to move some of its death-sentenced prisoners out of the underground solitary confinement facility into a different unit.²⁷¹ The DOC moved some of the death-sentenced prisoners to a facility above ground within the same prison; the A-unit.²⁷² As of October 2020, about 32 death-sentenced prisoners have been moved to the A-Unit, while 12 prisoners remain in the H-Unit.²⁷³ Some positive changes have been made in the A-Unit: death-sentenced prisoners are allowed to have contact visitation, they have a window in their cell, and they can have recreation in an outside yard instead of in the underground bunker.²⁷⁴ Outside recreation takes place in groups of three prisoners who are confined in individual pens.²⁷⁵ A few more prisoners have jobs; it is reported that seven prisoners currently have a job.²⁷⁶ In the A-Unit, prisoners are housed two per cell and thus have a cellmate.²⁷⁷ Group religious services have become available to prisoners in both units.²⁷⁸ The out-of-cell time has not changed in either unit; death-sentenced prisoners are still held in solitary confinement for twenty-three hours a day.²⁷⁹ Litigation to improve the conditions is ongoing.²⁸⁰

6. *Pennsylvania*

On January 25, 2018, five death-sentenced prisoners filed a class-action lawsuit against Pennsylvania's Department of Corrections.²⁸¹ The prisoners stated they had been housed in solitary confinement with limited and sporadic human interaction solely based on their death sentences and without any meaningful opportunity to challenge their placement.²⁸² Death-sentenced prisoners in Pennsylvania were held in continuously illuminated cells for twenty-two hours a day. On weekdays,

²⁷¹ Telephone interview with unnamed attorney (Nov. 5, 2019) [hereinafter November Telephone interview]; *Oklahoma Agrees to Move Death-Row Prisoners out of Underground Solitary Confinement*, DEATH PENALTY INFORMATION CENTER, (Oct. 8, 2019), <https://deathpenaltyinfo.org/news/oklahoma-agrees-to-move-death-row-prisoners-out-of-underground-solitary-confinement> [<https://perma.cc/Y787-T67G>].

²⁷² *Id.*

²⁷³ Interoffice Memorandum, *supra* note 268, at 2-4: (prisoners that are still in the H-Unit either did not want to relocate or were considered unfit to be relocated because of a danger to other prisoners, mental health, or because of a risk of victimization.)

²⁷⁴ November Telephone interview, *supra* note 271; September Email, *supra* note 266.

²⁷⁵ *Id.*

²⁷⁶ *Id.*

²⁷⁷ Interoffice Memorandum, *supra* note 268, at 2.

²⁷⁸ September Email, *supra* note 266.

²⁷⁹ November Telephone interview, *supra* note 271.

²⁸⁰ September Email, *supra* note 266.

²⁸¹ Complaint – Class Action at 1-2, *Reid v. Wetzel*, No. 1:18-cv-00176-JEJ (M.D. Pa., Jan. 25, 2018) [hereinafter *Complaint Reid*].

²⁸² *Id.* at 2.

they were allowed two hours of outdoor exercise in small cages.²⁸³ On weekends, they were held in their cells twenty-four hours a day.²⁸⁴ Death-sentenced prisoners were only allowed to have non-contact visits.²⁸⁵ The class-action members alleged that their confinement had caused them serious, irreversible physical and psychological harm.²⁸⁶ They also alleged there was no legitimate penological reason for their placement in solitary confinement and was based exclusively on their sentence.²⁸⁷ They claimed that their confinement, therefore, violated the Eighth and Fourteenth Amendments.²⁸⁸

Ten months later, the death-sentenced prisoners, represented by the ACLU, and the Pennsylvania Department of Corrections (DOC) reached a settlement agreement.²⁸⁹ The DOC agreed to house death-sentenced prisoners in the same manner as prisoners in general population, marking a fundamental change in their housing conditions.²⁹⁰ In Pennsylvania, death row is now operated as a general population unit that exclusively houses prisoners sentenced to death and is no longer classified as an administrative custody unit.²⁹¹ When moving within the unit, death-sentenced prisoners are no longer subjected to strip-searches or shackling.²⁹² The settlement also grants death-sentenced prisoners 42.5 hours of out-of-cell activities per week. In addition to yard and outdoor time, out-of-cell activities include time in the law library (for two-hour blocks), communal mealtime, counseling meetings, communal religious worship, work assignments, daily phone use, and contact visitation.²⁹³ Outdoor exercise is offered for at least two hours per day, seven days a week (weather permitting).²⁹⁴ Showers, medical appointments, and attorney meetings are not counted as out-of-cell activities.²⁹⁵ Death-sentenced prisoners are now permitted to purchase televisions, tablets, and radios and have access to free educational programming, mental health care, and religious activities.²⁹⁶ The legal director of the ACLU of Pennsylvania, Witold Walczak, called the settlement a “historic achievement” and stated that the changes have made Pennsylvania a

²⁸³ *Id.*

²⁸⁴ *Id.* at 2–3.

²⁸⁵ *Id.* at 2.

²⁸⁶ *Id.* at 3.

²⁸⁷ *Id.* at 4.

²⁸⁸ *Id.* at 5.

²⁸⁹ Settlement Agreement, *Reid v. Wetzell* at 1, No. 1:18-cv-00176-JEJ (M.D. Pa., Nov. 18, 2019) [hereinafter Settlement Agreement Reid].

²⁹⁰ *Id.*

²⁹¹ *Id.* at 10.

²⁹² *Id.* at 11.

²⁹³ *Id.* at 13, 18.

²⁹⁴ *Id.* at 14.

²⁹⁵ *Id.* at 14.

²⁹⁶ *Id.* at 12, 16, 17, 22.

national leader in treating all incarcerated persons humanely.²⁹⁷ The U.S. District Court for the Middle District of Pennsylvania approved the settlement on April 9, 2020, stating that ending the former “draconian conditions of death row” heavily favored approval.²⁹⁸

7. *South Carolina*

On September 26, 2017, South Carolina’s death row was moved to Kirkland in Columbia.²⁹⁹ Prior to the move, since 1997, the state’s death row had been located at Lieber Correctional Institution.³⁰⁰ Although death-sentenced prisoners had been in solitary confinement at Lieber Correctional Institution, conditions worsened when they were moved to Kirkland.³⁰¹ At Lieber, death-sentenced prisoners could at least communicate with each other through electronic outlets and could pass around a phone and share a microwave.³⁰² At Kirkland, all of that was taken away, cells were dirty, and cleaning supplies were only available for purchase from the commissary. Inmates were also denied regular access to recreation.³⁰³ In response to these conditions, on December 7, 2017, eighteen death-sentenced prisoners filed a federal lawsuit against the South Carolina Department of Corrections (DOC) challenging their automatic placement in solitary confinement.³⁰⁴ The complaint states that the indefinite and extreme isolation violated their Eighth and Fourteenth Amendment rights.³⁰⁵ The prisoners claimed the dehumanizing conditions had caused them severe and irreversible physical and psychological harm.³⁰⁶ The complaint states that there is no valid penological reason to place death-sentenced prisoners in solitary confinement and that the placement is based exclusively on their death sentence.³⁰⁷ At Kirkland, the death-sentenced prisoners were subjected to confinement for twenty-

²⁹⁷ ACLU Pennsylvania, SETTLEMENT REACHED TO END PERMANENT SOLITARY CONFINEMENT FOR PEOPLE SENTENCED TO DEATH IN PENNSYLVANIA, <https://aclupa.org/en/press-releases/settlement-reached-end-permanent-solitary-confinement-people-sentenced-death> [<https://perma.cc/8EH5-7ED9>].

²⁹⁸ Memorandum and Order at 5–6, *Reid v. Wetzel*, No. 1:18-cv-00176-JEJ (M.D. Pa., Apr. 9, 2020).

²⁹⁹ Report and Recommendation at 2, *Northcutt v. S. Car. Dep’t of Corr.*, No. 4:17-cv-03301-BHH-TER (D.D.C., June 26, 2018).

³⁰⁰ *Id.*

³⁰¹ *Id.*

³⁰² *Id.* at 2.

³⁰³ *Id.* at 3.

³⁰⁴ Complaint and Demand for Jury Trial at 1, *Northcutt v. S. Car. Dep’t of Corr.*, No. 4:17-cv-03301-BHH-TER (D.D.C., Dec. 7, 2017) [hereinafter *Complaint Northcutt*].

³⁰⁵ *Id.*

³⁰⁶ *Id.* at 3.

³⁰⁷ *Id.*

four hours a day in small, windowless cells.³⁰⁸ They were allowed to leave their cells in rare instances for individual recreation in small cages, which were outdoors but only partially open to the sky, and for periodic legal and family visits.³⁰⁹ There was no physical human contact of any kind.³¹⁰ During visits, death-sentenced prisoners were separated from their visitors by a glass wall.³¹¹ The DOC, in its response, denied all allegations made by the plaintiffs.³¹²

In July 2019, the DOC moved death-sentenced prisoners to the Broad River Correctional Institution.³¹³ According to the South Carolina DOC, the move addressed some of the concerns raised by the lawsuit filed on behalf of the eighteen death-sentenced prisoners.³¹⁴ The new housing unit operates like a general population dorm where death-sentenced prisoners can be out of their cells from 6 a.m. to 6 p.m.³¹⁵ Death-sentenced prisoners cannot interact with general population prisoners.³¹⁶ Most death-sentenced prisoners now have jobs on their unit, such as serving meals, cleaning common areas, working in the laundry, or assisting fellow prisoners with disabilities.³¹⁷ But death-sentenced prisoners also have the opportunity to worship together in services coordinated by the institution's chaplain.³¹⁸ However, the district court for the District of South Carolina has not yet ruled on the merits of the case.³¹⁹ In March 2020, the two parties continued settlement negotiations regarding minimum requirements on death row and other policies in hopes of resolving the suit without further court intervention.³²⁰ As part of the negotiations, Plaintiffs' counsel has even been allowed to inspect the conditions at both the death row at Kirkland and the current death row at Broad River, the facility to which plaintiffs were moved.³²¹ In July 2020, parties filed a joint status report on the settlement negotiations.³²²

³⁰⁸ *Id.*

³⁰⁹ *Id.* at 2.

³¹⁰ *Id.*

³¹¹ *Id.*

³¹² Defendant's Response in Opposition to Plaintiff's Motion and Memorandum for Preliminary Injunction at 17, *Northcutt v. S. Car. Dep't of Corr.*, No. 4:17-cv-03301-BHH-TER (D.D.C., Jan. 19, 2018).

³¹³ Press Release, South Carolina Dep't of Corr., Death Row (July 11, 2019), <http://public.doc.state.sc.us/agency-news-public/homeAction.do?method=view&id=410> [<https://perma.cc/GU46-T8PU>] [hereinafter Press Release].

³¹⁴ *Id.*

³¹⁵ *Id.*; Telephone interview with unnamed attorney (Mar. 11, 2020) [hereinafter March 11 Telephone interview].

³¹⁶ South Carolina Dep't of Corr., *supra* note 313.

³¹⁷ *Id.*

³¹⁸ *Id.*

³¹⁹ Telephone interview with two unnamed attorneys (Mar. 16, 2020).

³²⁰ *Id.*

³²¹ Joint Status Report at 1, *Northcutt v. S. Car. Dep't of Corr.*, No. 4:17-cv-03301-BHH-TER (D.D.C., July 27, 2020).

³²² *Id.*

The report mentions that parties are still engaged in a dialogue in the hopes of achieving a full negotiated resolution.³²³ One of the issues that parties are working on is drafting a new death row policy. The next mediation session was scheduled for September 25, 2020.³²⁴

8. *Virginia*

In November 2014, three death-sentenced prisoners, represented by the Virginia ACLU, filed suit against the director of the state's Department of Corrections.³²⁵ The prisoners alleged that the conditions of confinement for their time on Virginia's death row violated their Eighth Amendment rights.³²⁶ Death-sentenced prisoners in Virginia were housed in individual cells the size of a parking space for at least twenty-three hours a day and permitted to leave their cells for one hour of outdoor recreation five days a week and a ten-minute shower three days a week.³²⁷ During outdoor recreation, death-sentenced prisoners were confined to individual enclosures.³²⁸ Cells on death row were always lit.³²⁹ Visitation consisted of non-contact visits on the weekends, although a death-sentenced prisoner could request a contact visit with immediate family members once every six months.³³⁰ In practice, this request was only granted when a prisoner had a scheduled execution.³³¹ There was no form of communal recreation, and they could not participate in religious services.³³²

On February 21, 2018, the district court granted summary judgment in the plaintiffs' favor on their Eighth Amendment claim.³³³ In reaching that conclusion, the district court held that the conditions of confinement—particularly inmates' prolonged periods of isolation—on Virginia's death row “created, at the least, a significant risk of substantial psychological or emotional harm.”³³⁴ The district court further held that, under the undisputed evidence, State defendants were

³²³ *Id.*

³²⁴ *Id.* at 2.

³²⁵ *Porter v. Clarke*, 923 F.3d 348, 353 (4th Cir. 2019).

³²⁶ *Id.*

³²⁷ *Id.*; Judgment Order at 4, *Porter v. Clarke*, No. 1:14-cv-01588-LMB-IDD (4th Cir. May 3, 2019).

³²⁸ Judgment Order, *Porter v. Clarke*, *supra* note 328.

³²⁹ *Id.*

³³⁰ *Id.* at 4–5.

³³¹ *Id.* at 5.

³³² *Id.* at 5.

³³³ *Porter v. Clarke*, 290 F. Supp.3d 518, 518 (E.D. Va. 2018), *aff'd*, 923 F.3d 348 (4th Cir. 2019).

³³⁴ *Id.* at 532.

“deliberately indifferent” to the risk of harm.³³⁵ The State appealed. In a landmark ruling on May 3, 2019, the Fourth Circuit found Virginia’s former housing policies for death-sentenced prisoners to be unconstitutional:

The challenged conditions of confinement on Virginia’s death row—under which Plaintiffs spent, for years, between 23 and 24 hours a day alone, in a small cell with no access to congregate religious, educational, or social programming—pose a “substantial risk” of serious psychological and emotional harm. [. . .] The undisputed evidence established both that the challenged conditions of confinement on Virginia’s death row created a substantial risk of serious psychological and emotional harm and that the defendants were deliberately indifferent to that risk.³³⁶

On August 6, 2015, shortly after the lawsuit was filed, and before the ruling in federal court, the DOC had improved living conditions on Virginia’s death row.³³⁷ Changes made in 2015 included granting contact visits with family members on one day every week for an hour and a half per visit, participating in in-pod recreation with three other inmates seven days per week for a minimum of one hour per day, participating in outdoor recreation five days a week for ninety minutes per day, and showering seven days per week for fifteen minutes.³³⁸ During in-pod recreation prisoners could congregate in an area that has a television, tables with seating, games, and a JPAY kiosk.³³⁹ The Fourth Circuit’s ruling was related to prior conditions but nonetheless barred the State from reverting to unconstitutional housing conditions.³⁴⁰

B. Overview

In eight states—Arizona, Florida, Louisiana, Kansas, Oklahoma, Pennsylvania, South Carolina, and Virginia—there have been recent challenges to the automatic use of indefinite solitary confinement for death-sentenced prisoners. The challenges were based either solely on

³³⁵ *Id.* at 529.

³³⁶ *Porter v. Clarke*, 923 F.3d 348, 357 (4th Cir. 2019).

³³⁷ *Id.* at 364.

³³⁸ *Id.*

³³⁹ *Id.*

³⁴⁰ *Id.* at 365.

the Eighth Amendment or on the Eighth amendment in combination with the Fourteenth Amendment's Due Process Clause.³⁴¹ Although only one federal court has ruled on the merits—the U.S. Court of Appeals for the Fourth Circuit in Virginia—six of the eight challenges have successfully resulted in significant changes to the confinement conditions of death-sentenced prisoners in the states where these challenges were raised. In five states where lawsuits were filed—Arizona, Louisiana, Pennsylvania, South Carolina, and Virginia—significant improvements to prisoners' housing conditions were made, including an expansion of their out-of-cell time and an increase in human contact, such as contact visitation and group recreation. In the sixth state, Oklahoma, the out-of-cell time has not improved (yet), but prisoners now have a cell with a window, contact visitation, and outside group recreation. In the seventh state—Florida—no changes have been made either, but the Department of Corrections and the death-sentenced prisoners remain in mediation. It is too early to conclude anything about the lawsuit in Kansas, since at the time of this article, it had just been filed.

These challenges have called into question the constitutionality of the automatic use of indefinite solitary confinement based solely on a death sentence. The Supreme Court has not ruled on the issue, but it might soon be time to do so.

V. CONCLUSION

A comparison of housing policies and conditions for death-sentenced prisoners and other prisoners makes clear that death-sentenced prisoners are treated substantially differently because of their death sentences, despite their ability to conform to prison life. In all twenty-eight death penalty states, an individual assessment is used to decide which custody level to place nondeath-sentenced prisoners into. Yet approximately forty percent of death-sentenced prisoners in the United States are denied that same assessment and are instead automatically placed in indefinite solitary confinement. International standards strongly reject the use of solitary confinement based solely on a sentence or conviction and for an indefinite period of time.

The automatic placement of death-sentenced prisoners in prolonged solitary confinement based solely on their sentence also violates the U.S. Constitution—specifically the Eighth Amendment's ban on cruel and

³⁴¹ Complaint Nordstrom, *supra* note 209, at 3; Complaint Davis, *supra* note 6, at 3; Complaint Hamilton, *supra* note 244, at 3; Complaint Reid, *supra* note 281, at 5; Complaint Northcutt, *supra* note 304, at 1; Porter, 923 F.3d at 353.

unusual punishment and the Fourteenth Amendment's Due Process Clause which guarantees at least notice and a chance to be heard before a state imposes what is, in essence, an additional deprivation on top of a death sentence. Death-sentenced prisoners are theoretically entitled to the same procedural safeguards as any other prisoner but are systematically denied that right because of their sentence. The vast majority of others convicted of the same crime (*e.g.*, capital murder), but who are not sentenced to death, are not subjected to these conditions.

Recent lawsuits challenging these automatic placements show that this practice can be successfully challenged. The question, therefore, is not if but when challenges will be brought in the twelve remaining states where this abhorrent practice continues.

TABLE 1: HOUSING POLICIES FOR OTHER MALE PRISONERS IN DEATH PENALTY STATES AS OF OCTOBER 2020

State	Custody levels	Classification procedure	Factors that determine custody	Reclassification procedure
Alabama	close, medium, or minimum custody. ³⁴² Minimum custody is divided into three levels: Minimum-In, Minimum-Out, and Minimum-Community. ³⁴³	Individual assessment	Prisoner's crime(s), time to serve, overall criminal history, documented behavior, psychological reports and other information gathered during classification interviews. ³⁴⁴	Prisoners receive a classification review at least once a year. ³⁴⁵
Arizona	maximum, close, medium, or minimum custody. ³⁴⁶	Individual assessment	Most serious current offense, most serious prior/other offense, escape history, history of institutional violence, gang affiliation status, and current age. ³⁴⁷	Reclassification takes place when events occur that change a prisoner's custody level (event-driven). ³⁴⁸
Arkansas	Class I (highest security level), Class II, Class III, or Class IV. ³⁴⁹	Individual assessment	Prisoner's crime, length of sentence, disciplinary record, prior violence, escape history, and other factors that determine the risk to the public and risk within the institution. ³⁵⁰	Prisoners can apply for reclassification if he has not received any disciplinary sanction for a major rule violation for at least sixty days prior to applying for reclassification. ³⁵¹ Prisoners can be reassigned or reclassified to an appropriate unit because of poor institutional adjustment, disciplinary record, security concerns, or institutional needs. ³⁵²

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ALA. DEP'T. OF CORR., MALE INMATE HANDBOOK 6 (Sept. 25, 2017) [hereinafter MALE INMATE].

ALA. DEP'T. OF CORR., *Definitions*, <http://www.doc.state.al.us/Definitions> [https://perma.cc/7CX2R-85E4] [hereinafter *Definitions*].

MALE INMATE, *supra* note 342, at 6.

Id. at 3.

ARIZ. DEP'T. OF CORR. REHAB. & REENTRY, DEPARTMENT ORDER MANUAL, CHAPTER 801: INMATE CLASSIFICATION 3 (May 11, 2019) [hereinafter CHAPTER 801].

Id. at 1.

ARIZ. DEP'T. OF CORR., INMATE HANDBOOK 6 (March 2020).

Id. at 5.

Id. at 7.

Id. at 7.

State	Custody levels	Classification procedure	Factors that determine custody	Reclassification procedure
California	Levels I through IV (Level IV is the most restrictive level). ³⁵³	Individual assessment	Age at the time of the first arrest, current age, length of current sentence, current or past involvement in a street gang or disruptive group, prior jail or juvenile sentences, and prior incarceration in state or federal facilities. ³⁵⁴	A classification committee reviews the placements once every twelve months. ³⁵⁵
Florida	community custody, minimum custody, close custody, or maximum custody. ³⁵⁶	Individual assessment	length of sentence, criminal history, history of violence, escape history, and a number of other factors. ³⁵⁷	Reassessment takes place at least once every twelve months or when a State Classification Officer staff member decides that reclassification is necessary. ³⁵⁸
Georgia	Minimum, medium, close, or maximum custody. ³⁵⁹	Individual assessment	The length of sentence, nature of crime, criminal history, sex offenses, detainers, escape history, history of violent behavior, medical/psychiatric status, and drug/alcohol use. ³⁶⁰	There is a possibility for a reclassification ranging from once every three months to once every twelve months, depending on the custody level—except for prisoners with a life without parole sentence. ³⁶¹
Idaho	Minimum, medium, or close custody. ³⁶²	Individual assessment	Current crime, criminal history, escape history, age, institutional behavior, proximity to release, detainers and warrants, placement matrix, risk posed to the public, staff, and other offenders, and programming needs. ³⁶³	Reclassification takes place once every twelve months. ³⁶⁴

THE PRISON LAW OFFICE, THE CALIFORNIA PRISON AND PAROLE HANDBOOK 106, 107 (2019).

Id. at 108, 109.

Id. at 112.

FLA. DEP'T. OF CORR., CLASSIFICATION AND CENTRAL RECORDS § 33-601.210 (July 14, 2014) [hereinafter § 33-601.210].

FLA. DEP'T. OF CORR., INMATE ORIENTATION HANDBOOK 8 (Dec. 2, 2016).

Id.

GA. DEP'T. OF CORR., SECURITY CLASSIFICATION, HCO2-0002 220.02 at 1 (July 31, 2014) [hereinafter SECURITY CLASSIFICATION].

S. CTR. FOR HUMAN RIGHTS, ADVOCACY HANDBOOK: A GUIDE TO HELPING LOVED ONES IN GEORGIA PRISONS 33 (3rd ed. 2009).

Id. at 34; SECURITY CLASSIFICATION, *supra* note 359, at 5.

IDAHO DEP'T OF CORR., *How are Residents Classified*, FAQ, <https://www.idoc.idaho.gov/content/prisons/faq> [https://perma.cc/VWT2-CD2W].

IDAHO DEP'T OF CORR., *Inmate Classification*, https://www.idoc.idaho.gov/content/prisons/inmate_classification [https://perma.cc/56PK-Y03S].

IDAHO DEP'T OF CORR., OFFENDER HANDBOOK 8 (2014).

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State	Custody levels	Classification procedure	Factors that determine custody	Reclassification procedure
Indiana	Levels ranging from 1 to 4 (Level 4 is the most restrictive custody level). ³⁶⁵	Individual assessment	The economic and social history, educational, medical, risk and special needs, circumstances surrounding the present commitment, criminal history, and conduct and progress reports relating to the confinement. ³⁶⁶	Reclassification takes place on an annual basis. ³⁶⁷
Kansas	Special management (administrative segregation), maximum custody, high-medium custody, low-medium custody, or minimum custody. ³⁶⁸	Individual assessment	The length of minimum sentence, length of time remaining to serve, criminal behavior involved in the current offense, past criminal behavior, escape history, institutional adjustment, behavioral characteristics, special needs, performance in sex offender treatment, detainers, absconding supervised release, gang involvement, pending disciplinary issues, and civil commitment issues. ³⁶⁹	Reclassification takes place every 120 days or annually, depending on the custody level. ³⁷⁰
Kentucky	Community custody, minimum custody, restricted custody, close custody or maximum custody. ³⁷¹	Individual assessment	Prisoner's behavior and criminal record. ³⁷²	Reclassification takes place once every six months. ³⁷³ Prisoners can also initiate a custody review once every twelve months. ³⁷⁴

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IND. DEPT. OF CORR., MANUAL OF POLICY AND PROCEDURES, § 01-04-101, 9 (November 1, 2015).

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Id.

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Id. at 72.

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KAN. DEPT. OF CORR., *Custody Classification*, <https://www.doc.ks.gov/facilities/fmg/custody> [<https://perma.cc/4BDB-BVVR>] [hereinafter *Custody Classification*].

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Id.

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Id.

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KY. DEPT. OF CORR., POLICES AND PROCEDURES, § 18.5. 2 (Jan. 4, 2019) [hereinafter § 18.5].

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Id. at § 18.3, 4.

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Id. at § 18.1, 7.

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Id. at § 18.1, 8.

State	Custody levels	Classification procedure	Factors that determine custody	Reclassification procedure
Louisiana	General population (which consists of medium and minimum custody), restrictive housing, protective custody, working cellblock, or medical custody. ³⁷⁵	Individual assessment	The offense, sentence, age, adjustment potential, excessive criminal behavior, escape history, and observable behavior. ³⁷⁶	Prisoners can file complaints. ³⁷⁷ Prisoners placed in restrictive housing have an automatic review every 90 days to determine whether the prisoner is eligible to be placed in a less restrictive custody level. ³⁷⁸ It remains unclear if there is any other possibility for reclassification since the Department's classification procedures are not published.
Mississippi	Minimum (community), minimum (non-community), medium, or a close custody security level. ³⁷⁹	Individual assessment	The nature of offense, circumstances of the crime, behavior and attitude following arrest, type of sentence (length of sentence), prior criminal history, personal and social factors (personal goals), adjustment to incarceration, evaluation and psychological tests, and security requirements. ³⁸⁰	There is a possibility for reclassification, but it remains unclear how often it takes place and what or who can initiate a reclassification. ³⁸¹

³⁷⁵ LA. DEP'T. OF CORR., LOUISIANA INFORMATIONAL HANDBOOK FOR FAMILY AND FRIENDS OF PEOPLE IN PRISON 9 (Sept. 11, 2019), *Id.*
³⁷⁶ *Id.*
³⁷⁷ *Id.* at 24.
³⁷⁸ October 15 Telephone interview, *supra* note 253.
³⁷⁹ MISS. DEP'T. OF CORR., INMATE HANDBOOK 3 (June 2016) [hereinafter INMATE HANDBOOK].
³⁸⁰ *Id.* at 2.
³⁸¹ *Id.* at 2.

State	Custody levels	Classification procedure	Factors that determine custody	Reclassification procedure
Missouri	Minimum, medium, or maximum custody. ³⁸²	Individual assessment	The length of sentence, type of crime, institutional behavior, and a prisoner's individual needs for specialized programs and services. ³⁸³ The classification criteria apply to a facility placement rather than a housing unit placement. ³⁸⁴ Offenders placed in low custody level may have their assessment overridden for reasons of poor institutional adjustment, charges pending, and, in the case of sex offenders, failure to complete the Missouri Sex Offender Program. ³⁸⁵	There is a possibility for reclassification which is based on multiple factors such as length of sentence remaining and behavior during incarceration. ³⁸⁶ Offenders are transferred to a different facility when they are reclassified. ³⁸⁷ It remains unclear how often reclassification takes place.
Montana	Minimum, medium I, medium II, close, or maximum custody level (including administrative segregation and restricted administrative segregation). ³⁸⁸	Individual assessment	The most serious current conviction, severity of institutional misconduct, escape history, severity of felony convictions within last seven years, number of rule infractions, felony convictions within three years prior to incarceration, sentence length, parole or probation violations in the last three years, age at first felony. ³⁸⁹	The lower custody levels are reviewed once a year, and the higher custody levels are reviewed once every six months. ³⁹⁰

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MO. DEP'T. OF CORR., PROFILE OF THE INSTITUTIONAL AND SUPERVISED OFFENDER POPULATION 20 (June 30, 2017).

MO. DEP'T. OF CORR., *Division of Adult Institutions*, <https://doc.mo.gov/divisions/adult-institutions> [https://perma.cc/A3N4-FF3S]; Email from Communications Director, Missouri Department of Corrections (Mar. 4, 2020) [hereinafter Missouri Communications Director Email] (on file with author) ("The vast majority (more than 96%) of offenders in Missouri prisons eventually are released, and these offenders are reclassified based on multiple factors, including length of sentence remaining and behavior during incarceration. Offenders are transferred when they're reclassified.")

Missouri Communications Director Email, *supra* note 383.

MO. DEP'T. OF CORR., PROFILE OF THE INSTITUTIONAL AND SUPERVISED OFFENDER POPULATION 20 (June 30, 2019).

Missouri Communications Director Email, *supra* note 383.

Missouri Communications Director Email, *supra* note 383.

Questionnaire filled out by Chief of Technical Services Bureau from Montana Department of Corrections (Dec. 30, 2019) [hereinafter Questionnaire Montana].

Id.

Id.

State	Custody levels	Classification procedure	Factors that determine custody	Reclassification procedure
Nebraska	Maximum, medium, or minimum custody (with minimum custody consisting of A and B). ³⁹¹	Individual assessment	Legal aspects of the case, criminal history, social history, medical history and medical health, occupational interests and experience, educational status, religious preference, recreational interests, psychological evaluation, personal risk factors, personal adjustment factors, suicide assessment, staff reports, and pre-institutional assessment. ³⁹²	Reclassification takes place at least once every twelve months. ³⁹³ Reclassification can also take place outside of the regular schedule when a significant event occurs that impacts the prisoner's custody level. ³⁹⁴
Nevada	Maximum, close, medium, minimum or community custody level. ³⁹⁵	Individual assessment	Institutional adjustments, nature of offense, criminal history, total length of sentence, and program consideration. ³⁹⁶	Reclassification takes place at least once every six months. ³⁹⁷
North Carolina	Close, medium, minimum I, minimum II or minimum III custody level. ³⁹⁸	Individual assessment	The offender's crime, social background, education, job skills and work history, health, and criminal record (including prior prison sentences). ³⁹⁹	Reclassification takes place once every twelve months. ⁴⁰⁰

³⁹¹ NEB. DEP'T OF CORRECTIONAL SERV., ADMINISTRATIVE REGULATION, § 201.01, 10-11 (Jan. 31, 2020).

³⁹² *Id.* at § 201.02, 3.

³⁹³ *Id.* at § 201.01, 6.

³⁹⁴ *Id.*

³⁹⁵ NEV. DEP'T. OF CORR., ADMINISTRATIVE REGULATION 521 CUSTODY CATEGORIES AND CRITERIA 1-6 (May 19, 2015) [hereinafter ADMINISTRATIVE REGULATION 521].

³⁹⁶ NEV. DEP'T. OF CORR., ADMINISTRATIVE REGULATION 504 RECEPTION AND INITIAL CLASSIFICATION PROCESS 6-7 (May 19, 2015).

³⁹⁷ NEV. DEP'T. OF CORR., ADMINISTRATIVE REGULATION 506 RECLASSIFICATION SCHEDULE 3 (May 19, 2015).

³⁹⁸ N.C. DEP'T OF PUB. SAFETY, *Classification*, <https://www.ncdps.gov/adult-corrections/prisons/classification> [https://perma.cc/2LDZ-AHSE].

³⁹⁹ *Id.*

⁴⁰⁰ *Id.*

State	Custody levels	Classification procedure	Factors that determine custody	Reclassification procedure
Ohio	Level I, Level II, Level III, or Level IV (Level I is the lowest security level). ⁴⁰¹	Individual assessment	The history of assaultive, violent, or disruptive behavior, age, escape history, enemies of record, gender, sex, medical status, mental and emotional stability, notoriety of offenses, criminal history, type of sentencing and release eligibility, programming and education history, STG affiliation, and previous adjustment at less restrictive security levels. ⁴⁰²	Reclassification takes place once every twelve months. ⁴⁰³
Oklahoma	Maximum, medium, or minimum custody. ⁴⁰⁴	Individual assessment	The most serious current offense, seriousness of previous offenses; escape risk, number of prior convictions, and additional risk factors. ⁴⁰⁵	Reclassification takes place on an annual basis. ⁴⁰⁶
Oregon	Levels ranging from one to five, where one (minimum) is the lowest possible level of custody and five (maximum) is the highest. ⁴⁰⁷	Individual assessment	The escape history, sentence remaining, detainees, and institutional behavior. ⁴⁰⁸	Reclassification takes place when new information is received that affects a classification scoring policy element or when a prisoner requests it. ⁴⁰⁹

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OHIO DEP'T. OF REHAB. & CORR., 53-CLS-01, SECURITY CLASSIFICATION FOR INCARCERATED PERSONS LEVELS 1 THROUGH 4 at 3-4 (Feb. 3, 2020) [hereinafter 53-CLS-01].

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Id. at 5.

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Id. at 6.

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OKLA. DEP'T. OF CORR., *Classification and Population*, <https://oklahoma.gov/doc/organization/health-and-offender-services/classification-and-population.html> [https://perma.cc/L8XW-LFCZ].

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Id.

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OKLA. DEP'T. OF CORR., OP-060103(M), MALE CUSTODY ASSESSMENT PROCEDURES 1 (Aug. 25, 2020).

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OR. DEP'T. OF CORR., *HANDBOOK FOR FRIENDS AND FAMILY OF ADULTS IN CUSTODY 3* (2018) [hereinafter HANDBOOK FOR FRIENDS AND FAMILY].

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Id.

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OR. ADMIN. R. 291-104-0106 (2015).

State	Custody levels	Classification procedure	Factors that determine custody	Reclassification procedure
Pennsylvania	Levels ranging from one to five, where level five is the most restrictive custody level. ⁴¹⁰	Individual assessment	The individual's past development, present needs and behavior, and potential for change. ⁴¹¹	Reclassification takes place according to the DOC's policy statement, but it remains unclear how often reclassification takes place. ⁴¹²
South Carolina	Minimum out, minimum restricted, minimum in medium, close, or maximum custody. ⁴¹³	Individual assessment	The severity of the current offense, incarceration sentence, prior criminal history, disciplinary convictions, detainers, and escapes. ⁴¹⁴	Reclassification review takes place on an annual basis or when the prisoner's status changes. ⁴¹⁵
South Dakota	Maximum, high medium, low medium, or minimum custody. ⁴¹⁶	Individual assessment	Incidence of violence, dangerousness, repeat criminal behavior, and escape profile. ⁴¹⁷	After the initial classification, a staff member will set a date for the next classification review. ⁴¹⁸ Prisoners can also request a classification review. ⁴¹⁹
Tennessee	Minimum, medium, close or maximum custody. ⁴²⁰	Individual assessment	Past criminal convictions, conduct, escapes, and detainers. ⁴²¹	Reclassification takes place once every twelve months. ⁴²²

⁴¹⁰ PA. DEP'T. OF CORR., 11.2.1 RECEPTION AND CLASSIFICATION 48 (Jan. 28, 2011).
⁴¹¹ *Id.* at 46.
⁴¹² *Id.* at 51.
⁴¹³ S.C. DEP'T. OF CORR., OP-21-04 INMATE CLASSIFICATION PLAN 7 (Dec. 13, 2017).
⁴¹⁴ *Id.* at 6.
⁴¹⁵ *Id.* at 47.
⁴¹⁶ S.D. DEP'T. OF CORR., 1.4.B.2 MALE INMATE CLASSIFICATION 1 (Oct. 22, 2019) [hereinafter MALE INMATE CLASSIFICATION].
⁴¹⁷ S.D. DEP'T. OF CORR., *Inmate Classification*, <https://doc.sd.gov/about/faq/classification.aspx#:~:text=Inmates%20are%20assigned%20to%20the%20the%20the%20community> [https://perma.cc/ME4W-CCKB].
⁴¹⁸ *Id.*
⁴¹⁹ MALE INMATE CLASSIFICATION, *supra* note 416, at 7.
⁴²⁰ TENN. DEP'T. OF CORR., 502.04 INMATE RULES AND REGULATIONS 18 (Aug. 2018).
⁴²¹ *Id.* at 4.
⁴²² *Id.*

State	Custody levels	Classification procedure	Factors that determine custody	Reclassification procedure
Texas	Levels ranging from 1 to 5 or administrative segregation. ⁴²⁵ Level 5 and administrative segregation are the strictest custody levels. ⁴²⁴	Individual assessment	The current institutional behavior, previous institutional behavior, and current offense and sentence length. ⁴²⁵	If the offender violates any rules, he may be placed in a more restrictive custody level. ⁴²⁶ If the offender complies with the rules, for at least one year, he may be assigned a less restrictive custody level during an automatic review. ⁴²⁷ How often reclassification takes place depends on the custody level and sentence, but ranges from once every three months to a first classification review after ten years (this relates to prisoners who have a sentence of fifty years or more. ⁴²⁸
Utah	Levels ranging from 1 to 4 (Level 1 being the strictest custody level). ⁴²⁹	Individual assessment	History of institutional violence, violent criminal convictions, current age, prior institutional commitments, stability, and institutional STG activity. ⁴³⁰	Reclassification takes place once every six months or once every twelve months, depending on the custody level. ⁴³¹
Virginia	Minimum, moderate, medium, close, maximum, security level, or work center custody level. ⁴³²	Individual assessment	History of assaultive behavior, potential for victimization, history of prior victimization, special medical or mental health status, escape history, age, enemies or offender separation information, offense, length of sentence, behavior, and treatment needs. ⁴³³	Reclassification takes place on an annual basis. ⁴³⁴

TEX. DEP'T. OF CRIM. JUST., OFFENDER ORIENTATION HANDBOOK 6 (Feb. 2017).

⁴²³ *Id.*

⁴²⁴ *Id.* at 5.

⁴²⁵ *Id.*

⁴²⁶ *Id.*; Letter from Texas non-death-sentenced prisoner (Mar. 29, 2020) (on file with author).

⁴²⁷ Letter from Texas non-death-sentenced prisoner (Mar. 29, 2020) (on file with author).

⁴²⁸ UTAH DEP'T. OF CORR., *FC04 Inmate Classification*, in FACILITIES OPERATION: INMATE PROCESSING B-9 (Jan. 15, 2019) [hereinafter *FC04 Inmate Classification*].

⁴²⁹ *Id.* at 18–22.

⁴³⁰ *Id.* at 40.

⁴³¹ VA. DEP'T. OF CORR., 830.2 SECURITY LEVEL CLASSIFICATION 2 (Oct. 1, 2019) [hereinafter *SECURITY LEVEL CLASSIFICATION*].

⁴³² VA. DEP'T. OF CORR., 810.3 OFFENDER RECEPTION AND CLASSIFICATION 5 (Oct. 1, 2019); VA. DEP'T. OF CORR., *Incoming Offenders*, <https://naboc.virginia.gov/offender-resources/incoming-offenders/#security-levels> [https://perma.cc/6A28-6JWF].

⁴³³ VA. DEP'T. OF CORR., 830.1 INSTITUTION CLASSIFICATION MANAGEMENT 1–2 (Oct. 1, 2019).

⁴³⁴ *Id.*

State	Custody levels	Classification procedure	Factors that determine custody	Reclassification procedure
Wyoming	Minimum, medium, close, or maximum custody. ⁴³⁵	Individual assessment	Past institutional behavior, number of predatory violations, current conviction, most serious prior felony conviction, number of disciplinary records, total time to earliest parole eligibility, current age, performance in work and programming, escape history, and cognitive behavior. ⁴³⁶	Reclassification takes place once every six months, but this can be more once an inmate gets closer to his release date. ⁴³⁷ Other factors, such as age, can also cause a reclassification review. ⁴³⁸

⁴³⁵ WYO. DEP'T. OF CORR., 4-101 INMATE CLASSIFICATION 3 (Oct. 15, 2019), Questionnaire filled out by Public Information Officer from Wyoming Department of Corrections (Dec. 23, 2019) [hereinafter Questionnaire Wyoming].

⁴³⁶ Questionnaire Wyoming, *supra* note 435.

⁴³⁷ *Id.*

⁴³⁸ *Id.*

TABLE 2: HOUSING POLICIES FOR MALE DEATH-SENTENCED PRISONERS AS OF OCTOBER 2020

State	Classification procedure	Solitary confinement?	Conditions	Reclassification?	Male death-sentenced prisoners
Alabama	<p>Automatic placement in a close custody security level (Level VII) based on the sentence of death.⁴³⁹</p> <p>Recently the Alabama Department of Corrections has announced they will move death-sentenced prisoners to a different building within the Holman prison where conditions are supposedly going to be better, although specific details on the conditions are unknown.⁴⁴⁰ However, the relocation has been delayed at least several times already and it is currently unknown if and when relocation will take place.⁴⁴¹</p>	Yes.	<p>Death-sentenced prisoners are in their cells for at least twenty-three hours a day.⁴⁴² They are housed in single cells and are allowed to leave the cell only for exercise and showering.⁴⁴³ All movement outside the housing area requires that death-sentenced prisoners be restrained and accompanied by armed correctional personnel.⁴⁴⁴ There is no group recreation; recreation takes place in individual cages for fifteen or twenty minutes per day, the rest of the day they are in their cells.⁴⁴⁵ Death-sentenced prisoners are not allowed to shower alone, guards watch them the entire time.⁴⁴⁶ They are allowed to use the wall phones for twenty-five minutes per call, but the costs for making a phone call are often too expensive for those on death row.⁴⁴⁷ Death-sentenced prisoners are allowed limited contact visits.⁴⁴⁸ Once a week, death-sentenced prisoners are allowed to go to the law library for one hour.⁴⁴⁹</p>	There is no possibility to get the automatic placement reviewed. ⁴⁵⁰ There is a custody review if a prisoner receives punishment for a disciplinary infraction. ⁴⁵¹	170 ⁴⁵²

⁴³⁹ MALE INMATE, *supra* note 342, at 8; Email from unnamed attorney (Dec. 20, 2019) (on file with author) [hereinafter December 20 Email]; ALA. DEP'T OF CORR., *Alabama Inmates Currently on Death Row*, <http://www.doc.state.al.us/DeathRow> [https://perma.cc/B8FU-C6PN] [hereinafter *Alabama Inmates*].

⁴⁴⁰ Email from unnamed attorney (Oct. 19, 2020) (on file with author) [hereinafter October 19 Email].

⁴⁴¹ *Id.*

⁴⁴² December 20 Email, *supra* note 439.

⁴⁴³ *Definitions*, *supra* note 343.

⁴⁴⁴ *Id.*

⁴⁴⁵ ANTHONY RAY HINTON, *THE SUN DOES SHINE* 83, 93, 94 (St. Martin's Press, 2018).

⁴⁴⁶ *Id.* at 93 - 94.

⁴⁴⁷ ALA. DEP'T OF CORR., AR 431 INMATE TELEPHONE SYSTEM 3 (Oct. 31, 2005); Email from unnamed attorney (Feb. 24, 2020) (on file with author) [hereinafter February 24 Email].

⁴⁴⁸ February 24 Email, *supra* note 447; HUMAN RIGHTS CLINIC, UNIV. OF TEX. SCH. OF LAW, DESIGNED TO BREAK YOU: HUMAN RIGHTS VIOLATIONS AT TEXAS' DEATH ROW at 19 (Apr. 2017).

⁴⁴⁹ HINTON, *supra* note 445, at 121.

⁴⁵⁰ December 20 Email, *supra* note 439.

⁴⁵¹ *Id.*

⁴⁵² *Alabama Inmates*, *supra* note 439.

State	Classification procedure	Solitary confinement?	Conditions	Reclassification?	Male death-sentenced prisoners
Arizona	Automatic placement in a close custody security level. ⁴⁵³ Close custody is not the highest security level. ⁴⁵⁴	No.	Death-sentenced prisoners are housed both in the Browning Unit and the Central Unit. ⁴⁵⁵ The Arizona Department Order Manual states that death-sentenced prisoners "shall not be classified as Maximum Custody based solely on their death sentence". ⁴⁵⁶ They are, however, classified as (at minimum) close custody. ⁴⁵⁷ Death-sentenced prisoners are not held in solitary confinement; death row conditions improved following a 2017 settlement after an Arizona death-sentenced prisoner challenged the conditions on death row. ⁴⁵⁸ Death-sentenced prisoners in the Central Unit can have 'Dayroom time' in groups for three hours each day for leisure games and activities. ⁴⁵⁹ On three days per week, they receive three hours and fifteen minutes of group recreation on the athletic field of the Central Unit, showers are provided afterwards. ⁴⁶⁰ Death-sentenced prisoners are also allowed to eat their meals together in the dining room. ⁴⁶¹ They are allowed to use the phones to call with family and friends. ⁴⁶² Death-sentenced prisoners are allowed to have contact visits. ⁴⁶³	Since close custody is not the highest security level, death-sentenced prisoners have the ability to get their placement reviewed if they are placed in a maximum-security custody level, which is the highest security level. ⁴⁶⁴ Death-sentenced prisoners placed in close custody have no possibility to get their placement reviewed. ⁴⁶⁵	115 ⁴⁶⁶

⁴⁵³ ARIZ. DEPT. OF CORR. REHAB. & REENTRY, *Death Row Information and Frequently Asked Questions*, [https://perma.cc/NZP2-4XUG](https://corrections.az.gov/public-resources/death-row/death-row-information-and-frequently-asked-questions) [hereinafter *Death Row Information*]; CHAPTER 801, *supra* note 346, at 4.

⁴⁵⁴ CHAPTER 801, *supra* note 346, at 3.

⁴⁵⁵ *Death Row Information*, *supra* note 453.

⁴⁵⁶ CHAPTER 801, *supra* note 346, at 4.

⁴⁵⁷ *Id.*

⁴⁵⁸ *Stipulation and Notice of Settlement*, *Nordenstrom v. Ryan*, 2018 WL 1586754 (D. Ariz. Mar. 3, 2017) (No. 39).

⁴⁵⁹ *Death Row Information*, *supra* note 453; Michael Klefer, *Arizona death row comes out of solitary, giving convicts more human contact, socialization*, AZCENTRAL (Dec. 19, 2017), <https://www.azcentral.com/story/news/local/arizona-investigation/2017/12/19/arizona-death-row-inmates-moved-giving-more-human-contact-socialization/951808001/> [https://perma.cc/H3L3-RE56].

⁴⁶⁰ *Death Row Information*, *supra* note 453.

⁴⁶¹ *Death Row Information*, *supra* note 453.

⁴⁶² *Death Row Information*, *supra* note 453; Klefer, *supra* note 459.

⁴⁶³ CHAPTER 801, *supra* note 346, at 4.

⁴⁶⁴ *Id.*

⁴⁶⁵ ARIZ. DEPT. OF CORR. REHAB. & REENTRY, *Death Row*, [https://perma.cc/KGW3-AYQP](https://corrections.az.gov/public-resources/death-row).

State	Classification procedure	Solitary confinement?	Conditions	Reclassification?	Male death-sentenced prisoners
Arkansas	Automatic placement in a maximum-security unit designated for prisoners with a death sentence. ⁴⁶⁷	Yes.	Death-sentenced prisoners are alone in their cells for twenty-three hours a day. ⁴⁶⁸ They are allowed to have contact visits with friends, family, and attorneys if they don't have a disciplinary record. ⁴⁶⁹ They are not allowed to have group recreation. ⁴⁷⁰ Death-sentenced prisoners are placed in individual outdoor areas where it is not possible to have contact with other prisoners. ⁴⁷¹ The outdoor recreation areas are so filthy that the men on death row regularly prefer to skip outside recreation. ⁴⁷² There are religious services available, but during those services, death-sentenced prisoners have to stay in their cells. ⁴⁷³ Death-sentenced prisoners are housed in individual cells. ⁴⁷⁴ The cells have bars instead of solid doors, which could make contact with other prisoners possible when reaching through the bars to an adjacent cell. ⁴⁷⁵ They are not allowed to have jobs. ⁴⁷⁶ Death-sentenced prisoners are allowed to use the phone to call people who are on their preapproved phone list. ⁴⁷⁷ Each time these prisoners leave their cell, the guards place the prisoners in handcuffs and leg-irons. ⁴⁷⁸	There is no possibility to get this placement reviewed. ⁴⁷⁹	30 ⁴⁸⁰

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ARK. DEPT. OF CORR., GUIDE FOR FAMILY AND FRIENDS 6 (2016).

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Email from unnamed attorney (Jan. 27, 2020) (on file with author) [hereinafter January 27 Email].

469

Id.

470

Id.

471

Id.

472

Id.

473

Id.

474

September Email, *supra* note 266.

475

Id.

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January 27 Email, *supra* note 468.

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Id.

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FACEBOOK, *Solitary Confinement – Pen Pals for Inmates*, (Feb. 22, 2017), <https://www.facebook.com/SolitaryPenPals/photos/a.393343621007482/7394991997329514/?type=3> [https://perma.cc/351C-Z6FC].

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January 27 Email, *supra* note 468.

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Arkansas Department of Correction, Death Row, <https://doc.arkansas.gov/correction/inmates/death-row/> [https://perma.cc/5D9B-ZHQX].

State	Classification procedure	Solitary confinement?	Conditions	Reclassification?	Male death-sentenced prisoners
California	Death-sentenced prisoners are automatically housed in a designated death row at the San Quentin Prison. ⁴⁸¹ Death-sentenced prisoners in California are classified into two different custody classifications: A or B. ⁴⁸² However, in January 2020, the Department of Corrections and Rehabilitation started a two-year pilot by implementing the Condemned Inmate Transfer Pilot Program (CITPP). ⁴⁸³ The CITPP is	No.	Death-sentenced prisoners in California are classified into two different custody classifications. ⁴⁸⁹ Grade A are those without a high violence or escape potential who are disciplinary-free. ⁴⁹⁰ Grade B are those with a high violence or escape potential or with serious disciplinary or management problems. ⁴⁹¹ Grade B prisoners are all housed at the Adjustment Center at San Quentin. ⁴⁹² Grade A prisoners are housed in different units within San Quentin. ⁴⁹³ Newly arrived death-sentenced prisoners will initially be housed in the Adjustment Center for processing. ⁴⁹⁴ Within 30 days the prisoner will appear before a Institution Classification Committee for their initial classification. ⁴⁹⁵ During the initial classification, the prisoner's case factors will be reviewed in order to determine whether placement on a Grade A or B level is appropriate. ⁴⁹⁶ Grade A classified prisoners have the following privileges. Prisoners will have out-of-cell time every day from 9:00 a.m. till 2:30 p.m. ⁴⁹⁷ They are allowed to have group recreation and have access to a tier area for exercise and an outdoor recreation yard. ⁴⁹⁸ During recreation time, prisoners are free to walk around their tier and can	Grade A prisoners can be placed in Grade B when they have committed at least three or more offenses within the preceding five years. ⁵²² These offenses include fighting, assault, or possession or use of a controlled substance or cellphone. ⁵²³ A prisoner can also be classified as Grade B because he is deemed to pose an ongoing threat. ⁵²⁴ Once in the Grade B program, a prisoner will be reviewed every 180 days to see if the	704. ⁵²⁵

⁴⁸¹ THE PRISON LAW OFFICE, *supra* note 333, at 107.

⁴⁸² Email from unnamed attorney (Apr. 14, 2020) (on file with author) [hereinafter April 14 Email]; SAN QUENTIN OPERATIONAL PROCEDURE, No. 608: CONDEMNED MANUAL, 8 (Sep. 2016). Email from Deputy Press Secretary, California Department of Corrections and Rehabilitation (Feb. 18, 2020) (on file with author).

⁴⁸³ April 14 Email, *supra* note 482; SAN QUENTIN OPERATIONAL PROCEDURE, *supra* note 482, at 8.

⁴⁸⁴ THE PRISON LAW OFFICE, *supra* note 333, at 107.

⁴⁸⁵ *Id.*

⁴⁸⁶ April 14 Email, *supra* note 482.

⁴⁸⁷ *Id.*

⁴⁸⁸ SAN QUENTIN OPERATIONAL PROCEDURE, *supra* note 482, at 7.

⁴⁸⁹ *Id.* at 8.

⁴⁹⁰ *Id.*

⁴⁹¹ *Id.*

⁴⁹² SAN QUENTIN OPERATIONAL PROCEDURE, *supra* note 482, at 20.

⁴⁹³ *Id.* at 48.

⁴⁹⁴ *Id.* at 47–51.

⁴⁹⁵ *Id.* at 48.

⁴⁹⁶ *Id.*

⁴⁹⁷ CAL. DEPT OF CORR. AND REHAB., *Condemned Inmate List*, <https://www.cdcr.ca.gov/capital-punishment/condemned-inmate-list-secure-request/> [https://perma.cc/D1AF-ST6Q].

California, <i>Continued</i>	implemented in the California Penal Code (section 4038.1) after California voters passed Proposition 66 in November 2016. ⁴⁸⁴ The California Penal Code is amended to allow male death-sentenced prisoners to be transferred to any state prison that provides the necessary level of security. ⁴⁸⁵ Death-sentenced prisoners in this pilot will be housed with prisoners in general population, but only in a close custody unit. ⁴⁸⁶	doors to all cells are open. ⁴⁸⁹ Grade A prisoners are also allowed out of their cells for legal visits, regular visits, medical visits, dental visits, mental health appointment, group therapy, and chapel visits. ⁴⁹⁰ Grade A prisoners are allowed to make a monthly canteen order of \$220. The phones are also freely accessible during out-of-cell time. ⁴⁹¹ Certain jobs within the unit are available for Grade A prisoners, but they are limited. ⁴⁹² A minimum of five years without any disciplinary sanctions is needed in order to be considered for assignment as a worker. ⁴⁹³ As of April 2020, fewer than 30 people hold jobs. ⁴⁹⁴ Grade A prisoners are allowed to have contact with visitors. ⁴⁹⁵ These visits last for a minimum of two and a half hours and take place on Thursday, Saturday, and Sunday. ⁴⁹⁶ A prisoner can have a contact visit with up to five people at the same time. ⁴⁹⁷ Attorney visits are contact visits as well. ⁴⁹⁸ Grade A prisoners can have showers daily during their exercise programs. ⁴⁹⁹ They are also eligible to participate in music programs. ⁵⁰⁰ Grade A prisoners are allowed to have up to three electronic appliances such as a television, radio, and a typewriter, and can have games	inmate can be placed in the Grade A program again. ⁵⁰⁵
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Id.

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Id.

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CAL. DEPT. OF CORRE. AND REHAB., *Condemned Inmate Transfer Pilot Program*, <https://www.cdcr.ca.gov/capital-punishment/condemned-inmate-transfer-pilot-program/> [<https://perma.cc/74TU-MW7J>]; California Department of Corrections and Rehabilitation, Memorandum Condemned Inmate Transfer Pilot Program (Jan. 29, 2020) (on file with author) [hereinafter *Memorandum*].

489

Id.

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Id. SAN QUENTIN OPERATIONAL PROCEDURE, *supra* note 482, at 25; April 14 Email, *supra* note 482, April 14 Email, *supra* note 482.

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Id.

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April 14 Email, *supra* note 482.

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SAN QUENTIN OPERATIONAL PROCEDURE, *supra* note 482, at 29.

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April 14 Email, *supra* note 482.

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SAN QUENTIN OPERATIONAL PROCEDURE, *supra* note 482, at 23.

496

Id. at 25, 26.

497

Id. at 28.

498

Id. at 26.

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Id. at 32.

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Id. at 43.

501

Id.

502

Id.

California, <i>Continued</i>	Admission into this pilot is on a voluntary basis, but once approved, participation is mandatory. ⁴⁸⁷ One of the ideas behind this pilot is to have more work opportunities for death-sentenced prisoners. ⁴⁸⁸ Due to the outbreak of COVID-19, it is unknown whether any death-sentenced prisoners have thus far been transferred to other prisons through this pilot program.	such as cards, chess, dominos, or scrabble. ⁵¹¹ Prisoners qualified as Grade B have the following privileges. They have out-of-cell time, for recreation purposes, for a minimum of 10 hours per week. ⁵¹² They are not allowed to have group recreation and they recreate in separate cages. ⁵¹³ Grade B prisoners are allowed to make a monthly canteen order of \$55. They are not allowed to use the phone. ⁵¹⁴ They are also not allowed to have contact visitation, not even with their attorneys. ⁵¹⁵ A Grade B prisoner can have a visit with up to three people at the same time. ⁵¹⁶ Grade B prisoners are allowed to have up to two electrical appliances such as a television, radio, or a typewriter. ⁵¹⁷ Grade B prisoners can have showers three times a week. ⁵¹⁸ They cannot have jobs. ⁵¹⁹ Grade B prisoners are in solitary confinement. ⁵²⁰ All death-sentenced prisoners, in Grade A and B, are eligible to participate in college courses that are offered from local state colleges and universities. ⁵²¹	
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⁴⁸⁷ Memorandum, *supra* note 486.
⁴⁸⁸ *Id.*
⁵¹¹ *Id.* at 11.
⁵¹² *Id.* at 20.
⁵¹³ April 14 Email, *supra* note 482.
⁵¹⁴ SAN QUENTIN OPERATIONAL PROCEDURE, *supra* note 482, at 25; April 14 Email, *supra* note 482.
⁵¹⁵ SAN QUENTIN OPERATIONAL PROCEDURE, *supra* note 482, at 26.
⁵¹⁶ *Id.* at 28.
⁵¹⁷ *Id.* at 11.
⁵¹⁸ *Id.* at 32.
⁵¹⁹ *Id.* at 28.
⁵²⁰ April 14 Email, *supra* note 482.
⁵²¹ SAN QUENTIN OPERATIONAL PROCEDURE, *supra* note 482, at 34.

State	Classification procedure	Solitary confinement?	Conditions	Reclassification?	Male death-sentenced prisoners
Florida	Death-sentenced prisoners are automatically placed on death row in maximum security in a single-cell. ³³⁷ There is a death row located at Florida State Prison and at Union Correctional Institution, but conditions are the same. ³³⁸	Yes.	Death-sentenced prisoners are alone in their cells for twenty-four hours a day and have recreation for three hours a day on only two days per week. ³³⁹ However, recreation is often cancelled or shortened. ³⁴⁰ Death-sentenced prisoners can have outside recreation in groups, and can have one contact visit per week. ³⁴¹ Except for visitation purposes, if more than one prisoner is out of his cell within the death row unit at a time, there is always one officer accompanying each prisoner, and the prisoners are being kept at a certain distance from each other to preclude any physical contact. ³⁴² They are allowed to take a shower three times per week, for between five and ten minutes. ³⁴³ Death-sentenced prisoners are allowed to make one fifteen-minute phone call per month. ³⁴⁴ Every time the death sentenced prisoner has been outside the immediate housing unit, he will be strip-searched. ³⁴⁵ They are allowed to have a television in their cell. ³⁴⁶	There is an annual classification review to determine the overall institutional adjustment based on the inmate's disciplinary history, participation in programming, and cooperation with staff, but all death row prisoners in Florida are still housed on death row. ³⁴⁷	332, 338

³³⁷ § 33-601.210, *supra* note 336, at 2.
³³⁸ Complaint Davis, *supra* note 6, at 7, 10.
³³⁹ FLA. DEPT. OF CORR., CLASSIFICATION AND CENTRAL RECORDS § 33-601.830 (July 14, 2014) [hereinafter § 33-601.830].
³⁴⁰ Complaint Davis, *supra* note 6, at 8.
³⁴¹ § 33-601.830, *supra* note 6, at 8.
³⁴² § 33-601.830, *supra* note 529, at 3; Email from unnamed attorney (Jan. 15, 2020) (on file with author).
³⁴³ § 33-601.830, *supra* note 529, at 2.
³⁴⁴ Complaint Davis, *supra* note 6, at 8.
³⁴⁵ Complaint Davis, *supra* note 6, at 9.
³⁴⁶ § 33-601.830, *supra* note 529, at 2.
³⁴⁷ *Id.*
³⁴⁸ Complaint Davis, *supra* note 6, at 8; FLA. DEPT. OF CORR., *Death Row*, <http://www.dc.state.fl.us/ci/deathrow.html> [perma.cc/YV4A-6UTW].
³⁴⁹ FLA. DEPT. OF CORR., *Death Row Roster*, <http://www.dc.state.fl.us/OffenderSearch/deathrowroster.aspx> [perma.cc/LE27-VYUP].

State	Classification procedure	Solitary confinement?	Conditions	Reclassification?	Male death-sentenced prisoners
Georgia	Death-sentenced prisoners are automatically assigned to a maximum-security custody level. ³³⁹ The maximum-security custody level is meant for prisoners that are being considered assaultive or dangerous, and who pose a high escape risk. ³⁴⁰	Yes.	Death-sentenced prisoners are in their cells for twenty-three hours a day and have one hour of recreation. ³⁴¹ Death-sentenced prisoners are under constant supervision by correctional officers. ³⁴² They are allowed to have one contact visit every three months with family members and attorneys. ³⁴³ Non-contact visitation should take place more frequently, but just how frequently is still up for debate as multiple death-sentenced prisoners have reported different information on this issue, and the prison takes visitation away relatively quickly for disciplinary infractions. ³⁴⁴ Death-sentenced prisoners are not allowed to have group recreation. ³⁴⁵ They are not allowed to have jobs. ³⁴⁶	There is no possibility to get the initial placement reviewed. ³⁴⁷ There is a custody review if a prisoner receives punishment for a disciplinary infraction. ³⁴⁸	45 ³⁴⁹

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SECURITY CLASSIFICATION, *supra* note 339, at 4.
Id. at 1. S. CTR FOR HUMAN RIGHTS, *supra* note 360, at 134.
December 20 Email, *supra* note 439.
S. CTR FOR HUMAN RIGHTS, *supra* note 360, at 134.
HUMAN RIGHTS CLINIC, UNIV. OF TEX. SCH. OF LAW, *supra* note 448, at 19; Email from unnamed attorney (Feb. 5, 2020) (on file with author) [hereinafter February 5 Email]; October 19 Email, *supra* note 440.
Email from unnamed attorney (Oct. 20, 2020) (on file with author) [hereinafter October 20 Email].
February 5 Email, *supra* note 343.
October 20 Email, *supra* note 344.
SECURITY CLASSIFICATION, *supra* note 339, at 4.
December 20 Email, *supra* note 439.
DEATH PENALTY INFORMATION CENTER, *supra* note 3.

State	Classification procedure	Solitary confinement?	Conditions	Reclassification?	Male death-sentenced prisoners
Idaho	Death-sentenced prisoners are automatically placed in restrictive housing at the Idaho Maximum Security Institution. ⁵⁴⁰ Within two weeks upon arrival, a decision will be made whether to place the prisoner in a close custody security level, which is less strict than restrictive housing. ⁵⁴¹ Close custody is designed to house inmates who typically have an escape history or serious institutional disciplinary history and/or displayed dangerous behavior. ⁵⁴²	Yes.	All death-sentenced prisoners are housed on J-Block at the Idaho Maximum Security Institution (IMSI). ⁵⁴³ Idaho has no separate death row, and not all prisoners on J-Block have a death sentence. ⁵⁴⁴ Death-sentenced prisoners spend at least twenty-two hours a day in their cells. ⁵⁴⁵ They are allowed to have one hour of outside recreation per day. Outside recreation takes place in separate cages in an enclosed area. ⁵⁴⁶ Apart from outside recreation time, death-sentenced prisoners are allowed to have one hour of tier-time (whether outside recreation and tier-time actually takes places depends on whether the prison is fully staffed). ⁵⁴⁷ This means that they are able to walk around the tier unrestrained and have access to a J-pay Kiosk. ⁵⁴⁸ However, tier-time is alone, not with other prisoners. ⁵⁴⁹ The only other time prisoners are out of their twelve-foot by seven-foot cells is when they are escorted to the shower, have meetings with an attorney or require medical care. ⁵⁴⁰ Death-sentenced prisoners cannot have jobs. ⁵⁴¹ They are allowed to have one contact visit per year with a family member or friend. ⁵⁴² Death-sentenced prisoners can have weekly non-contact visits with family or friends. ⁵⁴³ They can have contact visits with their attorneys upon request. ⁵⁴⁴	Prisoners in the Idaho Maximum Security Institution get regular reviews of their housing placement. ⁵⁴⁵ However, death-sentenced prisoners have never received more favorable housing placements after review. ⁵⁴⁶ There is an annual review if the death-sentenced prisoner is placed in administrative segregation. ⁵⁴⁷	8 ⁵⁴⁸

⁵⁴⁰ IDAHO DEP'T OF CORR., 319.02.01.002 INMATES UNDER SENTENCE OF DEATH 2 (June 5, 2017) [hereinafter 319.02.01.002].

⁵⁴¹ *Id.* at 3.

⁵⁴² IDAHO DEP'T OF CORR., 303.02.01.001 CLASSIFICATION: INMATE 7 (Sep. 15, 2014).

⁵⁴³ Email from unnamed attorney (Mar. 7, 2020) (on file with author) [hereinafter March 7 Email].

⁵⁴⁴ *Id.*

⁵⁴⁵ IDAHO DEP'T OF CORR., Death Row, https://www.idoc.idaho.gov/content/prisons/death_row [https://perma.cc/V8BU-641J] [hereinafter Death Row]; March 7 Email, *supra* note 553; October 20 Email, *supra* note 544.

⁵⁴⁶ *Id.*

⁵⁴⁷ March 7 Email, *supra* note 553.

⁵⁴⁸ *Id.*; October 20 Email, *supra* note 544.

⁵⁴⁹ March 7 Email, *supra* note 553.

⁵⁵⁰ *Id.*

⁵⁵¹ Death Row, *supra* note 553.

⁵⁵² October 20 Email, *supra* note 544.

⁵⁵³ March 7 Email, *supra* note 553.

⁵⁵⁴ IDAHO DEP'T OF CORR., IMSI, <https://www.idoc.idaho.gov/content/prisons/visiting/hours/tmsi> [https://perma.cc/MMT5-4SUK]; October 20 Email, *supra* note 544.

⁵⁵⁵ October 20 Email, *supra* note 544.

⁵⁵⁶ March 7 Email, *supra* note 553.

⁵⁵⁷ October 20 Email, *supra* note 544.

⁵⁵⁸ 319.02.01.002, *supra* note 550, at 4 – 5.

⁵⁵⁹ Death Row, *supra* note 553.

State	Classification procedure	Solitary confinement?	Conditions	Redeclaration?	Male death-sentenced prisoners
Indiana	Death-sentenced prisoners are automatically classified as maximum security and housed in a unit separating them from the general population. ⁵⁶⁹	No.	Death-sentenced prisoners are not held in solitary confinement. ⁵⁷⁰ Even though death-sentenced prisoners are in their cells for twenty-one hours a day, they do have some meaningful human contact. ⁵⁷¹ They are allowed to have contact visits, and each visit can last for three hours. ⁵⁷² There is no limit on the amount of visits death-sentenced prisoners can have, but every visitor can only visit once every two weeks. ⁵⁷³ Death-sentenced prisoners are allowed to make phone calls and can have recreation in groups of two to three prisoners at a time. ⁵⁷⁴ Their cells also have bars, so death-sentenced prisoners can easily communicate with each other on the tier and every person walking by can see through. ⁵⁷⁵ They are allowed to have a television in their cell and in 2013, there was even a cat on the tier. ⁵⁷⁶ There are, however, no programs or jobs available for death-sentenced prisoners. ⁵⁷⁷	There is no possibility to get the placement on death row reviewed. ⁵⁷⁸	8 ⁵⁷⁹

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IND. DEPT. OF CORR., *Death Penalty in Indiana*, <http://id.leg.gov/docx/3340.htm> [https://perma.cc/N76X-MZMC].

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Telephone interview with unnamed attorney (Feb. 5, 2020) [hereinafter February 5 Telephone interview].

571

Id.

572

Id.

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Id.

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Id.

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Real Stories, *Maximum Security Men, Indiana's Death Row Inmates: Part Two*, YOUTUBE (Aug. 28, 2017), <https://www.youtube.com/watch?v=7upgS2m0g>.

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Id.

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February 5 Telephone interview, *supra* note 570.

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Id.

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DEATH PENALTY INFORMATION CENTER, *supra* note 3.

State	Classification procedure	Solitary confinement?	Conditions	Reclassification?	Male death-sentenced prisoners
Kansas	Death-sentenced prisoners in Kansas are housed in the El Dorado Correctional Facility, where they are automatically placed in administrative segregation based on their sentence of death. ³⁸⁰	Yes	Death-sentenced prisoners are in their cells for twenty-two to twenty-four hours a day and are allowed one hour of exercise, four or five days a week. ³⁸¹ They have individual recreation in a caged yard the size of a dog run. ³⁸² Death-sentenced prisoners have a phone in their cells and can make phone calls as much as they can afford to. ³⁸³ They are allowed to have visitation through video. ³⁸⁴ Death-sentenced prisoners are allowed extremely limited non-contact visits. ³⁸⁵ They have no opportunities to participate in any congregate religious activities, educational or self-improvement programs, or to hold jobs. ³⁸⁶	There is no possibility to get the placement in administrative segregation reviewed. ³⁸⁷	10 ³⁸⁸

³⁸⁰ KAN. DEP'T OF CORR., INTERNAL MANAGEMENT AND POLICY PROCEDURE § 20-104 at 5 (Aug. 12, 2011) [hereinafter § 20-104].
³⁸¹ *Custody Classification*, *supra* note 368; KAN. DEP'T OF CORR., INMATE RULE BOOK 60 (Apr. 20, 1992).
³⁸² February 5 Email, *supra* note 543.
³⁸³ *Id.*
³⁸⁴ *Id.*
³⁸⁵ Complaint Cheever, *supra* note 254, at 3.
³⁸⁶ *Id.*
³⁸⁷ § 20-104, *supra* note 580, at 5.
³⁸⁸ DEATH PENALTY INFORMATION CENTER, *supra* note 3.

State	Classification procedure	Solitary confinement?	Conditions	Reclassification?	Male death-sentenced prisoners
Kentucky	Death-sentenced prisoners are automatically placed on death row in maximum custody based on their sentence of death. ³⁹⁹	No. ³⁹⁰ The conditions on death row in Kentucky show that it is possible to confine prisoners to their cells for twenty-two hours a day and still provide some form of meaningful human contact. The conditions on Kentucky's death row are therefore not considered to constitute solitary confinement for purposes of this research. ³⁹¹	Death-sentenced prisoners are in their cells for twenty-two hours a day. ³⁹² While the death-sentenced prisoners have their own cell, one can see out of the cell and into the cell. ³⁹³ Death-sentenced prisoners are therefore easily able to talk to death-sentenced prisoners who have nearby cells. ³⁹⁴ They can also have contact visits with family members and friends on five days a month. ³⁹⁵ Visits with attorneys are contact visits as well. ³⁹⁶ Death-sentenced prisoners can obtain work assignments – such as a janitor or work in the kitchen – and are able to leave their cells for that. ³⁹⁷ They can have group recreation. ³⁹⁸ Even though death-sentenced prisoners are in their cells for 22 hours a day, that can change for those who have been given a job within the prison.	There is no possibility to get the placement on death row reviewed. ³⁹⁹	26 ⁴⁰⁰

399 KY. DEP'T. OF CORR., POLICIES AND PROCEDURES, § 10.2.1 (Jan. 4, 2019); § 18.5, *supra* note 371, at p. 4.
400 Email from unnamed attorney (Jan. 28, 2020) (on file with author) [hereinafter January 28 Email].

Id.

Id.

Id.

Id.

Id.

Id.

Id.

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Id.

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Id.

399 § 18.5, *supra* note 371, at p. 4.
400 KY. DEP'T. OF CORR., *Death Row Inmates*, <https://corrections.ky.gov/Facilities/AllPages/deathrowinmates.aspx> [https://perma.cc/72HS-93XD].

State	Classification procedure	Solitary confinement?	Conditions	Reclassification?	Male death-sentenced prisoners
Louisiana	Death-sentenced prisoners are automatically housed in a designated 'death row' based on their sentence on death. ⁶⁰¹	No.	Death-sentenced prisoners are in their cells for nineteen hours each day, after the State relaxed the conditions on death row in 2017. ⁶⁰² They are allowed five hours out-of-cell time each day. ⁶⁰³ They have group recreation for two hours in the morning and two hours in the afternoon, this includes eating lunch together with other death-sentenced prisoners. ⁶⁰⁴ There are opportunities for religious services and educational programs. ⁶⁰⁵ Religious services are held on the yard, on Sunday for Christians and on Friday for Muslims. ⁶⁰⁶ Death-sentenced prisoners have access to Jpay to send emails to their friends and family online. ⁶⁰⁷ They can use a Jpay machine or use a portable device to send out the emails, and download music and games. ⁶⁰⁸ Death-sentenced prisoners are also allowed to use the phone whenever they are out of their cells. ⁶⁰⁹ They can have unpaid jobs like help pass out lunch and clear the tiers. ⁶¹⁰ They are allowed to have contact visits with their family, but not with their attorneys. ⁶¹¹	There is no possibility to get the placement on death row reviewed. ⁶¹²	68 ⁶¹³

⁶⁰¹ January 13 Email, *supra* note 249.

⁶⁰² *Id.*

⁶⁰³ *Id.*

⁶⁰⁴ *Id.*

⁶⁰⁵ *Id.*

⁶⁰⁶ *Id.*

⁶⁰⁷ January 13 Email, *supra* note 249.

⁶⁰⁸ *Id.*

⁶⁰⁹ *Id.*

⁶¹⁰ *Id.*

⁶¹¹ *Id.*

⁶¹² *Id.*

⁶¹³ *Id.*

HUMAN RIGHTS CLINIC, UNIV. OF TEX. SCH. OF LAW, *supra* note 448, at 19; Letter from Louisiana death-sentenced prisoner (May 4, 2020) (on file with author).
DEATH PENALTY INFORMATION CENTER, *supra* note 3.

State	Classification procedure	Solitary confinement?	Conditions	Reclassification?	Male death-sentenced prisoners
Mississippi	Death-sentenced prisoners are automatically housed on a designated 'death row' based on their sentence of death and are precluded from assignment to a principal custody designation. ⁶¹⁴	Yes.	Death-sentenced prisoners are alone in their cells for twenty-three hours a day. ⁶¹⁵ They are allowed one hour of recreation per day, but they spend it alone in individual pens on an outside recreation yard. ⁶¹⁶ There is no group recreation. ⁶¹⁷ Death-sentenced prisoners are able to have visits only on the first and third Tuesdays of the month. ⁶¹⁸ The visits are always non-contact visits, even visits with attorneys. ⁶¹⁹ Death-sentenced prisoners can have a shower three times a week. ⁶²⁰ On death row there is the availability for one or two death-sentenced prisoners to obtain a job as a 'hall man'. ⁶²¹ This means a prisoner can work on the tier, making deliveries to the cells of others on death row. ⁶²² Prisoners have access to phones to call family members and friends who are listed on their approved phone call list. ⁶²³	There is no known possibility to get the placement on death row reviewed. ⁶²⁴	39 ⁶²⁵

- ⁶¹⁴ INMATE HANDBOOK, *supra* note 379, at 3; MISS. DEP'T. OF CORR., *Division of Classification*, <https://www.mdoc.ms.gov/institutions/Pages/Division-of-Classification.aspx> [<https://perma.cc/4JAH-TBCV>].
- ⁶¹⁵ Parker Yesko, *Letters from Parchman: Inside Mississippi's Notorious Prison*, APM REPORTS (May 29, 2018), [https://perma.cc/XN73-FRJD](https://www.apmreports.org/story/2018/05/29/inside-parchman-mississippi-notorious-prison)); DEATH PENALTY INFORMATION CENTER, *Time on Death Row: The Faces of Mississippi's Death Row* (Jul. 19, 2012), [https://perma.cc/8EZY-WTVX](https://deathpenaltyinfo.org/news/time-on-death-row-the-faces-of-mississippis-death-row)); Telephone interview with unnamed attorney (April 10, 2020) [hereinafter April 10 Telephone interview].
- ⁶¹⁶ Yesko, *supra* note 615; April 10 Telephone interview, *supra* note 615.
- ⁶¹⁷ April 10 Telephone interview, *supra* note 615.
- ⁶¹⁸ MISS. DEP'T. OF CORR., *Visitation*, [https://perma.cc/FA6T-EKK7](https://www.mdoc.ms.gov/inmate-info/Pages/Visitation.aspx).
- ⁶¹⁹ Yesko, *supra* note 615; April 10 Telephone interview, *supra* note 615.
- ⁶²⁰ April 10 Telephone interview, *supra* note 615.
- ⁶²¹ *Id.*
- ⁶²² *Id.*
- ⁶²³ *Id.*
- ⁶²⁴ INMATE HANDBOOK, *supra* note 379, at 3.
- ⁶²⁵ MISS. DEP'T. OF CORR., *Death Row Inmates*, [https://perma.cc/ERWL-4KX7](https://www.mdoc.ms.gov/Death-Row/Pages/Death-Row-Inmates.aspx)].

State	Classification procedure	Solitary confinement?	Conditions	Reclassification?	Male death-sentenced prisoners
Missouri	In Missouri, death sentenced prisoners are housed with general population prisoners in a maximum-security prison; the Potosi Correctional Center. ⁶²⁶	No.	Death-sentenced prisoners are automatically housed at a maximum-security prison. ⁶²⁷ They are, however, not held in solitary confinement, and are treated no differently than the other prisoners with the same custody classification in that institution. ⁶²⁸ The death-sentenced prisoners are not single-celled and are allowed to have eight hours of recreation each day, including group recreation. ⁶²⁹ They also have access to the law library. ⁶³⁰ Death-sentenced prisoners can use the phone to call with their attorneys and friends and family. ⁶³¹ They can have contact visitation. ⁶³² They can have jobs throughout the prison. ⁶³³ Currently, death sentenced prisoners have work assignments in laundry services, the tailor shop, in the food service, law library, and in education programs. ⁶³⁴ Missouri started making changes in its death row conditions after a class action was filed by several death sentenced prisoners in 1986 challenging their conditions of confinement on death row. ⁶³⁵	There is no possibility to get the assignment to a maximum custody facility reviewed. ⁶³⁶	22 ⁶³⁷

⁶²⁶ Missouri Communications Director Email, *supra* note 383; George Lombardi et al., *Mainstreaming Death Sentenced Inmates: The Missouri Experience and Its Legal Significance*, 61 FED. PROB. 3, 4 (1997).

⁶²⁷ Alsop et al., *Rethinking "Death Row": Variations in the Housing of Individuals Sentenced to Death*, YALE LAW SCH., PUB. LAW RESEARCH PAPER NO. 571, JUL. 2016), <https://ssrn.com/abstract=2806015> [<https://perma.cc/3S7N-8A3N>].

⁶²⁸ Linow, *supra* note 627, at 13.

⁶²⁹ *Id.* at 13–14.

⁶³⁰ George Lombardi, et al., *The Management of Death Sentenced Inmates: Issues, Realities, and Innovative Strategies* 11 (Mar. 1996), <https://doc.mio.gov/sites/doc/files/2018-01/DeathSentencedInmates.pdf> [<https://perma.cc/BR63-AJQE>] [hereinafter *The Management of Death Sentenced Inmates*].

⁶³¹ *Id.* at 12.

⁶³² HUMAN RIGHTS CLINIC, UNIV. OF TEX. SCH. OF LAW, *supra* note 448, at 19; AMNESTY INTERNATIONAL, *Visiting Reggie Clemens on Missouri's Death Row*, (March 12, 2012) <https://www.amnestyusa.org/visiting-reggie-clemens-on-missouri-death-row/> [<https://perma.cc/9EUM-QAWP>].

⁶³³ Lombardi et al., *supra* note 630, at 11.

⁶³⁴ Lombardi et al., *supra* note 630, at 11.

⁶³⁵ McDonald v. Armistead, 908 F. 2d 388, 389 (8th Cir. 1990); Lombardi et al., *supra* note 630, at 8.

⁶³⁶ Missouri Communications Director Email, *supra* note 383 ("However, all of them are housed at the same facility, Potosi Correctional Center, which is a maximum security prison.").

⁶³⁷ DEATH PENALTY INFORMATION CENTER, *supra* note 3.

State	Classification procedure	Solitary confinement?	Conditions	Reclassification?	Male death-sentenced prisoners
Montana	Montana no longer has a separate 'death row'. The two death-sentenced inmates are housed in the "High Side" or "Close Security" unit—which is called the SAU or Security Adjustment Unit. This is not maximum security but is still a high security unit. ⁶³⁸	No. ⁶³⁹	Death-sentenced prisoners have at least three hours of communal out-of-cell time each day. ⁶⁴⁰ They can go into the day room on a daily basis and can have outside recreation every other day. ⁶⁴¹ They can have jobs, such as a janitor. ⁶⁴² A number of college classes are available to death-sentenced prisoners. ⁶⁴³ They can also participate in hobby classes such as horsehair, beading, leather work, and painting. ⁶⁴⁴ Programs such as yoga and educational programs are available. ⁶⁴⁵ They have access to the library. ⁶⁴⁶ Death-sentenced prisoners are allowed to have music and electronic games, which can be purchased and downloaded through their own electronic devices. ⁶⁴⁷ Death-sentenced prisoners are allowed to have a cable television. ⁶⁴⁸ Visits take place on Saturday and Sunday. ⁶⁴⁹ These are non-contact visits, but special arrangements can be made to allow contact visits. ⁶⁵⁰ Recently, the prison implemented an email system which allows all prisoners – including death-sentenced prisoners – to have email accounts to correspond with approved individuals and counsel through email. ⁶⁵¹	There is no possibility to get this placement reviewed as long as the prisoner is under a death sentence. ⁶⁵²	2 ⁶⁵³

⁶³⁸ Email from unnamed attorney (Apr. 27, 2020) (on file with author) [hereinafter April 27 Email].
⁶³⁹ Email from unnamed attorney (Apr. 28, 2020) (on file with author) [hereinafter April 28 Email].
⁶⁴⁰ *Id.*
⁶⁴¹ *Id.*
⁶⁴² *Id.*
⁶⁴³ *Id.*
⁶⁴⁴ *Id.*
⁶⁴⁵ April 28 Email, *supra* note 639.
⁶⁴⁶ *Id.*
⁶⁴⁷ April 27 Email, *supra* note 638.
⁶⁴⁸ *Id.*
⁶⁴⁹ *Id.*
⁶⁵⁰ April 28 Email, *supra* note 639.
⁶⁵¹ Email from unnamed attorney (Oct. 6, 2020) (on file with author).
⁶⁵² Questionnaire Montana, *supra* note 388.
⁶⁵³ DEATH PENALTY INFORMATION CENTER, *supra* note 3.

State	Classification procedure	Solitary confinement?	Conditions	Reclassification?	Male death-sentenced prisoners
Nebraska	Death-sentenced prisoners are automatically placed in maximum custody because, according to Nebraska's DOC, "they pose an extreme security and escape risk due to the nature of their sentence." ⁶⁵⁴ They are, however, "not considered a restrictive housing population" and not placed in solitary confinement. ⁶⁵⁵	No.	Death-sentenced prisoners have access to the dayroom for two hours per day, seven days a week. ⁶⁵⁶ They are allowed to have out-of-cell activities in groups. ⁶⁵⁷ Death-sentenced prisoners are allowed to use the yard seven days a week and can utilize the gymnasium/courts/ ball field depending on the weather. ⁶⁵⁸ They can be assigned with jobs. ⁶⁵⁹ Death-sentenced prisoners can also have access to the law library. ⁶⁶⁰ They can use the phone to call with family and friends and with their attorneys. ⁶⁶¹ Death-sentenced prisoners are allowed to shower seven days a week, can clean their cells twice a week, and may receive a haircut every thirty days. ⁶⁶² They are also given at least twenty minutes to eat their meals outside of their cells. ⁶⁶³ It remains unknown whether they are allowed contact visitation.	There is no possibility to get this placement reviewed. ⁶⁶⁴	12 ⁶⁶⁵

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NEB. DEP'T OF CORRECTIONAL SERVS., ADMINISTRATIVE REGULATION, § 201.02 at 2 (Dec. 15, 2019).

Id. ("they are not considered as a restrictive housing population").

Id. at 2, 3.

Id.

Id. at 2.

Id. at 2, 3.

Id.

Id. at 2.

Id.

Id.

DEATH PENALTY INFORMATION CENTER, *supra* note 3.

State	Classification procedure	Solitary confinement?	Conditions	Reclassification?	Male death-sentenced prisoners
Nevada	Death-sentenced prisoners are automatically placed in a maximum custody security level based on their sentence of death; the highest security level. ⁶⁶⁶	Yes. ⁶⁶⁷	<p>Death-sentenced prisoners are in their individual cells for at least twenty-one hours a day.⁶⁶⁸ Tier-time is 1.5 hours of outdoor recreation time and 1.5 hours of indoor recreation time.⁶⁷⁰ During this time, death-sentenced prisoners can communicate with others on the tier.⁶⁷¹ They can also use the shower, phone, and use 'Access Corrections' during this time.⁶⁷² They are not allowed to have jobs.⁶⁷³ However, it frequently happens that their unit is put on lockdown and death-sentenced prisoners have to stay in their cells for over twenty-three hours per day.⁶⁷⁴ In 2019, this had happened approximately half of the time.⁶⁷⁵ During lockdown, death-sentenced prisoners are only allowed to go out of their cells for twenty-five minutes per day to use the shower and phone.⁶⁷⁶ Death-sentenced prisoners are allowed to have one contact visit per week.⁶⁷⁷ Contact visits can be with family members, friends, or attorneys.⁶⁷⁸ NDOC is currently taking 80% of money that prisoners receive in their prison account from friends and family.⁶⁷⁹ This money is being put towards restitution; leaving prisoners with only minimal funds.⁶⁸⁰</p>	There is no possibility to get the placement in maximum security reviewed. ⁶⁸¹	70 ⁶⁸²

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667 ADMINISTRATIVE REGULATION 521, *supra* note 395, at 2.

668 Email from unnamed attorney (Feb. 12, 2020) (on file with author) [hereinafter February 12 Email]

669 Email from unnamed attorney (Dec. 19, 2019) (on file with author) [hereinafter December 19 Email]; Email from unnamed attorney (Feb. 18, 2020) (on file with author) [hereinafter February 18 Email]

670 February 18 Email, *supra* note 668.671 *Id.*672 February 12 Email, *supra* note 667.673 *Id.*674 *Id.*675 December 19 Email, *supra* note 668.676 *Id.*677 February 18 Email, *supra* note 668.678 February 12 Email, *supra* note 667.679 *Id.*680 September Email, *supra* note 266.681 *Id.*682 ADMINISTRATIVE REGULATION 521, *supra* note 395, at 2.DEATH PENALTY INFORMATION CENTER, *supra* note 3.

State	Classification procedure	Solitary confinement?	Conditions	Reclassification?	Male death-sentenced prisoners
North Carolina	Death-sentenced prisoners are automatically housed in a death row housing unit in the North Carolina Central Prison. ⁶⁴³	No. ⁶⁴⁴	Death-sentenced prisoners in North Carolina can leave their cells and spent nearly all their time in a dayroom (with television) from 7:00 a.m. until 11:00 p.m. together with other death sentenced prisoners. ⁶⁴⁵ They can also have group recreation for at least one hour per day. Two days per week, death-sentenced prisoners are escorted to outdoor exercise areas, where they can play basketball together, walk, or jog. ⁶⁴⁶ They can participate in a one-hour Christian service on Sunday, or a one-hour Islamic service on Friday. ⁶⁴⁷ On Tuesday mornings, death-sentenced prisoners can attend a bible study class for ninety minutes. ⁶⁴⁸ They can have dinner together in dining halls. ⁶⁴⁹ Death-sentenced prisoners may be assigned with incentive wage jobs in the canteen or clothes house, or they may work as barbers or janitors within their housing areas. ⁶⁵⁰ They can have one visit per week with a maximum of two visitors. ⁶⁵¹ They cannot have contact visits. ⁶⁵²	There is no possibility to get this custody level reviewed. ⁶⁵³	137 ⁶⁵⁴

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N.C. DEPT OF PUB. SAFETY, *Death Penalty*, <https://www.ncdps.gov/adult-corrections/prisons/death-penalty> [<https://perma.cc/V7MS-RJSZ>].

Id.

Id.

Id.

Id.

Id.

Id.

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Id.

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N.C. DEPT OF PUB. SAFETY, *Death Row Roster*, <https://www.ncdps.gov/adult-corrections/prisons/death-penalty/death-row-roster> [<https://perma.cc/3NDN-KACN>].

State	Classification procedure	Solitary confinement?	Conditions	Reclassification?	Male death-sentenced prisoners
Ohio	Death-sentenced prisoners are not assigned with any security classification but are automatically designated a 'death row status' and housed on death row. ⁶⁸⁶ Death row is a general population assignment and is a hybrid of level 3 and level 4 practices. ⁶⁸⁶	No.	Death-sentenced inmates are allowed out of their cells from 6:15 a.m. to 8:30 p.m., except from the time between 12:00pm and 2:15 p.m. when they have to stay in their cells. ⁶⁸⁷ Death-sentenced prisoners can have group recreation. ⁶⁸⁸ There is an outdoor recreation yard where they are allowed to recreate five days a week for periods of three to four hours a day. ⁶⁸⁹ They can be assigned with jobs on their unit. ⁷⁰⁰ They are allowed contact visitation with family members and attorneys. ⁷⁰¹	Death-sentenced prisoners are not subject to security classification procedures and remain in the same status. ⁷⁰² However, if they pose a threat to security, they may be assigned to Level 4 or Level E and a prison assignment off death row that is appropriate for the security risk. ⁷⁰³ Only then will the security classification procedures apply, and once the prisoner no longer poses a threat to security, may be returned to death row. ⁷⁰⁴	135 ⁷⁰⁵

⁶⁸⁶ Oh. Dep. of Reh. and Cor., *Reception Admission Procedures: Male Death Row Inmates 52-RCP-02* (Dec. 2, 2019), p. 1.

⁶⁸⁷ Oh. Dep. of Reh. & Cor., *Inmate Security Classification Levels 1 through 4*, 53-CLS-01 (Feb. 3, 2020), p. 12.

⁶⁸⁸ January 28 Email, *supra* note 590.

⁶⁸⁹ *Id.*

⁷⁰⁰ *Id.*

⁷⁰¹ HUMAN RIGHTS CLINIC, UNIV. OF TEX. SCH. OF LAW, *supra* note 448, at 19.

⁷⁰² 53-CLS-01, *supra* note 401, at 12, 13; OHIO DEPT. OF REHAB. & CORR., 53-CLS-10, REVIEW AND RELEASE OF EXTENDED RESTRICTIVE HOUSING INMATES 3 (Dec. 8, 2019).

⁷⁰³ 53-CLS-01, *supra* note 401, at 12, 13.

⁷⁰⁴ *Id.* at 13.

⁷⁰⁵ OHIO DEPT. OF REHAB. & CORR., Death Row, <https://www.doc.ohio.gov/death-row> [https://perma.cc/81S2-P56K].

State	Classification procedure	Solitary confinement?	Conditions	Reclassification?	Male death-sentenced prisoners
Oklahoma	Death-sentenced prisoners are automatically housed in a maximum-security custody level. ⁷⁰⁶	Yes.	Oklahoma slightly improved the housing conditions for some of its death-sentenced prisoners in October of 2019 after the ACLU sent the Oklahoma DOC a demand letter. ⁷⁰⁷ The DOC relocated these prisoners to a different unit - the A-unit - with slightly better conditions, such as a window in the cell, job opportunities, and outdoor exercise, while some remain in the same unit with unchanged conditions - the H-unit. ⁷⁰⁸ H-unit currently houses 12 prisoners and A-unit currently houses 32 prisoners. ⁷⁰⁹ Death-sentenced prisoners in both units are in their cells for twenty-three hours a day. ⁷¹⁰ In the A-unit, death-sentenced prisoners are allowed to have contact visits with family members and friends, and are allowed to have outside recreation. ⁷¹¹ Outside recreation takes place in groups of three prisoners at a time, but in separate cages. ⁷¹² In the A-unit, one cell houses two death-sentenced prisoners; they thus have a cellmate. ⁷¹³ In the H-unit, one cell houses one prisoner. ⁷¹⁴ All death-sentenced prisoners are allowed to attend group religious services. ⁷¹⁵ Seven death-sentenced prisoners have been able to acquire a job within the prison, but as of now that is the exception rather than the rule. ⁷¹⁶	There is no possibility to get the placement on death row reviewed. ⁷¹⁷	45 ⁷¹⁸

⁷⁰⁶ ACLU Letter, *supra* note 262.

⁷⁰⁷ *Id.*; November Telephone Interview, *supra* note 271.

⁷⁰⁸ September Email, *supra* note 266; Interoffice Memorandum, *supra* note 268, at 2.

⁷⁰⁹ Interoffice Memorandum, *supra* note 268, at 3, 4.

⁷¹⁰ November Telephone Interview, *supra* note 271.

⁷¹¹ *Id.*

⁷¹² *Id.*

⁷¹³ *Id.*

⁷¹⁴ Interoffice Memorandum, *supra* note 268, at 2.

⁷¹⁵ September Email, *supra* note 266.

⁷¹⁶ November Telephone Interview, *supra* note 271; September Email, *supra* note 266.

⁷¹⁷ November Telephone Interview, *supra* note 271.

⁷¹⁸ DEATH PENALTY INFORMATION CENTER, *supra* note 3.

State	Classification procedure	Solitary confinement?	Conditions	Reclassification?	Male death-sentenced prisoners
Oregon	Death-sentenced prisoners are housed in general population, classified as medium security and placed in Level 3 or Level 4. ⁷¹⁹ This is a recent change. On May 15, 2020, the Oregon Department of Corrections announced that it would close death row at Oregon State Penitentiary and would reassign all death-sentenced prisoners to special housing units or general population. ⁷²⁰	No.	When the ODOC dissolved death row and moved death-sentenced prisoners into general population, a committee reviewed every prisoner and made a determination as to whether the prisoner could be housed on Level 3 or Level 4. ⁷²¹ Levels 3 and 4 are medium custody levels and are meant for prisoners with a sentence remainder of between 49 and 120 months. ⁷²² There are barely any differences between these levels. ⁷²³ When determining the custody level, the committee looks at the disciplinary history of the death-sentenced prisoner while on death row and the nature of the crime they were convicted of (specifically whether the prisoner was convicted for a murder committed while in prison). ⁷²⁴ Death-sentenced prisoners cannot be housed in Levels 1 or 2, because those custody levels are meant only for prisoners with a 48-month sentence remainder. ⁷²⁵ Death-sentenced prisoners are treated equally to other prisoners on Levels 3 and 4. ⁷²⁶ There are currently five facilities where death-sentenced prisoners are housed. ⁷²⁷ Each facility determines the amount of out-of-cell time for its prisoners. ⁷²⁸ However, prisoners on Levels 3 and 4 are	Death-sentenced prisoners will be housed at a custody level not lower than Level 3. ⁷²⁹ There is a committee that reviews death-sentenced prisoners that first arrive in prison to determine their custody level. ⁷³¹ There is also a review system in place when a death-sentenced prisoner is moved to a stricter custody level and to subsequently determine whether he can be released to a less stricter custody level. ⁷³²	29 ⁷³³

⁷¹⁹ Telephone interview with Superintendent of Security, Oregon Department of Corrections (Oct. 22, 2020) [hereinafter Oregon Superintendent of Security Telephone interview].

⁷²⁰ OR. DEP'T. OF CORR., *News and Updates*, <https://www.oregon.gov/doc/Pages/news-and-updates.aspx> [https://perma.cc/F88B-FB02].

⁷²¹ Oregon Superintendent of Security Telephone interview, *supra* note 719.

⁷²² *Id.*

⁷²³ *Id.*

⁷²⁴ *Id.*

⁷²⁵ *Id.*

⁷²⁶ *Id.*

⁷²⁷ *Id.*

⁷²⁸ *Id.*

⁷²⁹ *Id.*

⁷³⁰ Oregon Superintendent of Security Telephone interview, *supra* note 719.

⁷³¹ *Id.*

⁷³² *Id.*

⁷³³ *Id.*

OR. DEP'T. OF CORR., Oregon Death Penalty, <https://www.oregon.gov/doc/about/Pages/oregon-death-penalty.aspx> [https://perma.cc/F8UY-BFT7].

Oregon, <i>Continued</i>			allowed to have jobs a will be out of their cells for that. ⁷²⁹ They can have group recreation, either in an outside yard or indoor dayroom. ⁷³⁰ They can make phone calls. ⁷³¹ Death-sentenced prisoners can have contact visits. ⁷³² Moreover, death-sentenced prisoners have access to the library, gym, dayroom (including a television), and can possess a limited amount of personal property. ⁷³³ They have access to educational programs and religious services. ⁷³⁴ If death-sentenced prisoners have a disciplinary action, they can either be moved to Level 5 (maximum custody) or be placed in segregation. ⁷³⁵		
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Id.

Id.

HANDBOOK FOR FRIENDS AND FAMILY, *supra* note 407, at 6.

Id. at 8, 10.

Id. at 12, 14.

Id. at 16, 17.

Oregon Superintendent of Security Telephone interview, *supra* note 719.

State	Classification procedure	Solitary confinement?	Conditions	Reclassification?	Male death-sentenced prisoners
Pennsylvania	Death-sentenced prisoners are automatically housed in a unit separating them from the general population, but the unit operates as a general population unit. ⁷⁴⁰	No.	Death-sentenced prisoners are offered at least four hours of out-of-cell time for activities per day for seven days per week, and a total of at least 42.5 hours out-of-cell time for activities per week. ⁷⁴¹ They are not strip-searched or shackled every time they leave their cells. ⁷⁴² Death-sentenced prisoners are permitted to obtain work assignments such as working in the kitchen, groundskeeping, snow-removal, and grass-mowing work. ⁷⁴³ They can have outdoor exercise for at least two hours per week, seven days a week, and shower daily. ⁷⁴⁴ They are also permitted to make phone calls on a daily basis for fifteen minutes per usage. ⁷⁴⁵ Death-sentenced prisoners are allowed to buy televisions, tablets, and radios. ⁷⁴⁶ They have access to a law library and educational programs, and can attend religious activities. ⁷⁴⁷ Prisoners can have contact visitation with their attorneys and people that are listed on the prisoner's visit list. ⁷⁴⁸	Placement in a Capital Case Unit is only reviewable if a prisoner's conviction or capital sentence is modified by the court. ⁷⁴⁹	142 ⁷⁵⁰

⁷⁴⁰ Sentencing Agreement Reid, *supra* note 289, at 10.

⁷⁴¹ *Id.* at 13.

⁷⁴² *Id.* at 11.

⁷⁴³ *Id.* at 12.

⁷⁴⁴ *Id.* at 14.

⁷⁴⁵ *Id.* at 12.

⁷⁴⁶ *Id.*

⁷⁴⁷ *Id.* at 13.

⁷⁴⁸ *Id.* at 24.

⁷⁴⁹ *Id.* at 26.

⁷⁵⁰ DEATH PENALTY INFORMATION CENTER, *supra* note 3.

State	Classification procedure	Solitary confinement?	Conditions	Reclassification?	Male death-sentenced prisoners
South Carolina	<p>Death-sentenced prisoners are separated from all other prisoners and automatically assigned to death row.⁷⁵¹ Death row has three security levels; levels I through III.⁷⁵² Level III is the strictest degree of custody and control.⁷⁵³ Level III includes prisoners who just arrived to death row, those who have serious disciplinary charges—such as possession of a weapon or contraband, or display assaultive behavior—inmates that pose a serious risk of escape, and those who</p>	No, if housed on Level I and II.	<p>Prisoners on Level I and II are allowed more privileges than inmates on Level III.⁷⁵⁷ Newly-arrived prisoners start on Level III until their review is complete.⁷⁵⁸ Within forty-eight hours after arrival, the inmate will receive his initial custody level assignment after a review.⁷⁵⁹ The review is based on factors such as the current offense, any prior incarcerations, any escapes on record, social history, and a psychological evaluation.⁷⁶⁰ Most inmates will be housed on Levels I or II.⁷⁶¹ Prisoners on Levels I and II can be out of their cells from 6:00 a.m. to 6:00 p.m.⁷⁶² When out of their cells, they can play cards, play on the handball course, use a computer to do legal research, and sit down together at tables and communicate with each other.⁷⁶³ Prisoners on Level I and II are allowed to have group recreation.⁷⁶⁴ They are allowed to have a job that does not require them to leave the unit.⁷⁶⁵ These jobs include serving meals, cleaning the common areas, doing laundry or assisting fellow prisoners with disabilities.⁷⁶⁶ They also have the opportunity to worship together in religious services coordinated by the institution chaplain once a week.⁷⁶⁷ Prisoners on Level I and II can have meals together in a common area on</p>	<p>There is an annual review for prisoners on Level I, a 90-day review for prisoners on Level II, and a 30-day review for prisoners on Level III.⁷⁷⁶</p>	37 ⁷⁷⁷

751 S.C. DEP'T. OF CORR., OF-22-16 DEATH ROW 1 (June 26, 2014) [hereinafter OF-22-16].

752 *Id.* at 4.

753 *Id.*

754 *Id.*

755 *Id.* at 8, 9.

756 *Id.* at 5, 6.

757 *Id.* at 4.

758 *Id.*

759 March 11 Telephone interview, *supra* note 315.

760 *Id.*

761 OF-22-16, *supra* note 751, at 10.

762 *Id.* at 20.

763 Press Release, *supra* note 313.

764 *Id.* at 12.

765 *Id.* at 9.

766 S.C. DEP'T. OF CORR., *Death Row Roster* (Apr. 1, 2021), <http://www.doc.sc.gov/news/death-row-report.pdf> [https://perma.cc/D2BU-4RD6].

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South Carolina, <i>Continued</i>	have been placed on execution stans. ⁷⁶⁸ Prisoners on Level II include those who have been involved in an incident or have received a disciplinary charge. ⁷⁶⁹ Prisoners on Level I include those who have maintained good behavior, demonstrate a positive attitude, and adhere to SCTDC procedures. ⁷⁷⁰		the death row unit. ⁷⁶⁸ They can use the telephone to call a family member or friend for 15 minutes per usage. ⁷⁶⁹ Prisoners on Levels I and II are allowed to have a television, a radio, and a typewriter. ⁷⁷⁰ They can have eight two-hour non-contact visits per month. ⁷⁷¹ Prisoners on Level III are in their cells for twenty-three hours a day and have one hour of recreation per day. ⁷⁷² They have to remain in restraints during recreation. ⁷⁷³ They can have eight two-hour non-contact visits per month. ⁷⁷⁴ None of the death- sentenced prisoners have access to any educational programs, other than reading and math support whereby instructors are going from cell to cell. ⁷⁷⁵	
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764 *Id.*
765 *Id.*
766 *Id.*
767 *Id.*
768 *Id.* ex 21.
769 *Id.* ex 14.
770 *Id.* ex 11.
771 *Id.* ex 10.
772 *Id.* ex 11.
773 *Id.* ex 11.
774 *Id.* ex 20; March 11 Telephone interview, *supra* note 315.
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State	Classification procedure	Solitary confinement?	Conditions	Reclassification?	Male death-sentenced prisoners ⁷⁷⁸
South Dakota	Death-sentenced prisoners are automatically housed in a maximum custody level area, separated from the general population. ⁷⁷⁸	Yes.	Death-sentenced prisoners are alone in their cell for twenty-three hours and fifteen minutes, with only forty-five minutes out of cell recreation, five days a week. ⁷⁷⁹ Death-sentenced prisoners can use the telephone and tablets during recreation. ⁷⁸⁰ They can ask the warden for approval to complete specified programs. ⁷⁸¹ Death-sentenced prisoners cannot have any kind of employment. ⁷⁸² They can have two visits per week with a pre-approved family member or friend, these are non-contact visits. ⁷⁸³ Visits with attorneys are non-contact visits as well and the prisoner remains in full restraints during those visits. ⁷⁸⁴ Death-sentenced prisoners will have meals brought to them by staff and are not allowed to have any contact with general population inmates. ⁷⁸⁵ Death-sentenced prisoners can request books from the library. ⁷⁸⁶ Every time the prisoner is outside his cell, he will be escorted by prison staff and he will be in restraints. ⁷⁸⁷	There is no possibility to get the placement on this maximum custody level reviewed. ⁷⁸⁸	1 ⁷⁸⁹

⁷⁷⁸ S.D. DEP'T. OF CORR., 1.3.D.2 CAPITAL PUNISHMENT HOUSING 1 – 2 (Jul. 16, 2020) [hereinafter 1.3.D.2].
⁷⁷⁹ *Id.* at 3.
⁷⁸⁰ *Id.*
⁷⁸¹ *Id.*
⁷⁸² *Id.* at 2.
⁷⁸³ *Id.* at 3; S.D. DEP'T. OF CORR., 1.5.D.1. INMATE VISITING 5 (Jan. 10, 2020).
⁷⁸⁴ 1.3.D.2, *supra* note 778, at 4.
⁷⁸⁵ *Id.* at 2.
⁷⁸⁶ *Id.* at 4.
⁷⁸⁷ *Id.* at 3.
⁷⁸⁸ *Id.* at 1 – 2.
⁷⁸⁹ DEATH PENALTY INFORMATION CENTER, *supra* note 3.

State	Classification procedure	Solitary confinement?	Conditions	Reclassification?	Male death-sentenced prisoners
Tennessee	Death-sentenced prisoners are automatically placed in a separate, maximum security unit at the Riverbend Maximum Security Institution based on their sentence of death. ⁷⁹⁰ Death row has three levels of security: A, B, and C, with C being the most restrictive level. ⁷⁹¹	No, if housed on Level B or C.	When a death-sentenced prisoner first arrives on 'death row,' he is placed in Level C. ⁷⁹² In Level C, prisoners are locked in their cells for twenty-three hours a day. ⁷⁹³ They get one hour of recreation per day, alone. ⁷⁹⁴ Any time they leave their cells they are shackled and handcuffed. ⁷⁹⁵ All their visits are non-contact visits. ⁷⁹⁶ Death-sentenced prisoners on Level C cannot have jobs and do not have access to any educational classes. ⁷⁹⁷ They have access to the law library, but they cannot enter the library. ⁷⁹⁸ The books have to be brought to their cells. ⁷⁹⁹ After eighteen months, when the prisoner has not had any disciplinary actions, he will be moved to Level B automatically. ⁸⁰⁰ Prisoners on Level B are in their cells for twenty-two and a half hours and have one and a half hours of recreation time a day. ⁸⁰¹ They are allowed to have group recreation and contact visits. ⁸⁰² Any time they leave their cells they are shackled and handcuffed. ⁸⁰³ Prisoners on Level B do not	There is no possibility to get the placement on the maximum custody death row reviewed. ⁸⁰⁴ However, prisoners on Level B have the ability to move to Level A after twelve months of good behavior. ⁸⁰⁵ If the prisoner on Level B violates any prison rules in those twelve months, he will either be placed back on Level C or stays on Level B but needs an additional	50 ⁸⁰¹

⁷⁹⁰ TENN. DEP'T. OF CORR., 404.11 MANDATORY SEGREGATION 1 (Mar. 20, 2019) [hereinafter MANDATORY SEGREGATION]; TENN. DEP'T. OF CORR., 506.14 HOUSING ASSIGNMENTS 1 (Aug. 15, 2017), TENN. DEP'T. OF CORR., 506.16 LIVING CONDITIONS FOR SEGREGATED INMATES 1 (Apr. 1, 2019) [hereinafter LIVING CONDITIONS FOR SEGREGATED INMATES]; TENN. DEP'T. OF CORR., *Death Penalty in Tennessee*, <https://www.in.gov/correction/statistics-and-information/death-penalty-in-tennessee.html> [https://perma.cc/BT4P-SAEC] [hereinafter *Death Penalty in Tennessee*].

⁷⁹¹ *Death Penalty in Tennessee*, *supra* note 790.

⁷⁹² Telephone interview with unnamed attorney (Apr. 9, 2020) [hereinafter April 9 Telephone interview]; *Death Penalty in Tennessee*, *supra* note 791.

⁷⁹³ April 9 Telephone interview, *supra* note 792.

⁷⁹⁴ *Id.*

⁷⁹⁵ *Id.*

⁷⁹⁶ *Id.*

⁷⁹⁷ *Id.*

⁷⁹⁸ *Id.*

⁷⁹⁹ *Id.*

⁸⁰⁰ *Id.*; *Death Penalty in Tennessee*, *supra* note 791.

⁸⁰¹ April 9 Telephone interview, *supra* note 792.

⁸⁰² *Id.*

⁸⁰³ *Id.*

⁸⁰⁴ MANDATORY SEGREGATION, *supra* note 790, at 1; LIVING CONDITIONS FOR SEGREGATED INMATES, *supra* note 790, at 1.

⁸⁰⁵ April 9 Telephone interview, *supra* note 792.

⁸¹¹ TENN. DEP'T. OF CORR., *Death Row Offenders*, <https://www.in.gov/correction/statistics-and-information/death-row-facts/death-row-offenders.html> [https://perma.cc/B4HY-R5K6].

State	Classification procedure	Solitary confinement?	Conditions	Reclassification?	Male death-sentenced prisoners
Texas	Death-sentenced prisoners are automatically housed in death row segregation. ⁸²² Death row segregation consists of three levels: Level I, Level II, and Level III, with Level I being the least restrictive custody level. ⁸²³	Yes.	Death-sentenced prisoners on Level I are in their cells for at least twenty-two hours a day, and get a maximum of two hours out-of-cell time five days a week. ⁸²⁴ Level II and III is for chronic rule violators. ⁸²⁵ Death-sentenced prisoners on Levels II and III have, for example, less visitation rights, even less out-of-cell time, and less commissary options than those on Level I. ⁸²⁶ On Level II, death-sentenced prisoners get one hour out-of-cell time on four days a week. ⁸²⁷ On Level III, death-sentenced prisoners get one hour out-of-cell time on only three days a week. ⁸²⁸ On all levels, prisoners are not allowed to have any contact visits, and they recreate alone. ⁸²⁹ Death-sentenced prisoners were allowed to have jobs, but the work program for death-sentenced prisoners has been suspended since 1999. ⁸³⁰ There is no meaningful human contact, apart from a weekly two-hour non-contact visit with a family member or friend. ⁸³¹ Every time the death-sentenced prisoner has been outside the death row unit, for recreation or visits, he will be strip-searched. ⁸³² Once every ninety days, they can make a five-minute phone call to a person on their approved visitation list. ⁸³³	There is no possibility to get the initial placement on death row segregation reviewed. ⁸³⁴ There is a possibility to get the placements on Levels II and III reviewed and to be placed back on Level I. ⁸³⁵	210 ⁸³⁶

⁸²² TEX. DEP'T. OF CRIM. JUST., DEATH ROW PLAN 1 (Oct. 2004) [hereinafter DEATH ROW PLAN].

⁸²³ *Id.*

⁸²⁴ *Id.* at 17.

⁸²⁵ *Id.* at 16.

⁸²⁶ *Id.* at 16 – 18.

⁸²⁷ *Id.* at 17.

⁸²⁸ *Id.*

⁸²⁹ *Id.* at 10, 17.

⁸³⁰ HUMAN RIGHTS CLINIC, UNIV. OF TEX. SCH. OF LAW, *supra* note 448, at 13.

⁸³¹ DEATH ROW PLAN, *supra* note 822, at 10.

⁸³² *Id.* at 13.

⁸³³ Letter from unnamed Texas death-sentenced prisoner (Apr. 5, 2020) (on file with author); Letter from unnamed Texas death-sentenced prisoner (Oct. 2, 2020) (on file with author).

⁸³⁴ DEATH ROW PLAN, *supra* note 822, at 6 – 7.

⁸³⁵ *Id.*

⁸³⁶ TEX. DEP'T. OF CRIM. JUST., *Offenders on Death Row*, https://www.lbj.texas.gov/death_row/death_row_offenders_on_de.html [https://perma.cc/Y5XR-4BKP].

State	Classification procedure	Solitary confinement?	Conditions	Reclassification?	Male death-sentenced prisoners
Utah	Death-sentenced prisoners are automatically classified as Level I. ⁸³⁷ Level I is for prisoners that pose “the highest threat to institutional security and safety of staff, other prisoners, and/or self.” ⁸³⁸ There is no separate ‘death row’. ⁸³⁹	No.	Death sentenced prisoners are in their cells for a maximum of twenty-one hours a day. ⁸⁴⁰ They are, however, not in solitary confinement. ⁸⁴¹ They get at least three hours out-of-cell time each day, and have access to a yard. ⁸⁴² Death-sentenced prisoners are single-celled and are allowed to have a fan, radio, and television in their cell. ⁸⁴³ Death-sentenced prisoners have access to a phone on the unit, and during visits they are separated from their visitors by a barrier only. ⁸⁴⁴ They can communicate with each other through the doors of their cells. ⁸⁴⁵ Death-sentenced prisoners can have a job on their section for forty cents per hour. ⁸⁴⁶ Jobs vary from working in the furniture shop, cleaning the tiers, and doing laundry. ⁸⁴⁷ If a prisoner has a job, he will be out of his cell for most of the day. ⁸⁴⁸	There is no possibility to review the placement on Level I. ⁸⁴⁹	7 ⁸⁵⁰

⁸³⁷ *FCM Inmate Classification*, *supra* note 429, at 16.
⁸³⁸ *Id.* at 9.
⁸³⁹ Email from unnamed attorney (Apr. 7, 2020) (on file with author) [hereinafter April 7 Email].
⁸⁴⁰ UTAH DEP’T. OF CORR., INMATE FRIENDS AND FAMILY ORIENTATION BOOKLET 18 (Sep. 2013) [hereinafter INMATE FRIENDS AND FAMILY].
⁸⁴¹ April 7 Email, *supra* note 839.
⁸⁴² April 7 Email, *supra* note 839.
⁸⁴³ UTAH DEP’T. OF CORR., *Utah*, <https://corrections.utah.gov/index.php/family-friends/prison-facilities/18-droper-facilities> [https://perma.cc/T2HS-O48J].
⁸⁴⁴ INMATE FRIENDS AND FAMILY, *supra* note 840, at 28.
⁸⁴⁵ UTAH DEP’T. OF CORR., *Utah*, <https://corrections.utah.gov/index.php/family-friends/prison-facilities/18-droper-facilities> [https://perma.cc/T2HS-O48J].
⁸⁴⁶ INMATE FRIENDS AND FAMILY, *supra* note 840, at 10.
⁸⁴⁷ April 7 Email, *supra* note 839.
⁸⁴⁸ *Id.*
⁸⁴⁹ *FCM Inmate Classification*, *supra* note 429, at 40.
⁸⁵⁰ DEATH PENALTY INFORMATION CENTER, *supra* note 3.

State	Classification procedure	Solitary confinement?	Conditions	Reclassification?	Male death-sentenced prisoners
Virginia	Death-sentenced prisoners are automatically assigned to death row. ⁸⁵¹	No.	Death-sentenced prisoners are in their cells for a maximum of twenty-one hours a day. ⁸⁵² They are allowed to have contact visits once a week, and have access to an outside recreation yard and an indoor dayroom with games and a television. ⁸⁵³ Outside recreation for ninety minutes on five days a week. ⁸⁵⁴ Inside recreation takes place in groups with a maximum of three prisoners. ⁸⁵⁵ They also have access to a JPAY kiosk that allows them to download music, purchase books and movies, and send emails. ⁸⁵⁶ They are allowed to shower for fifteen minutes per day on seven days a week. ⁸⁵⁷	There is no possibility to get placement on this custody level reviewed. ⁸⁵⁸	2 ⁸⁵⁹
Wyoming	When the State still had death-sentenced prisoners, they were automatically housed in maximum custody based on their sentence of death. ⁸⁶⁰	Yes.	Death-sentenced prisoners were alone in their cells for twenty-three and a half hours a day. ⁸⁶¹ Death-sentenced prisoners were allowed to have recreation or take a shower for only thirty minutes per day. ⁸⁶² There was no group recreation. ⁸⁶³	There was no possibility to get the placement reviewed without a change in sentence. ⁸⁶⁴	Wyoming currently does not have any death-sentenced prisoners. ⁸⁶⁵

⁸⁵¹ SECURITY LEVEL CLASSIFICATION, *supra* note 432, at 5.

⁸⁵² Porter, 923 F.3d at 338.

⁸⁵³ *Id.* at 364.

⁸⁵⁴ *Id.*

⁸⁵⁵ *Id.*

⁸⁵⁶ *Id.*

⁸⁵⁷ *Id.*

⁸⁵⁸ *Id.*

⁸⁵⁹ SECURITY LEVEL CLASSIFICATION, *supra* note 432, at 5.

⁸⁶⁰ DEATH PENALTY INFORMATION CENTER, *supra* note 3.

⁸⁶¹ Questionnaire Wyoming, *supra* note 435.

⁸⁶² Email from unnamed attorney (Feb. 6, 2020) (on file with author).

⁸⁶³ *Id.*

⁸⁶⁴ Email from unnamed attorney (Feb. 11, 2020) (on file with author).

⁸⁶⁵ Questionnaire Wyoming, *supra* note 435.

⁸⁶⁶ September Email, *supra* note 266 (The death sentence of the last death-sentenced prisoner has been vacated and the prisoner is currently awaiting resentencing. He is not housed in the conditions described above.).

