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DEATH IN PRISON: THE RIGHT DEATH PENALTY COMPROMISE

Russell D. Covey*

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I. INTRODUCTION

You can’t beat something with nothing. That simple proposition helps explain the difficulty that death penalty opponents have faced in the campaign to abolish capital punishment. Although four states in recent years have moved forward with abolition, the majority of states continue to maintain capital punishment.¹ Across the nation,

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1. Illinois (2011), New Mexico (2009), New Jersey (2007), and New York (2007) were the most

the death penalty remains politically popular, and many who support the death penalty do so convinced that convicted capital murderers deserve to die.² Still, the tide seems to be turning. Overall, the number of death sentences imposed per year has fallen in half from the 1990s, and polls indicate that support for the death penalty given an alternative option of life without parole has dropped.³

Popular unease with capital punishment stems in part from its burdensome cost and in part from the increasing public awareness of the criminal justice system's potential to convict the innocent.⁴ The new awareness of the risks of capital punishment combined with the emerging consensus for leaner, less punitive, and more cost-effective punishment policies is promising to tip the balance. As James Liebman observed more than a decade ago, "conservative commentators who have in the past supported the death penalty have recently come out in favor of measures to check government power in this context, with some even urging abolition."⁵ This emerging consensus creates a rare opportunity for meaningful dialogue about major reform of the death penalty.

What is needed to push the debate to the next stage is a reform proposal that achieves the moral, political, and economic gains identified by death-penalty opponents while retaining the retributive,

recent states to abolish capital punishment. See *States With and Without the Death Penalty*, DEATH PENALTY INFORMATION CENTER, <http://www.deathpenaltyinfo.org/states-and-without-death-penalty> (last visited Mar. 7, 2012).

2. *Death Penalty Issues*, PRO-DEATH PENALTY.COM, <http://www.prodeathpenalty.com/issues.htm> (last visited Mar. 12, 2012) ("Indeed, the decision that capital punishment may be the appropriate sanction in extreme cases is an expression of the community's belief that certain crimes are themselves so grievous an affront to humanity that the only adequate response may be the penalty of death." (citing *Gregg v. Georgia*, 428 U.S. 153, 184 (1976))); see also Samuel R. Gross, *Update: American Public Opinion On The Death Penalty—It's Getting Personal*, 83 CORNELL L. REV. 1448, 1460 (1998) (reporting Gallup poll results showing that 50% of death penalty supporters stated that retribution, "a life for a life," was the strongest reason for their support).

3. Scott Turow, *The Death of the Death Penalty*, NEWSWEEK, Oct. 3, 2011, at 46.

4. See Jay D. Aronson & Simon Cole, *Science and the Death Penalty: DNA, Innocence, and the Debate over Capital Punishment in the United States*, 34 LAW & SOC. INQUIRY 603, 604 (2009) (stating that "over the past decade innocence has emerged as perhaps the dominant issue in death penalty discourse with 'an unprecedented effect on the debate about capital punishment'" (quoting Susan A. Bandes, *Framing Wrongful Convictions*, 2008 UTAH L. REV. 5, 8 (2008))).

5. Rachel E. Barkow, *The Court of Life and Death: The Two Tracks of Constitutional Sentencing Law and the Case for Uniformity*, 107 MICH. L. REV. 1145, 1194-95 (2009) (citing James S. Liebman, *The Overproduction of Death*, 100 COLUM. L. REV. 2030, 2140 n.264 (2000)).

incapacitative, and deterrent effects promised by contemporary death penalty practices. I present one such alternative here. In this Article, I argue that states should abandon their current dysfunctional death-penalty systems in favor of a new ultimate sentence: death-in-prison. A sentence of death-in-prison would be exactly what it says: a prisoner sentenced to death-in-prison would be incarcerated for the duration of his or her natural life. Death-in-prison sentences would be like sentences of life in prison without possibility of parole (“LWOP”) in that they would entail lifetime incarceration but no affirmative state action to terminate the prisoner’s life. Like LWOP, a sentence of death-in-prison would condemn its recipient to die without any chance of release or reintegration into the community.

Death-in-prison sentences would also share several features of the conventional death penalty. As with the conventional death penalty, a special penalty trial would be needed to impose the ultimate death-in-prison sentence. In addition, persons sentenced to death-in-prison might continue to serve their sentences in special segregated “death rows.”⁶ Death-in-prison sentences would also be imposed with all the magisterial weightiness of conventional death sentences. Persons so sentenced would be told, like those in conventional death penalty states, that the punishment for their crime is the ultimate one—death. Although largely symbolic, the expressive value of imposing a death sentence, rather than a life sentence, may be the proposal’s greatest strength.

Death-in-prison would thus not constitute a watershed change in our penal practices. As others already have recognized, LWOP itself is a kind of death sentence.⁷ My proposal begins by acknowledging this truth while also recognizing the powerful retributive symbolism

6. Preservation of death row is not an essential feature of the proposal. Research literature suggests that the current practice of segregating death-row prisoners is inordinately costly, harmful to prisoners and correctional facility staff, and unnecessary in terms of facility security. Accordingly, I do not recommend retention of segregated death rows unless doing so is the only politically feasible way to win support of the proposal.

7. See generally Robert Johnson & Sandra McGunigall-Smith, *Life Without Parole, America’s Other Death Penalty: Notes on Life Under Sentence of Death by Incarceration*, 88 THE PRISON J. 328 (2008), available at <http://tpj.sagepub.com/content/88/2/328.full.pdf+html>.

that accompanies the pronouncement upon a convicted murderer of a sentence of death.

Replacement of the conventional death penalty with a new death-in-prison sentence has much to commend it. It would save money, enhance equity among offenders, eliminate the risk of wrongful executions, and increase the odds that persons wrongfully convicted of capital crimes can obtain eventual redress. Death-in-prison would also increase the sense of “closure” and reduce years of stress and uncertainty felt by victims’ families awaiting imposition of capital sentences without reducing either the retributive or deterrent functions of punishment. The death-in-prison penalty would also redirect jurors’ attention to what should be the ultimate inquiry in capital cases: whether the perpetrator on trial might be rehabilitated, or instead permanently removed from civil society. For these reasons, jurisdictions that currently retain the death penalty should abandon their outmoded capital punishment apparatus in favor of a new, death-in-prison penalty.

The argument unfolds as follows. Part II discusses the primary rationales advanced by supporters of the current death penalty, demonstrates why the death penalty as currently fashioned fails to deliver on those rationales, and explains why death-in-prison would better serve penological interests. In addition, it documents the substantial cost savings that abolition of the conventional death penalty would make possible. Part III identifies two particular ways that replacement of the current death penalty with death-in-prison would improve criminal justice. First, death-in-prison would shift capital decision-makers’ focus away from whether the defendant lives or dies to what the key moral issue in the penalty phase of capital cases should be: whether the perpetrator should be temporarily or permanently excluded from civil society. By focusing the penalty phase jury on that issue, using death-in-prison sentences as the highest ultimate penalty advances and clarifies the jury’s moral decision-making function. Second, replacing conventional death sentences with death-in-prison might help trigger a downward

ratcheting of sentences across the board, which our overburdened criminal justice system desperately needs. Part IV briefly concludes.

II. “DEATH-IN-PRISON” SENTENCES WOULD BETTER SERVE PENOLOGICAL INTERESTS THAN THE DYSFUNCTIONAL CONTEMPORARY DEATH PENALTY

The modern American death penalty is a “peculiar institution,” in more ways than one.⁸ Death penalty supporters cite an array of justifications for keeping the institution, but after years of heated study and debate, there remains little, if any, evidence that the death penalty actually serves any of those purposes more effectively than alternate available punishments. While retribution and deterrence are generally cited as the two principal justifications for the death penalty,⁹ other justifications frequently invoked by supporters include the need for “closure” by family members and friends of the victim, the need to express the moral indignation and outrage of the community, the need to educate citizens about community norms and values, and the need to diffuse popular anger in order to foreclose resort to vigilante justice by outraged community members.

Whether the death penalty could, in theory, provide these benefits under the right conditions is debatable. What is not debatable is that, as currently practiced, the death penalty’s efficacy is deeply compromised. The death penalty’s inability to achieve the penological goals its advocates identify can be blamed on three features of modern capital punishment. First, the death penalty is very rarely imposed, and when it is imposed, death sentences are very rarely carried out. Second, even when a death sentence is both imposed and carried out, the typical period of delay between sentencing and execution is so great that it undermines many of the stated purposes of capital punishment. Third, regardless of whether death sentences ultimately are carried out, residual uncertainty about

8. DAVID GARLAND, *PECULIAR INSTITUTION: AMERICA’S DEATH PENALTY IN AN AGE OF ABOLITION* (2011).

9. In *Gregg v. Georgia*, the U.S. Supreme Court identified retribution and deterrence as the two penal objectives of the death penalty. *Gregg v. Georgia*, 428 U.S. 153, 183 (1976).

the prisoner's guilt, combined with substantial opposition to the use of the penalty, greatly dilutes the punishment's efficacy and distracts the public from what is intended to be a powerful and expressive "teaching moment." An ultimate sentence of death-in-prison, in contrast, would not suffer these defects, and as a result would provide a better, fairer, and cheaper alternative than the dysfunctional contemporary death penalty.

A. Infrequency

The death penalty today is an exercise in symbolism. Compared with the number of homicides committed each year, the number of persons sentenced to death is "vanishingly small,"¹⁰ and the number of persons actually executed smaller still. Only one in thirty-three persons convicted of a homicide offense is sentenced to death. Among persons convicted of murder, approximately one in five receives a death sentence. In contrast, large numbers of defendants—approximately ten times as many—are being sentenced to terms of life without chance of parole,¹¹ and approximately forty times more are serving life sentences of one sort or another.¹² Even among those relative few who are sentenced to death, only a small handful are actually executed. Currently, more than 3,300 inmates are housed on death row awaiting execution. In comparison, an average of forty-four persons were executed each year during the last four years. One recent study estimated that "less than 10 percent of all offenders on death row are ultimately executed."¹³

Those small numbers mean that many, perhaps most, of the most culpable killers receive less than the state's highest penalty. The rare,

10. Franklin E. Zimring & David T. Johnson, *The Dark at the Top of the Stairs: Four Destructive Influences of Capital Punishment on American Criminal Justice* 737 (Working Paper Series), available at <http://ssrn.com/abstract=1956686> (quoting GARLAND, *supra* note 8).

11. According to Adam Liptak, approximately 28% of the nation's 132,000 prisoners serving life sentences are ineligible for parole. See Adam Liptak, *To More Inmates, Life Term Means Dying Behind Bars*, N.Y. TIMES, Oct. 2, 2005, <http://www.nytimes.com/2005/10/02/national/02life.web.html?pagewanted=all>.

12. *Id.*

13. David Jacobs et al., *Who Survives on Death Row? An Individual and Contextual Analysis*, 72 AM. SOC. REV. 610, 610 (2007), available at http://www.joinclu.org/pdfs/capital/report_who_surviveson_deathrow.pdf.

selective use of the death penalty to punish “the worst of the worst” might be acceptable, were the death penalty used for that purpose. But it is not used in that way. Study after study concludes that the class of persons sentenced to death, and the class of persons actually executed, is not distinguishable, in terms of blameworthiness of the offenders or egregiousness of the crimes committed, from the class of persons sentenced to life without parole or who receive death sentences but are never executed. As a result, similarly situated offenders regularly are subject to varying penalties: some are sentenced to death, others to life without parole, still others live their entire lives on death row and die there of natural causes. Sometimes the differences are caused by choices to resolve a case through plea bargaining. In other cases, extremely culpable offenders are spared the death penalty because someone in the system—a prosecutor, juror, or judge—had qualms about authorizing an execution. At the same time, far less culpable defendants are routinely sentenced to die because the decision makers lacked these moral qualms or refused to make plea offers. As a result, there is little rhyme or reason to the sorting process. Indeed, studies indicate that death sentences are just as arbitrary in their imposition today as they were before *Furman v. Georgia* was decided.¹⁴

Infrequent use of the death penalty undermines its retributive and deterrent qualities in important ways. The distribution of punishment is an important feature of justice, and where its distribution is uneven, the criteria determining the distribution takes on particular salience. A substantial body of empirical evidence suggests that factors irrelevant to desert, including race, gender, intrastate geography, election-year politics, and the quality of defense counsel

14. See David McCord, *Lightning Still Strikes: Evidence from the Popular Press that Death Sentencing Continues to be Unconstitutionally Arbitrary More than Three Decades After Furman*, 71 BROOK. L. REV. 797, 806–07 (2005); Lindsey S. Vann, *History Repeats Itself: The Post-Furman Return to Arbitrariness in Capital Punishment*, 45 U. RICH. L. REV. 1255 (2011); N.J. DEATH PENALTY STUDY COMM’N, NEW JERSEY DEATH PENALTY STUDY COMMISSION REPORT 31, 50 (2007), available at http://www.njleg.state.nj.us/committees/dpsc_final.pdf (“[T]he risk remains that similar murder cases are being treated differently in the death penalty context thereby elevating the probability that the death penalty is being administered ‘freakishly’ and arbitrarily.”).

play a significant role in determining who is sentenced to death.¹⁵ If, as the evidence suggests, the criteria most often determinative of who lives and who dies lacks moral relevance to punishment, it is hard to argue that the system is meeting its retributive goals.¹⁶ Moreover, proportionality is a concept central to retributive punishment, and where the distribution of offenders' punishment is disproportionate to the distribution of offenders' culpability, the penal system is clearly failing to achieve basic retributive goals.¹⁷

At the same time, there is little reason to believe that executions, which occur with less frequency than lightning strikes, have much of a deterrent impact.¹⁸ Indeed, a robust debate about whether the death penalty in fact deters crime has been ongoing for decades without any resolution. The roots of the debate can be traced back to a 1975 study published by Isaac Erlich.¹⁹ In the study, Erlich claimed that each execution deters seven or eight murders.²⁰ The study received a substantial amount of attention at the time. Erlich's conclusions were discredited, however, by a panel of the National Academy of Science

15. See David C. Baldus et al., *Racial Discrimination and the Death Penalty in the Post-Furman Era: An Empirical and Legal Overview with Recent Findings from Philadelphia*, 83 CORNELL L. REV. 1638, 1651 (1998) (finding that blacks are more than four times as likely as whites to be sentenced to death); Elizabeth Rapaport, *The Death Penalty and Gender Discrimination*, 25 LAW & SOC'Y REV. 367 (1991) (finding that females were less likely to receive death sentence than males where crimes were comparably severe); Markel, *infra* note 17, at 458 (noting a finding by Illinois commission that "many offenders sentenced to death row were there because of morally irrelevant factors such as . . . intrastate geography"); Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835 (1993).

16. See Laura M. Argys & H. Naci Mocan, *Who Shall Live and Who Shall Die? An Analysis of Prisoners on Death Row in the United States*, 33 J. LEGAL STUD. 255, 255 (2004) (reporting results of study on executions of death row inmates finding that primary factors determining who is executed are "the race and gender of the inmate, the race and political affiliation of the governor, and whether the governor is a lame duck").

17. See Dan Markel, *State, Be Not Proud: A Retributivist Defense of the Commutation of Death Row and the Abolition of the Death Penalty*, 40 HARV. C.R.-C.L. L. REV. 407, 458 (2005) (characterizing "desire to avoid arbitrariness in the distribution of the death penalty" as a "core commitment[] of a liberal legal conception of retributivism"); Andrew Oldenquist, *Retribution and the Death Penalty*, 29 U. DAYTON L. REV. 335, 340 (2004) (arguing that one of the five criteria of retributive justice is that "[i]t is done consistently for similar cases and hence is predictable").

18. See Sara Colón, Comment, *Capital Crime: How California's Administration of the Death Penalty Violates the Eighth Amendment*, 97 CAL. L. REV. 1377, 1377 (2009) (citing meteorological records indicating that more people have died of lightning strikes in California than by execution).

19. Isaac Ehrlich, *The Deterrent Effect of Capital Punishment: A Question of Life and Death*, 65 AM. ECON. REV. 397 (1975).

20. See *id.*

chaired by a Nobel-winning economist, which found flaws in Erlich's methodology, including the fact that the decline Erlich observed in the murder rate in states implementing capital punishment occurred as well in states that did not authorize capital punishment.²¹ The panel concluded that "the available studies provide no useful evidence on the deterrent effect of capital punishment."²²

More recent studies have claimed to find evidence of a deterrent effect of capital punishment as well. One study asserted that each execution deters eighteen murders.²³ But these studies, too, have been scrutinized by other economists who have found the analysis flawed.²⁴ Indeed, competing studies purport to establish that executions not only do not deter, they increase the homicide rate.²⁵ Needless to say, the debate over the death penalty's deterrent effect remains, at best, undetermined. As Michael Tonry puts it, "[t]he only credible conclusions that can be drawn are either that capital punishment has no deterrent effects on homicide or that there is no credible evidence that it does."²⁶

21. See William Pizzi, *The Need to Overrule Mapp. v. Ohio*, 82 U. COLO. L. REV. 679, 706–07 (2011) (citing John J. Donohue & Justin Wolfers, *The Death Penalty: No Evidence for Deterrence*, ECONOMISTS' VOICE, Apr. 2006, at 1–2, available at [http://www.degruyter.com/dg/viewarticle.fullcontentlink:pdfeventlink/contentUri?format=INT&t:ac=j\\$002fev.2006.3.5\\$002fev.2006.3.5.1170\\$002fev.2006.3.5.1170.xml](http://www.degruyter.com/dg/viewarticle.fullcontentlink:pdfeventlink/contentUri?format=INT&t:ac=j$002fev.2006.3.5$002fev.2006.3.5.1170$002fev.2006.3.5.1170.xml)).

22. *Id.* at 707 (citing PANEL ON RESEARCH ON DETERRENT & INCAPACITATIVE EFFECTS, NAT'L RESEARCH COUNCIL, DETERRENCE AND INCAPACITATION: ESTIMATING THE EFFECTS OF CRIMINAL SANCTIONS ON CRIME RATES 9 (Alfred Blumstein et al. eds., 1978)).

23. Hashem Dezhbakhsh, Paul H. Rubin & Joanna M. Shepherd, *Does Capital Punishment Have a Deterrent Effect? New Evidence from Post-Moratorium Panel Data*, 5 AM. L. & ECON. REV. 344, 344 (2003).

24. See, e.g., Jongmook Choe, *Another Look at the Deterrent Effect of the Death Penalty*, 1 J. ADVANCED RES. L. & ECON. 12 (2010) (finding that the death penalty does not have a homicide reducing effect); Tomislav V. Kovandzic, Lynne M. Vieraitis & Denise Paquette Boots, *Does the Death Penalty Save Lives?*, 8 CRIMINOLOGY & PUB. POL'Y 803 (2009) (finding no empirical support, based on well-known econometric procedures for panel data analysis, for the argument that the existence or application of the death penalty deters prospective offenders from committing homicide); John Donohue & Justin Wolfers, *Uses and Abuses of Empirical Evidence in the Death Penalty Debate*, 58 STAN. L. REV. 791 (2005).

25. Michael J. Godfrey & Vincent Schiraldi, *The Death Penalty May Increase Homicide Rates, in DOES CAPITAL PUNISHMENT DETER CRIME?* 47, 50 (Stephen E. Schonebaum ed., 1998); see also Lawrence Katz, Steven D. Levitt & Ellen Shustorovich, *Prison Conditions, Capital Punishment, and Deterrence*, 5 AM. L. & ECON. REV. 318 (2003).

26. Michael Tonry, *Learning from the Limitations of Deterrence Research*, 37 CRIME & JUST. 279, 283 (2008).

Of course, it is possible that notwithstanding the absence of empirical evidence, the death penalty does have a deterrent effect. Numerous people, including Supreme Court Justices, have assumed as much. Even if we assume as a matter of “common sense” that the current death penalty has some marginal deterrent effect,²⁷ basic behavioral theory suggests that the effect is compromised by the infrequency of the death penalty’s use. In his influential tract on punishment, Cesare Beccaria long ago pointed out that certainty is more important than severity where deterrence is concerned. Recent studies on cognitive psychology confirm this observation.²⁸

Where punishment is severe, there is less chance that policy makers will exercise their discretion to carry out the punishment. In addition, punishment that is perceived to be overly harsh risks delegitimizing the state in the eyes of citizens.²⁹ We can observe both of these dynamics at work in capital punishment. Many of the most culpable offenders escape the death penalty, not because they do not deserve the highest punishment available, but because the relevant decision-makers are reluctant to impose it. Likewise, where the death penalty is utilized, it plainly undermines the state’s lawful authority in the eyes of some citizens. Although the use of the death penalty also advances the political standing of politicians in the eyes of others, it is far from clear that these costs and benefits are commensurate. Politicians may be trading short-term political appeal for long-term disaffection among substantial numbers of citizens. In any event, when the use of a punishment as politically controversial as the death penalty is at issue, the application of the penalty will

27. Proponents of the death penalty frequently make this assertion, but not everyone agrees with this “common sense” premise. *See, e.g.*, Lawrence C. Marshall, *The Innocence Revolution and the Death Penalty*, 1 OHIO ST. J. CRIM. L. 573, 581–82 (2004) (arguing that death penalty provides no marginal increase in deterrence over threat of life imprisonment because most offenders either do not believe they will be detected or do not care). It is also quite possible that the death penalty does not provide any greater deterrent than lesser threats.

28. Isaac Ehrlich, *Participation in Illegitimate Activities: A Theoretical and Empirical Investigation*, 81 J. POL. ECON. 521, 544–47 (1973) (finding that the certainty of punishment had greater deterrent impact than severity of punishment). The same insight has been asserted by law and economics scholars. *See, e.g.*, Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169, 178 (1968) (asserting the same).

29. Guyora Binder makes these observations about Beccaria’s views, with elaboration, in Guyora Binder, *Punishment Theory: Moral or Political?*, 5 BUFF. CRIM. L. REV. 321, 335–36 (2002).

ultimately turn on perceptions of the political costs and benefits of carrying it out. The politicization of the death penalty makes its use far more mercurial than other, less controversial punishments, and hence its application less certain. This too detracts from its deterrent force.

Death-in-prison, by contrast, would not suffer these defects. Far more defendants could be sentenced to death-in-prison. Indeed, most of the large number of capital defendants who currently receive LWOP could be sentenced to death-in-prison with no impact on the current allocation of prison resources. This would ensure that all persons who commit capital murder could be sentenced comparably. By adopting death-in-prison as a jurisdiction's highest penalty, the arbitrary selection of a small handful of unlucky defendants for execution would come to an end. Rather than sentence a few defendants to death and most others to LWOP, both groups of defendants could be sentenced to death-in-prison upon an adequate showing of desert. Exercise of the state's highest penalty would then look less like a lottery and more like a predictable, and fairly distributed, penal sanction. This would not only improve the proportionality of punishment, it would enhance deterrence by clearly communicating to the entire class of would-be offenders that the state's ultimate punishment will be imposed with certainty.

B. Delay

Not only is the current death penalty used infrequently, when it is imposed, the delay between sentence and execution is extraordinary. These long delays tend to further undermine the efficacy of the death penalty. Because of these delays, and because so many death row prisoners succeed in getting death sentences reversed, the perception among the general public—rightly or wrongly—is that justice in death penalty cases is as often derailed as done.³⁰ To make matters

30. See James S. Liebman, Jeffrey Fagan, Valerie West & Jonathan Lloyd, *Capital Attrition: Error Rates in Capital Cases, 1973–1995*, 78 TEX. L. REV. 1839, 1844 (2000) (describing belief among death penalty supporters that “death sentences move too slowly from imposition to execution, undermining deterrence and retribution”).

worse, the long delays between crime and punishment lead to a strangely convoluted discourse when the moment to administer punishment finally arrives because, as a result of the passage of time, the recipient of a death sentence often is in a morally salient way a very different person than the one who committed the crime.

1. The Causes of Delayed and Derailed Executions

There is one thing about which supporters and opponents of the death penalty can agree: the modern death penalty is marked by extremely long periods of delay between the imposition of a death sentence and its execution. On average, more than eleven years elapse between the imposition of sentence and its execution. In California, the average delay exceeds seventeen years, and it is not uncommon for delays of twenty years or more between sentence and execution.³¹

These delays are in part a product of the death penalty's procedural complexity. In an effort to preserve the death penalty from constitutional challenges, and to ensure that condemned prisoners have a full and fair opportunity to contest the procedural integrity of their convictions and sentences, litigation in capital cases is more complex, lengthier, and more resource-intensive than in any other area of the law. This complexity is necessary. When human life is at stake, courts rightly demand a degree of heightened due process not accorded defendants in non-capital cases. The special demands that arise in death penalty cases have caused the Supreme Court to develop a capital jurisprudence grounded on two governing principles. First, because death sentences are only rarely imposed, jurisdictions seeking to impose the penalty in individual cases must provide jurors with "guided discretion" that ensures a rational and non-arbitrary method of identifying the few death-worthy cases from the many non-death-worthy cases. At the same time, the Court has

31. See Judge Arthur L. Alarcón, *Remedies for California's Death Row Deadlock*, 80 S. CAL. L. REV. 697, 700 (2007) (reporting statistics and noting that delay is much longer in some cases); *id.* at 707 n.49 (reporting that, according to statistics kept by the California Department of Corrections as of 2005, 119 persons had been on death row for more than twenty years).

held, every capital defendant is entitled to the jury's individual consideration of whatever mitigating evidence exists. Because these two principles—guided discretion and individual consideration—are in fundamental tension,³² efforts to reconcile both principles have greatly compounded the complexity of capital jurisprudence.

Complexity in capital cases, however, is not solely a function of efforts to minimize error, ensure individual consideration of mitigation evidence, or to reduce arbitrary and capricious decision-making by juries. Because of the highly political nature of capital cases, states have lobbied for special rules that make it easier for prosecutors to win death sentences. The rules regarding the death-qualification of jurors, for example, have been shown to systematically skew juries to make them more prosecution-friendly. Such juries are not only more likely to hand down death sentences, they are also more likely to convict at the earlier guilt-innocence stage of proceedings. As a result, even in cases where prosecutors do not intend to pursue a death sentence, there is an incentive to charge a capital offense in order to win a jury panel that is more likely to convict.

The combination of heightened due process in some respects and substandard due process in others has inevitably made capital trials not only more complex, but also more prone to legal error, both by lawyers and judges, than conventional criminal trials.³³ This in turn has heightened the need for well-trained and competent capital lawyers to navigate the complexities of capital cases. While demand for competent counsel in death penalty cases has increased, cash-starved states have become increasingly reluctant to devote more than token resources to capital defense work. As a result, capital cases boast a disproportionate number of ineffective assistance of counsel claims.³⁴ The complexity of the cases and the high risk of

32. See William W. Berry, *Promulgating Proportionality*, 46 GA. L. REV. 69, 73 (2011) (noting that “requiring states to use a general set of parameters to create consistent jury verdicts in capital cases in conjunction with the requirement that juries consider all relevant individual and case-specific characteristics creates some internal tension, if not outright conflict”).

33. Liebman et al., *supra* note 30, at 1844 (finding that capital sentences “are persistently and systematically fraught with alarming amounts of error”).

34. See Sheri Lynn Johnson, *Wishing Petitioners to Death: Factual Misrepresentations in Fourth*

error make an extended post-conviction review process necessary, while the high stakes ensure that all post-conviction remedies are fully utilized. Capital convictions routinely make at least three trips up the appellate ladder: once on state direct appeal, once on state collateral review, and once on federal habeas review. On each trip, the United States Supreme Court has the discretion, but not the obligation, to hear the case. It is not unusual for capital cases to consume even more judicial resources than this.

2. *Delay and Retribution*

This systemic delay robs the death penalty of much of its ability to serve as an effective retributive institution. To many, justice delayed is justice denied. After delays of one or more decades, a community may long have forgotten the details or the emotional excitement that accompanied the crime. The prosecutors, judges, and jurors who participated in the capital trial may well have moved away, retired or died. The community may have changed, or they may have tired of the matter. For example, while most of the world was transfixed by the events leading up to the execution in 2011 of Troy Davis, who had been convicted and sentenced to death in 1991 for the murder of a Savannah police officer, some Savannah residents stated their preference to “move on” and claimed to pay little attention to the controversy.³⁵ “It’s fresh around the world, but it’s old news to us,” one resident stated, adding that “[a]bout half [of local residents] are interested and the other half are over it and just want to turn on the game.”³⁶

Given the routine delays between sentence and execution, many retributive justifications for the death penalty appear spurious. One such justification is based in an acknowledgement of a proper place for vengeance in criminal punishment. In affirming the constitutional validity of the death penalty in *Gregg v. Georgia*, the Supreme Court

Circuit Capital Cases, 91 CORNELL L. REV. 1105, 1109 (2006) (observing that “[i]neffective assistance of counsel claims are extremely common in capital habeas corpus cases”).

35. Katie Leslie, *Savannahians Divided on Davis Case, But Seek Closure*, ATLANTA J.-CONST. (Sept. 20, 2011, 5:45 PM), <http://www.ajc.com/news/savannahians-divided-on-davis-1185170.html>.

36. *Id.*

reasoned that retention of the death penalty was a necessary concession to man's baser instincts.

The instinct for retribution is part of the nature of man, and channeling that instinct in the administration of criminal justice serves an important purpose in promoting the stability of a free society governed by law. When people begin to believe that organized society is unwilling or unable to impose upon criminal offenders the punishment they "deserve," then there are sown the seeds of anarchy of self-help, vigilante justice, and lynch law.³⁷

The notion that the state's choice is between mob lynching and state execution may have had some historical basis, at least in certain parts of the American South.³⁸ But given the routinely long delays between sentence and execution that are characteristic of the modern death penalty, it is hard to take this idea seriously today. Certainly, it is hard to see how the uncertain prospect of an execution ten or more years in the future would satisfy the supposed bloodlust of a vigilante mob so impatient for justice that it cannot even wait for a conventional trial and appeals process to conclude. The claim that capital punishment is necessary to quell the impulse of the mob, moreover, is further diminished by the experience of the fourteen states that have abolished the death penalty without any apparent epidemic of vigilante justice. There is no reason to believe that sentences of death-in-prison would provide insufficient retribution or fail to neutralize the community's thirst for vengeance and prevent a return to the bad old days of lynching.

Another frequent and powerful retributive justification for capital punishment has emerged from the victims' rights movement. According to some, the chief benefit of capital punishment is the

37. *Gregg v. Georgia*, 428 U.S. 153, 183–84 (1976) (quoting *Furman v. Georgia*, 408 U.S. 238, 308 (1972) (Stewart, J., concurring)).

38. For a discussion of the relationship between lynching and capital punishment in the South, see Garland, *supra* note 8, at 32–38.

sense of “closure” it brings to the victim’s loved ones.³⁹ But here, too, the purported benefits of the death penalty are defeated by the long delay between crime and execution. Far from providing closure, a death sentence often portends years of uncertainty for victims’ families, who wait throughout the long appellate and collateral review process for the ultimate punishment to be inflicted. Family members may suffer extreme anxiety and emotional upheaval when executions are scheduled and then stayed by courts, sometimes repeatedly, over many years.⁴⁰ Family members are often compelled to testify in subsequent court proceedings and before clemency boards who review applications for relief by the condemned prisoner. They are interviewed by the media, and are asked again and again to relive what is likely the worst experience of their lives.⁴¹ This experience must feel nothing like justice to anyone who lives through it, but rather a kind of mindless bureaucratic torture.⁴² Finally, when executions do occur, family members usually express, more than anything else, a sense of numb relief that the long ordeal is over. Indeed, this relief is often followed by bouts of depression brought about by the realization that the execution of the perpetrator will not bring back a loved one or change the circumstances of that family member’s life.⁴³

39. See Susan Bandes, *When Victims Seek Closure: Forgiveness, Vengeance and the Role of Government*, 27 *FORDHAM URB. L.J.* 1599, 1599 (2000) (describing hope among families of murder victims).

40. See Bruce J. Winick, *The Supreme Court’s Evolving Death Penalty Jurisprudence: Severe Mental Illness as the Next Frontier*, 50 *B.C. L. REV.* 785, 853 (2009) (noting that “capital trials and the long delays between capital sentencing and execution may actually prevent their wounds from healing”).

41. See N.J. DEATH PENALTY STUDY COMM’N, *supra* note 14, at 33 (“Survivors testified to the pain of being forced to relive the trauma of their loved ones’ murders during prolonged appeals.”); Peter Loge, *The Process of Healing and the Trial as Product: Incompatibility, Courts, and Murder Victim Family Members*, in *WOUNDS THAT DO NOT BIND: VICTIM-BASED PERSPECTIVES ON THE DEATH PENALTY* 411, 413 (James R. Acker & David R. Karp eds., 2006) (observing that “[f]amilies must endure proceedings over years and through a series of iterations, forcing them to keep reliving the crime” ensuring that “[r]egardless of outcome . . . the family is always punished”).

42. See Bandes, *supra* note 39, at 1601 (reporting “experience of the long wait for execution” by one mother of murder victim as a self-described “kind of torture, another barrier to closure”); Margaret Vandiver, *The Death Penalty and the Families of Victims: An Overview of Research Issues*, in *WOUNDS THAT DO NOT BIND: VICTIM-BASED PERSPECTIVES ON THE DEATH PENALTY*, *supra* note 41, at 235, 239 (discussing research indicating “that ‘repetitive confrontations with the criminal justice system can disrupt the recovery of victims’ families”).

43. See Judith W. Kay, *Is Restitution Possible for Murder?—Surviving Family Members Speak*, in

Death-in-prison promises to deliver more closure to grieving family members than the dysfunctional death penalty ritual. Because punishment is imposed immediately upon sentence, whatever “closure” the community obtains from punishment will be experienced at the moment of sentencing, not years later. Family members of victims need not spend years waiting to see if the penalty will finally be carried out, nor feeling cheated of justice when the execution—for whatever reason—does not occur. Indeed, many family members currently consent, when consulted by prosecutors, to a plea bargain rather than demand a death penalty trial for the perpetrator precisely because they believe that such a path offers a quicker route to “closure.”⁴⁴ By consolidating trial, sentence, and the imposition of sentence, healing might commence sooner and communities might heal faster than they do in jurisdictions where executions are carried out years, and often decades, after the crime.

Although death-in-prison sentences arguably would look functionally similar to LWOP sentences, the moral import of a death-in-prison sentence would differ from a “life” sentence, or even an LWOP sentence, in at least two ways.

A death-in-prison sentence would be unlike a conventional death sentence in that it would not entail the possibility of affirmative state conduct that brings about the death of the prisoner. Such a sentence would nonetheless represent powerful expressive condemnation of criminal misconduct. Symbolically, a death-in-prison sentence is superior to a life without parole sentence and should resonate with retributive supporters of the death penalty because it emphasizes the ultimate nature of the penalty: total and permanent loss of civil life.

WOUNDS THAT DO NOT BIND: VICTIM-BASED PERSPECTIVES ON THE DEATH PENALTY 323, 337 (James R. Acker & David R. Karp eds., 2006) (noting that although majority of public appears to believe that capital punishment provides “closure” to family members of victims, “for survivors, healing, like closure, is a word abhorred, implying as it does ‘getting over it’”). A similar sentiment was expressed by Leah Popp in a joint hearing of the New Mexico House and Senate Judiciary Committees, who told the committees that “there is [no such] thing” as closure, and that if her niece’s killer was ultimately executed, “his death will not ease our pain nor will it honor our son.” Loge, *supra* note 41, at 412 n.5.

44. See, e.g., Robert L. Gottsfeld, Douglas L. Rayes & Patricia Starr, *A Court’s Remarkable Recovery from a Capital Case Crisis*, 48 ARIZ. ATT’Y 18, 24 n.18 (2011) (finding that in Arizona “[o]ften the victims advise they would rather have an attempt at closure sooner with a plea rather than wait out the average 20 years between conviction and the execution of the sentence”).

By emphasizing that the sentence is one of “death” rather than “life,” the sentence would highlight the terminal nature of the punishment.

Where juries must decide between conventional death sentences and life without parole, the juries’ decision to sentence the convict to life without parole may appear to be an act of mercy. Defendants who receive such sentences are popularly perceived to have been spared, the hand of the state stayed. And yet, punishment for the vast majority of LWOP prisoners is virtually identical to those sentenced to death. Both types of prisoners will spend decades in jail. Most will die in prison of natural causes. Barring pardon or exoneration, neither type of prisoner will ever rejoin civil society. Death-in-prison sentences would acknowledge the essential sameness of treatment endured by both groups of defendants in a way that current conventional death penalty sentencing proceedings obscure. Whereas a LWOP sentence emphasizes “life” for the condemned prisoner, death-in-prison emphasizes the condemned prisoner’s ultimate termination, making it far harder to interpret the sentence as an act of leniency or mercy.

In addition, while LWOP often functions as an alternative sentence to death, death-in-prison would represent the highest penalty available to a state. Because death-in-prison would be the severest punishment authorized by law, family members of victims would not feel that a comparative penal wrong had been done or that the victim in the case was being valued less than other victims whose killers were sentenced to die by execution.⁴⁵

45. See Bandes, *supra* note 39, at 1605 (observing that “prosecutors explicitly call upon juries to return death sentences in order to affirm the victims’ worth”); Vandiver, *supra* note 42, at 242 (“Any sentence lighter than the maximum provided by law runs the risk of seeming to indicate that the criminal justice system, or society in general, did not properly value the victim’s life or comprehend the magnitude of the family’s loss.”). Other features of the current death penalty could also be incorporated, such as continuing to house persons condemned to death-in-prison in segregated facilities, or “death rows,” and preventing from mixing with prisoners serving finite prison terms. However, research literature suggests that the current practice of segregating death-row prisoners is inordinately costly, harmful to prisoners and correctional facility staff, and unnecessary in terms of facility security. Accordingly, I do not recommend retention of segregated death rows unless doing so is the only politically feasible way to win support of the proposal.

3. *Delay and deterrence*

It is well established that punishment is most effective when sanctions quickly follow misdeeds. Long delay between them mutes the message intended by the punishment regime, both for the recipient of the sanction and for the community.⁴⁶ Even if we assume the death penalty has some deterrent value, the deterrent function is undermined by the long delays between crime and execution characteristic of the death penalty.⁴⁷ Few criminals motivated by rational calculations of expected punishment likely refrain from committing crimes in fear of a death penalty that is only rarely imposed and then only after a decades-long delay.⁴⁸

Death-in-prison sentences would be penologically superior to conventional death sentences because, in a literal sense, the punishment would be imposed immediately upon sentencing. When a convicted offender is sentenced and removed from the courtroom with knowledge that he or she will never be released from prison, the punishment is already being meted out. Of course, the same fate (immediate imprisonment) awaits the recipient of a conventional death sentence, but the meaning imposed on events is quite different. The condemned prisoner is sent to death row to await imposition of punishment. Death row is figured as a holding area, not the place of punishment itself.

One of the most frequently advanced arguments by death penalty advocates is that at least for one class of persons—those already sentenced to life-in-prison—the death penalty is essential to provide some marginal deterrent.⁴⁹ On closer inspection, however, this argument too appears specious. First, for reasons already discussed,

46. Lewis F. Powell, Jr., *Capital Punishment*, 102 HARV. L. REV. 1035, 1035 (1989) (“[D]elay undermines the deterrent effect of capital punishment and reduces public confidence in the criminal justice system.”).

47. See Alarcón, *supra* note 31, at 709 (“[L]ong delays diminish the deterrent value of the death penalty.”).

48. See Katz et al., *supra* note 25, at 319 (noting long lag between crime and execution and stating that “[g]iven the high discount rates of many criminals and the fact that many homicides are committed by individuals under the influence of alcohol or drugs, which further foreshorten time horizons, it is hard to believe that punishment with such a long delay would be effective”) (internal citations omitted).

49. See, e.g., Ernest Van Den Haag, *In Defense of the Death Penalty: A Practical and Moral Analysis*, in THE DEATH PENALTY IN AMERICA 323, 327 (Hugo Adam Bedau ed., 3d ed. 1982).

the long delays and arbitrary imposition that characterize the death penalty likely undercut the penalty's deterrent function for this group as well. Second, there is no evidence that homicide rates among life-sentenced prisoners are any greater in states with no death penalty than in states with a death penalty.⁵⁰ The likely reason is that correctional authorities possess far more effective administrative sanctions than the threat of capital punishment to deter prison violence. For example, corrections officers may use detention in solitary confinement cells and loss of institutional privileges. Indeed, studies show that prisoners serving life sentences are far less violent as a class than those serving definite terms.⁵¹

C. Uncertainty

Two main types of uncertainty tend to detract from the death penalty's effectiveness. The first concerns the accuracy of the criminal justice process, as mounting evidence demonstrates that innocent persons have been and continue to be sentenced to death. The second concerns the moral uncertainty of the citizenry about the penalty itself. Unlike with any other punishment, affirmative state killing engenders heated disagreement about its moral legitimacy. Inevitably, these debates fuse universal concerns with the particular claims for justice in individual cases, and result in clouded and ambiguous resolutions. To make matters worse, the long delays between crime and punishment lead to a strangely convoluted discourse when the moment to administer punishment finally arrives because, as a result of the passage of time, the recipient of a death sentence often is in a morally salient way a very different person than the one who committed the crime.

50. See, e.g., Wendy Phillips Wolfson, *The Deterrent Effect of the Death Penalty upon Prison Murder*, in *THE DEATH PENALTY IN AMERICA* 159, 167 (Hugo Adam Bedau ed., 3d ed. 1982).

51. See Andrea Lyon, "Reason Not the Need": *Does the Lack of Compelling State Interest in Maintaining a Separate Death Row Make it Unlawful?*, 33 *AM. J. CRIM. L.* 1, 4 (2005) (reviewing research study of Missouri prison system showing that after integration into mainstream facility with other prisoners, "death-sentenced inmates had rates of institutional misconduct that were equivalent to inmates sentenced to life-without parole" and far lower than parole-eligible inmates).

1. *Innocence and the death penalty*

With a flurry of highly publicized exonerations, many from death row, and in some instances coming within minutes of execution, the American public has been sensitized to the risk of wrongful executions. Such awareness has injected a dose of healthy caution into the capital punishment system, likely inducing prosecutors and judges, as well as jurors, to hesitate before seeking or imposing capital punishment. Cautionary impulses, however, do not always win out, and potentially innocent defendants continue to be sentenced to death or to have their death sentences carried out notwithstanding doubts about their culpability.⁵² Advocates for the abolition of the death penalty have used such cases in an attempt to rally support, with some success, for their position.

Since 1973, 140 prisoners have been released from death row based on evidence that they were innocent.⁵³ Seventeen of those prisoners have been exonerated as a result of post-conviction DNA testing alone.⁵⁴ Professor Liebman and his co-authors have estimated that more than two-thirds of all capital sentences are ultimately reversed on appeal.⁵⁵ Despite the frequent reversals, there is good reason to believe that mistaken executions occur. Strong evidence suggests that at least one innocent person has in recent years been executed.⁵⁶ Indeed, even in cases where the evidence of guilt is known to be both weak and faulty, states have proceeded with executions.⁵⁷ Given the evidentiary weaknesses apparent in these

52. For example, the death sentence of Troy Davis was carried out despite public outcry over his possible innocence, and Reggie Clemons remains on death row in spite of similar concerns.

53. *Innocence and the Death Penalty*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/innocence-and-death-penalty> (last visited Jan. 23, 2012).

54. See *Facts on Post-Conviction DNA Exonerations*, INNOCENCE PROJECT, http://www.innocenceproject.org/Content/Facts_on_PostConviction_DNA_Exonerations.php (last visited Dec. 5, 2011).

55. Liebman et. al., *supra* note 30, at 1847.

56. See David Grann, *Trial by Fire: Did Texas execute an innocent man?*, THE NEW YORKER, Sept. 7, 2009, available at http://www.newyorker.com/reporting/2009/09/07/090907fa_fact_grann; see also Paul C. Giannelli, *The Execution of Cameron Todd Willingham: Junk Science, An Innocent Man, and the Politics of Death*, (Case Legal Studies Research Paper No. 18, 2011), available at <http://ssrn.com/abstract=1917454>.

57. For example, in the Troy Davis case, seven witnesses recanted their trial testimony in some way. The testimony of one of those witnesses—a jailhouse “snitch”—was specifically found by the habeas

cases, it is almost certain that innocent defendants continue to be put to death.

Mistakes are inevitable in any humanly designed system, and so they are inevitable in a system of capital punishment too. Given our certain knowledge that mistakes on occasion will occur, the practice of executing death row prisoners who we may later learn are innocent is deeply problematic. The morally imperative goal of preventing wrongful executions thus provides a powerful argument for ending capital punishment. Unlike death, imprisonment is always at least theoretically subject to review and termination. While it is true, as some death penalty advocates argue, that all time served by someone who has been falsely convicted of a crime is irrevocably lost, it is simply not true that error-correction for all wrongfully-convicted persons is impossible. New evidence may surface days, or decades, after the jury renders its verdict. As long as a prisoner remains alive, it is possible to alter or amend a sentence. Although it may be impossible to fully compensate an exonerated prisoner for the time lost in prison, partial compensation is possible. In addition, a wrongly convicted prisoner can at least experience the satisfaction of vindication, can receive a formal apology, and can know that his or her name has been cleared. A person who has been executed cannot experience any of these things. A strong argument therefore exists that, even in cases where we are reasonably confident that death is the deserved sentence, taking affirmative action to bring about the death of the prisoner—and thereby permanently foreclosing any possibility of error-correction upon newly discovered evidence—unnecessarily truncates the post-conviction review process and therefore always falls below the minimum post-conviction process that is due.⁵⁸ Death-in-prison, which keeps alive the possibility that

court to have been perjury, yet neither the courts nor the pardons board were willing to halt Davis' execution. Kim Severson, *Georgia Pardons Board Denies Clemency for Death Row Inmate*, N.Y. TIMES, Sept. 20, 2011, <http://www.nytimes.com/2011/09/21/us/troy-davis-is-denied-clemency-in-georgia.html>.

58. See Bandes, *supra* note 39, at 1606 (arguing that death penalty “forecloses, too early, the societal obligation not to put an accused to death until he has a fair chance to show himself unworthy of the conviction and sentence”).

detected errors are corrected, is more consistent with the system's proven fallibility and the needs of due process.

Not only does the conventional death penalty inherently risk wrongful execution, but the presence of some evidence that particular prisoners may in fact be innocent injects an untenable degree of moral ambiguity into the act of executing capital defendants. This ambiguity seriously detracts from the contemporary death penalty's ability to deliver supposed penological benefits.

Consider again the Troy Davis case. In the fall of 2011, Georgia executed Troy Davis notwithstanding substantial evidence that Davis was innocent of the murder for which he had been sentenced to death. That evidence included recantations by seven of the nine witnesses who testified against him at trial, new ballistics evidence, and testimony by several individuals that another individual had confessed to the crime. Davis's last act before execution was to profess his innocence.⁵⁹ Thousands of spectators, protesting the execution outside the jail and, literally, around the world, believe it.⁶⁰

Whether or not Davis was, in fact, innocent, his execution under these circumstances was deeply problematic and advanced few coherent penological goals.⁶¹ As writer Scott Turow observed, Davis's execution likely will "leave only a lingering sense of injustice," making it "hard to argue it made the clear moral statement the death penalty supposedly represents."⁶² Where an execution is carried out in the face of an insistence on innocence, the convicted prisoner exhibits neither contrition nor remorse. Where that insistence is supported by at least some credible evidence of innocence, the execution will likely make the general public more,

59. See Hannah Roberts & Mark Duell, *The 23 Words that Sentenced Troy Davis to Death: U.S. Supreme Court Order Revealed as Clinton and Carter Weigh in on Debate*, MAIL ONLINE (Sep. 22, 2011), <http://www.dailymail.co.uk/news/article-2040054/Death-penalty-debate-US-Supreme-Court-order-confirmed-Troy-Davis-execution.html>.

60. See *Troy Davis Execution Sparks Anti-death Penalty Backlash, Protests*, WASH. POST (Sep. 23, 2011), http://www.washingtonpost.com/national/troy-davis-execution-sparks-anti-death-penalty-backlash-protests/2011/09/22/gIQAQawOoK_story.html.

61. As President Jimmy Carter observed, "[i]f one of our fellow citizens can be executed with so much doubt surrounding his guilt, then the death penalty system in our country is unjust and outdated." *Troy Davis Execution Sparks Anti-death Penalty Backlash, Protests*, *supra* note 60.

62. Turow, *supra* note 3.

not less, cynical about the efficacy and justice of the criminal law. Such executions might even undermine deterrence by deepening the perception among wrongdoers that they might commit crimes and escape justice by fooling the courts into convicting the wrong person.

Plausible death chamber professions of innocence, moreover, are not uncommon. Johnny Frank Garrett angrily professed his innocence before Texas officials put him to death. Many believe Garrett was innocent.⁶³ Another condemned Texas prisoner, Cameron Todd Willingham, was also asked if he wished to make a statement before death, and also proclaimed his innocence. Willingham is now widely viewed as probably having been executed for a crime he did not commit.⁶⁴ Yet another Texas prisoner, Steven Woods, professed his innocence and characterized his forthcoming execution as a “murder” rather than an “execution.”⁶⁵ Leonel Herrera, defendant in one of the Supreme Court’s landmark actual innocence cases, similarly died professing his innocence.⁶⁶ Of course, not all professions of innocence are true. Roger Coleman proclaimed his innocence to the end, but post-execution DNA testing confirmed Coleman’s guilt. We thus know that some condemned prisoners are lying about their innocence, but we rarely can tell which ones are and which are not, thus infusing the practice of executing prisoners with an inescapable aura of ambiguity. By contrast, in a death-in-prison regime, innocence-based appeals can be considered as part of the regular course of post-conviction review. Even where inadequate evidence exists to overturn a conviction, the possibility that new evidence might demand that result will remain.

63. *THE LAST WORD* (Cinco Rosas Productions 2008).

64. When asked if he wished to make a statement, Willingham reportedly answered, [t]he only statement I want to make is that I am an innocent man convicted of a crime I did not commit. I have been persecuted for 12 years for something I did not do. From God’s dust I came and to dust I will return, so the earth shall become my throne.

David Grann, *Trial by Fire: Did Texas Execute an Innocent Man?*, *NEW YORKER* (Sept. 7, 2009), http://www.newyorker.com/reporting/2009/09/07/090907fa_fact_grann?printable=true#ixzz1VCY7rTzR.

65. *See Last Words*, STEVEN WOODS: WRONGFULLY EXECUTED BY THE STATE OF TEXAS, <http://www.stevenmichaelwoods.info/StevenWoodsLastWords.html> (last visited Mar. 14, 2012).

66. *See* STUDES TERKEL, *WILL THE CIRCLE BE UNBROKEN?: REFLECTIONS ON DEATH, REBIRTH, AND HUNGER FOR A FAITH* (New Press 2001). Herrera’s proclamations of innocence were implausible, given the strong evidence of his guilt, including a written confession found in his pocket.

Not all possibly innocent condemned prisoners are put to death while proclaiming innocence. Some, in fact, succeed in winning commutations of their sentences. That was the case for Henry Lee Lucas. According to the Death Penalty Information Center, Lucas confessed to the murder of an unnamed hitchhiker in Texas in 1979, and was sentenced to death in 1984. Lucas, however, “also confessed to hundreds of other murders including the murder of Jimmy Hoffa and his fourth grade teacher, who is still alive. Most of his confessions have proved false.”⁶⁷ State investigators concluded that Lucas almost certainly did not commit the murder for which he had been convicted. Lucas’s death sentence was therefore commuted to life-in-prison in June 1998. Lucas died in prison in 2001. Winning commutation of a death sentence because of doubts about guilt is an unusual event, but when it occurs, such a commutation is something of a hollow victory. Commutation of a death sentence to life without parole still means the prisoner never returns to society. It is still a death sentence, just one that is drawn out over a longer process. For Lucas, it won him an extra three years. What is worse, such prisoners likely lose whatever legal leverage they had when an execution was looming. While pro bono counsel for death-sentenced prisoners is fairly common, far more life-serving prisoners go unrepresented. While the perception among the public that a decision to commute a death sentence to life without parole is an act of mercy, from the innocent prisoner’s point of view the commutation is at best a mixed blessing, perhaps better than the alternative but still wholly inadequate to rectify the wrong that has been done. In a death-in-prison regime, prisoners who convinced decision makers to commute their sentences based on innocence would presumably be entitled to release rather than continued incarceration, which seems a far fairer outcome where the prisoner has succeeded in demonstrating that he is more likely than not innocent.

67. *Additional Innocence Information*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/additional-innocence-information#R-Poss> (last visited Mar. 14, 2012).

2. *Offender-focused proceedings*

A second type of uncertainty—society’s own moral uncertainty about the propriety of the death penalty—provides an additional source of death penalty dysfunction. This uncertainty is often manifested in the periodic public stirs caused by an impending controversial execution. When the state gears up to put one of its citizens to death, many persons sympathize with the condemned, not because they value the life of the perpetrator over his victim, but because the act of execution requires independent justification. The public debate, like the legal debate, then necessarily places the condemned prisoner on center stage, allowing the perpetrator to be portrayed as a victim in his or her own right. This leads to one of the most frequently complained-about features of the modern American death penalty: that executions are heavily focused, by necessity, on the person who has been condemned to die. As victims’ rights advocates so often complain, the crime victim seems to get lost in the shuffle.⁶⁸ The focus on the condemned prisoner is compounded by the groundswell of sympathy that sometimes occurs as well. Under these conditions, the moral message of an execution can easily become clouded, as retributive sentiments intermix with concerns about racial and socioeconomic equity, due process, and community responsibility.

This dynamic is further complicated by the dramatic changes in the prisoner’s circumstances or character that sometimes occur during the long period between conviction and execution. The individual who is walked or wheeled to the execution chamber is often in some real sense a different person than the one who committed the crime. Over the years, drug addictions are overcome, mental illnesses are treated or acquired, identities shift. Individuals repent for their misdeeds, they age, they get sick.⁶⁹ They find a purpose, or lose all

68. See Loge, *supra* note 41, at 412 (noting that death penalty supporters “grow frustrated with what they see as undue focus on process, viewing it as ‘offender focused’”).

69. Clarence Ray Allen, for example, was convicted and sentenced to die for killing three people on September 5, 1980. When he was executed more than twenty-five years later, he was “seventy-six years old and suffering from blindness, hearing loss, advanced diabetes, heart disease, complications from a stroke, and complications from a heart attack that left him in a wheelchair.” Alarcón, *supra* note 31, at

hope. Sometimes rehabilitation occurs. The criminal may have been a drug-crazed hoodlum whose crimes were committed in the madness of a methamphetamine high, while the condemned prisoner on the gurney is a sober, civic-minded, G.E.D.-carrying, middle-aged prisoner who writes books or poetry and advocates against drug use.⁷⁰

Take the case of Stanley “Tookie” Williams. Williams was a founding member of the “Crips” street gang in Los Angeles, a gang responsible for countless killings, violent crimes, and drug activity. In 1979, Williams was convicted of two brutal robbery-murders, involving point-blank, execution-style shootings of multiple victims. Although Williams steadfastly asserted his innocence in these cases, the evidence suggests that Williams was a heavy-user of drugs at the time, and the jury likely convicted Williams convinced that Williams had committed the murders in a drug-induced vicious crime spree. The jury sentenced Williams to death.⁷¹

In subsequent years, however, while Williams’ appeal was working its way through the system, Williams underwent a striking transformation. As a result of prison, Williams recovered from drug addiction. He wrote a series of children’s books encouraging kids to stay away from gang life. He was asked to intervene in an ongoing gang war, and helped to broker a truce among the gangs. As a result of these activities, he was nominated for a Nobel prize.⁷²

Ultimately, after failing to win a reprieve in the courts, Williams asked California Governor Arnold Schwarzenegger for clemency. A high-profile debate ensued. As a result, Californians were forced to confront the reality that the person slated to die by lethal injection was not, in a quite visible sense, the same person who had been

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70. Cf. DAVID ROSE, *THE BIG EDDY CLUB: THE STOCKING STRANGLINGS AND SOUTHERN JUSTICE* 39 (2007) (discussing case of William Anthony Brooks, whose execution was stayed by the Eleventh Circuit eighteen hours before his scheduled death, and who earned a high school diploma and began studies for a university degree after being removed from death row).

71. See Evan J. Mandery, *Mercy and Contrition*, 42 CRIM. L. BULL. 4 (2006) (setting forth facts of Williams’ convictions).

72. See Alex Alonso, *Stanley Tookie Williams, Could be First Gang Member Executed in California*, STREETGANGS.COM (Oct. 26, 2005), http://www.streetgangs.com/features/102605_tookie.

sentenced to die many years before. The debate forced consideration of the possibility that even capital murderers might be rehabilitated, and focused the state's attention on the moral utility of executing an individual who managed to make meaningful contributions to society from his death-row prison cell. Ultimately, Governor Schwarzenegger declined Williams' petition and Williams was executed, but not without leaving many with a profound sense of the vacuity of the death penalty system.

3. Mixed moral message of state-sponsored killing

Uncertainty about the moral propriety of the death penalty is undergirded by deep disagreement about the moral legitimacy of state-sponsored killing. Regardless of which side is "correct," there can be little doubt that a state-sponsored execution is, at the least, an exercise fraught with moral tension. While supporters trumpet executions as the ultimate vindication of victims' rights and the realization of the retributive "eye-for-an-eye" principle, others point out the oddity, or even perversity, of teaching the wrongfulness of killing by killing. This is not a new observation. Cesare Beccaria long ago observed that it hardly makes sense "for the state to publicly commit murder in order to condemn it."⁷³ Some perceive little moral difference between the two acts. As one family member of a murder victim testified in hearings on the death penalty, capital punishment "is a horrible thing which almost matches the horror of what some of us have lost by murder."⁷⁴

Not only is the moral message inherent in state-sponsored executions potentially ambiguous, executions might do more to promote public violence than to quell it. Beccaria viewed public executions in this way, arguing that rather than teach the public the wrongness of killing, public executions provide an "'example of barbarity' that its witnesses would be more prone to emulate than to

73. Carol Steiker & Jordan Steiker, *Cost and Capital Punishment: A New Consideration Transforms an Old Debate*, 2010 U. CHI. LEGAL F. 117, 127 (2010) (quoting Cesare Beccaria, *OF CRIMES AND PUNISHMENTS* (1764), available at http://www.constitution.org/cb/crim_pun28.htm).

74. N.J. DEATH PENALTY STUDY COMM'N, *supra* note 14, at 39.

avoid.”⁷⁵ Beccaria’s contention appears to have been widely accepted in the modern era, evidenced by the universal shift of executions from the public square to the private execution chamber.⁷⁶ The ban on public executions evinces a recognition that state-sponsored executions have the potential to send mixed messages to the public, and displays an inherent ambivalence about the perceived moral propriety of state-sponsored killing.

Death-in-prison sentences avoid this inevitable paradox. By simultaneously imposing punishment that strips its recipient of his freedom for the remainder of his natural life, but in such a way as to reinforce the underlying message that killing is wrongful, death-in-prison represents a far superior, and far less problematic, penal response to murder.

4. Cost Savings

Needless to say, replacing the conventional death penalty with death-in-prison would save substantial public resources. These economic savings are tempting to all policymakers, even those in traditionally conservative states. As Carol and Jordan Steiker have observed, the economic argument against the death penalty has proven far more effective in garnering support for abolition, or at least for its reduced use, than have arguments based on morality or human rights.⁷⁷ Even conservative law-and-order politicians now recognize that exaggeratedly punitive and costly criminal justice policies need to be reconsidered.

Even before the financial crisis began in 2008, years of tax cuts and steadily increasing governmental costs placed major strains on state budgets. These strains were particularly acute for criminal justice programs, which have seen “years of underfunding.”⁷⁸ As a result, indigent defense programs have been squeezed beyond the

75. Steiker & Steiker, *supra* note 73, at 127.

76. See Garland, *supra* note 8, at 106–10.

77. Carol S. Steiker & Jordan M. Steiker, *Capital Punishment: A Century of Discontinuous Debate*, 100 J. CRIM. L. & CRIMINOLOGY 643, 670 (2010).

78. THE STATE OF CRIMINAL JUSTICE, ABA CRIMINAL JUSTICE SECTION 2 (2009).

breaking point, public defender positions have been slashed nationwide, and caseloads have continued to increase.⁷⁹

The effects of the budgetary squeeze have been particularly pronounced with respect to capital defense, in some places causing an almost total breakdown. In California, for example, the delay in assignments of lawyers to assist with mandatory post-conviction appeals now approaches five years, and the delay for appointment of counsel to assist in the habeas process averages an additional three years.⁸⁰ At the same time, the high cost of funding capital defense has greatly compounded the budgetary pressures on states' indigent defender systems. In Georgia, a single death penalty case in 2008 virtually bankrupted the entire state indigent defense budget,⁸¹ and indigent funding has yet to recover.⁸² Smaller and less wealthy counties in many states no longer pursue death penalty cases, regardless of the comparative desert of offenders, because their smaller budgets would be decimated by the cost of a capital

79. *Id.* "As state revenues fall and public defender budgets are slashed, more and more indigent defense delivery systems are reporting crippling caseloads." *Id.*; see also Darryl K. Brown, *Epiphenomenal Indigent Defense*, 75 MO. L. REV. 907, 908 (2010) ("[I]ndigent defense is perennially underfunded in many jurisdictions.").

80. See Judge Arthur L. Alarcón & Paula M. Mitchell, *Executing the Will of the Voters?: A Roadmap to Mend or End the California Legislature's Multi-billion Dollar Death Penalty Debacle*, 44 LOY. L.A. L. REV. 41, 47 (2011); see also Sara Colón, Comment, *Capital Crime: How California's Administration of the Death Penalty Violates the Eighth Amendment*, 97 CAL. L. REV. 1377, 1377 (2009) (citing CAL. COMM'N ON THE FAIR ADMIN. OF JUSTICE, REPORT AND RECOMMENDATIONS ON THE ADMINISTRATION OF THE DEATH PENALTY IN CALIFORNIA 23-24 (2008)).

81. The defense of Brian Nichols, who was convicted of killing four people in a brutal courthouse shooting and against whom prosecutors sought a death sentence, cost at least \$3.2 million. See Bill Rankin, *Can Georgia Afford the Death Penalty?*, ATLANTA J.-CONST., Nov. 11, 2009, at A1; Steve Visser & Rhonda Cook, *Nichols' Defense Costs \$3.2 Million*, ATLANTA J.-CONST., July 22, 2009, at B1. By comparison, the state of Georgia allocated \$4 million for its entire indigent defense budget. See Dennis Brandon Wood, *Driving Up the Costs: An Examination of the Brian Nichols Trial and the New Attack on the Death Penalty*, 33 J. LEGAL PROF. 173, 178 (2008). Writing for the New Yorker, Jeffrey Toobin noted that as a result of the Nichols case, "the state agency responsible for indigent defense ha[d] run out of money." Jeffrey Toobin, *Death in Georgia*, NEW YORKER, Feb. 4, 2008, available at http://www.newyorker.com/reporting/2008/02/04/080204fa_fact_toobin?currentPage=all.

82. See Steve Visser, *High Court Warns "Clock is Ticking" in Gwinnett Death Penalty Case*, ATLANTA J.-CONST., Feb. 27, 2012, available at <http://www.ajc.com/news/gwinnett/high-court-warns-clock-1364619.html> (discussing decision by Georgia Supreme Court not to throw out capital murder charges where a defendant "has not been brought to trial in nearly seven years, due in part to delays caused by the state's financially strained indigent defense system").

prosecution. The high cost of capital prosecutions has caused a decrease in death sentences in larger and wealthier counties as well.⁸³

While there is no reliable evidence that the conventional death penalty serves as a deterrent,⁸⁴ there is ample evidence that the costs of maintaining a functioning capital punishment system are bankrupting the public fisc. Although it is difficult to precisely calculate the comparative costs of the death penalty as to alternative punishments, there appears to be a broad consensus that the costs of death sentences are substantially higher than the costs of life without parole (LWOP).⁸⁵ Researchers have found that filing a death notice alone in a death penalty case in Maryland is associated with an additional \$1 million in costs.⁸⁶ Studies conducted in North Carolina in 1993 and in Kansas in 1994 found an annual additional expense for death penalty cases of some \$4 million each compared to non-capital punishment cases.⁸⁷ Additional expenses arise from the maintenance of special facilities to house those condemned to death. In California, recent studies have estimated that “death-row incarceration costs the state an additional \$90,000 per inmate, per year (above the cost of non-capital incarceration), or \$60 million a year overall.”⁸⁸

These costs add up. California has spent an estimated \$4 billion on capital punishment since reinstating the death penalty in 1978, over which time it has executed only thirteen individuals, translating into a

83. See Adam Gershowitz, *Statewide Capital Punishment: The Case for Eliminating Counties' Role in the Death Penalty*, 63 VAND. L. REV. 307 (2010) (noting that because death penalty cases are extremely expensive and complicated, counties with large budgets and experienced prosecutors are able to seek the death penalty often, while smaller counties with limited budgets frequently lack the funds and institutional knowledge to seek the death penalty in even the most heinous cases, resulting in geographic arbitrariness within a state).

84. See *supra* Part II.B.3.

85. See, e.g., N.J. DEATH PENALTY STUDY COMM'N REPORT, *supra* note 14, at 31 (concluding that “[t]he costs of the death penalty are greater than the costs of life in prison without parole, but it is not possible to measure these costs with any degree of precision”).

86. John K. Roman, Aaron J. Chalfin & Carly R. Knight, *Reassessing the Cost of the Death Penalty Using Quasi-Experimental Methods: Evidence from Maryland*, 11 AM. L. & ECON. REV. 530, 530 (2009).

87. MARTHA CARTER, L.R.D. REP. NO. 95-2, COST OF THE DEATH PENALTY: AN INTRODUCTION TO THE ISSUE (1995).

88. Steiker & Steiker, *supra* note 77, at 670.

per execution cost of more than \$307 million dollars.⁸⁹ Maryland, which has executed five individuals in the post-*Furman* era, has spent \$37.2 million per execution during that period.⁹⁰ The savings expected from abolition of the death penalty in low-usage New Jersey is calculated at \$1.46 million annually.⁹¹ Higher usage states like North Carolina, where abolition was projected to save the state around \$11 million per year, would likely save more.⁹² Some states, such as California, potentially stand to save even more than that.

The potential cost savings from abolition of the conventional death penalty are enormous. The main expense in capital cases comes from the increased costs of trials, which are substantially more costly to litigate than non-death-penalty cases.⁹³ Death penalty trials consume more resources for a variety of reasons, including that more and better experienced lawyers are typically involved, on both the prosecutorial and defense sides,⁹⁴ more investigators and experts are needed, especially at the penalty phase of a capital trial, and because jury selection in a capital trial takes far longer to complete.⁹⁵ Additional expenses are incurred as a result of the drawn-out appellate review and subsequent state and federal habeas and other post-conviction review processes.

89. Alarcón & Mitchell, *supra* note 80, at 41.

90. Steiker & Steiker, *supra* note 73, at 120.

91. N.J. DEATH PENALTY STUDY COMM'N REPORT, *supra* note 14, at 31. "The Office of the Public Defender estimated that, given its current caseload of 19 death penalty cases (as of August 2006), elimination of the death penalty would result in a cost savings of \$1.46 million per year." *Id.*

92. Phillip J. Cook, *Potential Savings from Abolition of the Death Penalty in North Carolina*, AM. L. & ECON. REV., Dec. 11, 2009, at 1, available at <http://www.deathpenaltyinfo.org/documents/CookCostRpt.pdf> (finding that "the state would have spent almost \$11 million less each year on criminal justice activities (including appeals and imprisonment) if the death penalty had been abolished").

93. See Randolph N. Jonakait & Larry Eger, *The Fiscal Crisis as an Opportunity for Criminal Justice Reform: Defenders Building Alliances with Fiscal Conservatives*, 28 GA. ST. U. L. REV. 1159, 1186-87 (2012); Mark A. Larranaga, *Washington's Death Penalty System: A Review Of The Costs, Length & Results Of Capital Cases In Washington State*, WASH. DEATH PENALTY ASSISTANCE CENTER 14 (2004), available at <http://www.abolishdeathpenalty.org/PDF/WAStateDeathPenaltyCosts.pdf> (finding costs of death penalty trials to range from 3 to 6 times more than non-death-penalty trials); Alarcón & Mitchell, *supra* note 80, at 71 (reporting that "[c]apital cases often cost 10 to 20 times more than murder trials that don't involve the death penalty").

94. Alarcón & Mitchell, *supra* note 80, at 77.

95. *Id.*

These expenses, which are necessary to ensure compliance with the heightened due process requirements triggered by the death penalty, can be quite large in some outlier cases, such as the Nichols trial in Georgia, which by itself was projected to cost the state more than \$3 million.⁹⁶ Some counties that opt to pursue capital convictions find the costs of trying the cases both onerous and controversial, as was true in the trial of Levi King, a Texas prisoner already serving a life sentence. After a Texas prosecutor charged King with capital murder, the rural county reportedly spent more than \$750,000 attempting to win a death sentence.⁹⁷ Despite these costs, the sentencing jury declined to impose a death sentence on King, leaving the county budget in disarray.⁹⁸

Death-in-prison would relieve states of the burden of devoting extraordinary trial-related resources whenever the state seeks to impose its highest penalty. Death is costlier when states seek to affirmatively kill criminals. Death-in-prison sentences, which involve penalties comparable to LWOP, should necessarily be imposed only where defendants receive constitutionally adequate representation at trial, but providing that representation should not consume the state's resources at anything like current death-penalty levels. These cost savings independently justify abolition of the conventional death penalty. Indeed, prospective cost savings were a major factor in the success of the abolition argument in states like New Mexico.⁹⁹

III. "DEATH IN PRISON" SENTENCES WOULD ADVANCE IMPORTANT PENAL REFORMS

Not only would death-in-prison better achieve the retributive and deterrent goals identified above and save money, it would open the

96. Visser & Cook, *supra* note 81.

97. Steiker & Steiker, *supra* note 73, at 121.

98. *Id.* (citing David Pittman, *Murder Trial Costs Gray County a Lot*, LUBBOCK AVALANCHE-J., Oct. 20, 2009, at A1).

99. See Alarcón & Mitchell, *supra* note 80, at 208 (noting that cost savings was explicitly cited by Governor Richardson when he signed legislation abolishing New Mexico's death penalty).

way for two important reforms: one specific to capital punishment, and one to criminal punishment more generally.

A. Permanent vs. Temporary Exclusion: The Real Moral Choice

Structuring the penalty phase around the question of whether or not to execute the defendant focuses the jury on an issue of remarkably little practical salience. Whether a defendant should be placed on death row for one or more decades and then, if his appeals fail and he manages to survive those years in prison, be put to death, or whether instead he should simply be consigned to prison to live out the remaining number of years and then die has almost no bearing on society in general. Either way, the prisoner is permanently removed from civil society. From the community's perspective, there is little practical difference whether capital defendants are executed or sentenced to LWOP. Both outcomes have the same ultimate effect: to remove an individual, forever, from society. Viewed in this light, capital penalty phase proceedings seem something of a sham. All of the money and energy expended in them is directed to determining an issue that makes almost no tangible difference to the life of the community.¹⁰⁰

Indeed, under current practices, the fixation on death versus LWOP has led to a situation that borders on the absurd. The United States Reports are packed with hundreds of Supreme Court decisions on the death penalty establishing a constitutional capital jurisprudence that is, in many ways, simply baroque. The Court's decisions have carved out a special, heightened standard of due process for capital cases that has significantly increased the costs and

100. Of course, unlike executed prisoners, imprisoned defendants can, in theory, escape from prison. The odds of escape are sufficiently remote, however, to make the threat almost entirely insubstantial. Moreover, because condemned prisoners currently spend such long periods in prison awaiting execution, the marginal risks posed by withholding executions are extremely minimal. Death-row prisoners currently pose the same escape risks as LWOPers during the decade or more wait for execution, and presumably both the risk of escape and the risk that the prisoner poses to society only diminishes as the prisoner gets older. In addition, prisoners who pose heightened risks of escape can always be housed in heightened security, supermax-type, facilities from which escape is virtually impossible. For all these reasons, most commentators acknowledge that there is no significant difference between lifetime imprisonment and a death sentence from an incapacitation standpoint.

the difficulty of imposing capital punishment. But the irony is that all this due process makes virtually no difference in practice, because as noted above, for most capital convicts, the imposition of a death sentence is functionally identical to the imposition of an LWOP sentence. Regardless of sentence, the individual will most likely spend the remainder of his or her natural life in prison and die a natural death there.

In addition, when a jury is forced to choose between death and LWOP, it has no opportunity to consider rehabilitation. As a project of the prison system, rehabilitation makes little sense as long as the rehabilitee will remain behind prison bars for life. Where jurors spare a defendant in part because they believe the possibility of rehabilitation is real, imposing a sentence that nonetheless precludes reentry seems morally perverse. Prisoners without hope of reentry are stripped of any incentive to comply with rehabilitation objectives. Indeed, they are stripped of any hope at all. To the extent that such prisoners nonetheless achieve some measure of rehabilitation, the victory is largely a matter of mere private concern, since the opportunities for permanently exiled prisoners to actively benefit society are so meager.

The far more important question—from a societal standpoint, and I think a moral one as well—is whether the convict should be permanently banished from society with no hope of reentry or whether there are some mitigating features of the case or defendant's personal background, history, and identity that leave room for hope that the defendant might someday be returned to society. This is the question that should be put to jurors and with which they should grapple.

In short, current death penalty proceedings are largely a waste of social resources because the morally important question is whether the defendant should be permanently banished from society or allowed, at some future date, to be considered for reentry. It would be far better to put that question directly to the jury. Adoption of a death-in-prison sentence would do exactly that. With death-in-prison the most severe sanction available, LWOP could not remain as the

death alternative. Rather, it would only make sense to fix the alternative sentence at some term of years. The jury's resolution of this question is far more salient to all parties affected by the sentencing decision. It determines whether the defendant will ever be reunited with members of his family, reintegrate into the community, or make any future contribution to society beyond prison.

B. Ratcheting Down the Chain of Overpunishment

Finally, replacing the conventional death penalty with death-in-prison would have system-wide benefits. America is currently experiencing an incarceration overload.¹⁰¹ America's prisons house an unprecedented number of persons, far more than any other industrialized nation.¹⁰² This development is of recent origin, as the explosion in prison population occurred almost entirely in the last forty years. Its causes are much debated, but most commentators agree that an increase in sentence length has played a major role in the expansion of prison populations.¹⁰³

Certainly, there is little doubt that draconian penalties for drug and gun crimes, mandatory minimum sentences, and dramatically higher penalties for other particularly reviled types of criminal conduct have led to longer prison sentences for many convicts. The inflation in the penal code can be traced, at least in part, to an increase at the very top of the punishment chain. As Jonathan Simon has argued, the increased use of "life without parole" sentences has set "the scale of punishment too high."¹⁰⁴ Because proportionality plays a powerful role in the construction of our "penal ladder," and because sentences for murder, and aggravated murder in particular, represent the peak of the ladder, the overall shape of the ladder is necessarily impacted by what happens at the ladder's highest rungs. Simon argues against

101. See David Cole, *Turning the Corner on Mass Incarceration*, 9 OHIO ST. J. CRIM. L. 27, 27 (2011) ("[T]he American criminal justice system has seen unremitting growth in the number of people behind bars.").

102. *Id.* at 28 (noting that U.S. is "the world's undisputed leader in incarceration").

103. See *id.* at 41 ("In the last three decades, the average time served in the United States has nearly doubled.").

104. Jonathan Simon, *How Should We Punish Murder?*, 94 MARQ. L. REV. 1241, 1304 (2011).

overreliance on LWOP because “if the worst crimes are punished with spending the rest of your natural life in prison, this provides virtually no constraint on the overall severity of punishment.”¹⁰⁵

But our current punishment practices at the highest rungs of the ladder are even worse, I think, than what Simon suggests. The problem, at least conceptually, is that LWOP is not the highest punishment most jurisdictions currently impose. Death is the highest penalty imposed. The profusion of LWOP sentences has had the incredibly corrosive effect on the punishment ladder because LWOP is currently considered in many jurisdictions not as the imposition of the most severe punishment, but rather as an act of leniency or mercy. With LWOP being used as a punishment below the top of the penal scale, the next lower space on the ladder can be occupied by penalties that remain truly draconian but which are “lesser” because they are expressed as a term of years.

Adoption of death-in-prison as a jurisdiction’s highest penal sanction would help to ameliorate this problem by ratcheting down the penal scale. This would occur because the main choice that would be presented to jurors in capital trials would be whether to sentence a convicted murderer to death-in-prison or, alternatively, a term of years. By capping the “death” alternative at a term of years, pressure might be created to lower other term-of-years sentencing provisions which clearly should be lower in accordance with basic principles of proportionality. The effect of this downward ratcheting should work itself throughout the entire penal code, helping to restore some semblance of sanity to America’s incarceration policies.

IV. CONCLUSION

For many reasons, the conventional death penalty is in retreat. Four states in recent years have repealed or abolished the penalty, and other states, including California, may be poised to follow. The largest obstacle to abolition of the death penalty elsewhere, however, is its continuing political popularity, no doubt fueled in large part by

105. *Id.* at 1305.

the widely shared belief that murderers deserve “death,” not “life.” Any abolition proposal, to be effective, will need to address this political reality. By preserving the rhetorical power of the death sentence, while modifying its meaning, death-in-prison provides the means to do so. Death-in-prison permits the state to get out of the business of affirmative killing while preserving the important moral message that death, not life, is in fact what the most culpable murderers deserve. It’s a slow death, to be sure, but not much slower than what results from the current, dysfunctional, death penalty. Death-in-prison would save the states money, minimize the risk of irreparable harm resulting from error, and remove the state from the business of affirmatively killing. It would moot the spectacle of frantically-filed petitions and politically-charged commutation battles, last-minute judicial stays, and media-friendly public vigils for those condemned to die, all of which inevitably focus the public spotlight on the prisoner convicted of the crime rather than its victim. Perhaps most importantly, it would permit a reframing of the question put to jurors in capital trials. The question would not be, as it is now, which form of banishment shall be used to permanently exclude the prisoner from society, but whether permanent exclusion is the right, and deserved, punishment for the prisoner’s crime. The side effect of reframing the question would be to ratchet down the presently over-inflated penal ladder, and permit a downward refashioning of criminal punishment at all levels. For all these reasons, death-in-prison is the right death penalty compromise.