

Into the Abyss: The Unintended Consequences of Death Penalty Abolition

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The only difference between death and life without parole is one you kill me now, the other one you kill me later. There's not even a shred of hope. There's no need to even try to muster up a seed of hope because you're just gonna die of old age in here.... With the death penalty sentence I'm entitled to more appeals. – Oklahoma Death Row Inmate Micheal Selsor, two years prior to his execution.¹

[I]t is wrong to advocate for a sentence of life without parole (LWOP)—which is a death sentence simply being called by another name. – California Death Row Inmate Darrell Lomax.²

They decided to give me life without parole. The hard death penalty. We call it the hard death penalty. –Inmate serving life without parole in Delaware.³

Introduction

A decade ago, Alfred C. Villaume warned “that life without parole and virtual life sentences (in contrast to formal or ‘real’ death sentences) are, in actuality, semantically disguised sentences of death.”⁴ Nonetheless, in the ensuing decade, most death penalty abolitionists embraced life without parole (“LWOP”) as a palatable alternative to the death penalty, a move that contributed to both a decline in the number of formal death sentences⁵ and the abolition of the death penalty in seven states. As well intentioned as

¹ John Rushing, *Interview With a Death Row Inmate*, AL JAZEERA ENGLISH (May 10, 2012), <http://www.aljazeera.com/programmes/2012/05/201259135628279639.html>.

² Darrell Lomax, *Death Sentence by Another Name*, SOCIALIST WORKER (Apr. 12, 2012), <http://socialistworker.org/2012/04/12/death-sentence-by-another-name>.

³ MARGARET E. LEIGEY, THE FORGOTTEN MEN: SERVING LIFE WITHOUT A PAROLE SENTENCE 15 (2015).

⁴ Alfred C. Villaume, “*Life Without Parole*” and “*Virtual Life Sentences*”: *Death Sentences by Any Other Name*, 8 CONT. JUST. REV. 265, 266 (2005).

⁵ Carol S. Steiker & Jordan M. Steiker, *Opening a Window or Building a Wall? The Effect of Eight Amendment Death Penalty Law and Advocacy on Criminal Justice More Broadly*, 11 U. PA. J. CONST. L. 155, 158 (2008).

the recent repeal efforts have been, they have been accompanied by a number of unintended consequences that, from an abolitionist's perspective, may be impeding the quest for a more humane and less degrading justice system. Most of the recent death penalty repeals have been justified on fiscal grounds rather than concerns for human rights or racial justice while simultaneously touting the retributive, incapacitating, and deterrent power of LWOP sentences. As such, they have not only failed to alleviate many of the problems that abolitionists have traditionally viewed as plaguing the death penalty, they have actually encouraged the increased proliferation of a penalty that could be considered worse than death.

The recent spate of repeals has simply replaced the death penalty with LWOP, but despite the fact that they are condemned to die in prison, inmates serving LWOP and other “virtual death sentences”⁶ or “death-in-prison” sentences⁷ are not afforded the same heightened due process protections afforded to those on death row by the Supreme Court's jurisprudence of death. As such, they have *less* access to the courts and *less* ability to challenge the accuracy or legality of their convictions and are therefore in a *worse* position than those who have been sentenced to death. Furthermore, by adopting the language of and capitulating to the demands of death penalty proponents, abolitionists have failed to challenge the very philosophical justifications that have sustained the death penalty, thus contributing to the same “get tough” approach that supports the excessive punitiveness of the American criminal justice system as a whole. This move has dramatically increased the number of prisoners condemned to die in prison. In this piece, each of these issues is explored in turn. First, we demonstrate the ways in which LWOP

⁶ Villaume, *supra* note 4, at 268.

⁷ Jessica S. Henry, *Death-in-Prison Sentences: Overutilized and Underscrutinized*, in LIFE WITHOUT PAROLE: AMERICA'S NEW DEATH PENALTY 66 (Charles J. Ogletree & Austin Sarat, eds., 2012).

is similar to—or perhaps more severe than—the death penalty. Second, we illustrate the advantages of being sentenced to death in terms of access to the courts, and finally, we show how the rhetoric adopted by the abolitionist movement has supported the implementation of harsher, more severe sentences, and moved American penal practices away from a focus on human rights, human dignity and the possibility of rehabilitation.

Life Without Parole: Death by Another Name

Abolitionists often tout LWOP as a legitimate and palatable alternative to the death penalty, a move that has led to a decline in the number of death sentences⁸ and appears to have at least aided in the success of recent repeal efforts (all six states that abolished capital punishment from 2007 to 2013 replaced it with LWOP).⁹ Yet, both sentences have the same outcome: the offender dies in prison. In both cases, we abandon those who are punished and give up on any chance of redemption or rehabilitation. In the words of Margaret Leigey, “[b]oth sentences constitute a rejection by the public, as they send the message that the offenders are unworthy of ever re-entering society....”¹⁰

Therefore, both punishments give up on inmates or any opportunity for them to change, deprive them of hope, treat them as unfit for membership in the human community, and

⁸ Steiker & Steiker, *supra* note 5.

⁹ *Life Without Parole Laws in States that Recently Repealed the Death Penalty*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/lwop-post-repeal> (last accessed May 15, 2016). Nebraska repealed its death penalty in May 2015. According to the language of the law, the death penalty was replaced with “life imprisonment,” but it is not clear if this allows those convicted of first degree murder to be paroled or not. According to the Nebraska Supreme Court, the state legislature lacks the authority to insert the phrase “without parole” after “life imprisonment,” but prosecutors have told Nebraska lawmakers that this does not impact murder sentences because life sentences for first degree murder do not allow for parole. *See* S. Chambers Legis. B. 268 (Neb. 2015), <http://nebraskalegislature.gov/FloorDocs/104/PDF/Slip/LB268.pdf>; *Nebraska Bill Strikes “Without Parole” from Life Sentence*, SIOUX CITY J. (Feb. 17, 2011), http://siouxcityjournal.com/news/state-and-regional/nebraska/nebraska-bill-strikes-without-parole-from-life-sentence/article_6b4e34ca-3adf-11e0-874e-001cc4c002e0.html; *State of Nebraska v. Conover*, 270 Neb. 446 (2005).

¹⁰ Leigey, *supra* note 3, at x.

ensure they die in prison. Like those who are executed, those *servng* LWOP are hidden behind prison walls and will die without ever experiencing freedom again.

In some ways, LWOP may be worse than death because “life without parole allows for greater suffering [than the death penalty]....”¹¹ Research by Leigey has shown that many men serving LWOP agree with this assessment. In the words of one man she interviewed:

I think a guy that’s on death row, I think he would be a lot better off if they just went on and executed him as opposed to the life without parole because that’s torture. That is cold-blooded torture to stay here, and like I said, I’ve been here twenty-nine years.¹²

Another stated, “it would be better if they just take us out back and shot us.”¹³ Kenneth Hartman, who runs the Other Death Penalty Project while serving LWOP in California, has referred to LWOP as “a long, slow, dissipating death sentence....”¹⁴

Interestingly, capital defense attorneys often make similar arguments in their mitigation cases. In a strange twist of logic, they often try to convince the jurors that a life sentence is equal to or worse than a death sentence and to vote for the penalty they have described as harsher for their client. As a capital defender from Tennessee stated to the jury in his attempt to get them to vote for life in one case, “[m]ake him suffer every day of the rest of his life for what he did.”¹⁵ Research on mitigation cases from Delaware finds that it is actually a common practice for defense attorneys to tell jurors that a life sentence is equivalent to a death sentence because in both cases the defendant is going to

¹¹ William W. Berry III, *More Different Than Life, Less Different Than Death: The Argument for According Life Without Parole Its Own Category of Heightened Review under the Eight Amendment after Graham v. Florida*, 71 OHIO ST. L. J. 1109, 1124 (2010).

¹² Leigey, *supra* note 3, at 15.

¹³ *Id.*

¹⁴ James Ridgeway & Jean Casella, *What Death Penalty Opponents Don't Get*, THE MARSHALL PROJECT (Nov. 30, 2014), <https://www.themarshallproject.org/2014/11/30/what-death-penalty-opponents-don-t-get>.

¹⁵ Henry, *supra* note 7, at 74.

die in prison, and in many cases they go even further by trying to suggest that LWOP is harsher than death: “[i]t’s going to be an empty life. He’ll have nothing to look forward to. His girlfriend will abandon him. He’ll just sit there with the world going by, just waiting, waiting to die.” In another trial, defense counsel told the jurors that LWOP would include “the harshest conditions that prison has to offer.”¹⁶

This perception is not limited to attorneys or those actually serving LWOP; it is shared by many death row inmates as well. In Tennessee, half of the death row inmates surveyed in the early 1990s were reported to prefer death to LWOP,¹⁷ and in conversations with one of the authors, many condemned men in Delaware have portrayed the same sentiment. According to one, “I wouldn’t compare [LWOP and death]. They are like living on the East and West sides of Hell. No matter what side you’re on, the bottom line is you’re in hell.” A second death row inhabitant in Delaware said the difference between LWOP and death is like the “difference between drowning and suffocation,” and a third one stated, “I would consider suicide if my sentence was reduced to LWOP. I don’t wish to spend the rest of my days on earth in this place.” Perhaps most poignantly, one condemned man in Delaware said:

I would prefer death over LWOP because life in here is a death sentence. It’s just a long and slow death that will eat at your soul and your mind until you die. Think of it like a Band-Aid. You would much rather pull it off quickly, with one pull. Sure it hurts, but not as long as it will if you try to pull it off slowly.¹⁸

For some death row inmates, the prospect of receiving a sentence reduction from the death penalty to LWOP is enough in and of itself to lead them to decide to waive their

¹⁶ ROSS KLEINSTUBER, HEGEMONIC INDIVIDUALISM AND SUBVERSIVE STORIES IN CAPITAL MITIGATION 36 (2014).

¹⁷ Julian H. Wright, Jr., *Life Without Parole: The View from Death Row* 27 CRIM. L. BULL. 334, 348 (1991).

¹⁸ Authors’ interviews with Delaware inmates, on file with authors.

remaining appeals and “volunteer” for their own execution. Of the sixteen men who have been executed in Delaware since 1992, six have waived their appeals in an effort to expedite their own executions.¹⁹ The most recent one, Shannon Johnson in 2012, signed his final letter to one of the authors, “Death Before Dishonor.”²⁰ This phenomenon is not unique to Delaware. According to data obtained from the Death Penalty Information Center, of the 1359 executions carried out between 1976 and 2013, there were 141 documented “volunteers,” and the motivations of those who have volunteered for execution suggest that the harsh reality of LWOP encourages many on death row to turn down their appeals and be executed.²¹ For instance, when Kevin Conner was executed in 2005 by the state of Indiana, he told Governor Mitch Daniels that “killing a person is far more honest and humane than imposed repression under the guise of justice in the penal system.” Before his 2004 execution in Nevada, Terry Jess Dennis stated at a hearing, “Death is preferable to another fifteen to twenty years in prison.” After sitting on Florida’s death row for eight years, Newton Slawson asked to end his appeals in 2003, stating to the judge, “[t]here simply comes a time when death is a release, not a punishment.”²²

Clearly, the prospect of serving a natural life sentence is daunting enough to lead some inmates on death row to make the drastic decision to expedite their own deaths. This view is even shared by many whose death sentences have been commuted to life or LWOP. For example, former Utah death row inmate Randy Arroyo, whose sentence was

¹⁹ *Information on Defendants Who Were Executed Since 1976 and Designated as “Volunteers,”* DEATH PENALTY INFO. CTR. (Jul. 29, 2013), <http://www.deathpenaltyinfo.org/information-defendants-who-were-executed-1976-and-designated-volunteers>.

²⁰ On file with authors.

²¹ *Information on Defendants, supra* note 19.

²² *Id.*

commuted to LWOP, has expressed a wish that he was still on death row.²³ Wilbert Rideau, whose death sentence was commuted to life by the *Furman v. Georgia*²⁴ decision and who was eventually paroled after forty-four years, stated during a 1981 interview that the “death penalty is mercy” because LWOP is “just another form of death. It’s just that it is more excruciating than the [formal death penalty] because he’s gonna suffer for the rest of his life.”²⁵ Even many “law-and-order” politicians and prison employees are beginning to recognize that LWOP may indeed be a more severe sanction than death. New Mexico Governor Bill Richardson agreed to abolish that state’s death penalty after visiting the cells where prisoners would spend twenty-three hours per day and concluding that being housed in such conditions amounted to a fate worse than death.²⁶ Former prison warden Lewis E. Lawes has suggested that spending the rest of your life in prison longing for freedom is more retributive than the death penalty, and an unnamed corrections officer stated that “[LWOP] is harder to face than the death penalty....”²⁷ Those who are sentenced to life terms often begin their sentences confined to solitary cells for twenty-three hours per day and “endure a fairly bleak existence.”²⁸ When Connecticut abolished the death penalty in 2012, it replaced it with LWOP in solitary confinement.²⁹ Although solitary confinement is only mandated in Connecticut, the practice of housing lifers in

²³ Henry, *supra* note 7, at 75.

²⁴ 408 U.S. 238 (1972) (striking down the arbitrary application of the death penalty and causing a temporary moratorium on the death penalty in the United States).

²⁵ Wilbert Rideau, *Wilbert Rideau Admits to Hate Crime Murders*, VIMEO (Jun. 11, 2010), <https://vimeo.com/12482122>.

²⁶ Henry, *supra* note 7, at 73.

²⁷ *Id.* at 75.

²⁸ Villaume, *supra* note 4, at 274.

²⁹ Ridgeway & Casella, *supra* note 14.

solitary exists nationwide. For example, in New York, William Blake has been serving a life sentence “in extreme isolation in a 7 x 9 cell” since 1987.³⁰ He has stated:

If I try to imagine what kind of death, even a slow one, would be worse than twenty-five years in the box ... I can come up with nothing. Dying couldn't take but a short time if you or the State were to kill me; in [solitary confinement] I have died a thousand internal deaths.³¹

LWOP Reduces Opportunities to Challenge Wrongful Convictions

Of course, not everyone will agree that living a life behind prison walls with the guarantee to die there is worse than capital punishment, so there is one relevant difference between LWOP and death that must be taken into consideration: LWOPers are cast into the abyss and disappear. They are forgotten about and denied the same legal protections and access to the courts as those who are under a formal sentence of death. Although many death penalty opponents argue that LWOP is better than death because we cannot rectify an error once we have executed someone, the reality is that “innocent defendants ... are better off with a capital sentence because they will be provided with ‘a whole panoply of rights of appeal and review that you don’t get in other cases.’”³² In fact, despite their alleged concern for the wrongly convicted, death penalty opponents in most states—including those that have recently abolished the death penalty—have made the high costs associated with the additional scrutiny given to capital sentences *the reason* they have used to urge legislators, courts, and the public to abolish the death penalty.³³

Take, for example, the following Facebook post made in August 2014 by a California death penalty opponent who led a drive to petition state Attorney General Kamala Harris not to appeal a federal court ruling that California’s death penalty was

³⁰ *Id.*

³¹ *Id.*

³² Henry, *supra* note 7, at 77.

³³ Rob Warden, *How and Why Illinois Abolished the Death Penalty*, 30 L. & INEQ. 245, 278 (2012).

unconstitutional. Upon being informed that, despite the petition, Harris would indeed appeal the decision to the U.S. Court of Appeals, the petition's originator wrote:

Friends: I have disappointing news. The Attorney General has decided to appeal in *Jones v. Chappell*. I am not surprised, but I am very disappointed. Whoever has taken part in reaching this decision is not supporting the law or defendants' rights; they are supporting wasteful, unconscionable expenditures of \$130 million annually on a lengthy incarceration in a dilapidated facility, *complete with decades of state-funded post-conviction litigation*. This is a very sad day for any reasonable, conscious Californian, but we will fight on, in litigation and through legislative and political means, and we will see nationwide abolition in our time (emphasis added).³⁴

The primary rationale for abolishing the death penalty presented in this post is the cost of the system that is generated by years of "wasteful" appeals.

This author is not alone. Although the Savings, Accountability, and Full Enforcement (SAFE) for California Act was defeated by voter referendum in 2012, the arguments presented in support of the bill offer an excellent illustration of how the recent death penalty repeal movement has been too focused on cost savings to the detriment of the very individuals for whom they claim to be fighting. According to Points 2-4 of the proposed bill, supporters wanted:

2. To save the taxpayers \$1 billion in five years so those dollars can be invested in local law enforcement, our children's schools, and services for the elderly and disabled.
3. To use some of the savings from replacing the death penalty to create the SAFE California Fund, to provide funding for local law enforcement, specifically police departments, sheriffs, and district attorney offices, to increase the rate at which homicide and rape cases are solved.
4. To eliminate the risk of executing innocent people.³⁵

³⁴ Although this post was made in a public forum, we have decided to omit the citation in order to conceal the author's identity because our goal here is not to publically criticize or embarrass someone for doing what she or he truly believes in his or her heart is the right thing. Rather, our goal is simply to point out the potential drawbacks of this strategy.

³⁵ CALIFORNIA DEPT. OF STATE, 2012 TEXT OF PROPOSED LAWS 96 [hereinafter PROP. 34], <http://vig.cdn.sos.ca.gov/2012/general/pdf/text-proposed-laws-v2.pdf#nameddest=prop34> (last accessed June 10, 2016).

The fourth point seems to contradict the second and third points, however, because as the SAFE California Campaign mentioned, the reason the death penalty is so expensive is because:

[t]he Constitution requires extra protections in death penalty cases—protections not required for those sentenced to life imprisonment without parole—to ensure that we do not mistakenly execute an innocent person or send someone to their death just because they are poor.³⁶

Therefore, rather than protecting the innocent, by eliminating the “extra protections” afforded to those on death row, the SAFE Act would have made it harder for the wrongly convicted to prove their innocence and, as detailed below, condemned *more* of them to die in prison.

For this reason, only three of the approximately fifty death row inmates in California that responded to a survey by the Campaign to End the Death Penalty supported the SAFE Act.³⁷ In the words of California death row inmate Darrell Lomax:

The SAFE California initiative is no more than a slow death for all those currently incarcerated on California’s death row—still death just by a different name. It also seeks to retroactively terminate all death row prisoners’ appeal rights, which means more innocent people will die and more injustices will be carried out. How will it be possible for the innocent to prove their innocence?³⁸

Jarvis Jay Masters argued that the SAFE California Act, if passed, would have “throw[n] away the key for all the innocent men and women on death row, and instead, sentence[d] all prisoners on death row to spend the rest of their lives in

³⁶Julien Ball, *A Closer Look At SAFE California*, CAMPAIGN TO END THE DEATH PENALTY, <http://www.nodeathpenalty.org/closer-look-safe-california> (last accessed May 5, 2016).

³⁷Bob Egelko, *Death Row inmates oppose Prop. 34*, SF GATE (Apr. 30, 2014, 4:43 PM), <http://www.sfgate.com/news/article/Death-Row-inmates-oppose-Prop-34-3891122.php>.

³⁸Lomax, *supra* note 2.

prison ... without effective legal representation.”³⁹ This is not an abstract fear attached to a bill that never became law. It is a very real consequence for those convicted of murder in the seven states that recently abolished the death penalty. In the post-*Furman* era,⁴⁰ these seven states combined to execute twenty-two and exonerate twenty-six death row inmates,⁴¹ which means the heightened scrutiny attached to death sentences saved more lives than the death penalty claimed in those states. Nonetheless, even a cursory examination of the language used to justify abolition in these states reveals that limiting access to the courts was one of the primary motivations behind these repeals. For example, when Connecticut abolished its death penalty in 2012, Governor Daniel Malloy announced, “[t]he people of this state pay for appeal after appeal, and then watch time and again as defendants are marched in front of the cameras, giving them a platform of public attention they don’t deserve.”⁴² Nebraska State Senator Colby Coash, who co-sponsored that state’s 2015 repeal bill referred to the death penalty as “inefficient” and claimed “it was costing us money.”⁴³ The sponsor of New Mexico’s 2009 death penalty ban, Representative Gail Chasey, stated that the new law would

³⁹ Jarvis Jay Masters, *It is a Matter of Innocence, not Economics: Examining the California SAFE Act*, CAMPAIGN TO END THE DEATH PENALTY, <http://www.nodeathpenalty.org/it-matter-innocence-not-economics> (last accessed June 2, 2014).

⁴⁰ The time period after the Supreme Court’s decision in *Furman v. Georgia* is often referred to as the “modern era” because it is the time period in which the Supreme Court has given extra scrutiny to death penalty cases.

⁴¹ *Innocence: List of those Freed From Death Row*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/innocence-list-those-freed-death-row> (last accessed Jan. 10, 2015); *Number of Executions by State and Region Since 1976*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/number-executions-state-and-region-1976> (last accessed Jan. 10, 2015).

⁴² Mackenzie Weinger, *Connecticut Bans Death Penalty*, POLITICO (Apr. 25, 2012), <http://www.politico.com/story/2012/04/conn-bans-the-death-penalty-075619>.

⁴³ Mark Berman, *Nebraska Lawmakers Abolish the Death Penalty, Narrowly Overriding Governor’s Veto* WASH. POST (May 27, 2015), <https://www.washingtonpost.com/news/post-nation/wp/2015/05/27/nebraska-lawmakers-officially-abolish-the-death-penalty/>.

reduce appeals so more money could be put toward law enforcement.⁴⁴ Similarly, the New Jersey Death Penalty Commission Report, which ultimately led the state to abolish the death penalty in 2007, recommended “that any cost savings resulting from the abolition of the death penalty be used for benefits and services for survivors of victims of homicide,”⁴⁵ and when Illinois repealed capital punishment in 2009, the bill took the funds that were expected to be saved and reallocated them to law enforcement training and services for victims’ families.⁴⁶ There is nothing wrong with providing funding to law enforcement or the families of victims, but if that money is being taken from the funds that were previously spent on capital litigation, that means there are fewer funds remaining for post-conviction litigation of any kind.

The fiscal argument is logical when challenging other excessively punitive penalties, such as Three Strikes Laws, because most of the costs associated with those penalties come in the form of an ineffective and excessively lengthy incarceration. But in the case of the death penalty, most of the costs are associated with error correction. Therefore, the focus on cost makes little sense. Some abolitionists may say that they are simply using an argument of convenience to accomplish their humanitarian goal—using whatever means necessary to achieve a righteous and just end. We have no doubt that most abolitionists truly feel that way. But this line of reasoning has some potentially cataclysmic consequences, as the grant of appellate rights is neither insignificant nor inconsequential.

⁴⁴ *New Mexico Governor Repeals Death Penalty in State*, CNN (Mar. 18, 2009), <http://www.cnn.com/2009/CRIME/03/18/new.mexico.death.penalty/index.html>.

⁴⁵ M. WILLIAM HOWARD, JR. ET AL., *NEW JERSEY DEATH PENALTY STUDY COMM’N REPORT 2* (Jan. 2007), http://www.njleg.state.nj.us/committees/dpsc_final.pdf.

⁴⁶ Warden, *supra* note 33, at 281.

Consider a few facts:

The rate of exonerations among death sentences in the United States is far higher than for any other category of criminal convictions. Death sentences represent less than one-tenth of one percent of prison sentences in the United States, but they account for about twelve percent of known exonerations of innocent defendants from 1989 through early 2012, a disproportion of more than 130 to one.⁴⁷

Even among those sentenced to death, there is a tremendous advantage to remaining on death row. Of those who have been exonerated after being sentenced to death, 91.5% were still on death row when they were exonerated, and the exoneration rate for those under a formal death sentence is 2.23%, while the exoneration rate for those who are removed from death row prior to being exonerated is only 0.37%!⁴⁸

There is no reason to believe that those sentenced to death are any more likely to be innocent than those who were sentenced to life or those whose death sentences were overturned. In fact, a major reason given by capital jurors for not sentencing a convicted killer to death is lingering doubts about guilt,⁴⁹ which suggests that those sentenced to death are less likely to be innocent. Yet, they are more likely to be exonerated. This all suggests that a wrongly convicted person faces substantially better odds of being exonerated and released if he or she is on death row than if he or she is not.

A major reason for this extraordinary exoneration rate is that far more attention and resources are devoted to death penalty cases than to other criminal prosecutions, before and after conviction. The vast majority of criminal convictions are not candidates for exoneration because no one makes any effort to reconsider the guilt of the defendants.⁵⁰

⁴⁷ Samuel R. Gross et al., *Rate of False Conviction of Criminal Defendants Who Are Sentenced to Death* 111 NAT'L ACAD. SCI. PROC. USA 7230, 7230 (2014).

⁴⁸ Authors' calculations of data provided in Gross et al., *id.* at 7233-34.

⁴⁹ Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?* 98 COLUM. L. REV. 1538, 1559 (1998).

⁵⁰ Gross et al., *supra* note 47, at 7230.

This means that, if the death penalty is abolished in order to save money—most notably on state-funded appeals—then the odds of innocent defendants ever being released will decline dramatically. Viewed in this light, the abolitionists’ focus on “wasteful ... decades of state-funded post-conviction litigation” seems misplaced. Although they claim to be concerned with defendants’ rights, defendants actually have *more rights* when sentenced to death, a reality that is far from inconsequential. Despite their fear “of executing innocent people,” eliminating or reducing the very appeals designed to uncover miscarriages of justice would actually increase the risk of sentencing innocent persons to “semantically disguised sentences of death.”⁵¹

Some may argue that this fear is unwarranted because once attorneys and others concerned with actual innocence are freed from the pressing time constraints imposed by a pending execution, they would be free to focus on the innocence of all inmates. This does not appear to be the case. If the primary logic for abolishing the death penalty is saving “states millions of dollars on costly death penalty appeals,”⁵² then it stands to reason that these inmates would have a substantially more difficult time even accessing the courts. The Maryland Commission on Capital Punishment looked at this very issue and concluded that “the procedural protections ... that are the cause of the exorbitant cost of [capital] cases” would not trickle down to life cases if the death penalty were abolished.⁵³ As they put it, several experts “unequivocally stated that it is very unlikely that the unique procedural protections applicable to capital cases will be held to apply in

⁵¹ Villaume, *supra* note 4.

⁵² *Death No More: Life Without Parole Should Be New Standard*, DALL. MORNING NEWS (Apr. 16, 2007), available at <http://www.fordarlieroutier.org/MediaArticles/DMN/DMN070416.html>.

⁵³ BENJAMIN R. CIVILETTI, ET AL., MD. COMM’N ON CAP. PUNISHMENT: FINAL REP. TO THE GEN. ASSEMB. 52-53 (2008), <http://www.goccp.maryland.gov/capital-punishment/documents/death-penalty-commission-final-report.pdf>.

life without parole cases.”⁵⁴ In fact, due to the Prison Litigation Reform Act of 1996 and the Anti-Terrorism and Effective Death Penalty Act of 1996, access to federal habeas corpus relief, the ability to obtain state-funded transcripts or attorneys, and the ability to pay for post-conviction court proceedings is severely limited for most prisoners.⁵⁵

Prisoners under formal sentences of death, on the other hand, “have greater access to the courts than other prisoners, including those who are serving virtual death sentences.”⁵⁶

The experience of Massachusetts, which has not had the death penalty since 1984, offers an excellent case-in-point. According to Scott Harshbarger, the former attorney general of Massachusetts, “[t]he imposition of ‘life without parole’ in Massachusetts, while subject to strict due process and legal/constitutional scrutiny, has never been hamstrung by the extraordinary constitutional review that death cases rightfully receive ...”⁵⁷

Furthermore, since New York abolished capital punishment:

There has been no revision of the statutes to provide for specialized services in life without parole cases. Nor has a broader right to counsel emerged or a more extensive right to appeal. And no greater procedural protections have been articulated by the courts.⁵⁸

Therefore, it is hard to see how things will be any better for the wrongly convicted without the formal death penalty. Without an expansion of super due process rights to all of those condemned to die in prison, “[death-in-prison] sentences ... are likely to remain intact” and “may be *de facto* irrevocable,”⁵⁹ which means more—not fewer—innocent people will be condemned to die in prison.

⁵⁴ *Id.* at 53.

⁵⁵ Villaume, *supra* note 4, at 272.

⁵⁶ *Id.* at 273.

⁵⁷ CIVILETTI, *supra* note 49, at 54.

⁵⁸ *Id.*

⁵⁹ Henry, *supra* note 7, at 77.

The Wrong Rhetoric

As bad as the move from death to slow death with no appeals is, the worst part about the current spate of repeals based upon costs might actually be its support for the harsh, draconian rhetoric that sustains the retributive and brutal nature of the current American carceral apparatus. Rather than focusing on the inhumane nature of the death penalty, death penalty opponents in America have focused their attention on the (contradictory) concerns of cost and innocence—a move that seems to suggest that the real problem with the death penalty is too much due process and not its inhumane, brutal, and degrading nature. In fact, many abolitionists have even adopted the “law-and-order” rhetoric that justifies punitive punishments in the first place, causing them to seek a Pyrrhic victory, advocating for the abolition of one inhumane penalty (death) at the expense of a more sustained attack against the excessively brutal and degrading nature of American penal policy. Without a focus on human dignity, there is nowhere left for abolitionists to turn once they have accomplished abolition of the death penalty. As a consequence, although the number of death sentences has fallen in recent years, there has been a dramatic uptick in the number of people sentenced to LWOP and other “death-in-prison” sentences.⁶⁰

Consider the language used in an editorial published by the *Dallas Morning News*:

[LWOP is] harsh. It's just. And it's final without being irreversible. Call it a living death.... Death does not provide an added level of justice. A prison sentence that does not allow for the possibility of parole accomplishes the same objectives: protecting society from violent criminals and ensuring that every day of a murderer's life is a miserable

⁶⁰ See Rebecca Burns, *Is Life Without Parole Any Better Than the Death Penalty?*, IN THESE TIMES (Mar. 22, 2013) http://inthesetimes.com/article/14773/death_penalty_abolition_life_without_parole. “Between 1992 and 2009, we saw a 300 percent increase in the number of life without parole sentences.” *Id.*

existence. Our standards of punishment have evolved over time, from the gallows to firing squads, from the electric chair to lethal injection. Life without parole, essentially death by prison, should be the new standard.⁶¹

This language hardly attempts to see offenders in a different light or to humanize them; it does not discuss the potential for reform or alter the punitive frame through which criminal offenders have been viewed for the last forty years. On the contrary, it touts the harshness and misery of a LWOP sentence, equating it with a death sentence.

Language like this is not exclusive to conservative, Southern states like Texas that continue to use the death penalty with a high level of frequency; it was evident in the states that recently abolished capital punishment and was utilized by proponents of California's failed Proposition 34. In New Jersey, New Mexico, Connecticut, and Illinois, the primary focus of the abolitionist movement was on the risk of a wrongful execution and on the costs associated with the death penalty rather than the punishment's inherent barbarity.⁶² In fact, the language used in those states often explicitly endorsed a tough-on-crime rhetoric that failed to acknowledge the humanity of convicted killers. Prior to signing Connecticut's death penalty repeal measure in 2012, Governor Daniel Malloy stated: "[g]oing forward, we will have a system that allows us to put *these people* away for life, in living conditions none of us would want to experience... *Let's throw away the key* and have them spend the rest of their natural lives in jail."⁶³ When New Mexico abolished the death penalty in 2009, Governor Bill Richardson stated, "[w]ith my

⁶¹ *Death No More*, *supra* note 52.

⁶² Warden, *supra* note 33, at 284-285.

⁶³ James Ridgeway & Jean Casella, *Connecticut Votes to Replace Death Penalty with Life in Solitary Confinement*, SOLITARY WATCH (Apr. 12, 2012), <http://solitarywatch.com/2012/04/12/connecticut-legislature-votes-to-replace-the-death-penalty-with-life-in-solitary-confinement/> (emphasis added).

signature, we now have the option of sentencing the *worst criminals* to life in prison without the possibility of parole. They will *never get out of prison*.”⁶⁴

Even the supposedly liberal American Civil Liberties Union (ACLU) of Northern California used extremely draconian language in offering its support for replacing the death penalty with LWOP:

The facts prove that life in prison without the possibility of parole (LWOP) is swift, severe, and certain punishment. The reality is that people sentenced to LWOP have been condemned to die in prison and that’s what happens: they die in prison of natural causes, just like the majority of people sentenced to death....

Spending even a small amount of time in California’s overcrowded, dangerous prisons is not pleasant. Spending thirty years there, growing sick and old, and dying there, is a horrible experience.⁶⁵

According to the ACLU, this is a *benefit* of — not a drawback to — LWOP. California’s failed ballot initiative used similarly punitive language: “[m]urderers and rapists need to be stopped, brought to justice, and punished,” and “[c]onvicted murderers must be held accountable and pay for their crimes.”⁶⁶ In order to accomplish this, the measure would have “require[d] that persons convicted of murder with special circumstances remain behind bars *for the rest of their lives*, with mandatory work in a high-security prison, and that money earned be used to help victims through the victim’s compensation fund.”⁶⁷

With a few rare exceptions, there was little attempt to change the retributive philosophical frame that has been used to justify the death penalty and other extremely harsh punishments. There was almost no discussion of mitigating circumstances, the

⁶⁴ *Death Penalty Abolished in New Mexico—Governor Says Repeal Will Make State Safer*, DEATH PENALTY INFO. CTR. (Mar. 19, 2009), <http://www.deathpenaltyinfo.org/death-penalty-abolished-new-mexico-governor-says-repeal-will-make-state-safer> (emphasis added).

⁶⁵ *The Truth About Life Without Parole: Condemned to Die in Prison*, ACLU OF NORTHERN CALIFORNIA, <https://www.aclunc.org/article/truth-about-life-without-parole-condemned-die-prison> (last accessed on Oct. 14, 2014).

⁶⁶ PROP 34, *supra* note 35, at 95.

⁶⁷ *Id.* at 96, emphasis added.

possibility for reform or rehabilitation, or the inherent humanity of killers. On the contrary, most abolitionists have adopted the same dehumanizing rhetoric championed for decades by proponents of “get tough” legislation that has justified the death penalty, fueled mass incarceration, and made the United States the imprisonment capital of the world while doing nothing to address the root causes of crime. As such, the abolitionist movement has actually been complicit in condemning *more* people to die in prison:

As death sentences declined, LWOP sentences increased, but not in perfect substitution. LWOP sentences were not simply meted out in what would formerly have been death cases. Rather, LWOP also became a legitimate form of punishment for a host of offenses that were never death eligible in the first place.... In this way, the concerted and well-intentioned effort of some abolitionists, scholars, and policymakers to avoid the execution of the few may have resulted in increased [death-in-prison] sentences for the many.⁶⁸

As Steiker and Steiker put it, “it may well be that the widespread adoption of LWOP... increased the sentences of the many in order to make less likely the already unlikely execution of the few.”⁶⁹

Connecticut offers an excellent example of this phenomenon. Since executions resumed in 1976 following *Gregg v. Georgia*,⁷⁰ Connecticut executed just one person,⁷¹ but when the state abolished the death penalty in 2012, it authorized the use of LWOP in solitary confinement for *anyone* convicted of “murder with special circumstances.”⁷² Unlike in cases where the state sought the death penalty, where the existence of special circumstances simply made one *eligible* for the death penalty but did not mandate it, the new statute makes no provision for the consideration of mitigating circumstances.⁷³

⁶⁸ Henry, *supra* note 7, at 66-67.

⁶⁹ Steiker & Steiker, *supra* note 5, at 158.

⁷⁰ 428 U.S. 153 (1976) (ending the moratorium imposed by *Furman v. Georgia* four years earlier).

⁷¹ *Number of Executions by State*, *supra* note 41.

⁷² S. 280, 2012 Gen. Assemb., Feb. Sess. (Conn. 2012).

⁷³ CONN. GEN. STAT. ANN. § 53a-54b (West 2015).

Rather, *everyone* convicted of what would have previously been capital murder is subject to the punishment.

A brief overview of the nationwide numbers confirms this trend: both the number of death sentences (forty-nine) and the number of executions (twenty-eight) hit historic lows in 2015,⁷⁴ but the number of people serving life and LWOP sentences is at an all-time high. There has been an eighty-four percent decline in the number of annual death sentences issued since they peaked at 315 in 1996.⁷⁵ The data on life sentences are slightly less recent, but over the twenty-year period from 1992 to 2012, the number of people serving life sentences more than doubled from 69,845 to 159,520, and the number of people serving LWOP nearly *quadrupled* from 12,453 to 49,081.⁷⁶ All of this occurred despite the fact that both the homicide rate and the violent crime rate declined by fifty percent from 1992 to 2012.⁷⁷ In comparison, the size of the overall sentenced prisoner population only grew by seventy-nine percent,⁷⁸ which represents a forty-five percent increase in the imprisonment rate.⁷⁹ Considering the historically low crime rates recorded by the Federal Bureau of Investigation, this growth in the imprisonment rate indirectly reflects the downfalls of adopting the same rhetoric used by proponents of “law-and-

⁷⁴ *The Death Penalty in 2015: Year End Report*, DEATH PENALTY INFO. CTR. (Dec. 16, 2015), <http://deathpenaltyinfo.org/documents/2015YrEnd.pdf>.

⁷⁵ *Id.*

⁷⁶ ASHLEY NELLIS, THE SENTENCING PROJECT, LIFE GOES ON: THE HISTORIC RISE IN LIFE SENTENCES IN AMERICA 13 (2013), <http://sentencingproject.org/wp-content/uploads/2015/12/Life-Goes-On.pdf>. Over this same time period (1992-2012), the number of death sentences declined by 72% (from 286 to 79). *Sentences by Year: 1976-2012*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/death-sentences-year-1977-2009>.

⁷⁷ *State-by-State and National Crime Estimates by Year(s)*, FED. BUREAU OF INVESTIGATIONS, UNIF. CRIME REPORTING STATISTICS, <http://www.ucrdatatool.gov/Search/Crime/State/StatebyState.cfm>.

⁷⁸ E. Ann Carson & Joseph Mulako-Wangota, *Sentenced Prisoners Under the Jurisdiction of State or Federal Correctional Authorities, December 31, 1978-2014*. Generated using Correctional Statistical Analysis Tool (CSAT)-Prisoners, <http://www.bjs.gov/index.cfm?ty=nps>.

⁷⁹ E. Ann Carson & Joseph Mulako-Wangota, *Imprisonment Rate of Sentenced Prisoners under the Jurisdiction of State or Federal Correctional Authorities per 100,000 U.S. Residents, December 31, 1978-2014*. Generated using the Correctional Statistical Analysis Tool (CSAT)-Prisoners, <http://www.bjs.gov/index.cfm?ty=nps>.

order” crime policies. The United States now has the highest incarceration rate in the world, boasting twenty-five percent of the world’s prisoners, despite having only five percent of the world’s population.⁸⁰ There is now more than one adult male in prison for every 100 adult male residents,⁸¹ and if we include prisoners in jail, just under one percent of the entire adult population of the United States is behind bars.⁸²

It is true that there have been some recent efforts to reform American sentencing policies in a less punitive direction. Beginning in 2008, the overall imprisonment rate and the total number of sentenced inmates began to flatten out and then decline, but this reduction did not carry over to lifers. Life sentences have been largely “excluded from serious consideration in sentencing reform discussions.”⁸³ While the overall prison population declined by 2.3%⁸⁴ and the number of annual death sentences declined by more than a third (from 121 to seventy-nine) from 2008 to 2012,⁸⁵ the number of people serving life increased by 11.8%, and the size of the LWOP population rose by a staggering 22.2% over the same period.⁸⁶ Nearly one out of every nine prisoners is now serving a life term, up from approximately one in twenty-five in 1984; nearly one in thirty is now serving LWOP, up from one in every sixty-eight in 1992.⁸⁷ Again, this has

⁸⁰ SUZANNE M. KIRCHHOFF, CONG. RESEARCH SERV., ECONOMIC IMPACTS OF PRISON GROWTH (2010); THE SENTENCING PROJECT, FACT SHEET: TRENDS IN U.S. CORRECTIONS 2 (Sept. 2014), http://sentencingproject.org/doc/publications/inc_Trends_in_Corrections_Fact_sheet.pdf.

⁸¹ E. ANN CARSON, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2014 7 (Sept. 2015), <http://www.bjs.gov/content/pub/pdf/p14.pdf>.

⁸² LAUREN E. GLAZE & DANIELLE KAEBLE, BUREAU OF JUSTICE STATISTICS, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2013 1 (Dec. 2014), <http://www.bjs.gov/content/pub/pdf/cpus13.pdf>.

⁸³ NELLIS, *supra* note 76, at 18.

⁸⁴ Carson & Mulako-Wangota, *supra* note 78.

⁸⁵ *The Death Penalty in 2015*, *supra* note 74.

⁸⁶ NELLIS, *supra* note 71, at 1.

⁸⁷ *Id.* at 1, 6, 13; Ashley Nellis, *Throwing Away the Key: The Expansion of Life Without Parole Sentences in the United States*, 23 FED. SENT’G REP. 27, 27 (2010).

occurred despite the fact that the violent crime rate declined by 15.6% and the murder rate declined by 12.8% from 2008 to 2012.⁸⁸

This expansion in the use of life and LWOP should be especially concerning because, unlike the death penalty, LWOP can be imposed mandatorily, with no consideration of mitigating circumstances, for non-homicide offenses, without a true proportionality review by the courts, and on juveniles. Whereas the Supreme Court ruled that mandatory death sentences were unconstitutional because they did not allow the sentencing authority to consider the “diverse frailties of humankind”⁸⁹ and has since ruled that there is virtually no limit on the mitigating circumstances that capital defendants are permitted to present and jurors or judges are required to consider,⁹⁰ at least twenty-seven states currently *mandate* LWOP for at least one offense.⁹¹ Originally, life sentences were reserved for extremely serious offenses, usually as an alternative to the death penalty for murder. Today, however, thirty-seven states allow LWOP to be imposed for non-homicide,⁹² and there are some 10,000 people serving life for *non-violent* crimes in the United States.⁹³ Many of these offenders were convicted of extremely low-level offenses. For example, thirty-one-year-old Teresa Wilson was sentenced to LWOP for selling prescription drugs to an undercover police officer; it was her first criminal conviction.⁹⁴

⁸⁸ FED. BUREAU OF INVESTIGATION, CRIME IN THE U.S. 2012, http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2012/crime-in-the-u.s.2012/tables/1tabledatadecoverviewpdf/table_1_crime_in_the_united_states_by_volume_and_rate_per_100_000_inhabitants_1993-2012.xls.

⁸⁹ Woodson v. North Carolina, 428 U.S. 280, 304 (1976).

⁹⁰ See generally, Morgan v. Illinois, 504 U.S. 719, 738-39 (1992); Penry v. Lynaugh, 492 U.S. 302, 337-38 (1989); Eddings v. Oklahoma, 455 U.S. 104, 113-14 (1982); Lockett v. Ohio, 438 U.S. 586, 608 (1978).

⁹¹ Nellis, *supra* note 87, at 28.

⁹² *Id.* at 27.

⁹³ NELLIS, *supra* note 76, at 1.

⁹⁴ Henry, *supra* note 7, at 85.

Unsurprisingly, this expanded and indiscriminate use of life and LWOP has done little to ameliorate the racial bias that is evident in the death penalty; on the contrary, it has had a devastating impact on minority communities. In 2012, nearly two-thirds of all lifers were non-white, and nearly three out of every five inmates serving LWOP were African-American.⁹⁵ In comparison, African-Americans comprised just thirty-six percent of the overall prison population⁹⁶ and thirteen percent of the general population in 2012.⁹⁷ Furthermore, there are at least 2,500 offenders serving LWOP in the United States for crimes they committed as *juveniles*.⁹⁸ No other country in the world imposes LWOP on juvenile offenders;⁹⁹ in fact, the UN Convention on the Rights of the Child, which has been ratified by every nation in the world except the United States and South Sudan,¹⁰⁰ explicitly bans LWOP for children.¹⁰¹

As stark as these numbers may be, they actually understate the depth of the problem because they do not include an unknown number of people serving *de facto* LWOP sentences that will keep them incarcerated for a term of years longer than they can reasonably expect to live (e.g., a 200-year sentence), and because “the significant majority [of those serving life terms with the possibility of parole] will die while serving

⁹⁵ NELLIS, *supra* note 76, at 10.

⁹⁶ E. ANN CARSON & DANIELA GOLINELLI, PRISONERS IN 2012: TRENDS IN ADMISSIONS AND RELEASES, 1991-2012 (Sept. 2, 2014), <http://www.bjs.gov/content/pub/pdf/p12tar9112.pdf>.

⁹⁷ The percentage of African Americans in 2012 is estimated from U.S. Census Bureau data. According to the Census Bureau, African Americans comprised 12.6% of the population in 2010 and 13.2% of the population in 2013. *Quick Facts beta*, US CENSUS BUREAU, <http://www.census.gov/quickfacts/table/PST045214/00> (last accessed Jan. 7, 2015).

⁹⁸ NELLIS, *supra* note 76, at 11.

⁹⁹ *Id.*

¹⁰⁰ AMNESTY INTERNATIONAL U.K., SOMALIA: RATIFICATION OF THE UN CONVENTION ON THE RIGHTS OF THE CHILD A BREAKTHROUGH (Jan. 20, 2015), <http://www.amnesty.org.uk/press-releases/somalia-ratification-un-convention-rights-child-breakthrough>.

¹⁰¹ See Natasja Sheriff, *UN Expert Slams US as Only Nation to Imprison Kids for Life Without Parole*, AL JAZEERA AMERICA (Mar. 9, 2015), <http://america.aljazeera.com/articles/2015/3/9/un-expert-slams-us-as-only-nation-to-sentence-kids-to-life-without-parole.html>.

out their sentence.”¹⁰² Parole boards are becoming less likely to grant parole to lifers at all, and when they do offer release, they are doing so only after longer terms of incarceration. In California, for example, only two to five percent of parole applications filed by lifers are granted, and the majority of those that are granted are still rejected by the governor.¹⁰³ According to one estimate, lifers admitted to prison in 1997 will have to serve thirty-seven percent longer than those admitted in 1991 (twenty-nine years versus 21.2 years) before being released.¹⁰⁴

One of the primary reasons that life and LWOP sentences have been excluded from the sentencing reform discussion is that abolitionists and other so-called liberal organizations such as the ACLU have been *promoting* LWOP as an alternative to death. We are not suggesting that the unprecedented growth in the use of life and LWOP sentences is entirely (or even mostly) attributable to the recent successes of abolitionists, but history suggests that there is some relationship between LWOP and death penalty abolition. Prior to the Supreme Court’s temporary ban on capital punishment in *Furman*, only seven states had LWOP as a possible penalty.¹⁰⁵ In direct response to *Furman*, three states passed LWOP statutes, and today, with annual death sentences at historic lows, the only state without a LWOP statute is Alaska.¹⁰⁶ In fact, there are now thirty-four states that allow *juveniles* to be sentenced to LWOP.¹⁰⁷ Public opinion polls consistently show that support for the death penalty declines when people are given LWOP as an option.¹⁰⁸

¹⁰² Henry, *supra* note 7, at 70.

¹⁰³ *Id.* at 69.

¹⁰⁴ MARC MAUER ET AL., THE SENTENCING PROJECT, THE MEANING OF “LIFE”: LONG PRISON SENTENCES IN CONTEXT 3 (2004), http://www.sentencingproject.org/doc/publications/inc_meaningoflife.pdf.

¹⁰⁵ NELLIS, *supra* note 76, at 3.

¹⁰⁶ *Id.*

¹⁰⁷ JOSHUA ROVNER, THE SENTENCING PROJECT, POLICY BRIEF: JUVENILE LIFE WITHOUT PAROLE, 1, (Apr. 2016), http://sentencingproject.org/doc/publications/jj_Juvenile_Life_Without_Parole.pdf.

¹⁰⁸ *See Death Penalty*, GALLUP, (Oct. 15, 2015), <http://www.gallup.com/poll/1606/death-penalty.aspx>.

As the death penalty has become less and less popular, LWOP and other increasingly lengthy prison terms have become more popular.

Ironically, the abolitionists' support for LWOP and other lengthy prison terms actually negates their primary rationale for abolition. While abolitionists are correct that a single death sentence is several times more expensive than a single LWOP sentence, as these numbers demonstrate, there is not a simple one-for-one replacement. LWOP and other lengthy prison terms are being used with greater frequency and in cases for which death was never a possibility. At a cost of more than thirty thousand dollars per inmate per year,¹⁰⁹ the explosion in the use of virtual life sentences completely offsets any money that may be saved by abolishing the death penalty, especially when one considers the increased cost of caring for older inmates. Because they require more medical care and special accommodations, such as handicap-accessible restrooms, wheelchair ramps, or separate housing to protect them from younger inmates, it costs two to three times more to incarcerate inmates who are over the age of fifty than it does to incarcerate younger inmates.¹¹⁰

Nonetheless, because of the proliferation of life and other extremely lengthy prison sentences, the size of the elderly population in prison has been growing at an extraordinary rate. Between 1995 and 2010, the number of prisoners over the age of fifty-five grew six times faster than the general prison population, and from 2007 to 2010, the

¹⁰⁹ Per inmate expenditures can only be estimated because there are fixed correctional costs that do not fluctuate with the inmate population. The ACLU estimates that it costs, on average, \$34,135 to house each inmate, while Henrichson and Delaney estimate that cost at \$31,286. ACLU, AT AMERICA'S EXPENSE: THE MASS INCARCERATION OF THE ELDERLY ii (June 2012), https://www.aclu.org/files/assets/elderlyprisonreport_20120613_1.pdf; CHRISTIAN HENRICHSON & RUTH DELANEY, VERA INSTITUTE OF JUSTICE, THE PRICE OF PRISONS: WHAT MASS INCARCERATION COSTS TAXPAYERS 9 (Jul. 20, 2012), <http://www.vera.org/sites/default/files/resources/downloads/price-of-prisons-updated-version-021914.pdf>.

¹¹⁰ ACLU, AT AMERICA'S EXPENSE, *supra* note 1089, at xiv; *See generally*, Jeff S. Erger & Randall R. Beger, *Geriatric Nursing in Prisons Is a Growing Concern*, CORRECTIONS TODAY 122 (Dec. 2002).

number of prisoners over the age of sixty-five increased at a rate ninety-four times greater than the general prison population did.¹¹¹ Traditionally, prisoners have been fairly young since crime tends to be the province of the young, but in 2014, a majority of prison inmates in the US was over the age of thirty-five, and more than one out of every six was over the age of fifty—well past their crime-prone years!¹¹² It is projected that by the year 2030, more than one-third of all American prisoners will be over the age of fifty-five—an increase in raw numbers of 4,400% since 1981.¹¹³ It now costs US taxpayers sixteen billion dollars per year just to incarcerate those who are over the age of fifty.¹¹⁴ In comparison, the total cost of the 8,300 death sentences issued between the re-instatement of the death penalty in 1973 and the end of 2011 is estimated to be about twenty-five billion dollars¹¹⁵—an average of 641 million dollars per year. It thus seems that the attempt to save money by abolishing the death penalty could be backfiring by contributing to the dramatic increase in the number of expensive, elderly inmates who pose little public safety risk.

Conclusions & Recommendations

Abolitionists often claim that they must embrace LWOP as an alternative to death because to do otherwise would be to allow the perfect to become the enemy of the good. But as the realities demonstrated in this piece indicate, it is not at all clear that LWOP is better than death. Both sentences end with a coffin, but LWOP does not afford the same due process protections as a formal death sentence, and LWOP sentences have been

¹¹¹ HUMAN RIGHTS WATCH, OLD BEHIND BARS: THE AGING PRISON POPULATION OF THE UNITED STATES 6 (Jan. 2012), http://www.hrw.org/sites/default/files/reports/usprisons0112webwcover_0_0.pdf.

¹¹² CARSON, *supra* note 81.

¹¹³ ACLU, *supra* note 109, at i.

¹¹⁴ *Id.* at 28.

¹¹⁵ RICHARD C. DIETER, DEATH PENALTY INFO. CTR., THE 2% DEATH PENALTY: HOW A MINORITY OF COUNTIES PRODUCE MOST DEATH CASES AT ENORMOUS COSTS TO ALL 15 (Oct. 2013), <http://www.deathpenaltyinfo.org/documents/TwoPercentReport.pdf>.

adopted far more liberally than death ever was, being used for a whole host of non-homicide offenses—including non-violent crimes—and for juvenile offenders. Both sentences are brutal, degrading, inhumane, and racist. Yet there is one thing the death penalty gets right, one area where it is better than the rest of the American judicial system: super due process. But in a marriage of convenience with fiscal conservatives, anti-death penalty activists have latched onto the one thing the death penalty gets right as *the* reason to abolish the death penalty. This sets a very dangerous precedent because, in effect, it legitimizes the excessively punitive nature of American penal sanctions and the assaults on prisoners' and appellate rights. If the death penalty is abolished because super due process costs too much (rather than because it is inhumane), it becomes extremely difficult, if not impossible, to argue that other prisoners should have the very rights that were the reason the death penalty was abolished.

We recognize that nothing we have stated in here will convince death penalty supporters to alter their position, but that does not mean we seek to reinstate the death penalty. Rather, the goal of this essay is to convince LWOP supporters to stop framing the debate as a choice between LWOP and death because LWOP is just another form of the death penalty, it is plagued by the same problems as the death penalty, it is not accompanied by the same due process protections, and it has become increasingly used for a whole host of offenders who were never at risk of an execution. Therefore, abolitionists would do well to take a different path, one that challenges the death penalty while advocating for the inherent humanity of all people and acknowledging the fallibility of the system in *all* criminal cases. To accomplish this task, we make the following three recommendations.

First, abolitionists need to stop advocating for LWOP and recognize that LWOP is simply another form of the death penalty that should also be abolished. Arguing that LWOP is better than the death penalty is akin to saying the gas chamber is better than a firing squad because the gas chamber takes longer to kill the person, or saying that executing someone after ten years is better than executing him or her after eight years. We are not suggesting that killers should avoid severe penalties for their crimes, but there needs to be a realization that it is impossible to determine “*at the time of sentencing* that the offender will forever be beyond redemption.”¹¹⁶ In fact, research suggests that older inmates who have served long periods in prison are especially unlikely to recidivate.¹¹⁷ For example, one study found that paroled lifers are less than one-third as likely to recidivate as other paroled inmates are,¹¹⁸ and the Pennsylvania Advisory Committee on Geriatric and Seriously Ill Inmates concluded that in Pennsylvania, inmates who are fifty years old or older when they are released have a recidivism rate around one percent. Of these, only two were convicted of a new violent offense, and both of these individuals were mentally ill. The report also noted that in Ohio, none of the twenty-one inmates released in 2000 who were at least fifty years old and had served at least twenty-five years in prison committed a new crime in the three years after they were released.¹¹⁹

Of course, there are many who might claim that these low recidivism rates are irrelevant because the goal of punishment is retribution rather than rehabilitation.

However, these individuals are unlikely to support death penalty abolition at all, and this

¹¹⁶ Henry, *supra* note 7, at 88.

¹¹⁷ Nellis, *supra* note 87, at 28-29.

¹¹⁸ MAUER ET AL., *supra* note 104.

¹¹⁹ SCOTT THORNSLEY ET AL., GEN. ASSEMB. OF THE COMMONWEALTH OF PENN., JOIN STATE GOV'T COMM'N REPORT OF THE ADVISORY COMM. ON GERIATRIC AND SERIOUSLY ILL INMATES 79-81 (June 22, 2005), <http://jsg.legis.state.pa.us/resources/documents/ftp/publications/2005-40-INMATES%20REPORT.pdf>.

focus on retribution is one of the reasons that we argue below that abolitionists need to change the frame and alter the philosophical justifications they offer for punishment. We also recognize that not everyone can be rehabilitated and that there may be some people who can never be released. But it paints with too broad of a brush to assume that all murderers are inherently evil persons with no potential for reform or redemption. There are numerous stories of killers successfully re-integrating. In fact, when rehabilitated death row inmates and lifers are successfully integrated back into society, they often dedicate their lives to educating society about the causes of crime and engage in the prevention and early intervention of criminal behavior among those headed down a self-destructive path. The value that these ex-offenders offer to society only serves to increase public safety.¹²⁰ Therefore, “[A] reliable mechanism should always be in place to review personal change and consider evidence of remorse, as well as to assess the cost of continued confinement, including paying mounting medical and housing costs for those who no longer pose a threat to public safety.”¹²¹

This means that *all* life sentences should come with the *possibility* (but by no means guarantee) of parole. Unlike the perfunctory review performed by political appointees that is typical today, this process should entail a true, in depth review of the inmate’s crime, institutional record, and potential dangerousness that is conducted by correctional professionals, who can offer an impartial and expert assessment of the prisoner’s progress, his or her likelihood of abstaining from crime, and a variety of other

¹²⁰ To learn about two such stories of redemption, see WILBERT RIDEAU, *IN THE PLACE OF JUSTICE: A STORY OF PUNISHMENT AND DELIVERANCE* (2010); Amita Sharma, *After Woman Spends 18 Years in Prison for Killing Her Pimp, She Starts Anew*, KPBS (Aug. 12, 2014), <http://www.kpbs.org/news/2014/aug/12/freedom-sara-kruzan-means-cleansing-reconnecting-1/>.

¹²¹ NELLIS, *supra* note 76, at 18.

relevant factors in order to allow “those prisoners who no longer need to be incarcerated” to be released.¹²²

We recognize that advocating for LWOP may be a strategic move on the part of abolitionists to gain public support. After all, polls indicate that when they are given the alternative of LWOP, Americans are far less likely to support the death penalty,¹²³ so it makes sense to offer LWOP as the alternative to death. However, public opinion is quite responsive to political activity,¹²⁴ so the abolitionist community can shift public opinion in this regard. In fact, there is evidence that the public support for LWOP as an alternative to death came about as a result of activism by abolitionists—in particular their alliance with supporters of tough-on-crime policies.¹²⁵ Therefore, if abolitionists can move public opinion away from death and toward LWOP, they can also move public opinion away from LWOP and toward life with parole. An excellent example of this very shift is evident in the rapidly changing attitudes toward juvenile offenders. Five years after getting the Supreme Court to abolish the juvenile death penalty in *Roper v. Simmons*,¹²⁶ activists were able to get the Court to abolish juvenile LWOP in non-homicide cases,¹²⁷ and a mere two years after that, the Court ended the use of mandatory LWOP sentences in juvenile cases.¹²⁸

Secondly, abolitionists need to stop touting the cost savings of abolition and advocate for an *expansion* of appellate rights. If they are legitimately concerned with wrongful convictions, it makes no sense to support a system that makes it exponentially

¹²² Nellis, *supra* note 87, at 30.

¹²³ GALLUP, *supra* note 108.

¹²⁴ See KATHERINE BECKETT & THEODORE SASSON, *THE POLITICS OF INJUSTICE: CRIME AND PUNISHMENT IN AMERICA* 129-60 (2d ed., 2004).

¹²⁵ Steiker & Steiker *supra* note 5, at 2-3.

¹²⁶ 543 U.S. 551 (2005).

¹²⁷ *Graham v. Florida*, 560 U.S. 48 (2010).

¹²⁸ *Miller v. Alabama*, 132 S. Ct. 2455 (2012).

more difficult to uncover wrongful convictions. Mistakes are inevitable; therefore, every available effort should be made to look for and uncover those errors:

Many precautions are taken in death-eligible cases because of the gravity and permanency of this punishment, and yet even with these in place the death penalty has been clearly documented to be plagued with deficiencies. It is worrisome that the same precautions are not taken in cases that could result in a parole-ineligible life sentence, what some call a living death sentence.¹²⁹

This expansion of appellate rights needs to be accompanied by the creation of a specialized bar to deal with appeals of inmates serving long-term sentences. There are highly specialized attorneys that handle capital cases and capital appeals; there is no comparable bar dedicated to handling LWOP cases, which contributes to the exceptionally high failure rate of non-capital criminal appeals.¹³⁰ Although providing this type of court access to all defendants may be expensive, the alternative is thousands of innocent people locked in prison, many of whom will die there.¹³¹

Of course, expanding appellate rights is not without its drawbacks. Doing so runs the risk of causing additional pain to the survivors of victims, because they may be required to endure repeated court appearances that will prevent them from receiving closure or force them to continually relive the trauma of the original crime. In fact, one of the points legislators in New Jersey, Maryland, and Nebraska used to argue in favor of abolition was the negative impact that death penalty appeals had on victims' survivors.¹³² Despite these drawbacks, it is still important to make systems of error correction more widely accessible because when the wrong person is imprisoned, the guilty party remains

¹²⁹ Nellis, *supra* note 87, at 30.

¹³⁰ *Id.*

¹³¹ If even just 1% of those inmates sentenced to one year or more are innocent, that amounts to more than 15,000 innocent inmates in American prisons. Authors' calculations from CARSON, *supra* note 81, at 1 (stating that an estimated 1,561,500 prisoners were held in state and federal correctional facilities).

¹³² See Berman, *supra* note 43; Kevin H. Wozniak, *Legislative Abolition of the Death Penalty: A Qualitative Analysis*, 57 *STUD. IN L., POL., & SOC.* 31 (2012).

free to commit more crimes and create more victims. By making errors easier to detect, it will become more likely that the actual guilty party can be identified and apprehended, thus reducing the overall number of victims. Furthermore, survivors are actually best served by a process that ensures that the correct person is incarcerated. Many victims' rights groups have identified punishment as the primary victims' right,¹³³ but when the wrong person is incarcerated, the goal of punishing the actual offender is not being met. Relatedly, a process that increases the certainty that the actual perpetrator has been identified and can correct the errors that will inevitably occur can actually help victims heal. For example, Jenny Thompson was aided in the healing process by authoring a book with the man who had been wrongfully convicted of raping her based upon her mistaken eyewitness testimony.¹³⁴ Without a process to review convictions, this healing would have proven to be much more of a challenge. A final consideration when evaluating the impact of expanded appellate rights on victims is the fact that those who are wrongly convicted are victims too—victims of a fallible justice system—so their rights and pain need to be considered as well. When the wrong person is convicted, everyone suffers. A process that can better identify and correct wrongful convictions will benefit everyone—victims, the wrongly incarcerated, and society.

Lastly, abolitionists need to adopt a broader view of their goals and change the framework. They cannot simply accept the same “tough-on-crime” rhetoric that has led to America’s incarceration binge, and they cannot simply focus on the costs of the death penalty. If they want to make any sustained progress against the inhumanity and brutality

¹³³ See BECKETT & SASSON, *supra* note 124, at 140-149.

¹³⁴ Brandon L. Garrett, *Getting It Wrong: Convicting the Innocent*, SLATE (Apr. 12, 2011), http://www.slate.com/articles/news_and_politics/jurisprudence/features/2011/getting_it_wrong_convicting_the_innocent/how_eyewitnesses_can_send_innocents_to_jail.html

of American penal policy, then they need to adopt a frame that explicitly focuses on human rights and attacks the philosophical tenets that justify capital punishment and other excessively punitive penalties. Otherwise, even if they accomplish complete abolition, they will simply be left with another cruel, degrading, inhumane, and ineffective punishment in its place—one that is used far more often, with significantly less judicial oversight, and for substantially less severe crimes.¹³⁵ Only by adopting a human rights framework will it be possible to see offenders as fellow human beings, question the goal of punishment, and alter the retributive focus of the current American penal state. We acknowledge that many Americans view retribution as the primary goal of punishment, but when abolitionists succumb to this temptation, they end up inadvertently supporting the expansion of the penal state and the dehumanization of offenders and drastically reduce their means of challenging other draconian penalties. Therefore, it is critical that death penalty opponents attack the retributive tenets upon which the current carceral regime is built and instead focus on the humanity and redeemability of offenders. This is not to suggest that there is no room for retribution in sentencing policies, but it should not be the *primary* sentencing rationale.

In most of the rest of the world, the anti-death penalty movement has already adopted a human rights framework and successfully used it to challenge not just the death penalty, but a whole host of other harsh punishments. As mentioned above, LWOP is unavailable for juvenile offenders anywhere in the world outside the United States, and in 2013, the European Court of Human Rights ruled that LWOP sentences for *adults* violate the European Convention of Human Rights because they constitute “inhuman or

¹³⁵ Henry, *supra* note 7.

degrading treatment or punishment.”¹³⁶ Several European and Latin American nations have even outlawed life with parole because such punishments are considered a violation of human rights.¹³⁷ Getting to this point, however, requires a fundamental reframing of the narrative. It requires a focus on the inherent humanity of offenders and on the possibility for reform:

The arguments in favor of having no life sentence at all and the arguments for having a fixed minimum period after which release must be considered have essentially the same foundation: No human being should be regarded as beyond improvement and therefore should always have the prospect of being released.¹³⁸

Some abolitionists in the US have already adopted this human rights frame. For example, Human Rights Watch (HRW) opposes “the death penalty in all cases as inherently cruel.”¹³⁹ This approach allows HRW to criticize other “disproportionately severe” penalties in the US as violative of “human rights laws binding on the United States that prohibit cruel, inhuman or degrading treatment or punishment....”¹⁴⁰ Senator Ernie Chambers, who sponsored Nebraska’s 2015 death penalty repeal justified his position by referring to “human dignity,”¹⁴¹ and in Maryland, which abolished the death penalty in 2013, Governor Martin O’Malley utilized a human rights perspective when he urged the legislature to repeal capital punishment in 2009: “[f]reedom, justice, the dignity of the individual, equal rights before the law – these are the principles that define our

¹³⁶ *Case of Vinter and Others v. the United Kingdom*, 66069/09, 130/10, and 3896/10 Eur. Ct. H.R. (2013).

¹³⁷ Henry, *supra* note 7, at 78-79.

¹³⁸ Dirk van Zyl Smit, *Outlawing Irreducible Life Sentences: Europe on the Brink?* 23 FED. SENTENCING REP. 39, 40 (2010).

¹³⁹ HUMAN RIGHTS WATCH, EXCESSIVE PUNISHMENTS AND RESTRICTIONS (2009) https://www.hrw.org/sites/default/files/related_material/2009_USProgram_Brochure.pdf.

¹⁴⁰ *Id.*

¹⁴¹ Julie Bosman, *Nebraska Bans Death Penalty, Defying a Veto*, N.Y. TIMES (May 27, 2015), http://www.nytimes.com/2015/05/28/us/nebraska-abolishes-death-penalty.html?_r=0.

character as a people. And so we must ask ourselves: are these principles compatible with the ‘civil’ taking of human life?”¹⁴²

Furthermore, although the primary focus of the final report of the Maryland Commission on Capital Punishment was on pragmatic issues such as discrimination, cost, the risk of executing the innocent, and the severity of LWOP and its capability of “gravely punishing the guilty defendant,”¹⁴³ the report also included a section on religious views on capital punishment. Written by two religious leaders, this section discussed “the sanctity of human life” that prohibits retributive homicide and even compared capital punishment to other “cruelties ... whose time has come and gone, noting that it persists mostly in societies with which we hesitate to identify ourselves,” such as torture, mutilation, and the public display of executed bodies.¹⁴⁴ The two religious leaders went on to argue that even if capital punishment could be applied without error or racial bias “we should not resort to the death penalty, not even in the case of one who takes the life of another human being....”¹⁴⁵

Adopting this human rights frame will allow abolitionists to view convicted killers as fellow human beings. It will empower abolitionists to continue attacking the death penalty without having a negative ripple effect on the rest of the justice system, in a way that opens up doors to attacking other excessively punitive sanctions and expands opportunities to challenge and discover wrongful convictions of all kinds. This is not a criticism of the current abolitionist movement. The abolitionists’ embrace of LWOP is

¹⁴² Repeal of Capital Punishment in Maryland: Hearing Before the State of Maryland Senate Judicial Proceedings Committee (Feb. 18, 2009) (statement of Martin O’Malley, Governor the State of Maryland), reprinted at <http://votesmart.org/public-statement/411137/hearing-of-the-state-of-maryland-senate-judicial-proceedings-committee-repeal-of-capital-punishment-in-maryland#.V2s7EpMrKwQ>.

¹⁴³ CIVILETTI ET AL., *supra* note 53, at 109.

¹⁴⁴ Mark Loeb & Denis Madden, *A Religious Perspective on Capital Punishment*, in CIVILETTI ET AL., *supra* note 53, at 105-06.

¹⁴⁵ *Id.* at 106-107.

understandable given its ability to garner support for abolition. However, this position is akin to hiding under a tall tree during a thunderstorm. It may make intuitive sense, but upon further examination of the facts, it turns out to be counterproductive. As we have pointed out here, LWOP is essentially the same as a death sentence, but it is not accompanied by the same due process protections or opportunities to challenge the accuracy of the conviction, and it has become used far more frequently than death ever was and for far less serious offenses. Like the death penalty, LWOP sentences deny the humanity of offenders and give up on any hope of rehabilitation. This denies society the opportunity to be repaid by and to benefit from the positive contributions offenders may make in the future. As such, we should not replace one death sentence with another. That is not progress.