

Montana State Legislature

2013 Session

Additional Documents include:

- * **Business Report**
- * **Roll Call- attendance**
- * **Standing Committee Reports,**
- * **Table Bills, Fiscal reports etc.**
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- * **Witness Statements**
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 - ~ **Petitions if any?**
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BUSINESS REPORT

**MONTANA HOUSE OF REPRESENTATIVES
63rd LEGISLATURE - REGULAR SESSION**

HOUSE JUDICIARY COMMITTEE

Date: Thursday, February 14, 2013
Place: Capitol

Time: 8:00 AM
Room: 137

BILLS and RESOLUTIONS HEARD:

HB 236 - Eliminate license exemption for certain private adolescent treatment programs - Rep. Ellie Boldman Hill

HB 370 - Abolish death penalty and replace with life in prison without parole - Rep. Doug Kary

HB 438 - Establish procedures for landlord tenant actions in justice court - Rep. Nancy Ballance

EXECUTIVE ACTION TAKEN: None

Comments:



REP. Krayton Kerns, Chair

HOUSE OF REPRESENTATIVES
Roll Call
JUDICIARY COMMITTEE

DATE: 2/14/2013

<u>NAME</u>	<u>PRESENT</u>	<u>ABSENT/ EXCUSED</u>
REP. JERRY BENNETT, VICE CHAIR	X	
REP. MARGIE MACDONALD, VICE CHAIR	X	
REP. ALAN DOANE	X	
REP. CAROLYN PEASE-LOPEZ	X	
REP. KEITH REGIER	X	
REP. VIRGINIA COURT	X	
REP. CLAYTON FISCUS	X	
REP. BRIDGET SMITH	X	
REP. DENNIS LENZ	X	
REP. JENNY ECK	X	
REP. KIRK WAGONER		
REP. SARAH LASZLOFFY	X	
REP. WENDY WARBURTON		exc
REP. ELLIE BOLDMAN HILL		X
REP. JERRY O'NEIL	X	
REP. JENIFER GURSKY	X	
REP. DAVID HALVORSON	X	
REP. RYAN LYNCH	X	
REP. MARK BLASDEL		exc
REP. KRAYTON KERNS, CHAIR	X	

**MONTANA House of Representatives
Visitors Register
HOUSE JUDICIARY COMMITTEE**

Thursday, February 14, 2013

HB 370 - Abolish death penalty and replace with life in prison without parole

Sponsor: Rep. Doug Kary

PLEASE PRINT

Name	Representing	Support	Oppose	Info
Steve Dogiakos	MT Conservatives Concerned About DP	X		
Jennifer Kirby Hermanson	Montana Abolition Coalition	X		
Katie McKeown	MT Abolition Coalition	X		
Rachel Carroll Rivas	MT Abolition Coalition / MHRN	X		
Abigail St. Lawrence	Montana Assn. of Churches	X		
Sarah Craft	Equal Justice USA	X		
Violet MadPlume	Sister of a murder vic.	X		
Pam Shelden	Montana Assoc. of Churches	X		
Kate Olp	MT Abolition Co.	X		
Mark Beall	ACLU	X		
Greg Harding	Victims		X	
Matt Kuntz	NAMI Montana	X		
ROBERT KOLAR	Self	X		
Garrett Bacon	Self		X	
Jessie McQuillan	MT Innocence Project	X		
Steve Hinebaugh	Self		X	
Jordan D. Hill	Self		X	
Laura d'Esteve	MT Catholic Conference	X		
FRANK J. SMITH	SELF	X		
Duane Mitchell	Richland Co. commissioners		X	
Melissa Barcroft	Self	X		
Karen Pfeiffer	Self	X		

Please leave prepared testimony with Secretary. Witness Statement forms are available if you care to submit written testimony.

**MONTANA House of Representatives
Visitors Register
HOUSE JUDICIARY COMMITTEE**

Wednesday, February 13, 2013

HB 370 - Abolish death penalty and replace with life in prison without parole

Sponsor: Rep. Doug Kary

PLEASE PRINT

Name	Representing	Support	Oppose	Info
William Hooks	Office of Public Defender			X
Marguerite Denmark	Mt. Abolition Coalition	X		
John Connor	self / Intl	X		
Scott Cricht	A & L U	X		
BETH BRENNEMAN	Disability Rights MT	X		
Tim Schroeder			X	
Leanne	MT Abolition Coalition	X		X
Supanne Johnson	Self	X		
Jim Brown	CONVICTS			
	concerned about the DEATH PENALTY	X		
Saul Rossi	MCADSV	X		
Jamee Greer	MHRN	X		
Jean H. Young	RICHLAND CO.		X	
Roy Ballalant	Self HD 28		X	
Tommy	HD 45		X	
Jeff Lagzloff	Self		X	
Lewis K. Smith	Power Court Attorney		X	
Kate Westerman	Self	X		
Dennis M. Taylor	ACLU	X		
Rickey Linfelt	Self		X	
Sharon Lodge			X	

Please leave prepared testimony with Secretary. Witness Statement forms are available if you care to submit written testimony.

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**MONTANA House of Representatives
Visitors Register
HOUSE JUDICIARY COMMITTEE**

Thursday, February 14, 2013

HB 370 - Abolish death penalty and replace with life in prison without parole

Sponsor: Rep. Doug Kary

PLEASE PRINT

Name	Representing	Support	Oppose	Info
Karla Gray	Self	X		
Lavonne Hohn	ABC O	X		
Susan DeBree	Self Grandmother & Mother Montana Assoc. of Churches	X		
DIANA COTE	Mont Abolition Coalition	X		
Steve Eckels	Montana State ⁴⁷⁰⁰ Union		X	
Marinda Jaeger Lane	MT Abolition Co.	X		
Harris David	Montana ST Prison		X	
Sarah Beck	MT Abolition Coalition	X		
Ziaor Ziegler	MT LAFIT CONFERENCE ABOLITION COALITION	X		
Elizabeth A. Hawthorn	"	X		
Bill Mangels	Victims		X	
Shelly G. Parke	Abolition Coalition	X		
Caroline M. Simpson	VICTIMS	X		
Vicki Madeline	Victims	X		
Emily Roehm	Evangelical Perspective	X		
Dr. Gary Mihelich	NAMI-HELM	X		
Bob Filipowich	self	X		
FRANK J SMITH	SELF	X		
Maury Lambert	Gallatin County Atty		X	
Brett Linneweber	Park County Atty		X	
Kate Oly	AbCo	X		
Michael W. Wurfel	Montana Catholic Conference Bishop	X		

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**MONTANA House of Representatives
Visitors Register
HOUSE JUDICIARY COMMITTEE**

Wednesday, February 13, 2013

HB 236 - Eliminate license exemption for certain private adolescent treatment programs

Sponsor: Rep. Ellie Boldman Hill

PLEASE PRINT

Name	Representing	Support	Oppose	Info
Jim Almus	Montana Children's Institute	✓		
Matt Kurb	NAMI Madras	✓		
Karen Proctor	Self	✓		
Joslyn Hunt	Dept. of Labor			X
Beth Bronneman	Disability Rights MT	X		
Travis Butcher	Self		X	
Janae Butcher	Self		X	
CHUCK SWENSON	SELF		X	
Rosh Butcher	Self		X	
Rick Bondy	SELF		X	
Jonathan Larsson	Self		X	
J.C. Croan	Self		X	
LAURA SILGEN	SELF		X	
Stanley Barnes	Self		X	
Ned Keut	Self		X	
Maxine Keut	Self		X	
Kim Beaudin	Self		X	
DEANNE HAINES	SELF		X	
Dorothy M. Kemery	self		X	
Jon D. Keeney	Self		X	
John SINGARD	SELF		X	
Adam Houghton	self		X	

Please leave prepared testimony with Secretary. Witness Statement forms are available if you care to submit written testimony.

tall, graceful trees. After the men position the casket, Lori and I go in alone. She uses the key the funeral director had given her and opens the casket to see him for the final time. Her knees buckle, and the mayor puts his arm around her and says, "Be strong, Lori, be strong."

The next morning in the church, we sit in the first row near the casket and people stream in, bringing flowers and notes, leaning over and kissing Lori, clasping her hand, touching the casket, some of them crying. Some have brought their children, who look up at Lori with awe, offering a consoling kiss or a small clutch of flowers. Four men in dark suits and white gloves stand as honor guard around Joe's coffin.

Fifteen minutes before Mass begins, press photographers are allowed into the church. Luciano has briefed Lori beforehand about the photographers, so she is prepared for them. I notice how calm and poised she is. Her ardent but futile efforts to save Joe's life have captivated the hearts of the Italian people.

The little church is packed. Some, unable to get inside, stand on the steps, listening to the singing and snatches of the priest's words at the homily. Joseph O'Dell's life and death resembles that of Jesus, the priest says; both were innocent and executed by the state. Both endured humiliation, agony, and cruel suffering. But now we believe that Joseph O'Dell has joined Jesus in glory; life eternal has conquered earthly death.

When the priest finishes speaking, loud and sustained applause fills the little church. I can't help but contrast this funeral with the others I have attended of executed men: small clutches of family members huddled around the grave, dreading publicity of any kind. I remember that just before the funeral ceremony of Robert Lee Willie, there was a ruckus outside the funeral home when one of his aunts ran off a photographer, threatening to hit him with her shoe.

At the conclusion of the Mass, the priest sprinkles holy water on Joe's casket and the choir sings, "May the angels lead you into paradise. . . ." The pallbearers raise the casket to their shoulders and carry it out of the church. Using two white bands, the men slowly lower the casket into the grave, and once again the crowd applauds. Then the men put into place the memorial slab, on which is written in Italian and English:

JOSEPH O'DELL * 165

JOSEPH ROGER O'DELL III
BELOVED HUSBAND OF LORI URS O'DELL
HONORARY CITIZEN OF PALERMO
KILLED BY VIRGINIA USA

IN A BRUTAL AND MERCILESS JUSTICE SYSTEM
BORN SEPTEMBER 20, 1941
DIED JULY 23, 1997

Lori Urs never faltered in her efforts to prove the innocence of Joseph O'Dell. After his death, she made one last attempt to gain possession of the evidence for DNA testing. As Joe's widow, she filed a legal suit demanding Joe's clothes and other personal effects as part of his legal estate. But the state of Virginia refused to relinquish the items, arguing that as state's evidence they were not subject to probate law. And once again the Virginia courts backed them up. Shortly after the court's decision in their favor, a state official announced that all evidence in the O'Dell case had been destroyed.⁵⁶

On September 25, 2003, six years after the execution of Joseph O'Dell, I receive an e-mail message from Steven Watson, the jailhouse snitch who was so instrumental in putting Joe on death row. He had asked me to respond, and when I did so one more sad story of a human being under pressure in the criminal justice system came pouring out:

AFTER THE ORDEAL WHICH OCCURRED IN VA,
THANK GOD I GOT MY LIFE STRAIGHT AND IN 1983
MARRIED, HAD THREE CHILDREN, WAS MARRIED
UNTIL 1989. AFTER TWO YEARS, I REMARRIED IN 1990,
WE JUST CELEBRATED 14 YEARS. YOU KNOW WHEN I
WAS IN JAIL WITH JOE ODELL, WE DID TALK A LOT, I AT
THE TIME WAS FACING MANY YEARS IN PRISON, I WAS
YOUNG, SCARED, NIEVE TO THE LAW. AT THE TIME
THE ONLY THING ON MY MIND WAS TO FIND A WAY
OUT OF THE TROUBLE I WAS IN. THEN I REMEM-
BERED THE THINGS THAT JOE AND I HAD SPOKE
ABOUT, THE MORE I THOUGHT ABOUT IT THE MORE
DETERMIND I WAS IN FINDING THAT ONE WAY OUT

OF MY MESS. I WAS NOT WORRIED ABOUT ANY ONE BUT MY SELF THEN I CAME UP WITH THE SOLUTION, THAT IF I WOULD SAY THAT JOE DID CONFESS TO ME, I COULD TELL THE ATHOURITIES AND GET A PLEA AGREEMENT, NEVER DREAMING THAT I WOULD HAVE TO TESTIFY ON WHAT I TOLD THEM.... I WANT SO MUCH TO TELL THE REAL STORY AND I WANT SO MUCH TO SIT DOWN FACE TO FACE WITH YOU AND GIVE YOU THE TRUE FACTS OF WHAT OCCURRED THAT SENT A INNOCENT MAN TO HIS DEATH ALL BECAUSE WHEN THE TRUTH CAME OUT* I HAD THE STATE POLICE KNOCKING AT MY DOOR, TELLING ME THAT PERJURY IS TEN YEARS IN PRISON. THEN I BEGAN THINKING HERE I AM HAPPILY MARRIED WITH CHILDREN, AGAIN FACING TIME IN PRISON AND THIS TIME BECAUSE I WANT TO MAKE AMEND AND GET EVERY THING OUT AS IT SHOULD BE.... I WAS TOLD DO IT OR ELSE IN MY CASE, TO DO A BAD THING I GOT REWARDED. TO TRY AND DO A GOOD DEED I WAS GOING TO GET PUNISHED... ME I GET OFF JOE DIES. ITS NOT RIGHT... ITS 4:30 AM....

THREE * THE MACHINERY OF DEATH

I

When I see him in the New Orleans International Airport, I can't believe it's Supreme Court justice Antonin Scalia, fiddling with the headphones of his compact disc player. I figure he's flying back to Washington, D.C., and I guess where he's been: duck hunting with my brother Louie. They met nine years ago at the wedding of one of Justice Scalia's sons, and they've been hunting buddies ever since. They pack their guns and head to Pecan Island in Louisiana, where Louie cooks up seafood gumbo and jambalaya, which he says "Nino just loves." I'm amazed by the coincidence not only that my brother Louie and Scalia are friends, but that I should encounter the justice, who calls himself part of the "machinery of death," in my hometown airport. But here we are, Scalia and I, on a Sunday night in November 2002, Concourse A, Gate 7—meeting.

Louie tried to convince me that Justice Scalia is a devout Catholic: "Sis, he's got nine kids, you know he's a good Catholic."

*Lori Urs had persuaded Watson to recant, and local media had made his recantation public. But when he was threatened with imprisonment for perjury, Watson recanted his recantation.

EPILOGUE

The journey continues.

In April 2004 Susan Sarandon telephoned to tell me that James Allridge, a man on death row in Texas with whom she had been corresponding, had a date of execution of August 26, and she felt the date was real. She was shaken. I could hear it in her voice. She had written to James for eight years and come to know him as a person, alive and filled with insight, allowing the alchemy of seventeen years on death row to transform his life. On several occasions when I visited Susan in New York, she had shown me James's art. Using ordinary colored pencils, he had found a most amazing way to draw light out of flowers.

"What should I do?" she asks.

"Just what you've been doing," I answer. "Be his friend. You give him dignity."

She said that she'd visit him, but try to keep it quiet. (Which proved to be impossible. Media awaited her when she arrived at the prison.)

One month later when Susan and I talked, she dropped a bombshell: "James wants you to be with him if he's killed."

I said, "Oh no, Susan, you should be with him. You've been his friend for eight years."

She said, "No, no, Helen, you saw the film, this is what *you* do." I thought, What is this? Life imitating art imitating life?

That's how it came about that on August 26 when James Allridge became the 325th person killed by the state of Texas, I was with him as his spiritual adviser. His appeals lawyer, Jim Marcus of the Texas Defender Service, and his hardworking team* did their utmost to save James's life. They had a video made of James's transformed life and sent it to the six members of the Texas Board of Pardons and Paroles, hoping to convince them to grant clemency, and in the petition to the appeals court and the U.S. Supreme Court James's legal team presented two new constitutional issues:

The first asked, Does the Eighth Amendment prohibit the state of Texas from incarcerating a prisoner for seventeen years, rehabilitating him into a model inmate, who enhances the safety and stability of the prison society, and then executing him based on the erroneous prediction that he would pose a threat to society if sentenced to life in prison? As had happened in the case of Karla Faye Tucker, James Allridge once again raised the question: Why kill a person who is rehabilitated?

The second questioned the constitutionality of the Texas capital sentencing statute, which, though demanding that a jury find proof *beyond reasonable doubt* for guilt (a requirement of "due process"), drastically reduced the standard for determining punishment. The Texas statute requires that for a sentence of death to be imposed a jury only need determine the *probability* that a defendant would continue to pose a threat of future dangerousness to society. The injection of the word *probability*, however, drains the "beyond a reasonable doubt" of any meaning (it would be like telling the jury it could convict if they believed—beyond a reasonable doubt—that the defendant *might* be guilty. When Jim told me of the "future dangerousness" argument, I couldn't help but wonder that if jurors in capital cases

already face the impossible task of analyzing people's *past* actions to determine the "worst of the worst" murders, how on God's green earth can they be expected to predict how human beings might act in the *future*? At least past actions yield tangible evidence that can be examined; but what is the content, the raw matter for predicting future actions? Doesn't it fly in the face of "due process of law" to punish people for what they *might* do in the future? The issue of "future dangerousness" raises a constitutional challenge particularly for Texas, which is one of only three states to allow this highly speculative consideration to play a crucial role in life and death decisions made by juries.

Unsurprisingly, the Texas Defender Service's (TDS) study of 155 Texas capital cases in which prosecutors hired experts to predict defendants' future dangerousness revealed that the so-called experts' predictions were wrong 95 percent of the time. (The study, "Deadly Speculation: Misleading Texas Capital Juries with False Predictions of Future Dangerousness" is available at: www.texasdefender.org/publications.htm.)

That's a stunning number of wrong predictions, but what else can be expected of a process based on sheer speculation? As the TDS study points out, "Beginning in the early 1980s researchers and professionals concluded that 'mental health professionals cannot predict dangerousness,' " and the American Psychiatric Association states, "the unreliability of psychiatric predictions of long-term dangerousness is by now an established fact within the profession." Predictably, prognostications of future dangerousness, are fertile fields for racial prejudice to insinuate itself. In at least seven death cases reviewed by the TDS a licensed psychologist, hired by the state, testified that, in his opinion, being a member of a minority race makes a defendant more dangerous.

As is their pattern, neither the Texas Court of Criminal Appeals nor the U.S. Supreme Court agreed to consider the constitutional issues raised in James Allridge's petition. The U.S. Supreme Court did not give a reason for not hearing James's case (it rarely does). The Texas Court of Criminal Appeals (the Texas supreme court for criminal cases) stated that it would not allow consideration of James's claims because they should have been raised by James's previous lawyers. (In other words, Sorry, Mr. Allridge. It looks like,

*Assisted by Peter M. Friedman and Lisa R. Fine of Well, Goshal & Manges LLP, a civil law firm in Washington, D.C.

even though you have provocative and interesting constitutional challenges, you're petitioning too late. It's regrettable that your previous lawyers did not have the smarts and creativity to raise the issues within the timeframe we've mandated. So, it looks like you die, Mr. Allridge.)

So, once more we see the machinery of death at work in the courts: procedural requirements valued over substance, legal mechanisms trumping what Jesus called the "weighty matters of justice and mercy."

I hope I go to my death with a tiny fraction of the poise and grace James Allridge possessed as he stepped into eternity. He asked pardon of the victim's family, thanked family and friends for loving him, and as calmly as if he were talking about going on an errand, departed with the words: "I came into this world in love and I leave it in love." And once again I found myself standing as mute witness to the protocol of death, this time in the busiest killing chamber in the United States. The night before James was killed by the state of Texas, another man, Jasen Shane Busby, had been killed, and Jim Marcus predicted fifteen more executions before the end of January 2005. As of September 27, the state of Texas accounted for half of the total number of U.S. executions in 2004. Regional disparity in the application of the death penalty could not be more pronounced, and the Fourteenth Amendment's promise of "equal protection of law" could not be more flagrantly ignored. Yet the official guardians of the Constitution continue to allow procedural requirements to shield them from taking a fresh look at the constitutional challenges that continue to arise in death cases. Justices' rigid adherence to stay the course of their own legal precedents, no matter how wrongheaded, renders them unwilling to admit, as did Justice Harry Blackmun, that "the death penalty experiment has failed." And so the southern machinery of death clanks on, for that is what it truly is, a predominantly southern practice that goes back to the days of slavery.

The last cry of the heart is my own.

I invite you to join me in the struggle to end the death penalty in the United States and around the world. Its practice demeans us all.

A page of resources follows. For a jump start go to www.moratoriumcampaign.org. For photos of Dobie Williams, Joseph

O'Dell, and Lori Urs and me with Pope John Paul II, go to www.deathofinnocents.com and www.sisterhelen.org.

Now that this book is finished, I'll once again be on the speaking circuit. It means leaving the quiet writing haven and getting on airplanes again.

See you on the road.

Life Without Parole, America's Other Death Penalty

Notes on Life Under Sentence of Death by Incarceration

Robert Johnson

American University, Washington, D.C.

Sandra McGunigall-Smith

Utah Valley University, Orem

Life without parole is examined as a form of death penalty, namely, death by incarceration as distinct from death by execution. Original interviews with a sample of prisoners (condemned prisoners and life-without-parole prisoners) and prison officers are used to develop a picture of the experience of life under sentence of death by incarceration. It is argued that offenders sentenced to death by incarceration do not pose a special danger to others in the prison world or in the free world and that the suffering they experience is comparable to the suffering endured by condemned prisoners. Life without parole thus emerges as a viable alternative to capital punishment.

Keywords: *prison adjustment; life without parole; death by incarceration; death penalty; capital punishment; supermax*

Life without parole is sometimes called a "true life sentence" because offenders are sentenced to spend the remainder of their natural lives in prison. A better term for this sentence might be *death by incarceration*, as these persons are, in effect, sentenced to die in prison. Indeed, it is argued here that the sentence of life in prison without the possibility of parole can be equally as painful as the death penalty, albeit in different ways. The sentence can thus be thought of as "our other death penalty."

Authors' Note: We wish to thank Jordan E. Segal for his helpful background research and thoughtful comments on an earlier draft of this article.

Offenders sentenced to death by incarceration suffer a "civil death." Their freedom—the essential feature of our civil society—has come to a permanent end. These prisoners are physically alive, of course, but they live only in prison. It might be better to say they "exist" in prison, as prison life is but a pale shadow of life in the free world. Their lives are steeped in suffering. The prison is their cemetery, a cell their tomb. If we as a society were to limit life without parole to aggravated murders, as we try to do with capital punishment, it could be argued that lifers¹ give their civil lives in return for the natural lives they have taken (see Johnson, 1984, 1998). Under this formulation, use of life sentences for crimes short of capital murder would be excessive and unjust. By the same token, capital punishment would be entirely unnecessary, as capital murder would be adequately punished by "our other death penalty," death by incarceration.²

Objections to replacing death by execution with death by incarceration relate to public safety (e.g., are lifers a danger to others in prison or the outside world?) and adequacy of punishment (e.g., is a life sentence sufficient punishment for capital murder?). As we shall see, life without parole does not pose a special risk to public safety and is a sanction of great severity, arguably comparable to the death sentence in the suffering it entails. Moreover, it is worth noting that one of the unique features of death by incarceration is that it allows a large window of time—much larger than that afforded by the death penalty—for evidence of innocence to emerge and thus permits the release and perhaps compensation of persons wrongly sentenced to prison for life.

A Note on Method

In portions of this article, we draw heavily on McGunigall-Smith's unpublished doctoral research conducted at Utah State Prison from 1997 to 2002. McGunigall-Smith conducted structured, tape-recorded interviews with 7 of the 11 men on Utah State Prison's death row (4 inmates refused to speak with her) as well as with an opportunity sample of 22 prisoners serving life without parole and an opportunity sample of 34 staff members assigned to supervise condemned prisoners and prisoners serving life without possibility of parole. Given the limits of sampling (a small death row group and nonrandom samples of life sentence prisoners and correctional staff), we use quotations from interviews for two main exploratory purposes: (1) to illustrate themes widely shared by McGunigall-Smith's participants and (2) to shed further light on themes firmly established in the ethnographic literature on prison life and adjustment. For more details on method, consult McGunigall-Smith (2004a, pp. 89-107).

Public Safety

Lifers in Prison

Are prisoners sentenced to life without the possibility of parole a special danger to others in the prison, the setting in which they are slated to die? Executed prisoners are dead; dead prisoners pose no threats, whereas lifers are at least potential dangers to others in the prison. Some proponents of the death penalty warn us that lifers have nothing to lose and therefore will be uncontrollably violent, injuring or killing officers and inmates at will. In the absence of the death penalty, the speculation goes, "What more can we do to deter them from violence?"

As plausible as this scenario may seem, it is dead wrong. In fact, the opposite is true. A substantial body of empirical research supports the claim that lifers are less likely, often much less likely, than the average inmate to break prison rules, including prison rules prohibiting violence. Experience in both state and federal prisons reveals that the vast majority of lifers are manageable prisoners. McGunigall-Smith's (2004a) interviews with a sample of 22 life-without-parole prisoners in Utah State Prison did not turn up a single inmate who posed a serious disciplinary problem for staff or had a violent confrontation with staff. No inmates reported ever having been assaulted by staff (save one, whose allegation was dismissed by staff and other inmates). Similarly, McGunigall-Smith's (2004a) interviews with a sample of 34 correctional officers at the Utah State Prison did not turn up a single instance in which lifers were seen by officers as any more of a threat than other inmates.

Typical of the officers' observations in McGunigall-Smith's (2004b) research is this comment: "I'm as comfortable with them as with any inmate. An inmate is an inmate to me. I view them all as the same level" (p. 1). Officers, as a rule, told McGunigall-Smith that they knew the prisoners as inmates, not as offenders; it was the inmates' prison behavior that mattered to the officers, not their crimes and not their sentences. The general wisdom was that any inmate could pose a threat at any time. The prison behavior of lifers, however, led the officers to view them as no more of a threat, and often much less of a threat, than other prisoners. As one officer who worked in a building that housed lifers related to McGunigall-Smith (2004b), "the ones in this building I'm pretty comfortable with. I know them and know what they are capable of. I know what my rapport is with the inmates in this building. I feel pretty comfortable" (p. 2).

Lifers are sometimes said to have "nothing to lose" because they can never gain release from prison, but the small rewards of prison life are of

considerable value to them (see Johnson & Dobrzanska, 2005; see also Leigey, 2007). Prison is their involuntary home for life. Accordingly, lifers strive to make the most of the life that is available to them behind bars. Most lifers begin their prison sentence in maximum, and very often supermaximum, facilities; the very bleakest of prison existence. This experience often proves to be a profoundly painful immersion into the "belly of the beast" that dramatically highlights how much lifers have to lose and how hard prison life can be if they get into trouble. As a general matter, then, self-interest guides lifers to avoid trouble because trouble jeopardizes the few privileges they can secure in the prison world and, moreover, can land them in very grim living environments. "They cope probably better," one officer at Utah State Prison told McGunigall-Smith (2004b), because unlike short termers, "they learn how to work the system. They have the best jobs and they know how to get what they want. Their disciplinary records are smaller. The longer they are here the better they cope with the system" (p. 3).

In all but 1 of the 38 states that have the death penalty (New Mexico), capital murderers can be sentenced to death or to life without parole. Many death sentences are overturned on appeal,³ with the offender typically released into the prison population with a life term (with or without parole eligibility). Significantly, research reveals that "former death row and life-sentenced capital inmates were disproportionately less likely to commit acts of serious violence in prison than non-capital offenders" (Cunningham, Reidy, & Sorensen, 2005, p. 308). Studies supporting these observations have been conducted in Texas, Missouri, Indiana, and Arizona (see Cunningham et al., 2005; Reidy, Cunningham, & Sorensen, 2001; Sorensen & Marquart, 2003; Sorensen & Wrinkle, 1998).

The premier study on the putative dangerousness of lifers was conducted in Missouri and covered an 11-year period (Cunningham et al., 2005). For our purposes, the populations under study included inmates serving sentences of life without parole for first-degree murder ($N = 1,054$) and inmates serving parole-eligible sentences ($N = 2,199$). All inmates were housed in maximum security, the level just below "supermax" prisons. Lifers were significantly less likely than parole-eligible inmates to be involved in violent misconduct (Cunningham et al., 2005, pp. 313-314). Only 1 of the 1,054 life-without-parole prisoners committed a homicide in prison. Moreover, prisoners eligible for parole were much more dangerous than life-without-parole prisoners. Indeed, parole-eligible prisoners were almost twice as likely to commit acts of violence as were life-without-parole prisoners and almost 4 times as likely to commit major assaults.

Nor are life prisoners a danger to citizens in the free world. The only means of egress from prison for these offenders, other than death, is by commutation or pardon. (Escapes from high-security prisons—by any prisoners, let alone lifers—are so rare as to pose a negligible threat to public safety.) As a practical reality, life-without-parole prisoners would only be pardoned if they were found to be innocent, in which case their release is entirely appropriate. Commutations are rare events for persons sentenced to prison, let alone a prison term of life without parole, as commutations are generally met with considerable political resistance. In the state of California alone, more than 2,500 offenders have been sentenced to life without parole since 1978; not a single one of these offenders has had his sentence commuted (Sundby, 2005, p. 38).⁴ It is interesting that most lifers fully expect to die in prison. They may hope for release, but the dominant sentiment is defeat: “My sentence is natural without. . . . I don’t *ever* expect to go out the front door. There is no possible way in all reality.” Said another lifer, “I’ll die here, hopefully soon” (McGunigall-Smith, 2004b, p. 4).

As a practical matter, it is life without parole that is the sure and swift sentence, not the death penalty. Moreover, life without parole is increasingly popular with the public—more popular in recent years than the death penalty (Death Penalty Information Center, 2006). Support for the death penalty drops dramatically when the sanction of life without parole is an option. The popularity of life without parole appears to reflect the belief that this sanction may be a better deterrent than the death penalty (because it is more certain) and, moreover, that life without parole is a penalty that spares us the risk of executing an innocent man or women. There is also the belief held by many that a life sentence without the possibility of parole guarantees that the offender will suffer greatly for the remaining days of his or her life.⁵

Life in Prison as Punishment

Life sentence inmates are manageable prisoners, some are even model prisoners, but their decent adjustment does not change the fact that their lives are marked by suffering and privation. Lifers do not adjust well because prison life is easy; they adjust well because self-interest moves them to make the most of a very difficult situation—a life confined to the barren, demeaning, and often dangerous world of the prison.

Some of us fail to appreciate the rigors of a life in prison because we do not believe prison is punishment. Prisoners are given a roof over their heads, three meals a day, and basic amenities like showers, recreation periods, and

even ready access to television. Some prisons are air-conditioned. Because prisoners do not have to work to be fed, clothed, and housed, it may appear—even to the inmates themselves—that they are being coddled. But the deeper reality is emotional, not physical, and it is the emotional aspects of prison life that inmates find enormously stressful. As one inmate told McGunigall-Smith (2004b):

It may sound weird but the actual physical part of being here is really easy. It almost makes you feel like you're a baby because you're fed, all your bills are taken care of. You don't have to do anything. You don't have to get out of bed in the morning if you don't want to. . . . Everything is provided. But, the emotional is hard. I hate this place with a passion. I cannot stand it. Sometimes I wake up and start looking around me and then I just lay there with my eyes closed because I just don't want to look at it. I don't want to see the concrete. I don't want to remember that I'm here. (p. 5)

One source of evidence on the extent of pain associated with a life sentence is provided by condemned prisoners who tell us point blank that a life sentence is worse than a death sentence. These are not just empty words. A remarkable 123 prisoners—11% of the 1,099 executions carried out at the time of this writing—have dropped their appeals and allowed themselves to be killed (Death Penalty Information Center, 2008). Some of these “volunteers,” as they are sometimes called, lived on death rows that afforded more liberties and comforts than many maximum-security prisons. In Utah, for example, death row inmates with clean disciplinary records (which is true for the majority of condemned prisoners) have up to 6 hours out of the cell, during which time they can mingle with one another freely. They may have televisions (if they can afford to pay for them) in their air-conditioned cells. When Joseph Parsons, a Utah prisoner, dropped his appeals and was executed in 1999, his aim was not to get away from oppressive death row conditions. He wanted to get away from prison entirely, not just death row. Parsons made it quite clear that he preferred death in the execution chamber to life in prison: “I think it takes more courage to go on.” In his view, “dying is easy . . . it takes guts to keep plodding along” (McGunigall-Smith, 2004a, p. 150).

In prison, Parsons made clear, “plodding along” means living an empty, futile existence. Visibly weary of life in prison, Parsons observed:

There has to be something better than this. Nothing could be worse than this. I'm not a religious person—I'm not into God and all that and the Devil and all that stuff. But if you want to use a good analogy this has got to be hell right here. There can't be anything worse than this. What they say is hell, the fire

burning, the torture and everything else, well at least you're doing something! Here . . . it doesn't make any sense to me. (McGunigall-Smith, 2004a, p. 135)

Six hours before he was executed, Parsons was asked about his feelings about his impending execution. He replied, "I'm not scared about the time between now and my execution. It's easy. The hard part is living every day here" (McGunigall-Smith, 2004a, p. 138). Asked if he had second thoughts, he replied emphatically, "Have I had second thoughts? No. I'm tired of being here" (McGunigall-Smith, 2004a, p. 153). Remarkably, Parsons was eager to face execution:

I'm looking forward to this. The situation I'm in now is horrible. To me, I can't think of anything worse than this . . . to me, in my situation that I am in right now, this is the worst it could possibly be so it's a relief to know that I'm not going to be here no more . . . the next journey has got to be better than this one. All my bad karma came and hit me hard in this lifetime. I believe in good karma and bad karma. I got to figure in the next one I'm going to have a chance to do a little bit of good. (McGunigall-Smith, 2004a, p. 139)

Parsons never maintained that the physical conditions of his confinement were what drove him to drop his appeals. As he told McGunigall-Smith (2004a), "we've got three meals a day. We got a TV and a radio. We got air conditioning in summer (sometimes)" (p. 158). His life was hell in part because of the other people around him. Like Sartre (1949), he found hell in the fact that there was "no exit" from the company of people he held in contempt, some of whom (both inmates and guards) he characterized as "idiots." More important, Parsons stressed that he was never treated as a person, which is to say, shown respect and concern during incarceration. His degrading treatment was vividly brought home to him when he was sent to a civilian hospital for emergency surgery. His treatment there was in sharp contrast to his treatment as a death row prisoner:

The hospital staff were good to me, and their attitude was that I was a regular patient. They were pretty nice to me actually. Being able to get up and walk around was what made me feel real good. They were talking and bullshitting with me and making me laugh . . . I was walking around the halls talking to people. It kind of felt like I was a human being. I almost felt like I was normal. (McGunigall-Smith, 2004a, p. 134)

It should be noted that Parsons was under very close supervision by prison staff during his stay at the hospital. The freedom he experienced was

psychological, not physical. Because he was treated like a person, he felt free of the prison and therefore felt like a normal human being, not a captive. Back in prison, Parsons felt once again as he had always felt—that he was not seen as normal, not treated as a human being.

Parsons reports that he was always attuned to the various indignities and slights of prison life, which he claims were forcefully brought home to him by inconsistencies in the implementation of prison rules and procedures. These inconsistencies, in turn, interfered with his personal daily routine, disrupting his life and highlighting his sharply limited autonomy. Parsons stressed that he was “tired to death” of inconsistency. He was disturbed by schedules that changed in small ways but nevertheless in ways he could not anticipate and plan for; he resented promises by staff that were not kept or were left pending for longer than he could bear, leaving him on edge. To survive, Parsons needed a firm daily routine in which to lose himself. What he found on death row were small but repeated departures from routine that left him anxious and uncertain.

For Parsons, life on death row was a precarious and exhausting battle to establish and maintain a routine with which he could live. More specifically, he sought a routine in which he could lose himself and not have to think about the indignity of a life lived in a place where he would never be a full-fledged human being, where he would never be treated as truly normal. Eventually, he simply ran out of energy. “I guess you have to deal with whoever and whatever comes in here,” Parsons told McGunigall-Smith (2004a), “[but] I’m not dealing with it any more. I’m tired of dealing with it” (p. 153). The sheer effort of trying to forge a routine strong enough to allow him to live by habit, free from painful introspection, was too much for him. “Even if it did change drastically,” Parsons observed, “I wouldn’t change my mind. I’m already dead” (McGunigall-Smith, 2004b, p. 6). Death in the execution chamber looked better, much better, than life in prison as Parsons had come to know it.

Lifers, like Parsons and other execution volunteers, see many parallels between life sentences and death sentences. The lifers interviewed by McGunigall-Smith were asked which sentence they would prefer, a death sentence or a life sentence without the possibility of parole. The lifers were divided—eight chose the death penalty, eight chose life without parole (their current sentence), and six were ambivalent, sometimes preferring execution, at other times preferring life in prison. Typical of those who would choose death is the sentiment that life in prison is an exercise in futility. “Despite my best efforts,” observed one lifer, “I lead a pointless, monastic existence with no end in sight . . . I live in hell” (McGunigall-Smith, 2004a, p. 214).

Note that this concern for a pointless, empty life, a kind of living hell from an existential point of view, is exactly what motivated Parsons to drop his appeals and hasten his execution.

Prisoners who chose life sentences did so, to paraphrase a common view, because where there is life, there is hope—for release. Nothing about prison life offered any intrinsic appeal; the goal of choosing life in prison was to achieve the extrinsic goal of release from prison. Prisoners who expressed ambivalence about which was worse, life in prison or death in the execution chamber, framed the choice as a struggle with two more or less equally unappealing options. Said one prisoner, “there are times when I think I would be better off [executed] just because we’re not doing nothing at all [here in prison]” (McGunigall-Smith, 2004b, p. 7). Another man described an emotional journey in which an original preference for execution gave way to a grudging embrace of life in prison because prison life offered more pain, not less:

In the beginning I did [want the death penalty]. I was feeling sorry for myself because I got caught. The death penalty, in my mind at that time, would have erased everything. I would have ceased to exist. The pain would cease. As time went by I grew to enjoy that pain. That pain woke me up. To me the death penalty is the easy way out. (McGunigall-Smith, 2004b, p. 8)

To call the death penalty “the easy way out” does not, in our view, minimize the pains of life under sentence of death by execution. Life on death row may well be a kind of psychological torture, as suggested by Parsons and supported in some research (see Johnson, 1998, 2003), but death row prisoners like Parsons have the legally valid choice to end that torturous existence by dropping their appeals and submitting to the judgment of the court.⁶ Lifers have no comparable choice; the life sentence offers prisoners no legal way to end their suffering. Life in prison had been chosen for them and indeed imposed on them by the courts, and in this sense, their life sentences render them less autonomous than condemned prisoners.

Living in Prison for Life

Pains of Life Imprisonment

The pains of imprisonment—for inmates in general and lifers in particular—are not obvious to outsiders because they are not visible. As one life sentence prisoner insightfully observed, “prison can be compared with

the microwave oven in my kitchen at home—it destroys you on the inside long before its effects are evident on the outside” (Johnson & Toch, 2000, p. 138; see also Johnson & Toch, 1988). Outsiders find it hard to put themselves in the shoes of prisoners; the prison world is alien to most citizens, so removed from our daily life that prisons might as well exist on another planet. To fully appreciate the pains of life imprisonment, one has to look at the prison as it is experienced by the inmates who must live each and every day of their lives in confinement.

A central fact of life imprisonment from the inmate's point of view is a life of unremitting loneliness. The prisoner is permanently separated from his family and other loved ones, and with this separation comes a profound and growing sense of loss. Loss of family shows itself in ways big and small. Some inmates, for example, talk about the little things they miss greatly because they are separated from family. Not being around for the daily events that make up family life hits many prisoners hard. One man missed “the opportunity to go to a park with my nephews and nieces and spend time with them” (McGunigall-Smith, 2004b, p. 9). Said another, “my children will grow up and I won't get to enjoy them—high school, getting married, starting families” (McGunigall-Smith, 2004a, p. 207). Lifers know that they cannot be parents in the sense most of us understand the term, which is to say, they cannot guide and support their children: “I'm not there to say ‘Honey, he wouldn't be good for you . . .’ I'm not there to pat them on the back and I'm not there to pick them up when they fall. And that's the hardest part” (McGunigall-Smith, 2004a, p. 207; see also Johnson & McGunigall-Smith, 2006).

Lifers know that family ties are apt to wither over time and that family members, notably their parents, are likely to die while they are still alive in prison. Loss of a parent can be a terrible blow. “My father passed away last month,” observed one lifer, “and I wasn't able to attend his funeral. That's probably the hardest thing I've had to deal with” (McGunigall-Smith, 2004a, p. 207). Said another prisoner, when asked to describe the greatest hardship he faced as he served his life sentence, “knowing my family is dying out there and moving away and I can't keep in touch with them” (McGunigall-Smith, 2004b, p. 10). The life sentence inmate must face the painful fact that one day he may be entirely alone, bereft of outside support or concern. “I don't have any contact with anybody on the streets,” said one prisoner, “I don't know anybody . . . I don't have anybody to talk to, to connect with. This is my world now. This is all I know—the inside of these walls” (McGunigall-Smith, 2004b, p. 11; see also Jewkes, 2005).

Daily life on “the inside of these [prison] walls” is lonely as well. Inmates are often in the company of others but feel very much alone because they are surrounded by strangers who are indifferent, if not hostile, to their welfare. As one inmate put it:

prison is coldness . . . no one in prison really cares about you, not like those at home do. It’s a chilling feeling to realize that no one’s life here would be significantly changed if I were to die tomorrow. Loneliness breeds and thrives in the belly of the monster known as prison. It strikes constantly and insidiously and it never goes away. (Johnson & Toch, 2000, p. 139)

When asked what was the most difficult thing about serving a life sentence, one inmate interviewed by McGunigall-Smith (2004b) said this, “No love. Nobody to grab hold of me and hug me. I mean real love. I’ll never feel that emotion again” (p. 12). At the conclusion of another interview, a prisoner told McGunigall-Smith (2004a), “You’re probably the first person I’ve talked to in fifteen years about stuff like my health—physical and mental. I never talk to anybody about anything” (p. 210).

Prison often is a debilitating place in which to live. A key feature of prison life is repetition. Each day in prison is essentially the same. The result is a lifetime of endless boredom, which prisoners tell us—and which we can readily imagine—is a terrible thing to endure. As one inmate observed,

I awaken with a feeling of dread. A day in prison offers nothing to look forward to. It is an existence of endless repetition, restriction, and regimentation. . . . Prison is sameness, day after day, week after week, year after year. It is total confinement of body and spirit and total separation from everything real and important. (Johnson & Toch, 2000, pp. 138, 140)

Part and parcel of a repetitive routine is loss of choice. “The thing I miss most,” said one lifer interviewed by McGunigall-Smith (2004b), “is the right to choose. I no longer have any choice—when I shower, where I go, what I do” (p. 13). Each day brings mortifications that remind prisoners of their helplessness and the sheer loss of dignity they suffer in a world in which no one recognizes their inherent worth as human beings (see Todorov, 1996, p. 59). A mundane but telling example offered by one inmate: “Having to ask a guard for toilet paper. You could ask ten times in a period of three to four hours for such an item. Things like this amount to cruel punishment” (McGunigall-Smith, 2004b, p. 14). Lifers are perhaps especially sensitive to such slights because they are experiencing the cumulative effects of lack of autonomy. Their dignity as self-determining human beings has been taken

from them, and they, unlike other inmates, cannot look forward to a time when they will leave prison and perhaps regain their status as full-fledged human beings.

Prisons are experienced by inmates as settings of deprivation. Locking people up means locking them away from the free world with its variety and opportunity that is now replaced with a deadening routine of lock-ins and lock-outs, of group feedings and group movements; it means locking people away from loved ones who are now replaced by strangers and keepers, few of whom even know their names let alone care about them; it means locking prisoners away from the many simple things we all enjoy, like good food eaten in good company and moments of treasured privacy. The life of the lifer is made up of many small losses, which cumulate and leave the prisoner with a sense that he (or she) has no dignity or worth as an individual.

At the core of the prison experience, of course, is the loss of freedom. In a sense, loss of freedom is experienced as the sum of the various deprivations and hurts inherent in confinement. As one inmate observed, prisoners ultimately have no choice other than to submit to the prison:

For the prisoners, the loss of freedom is devastating. Everything they have taken for granted is gone. They have no control over their lives, no choices. Others decide when and where they eat, work, and sleep. . . . Their lives are fastened to rules and regulations that discourage and disregard normal impulses. They accept the rules and adjust to them, just as they do to the overcrowded conditions, body odors, lack of privacy, standing in lines, and the like. They have no choice. (Johnson & Toch, 2000, p. 141)

Adjusting to a Life of Prison

All prisoners, not only lifers, are held in a kind of suspended animation, the social equivalent of a coma, while the rest of the world changes and evolves. The free world is dynamic, the prison world static. By its very nature, the free world offers hope for change. Prison, by its very nature, isolates the offender and holds hope hostage until the offender is released. Lifers, unlike regular prisoners, will never be released, so life as they know it ends at the prison gate. For them, a life sentence is a death sentence. "Being given a life sentence," observed one prisoner, "is like being told by a doctor that you're going to die, you know, like you've got a terminal illness. You feel as if your life's effectively over" (Jewkes, 2005, p. 366). A life of prison may also be like being told by your doctor that you must be put into a coma, never to return to normal consciousness and normal human interaction. It is

interesting that most people in the free world rank a coma as worse than death (Dinger, 2005; Mold, Looney, Viviani, & Quiggins, 1994).

An overarching concern of lifers is whether they will be able to make it through their sentence and at what cost to them as human beings. One's life in the free world is "effectively over," but one's life as an inmate has only just begun. In one inmate's words:

I don't know how I'm going to [make it]. There's a man who lives next door to me. He's about seventy years old and his crime was multiple murders back in the sixties. He has been in here ever since. . . . Sometimes I wonder if and how I'm going to manage living in here that long. I think when you come to prison you stop developing which is why he is also very childish. He got arrested at a very young age like me and I wonder. I think it's pretty obvious that I stopped developing the minute I was arrested. You don't develop in here. That stops and you are basically stuck at whatever age you were when you were arrested. So, I see this seventy year old man with the mentality of a twenty-three year old and I was arrested when I was nineteen. (McGunigall-Smith, 2004b, p. 15)

Some correctional officers are keenly aware of the travails of lifers and in fact consider a life sentence to be worse than a death sentence. Said one officer:

I think that's [LWOP] harder to face than the death penalty in the sense that they know they are going to live the rest of their life in this kind of an environment. They are not going to get out and be able to be with their families and loved ones again. I think that's a little harder—they just go on day after day wondering when they are going to die. It's a sorry situation to be in for that long. (McGunigall-Smith, 2004b, p. 16)

The time-honored approach to coping with adversity, including prison adversity, entails taking things one day at a time, focusing on the present (over which one has some control) and ignoring the past and future, over which one has no control and, in all likelihood, apprehensions or regrets (Cohen & Taylor, 1972; Johnson, 2002; Toch, 1975). Typical comments recorded by McGunigall-Smith (2004b) included "one day at a time, only way to do it" or "just like I've been doing—one day at a time" (p. 17). The simplicity of such statements hides an underlying complexity. Probing reveals that there are conditions—like personal flexibility and environmental stability—under which the simple "keep your head down and stay in the present" approach may depend.

"One day at a time and hope to remain flexible enough to find one more thing to keep me going," said one man, when asked how he coped with his

life sentence (McGunigall-Smith, 2004b, p. 18). Elaborating on his adjustment strategy, he observed, "I tend to pick projects that at least last a year so that I don't have to think of this 'fate worse than death' for at least a whole year." The "enormity of the amount of time they have handed me," he continued, "becomes overwhelming, at least for me to manage emotionally. I would like to think I would be able to do it just as I'm doing it right now—a positive outlook, a limited hopeful outlook." Upon further questioning, we learn that this "limited, hopeful outlook," in turn, is contingent on environmental conditions that

could change within the next year if the trend keeps going the way it goes with privileges and lockdowns and the violence and stuff like that. It's hard to maintain any type of positive character traits after you've been exposed to this for so long. (McGunigall-Smith, 2004b, p. 18)

If things are bad enough for long enough, coping efforts fail and, in his words, "you kind of succumb to the environment." A year or so after this interview, the prisoner violated a rule and was moved to a more restrictive environment, which presumably interfered with his adjustment projects and brought home the "enormity of the amount of time they have handed me." Soon thereafter, he took his own life.

The better adjusted prisoners, and especially the lifers, work with the prison's routine. For them, the larger routine—the counts and mealtimes, the out-of-cell times and lights-out times—is like an anesthetic. The rhythm of the prison day dulls the pains of loss and regret. This daily routine makes for a repetitive, empty existence, as we have noted, but for most, it is a bearable one. Prisoners put themselves on automatic pilot and try not to think about their lives. Within the structure, lifers typically forge more personal routines that give some meaning to their days. Here are two typical comments drawn from McGunigall-Smith's (2004b) interviews:

I try to change my routine or vary it a bit. I have my mainstays but I change a few things now and then just to get a little bit of variety. But a routine keeps my sanity. (p. 19)

It allows me to divide time up into parts that I can manage and it gives my life a cadence and consistency and predictability and offers the illusion of control. (p. 20)

When prison conditions deteriorate—when there are "lockdowns and the violence and stuff like that"—daily life becomes unstable or oppressive.

Under these conditions, the helpful “bit of variety” and the comforting “illusion of control” found in one’s personal prison routine are lost and prisoners suffer great stress. McGunigall-Smith (2004a) called this stress the “pains of inconsistency,” which are reflected in the following interview excerpts:

Days start getting real long if you break your routine. The way they do things here they move you around so much—change rules and stuff every day. That gets to you. (McGunigall-Smith, 2004b, p. 21)

Since the lockdown they have been doing a lot of shakedowns—every day. The fight took place in another building but we are suffering. . . . Shakedowns are very upsetting to our routine. It’s hard to relax. I have seen an inmate, who has had enough of this, start banging his head on the wall—that’s what’s going to happen. (McGunigall-Smith, 2004b, p. 22)

Routine provides stability and predictability for prisoners. Lifers want to live life on the surface of things, by habit and rote. Below the surface calm, they know from experience, lies a deep well of loss and discontent.

Punishment, Ruined Lives, and the Limits of Retribution

Prisoners, and especially lifers, have made a tragic mess of their lives; if they dwelled on this sad fact, they’d drive themselves to distraction. The battle to maintain workable routines, discussed earlier, is a battle to keep these ugly thoughts at bay. At times, however, prison life is utterly and completely superseded by events from the outside world—loved ones come to you with a problem and you cannot help; a visit is missed and you wonder why; you do not get mail and you wonder why. In situations such as these, prisoners are shaken from their personal routines as well as from the routine structure of daily life behind bars. As a result, they are painfully reminded that they are prisoners, that they got themselves into this mess, and that the future is bleak. As one prisoner observed:

You’re coping pretty well when you get one of those painful reminders of your situation. One of three events occurs or recurs. You learn of a family problem that demands your presence to handle, and you understand the meaning of being helpless. The problem would be nothing if you were not in prison, but now it seems enormous because you can’t deal with it. It makes you brood, feel the shame of what you are doing to your loved ones and appreciate the fact that you are a pretty disgusting person. The other two events are visiting hours without a visitor and mail being delivered without a letter for you, which is the definition of loneliness. It makes you think a lot

about home, loved ones, friends, the world outside. You remember little things you did before this; they were unimportant then, but now you realize they were very important. (Johnson & Toch, 2000, p. 142)

It is at these junctures—when the free world intrudes into the prison, awakening prisoners from their prison-induced comas—that the most fundamental pain of imprisonment is revealed, for it is at these times that prisoners look at themselves and at their lives. Almost invariably, they are deeply distressed by what they see:

Like it or not, you are being exposed to who you really are way down deep inside. It becomes increasingly difficult to hide from yourself. Often you find yourself lost in the darkest crevices of your being and not too happy with what you are finding. You are hesitant to continue but you do, hoping for the best, finding the worst. Constantly you are thinking, thinking, and thinking. It happens while you are working, pacing your cell floor, waiting for a letter or a visit, while you are mopping floors or performing some other robot work you've been assigned, or as you lie awake at night wishing for the escape of sleep. The layers of your character are getting peeled away like the skin of an onion, and don't expect flower buds to be hidden at the core. (Johnson & Toch, 2000, p. 142)

This inmate's reference to the pains of reflection when you pace your cell or lie awake at night is quite significant. Anytime an inmate's mind breaks from the prison routine and drifts to the past, there is the palpable risk that "the demons of the past will chase you and you re-run the scenarios of the past, you think of what you could have done, what you could have been" (McGunigall-Smith, 2004a, p. 207). The catalog of regrets provided by McGunigall-Smith's respondents ranges from people one has let down and hurt to opportunities missed to live decently or indeed to have a life at all:

Not being there for my daughter. I once vowed that I would be there for her always. I kick myself that I can't. (McGunigall-Smith, 2004b, p. 23)

Seeing my mom get all upset. . . . Not being able to hold her or touch her. Not being able to live my life. . . . Not being able to have a life. (McGunigall-Smith, 2004b, p. 24)

Just thinking about your time, what you did, remembering how stupid you were when you were out [in the free world]. (McGunigall-Smith, 2004b, p. 25)

Out there I just lived for drugs and the rush, and all that—it was stupid. The worst part is that I won't have a chance to get it right. (McGunigall-Smith, 2004b, p. 26; see also Johnson & McGunigall-Smith, 2006)

The most basic hurt inflicted by life without parole is this: a lifetime of boredom, doubt, and anxiety punctuated by piercing moments of insight into one's failings as a human being. As one inmate told McGunigall-Smith (2004b), "my life is ruined for life; there is no redemption, and to some that is a fate worse than death" (p. 27). This miserable existence only ends when the prisoner dies—alone, unmourned, a disgrace in the person's own eyes as well as in the eyes of society (Aday, 2003).

If our goal is to make prisoners suffer greatly for the rest of their lives, life imprisonment without the possibility of parole offers itself as perhaps the ultimate punishment we can inflict. If our goal is justice, the bedrock principle of proportionality in punishment requires that we reserve this ultimate punishment for the ultimate crime: capital murder. Once we accept death by incarceration as our ultimate legal sanction, moreover, we should provide to all defendants facing this sanction the same legal safeguards and appellate procedures presently afforded to capital defendants. The oft-heard refrain that "death is different" explains the special attention to procedure in capital trials and subsequent appellate review. Death by incarceration is different as well. Our research leads us to conclude that death by incarceration is just as final, just as painful, and just as worthy of the careful scrutiny to which we subject traditional capital sentences.

Notes

1. For the purposes of this article, we variously refer to those serving life without the possibility of parole as "life sentence prisoners," "LWOP prisoners," or simply "lifers."

2. We limited our research to offenders sentenced to life without parole. Persons sentenced to prison terms that exceed the human lifespan also suffer death by incarceration. Prisoners who get a sentence measured in hundreds of years, for example, serve what Villaume (2005) has called "virtual" death sentences. Following our analysis, such offenders are undergoing death by incarceration—our other death penalty—and should only be sentenced to such terms for capital murder. A more difficult category of cases noted by Villaume includes offenders sentenced to prison terms that, though not longer than the human lifespan, exceed the amount of time those offenders likely have left to live. A 70-year-old offender who gets a 20-year sentence, for example, is likely to die in prison. This area of sentencing bears further analysis. Our thinking at this point is that such sentences are not intended as death sentences even if death in prison is the likely result. The elderly offender's death before he completes a 20-year sentence, for example, is a by-product of the sentence, not its goal or expected outcome. The same would be true of a very ill offender; he or she might die during the prison term, even a short prison term, but the sentence was not meted out as a death sentence. With sentences of death by execution, life without parole, and 100-plus-year sentences, on the other hand, death behind bars is the intended result of the sentence.

3. Just under one third of all those condemned to die subsequently have their sentence or conviction overturned, and 2% have their sentence commuted. More than 120 prisoners have

been exonerated and subsequently released from death row since 1973 (Death Penalty Information Center, 2004).

4. Many, if not most, of these sentences were meted out for crimes short of murder and are, in our view, excessively harsh and therefore unjust (see Mauer, King, & Young, 2004). Regrettably, life without parole was originally created to offer capital juries an alternative to the death penalty in the sentencing phase. Juries are in fact less inclined to impose capital punishment when life without parole is an option, but life without parole has, as it were, taken on a life of its own as a penalty for noncapital crimes (see Appleton & Grover, 2007; Note, 2006).

5. "I'm glad he's not going to breathe another free breath," said one prosecutor. "He'll spend the rest of his life in prison, and he'll lead a miserable existence" (Mudd, 2006, p. A1).

6. This choice may be ethically suspect, but the prisoners who decide to drop their appeals, like Parsons, describe the decision as empowering.

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ishment. The death penalty is not imposed to avenge every killing and—as some contend—to bring “closure” to the family of every victim, but is inflicted in less than 1 percent of all murder cases. Of more than 20,000 murders in the United States annually, an average of fewer than 300 people are sentenced to death, and only 55 are executed each year.¹ Only 19 states actually carried out executions between 1976, when the U.S. Supreme Court authorized the resumption of capital punishment after declaring it unconstitutional in 1972, and the end of 2002. Eighty-six percent of those executions were in the South. Just two states—Texas and Virginia—carried out 45 percent of them.

Any assessment of the death penalty must not be based on abstract theories about how it should work in practice or the experiences of states like Oregon, which seldom impose the death penalty and carry it out even less. To understand the realities of the death penalty, one must look to the states that sentence people to death by the hundreds and have carried out scores of executions. In those states, innocent people have been sentenced to die based on such things as mistaken eyewitness identifications, false confessions, the testimony of partisan experts who render opinions that are not supported by science, failure of police and prosecutors to turn over evidence of innocence, and testimony of prisoners who get their own charges dismissed by testifying that the accused admitted the crime to them. Even the guilty are sentenced to death as opposed to life imprisonment without the possibility of parole not because they committed the worst crimes but because of where they happen to be prosecuted, the incompetence of their court-appointed lawyers, their race, or the race of their victim.

Former Illinois Governor George Ryan is a prominent example of a supporter of capital punishment who, upon close examination of the system, found that it “is haunted by the demon of error—error in determining guilt, and error in determining who among the guilty deserves to die.” As a member of the legislature in 1977, Ryan voted to adopt Illinois’s death penalty law and he described himself as a “staunch supporter” of capital punishment until as governor 23 years later, he saw that during that period the state had carried out 12 executions and released from its death row 13 people who had been exonerated. In 2003, Governor Ryan pardoned four people who had been tortured by police until they confessed to crimes they did not commit

Why the United States Will Join the Rest of the World in Abandoning Capital Punishment

Stephen B. Bright

The United States will inevitably join other industrialized nations in abandoning the death penalty, just as it has abandoned whipping, the stocks, branding, cutting off appendages, maiming, and other primitive forms of punishment. It remains to be seen how long it will be until the use of the death penalty becomes so infrequent as to be pointless, and it is eventually abandoned. In the meantime, capital punishment is arbitrarily and unfairly imposed, undermines the standing and moral authority of the United States in the community of nations, and diminishes the credibility and legitimacy of the courts within the United States.

Although death may intuitively seem to be an appropriate punishment for a person who kills another person and polls show strong support for the death penalty, most Americans know little about realities of capital punishment, past and present. As Bryan Stevenson describes in another chapter, the death penalty is a direct descendant of the darkest aspects of American history—slavery, lynching, racial oppression, and perfunctory capital trials known as “legal lynchings”—and racial discrimination remains a prominent feature of capital pun-

such a pardon and such amnesty can be granted only by the man whom they slighted—the peasant on the train who no longer exists. Who can grant forgiveness on behalf of the dead?³⁷

The vast majority of murderers do not deserve a death sentence and only one in a thousand actually receives such a penalty. It may well be that some states in America need to become much more discriminating about whom they put on death row. Professor Robert Blecker argues³⁸ that we should execute only a fraction of those currently condemned and do so much more quickly than the current average wait of 10 to 12 years from conviction. Count me among those like Professor Blecker and Judge Kozinski who believe that only the worst of the worst belong on death row.

Americans are generally a compassionate people. Their support for the possibility of a death sentence in the most egregious cases is not a paradox. It is a sign that life is so precious that it should be taken only with the greatest of care.

NOTES

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and commuted the sentences of the remaining 167 people on Illinois's death row for reasons that he eloquently sets out elsewhere in this book.

Many other supporters of capital punishment, after years of struggling to make the system work, have had sober second thoughts about the fairness with which the death penalty is imposed. Justice Sandra Day O'Connor, who joined the United States Supreme Court in 1981 and has regularly voted to uphold death sentences, has acknowledged that "serious questions are being raised about whether the death penalty is being fairly administered in this country" and that "the system may well be allowing some innocent defendants to be executed."² Justices Lewis Powell and Harry Blackmun also voted to uphold death sentences as members of the court, but eventually they came to the conclusion, as Justice Blackmun put it, that "the death penalty experiment has failed."³

Further experimentation with lethal punishment after centuries of failure has no place in a conservative society that is wary of too much government power and skeptical of the government's ability to do things well. Further experimentation might be justified if it served some purpose. But capital punishment is not needed to protect society or to punish offenders, as shown by over 100 countries around the world that do not have the death penalty and states such as Michigan and Wisconsin, neither of which have had the death penalty since the mid-1800s.⁴ It can be argued that capital punishment was necessary when America was a frontier society and had no prisons. But today the United States has not only maximum security prisons, but "super maximum" prisons where serial killers, mass murderers, and sadistic murderers can be severely punished and completely isolated from guards and other inmates.

Nor is crime deterred by the executions in fewer than half the states of an arbitrarily selected 1 percent of those who commit murders, many of whom are mentally ill or have limited intellectual functioning. The South, which has carried out 85 percent of the nation's executions since 1976, has the highest murder rate of any region of the country. The Northeast, which has the fewest executions by far—only 3 executions between 1976 and the end of 2002—has the lowest murder rate.

The United States does not need to keep this relic of the past to

show its abhorrence of murder. As previously noted, 99 percent of the murders in the United States are not punished by death. Even at war crimes trials in The Hague, genocide and other crimes against humanity are not punished with the death penalty. The societies that do not have capital punishment surely abhor murder as much as any other, but they do not find it necessary to engage in killing in order to punish, protect, or show their abhorrence with killing.

Finally, capital punishment has no place in a decent society that places some practices, such as torture, off limits—not because some individuals have not done things so bad that they arguably deserved to be tortured, but because a civilized society simply does not engage in such acts. It can be argued that rapists deserve to be raped, that mutilators deserve to be mutilated. Most societies, however, refrain from responding in this way because the punishment is not only degrading to those on whom it is imposed, but it is also degrading to the society that engages in the same behavior as the criminals. When death sentences are carried out, small groups of people gather in execution chambers and watch as a human being is tied down and put down. Some make no effort to suppress their glee when the sentence is carried out and celebrations occur inside and outside the prison. These celebrations of death reflect the dark side of the human spirit—an arrogant, vengeful, unforgiving, uncaring side that either does not admit the possibility of innocence or redemption or is willing to kill people despite those possibilities.

A HUMAN RIGHTS VIOLATION THAT UNDERMINES THE STANDING AND MORAL AUTHORITY OF THE UNITED STATES

If people were asked 50 years ago which one of the following three countries—Russia, South Africa, or the United States—would be most likely to have the death penalty at the turn of the century, few people would have answered the United States. And yet, the United States was one of four countries that accounted for 90 percent of all the executions in the world in 2001 (the others were China, Iran, and Saudi Arabia), while Russia and South Africa are among the nations that no

longer practice capital punishment.⁵ Since 1985, over 40 countries have abandoned capital punishment whereas only four countries that did not have it have adopted it.⁶ One of those, Nepal, has since abolished it. Turkey abolished the death penalty in 2001 in its efforts to join the European Union, leaving the United States the only NATO country that still has the death penalty.⁷

The United States is also part of a very small minority of nations that allow the execution of children. Twenty-two of the 38 states with death penalty statutes allow the execution of people who were under 18 at the time of their crimes. Between 1990 and the end of 2001, these states put 15 children to death, with Texas carrying out over 60 percent of those executions. The only other countries that executed children during this time were the Congo, Iran, Nigeria, Pakistan, Saudi Arabia, and Yemen.⁸ The United States and Somalia are the only two countries that have not ratified the International Covenant on the Rights of the Child, which, among other things, prohibits the execution of people who were children at the time of their crimes.

Being among the world leaders in executions and the leader in execution of children is incompatible with asserting leadership on human rights issues in the world. As Frederick Douglass said over a century ago, "Life is the great primary and most precious and comprehensive of all human rights—[and] whether it be coupled with virtue, honor, and happiness, or with sin, disgrace and misery, . . . [it is not] to be deliberately or voluntarily destroyed, either by individuals separately, or combined in what is called Government."⁹

The retention of capital punishment in the United States draws harsh criticism from throughout the world. It is suggested elsewhere in this book that the democracies in European countries function so poorly that the elite have prevented the use of the death penalty in them for decades; however, Felix G. Rohatyn, who saw the people of Europe firsthand during four years as U.S. Ambassador to France, found that "no single issue evoked as much passion and as much protest as executions in the United States."

Capital punishment also affects the United States's relations with other countries in other ways. Canada and Mexico have repeatedly protested when their nationals are executed by the United States, as have other countries. Canada, Mexico, and most European countries

will not extradite suspects to the United States if they are subject to capital punishment and will not assist in the prosecution of people facing the death penalty. Just as the United States could not assert moral leadership in the world as long as it allowed segregation, it will not be a leader on human rights as long as it allows capital punishment.

ARBITRARY AND UNFAIR INFLICTION

Regardless of the practices of the rest of the world or the morality of capital punishment, the process leading to a death sentence is so unfair and influenced by so many improper factors and the infliction of death sentences is so inconsistent that this punishment should be abandoned.

The exonerated of many people who spent years of their lives in prisons for crimes they did not commit—many of them on death rows—has dramatically brought to light defects in the criminal justice system that have surprised and appalled people who do not observe the system every day and assumed that it was working properly. The average person has little or no contact with the criminal courts, which deal primarily with crimes committed against and by poor people and members of racial minorities. It is a system that is overworked and underfunded, and particularly underfunded when it comes to protecting the rights of those accused.

Law enforcement officers, usually overworked and often under tremendous public pressure to solve terrible crimes, make mistakes, fail to pursue all lines of investigation, and, on occasion, overreach or take shortcuts in pursuing arrests. Prosecutors exercise vast and unchecked discretion in deciding which cases are to be prosecuted as capital cases. The race of the victim and the defendant, political considerations, and other extraneous factors influence whether prosecutors seek the death penalty and whether juries or judges impose it.

A person facing the death penalty usually cannot afford to hire an attorney and is at the mercy of the system to provide a court-appointed lawyer. While many receive adequate representation (and often are not sentenced to death as a result), many others are assigned lawyers who lack the knowledge, skill, resources—and sometimes even the

inclination—to handle a serious criminal case. People who would not be sentenced to death if properly represented are sentenced to death because of incompetent court-appointed lawyers. In many communities, racial minorities are still excluded from participation as jurors, judges, prosecutors, and lawyers in the system. In too many cases, defendants are convicted on flimsy evidence, such as eyewitness identifications, which are notoriously unreliable but are seen as very credible by juries; the testimony of convicts who, in exchange for lenient treatment in their own cases, testify that the accused admitted to them that he or she committed the crime; and confessions obtained from people of limited intellect through lengthy and overbearing interrogations.

Judge Cassell dismisses concerns about the unfair application of the death penalty as mere “administrative objections” that are ill-founded or easily cured. But these are not minor, isolated incidents; they are long-standing, pervasive, systemic deficiencies in the criminal justice system that are not being corrected and, in some places, are even becoming worse. There is tremendous resistance to change, as shown by the unwillingness of the Illinois legislature to adopt many of the recommendations of Governor Ryan’s commission to reduce the likelihood of wrongful convictions in capital cases. Law enforcement agencies have been unwilling to videotape interrogations and use identification procedures that are more reliable than those presently employed. People who support capital punishment as a concept are unwilling to spend millions of tax dollars to provide competent legal representation for those accused of crimes. And courts have yet to find ways to overcome centuries of racial discrimination that often influence, consciously or subconsciously, the decisions of prosecutors, judges, and juries.

A Warning That Something Is Terribly Wrong: Innocent People Condemned to Death

Over 100 people condemned to death in the last 30 years have been exonerated and released after new evidence established their innocence or cast such doubt on their guilt that they could not be convicted.¹⁰ The 100th of those people, Ray Krone, was convicted and sentenced to death in Arizona based on the testimony of an expert witness that

his teeth matched bite marks on the victim. During the ten years that Krone spent on death row, scientists developed the ability to compare biological evidence recovered at crime scenes with the DNA of suspects. DNA testing established that Krone was innocent.¹¹ On Krone’s release, the prosecutor said, “[Krone] deserves an apology from us, that’s for sure. A mistake was made here. . . . What do you say to him? An injustice was done and we will try to do better. And we’re sorry.” Although unfortunate to be wrongfully convicted, Krone was very fortunate that there was DNA evidence in his case. In most cases, there is no biological evidence for DNA testing.

Other defendants had their death sentences commuted to life imprisonment without the possibility of parole because of questions about their innocence. For example, in 1994, the governor of Virginia commuted the death sentence of a mentally retarded man, Earl Washington, to life imprisonment without parole because of questions regarding his guilt. Washington, an easily persuaded, somewhat childlike special-education dropout, had been convicted of murder and rape based on a confession he gave to police, even though it was full of inconsistencies. For example, at one point in the confession Washington said that the victim was white and at another that the victim was black. Six years later, DNA evidence—not available at the time of Washington’s trial or the commutation—established that Washington was innocent and he was released.

Although DNA testing has been available only in cases where there was biological evidence and the evidence has been preserved, it has established the innocence of many people who were not sentenced to death—more than 100 by the end of 2002. A Michigan judge in 1984 lamented the fact that the state did not have the death penalty, saying that life imprisonment was inadequate for Eddie Joe Lloyd for the rape and murder of a 16-year-old girl. Police had obtained a confession from Lloyd while he was in a mental hospital. Seventeen years later, DNA evidence established that Lloyd did not commit the crime. On his release, Lloyd commented, “If Michigan had the death penalty, I would have been through, the angels would have sung a long time ago.”¹²

Sometimes evidence of innocence has surfaced only at the last minute. Anthony Porter, sentenced to death in Illinois, went through all the appeals and review that are available for one so sentenced. Every

court upheld his conviction and sentence. As Illinois prepared to put him to death, a question arose as to whether Porter, who was brain damaged and mentally retarded, understood what was happening to him. A person who lacks the mental ability to understand that he is being put to death in punishment for a crime cannot be executed unless he is treated and becomes capable of understanding why he is being executed. Just two days before Porter was to be executed, a court stayed his execution in order to examine his mental condition. After the stay was granted, a journalism class at Northwestern University and a private investigator examined the case and proved that Anthony Porter was innocent. They obtained a confession from the person who committed the crime.¹³ Anthony Porter was released, becoming the third person released from Illinois's death row after being proven innocent by a journalism class at Northwestern.¹⁴

Some people have been executed despite questions of their innocence. Gary Graham was sentenced to death in Texas based on the identification of a witness who said she saw a murder from 40 feet away. Studies have demonstrated that such identifications are often unreliable. But Graham had the misfortune to be assigned a notoriously incompetent lawyer, Ron Mock, who had so many clients sentenced to death that some refer to the "Mock Wing" of death row. Mock failed to seriously contest the state's case, conduct an independent investigation, and present witnesses at the scene who would have testified that Graham was not the person who committed the crime and that the perpetrator was much shorter than Graham. Although it was apparent that Graham did not receive a fair trial and adequate legal representation, he was executed by Texas in 2000. Whether Graham was innocent or guilty will never be resolved because in his case, like most others, there was no DNA evidence that would conclusively establish guilt or innocence.

Some proponents of capital punishment argue that the exoneration of Porter and others shows that the system works and that no innocent people have been executed. However, someone spending years on death row for a crime he did not commit is not an example of the system working. When journalism students prove that police, prosecutors, judges, defense lawyers, and the entire legal system failed to

discover the perpetrator of a crime and instead condemned the wrong person to die, the system is not working. Porter and others were spared, as Chief Justice Moses Harrison of the Illinois Supreme Court observed, "only because of luck and the dedication of the attorneys, reporters, family members and volunteers who labored to win their release. They survived despite the criminal justice system, not because of it. The truth is that left to the devices of the court system, they would probably have all ended up dead at the hands of the state for crimes they did not commit. One must wonder how many others have not been so fortunate."¹⁵

If there had been no question about Anthony Porter's ability to understand why he was to be put to death, his execution would not have been stayed. If his intellectual functioning had been just a little higher and he had had a little less brain damage, he would have been executed. The journalism students would not have investigated his case. Similarly, had it not been for the scientific breakthrough regarding DNA, Ray Krone would have been executed. Had not Governor Douglas Wilder commuted his sentence to life imprisonment, Earl Washington would not have lived until DNA testing proved his innocence. A different governor at a different time might well have denied commutation. Had Porter, Krone, and Washington been put to death, the proponents of capital punishment would still be strenuously arguing—as some do in chapters in this book—that no innocent person has been executed, safe in their ignorance that such fatal mistakes had been made. But for every Anthony Porter, Ray Krone, or Earl Washington whose innocence has been discovered, there are others for whom there is no biological evidence that can be subject to DNA testing, no journalism class, no lawyer, no serendipitous discovery of evidence that exonerates them. And as executions become more "routine," with less attention to each one, they and other innocent people will be put to death.

Other proponents of capital punishment, instead of insisting that the system works when journalism students free people wrongfully sentenced to death, admit that the system is not working. Gerald Kogan, formerly the head of the homicide unit of the prosecutor's office in Miami-Dade County, Florida, asked for the death penalty as a

prosecutor and supervised other prosecutors asking for and obtaining the death penalty. He presided over capital cases as a trial judge and reviewed hundreds more as a justice and then chief justice of the Florida Supreme Court. Upon retiring, he stated that capital punishment "does not work at this time and has not worked in the State of Florida for many, many, many years."¹⁶

Gerald W. Heaney announced, after 30 years of reviewing capital cases as a federal appellate judge, that he was "compelled . . . to conclude that the imposition of the death penalty is arbitrary and capricious." He found that "the decision of who shall live and who shall die for his crime turns less on the nature of the offense and the incorrigibility of the offender and more on inappropriate and indefensible considerations: the political and personal inclinations of prosecutors; the defendant's wealth, race, and intellect; the race and economic status of the victim; the quality of the defendant's counsel; and the resources allocated to defense lawyers."¹⁷

After declaring a moratorium on executions in Illinois, Governor Ryan appointed a 14-member commission made up of respected judges, prosecutors, defense attorneys, business leaders, an author, and a former U.S. senator to study the criminal justice system in Illinois; the commission made 85 recommendations in 2002 for reforms to minimize the risk of wrongful convictions. The legislature, however, was unwilling to enact reforms such as reducing the number of capital prosecutions so that each one could be handled with appropriate care, and prohibiting death sentences when a defendant is convicted with just a single witness, a jailhouse informant, or an accomplice whose testimony is not corroborated with other evidence. Illinois and other states want the death penalty, but they are unwilling to pay the cost of reducing the risk of error and making the system fairer. And even if every single reform were adopted, it would not eliminate the possibility of executing innocent people. As the Canadian Supreme Court recognized in holding that it would not allow the extradition of people to the United States if the death penalty could be imposed, courts will always be fallible and reversible, while death will always be final and irreversible.¹⁸

The Two Most Important Decisions—Made by Prosecutors

The two most important decisions in every death penalty case are made not by juries or judges, but by prosecutors. No state or federal law ever requires prosecutors to seek the death penalty or take a capital case to trial. A prosecutor has complete discretion in deciding whether to seek the death penalty and, even if death is sought, whether to offer a sentence less than death in exchange for the defendant's guilty plea. The overwhelming majority of all criminal cases, including capital cases, are resolved not by trials but by plea bargains. Whether death is sought or imposed is based on the discretion and proclivities of the thousands of people who occupy the offices of prosecutor in judicial districts throughout the nation. (Texas, for example, has 155 elected prosecutors, Virginia 120, Missouri 115, Illinois 102, Georgia 49, and Alabama 40.) Some prosecutors seek the death penalty at every opportunity, and others never seek it; some seldom seek it; some frequently seek it. There is no requirement that individual prosecutors—who, in most states, are elected by districts—be consistent in their practices in seeking the death penalty.

As a result of this discretion, there are great geographical disparities in where death is imposed within states. Prosecutors in Houston and Philadelphia have sought the death penalty in virtually every case in which it can be imposed. As a result of aggressive prosecutors and inept court-appointed lawyers, Houston and Philadelphia have each condemned over 100 people to death—more than most states. Harris County, which includes Houston, has had more executions in the last 30 years than any *state* except Texas and Virginia. A case is much more likely to be prosecuted capitially in Houston and Philadelphia than in Dallas, Ft. Worth, or Pittsburgh.

At the other end of the spectrum, Manhattan District Attorney Robert Morgenthau, who opposed the adoption of New York's death penalty law in 1995, and Bronx District Attorney Robert Johnson, an outspoken opponent of the law, have not sought the death penalty in a single case since New York enacted this punishment. Other New York prosecutors in areas that have far lower crime rates than Manhattan and the Bronx have sought and obtained death sentences.

A study conducted in 1999, found that 15 counties in the country

LEGISLATIVE AUDIT DIVISION

Tori Hunthausen, Legislative Auditor
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Cindy Jorgenson
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MEMORANDUM

TO: Tori Hunthausen, Legislative Auditor
FROM: Sarah Carlson, Performance Auditor
DATE: January 3, 2013
RE: Violent Incidents at Pine Hills and Riverside, Legislative Request 13L-3647

This memo includes information regarding the frequency of violent incidents at the Department of Corrections' Pine Hills and Riverside facilities. The Department reviewed their internal records and forwarded the below information regarding number of incidents, which is organized by incident type and covers the Fiscal Year 2012 time period.

Violent Incidents at Pine Hills and Riverside Facilities Fiscal Year 2012		
Incident Type	Riverside	Pine Hills
Number of youth deaths	0	0
Number of youth charged with assault on staff - no injury*	3	21
Number of youth charged with assault on staff - injury to staff*	3	22
Number of youth charged with assault on youth - no injury*	2	52
Number of youth charged with assault on youth - injury*	0	16
Number of employees disciplined for excessive use of force	0	1
Number of employees charged for physical and/or sexual abuse of youth**	0	0

*Youth "charged" with assault, does not mean charged via law enforcement, rather it means charged internally via a major facility rule violation.

**"Charged" for physical/sexual abuse refers to law enforcement involvement.

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