

# **Incarceration on Death Row: A Microcosm of Communication?**

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## State Abbreviations

AL – Alabama	AK – Alaska	AR – Arkansas
AZ – Arizona	CA – California	CO – Colorado
CT – Connecticut	DE – Delaware	FL – Florida
GA – Georgia	HI – Hawaii	IA – Iowa
ID – Idaho	IL – Illinois	IN – Indiana
KS – Kansas	KY – Kentucky	LA – Louisiana
MA – Massachusetts	MD – Maryland	ME – Maine
MI – Michigan	MN – Minnesota	MO – Missouri
MS – Mississippi	MT – Montana	NC – North Carolina
ND – North Dakota	NE – Nebraska	NH – New Hampshire
NJ – New Jersey	NM – New Mexico	NV – Nevada
NY – New York	OH – Ohio	OK – Oklahoma
OR – Oregon	PA – Pennsylvania	RI – Rhode Island
SC – South Carolina	SD – South Dakota	TN – Tennessee
TX – Texas	UT – Utah	VA – Virginia
VT – Vermont	WA – Washington	WI – Wisconsin
WV – West Virginia	WY – Wyoming	

## Abbreviations

ACLU – American Civil Liberties Union

DPIC – Death Penalty Information Center

ECHR – European Court of Human Rights

HRW – Human Rights Watch

JLWOP – Juvenile Life Without Parole

LWOP – Life Without Parole

# Abstract

Death row is a space across the United States that continues to expand, not only in numbers, but in the length of time inmates spend confined there. Fewer and fewer inmates are executed and death row is now increasingly the only punishment of capital convicts. This thesis examines the retributive and punitive treatment of death-sentenced offenders within that space and, by viewing that form of imprisonment as part of a communication process, it assesses the contribution it makes to the death penalty more generally in the USA to argue that death row imprisonment is crucial in sustaining the distinction of capital offenders, and the death penalty itself.

Just as death row receives images from wider culture, it simultaneously generates images that complement and validate those it receives, of death sentenced offenders as dangerous monsters. These images, of offenders who require punitive detention, align with the dominant supportive rationale of capital punishment, retribution, and provide a basis for continued death penalty support in an era of declining executions.

In the “hidden world” of death row, prisoners are left to be abused, mistreated, and denied privileges and opportunities available to other prisoners. The capital offender is presented by his death row incarceration as different from all other offenders serving other sentences, even life without parole. Death row incarceration communicates the worth and status of the condemned, presenting him as a dangerous, and dehumanised other, who needs to be securely detained, and restricted. Thus death row validates and justifies the cultural needs of capital punishment. Just as wider culture, including, specifically, the legal community, dictates a requirement for punitive detention, death row corroborates that image with its own in a self-affirming loop. Death row is therefore functional beyond the mere holding of offenders, it affirms cultural descriptions of the condemned and thus justifies, and provides support for, the very continuation of capital punishment itself.

**The University of Manchester**

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# **A Reciprocal Communication: Dominant Cultural Attitudes & Death Row Detention**

## **- Culture and Death Row: A Communicative Loop**

The space between the imposition of a death sentence and the execution of that sentence is filled by death row. Death row is a space, across the United States that continues to expand; not only in numbers, with sentencing outpacing executions, but in the length of time inmates spend confined there. Fewer and fewer inmates are executed and death row is now increasingly the punishment of capital convicts.

This thesis examines the retributive and punitive treatment of death sentenced offenders within the space of death row. By viewing that form of imprisonment as part of a communication process it assesses the contribution death row makes to the death penalty more generally in the USA. Applying an interpretation of punishment as communication, an interpretation whereby individual or general deterrence are largely incidental to the process, this research examines the utility of maintaining segregated, punitive death row detention beyond mere imprisonment. Instead, death row imprisonment is regarded as part of a communication process that supports retention of the death penalty by generating images that complement and validate those in wider culture, of death sentenced offenders as dangerous monsters (Lynch 2000a, Lynch 2002, Haney 1995:549, Garland 2007a:447). Those Images, pivotally, align with the dominant supportive rationale of capital punishment, retribution. Punitive treatment of the condemned, and images and descriptions of that treatment, is now increasingly relied upon to punish offenders and maintain death penalty support, at a time when the utility of capital punishment is attacked, and a decreasing number of offenders are executed.

Existing death penalty literature has overwhelmingly focused on the institution's legality, morality, practicality, or long term trends of usage, but the "little understood world of death row" (Death Penalty Information Center 2011) has often been excluded from such analyses; death row is seemingly assumed as only a necessary appendage to the capital system. That is not to assert that there are no insights into death row, quite the opposite, there are numerous descriptive accounts of 'life on the row': personal commentaries, poetry collections, edited stories, and memoirs of condemned offenders (see, for example: Chessman 2006, Abu Jamal 1995, Arriens 1992, Berry Dee & Brown 2003, Michael Rossi 2004). Whilst undoubtedly useful to describe life on death row, such accounts are autobiographical rather than academic works. In the wealth of prison literature, and

death penalty literature, produced from the disciplines of sociology, criminology, and law, death row is largely without any academic analysis, other than Johnson's (1981, 1998) excellent, if dated accounts<sup>1</sup>. Never before has a research project or account of death row imprisonment examined the instrumental effect of death row detention. This research endeavour is necessary then to highlight, in an academic framework, the treatment of death sentenced offenders, treatment imposed in reference only to their label as capital convicts, not in reference to institutional behaviour. It is also a timely project; with the increasing wait between sentence and execution, and a consistent reduction in the annual number of executions carried out, death row is for many offenders, the final disposition of their cases. The manner of their detention acts an extra-judicial punishment for capital convicts, those few executed and the majority who are not; all are reduced to the same status and subject to the same death row treatment.

All punishments, arguably, have communicative properties, communicating society's level of intolerance to crime, issuing a message of condemnation and censure, of general and individual deterrence (see for example Duff 1996). David Garland applies the concept of punishment as communication to the death penalty in America in a less traditional manner, one which discounts deterrence as an aim of communicating through punishment (Garland 2010:312). For Garland, the death penalty can be used to communicate messages that do not seek to deter lawbreakers, rather, executions, in such relatively low numbers, now serve to legitimise capital punishment, (Garland 2008:137) but fail to convey a deterrent message. In Garland's view, the prevalence of the punishment in modern culture instead enables individuals and groups to use the death penalty to speak on a range of subjects to which the death penalty can relate, or be manipulated to relate: cultural traditions, federalism and states' rights, crime, race relations, the economy, and political allegiance, for example. In the political arena and in the context of entertainment "talk about death permits symbolic acts, exchanges, and representations that are used by groups and individuals in their pursuit of power, profit, and pleasure" (Garland 2010:312). Nowhere in that communication is the actual offender, or any potential offender, configured as the recipient of any messages. The offender is discounted entirely, not just in terms of deterrence, but simultaneously, in any prospect of the offender's rehabilitation or reformation. For Garland, death penalty communication is not for the good of others, or for offenders, it is for the benefit of those who seek to use it to speak on related issues to further personal interest.

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<sup>1</sup> Robert Johnson (1981, 1998) has carried out in depth interviews with death sentenced offenders that have yet to be surpassed in their quality or research effort, providing the most comprehensive and incisive account of the experience of being incarcerated on death row, and living under a sentence of death.

In investigating or declaring the communicative aspects of punishment, as Garland notes, attention is drawn to the public and declaratory practices of punishment. In the past these would have included those punishments enacted in public, the whipping post, or the scaffold, for example (Garland 1990:254). Although such public punishments have been eradicated, there are still elements of penal practice which are consumed by the public and which are communicated to a social audience: judges' remarks, government policy statements, and agency reports, for example (Garland 1990:254). Contemporaneously, in replacement of overt historic public enactments, for Garland, it is the routine, daily operations of punishing offenders that are important to consider for the communication of messages:

the daily routine of sanctioning and institutional practice...does most to create a particular framework of meaning (Foucault would say a 'regime of truth') in the penal realm, and it is to these practical routines that we should look first of all to discover the values, meanings, and conceptions which are embodied and expressed in penalty (Garland 1990:255).

This thesis takes Garland's theory that the sites of punishment are active generators of images for wider culture (Garland 1990:250), applies it, for the first time to death row incarceration, and finds that death row also implements and receives images from wider culture. Death row, it is asserted, by communicating through the regimes of inmate confinement and treatment, the dominant cultural and legal description of death sentenced offenders as less than human, as dangerous, endorses and verifies the propriety of capital punishment itself. Death row confinement, simultaneously, is, itself, informed by cultural descriptions of the death sentenced offender. The planners of his incarceration are told of his dangerousness and 'otherness', by law, and by wider culture through the imposition of a death sentence and a prophecy of future violence implicit in that sentence (as discussed in chapter three). So, there exists a circular communication, a loop: culture tells states, authorities, prisons - both a death penalty system and actors within that system - that the death sentenced offender is 'different', different from all other offenders, the treatment of the offender whilst on death row, the normalization of that treatment (and the lack of impetus toward change or reformation), confirms that description and informs wider culture, through portrayals, accounts, and reports of death row, that its construction of the capital offender is correct. Moreover, in the confirmation of that description, capital punishment, a unique punishment, is certified as 'needed' for certain offenders, in a self-affirming loop.

This same message, of an offender's difference could be communicated by a 'fast' execution system, a system that puts all sentenced prisoners to death, but that is not currently in operation in the

United States. An emphasis is given to death row in some states by preference, some states do not chose to pursue executions, some states even discourage voluntary executions (Connecticut for example, when a retentionist state, as discussed in chapter six). Yet other states, states which previously exhibited a relatively high execution rate, are increasingly obliged to rely on death row to act as a disposition for death sentenced offenders. Those states are forced to do so by the confluence of factors that have caused a slowdown in executions since the late 1990s (drug shortages, and delays in state and federal court systems, for example, as discussed in chapter four). Yet, when retributive sentiment, the primary rationale for public support of the death penalty (Amnesty International 2011:6, Gallup 2009), is not seen in execution, already diminished by the medical aesthetic of the lethal injection (Sarat 2004:29, Merrill 2008–2009:189, Denno 2002:65), it *needs* to be communicated through death row incarceration. This is increasingly recognised as *the* punishing element of the penalty (Altimari 2011, Sarat 2001:149): if not, without any outlet for, and accommodation of, retribution in the punishing process, majority support for the institution could be jeopardised. Without death row imprisonment, a death sentence would, largely, be regarded by many observers, and supporters, as reduced to little more than a process of expensive litigation for the majority of offenders, without any corresponding sense of punishment.

Communication here is differentiated from expression. Expression is a one way process; by contrast communication is essentially a two-way activity, “we communicate *with* another, who figures not simply as a passive recipient, but as a participant with us” (Duff 1996:33). Although death row is hidden, shut off from society, physically and figuratively, reports and portrayals of it, and its inhabitants, are common. If people come to think and know about the death penalty through the most monstrous offenders, through “the most sensational cases” (Bailey and Chermak 2007:x) then death row is similarly most widely known through the common, often sensational accounts of offenders and their detention that flood the mass market (Berry Dee 2007, Crawford 2008, Kuncel 1995, Berry Dee & Brown 2003, Weinstein and Bessent 1996, Jarvis 2006, Grixti 1995, Ingbreetsen 2001, Michaud & Aynesworth 2000). Those sensationalised accounts combine with all other accounts, official and unofficial, that are available in the public domain, that also describe the austere and punitive conditions of death row, combining to create a mythology of death sentenced offenders and their imprisonment on death row (Lyon & Cunningham 2005-2006:2). As the death sentenced offender is muted by his seclusion from society (even prison society) his communication is most often via a third party; journalists, magazine editors, non-profit organisations, criminologists, activists, prison authorities themselves, who edit and speak of (and for) the offender. Prisoners themselves, through memoirs, poetry collections, and diaries, for example, are able to communicate, to describe the conditions of their detention, but never independently of their crimes,

the cause, manner, and *need* of their death row imprisonment, and, moreover, are frequently underpinned by a profit motivated, mass market appeal. When the manner, form, and experience, of death row incarceration is repeated back to wider culture, death row becomes an active component in the generation of those terms used to describe capital offenders (Garland 1990:250). Like the capital punishment statutes and Supreme Court jurisprudence which has produced a construction of the capital offender as the 'worst of the worst', so too death row, and the treatment of offenders within that space, produces its own similar construction. In that construction, offenders are so dangerous, so devoid of humanity that, if given the opportunity, will seek to kill again. They need to be segregated, denied the opportunities and privileges available to other prisoners and treated in a way that highlights their difference and manages their dangerousness. In this way Garland's assertion is verified:

Penal institutions positively construct and extend cultural meanings as well as repeating or 'reaffirming' them. Instead of thinking of punishment as a passive 'expression' or 'reflection' of cultural patterns established elsewhere, we must strive to think of it as an active generator of cultural relations and sensibilities (Garland 1990:250)

Through death row confinement, all prisoners are reduced to the same caricature, the worst of the worst, most monstrous, dangerous offenders. Death row treatment of prisoners, the reduction of inmates to a caricature, overrides the realities of capital sentencing (offenders sentenced to death over life without parole are often simply those without funds to secure effective representation, overwhelmingly representative of racial biases (frequently from an ethnic minority group, having killed a white victim (Amnesty International 2003)), often of below average intelligence, and without adequate legal representation (Death Penalty Information Center 2012a, New York Times 2012, Amnesty International 2006, Dallas Morning News Editorial 2000)). Rather than exposing such realities, of validating behavioural studies that death sentenced offenders do not, as a rule, commit further murders in a prison setting (Marquart and Sorenson 1988, Sorenson and Wrinkle 1996, Texas Defender Service 2004) (even when housed in the less restrictive general prison population (Lombardi, Sluder, & Wallace 1996)), death row treatment backs up legal and wider cultural theory, communicating a complementary message: death sentenced offenders are truly exceptional offenders who require punitive detention in recognition of their lack of humanity, to minimise their risk of further indiscriminate violence.

## - Cultural Communiqués

In legal terms, capital offenders are described as the ‘worst of the worst’ (ACLU 2003, ACLU 2012), in general culture as monsters, or wicked, unfeeling psychopaths (Lynch 2000a, Lynch 2002, Haney 1995:549, Garland 2007a:447), descriptions which are not without consequence. Those phrases repeatedly used to describe capital offenders are not merely words; their adoption and use brings about a way of thinking which affects social attitudes towards those so stigmatised (Garland 1990:257). Death sentenced prisoners, for example, who volunteer for organ donation are denied their request, despite potential positive benefits (Longo 2011), their face in a public place on a poster or billboard is read as a “contamination” of civilised society (Girling 2004:282). The stigmatisation of the offender, the description of him, likewise, affects and informs the form of his incarceration. As discussed in chapter six, in some states, such as New York, death row conditions have been intentionally worsened compared to those imposed on other inmates; in other states such as Mississippi, conditions on death row have been intentionally neglected compared to other parts of the prison. Over time, through intention and neglect, oppressive death row incarceration has become normalised, punitive death row detention now being standard across the country (Babcock 2008).

When American culture is flooded with explicit accounts, extreme and graphic examples of capital murder, viewpoints on the general form and frequency of capital crime, and thus its perpetrators, become skewed. Thus, a version of capital murder is presented that largely ignores, for example, gang related homicide, and familial murder, and depicts the most extreme, serial and mass murder as the norm. Capital offenders are, in that vein, now depicted as “something less than human” (Haney 1995:549), “not worthy of consideration for human rights” (Lynch 2002:224), they are only intentional murderers who, theoretically at least, pose a continuing threat to all, unless sentenced to death. That dominant mainstream description and regard, which combines with journalistic accounts and television news reports of the most sensationalised murder cases, thus generalise and distort views on capital offenders (Surette 1992:246, Schildkraut & Donley 2012:2, Lin & Phillips 2012) and debates on capital punishment thus become frequently underpinned with the most extreme examples of capital murder and its perpetrators (Sarat 2001:11).

The mass market though, has long been receptive to accounts of true crime, true murder stories, particularly the most graphic and sensational cases, a market that tacitly, at least, approves the retributive punishment of death sentenced offenders. When Florida Supreme Court Justice Leander Shaw, for example, made public the photographs of Alan Lee Davis’ execution, pictures showing his electrocuted body strapped in the electric chair, blood having poured out from beneath his facial

restraint mask, public interest caused the court website to crash and be disabled for months afterwards (Denno 2000:667). Although the intention of Justice Shaw had been to “reveal the horror of the execution method” (Lynch 2000a:1), their publication had the reverse effect. More than 2,000 people directly contacted the court asking for their web address, or to pass on congratulations for a ‘job well done’, some requested pictures and videos of other executions, whilst some requested the pictures as a background wallpaper for their computer screens. The volume of indirect requests, the number trying to view the pictures on the court’s website resulted in crashing the computer system (Lynch 2000a:1): such is the interest in the punishment of capital offenders.

Death row, as a feature of the death penalty, is situated within that culture that approves of retributive punishment. The staff and guards of death row, participants within that culture, are, as will be detailed in chapter six, not immune to the feelings, the fear, the loathing of the typical capital offender construction that propels such interest, indeed they become the most immediate means of communicating those feelings; often immediately responsible for implementing the status and regard of the condemned through the regimes of death row confinement. Guards on death row have been reported to sexually assault inmates (Jackson and Burke Jr. 1999), adulterate food (Johnson 1981:45), deny them the most basic of privileges and amenities based on nothing more than their status as capital convicts (Johnson 1981), and to neglect and intentionally worsen environmental conditions that affect inmates (Hammer et al 2002). They are not only actors within a death penalty system, but actors within a wider culture saturated with images of the condemned as demonised monster, different from other prisoners,

You have handed over to us robbers and murderers because you thought of them as wild beasts...there is no reason why we, the guards, the representatives of ‘law and order’, we, the instruments of your morality and prejudices, would not think of them as wild animals...You signalled to us that they are wild beasts; we signal in turn to them (interview with Michel Foucault reproduced in Simon 1991:27).

Actors within the system, in this context, prison officials, guards, and correctional personnel, work within a micro culture, within a system that has normalized punitive, discriminatory treatment of death sentenced offenders; their general attitude has become one where ‘aspirin are deemed too good for the condemned’ (Johnson 1979:182), those who have been deemed unfit to live. In those rare instances when an actor within the prison system may challenge the norm of death row detention and treatment of offenders within that space, they are often derided by colleagues, transferred to duties away from capital convicts, or even dismissed from their job (Johnson 1981:65). Whilst cultures of disdain for prisoners can indeed be found amongst other prisoner

groups, research has documented the specific abuse of death sentenced offenders as a result of their label as a capital convict (Johnson 1981, Johnson 1998).

Moreover, reform from civic groups, charitable organisations, and human rights organisations is subdued not only by the dominant image of the condemned, the popular endorsement of it, and prison actors verification of it, but by the inability of the death sentenced offender to speak out independently against the conditions of his confinement, independent of his crimes, and the assertion of his future dangerousness. Hidden from public view, punishment not made into a spectacle but integrated into the daily routine of inmates, means brutality perpetrated against offenders at a distance is easy to enact. The knowledge, if not proof – judging by lack of legal intervention - that such abuses occur, that offenders in some way receive their ‘just deserts’, means the public, with an image and stereotype of the capital offender, can excuse and even enjoy the prospect of such treatment, and, with the death sentence offender so configured, it can pass under any objection that may apply to other offenders, railing, as it does, against twenty first century distancing from bodily punishments. As Garland notes:

Because the public does not hear the anguish of prisoners and their families, because the discourses of the press and of popular criminology present offenders as ‘different’, and less than fully human, and because penal violence is generally sanitized, situational, and of low visibility, the conflict between our civilized sensibilities and the often brutal routines of punishment is minimized and made more tolerable (Garland 1990:243)

- **Communicating their Worth: Introducing the Punishment of Death Row Incarceration**

If there is to be much time between sentencing and execution, the condemned must be kept some place. In order to minimize the presence of the now “living dead”, he needs to be kept sequestered in a concealed place, visitor access to which is either prohibited or minimized under stringent regulations. Obviously, the more people who interact with the condemned, the more that can be reported, thought, and perhaps even done about him (Lofland 1977:277)

Modern death rows generally reflect Lofland’s view: prisoners are isolated, segregated, and have only minimal contact with each other, prison personnel, indeed, anyone (Johnson 1981, Johnson 1998, Hammer et al 2002, King 1994). It is primarily in the current death penalty era, over the past thirty five years, that Lofland’s interpretation of death row has been vigorously implemented



(Babcock 2008). Whilst there are some variations in the nature and manner of restrictions and security measures adopted on different death rows, the literature regarding life under those conditions is invariably underscored by their harshness, by their punitive nature (Hammer et al 2002, ACLU 2004a). In Texas, for example, death row is reported as a continuous existence of solitary confinement without access to health care, religious services, or unspoiled food, whilst inmates are subjected to indiscriminate attacks by guards and continual sleep deprivation (Elsner 2002). Conditions on death row in the federal system have been described as so intolerable that, according to reports, those conditions have driven some inmates to volunteer for execution as a means of escape (ACLU 2008a). In Mississippi the U.S. Court of Appeals for the 5<sup>th</sup> Circuit described conditions on the state's death row as akin to torture (ACLU 2004b), and in Virginia, guards are reported as having been open to bribery, prone to carry out sexual assaults on inmates, and complacent about inmate on inmate rape and violence (Jackson and Burke Jr. 1999). Whilst general conditions in state prisons are also widely reported to be brutal, dangerous, and dehumanizing (Hallinan 2001), the physical conditions of death row combined with limited access given to amenities, and services, is a space of incarceration in which inmate suffering appears to be maximised based upon his label of death sentenced offender. Moreover, additional suffering is heaped upon him by the wait for execution, a threat that, no matter the dwindling execution rate across the country, or a state's historic record of death sentence execution, hangs over every death-sentenced offender and adds to the torment of their incarceration:

The devastating, degrading fear that is imposed on the condemned for months or years is a punishment more terrible than death, and one that was not imposed on the victim... the horror is parcelled out to the man who is condemned to death. Torture through hope alternates with the pangs of animal despair... He hopes by day and despairs of it by night... He is no longer a man but a thing waiting to be handled by the executioners. He is kept as if he were inert matter, but he still has a consciousness which is his chief enemy... For a certain number of weeks he travels along in the intricate machinery that determines his every gesture and eventually hands him over to those who will lay him down on the killing machine (Camus 1963:152-3)

"A living death" (Johnson 1981:5), a phrase, and several other derivatives "a living hell", "dying twice", for example, that are commonly used to describe death row incarceration. That is not to say that punishment is not deserved for the crimes committed by capital offenders but, they are punished beyond execution, and more so than those offenders in a general prison population setting. The death sentenced offender is often cut off, not only from society, not only from his

closest friends and family, but even prison society (Johnson 1981). Whilst other offenders are held in more local jails, death rows are always located in the highest security institutions frequently placed away from urban centres. As such, even if visitation was not as restricted as it most commonly is, long term contact with others for death sentenced offenders is often problematic (Johnson 1981). Where visitation is permitted, and capital offenders receive visitors, the visit is conducted through a sheet of plexi glass, and those who do visit death row are subject to intrusive body searches and restrictions on personal items permitted inside the row (Radelet, Vandiver, & Berardo 1983, Johnson 1998:100). Once inside, such visitation is often regarded as an exercise in humiliation for the prisoner (Johnson 1981:54), often allowed less contact than their non-capital counterparts based only on their sentence (Johnson 1981:155). With visitation problematic, a setting deliberately characterised by additional signs and symbols of security, death row incarceration is presented as a process of dehumanisation:

...when the staff is reduced, this gate is locked, further closing off death row from the rest of the prison and making condemned prisoners pariahs within even the constricted world of the isolated offender. "You got to go some to get in here", remarked one inmate, referring to the arsenal of security that confined him and his peers on death row... on death row one feels deeply embedded in prison – lodged, figuratively, in its bowels – shut off from light and liberty. The setting is like a tomb, a symbol of the psychological experience of death row confinement... you never really lose the feeling that you have pushed your way as deep down into the prison as you can go. Even guards are notably anxious to escape the atmosphere of death row (Johnson 1981:44)

The minutiae of daily life on death row is a constant assault upon the condemned, specifically an attack upon any residual trace of his former self (Johnson 1981). Inside the row, the prisoners often reduced to the same generic prison uniform, often orange to distinguish them from non-capital offenders, denied access to work, amenities, and programmes of education or rehabilitation (Babcock 2008). Physically, mentally, emotionally, in total, the death row experience is often felt by the prisoner to be a steady process of dehumanisation.

#### **- An "American Communication": The Death Penalty and Death Rows of the United States**

This research pertains only to capital punishment and death row detention within the United States. Each nation in which capital punishment is available has its own laws or constitutional parameters that govern the usage of the penalty, and the United States offers its own particular constitutional

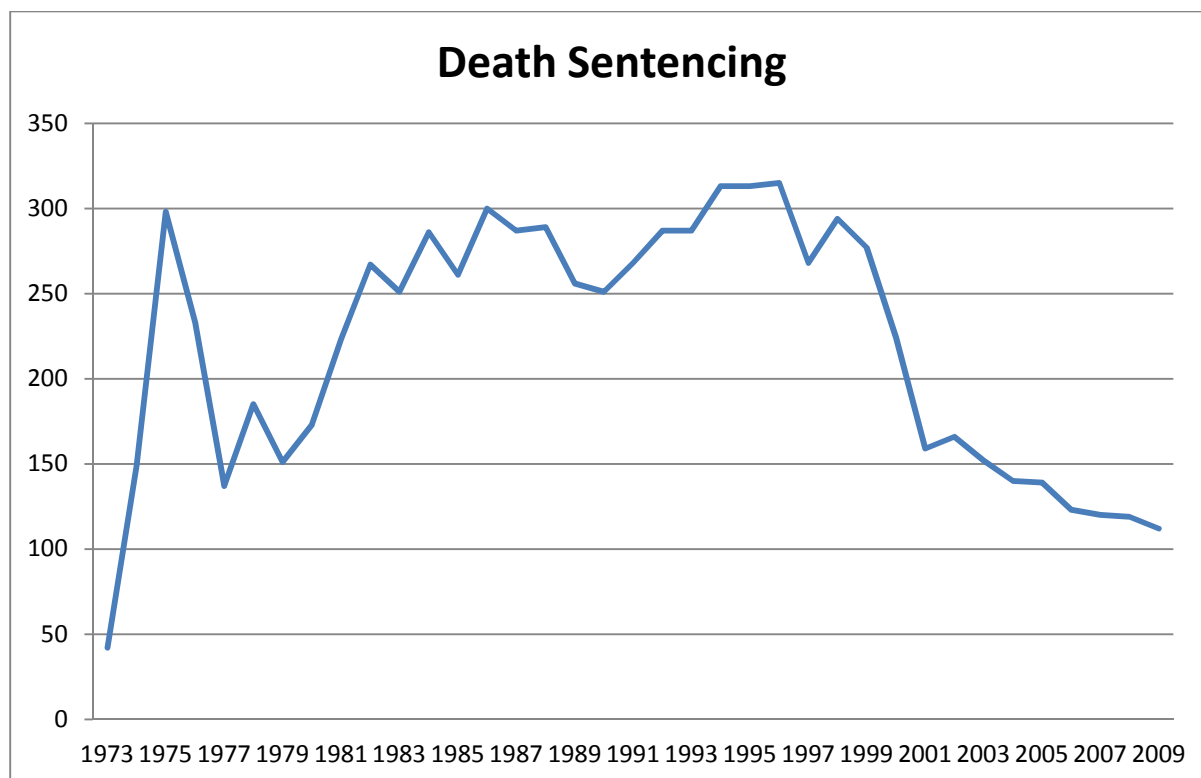
framework in which capital punishment is regulated and adjudicated. Moreover, social, economic, legal, and political conditions vary between nations and whilst they may not solely explain the continued retention of capital punishment in the United States, they can and do affect how the penalty is used and who is subject to it.

There is no 'American' death penalty; the 'American' death penalty exists only as shorthand to denote a country in which criminal offenders are put to death. Rather, there are 33 states in the union which have capital punishment legislation,<sup>2</sup> in addition to the death penalty statutes of the Federal Government and US Military. Whilst there are, however, a number of different death penalties, used to different extents, there are overriding constitutional parameters (and accompanying United States Supreme Court jurisprudence) which govern how all retentionist states use their capital punishment legislation; theoretically, in a non-discriminatory, non-arbitrary manner, as a punishment reserved for the 'worst of the worst', the most culpable offenders.

The death penalty map of the United States, looks different now than just a decade ago. In 2007, New Jersey became the first state in a generation to legislatively abolish the punishment; followed by New Mexico (2009); Illinois (2011) and Connecticut(2012). Those legislative abolitions followed a 2004 ruling of the New York Supreme Court that held that state's death penalty was unconstitutional (*People v. Stephen LaValle* 2004). To remedy the defect identified by the court would have required a new death penalty statute to be written; to date New York remains abolitionist. For the thirty three retentionist states of the union, their death penalties, individually, and as whole, demonstrate a continued decline in use, both in sentencing offenders to death, and executing them, shown below. This decline occurring at a time when issues of cost, faltering public support, a steady number of death row exonerations, and the availability of life without parole have risen in prominence (as discussed in chapter four).

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<sup>2</sup> See Appendix A: Death Penalty and Non-Death Penalty States



Just as there is no ‘American’ death penalty there is also no ‘American’ death row, in a literal sense, each state has its own holding facilities, and regimes within those facilities that govern death sentenced prisoners<sup>3</sup>. All condemned prisoners are incarcerated at state, rather than county level, and all are held in the highest security classification; that is in the state penitentiaries, prisons, and correctional centres that house those convicted of the most serious offences. Each state, whilst having the autonomy and power to construct its own regimes of detention has chosen to incarcerate their condemned prisoners, as a matter of course, in the most austere and restrictive custodial regimes of any prisoner group in the United States. Their segregation and isolation is not only intended by prisoner management but by death row architectural design (Lynch 2000b, King 1994). Missouri is an exception, however, where, as discussed in chapter six, death sentenced offenders are integrated into the general prison population of the Potosi Correctional Center.

There is a generalisation of treatment across the different death rows that exist in the United States, not only in the classification of the condemned, but in the way that death rows are run and managed. Naturally, there are some differences between states and prisons. Yet, as there is an overriding similarity in death row confinement, restrictions on visitation, work opportunities, and movement, for example, this thesis holds that there are enough of those commonalities to configure

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<sup>3</sup> Although now abolitionist states, both New Mexico and Connecticut have preserved the death sentences of those men convicted before their respective abolitions of capital punishment, thus, death row incarceration remains in both states.

a generalisation of the treatment of capital convicts. This research, examines only death row incarceration of men (hence use of male pronoun throughout). Women are, of course, theoretically at least, as equally subject to the death penalty as their male counterparts but, with so relatively few death sentences imposed upon women, aside from a handful of states, such as California, many states have no female death rows<sup>4</sup>, simply without the numbers needed for their existence. Female incarceration does, according to sporadic reports however, mirror that of males; even where only a few women are sentenced to death, female prisoners are typically housed in solitary confinement, within a high security women's facility, and deprived of treatment, services, and facilities that are available to other prisoners (ACLU 2004a).

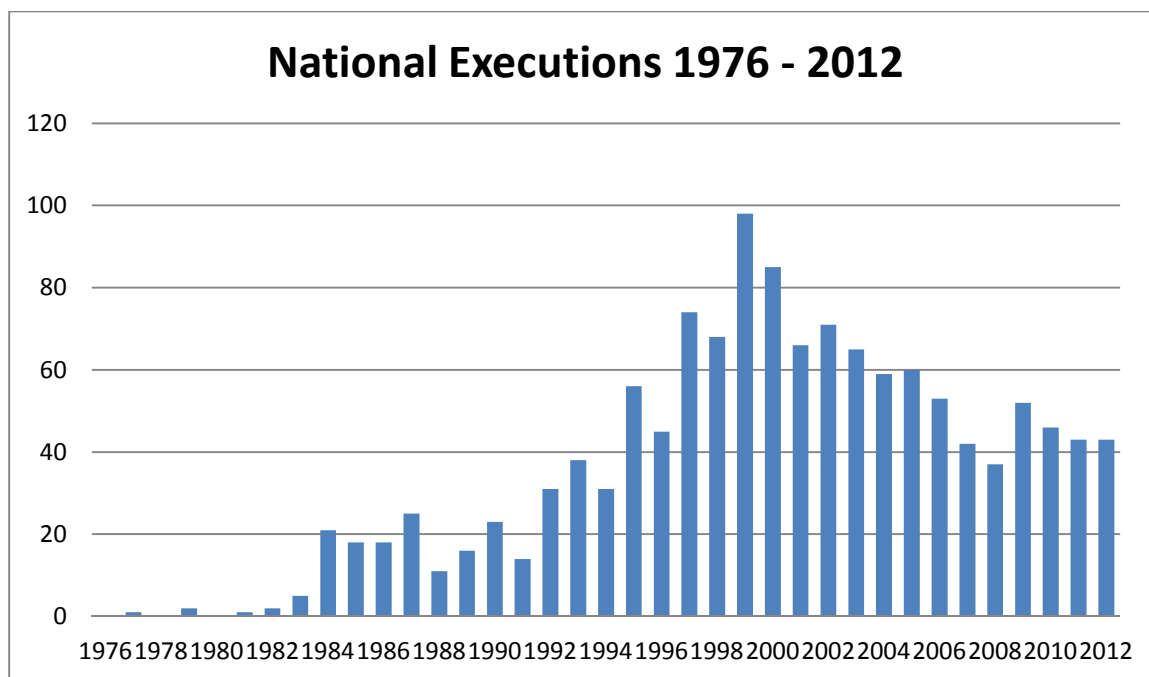
There are currently 3170 offenders on death rows in the United States (Death Penalty Information Center). California leads the nation in the number of offenders it houses subject to a death sentence, 685, comprising over 20% of all those under a capital conviction in America. Nine states have death row populations exceeding 100 offenders. Meanwhile there are more states, eleven, that house ten or fewer offenders on death row: (Death Penalty Information Center).<sup>5</sup>

Whilst executions provide the literal, and theoretical meaning of a death sentence only 15% of those sentenced to death since 1973 have been executed (Death Penalty Information Center 2011) still, though, more than 1,250 persons. From a stalling start in the early years, only one execution in 1977, that of Gary Gilmore who volunteered to be executed, and no more than two executions in any year over the subsequent five, execution figures began to climb in the 1980s, as states became used to once again putting offenders to death. Executions reached their peak in the 1990s when 98 persons were put to death across the country in 1999, as shown below. This period of execution enthusiasm was at its height across the regions of America, only the northeast remained exempt, with just four executions carried out across the region in the past thirty years (all volunteers). In the northeast, rarely, in this era, has a death sentence equated to an execution. Across the nation though, since an executing high in 1999, execution rates have been in a relatively steady decline.

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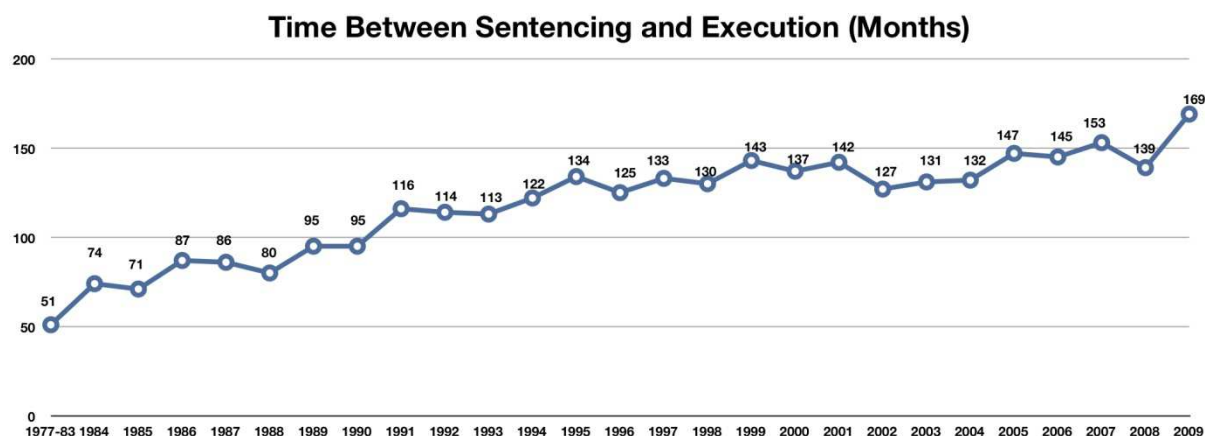
<sup>4</sup> See Appendix B: Female Death Row Populations

<sup>5</sup> See Appendix C: Death Row Populations



- **Without Executions: An Increased Reliance on Death Row to Communicate Difference**

A national slowdown in executions which has occurred since the late 1990s (combined with the increased availability of life without parole, issues of cost, and constitutional uncertainty over lethal injection protocols, as discussed in chapter four), inevitably produces an increasing time spent on death row for individual offenders. In practice, the vast majority of the offenders currently on death rows around the United States will remain there, incarcerated, until their death, a death that is increasingly unlikely to be the result of state execution.



(Source: Bureau of Justice Statistics, reproduced from Death Penalty Information Center 2012b)

In 1972, the United States Supreme Court ruled all existing death penalty statutes as unconstitutional (discussed in chapter three) in *Furman v Georgia*. When executions resumed in 1977, after the United States Supreme Court decision in *Gregg v Georgia* (1976), in which certain newly drafted death penalty statutes were constitutionally approved, on average, an offender could expect to spend slightly over four years on death row awaiting execution, 51 months (Death Penalty Information Center 2012b). In 2009, the average length of time spent on death row achieved a record high of more than fourteen years, an average death row residency of 169 months. Although the average time on death row is relatively high, that is reduced by the 10% who waive their appeals and volunteer for execution<sup>6</sup> (Death Penalty Information Center). For the majority, however, an overburdened court system struggling to cope with the capital appeals process, political reticence to execute, and even a shortage of the necessary lethal drugs required to put offenders to death (as discussed in chapter four) has left capital offenders imprisoned on death row for increasing amounts of time before ever being put to death.

Virginia leads the states in the ratio of death sentence to executions conversions with a rate of 0.662 (Death Penalty Information Center). All other states, meanwhile, have a conversion rate of less than 0.5 per death sentence, more than 20 states have a conversion ratio of less than 0.1 (Death Penalty Information Center). Aside from Virginia, only Texas, Missouri, and Utah convert more than one third of their death sentences into an execution.<sup>7</sup> Indeed, around the country the ratio of death sentences to executions is low and the gap has continued to widen (Kozinski and Gallagher 1995). Increasingly, a death sentence is a sentence of death row imprisonment, not execution, and so that imprisonment becomes the post conviction source of messages that communicate the regard of the condemned, his retributive punishment, and the propriety of capital punishment itself. Putting to death an offender is less and less the means by which the regard, status and punishment of the condemned is communicated: death row, however, is a punishment experienced by all capital offenders, even though execution, increasingly, is not. Indeed, over one third of all retentionist states, and the federal government, have an execution rate of less than 1 person per decade since the 1970s. Even in states with a greater number of executions, the rate remains low, in California, for example, there have been more deaths on San Quentin's death row as a result of suicide (14), than from state execution (13) (Elias 2007). Yet, despite a low execution rate, death sentences are still imposed and offenders are still sent to death row, and it is through death row, increasingly, that the punishment and stigma of the condemned is communicated.

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<sup>6</sup> See Appendix D: Voluntary Executions

<sup>7</sup> See Appendix E: Death Sentence/Execution Conversions

Juries, in a pertinent example, communicate their regard, the community's assessment of worth and status of the offender in their imposition of the death penalty, particularly when imposed over the alternative of life without parole (even if they are not imposing, ultimately, a physical death). Indeed, it is not unreasonable to assume that jurors, as citizens, are aware of the true meaning of a death sentence, as borne out by previous capital jury research:

[none of the jurors] believed that execution was a likely result of the death sentence. As Howles [a juror] put it, "we all pretty much knew that when you vote for death you don't necessarily or even usually get death. Ninety nine percent of the time they don't put you to death. You sit on death row and get old"....This belief is typical of the views and attitudes of Americans (Sarat 2001:149).

Interestingly in the testimony of this juror, made more than ten years ago when executions were more likely than they are now, he specifically notes the death penalty as lifelong internment on death row; the offender is not merely dispatched to prison to be forgotten, he is sent to death row. Moreover, 'he sits on death row', he is deprived of opportunities, social intercourse, and amenities, death row is configured in the imagination (and in practice) as a bleak and desolate place of incarceration separated in condition and effect from simple imprisonment. Increasingly, in line with this jurors' belief, and Austin Sarat's assertion of the generality of that belief (Sarat 2001:149), is its accuracy: this is typically *the* death penalty across America.

Some state populations, in fact, could now be considered as relatively acclimatised to death sentencing without a corresponding execution two states have failed to put a person to death in the modern era, five states have only executed volunteers.<sup>8</sup> For those states, the death penalty, currently, ends at incarceration of the offender on death row, even for those whose appeals have been exhausted, and many states seem content for this to remain the status quo. Indeed, a long delay in conducting executions and a reliance on death row to be the disposition and, tacitly at least, the punishment of offenders, is not a new phenomenon. Across many death penalty states there was a relatively long period between enactments of death penalty statutes after *Furman* and subsequent executions. Some states never pursued executions and only put an offender to death when an inmate volunteered for execution, Pennsylvania, for example. It was over thirty years between Connecticut enacting its death penalty statute and its first execution (32 years) and over twenty years for a host of other states, Kentucky, Maryland, and Ohio, for example.

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<sup>8</sup> See Appendix F: First Non Voluntary Execution after Death Penalty Re-Enactment



## - **Outline of Thesis**

As the final disposition for the majority of capital offenders, death row, although without much analysis, is an important area for academic scrutiny. Examination reveals that death row, as a form of imprisonment, is increasingly important to sustain support for the institution, and a distinction of offenders. Without executions to convey the punishment, and regard, of the condemned and to ensure the death penalty retains its purpose, punishment needs to be conveyed from a different source; death row. Death row communicates a description of the condemned as 'needing' to be segregated, just as it implements culture's description of him as dangerous and different. Yet modern death row incarceration, which is deliberately punitive, is only a recent phenomenon, an accompaniment to a death penalty increasingly supported by a sense of retribution but executing relatively few offenders. Death row thus needs to be examined not only as a topic within itself, but as an instrumental tool of the death penalty.

Although now described as a "living death" (Johnson 1998, Johnson 1981, Michael-Rossi 2004, Magee 1980), the treatment of the offender on death row has changed over time. Historically, execution was more likely, and death row confinement was much less oppressive and restrictive, the subject of the next chapter. Unlike today, where capital punishment statutes have been refined in their application, historically, even as recently as the 1960s, the crimes for which an offender could be sentenced to death were less serious, robbery, for example, and the humanity of the condemned could still be found, respected, and accommodated in his imprisonment: he was not the worst of the worst having committed the very worst of offences. The current treatment, the oppressive and punitive custody of death sentenced offenders, their neglect and the withholding of services to inmates, is unique to the current era, an era where death penalties, theoretically at least, are focused upon only 'the worst of the worst' offenders. Death row confinement from previous centuries, and even previous decades, reflected a wide scope of capital offences, cultures less dominated and saturated by distorted, monstrous caricatures of capital offenders, and shows an imprisonment that accommodated the humanity and individuality of the condemned.

As death row has become increasingly punitive in its restrictions and treatment of the condemned (Babcock 2008), legal regulation has sought to limit the scope of capital punishment and reduce the pool of death eligible offenders to the 'worst of the worst', to those convicted of first degree murder with a finding of aggravating circumstances. In this way, the legal establishment too has asserted who and what constitutes a capital offender, the subject of chapter three. The capital offender, in legal terms, is no longer mitigated by diminished mental capacity, or age, or the commission of a non-lethal offence, as he may have been as recently as the 1950s and 1960s; he is fully competent,

rational, and culpable. Also explored in this chapter is the dual importance of the legal sector not only as promoting death sentenced offenders as the worst of the worst, as dangerous, potentially repeat offenders, but as the only potential source to uniformly, mandate change in the manner of death row confinement. As such, this chapter traces the legal reticence to regulate the punitive segregation of death row confinement, which would have the corollary of undermining its own version of the capital offender as likely to commit further acts of violence. Legal action, and inaction, has portrayed the capital offender as in *need* of the repressive conditions that currently characterise death row.

Chapter four explores the current impediments to executing offenders and the consequent effect upon the length of time to which offenders are subjected to death row confinement. Whilst for some states the emphasis given to death row as the punishing element of a death sentence is not new, for other states, that emphasis is increasingly forced upon them as factors combine to reduce executions: public concerns over cost, death row exonerations and wrongful convictions, pragmatic issues with lethal injection, authoring constitutionally acceptable execution protocols, or even sourcing the necessary lethal drugs. This chapter notes that when a death sentence does not mean certain execution, and cannot do at present, or in the near future for many states, death row is increasingly emphasised as the communication of culture's fear, loathing, and revulsion of capital offenders.

Life without parole, when used alongside the death penalty to also sentence those convicted of aggravated murder, even some of the most notorious examples of serial murder (Johnson 2006)<sup>9</sup>, invites a comparison of inmate treatment within the prison setting, by proxy, to those states that do not retain the death penalty<sup>10</sup>, the subject of chapter five. If death row incarceration communicates the specific worth of the capital offender then, by comparison, those not capitally convicted, even if convicted of similar offences, comprising a proportion of those sentenced to life without parole, should not be exposed, as a rule based upon status and stigma, to the same conditions and punitive treatment; their future dangerousness not prophesised in law, their threat not prophesised by a sentence of death. This chapter confirms the communicative feature of death row by examining and comparing life in the general prison population for those convicted of similar offences, and sentenced to life without parole, finding that the punitive conditions of death row are, even though they are not a requisite element of the death sentence, imposed on the basis of that label.

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<sup>9</sup> Gary Ridgway, the 'Green River Killer' was, for example, spared the death penalty by prosecutors in return for information regarding the burial sites of his forty plus victims (Johnson 2006)

<sup>10</sup> All non-death penalty states now have provision for life without parole for first degree murder, except Alaska where the minimum term for such sentences is 99 years (Death Penalty Information Center).

Chapter six, then examines in detail, the experiences of those confined on death rows in the United States, examining communication in practice, the segregation, security measures, and punitive custody that underpin daily life on death row. Specifically, this chapter notes how the configuration and description of the death sentenced offender in wider culture informs his detention, a description and assertion of dangerousness that is not verified by behavioural studies of death sentenced offenders. In a continuation of a point referenced in chapter three, the primary reason for international refusal to extradite offenders to face capital charges within the United States, this chapter also examines the concept of 'death row syndrome' and its contribution to the voluntary execution rate, highlighting, further, the reticence of the legal sector to intervene in the current forms and regimes of death row imprisonment.

As the diminishing number of executions has been referred to throughout the thesis, the persistence of death penalties, even non-lethal ones, is taken up and explored in the final section. The final chapter of the thesis then discusses and analyses, using the material of the preceding chapters, how death row confinement figures in a communicative process with wider culture: how that imprisonment not only assimilates the descriptions of death sentenced offenders but transmits those same descriptions back in a communicative, self-affirming loop. This chapter highlights, through examination of reactions to the Benetton advertising campaign 'We on Death Row', preference in wider culture for the rejection of the offender's humanity, the dehumanisation of the death sentenced offender, and corroboration of culture's generic image of the capital offender and, thus, the punitive treatment and containment of those under a sentence of death. The chapter concludes the utility of death row imprisonment is beyond any institutional security concerns or classification arrangements, and is instead for the benefit of the death penalty itself: death row incarceration, by reinforcing and affirming the common cultural descriptions of the capital offender, reinforces the cultural 'need' for capital punishment. With that communication so identified, this section offers a revised theory of punishment as communication, one that aligns with Garland's general theory of the instrumentality of the death penalty and discounts the offender as central to that communication.

# Not Always the Way: Comparing Death Row Detention Across Time

## - **Historic Death Row and a Different Treatment of the Death Sentenced Offender**

Death row has not yet become an object of historical study by itself. Historians strangely avoid it; legal specialists don't provide precise accounts either and take its existence for granted (Grivet 2005:1)

Not only has the length of wait on death row before execution significantly increased, whilst cultural attitudes towards capital offenders have hardened (Lynch 2000a, Lynch 2002) but, over time, the availability of privileges to death sentenced offenders has changed, being now much more restricted than in centuries, even decades past. Despite squalid conditions of detention in early modern prisons and on death rows, the condemned were permitted much more freedom within their incarceration, treated more as individuals rather than the depersonalised dehumanised 'units' of today (Lynch 2000b, Lynch 2002). Even in early America, whilst conditions on death rows could only reflect, at best, the general conditions, and hygiene of the prison, the amenities and services provided reflected the condemned themselves: the condemned were still considered, and treated, as men. Although wealth might separate those offenders to whom special privileges were given, access to people, food, and drink, for example, on earlier death rows poor offenders were denied on that basis, not denied on their basis as death sentenced offenders. That label, that appendage, is now enough in itself to prevent and bar access to even basic privileges, services, and amenities for those incarcerated on death row (Hammer et al 2002).

Available literature on the specific conditions for the holding of condemned persons whilst awaiting execution in early America is scant; analyses of American death rows commonly begin with a historical overview of death rows in early modern England (Johnson 1998:65). This is not misplaced however, the American system of capital punishment was imported in form from across the Atlantic, and was refined and modernised from the basic schematic of that system. As such the practices of administering death as punishment in England are relevant to the early manifestations of capital punishment in America (Johnson 1998).

Separate confinement for the condemned, segregated from other criminals whilst awaiting the enactment of their sentence, probably started when prisons, then known as Bridewells, became common (Johnson 1998:64). Historically, as detailed below, offenders were permitted a relative amount of freedom within their death row incarceration. Even into the twentieth century, personal

expressions of identity were permitted to the condemned, services, and privileges that related to and reflected the individual, their needs and desires as people facing death. As late as the 1930s, requests to express personal autonomy were granted by prison authorities, requests for personal possessions, clothes, cigarettes, and music for example (Johnson 1998:68). Yet, significant restrictions have since been imposed on death row incarcerates, the condemned now reduced by those restrictions only to a “dehumanised unit” (Lynch 2000b, Lynch 2002). They are no longer a person that can be sympathised with, one that elicits sympathy or empathy; interpreting, and implementing, their status in legal and wider culture (Haney 1995) they are denied any but the most basic of rights, as discussed in chapter six.

Incarceration is, of course, a punishment in and of itself for a range of offences but, being a necessary prerequisite to the execution of death sentenced offender, in the very immediate sense to ensure execution can be carried out and the appeals process honoured, it means the capital sentence must have two components: incarceration on death row and then, theoretically at least, death by execution. Whilst originally used as only a holding site in preparation for execution, a reality in the early modern era and in the early history of the American death penalty, the length of time an offender now spends on death row, by contrast, combined with the conditions of that detention, renders capital punishment not just as two components but as two distinct punishments (for those that are actually executed).

Added to incarceration is the ‘death wait’, the threat of execution. When execution is threatened, even if never fulfilled, aside from death row conditions, that threat alone enacts a heavy toll upon the prisoner, a punishment before *the* punishment (of execution). The longer that threat lasts, the longer the death row wait, the greater the psychological devastation of the person, as Camus has noted

The feeling of powerlessness and solitude of the condemned man, bound and up against the public coalition that demands his death, is in itself an unimaginable punishment... As a general rule, a man is undone by waiting for capital punishment well before he dies. Two deaths are inflicted on him, the first being worse than the second, whereas he is killed but once. Compared to such torture, the penalty of retaliation seems like a civilized law. It never claimed that the man who gouged out one of his brother’s eyes should be totally blinded (Camus 1963:156)

The wait for execution can, of course, not be avoided if the death penalty is imposed and the offender is permitted to exercise his constitutional right to appeal his sentence; granted the time to

fight his conviction and sentence in the courts. Even the procedural difficulties in conducting an execution (authoring constitutionally tolerable execution protocols, for example) exist, at least in part, for the protection of offenders, however oxymoronic that might strike the observer; efforts though that lengthen death row incarceration<sup>11</sup>. Reports from death row, detailed in chapter 6, overwhelmingly assert, however, that the modern regimes and isolation imposed on death sentenced offenders during their death wait act, and are felt by inmates as intended to act (Johnson 1981, Johnson 1998), as an additional punishment, exacerbating the psychological torment of waiting for an execution date to be set,

The image of confinement on death row as a living death [is] used by many inmates to capture the essential or cumulative experience of the condemned prisoner... The image, spontaneously and forcefully reinforced by the prisoners themselves, serves as a dramatic summary statement of the death row experience, encompassing its central psychological features of powerlessness, fear, and emotional emptiness (Johnson 1981:17)

Although the effect of living under a sentence of death and a threat of execution may be consistent through time, the nature of confinement has changed, compounding that threat of execution. The regimes, restrictions, and punitive nature of death row confinement that produce a “living death”, the powerlessness, fear, and emotional emptiness that Johnson notes, are not only psychologically destructive, discussed further in chapter six, but are acting, increasingly, as *the* retributive punishment of many death sentenced offenders. Such are the conditions on modern death rows, conditions that retain the outward markers of retribution that even in execution the lethal injection aesthetic denies, all death sentenced offenders are subjected to a retributive punishment, the primary reason why the death penalty is publicly endorsed (Gallup 2009, Amnesty International 2011:6). As death row is now a “hidden world” (Death Penalty Information Center 2011) this new form of punishment, this evolution in the meaning of the death sentence, punishing with incarceration, retributive punishing in relative secrecy behind prison walls, is, in form, the opposite of the death penalty of previous centuries.

To contrast English and American executions circa 1950 with those circa 1700 is virtually to contrast pure strategies of dramaturgical concealment and openness. There is a

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<sup>11</sup> In California, for example, District Judge Jeremy Fogel in *Morales v Hickman* (2006), ruled that the State could not conduct executions without qualified medical personnel in attendance to ensure the unconsciousness of the prisoner. Ultimately the State could not secure such personnel to participate in executions and executions currently remain on hold whilst the state authors new lethal injection protocols.

sense in which agrarian England and America, with all their rawness, indifference, brutality, and cruelty were also more open and even honest about how they dealt with the basic, life and death aspects of social existence. There was a sense in which communication was more straight out and direct, in which conflicts were perhaps not so much more intense as more openly acknowledged and acted out rather than covered over and muted (Lofland 1977:283).

In earlier centuries the character of the death penalty was different than today: capital punishment was less contentious, socially and politically. Indeed, hangings were common, even mass events greatly enjoyed by the public (Banner 2002:146). There was no embarrassment about death, no qualms in enacting it as punishment, even for relatively minor offences (Lofland 1977). As an example of the dramaturgical openness of the death penalty of previous centuries the condemned were publicly displayed, both during their death row confinement for prison visitors and at their public execution. That display was a chance for the state to display its power, and, theoretically at least, a chance to deter others from behaviour that would lead to the same fate. When the death penalty was used to communicate, historically, it was done so to broadcast the might of the state, a warning to potential law breakers. Even then, however, as a tool of the state, the individual was allowed to assert himself and his individuality, he was not dehumanised as he is today. In fact his personal qualities were often focused upon during his execution and the lead up to it (Banner 2002:148). The condemned was a citizen that had taken the wrong path and as such could be any member of the public, displaying him, and his qualities can thus be read an early form of deterrence, speaking to everyone who was like him. Today, the dominant image of the offender, so dehumanised, renders nobody as like him, the death sentence confirming his difference from even other murderers. Contemporarily, for support of the death penalty, he is beyond understanding and and therefore beyond sympathy, an evildoer that cannot be identified with therefore needs to be expunged (Garland 2007a:447). Disruptions to the image do occur, however, when offenders are exonerated from death row, as discussed, in chapter four, when, after a personal transformation on death row renders the presentation of an execution as problematic (Stanley “Tookie” Williams, or Karla Faye Tucker, for example, as discussed in chapter six), but these are only seldom disruptions to the dominant image of the contemporary death sentenced offender as monstrous ‘other’ (Haney 1995:549, Lynch 2002:224).

Whilst awaiting execution the condemned was, in centuries past, freely allowed to entertain guests, to converse with others, to eat and drink. When executed he was permitted to choose the clothes in which he would be hanged, today the condemned, by comparison, are reduced to wearing prison

issue nappies, “diapers” (Denno 2002:103, Solotaroff 2001:59). Of course, an offender choosing his execution clothing is only a small aspect of administering and conducting an execution, more notable is the very fact that authorities allowed the practice. The offender was allowed an assertion of the individual, particularly striking, in retrospect, against the carefully controlled and managed execution process that characterises contemporary death administration today: even last meal requests can be constrained by the availability of materials in the prison kitchen and the last words of the condemned are sometimes relayed via, and edited by, a third party such as the warden (Lynch 2000b).

Colorful, self chosen clothes endow the condemned with the capacity for personal taste and preference. This personalizes the scene, as does allowing him to provide any of the death equipment, such as the rope that hangs him or binds his hands. Bland state controlled or state provided clothes and state standardized death equipment serve better to depersonalize and conceal (Lofland 1977:280).

Privileges for the condemned, permitted assertions of autonomy and individuality, were not solely confined to the immediate preface of an execution but, rather, were permitted during the condemned’s entire internment on death row, no matter how short that would be. Historically, if the prisoner had the means, he was relatively free to move about within the confines of his incarceration and could enjoy the amenities and services provided within the prison. In Newgate prison, liquor, tobacco, gambling, and sex were available, the latter of which “offered a pleasurable diversion from the rigours of Newgate and enhanced the gaol’s notorious reputation” (Sheehan 1977:243). Even under a sentence of death the prisoners were still regarded as deserving of such ‘necessities’. Female prisoners would be able to seek sex with male prisoners for the purposes of becoming pregnant so they could ‘plead their belly’ and secure a pardon (Sheehan 1977:243). Liquor was freely available within the prison and the ‘Newgate taphouse’ was the centre of life in Newgate throughout the eighteenth century, a place where prisoners “could get drunk night after night, or pass their time gaming, smoking or merely conversing” (Sheehan 1977:239). By contrast, no such amenities or ‘privileges’ are afforded the condemned of modern day; indeed the construction of modern death row has in its design a prohibition of human contact or even conversation amongst the condemned (Lynch 2000b, Johnson 1981:44).

Whilst modern death rows are characterised by extreme restriction upon the movements of the offender and meagre privileges available to him, earlier conceptions of death row facilitated much more liberal access to outside people, services, and amenities. Indeed, earlier versions of death row



provided, in some instances, although probably rare instances, an almost party atmosphere for those under a sentence of death

...Jack Sheppard, executed in 1724, received “no fewer than three thousand persons” in his death cell at Newgate Prison. In 1744, another had “seven girls to dine with him on the evening before he was hanged”, a party at which the condemned was reported “not less cheerful than those who hoped to live longer”. A condemned called the “monster of London” held a “Monsters Ball” for about 40 people at Newgate Prison in 1790. “Tea was served at 4 P.M. to the music of violins and flutes, after which the company danced until 8 P. M. when a cold supper was produced. The party broke up at 9 o’clock, the usual hour for closing the prison”. Alcohol and other amenities were available... (Lofland 1977:286)

Those with money, “could spend their last days in Newgate in dissipation, as John Ryan did, along with highwayman Paul Lewis in 1763 when he entertained guests in the condemned cell by singing bawdy songs and vilifying the parson” (Gatrell 1996:36). Paul Lewis was not alone in attracting a mass of visitors prior to his execution, Horace Walpole wrote that over 3000 people had paid to view ‘a notorious highwayman’ prior to his hanging (Sheehan 1977:236). Such visits were, of course, not an entirely benevolent action but were a profitable enterprise for officers in the gaol, as Sheehan notes, as late as 1814 officers could make £300 a year from ‘spectators’ fees’ for the public display of the condemned (Sheehan 1977:236). Such visits also served to satisfy the titillation of the general public, a satisfaction of a morbid curiosity to visit with the notorious criminal while he awaited the enactment of his sentence. Yet, these visits were also of imagined benefit to the condemned who was allowed to mingle, converse, eat, and drink with those who came to see him: “...historic death cells and trips, especially, provided the condemned with a margin of freedom to express their personal uniqueness. They were visited and went visiting; they were talked to and talked” (Lofland 1977:306). Family members were free to ‘come and go’ at will (Sheehan 1977), supplying prisoners with food, drink, sex, money, and any other amenities they desired. It was not uncommon for wives to even move into the prison with their husbands, certainly not uncommon for wives to spend the night. In eighteenth century Newgate, Major John Bernadi married in the prison and then raised his children in the Press Yard. By 1809, so accepted was the practice that it was financially regulated and capitalised upon, it cost 1s per night to keep a prisoner’s family in the prison with him (Sheehan 1977:236).

Contemporarily, access to people outside death row is restricted to visits with family, but such visits are barely comparable to that privilege historically. Access to family is disruptive to the process of

dehumanisation of the offender by the regimes of death row, a disruption to the prevalent view of the condemned. On death row visits are “discouraged” by officials through a variety of “restrictive rules and regulations” (Johnson 1998:99) but, pivotally, even when they at first exist, those visits frequently dwindle as spouses remarry and parents grow old. Given the placement of death rows in high security institutions, often far away from urban centres those visits are often rare even immediately after the imposition of a death sentence (Johnson 1998:99). Additionally, those visits are only poor reflections, at best, of family access outside the world of death row; bodily contact is frequently not permitted, conversations are overheard, movements are monitored by prison staff, and those coming into death row often subject to intrusive, even demeaning personal body searches (Radelet, Vandiver, & Berardo 1983, Johnson 1998:100). Visits become, for some condemned offenders on death rows today, “an exercise in humiliation” (death sentenced inmate, Abu Jamal, quoted in Johnson 1998:100), as such many death sentenced offenders prefer to forgo the ‘privilege’ (Johnson 1998:99)

...demoralizing visits are, moreover, experienced by many inmates as an intentional effort to destroy the human relationships that sustain condemned prisoners. In Pennsylvania, as in many other death states, noncontact visits are the rule. It is not just a security rule; it is a policy and structure that attempts to sever emotional connection by denying physical connection between the visitor and the inmate. The empty existence of death row may, in any case, render prisoners mute during visits... Unrewarding visits [thus] reflect the prisoners’ basic sense of alienation from the world of the living. As a result, most condemned prisoners describe themselves as abandoned by the free world and left to their own devices to endure their confinement (Johnson 1998:100)

The comparative privileges an offender could enjoy on earlier versions of death row, however, must be separated from the physical conditions of death holding, indeed, the conditions of prisons themselves. Conditions in early prisons were squalid, insanitary, and dangerous and death rows or, more accurately any place in which the condemned were kept prior to their execution, could not be expected to surpass those conditions. The sanitation and cleanliness of the death row setting was only equal to those conditions. This is in contrast to contemporary death holding, however, where conditions for the condemned are, at best, subject to neglect, at worst, intentionally worsened compared to other areas of the prison (Johnson 1981, ACLU 2004b). This difference though, supports a distinction between capital and non-capital offenders, as discussed in chapter five; capital offenders are treated as unworthy of a level of care given to other prisoners not stigmatised with a

death sentence. An account of the last days of Joseph Harwood, an offender waiting to be hanged, describes the squalid conditions he was faced with whilst he awaited execution in Newgate prison

...crammed with two or three others into a Newgate cell measuring eight feet by six. It was furnished with a rope mat and stable rug for each prisoner, and at night it was lit by a candle. It was ventilated through a hole in the prison's three feet thick front wall, crossed by two frames of close iron bars. The cells were 'beastly', the radical free thinker Haley wrote from inside knowledge in November 1824: the condemned were 'half devoured by vermin of the most loathsome description'. The food was bread, water, and gruel. By day, Harwood had access to two communal rooms and the prison's press yard, a gloomy space flanked by blank stone walls topped with spikes... A gate of iron bars permitted prisoners to communicate with friends across a short passage terminated by another barred gate, watched by turnkeys (Gatrell 1996:42)

The facilities, amenities and privileges that could be acquired on early modern death rows, by prisoners with means, should not mistakenly betray the foulness of death row and the rampant disease that infected prisons of the time. The 'squalor' and 'unhealthiness' of early prisons is well documented, particularly of the infamous Newgate prison in London where,

In warm weather a noisesome stench drifted from the prison and permeated the surrounding neighbourhood... Physicians flatly refused to enter Newgate and frequently warned that gaol fever, a virulent form of typhus, might spread from the prison and decimate the entire city (Sheehan 1977:229).

Contemporary death rows should, theoretically at least, be cleaner more sanitary places if only owing to evolutionary improvements in building design and disease control. However, some accounts offer little to differentiate some modern death rows from those of earlier times when institutional cleanliness was of little concern to prison authorities. Historic death row confinement, however, predates modern standards of care that are meant to characterise treatment of people in public institutions, even prisons, as well as predating a wealth of knowledge on the physical and psychological effects of degrading prisoner treatment and exposure to unsanitary living conditions. Still, however, conditions on current death rows reflect the squalor of their earlier equivalents,

Conditions in this facility [Mississippi State Penitentiary Death Row], including excessive heat, filth, uncontrolled insect and mosquito infestations with attendant risk of West Nile infection, inadequate water supply, water leaks, impaired ventilation, uncontrolled water temperatures, malfunctioning toilets, the apparent lack of adequate cleaning

supplies, food being held and served at unsafe temperatures, unsanitary laundry, broken automatic fire detection and alarm system, excessive noise, and extremely poor lighting, all combine to seriously jeopardize the health and safety of the inmates and the correctional officers who live and work in Unit C – 32, Death Row (Balsamo 2002:1)

All the cells in Death Row have “ping pong” toilets: Sewage from one cell backs up in the toilet in the adjoining cell. This plumbing defect presents a serious health hazard. It causes fecal material and micro organisms from the sewage disposal system to bubble up in the toilet of other cells, creating a hazard that the toilet will overflow, and fecal materials and microbiological agents will be released into the air. Prisoners and correctional staff then must breathe this air filled with aerosolized fecal matter (Balsamo 2002:1)

So, at least in contrasting some modern death rows to those of previous centuries, sanitation and general cleanliness can offer little in difference. That is not to say that the conditions of contemporary death rows are uniformly comparable to those of Newgate Prison, for example, rather it is to assert that death rows are foul places of detention often characterised by poor sanitation and lack of cleanliness even though they need not be: such is the regard that today’s death sentenced offenders are held in.

To contrast death row confinement across time is to contrast the freedom of the condemned within their incarceration, once permitted to express themselves as individuals, now reduced to dehumanised units (Lynch 2000b). Pivotal, in a parallel to modern American usage of capital punishment, at the time in history when death was imposed for relatively minor offences (more than 200 crimes, including property offences were listed as capital under the English ‘Bloody Code’ (Landau 2002:4), just as capital felonies in colonial America were much broader than those of today, death row confinement was loosely structured. Even in twentieth century America, as recently as the 1960s, death penalties and capital offenders (and cultural perception of those offenders) were not regulated by the ‘worst of the worst’ principle, death sentences could be, and were imposed, and executions carried out for offences such as rape, robbery, and arson. If only by inference of the sometimes relatively minor offences for which an offender was condemned, minor in comparison to the first degree aggravated murder that constitutes capital offences today, the offender was still granted his individuality and humanity, and privileges that reflected that: death row incarceration was, comparably, permissive and relaxed. It is in the contemporary era that attitudes and death row incarceration have changed. Historically, the humanity of the offender was recognised (he was a citizen who had made bad choices, one of the citizenry that could be identified with, even

empathised with (Banner 2002:148)) now, as detailed in later chapters, to give the death penalty purpose and security as a necessary punishment, the humanity of the condemned is denied, continually regarded as beyond sympathy or understanding (Garland 2007b:447). The death penalty is regarded as the necessary means to remove an offender from the society and the preferable means over incarceration in a general prison population, with its attendant services and privileges deemed 'too good' for those under a sentence of death (Johnson 1979:182). Upon entrance to modern death row, prisoners are subjected to a process of dehumanisation, as discussed in later chapters, a process of reinforcement of their status as death sentenced offenders, as undeserving of any notion or respect of his humanity. This is a striking characteristic of modern death row; a restriction, isolation and quarantine of the individual that denies the offender his personality, from personal expressions to visitation and, indeed, any contact with the outside world. As Lofland notes, however, this isolation and punitive use of death row confinement provides a shield, even an encouragement, for the oppressive treatment of the condemned, "Modern sequestering prevents criminals from doing or saying much of interest and the public's knowing and therefore feeling much about it" (Lofland 1977:308). Moreover, it prevents any significant "liberal contingency" from challenging the status quo and the dominant constructions of the capital offender (Garland 1990:243). When the condemned were on display in previous centuries, from death row incarceration through to public execution, access engendered identification within him; indeed, when executions were public displays pity for the condemned was as likely to emanate from the public as much as condemnation of him particularly when charged with relatively minor offences and with a focus upon his personal qualities in the execution performance (Banner 2002:148). When the condemned are now quarantined to death row, their humanity denied and access to others prevented, even, as discussed in chapter six, access to prison guards is limited, his reduction to subhuman is confirmed and there is less a person with which to identify. Instead of identification, wider cultural and legal depictions of his 'otherness' are affirmed by accounts of death row detention and the institutional justification for its severity. Moreover, that death row quarantine prevents the offender from working against that ascription and restricts any attempt to reassert his identity, as discussed in chapter six.

Now, as attempts to assert individuality, and personality, including even remorse, have been restricted, the capital offender's identity is constructed for him, in wider culture, by those who support the death penalty and, indeed, by the legal sector, the United States Supreme Court, who have refined the capital offender to the 'worst of the worst', whose actions are unmitigated by a young age or mental instability, the subject of the next chapter.

# Communicating an Image: Legal Searching for ‘The Worst of the Worst’

## - *Hyper Regulation of the Death Penalty*

There are, generally speaking, three stages of progression for those persons executed in the United States: trial, death row incarceration, and execution. This chapter details how American jurisprudence has concerned itself only with two of those stages; trial and execution. Far from intervening, ameliorating, or regulating, death row confinement, legal regulation has instead focused on the narrowing of death penalties to intentional murder with aggravating circumstances. As the severity of the death penalty has become appreciated in an era of global abolition, in reports of its arbitrary infliction, the Supreme Court has sought to reduce those to whom it can be applied, excluding juveniles and the mentally retarded from its remit. The regulatory achievements of the Court have had, as their driving force, the reduction of capital offenders to the ‘worst of the worst’ (Gregg v Georgia 1976, Coker v Georgia 1977, Kennedy v Louisiana 2008), the most deserving of punishment, thus producing, through that regulation, a legal image of the capital offender. That image is one of an offender who *needs* to be expunged from society (prison society, pivotally, being held by the legal establishment to constitute a society in its own right (Jones v North Carolina Prisoners’ Labor Union 1977, Lawrence v Texas 2003)). Thus, that jurisprudence, combined with a lack of intrusion, into the “unchartered bog” of capital offender imprisonment, tacitly endorses current, austere death row detention to manage such dangerous offenders.

Increasingly Supreme Court jurisprudence has ring fenced the death penalty as a unique and exceptionally different punishment, in a line of jurisprudence that stretches back to the 1970s (*Furman v Georgia* 1972). It was the Furman decision that articulated the contemporary ‘death is different’ doctrine, emphasising that, relevant to other punishments, death was “an unusually severe punishment, unusual in its pain, in its finality, and in its enormity” (Justice Brennan, concurring, *Furman v Georgia* 408 U.S. 584 (1972)). The Supreme Court has since abided by that principle of ‘death as different’, creating a complex chain of legal rulings pertaining to capital punishment; if only in areas other than death row. Indeed, the sheer volume of capital cases before the Court gives some clue as to the overwhelming presence of the death penalty in American jurisprudence. Supreme Court dockets comprise an extremely high number of death penalty adjudications, between one quarter and one half of cases over the past decade, even though capital defendants only account for approximately 0.1% of criminal defendants in a given year (Steiker and Steiker 2008:156). The intense legal attention to the death penalty began in 1972 when the Supreme

Court articulated how the death penalty should be applied, who should be subjected to it, and how it should operate: a radically different death penalty that, they felt, existed at the time.

- ***Finding the Worst of the Worst? Reducing the Scope of Capital Punishment***

...we have a massive system of regulation that doesn't accomplish very much. Death penalty law is, in fact, extraordinarily intricate, difficult to apply, complex, and a tremendous burden on our criminal justice system (Steiker J in Bessette et al 1997:X)

Supreme Court regulation of the death penalty, readily described as 'hyper regulation', particularly in comparison to the non-capital sphere, and the lack of comparative regulation of the prison, has shaped and defined the contours of the contemporary death penalty and the offenders who may be subject to it. More than ever, from a legal perspective, death is different. If that Supreme Court sentiment and jurisprudence has had the intended effect of securing the death penalty as applicable only to the 'worst of the worst offenders' who have committed the most heinous of crimes, and who pose the greatest, continuing threat to society (both free society and prison society), then the maintenance of segregated, heavily secured death rows could be approved for instrumental concerns (and the lack of legal intervention in death row detention could be better understood).

The story of modern death penalty regulation, the narrowing of death penalties, and the legal production of a death sentenced offender image, begins with the United States Supreme Court case of *Furman v Georgia* (1972). The Furman case arose out of a sharp decline in the use of the death penalty across America. By the time the Furman case came before the Supreme Court, most states had, in practice, abandoned executions. In the 1930s the United States nationally averaged 166 executions, falling to 128 in the 1940s and declining further to just 72 in the 1950s (Radelet 2005:1). By 1965, the executing pace of the entire country had dramatically slowed with only seven executions carried out across four states. The following year there was only one execution, and in 1967, only two. From that point there would be no more executions before the Supreme Court reviewed Furman, and ultimately none until Gary Gilmore volunteered for execution in 1977. Executions, however, were not the only death penalty marker to show a decline in the preceding years before the Furman case. Public opinion had also shown a decline in support for capital punishment in the years before Furman. From the mid 1960s the American public was consistently polled as less and less supportive of capital punishment, at least in the abstract: in 1965 Gallup recorded support at 45%, in 1966 that rate had dropped to 42% (Gallup 2009). Although the level of

support recovered slightly in the years preceding the Furman decision, that support was never overwhelming or convincing: in 1969 support for the death penalty was measured at 51%, in 1971 at 49%, and earlier in the year before Furman, at 50% (Gallup 2009). Moreover, as public confidence declined, so too did political support; state Governors such as Endicott Peabody of Massachusetts, Pat Brown of California, Michael DiSalle of Ohio, and Winthrop Rockefeller of Arkansas all became vocal supporters of death penalty abolition (Radelet 2005:2). Nor was disapproval of the death penalty nationally contained as America slowly came to stand out as a retentionist nation, an anomaly following a period of abolition in Western Europe (Amnesty International 2010).

At home, in America, the country had undergone a revolution; spurred along with no small help by the United States Supreme Court itself. The 'liberal contingency', the social reformists, had won battles in several areas; desegregation, and housing, for example (*Brown v Board of Education* 1954, *Jones v Alfred H. Mayer Co.* 1968, *Griggs v Duke Power Co.* 1971). Indeed, the civil rights era was a means of change for the very relationships amongst American citizens, particularly in the South, and the constitutional adjudication of the death penalty was to come at the tail end of that revolution; in fact many believed that the capital punishment 'issue' would be similarly resolved (Haines 1996). By the time the Supreme Court came to hear the Furman case, many believed that the death penalty was finished in the United States and that the country had witnessed its last execution, an opinion that characterised immediate abolitionist hope for the Furman hearing (Radelet 2005:5).

The Furman case was actually a review of three different cases: *Branch v Texas*, *Furman v Georgia*, and *Jackson v Georgia*, and their review was limited to the question, 'does the imposition and carrying out of the death penalty in this case constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments?' (Meltsner 1973:246). Furman was a murder case whilst Branch and Jackson were both cases of rape.

In June 1972, by a vote of 5 – 4, the United States Supreme Court ruled that the statutes under review amounted to cruel and usual punishment, and were a violation of the Eighth and Fourteenth Amendments. The Court stopped short of declaring the death penalty itself unconstitutional, only those statutes under review and, by implication, all others in use around the country. The effect was to end the death penalty as was administered at the time and begin the process, which continues today, of overhauling the capital system and narrowing the scope, application, and imposition of the death penalty to, theoretically, the worst of the worst. The Furman decision was the start of a process, setting out a modern death penalty, why and how it should be applied but with no subsequent intervention into death row incarceration, only trial practices and, later, execution.



No Justices joined in any one opinion in *Furman* and the decision remains, to date, one of the longest decisions ever issued by the United States Supreme Court. The four dissenting Justices, all appointed to the Court by President Nixon, were Justices Powell, Blackmun, Rehnquist, and Chief Justice Burger, whilst Justices Douglas, Marshall, Brennan, Stewart, and White comprised the majority. Justice Brennan and Justice Marshall concluded that the use of capital punishment, regardless of the offence for which it is imposed, would always be a violation of the Eighth Amendment on cruel and unusual punishment. The three remaining Justices in the majority reasoned that the death penalty was cruel and unusual punishment owing to the 'arbitrary and capricious operation of laws that permitted juries and judges to select the men and women who were to be executed from all those convicted of a capital offense'; the death penalty was not exclusively used to punish only the very worst of offenders (Meltsner 1973:293). That executions had dwindled and occurred in such a haphazard manner had, for the Justices in the majority, deprived the death penalty of serving any legitimate penal objective, be it retribution or deterrence.

Justice Douglas attacked the discretionary nature of capital sentencing as facilitating a biased and arbitrary imposition of the death sentence. For Douglas, the Eighth Amendment required legislatures to write laws that were "even-handed, non-selective, and non-arbitrary" and required judges to ensure that such laws were not applied "sparsely, selectively, and spottily to unpopular groups" (Justice Douglas, concurring). Douglas remarked that the statutes under review were, 'pregnant with discrimination', feeling that,

...the discretion of judges and juries in imposing the death penalty enables the penalty to be selectively applied, feeding prejudices against the accused if he is poor and despised, and lacking political clout, or if he is a member of a suspect or unpopular minority, and saving those who by social position may be in a more protected position (Justice Douglas, concurring, *Furman v Georgia* 408 U.S. 584 (1972)).

Justice Douglas interpreted the death penalty, as then used, not as removing the most threatening from society, but only the marginalised. For Justice Brennan, who systematically rejected all traditional arguments of support for capital punishment, deterrence, incapacitation, and retribution, the death penalty was an affront to human dignity. However, given that the practice of putting offenders to death was longstanding in the United States, Brennan felt pressed to buttress his concurrence with the infrequency with which capital punishment was applied, for any crime,

When a country of over 200 million people inflicts an unusually severe punishment no more than 50 times a year, the inference is strong that the punishment is not being

regularly and fairly applied (Justice Brennan, concurring, *Furman v Georgia* 408 U.S. 584 (1972)).

For Justice Brennan, the likelihood of an execution for an offender was little more than a lottery, as such, in his opinion, the death penalty could only be described as an arbitrary system. Moreover, he also roundly rejected the claim that the imposition of the death penalty was being reserved for ‘the worst of the worst’,

When the rate of infliction is at this low level, it is highly implausible that only the worst criminals or the criminals who commit the worst crimes are selected for this punishment. No one has yet suggested a rational basis that could differentiate in those terms the few who die from the many who go to prison. Crimes and criminals simply do not admit of a distinction that can be drawn so finely as to explain, on that ground, the execution of such a tiny sample of those eligible. Certainly the laws that provide for this punishment do not attempt to draw that distinction; all cases to which the laws apply are necessarily ‘extreme’ (Justice Brennan, concurring, *Furman v Georgia* 408 U.S. 584 (1972)).

Opening his concurrence by highlighting ‘death as different’, Justice Stewart described the death penalty as ‘wantonly and freakishly imposed’. For Stewart, the random imposition of the death penalty upon so very few rendered capital punishment as cruel and unusual in the same way that “being struck by lightning is cruel and unusual” (Justice Stewart, concurring). Without the phrasing of Justice Stewart, that is so readily cited to the present day (Dieter 2011), Justice White, also stressed the infrequency with which the death penalty was being imposed. He questioned the utility of a punishment, when the threat of execution is ‘too attenuated’, and rejected, via that reasoning, any deterrent value in the death penalty.

The judgement of Justice Marshall, the final Justice to comprise the majority in ruling the statutes under review as unconstitutional, proclaimed the death penalty as unnecessarily harsh. Justice Marshall additionally found that capital punishment was “morally unacceptable to the people of the United States at this time in their history” (Justice Marshall, concurring). For Justice Marshall, the American people knew little or nothing about the workings of capital systems and would undoubtedly fail to support the death penalty if they did, if they were aware of its racial bias, its failure as a deterrent, and its effect upon the rest of the criminal justice system. Justice Marshall, like Justice Brennan, concluded that the death penalty in all circumstances is a violation of the Eighth Amendment.

For those dissenting Justices, the reasoning of their decision was based on a more narrow view of the Eighth Amendment than their counterparts in the majority (Meltsner 1973:296). Additionally, they disputed the empirical data on which the majority had based their conclusions regarding the deterrent properties of the death penalty, arbitrary enforcement of the punishment, and public opinion. Collectively they stressed that it is for legislative bodies, and not the Courts, to decide upon and implement abolition of the death penalty (Meltsner 1973:297).

...the primacy of the legislative role narrowly confines the scope of judicial inquiry. Whether or not provable, and whether or not true at all times, in a democracy the legislative judgement is presumed to embody the basic standards of decency prevailing in the society. This presumption can only be negated by unambiguous and compelling evidence of legislative default (Chief Justice Burger, dissenting, *Furman v Georgia* 408 U.S. 584 (1972))

For Chief Justice Burger, there had been no change, no 'instant evolution' in the law that should suddenly render capital punishment unconstitutional when, in the 181 years since the enactment of the Eighth Amendment, no decision of the United States Supreme Court had 'cast the slightest shadow of a doubt on the constitutionality of capital punishment'. Chief Justice Burger could find no evidence that capital punishment had suddenly acquired the capacity to shock the moral standards of society, or that the legislature needed to be corrected. For Burger, the declining imposition of death was not a marker of legislative default,

...the rate of imposition of death sentences falls far short of providing the requisite unambiguous evidence that the legislatures of 40 States and the Congress have turned their backs on current or evolving standards of decency in continuing to make the death penalty available (Chief Justice Burger, dissenting, *Furman v Georgia* 408 U.S. 584 (1972)).

The dissent of Justice Blackmun echoed that of Chief Justice Burger. Although from Minnesota, a longstanding abolitionist state, and in spite of his personal objection to the punishment, indeed his 'distaste, antipathy, and abhorrence' for it, that conviction was not enough to sway him in his view, that the majority of the Court had 'misread history and constitutional law' (Meltsner 1973:298). For Justice Blackmun, there was no evidence that evolving standards of decency demanded or required abolition when the majority of states, as well as congress, provided for capital punishment.

Although personally I may rejoice at the Court's result, I find it difficult to accept or to justify as a matter of history, of law, or of constitutional pronouncement. I fear the

Court has overstepped (Justice Blackmun, dissenting, *Furman v Georgia* 408 U.S. 584 (1972)).

Justice Powell noted the significance of the decision reached by the majority of the Court, beyond the immediate commutation of more than six hundred offenders awaiting execution on death row. He stressed, and was dismayed by, the violation of the Court's proper role, of the "shattering effect this collection of views has on the root principles of stare decisis, federalism, judicial restraint and – most importantly – separation of powers" (Justice Powell, dissenting). Like Chief Justice Burger, Justice Powell could find no legitimate reason as to why the Court had brushed aside 'an unbroken line of precedent reaffirming the heretofore virtually unquestioned constitutionality of capital punishment'.

Justice Powell could not find, as the Justices in the majority had done, a societal rejection of capital punishment. Citing the failure of abolition bills around the country, state referenda on the future of the death penalty, and the continued imposition of death sentences by juries, the death penalty, for Justice Powell, still comported with the standards of wider society. Moreover, the standing of the death penalty was not affected, for Justice Powell, by its imposition upon marginalised members of society,

Certainly the claim is justified that this criminal sanction falls more heavily on the relatively impoverished and underprivileged elements of society. The "have-nots" in every society always have been subject to a greater pressure to commit crimes and to fewer constraints than their more affluent citizens. This is, indeed, a tragic by-product of social and economic deprivation, but it is not an argument of constitutional proportions under the Eighth or Fourteenth Amendment. The same discriminatory impact argument could be made with equal force and logic with respect to those sentenced to prison terms (Justice Powell, dissenting, *Furman v Georgia* 408 U.S. 584 (1972)).

So, in finding little merit in the discriminatory impact arguments, tacitly providing weight to the argument that it was not truly the most dangerous being sent to death row or executed, Justice Powell, also found little in the claim that divesting discretionary power to juries caused an arbitrary imposition of the penalty (particularly when the Court had so recently upheld that power in *McGautha v California* (1971)). In the same vein he found that juries, unlike in the past perhaps, had begun to represent 'minority group elements of the community' and thus, "the possibility of racial bias in the trial and sentencing process had diminished in recent years" (Justice Powell, dissenting).

For the final dissenter in the Furman decision, Justice Rehnquist, the issue at stake was the proper exercise of judicial authority. The Court, in striking down the death penalty, as then administered, as unconstitutional, was, for Justice Rehnquist, an overreach of the Court's proper authority,

...judicial self restraint is surely an implied, if not an expressed, condition of the grant of authority of judicial review. The Court's holding in these cases has been reached, I believe, in complete disregard of that implied condition (Justice Rehnquist, dissenting, *Furman v Georgia* 408 U.S. 584 (1972)).

Yet, despite the strenuous objections of the minority, the Furman decision ended, albeit temporarily, capital punishment in the United States. Death penalty statutes were invalidated, all existing death sentences were commuted and, for many, it seemed that the United States might be following the global trend of first world nations, and begun its abandonment of capital punishment. That potential, however, was not to be fulfilled, the decision rendered in Furman would only mark the start of the modern 'hyper regulation' of the death penalty, intensive regulation that continues to the present day

...the death penalty looked very different in the late twentieth century...It was now administered within a complex structure of constitutional law that shaped the conduct of trials and the tactics of abolitionists. The old combination of the death penalty's popularity in the abstract and the human reluctance to apply it in specific cases – a hesitation now expressed in the language of constitutional law – created a cumbersome, expensive, and ultimately pointless mode of litigation... (Banner 2002:267)

In a reversal of what many believed had been a permanent change in public and political attitudes, the Furman decision was immediately and vehemently rejected by many states, legislators, and the public. The day immediately following the Court's decision, legislators in five states announced an intention to rewrite capital punishment statutes to comply with the dicta of the Court (Banner 2002:268). The lieutenant Governor of Alabama lamented the attitude of the Supreme Court, complaining that the majority of Justices had lost contact with the real world, whilst his Georgian counterpart labelled the decision a 'license for anarchy, rape, and murder' (Haines 1996:23). Even police chiefs joined the chorus of disapproval, Atlanta Police Chief John Inman bemoaned the loss of 'a definite deterrent to major crime', the chief of police in Memphis warned, 'people who hesitated to pull the trigger before just might go ahead and do it now' (Meltsner 1973:290), whilst the Attorney General of Nevada labelled the decision of the Court as "an insult to its laws, and to its people" (Garland 2010:248). Most commonly those who support the death penalty have to do little

to defend their position as support for the sanction is dominant (Lynch 2002), there was not even an amicus curiae brief submitted (information or evidence volunteered to the Court by an unsolicited party), even by the Federal Government, in support of Georgia's case. Quite simply death penalty supporters had never been asked, forced, or felt compelled to demonstrate their position or, seemingly, contemplated ever having to.

Furman immediately changed the status quo, however, and supporters were compelled to act upon their conviction, and not just capital punishment proponents. Furman was, additionally, not wholly read as solely concerning the death penalty, in line with Garland's communication theory (Garland 2008, Garland 2010), the death penalty was a means by which to speak on a whole range of other issues. There were many who felt that the court had gone too far in impeding state rights (particularly nuanced at the tail end of the civil rights movement in which the Court was so heavily involved), combining with those who felt that the court's attack upon their values, personally, and as a society, had gone too far (Garland 2010:233). In the South, the Furman decision was read as an attack on the region's cultural traditions by outside elites (Garland 2010:248). However, of the battles that could be waged against Supreme Court decisions that were tinged by the civil rights movement, the death penalty was, at least superficially, less blatantly a racist issue, unlike desegregation, and thus an issue upon which legislators could speak out and act, more openly able to voice criticism, more able to push against the Supreme Court. Politicians, local and national, as far as the President (immediately after the decision President Nixon had asked the FBI to supply him with examples of homicides committed by convicted killers after their release from prison (Banner 2002:298), as well as the general public, read the decision as one too far. *Furman* had brought together those concerned with law and order, those concerned by state autonomy, and those leading the charge of the civil rights backlash; the death penalty was, for some, only the means that brought them together. Regardless of the motivation of individuals and groups, the death penalty was the means to reassert 'people power' against the Supreme Court. In California, where the State Supreme Court had declared the death penalty unconstitutional under the State Constitution before Furman, public support put the issue on the public ballot in November the year that *Furman* was decided. Voters, by a 2 – 1 margin, voted to amend the constitution explicitly to permit the use of the death penalty (Banner 2002:268, Meltsner 1973:306). Public opinion, nationally, also began to demonstrate change in the aftermath of the Furman decision; by 1976 66% of respondents supported the death penalty compared to only 28% who did not, an approval figure that would climb even further, to 75% in less than a decade (Gallup 2009).

There was no clear guidance, however, as to what revised statutes would meet with constitutional approval from the Court. No two Justices had joined in any one opinion. Whilst the decision was vague in that legislatures were unsure in how to answer the Court's concerns, the Furman ruling stressed that the deficiencies of capital sentencing schemes would not be allowed to continue, only the most deserving of offenders should be death sentenced, sent to death row, and executed. As such, for a state to utilise the death penalty it must be imposed upon the most deserving, and imposed in a fair and rational manner. Death would require due process, or being as different as the punishment is, it might even require super due process (Garland 2010:230), a layering of procedures to ensure the fairness and propriety of a death sentence.

The result of Furman was the development of four different sentencing schemes, each one attempting to restrict sentencing discretion to avoid the arbitrariness and capriciousness cited by the Justices in Furman and, theoretically, apply capital punishment only to the 'worst of the worst'. Utah, Montana, Texas, Illinois, and Georgia developed statutes that listed aggravating circumstances, one of which must be found before the death penalty could be imposed. Arkansas, Florida, Colorado, and Nebraska offered statutes that further attempted to control sentencing discretion by listing factors that must be considered in mitigation once an aggravating factor has been found. In California, Connecticut, Pennsylvania, and Ohio, death penalty 'quasi mandatory' statutes were offered which, unlike the mandatory sentencing schemes offered by sixteen other states, defined criminal acts broadly and then prescribed sets of mitigating and aggravating circumstances. The mandatory schemes incorporated the aggravating circumstances in the definition of the offence and made death mandatory for all offenders (Barry 1979:89).

By the time the Supreme Court came to review the case of *Gregg v Georgia* in 1976 the majority of states had written new death penalty statutes<sup>12</sup>. Ultimately, thirty three of the states with capital punishment legislation before Furman enacted new statutes, as well as five states that had rejected the death penalty before Furman (Simon and Spaulding 1999:83). Additionally, Congress had enacted a statute that provided for the death penalty for the offence of aircraft piracy that resulted in death. Yet, despite the flurry of legislative activity, the Legal Defense Fund still maintained that 'capital punishment was so barbaric that it offended contemporary standards of decency' (quoted in Barry 1979:56). Ultimately, the Court would find no substance in that claim, citing both jury, legislative, and public reaction to Furman to buttress the claim that the death penalty did in fact comport with evolving, and contemporary standards of decency.

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<sup>12</sup> See Appendix G: Enactment of Death Penalty Statutes after Furman v Georgia

Those new statutes under review in *Gregg* varied in their form and content. Several states offered mandatory death penalties, allowing juries no consideration of mitigating factors to spare a defendant execution, others offered aggravating circumstance schemes, others a dichotomous aggravating and mitigating circumstance schemes, and others a quasi-mandatory sentencing scheme. As such, the *Gregg* case was a combination of five cases: *Woodson v North Carolina*, *Roberts v Louisiana*, *Gregg v Georgia*, *Proffitt v Florida*, and *Jurek v Texas*. None of the defendants in the adjoined cases challenged their respective juries' finding of guilt; rather they only challenged the imposition of capital punishment upon them on constitutional grounds. In its review of the cases, and the different sentencing statutes under review, the Court had to decide whether the arbitrariness and capriciousness it found in *Furman* had been eliminated (Barry 1979:55). *Woodson* was a review of the mandatory sentencing scheme, like in *Roberts*, although the Louisiana statute further required the sentencer to answer a set of 'responsive verdicts' before imposing a sentence of death. In *Gregg* the issue to be decided was whether imposing death, after a bifurcated trial, under a statute that required consideration of both aggravating and mitigating circumstances was unconstitutional under the Eighth Amendment. In *Proffitt*, the issue before the Court was whether, also after a bifurcated trial, the trial judge decides whether or not to impose a death sentence after weighing 'enumerated circumstances' and receiving an advisory verdict from the jury. Finally, in *Jurek*, the issue was whether the imposition of a death sentence was constitutional when an offender is found by the jury to have deliberately caused the death of the victim, and is also found to be a continuing threat to society.

On July 2, 1976, the United States Supreme Court ruled, by a vote of 7 – 2, that certain death penalties were constitutionally acceptable. The Court upheld three of the statutes under review, those of Georgia, Florida, and Texas, whilst it struck down those of North Carolina and Louisiana, those statutes that mandatorily imposed the death sentence. Justice Brennan and Justice Marshall continued in their rejection of capital punishment in all circumstances and comprised the two dissenting views. For the Justices in the majority, the guided discretion statute which provided guidance for juries in their sentencing determination removed the arbitrariness and capriciousness identified in *Furman*. Moreover, the automatic sentence review by the State Supreme Court, after the imposition of the death sentence at trial, satisfied the Court in providing an additional safeguard against 'prejudicial or arbitrary factors'. Additionally, at the level of review, the Georgia statute required that the sentence of death, once affirmed, be compared to other decisions reached in similar types of cases.



For the seven Justices in the majority, they were convinced that the Georgia statute was thus constitutional.

So ends the four year hiatus of capital punishment. Henceforth, the Court will return to its historical role of determining not if the death penalty is constitutional but if the death penalty statutes guarantee that the constitutional rights of defendants will not be sacrificed, especially in terms of decisions that are capricious, arbitrary, and haphazard (Foley 2003:95).

A little over six months after the Court's ruling in *Gregg v Georgia*, Gary Gilmore became the first person executed in a decade, put to death by firing squad in Utah, January 17, 1977.

From a legal perspective, at the level of capital punishment's implementation and enactment, the legacy of the Furman Gregg dichotomy has been the continual attempted maintenance of capital punishment to keep up the actual, or facade, depending on the viewpoint, of the constitutionality of the death penalty and its capability to be applied fairly, free from the arbitrariness that was found in earlier statutes. Many commentators have decried the constitutional regulation of the death penalty as a failure (Bessette et al 1997, Dieter 2011, Steiker and Steiker 1995). Indeed, even some Supreme Court Justices have publicly declared the failure of this 'experiment' (Dieter 2011). Justice Powell, for example, has condemned the failure of the regulation of the death penalty (Banner 2002:288) whilst Justice Blackmun who dissented in *Furman*, has since reversed his position and declared the futility of death penalty regulation in an attempt to live up to the expectations that surrounded the Gregg decision.

The death penalty remains fraught with arbitrariness, discrimination and mistakes. Experience has taught us that the constitutional goal of eliminating arbitrariness and discrimination from the administration of death can never be achieved without comprising an equally essential component of fundamental fairness in individual sentencing (Justice Blackmun, 1994, quoted in Bessette et al 1997).

Articulated, in the Furman decision was the 'death is different' principle, a principle which accounts for its 'hyper regulation', particularly as compared to other punishments. Bifurcated trials, death qualified juries, mandatory review of sentence, and historically, a lower level of proof required to make a successful claim under the Eighth Amendment; these are all ways in which the punishment of death has been more regulated compared to other punishments. For the Supreme Court, because the death penalty is the most severe punishment, "the Eighth Amendment applies to it with special force" (*Thompson*, 487 U.S. at 856, O'Connor J, concurring in the judgement 1988). The Eighth

Amendment though, has only been applied to trial and execution; those points of the capital system that are visible, even if only by third parties, death row, however, is not a site to which the Constitution has been applied. Death row is seemingly assumed as mere imprisonment, not a site unique to capital offenders.

In *Furman*, both Justice Brennan and Justice Stewart, in separate opinions, demarcated death as a different and unique punishment “not in degree but in kind” (Stewart, J., concurring). Justice Brennan stressed ‘death as the ultimate sanction’, particularly in comparison to the lack of debate regarding other punishments. For him, the continuous regulation of the death penalty, the different trial procedures that surround capital trials, and the treatment, by the Supreme Court, renders death cases as ‘a class apart’. Vehemently, Justice Brennan stressed the severity of the death penalty as an explanation for the ‘uniqueness of death’ as punishment,

Two features, according to the Court, mark the death penalty as different to any length of imprisonment. Firstly, the finality of an execution renders the consequences of any possible error irrevocable: “to err may be human, but death is different jurisprudence asks for added procedural safeguards when humans play at God” (Abramson 2004:118). Secondly, death as punishment has been underscored in difference owing to its severity, in its ‘total denial of the humanity of the convict’ (Abramson 2004:119). Whilst the prison experience for many (and particularly those sentenced to life with no possibility for parole), may also be widely regarded as a total denial of an offender’s humanity (Johnson and McGunigall–Smith 2008, Fraser 2007, Godoy 2007) (as discussed in chapter five), for the Court, the death penalty is endowed with an inherent quality that denies an offender his humanity where prison sentences cannot. Indeed, since its first articulation this doctrine has been affirmed and remarked upon by various Justices in a line of Supreme Court jurisprudence: *Spaziano v Florida* (1984), *Lockett v Ohio* (1978), *Wainwright v Witt* (1985), *Atkins v Virginia* (2002), *McCleskey v Kemp* (1987), *Ring v Arizona* (2002), and has long characterised the attitude of the Supreme Court towards death penalty regulation and its constitutional maintenance: at least in terms of trial and execution, if not death row detention.

Death is today an unusually severe punishment, unusual in its pain, in its finality, and in its enormity. No other existing punishment is comparable to death in terms of physical and mental suffering...the unusual severity of death is manifested most clearly in its finality and enormity (Justice Brennan, concurring, *Furman v Georgia* 408 U.S. 584 (1972)).

Pain and suffering, however, as Constitutional concerns, are attributed to execution, not death row. After Gregg the Supreme Court continued to focus attention on the front end of the death penalty, concentrating on trial procedures and then, capital offenders. That concentration though has very real implications for death row confinement, providing possible justifications for particularly punitive incapacitation if those imprisoned there are truly the 'worst of the worst' who need special measures of segregation so as to contain and manage their dangerousness. Indeed, those who may be subject to capital punishment have been refined to produce the legal image of the capital offender, the worst of the worst having committed only the worst of offences, those who are likely, according to legal accounts of his future dangerousness, discussed below, are likely to reoffend.

In the contemporary era refinement of offender types began with the case of *Coker v Georgia* (1977). Georgia, like many other southern states before Furman, regarded rape as a capital crime. The rapist figure had been particularly prominent in southern executions in the first half of the twentieth century, and, even as executions began their decline in the years preceding Furman, offenders convicted of rape continued to constitute a relatively high ratio of offenders put to death. Indeed, of the cases adjoined for adjudication in *Furman v Georgia*, only Furman was a murder case whilst the other two cases (*Branch v Texas*, and *Jackson v Georgia*) were cases of rape. Those cases adjoined in the Gregg decision in 1976 were all murder cases and thus, before Coker, the Supreme Court had not been presented with an opportunity to rule on the constitutionality of imposing the death penalty for cases of rape, when a death does not occur, specifically the rape of an adult woman. In Coker the Court was asked to consider whether the imposition of death for the crime of rape constituted a disproportionate and excessive punishment in violation of the Eighth Amendment. The Court did in fact hold that imposing the death penalty for rape of an adult woman was a cruel and unusual punishment, finding that the Eighth Amendment bars not only those punishments that are "barbaric", but also those that are excessive in relation to the offence committed. Simply, the rapist figure, particularly after the civil rights era, before which rape cases overwhelmingly involved white victims and black defendants, was no longer to be held as 'the worst of the worst'.

In Coker, the majority of the Court agreed that their judgement, their interpretation of the Eighth Amendment, should be informed by objective indicia; "attention must be given to the public attitudes concerning a particular sentence history and precedent, legislative attitudes, and the response of juries reflected in their sentencing decisions are to be consulted" (Justice White, concurring, *Coker v Georgia* 433 U.S. 584 (1977)). The Justices in the majority found that the vast majority of states had not included rape as a capital offence in the statutes rewritten after the

Court's decision in *Furman*; which, in turn, they took as evidence of a growing aversion to regarding rape as serious enough to warrant the death penalty. Additionally, they noted the rare imposition of the death sentence upon such offenders in Georgia. Whilst the state argued that the infrequent imposition of a death sentence upon the rapist, imposed only six times between 1973 and the time the case was heard, 1977, was a reflection of the penalty being reserved for the 'worst of the worst', the Justices in the majority disagreed. They held that the offence of rape was secondary in its effects to that of the offence of homicide and, consequently, undeserving of the death sentence. Although the dissenting Justices argued that a national consensus had not been given time to form, and that the Georgia statute could be left as a test model, 'a laboratory of experiment' to determine the rejection, or agreement, of rape as a capital crime, their opinion could not persuade the majority (a suggestion, again proposed in determining the propriety of Eighth Amendment claims in relation to the length of time an offender spends on death row prior to execution, as discussed below). From the moment of the Court's judgement, the image of the capital offender was refined, the death penalty, in practice, was to be reserved only for murderers, a stance which was affirmed by the Court as recently as 2008 (*Kennedy v Louisiana*), discussed below.

The culpability of the offender, and the applicability of the Eighth Amendment in the capital sphere, would continue to consume the court for the rest of the Twentieth Century. In *Enmund v Florida*, 1982, the Supreme Court was asked to consider whether imposing a sentence of death upon an offender who was not actively involved in the robbery and murder of the victims was constitutional under the Eighth and Fourteenth Amendments. Here, the Court, in affirming the death is different doctrine, noting its severity and irrevocability, found that imposing the death sentence for participation in the act of robbery was excessive. For the Justices in the majority, when the defendant's role is minor, and he is without prior knowledge that lethal force may be used in the commission of the crime, his actions are not so culpable as to warrant the use of the death penalty.

Five years later however, in 1987, in *Tison v Arizona*, the Supreme Court affirmed the death sentences of two defendants who had neither intended the death of the victims nor inflicted the wounds that led to their death. Those Justices in the majority found that while the defendants had not intended to kill, the requisite intent was established by the defendants' participation in the planning of the crime that led to the murders (a prison breakout), their lack of interference in the murders themselves, and their failure to disassociate themselves with the killers after the event took place. The Court was thus able to find the defendants' mental state as one of 'reckless indifference', that reckless disregard for human life, for the Court, represented a 'highly culpable mental state' that could support the imposition of a death sentence in combination with a 'major participation' in

the commission of a felony that then results in death. The Court's ruling did not overturn that made in *Enmund v Florida* but only clarified its meaning; seeking to ensure that the death sentence would be imposed only upon the most culpable: 'the worst of the worst' offenders.

It was the opening decade of this century, however, that saw the most drastic reduction of the number of death eligible offenders: the legal effort to find the 'worst of the worst', unmitigated in their culpability by any inherent or assumed deficiency. In 2002, the Supreme Court issued a ruling in *Atkins v Virginia* prohibiting the execution of mentally retarded offenders (now sometimes referred to as offenders suffering from intellectual disability). Overruling its earlier decision in *Penry v Lynaugh* 1989, where the Court held as constitutional the execution of a 'moderately retarded adult with the mental comprehension of a six year old (Foley 2003:14), the Court now found that such executions were in violation of the Eighth Amendment. Relying on the formation of a national consensus against such executions, the Court stressed the lack of culpability that was now being placed upon such offenders: "...the large number of States prohibiting the execution of mentally retarded persons provides powerful evidence that today society views mentally retarded offenders as less culpable than the average criminal" (Justice Stevens, concurring). The Court questioned whether the two foundations, in its view, of the death penalty, retribution and deterrence, could be properly applied to such offenders. For the Court, the intellectual deficiency of such offenders would render deterrence less successful than to other prospective offenders. Retribution, for the Justices in the majority, rested upon the culpability of the offender which, lessened by intellectual disability, consequently meant that those offenders do not deserve such an extreme form of punishment. The Court asserted that capital punishment must only be applied to those offenders who commit the most serious crimes and whose extreme culpability makes them 'the most deserving of execution' and, thus, the most deserving of extreme levels of segregation and incapacitation found on death row.

The *Atkins* decision was followed, three years later, by the case of *Roper v Simmons* (2005) which, in a continuation of the Court's narrowing of death eligible offenders, prohibited the execution of those offenders who committed their offence whilst under the age of eighteen. The Court had already found, in 1988, that the execution of those whose offence committed whilst under the age of sixteen was unconstitutional, *Thompson v Oklahoma*. The following year, however, the Court permitted the execution of those whose offence was committed whilst under eighteen, but over sixteen (*Stanford v Kentucky* 1989). The *Atkins* ruling was a reversal of that position, now finding that executing such offenders would be in violation of both the Eighth and Fourteenth Amendments. As in the *Atkins* case, the Court was able to find a national consensus against the execution of juvenile

offenders. Owing to the deficiencies inherent in a young age, in mental immaturity and susceptibility to outside influences, the Court found that juvenile offenders could not be classed amongst the worst of the worst offenders, those offenders deserving of execution. For the Court, the differences between the juvenile and adult offender “render suspect any conclusion that a juvenile falls among the worst offenders” (Justice Kennedy, concurring). As in *Atkins*, the Court found the retributive principle of capital punishment less easy to apply to the juvenile offender, that principle which drives death penalty support, and is implemented in death row incarceration

...the case for retribution is not as strong with a minor as with an adult. Retribution is not proportional if the law’s most severe penalty is imposed on one whose culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity (Justice Kennedy, concurring, *Roper v Simmons* 543 U.S. 551 (2005)).

So, the *Roper* decision, like the decision in *Atkins*, had the effect of further reducing the categories of capital offender. That number of possible capital offenders was again further reduced by the Supreme Court’s decision in *Kennedy v Louisiana*, 2008, which, firstly, prevented the imposition of the death penalty upon the child rapist and secondly, had the wider effect of establishing, reinforcing, a prohibition on applying capital punishment to offences that do not involve the death of the victim. Of course, offences against the state, treason, espionage, or aircraft hijacking, for example, may still be defined as capital, but the applicability of death as punishment to such offences has yet to be tested.

The decision in *Coker* explicitly applied to the rape of an adult woman, although the decision did seem to signal that the death penalty, from then on, would only be applicable to cases of homicide. However, referenced as a separate issue in that decision, were in fact, cases of the rape of a child by an adult offender. Indeed, such cases were held to be different and therefore unable to provide support for the case of Georgia in the *Coker* decision,

It should be noted that Florida, Mississippi, and Tennessee also authorized the death penalty in some rape cases, but only where the victim was a child and the rapist an adult...The upshot is that Georgia is the sole jurisdiction (Justice White, concurring, *Coker v Georgia* 433 U.S. 584 (1977)).

The position was highlighted, in reverse, in the *Kennedy* case with the plurality noting that, in *Coker*, the phrase ‘an adult woman’ or ‘an adult female’ was repeated eight times, and that the distinction between adult and child was not merely rhetorical but ‘central to the Court’s reasoning’. In fact the Louisiana State Supreme Court had affirmed *Kennedy*’s death sentence noting that the *Coker*

decision only barred the imposition of the death sentence for the rape of an adult woman, leaving open the question of whether other non-homicide offences could be punished with death consistent with the Eighth Amendment. The Court reasoned that the rape of a child, specifically, was unique in the harm it inflicts upon society as a whole, noting that children are a class in need of 'special protection'. For those states that supported the position of Louisiana, the Court's position on rape set out in *Coker* had been interpreted in too an expansive way meaning that some legislatures had refrained from capitalising child rape in the belief that the *Coker* decision had prohibited such action when, in fact, it had not.

Whilst the position of Louisiana, in capitalising child rape, was supported by several other states, the Supreme Court still found a consensus against imposing the death penalty in such instances, "Though the death penalty is not invariably unconstitutional...the Court insists upon confining the instances in which the punishment can be imposed" (Justice Kennedy, concurring). In a 5 – 4 decision, the Court ruled that the imposition of the death sentence upon the child rapist was unconstitutional under the Eighth and Fourteenth Amendments. Whilst the *Atkins* and *Roper* decisions focused upon the offender's culpability and their lesser degree of responsibility, in this case the Court focused upon the act itself, so using the 'evolving standards of decency' principle in a different manner than its earlier decisions (del Carmen, Ritter, and Witt 2008:295), but in so doing furthering its commitment to narrowing those instances in which capital punishment can be applied. However, In *Kennedy* the Supreme Court had to 'brush aside' the evolving consensus on capitalising child rape. Whilst committed to its narrowing function the Supreme Court, for some, had once again overstepped its proper function (Lane 2010).

There was no immediate backlash to the perceived improper use of quasi legislative power, as there had been as a result of *Furman*, only sparse and diluted political asides. The absence of a backlash can be read as a marker of the relative unpopularity, or at least, lack of preoccupation with the death penalty by the public at the present time (discussed in the following chapter), which contributes to a low execution rate and expands the length of time spent by inmates on death row. Whilst the proper function of the Supreme Court in narrowing the scope of the death penalty may be contested (Lane 2010), thirty five years of regulation have drastically reduced the categories of offender, as well as offence type. They have defined the contours of the death sentenced offender, refined his image; now a rational, fully culpable offender, having committed the most serious offence defined in statute, murder with a finding of aggravating circumstances. In addition, that line of Supreme Court jurisprudence has built tighter, more regulated trial procedures, bifurcated trials, death sentences imposed by juries not judges (*Ring v Arizona* (2002)), automatic sentence review, all

those elements which can be judged in reference to the modern death penalty which, now, must be imposed in a non arbitrary, fair, and rational manner (*Gregg v Georgia* 1976). Whilst the Supreme Court has sought to ensure capital offenders are the worst of the worst, the most dangerous offenders, the execution of those offenders has also come to feature prominently in its jurisprudence, as discussed below. Pivotal meaning that, whilst the trial and prosecution procedures for capital offenders have been regulated, their execution regulated, their incarceration between those two points is a void, without any comparable legal concern. The trial, and the execution, are visible points of the capital offender's journey through the death penalty system, "the hidden world of death row" (Death Penalty Information Center 2011) is not. That lack of visibility provides a relative, constitutional shield for punitive treatment and makes legal regulation less urgent, less required to keep up the facade of the death penalty evolving in line with civilising forces.

- ***The Uneasiness of Legitimising the Institution: How to Kill the Condemned?***

Executions, even in low numbers, legitimise the death penalty, they provide its literal meaning. The means by which to conduct those executions, however, is of equal significance: killing the condemned but distinguishing between lawful and unlawful killing.

Although there is no judicial concern, any substantive concern, of how the condemned live, on death row (as discussed below), the site of the offender's execution, particularly in the method used, has been the subject of much academic commentary and debate (Denno 1992, Denno 1994, Denno 1997, Denno 2002, Koniaris et al 2005, Human Rights Watch 2006, Denno 2007). Additionally, in recent years, it has also been the subject of judicial enquiry (*Fierro v Gomez* 1999, *Baze v Rees* 2008, *Campbell v Wood* 1994), all in relation to the evolution of execution methods, and 'the search for the most humane way to kill a man'.

It is fair to call the search for modern means of executions a public relations gesture only if it is acknowledged that this sort of "public relations" is of central importance. Capital punishment could seem appropriate only if a technique for taking life could be devised that appeared to be an authentic part of modern America (Zimring & Hawkins 1986:122)

Public relations is indeed a central component of contemporary capital punishment. The means by which an offender is put to death, when the might of the state and the weakness of the individual are magnified, has been of great concern to administrators of capital punishment and the legal community for more than a century; if not of the Supreme Court, through the prevention of



legislative intervention, discussed below, then of state courts (*Fierro v Gomez* 1999, *Campbell v Wood* 1994, *Provenzano v Moore* 1999, *Morales v Hickman* 2006).

Execution methods have typically evolved ahead of Supreme Court intervention, with state legislatures voting to change an execution method ahead of looming constitutional challenges. In 1999, for example, the Ninth Circuit Court of Appeals (*Fierro v Gomez*) struck down California's use of lethal gas as unconstitutional (the United States Supreme Court later vacated the decision, however, after California amended its capital punishment statute to make lethal injection its primary method of execution, leaving lethal gas as only a method of execution available for the condemned's choice (Denno 2002:190)). Similarly, in Florida, after a trio of botched electrocutions in the 1990s the Florida legislature voted overwhelmingly to make lethal injection its primary method of execution so as to prevent a constitutional challenge to its use of the electric chair (Greer 2006). As states have blocked constitutional challenges by relegating older, questionable methods of execution to secondary or optional methods, the United States Supreme Court has rarely had opportunity to grant certiorari to review a petitioner's claim, grant a hearing, that a particular method of execution is a violation of the Eighth Amendment prohibition on cruel and unusual punishment. Moreover it has never, in its history, declared a method of execution as unconstitutional.

- ***Baze v Rees: Silencing the Suffering of the Condemned***

Most recently, in *Baze v Rees* 2008, the Supreme Court reviewed the 'lethal injection issue'. After reports of pain and suffering on the part of the condemned (Koniaris et al 2005), state court rulings declaring the unconstitutionality of lethal injection protocols (*Morales v Hickman* 2006), and a number of state moratoria owing to the uncertainty of the legality of those protocols (Death Penalty Information Center) the Supreme Court reviewed lethal injection as an execution method, choosing to review the Kentucky execution protocol. Although the Court upheld the constitutionality of the rarely used Kentucky protocol, and although lifting the national moratorium enacted whilst the case was under review, several states still have moratoria in place whilst they examine their own execution protocols at state level: in Arkansas, Tennessee, North Carolina, Nevada, Nebraska, Maryland, Kentucky, Delaware, Colorado, and California, as well as in the federal system (Death Penalty Information Center). Whilst such issues remain to be resolved, the messages conveyed by putting an offender to death are lost and the time spent on death row by offenders continues to lengthen.

The case of *Baze v Rees* must be analysed by reference to what is seen and what is not, death row is hidden, the execution is publicly relayed through media witnesses; “Like it or not, you are putting on a show” (Louisiana director of executions, cited in Garland 2010:54). Indeed, what can be seen at a lethal injection execution, by the witnesses in attendance, was explicit in the reasoning of the Supreme Court Justices in *Baze*, more so than the welfare of the condemned, whose pain and suffering is masked by the use of pancuronium bromide (Koniaris et al 2005). Such lack of concern for the condemned, but primary concern for those around him, is a point which frames the use (and lack of legal regulation) of the punitive measures and regimes found on death row.

The primacy of protecting witnesses from viewing a barbaric execution, as opposed to the condemned from suffering such an execution, is not a new recognition: “The argument is not that lethal gas is painful to the condemned men but that the spectacle of gradual expiration is ‘torture to the spectators’.” (Barnes & Teeters, 2010:178). Other scholars have argued that the progression in execution methods is more centred on making the task of taking a life easier for those charged with the task: Hyde argues, for example, that, “the quest for technology has less to do with pain and more to do with effacing contact between the executioner and the condemned, and graphically representing society’s mastery of death” (Hyde 1997:194). For some commentators though, it is a combination of both, “it’s not about the prisoner. It’s about public policy. It’s about the audience and prison personnel who have to carry out the execution” (Kaufman Osborn 2009:238). For others, the task of a lethal injection execution is to distinguish between two types of killing, lawful and unlawful (Sarat 2001:82). Yet, concern is not for the condemned on any of these accounts of execution methods; concern is instead reserved for how the death penalty looks and feels to all other participants, from observers, to supporters, to executioners, everyone except the condemned.

Let’s be honest: Seeking a ‘humane’ form of executions has nothing to do with it. It is not about sparing the condemned, but sparing ourselves. We like to keep the whole awful business at arm’s length, to tell ourselves capital punishment is civilized (Commentator of Pedro Medina’s execution cited in Sarat 2001:65)

In *Baze v Rees*, of the choices offered to the Court, “[in choosing between] preventing a slight risk of suffering on the part of the condemned, or protecting witnesses from the sight of disturbing bodily movements...The Court chose the latter” (Garland 2010:272). The Court, in fact, chose to view witnesses as “potential casualties” whilst the condemned was merely “relegated to the role of a silenced body whose inertness must be guaranteed to ensure that these innocents are not psychologically harmed” (Kaufman Osborn 2009:237), a sentiment implemented, similarly, by the custodians of death row, as discussed in chapter six. A one drug protocol, over the three drug

protocol under review, it was argued, could kill the condemned as easily as a combination of three, a one drug protocol it was contended though would take much longer and would thus equate to a prolonged and unnecessary discomfort for those viewing the execution. Indeed, a drug in the three drug protocol under review in *Baze*, pancuronium bromide, was actually conceded by the state to serve no therapeutic purpose.

Petitioners argue that involuntary muscle contractions have no bearing on the dignity of the condemned, since the administration of thiopental renders the inmate impervious to pain. However, petitioners' argument ignores the impact on family members and other witnesses who view the involuntary contractions (Cited in Kaufman Osborn 2009:237).

Justice Roberts endorses such a protection for those viewing the execution and, by extension, for the death penalty itself; "The Commonwealth has an interest in preserving the dignity of the procedure, especially where convulsions or seizures could be misperceived as signs of consciousness or distress" (Justice Roberts, concurring opinion, *Baze v Rees* 2008 553 U.S. 35 (2008)).

In an attempt to bring executions in line with our evolving standards of decency, we have adopted increasingly less painful methods of execution, and then declared previous methods barbaric and archaic. But by requiring that an execution be relatively painless, we necessarily protect the inmate from enduring any punishment that is comparable to the suffering inflicted on his victim. This trend, while appropriate and required by the Eighth Amendment's prohibition on cruel and unusual punishment, actually undermines the very premise on which public approval of the retribution is based (Amnesty International 2011:11)

Compared to earlier execution methods, lethal injection is a 'virtual non event', with little to see (Lynch 2000b:11, Girling 2004). Indeed, the uneasy coalition of lethal injection and retributive support for capital punishment, the primary reason for death penalty support in the United States (Gallup 2009) may, on the reading of some scholars, hasten the abolition of capital punishment in the United States,

...the underlying emotion that still appears to play at least a small part in the public's relationship to capital punishment as symbol and practice may lead to a dramatically different interpretation of the changing role of capital punishment in the penal and social realms. Indeed, it may be that the reshaping of the death penalty into a sanitized and routinized disposal process...may actually hasten its obsolescence (Lynch 2000b:25)

The assertion of Lynch may yet, in the future, have some promise, particularly if death row were ever overhauled, and current punitive treatment ended. As Garland also notes, “the death penalty that exists in the public imagination and in the justificatory argument grows ever more distant from the death penalty as it is actually administered” (Garland 2010:100). If retributive messages cannot be found in execution, or in capital offender imprisonment, where they currently lay in abundance, majority support for the institution could decline. The underlying emotion to which Lynch refers is, at best, a sense of retribution, at worst outright revenge, a feeling so strong that Garland refers to it as ‘an operative force within our system, clearly providing the death penalty with both energy and appeal’ (Garland 2007b:448). Although punishment as revenge is not an acceptable basis for death penalty support for the Supreme Court, unlike retribution, (*Gregg v Georgia* 1976) it does have a strong academic lineage (Foucault 1977:48, Sarat 2001) and has frequently been commented upon as a primary retentionist sentiment (Gross 1998). Although that sentiment is not easily read in a lethal injection execution, and even further diminished by a low execution rate, it can be seen in death row incarceration, which thus becomes pivotal. For the death penalty not to reflect cultural endorsement of the sentence on retributive grounds in either execution or death row incarceration (the latter of which increasingly recognised as the punishing element of the sentence (Altimari 2011, Sarat 2001:149) then the institution would not likely retain majority support given that retribution is now, given the steady erosion of the deterrence argument, the “animating” force behind death penalty retention (Amnesty International 2011:6). When death row operates without the judicial scrutiny attendant to the other stages of the capital offender’s journey through the capital system, those cultural sentiments can be more easily implemented, and death row thus becomes an aid in supporting the death penalty in a retributive vein.

- ***Communicating a Vision of the Condemned: Assertions of Future Dangerousness at Trial***

The severe, austere conditions of death rows in America could, according to state authorities, exist in necessity. Indeed, the line of Supreme Court jurisprudence traced above, from *Gregg v Georgia* onwards, has sought to ensure that those sentenced to death, are those who have committed the most heinous forms of murder, and those that pose the greatest continuing threat to society (prison being held by the Court to be a society in itself, *Jones v North Carolina Prisoners’ Labor Union* 1977, *Lawrence v Texas* 2003). That assertion of future dangerousness is pivotal in assessing any proposed necessity of incarcerating death sentenced offenders in the manner and conditions that characterise death row incarceration. Claims of future dangerousness then not only encourage the imposition of a death sentence, as discussed below, but also, by virtue of that sentence, and the inherent promise

that the defendant will poses a future risk, encourage the restrictive and retributive conditions of death row.

The potential for future violence is wholly relevant to the disposition of the capital offender, particularly as to his incarceration after conviction, and any potential demand for his segregation for the safety of the guards and inmates around him. The adjudication of the potential for future dangerousness has provoked debate (Lyon & Cunningham 2005-2006, Cunningham and Reidy 1999), primarily owing to its unreliability in prediction and its subjective interpretation by jurors. That deficiency notwithstanding, the potential for future violence is an aggravating factor in 21 states, and in Texas and Oregon the jury must find a probability of future violence before a sentence of death can be imposed. Indeed, this provision, sentencing an offender, at least partially, for offences he has yet to commit raises a potential ethical problem, but has still been upheld by the United States Supreme Court (Sorenson and Pilgrim 2000:1254) (as a counterbalance, the likelihood that an offender will successfully adapt to prison life can, conversely, can be presented as a mitigating factor, the 'Skipper defense' (upheld as admissible in *Skipper v South Carolina*, 1986)). Even in those jurisdictions where the risk of future violence is not explicitly asked to be determined by jurors, research has demonstrated that the risk remains central to juror deliberations (Edens et al 2005:57, Cunningham, Reidy, and Sorenson 2008:47),

Influenced by stereotypical images of the violent recidivist – the psychopathic serial killer disproportionately portrayed in the media and the new “true crime” genre of television shows – jurors seldom realize research has consistently found the true incidence of recidivism among murderers released from prison to be much lower than for other types of parolees (Sorenson and Pilgrim 2000:1254).

For a successful prosecution of a capital defendant, prosecuting attorneys have long traded in stereotypes, selling to the jury the cultural, monstrous, demonised image of the offender (Garland 2007b:444, Lynch 2002:227); fully competent, rational, and blameworthy (Greer 2006:87), and, without sentencing him to death, ignoring, even facilitating the risk that he could reoffend. This is the intersection of a legal and wider cultural description, image, and stereotype of the capital offender, an intersection of images and descriptions reproduced again on death row. Of course, this situation, sentencing an offender to death in order to manage his risk, has come to be complicated in recent years by the lack of clarity given to juries in the sentencing process with previous research showing that many jurors do not have the relevant information regarding the literal meaning of life sentences (Hood III 1989, Paduano and Stafford Smith 1987) with some believing that a prison term, even one of life without parole, could result in an offender being released at a future point (Sarat

2001). In Texas, research has shown that the average juror has believed that, if sentenced to a term of life imprisonment, rather than being sentenced to death, an offender would be released after fifteen years (Sorenson and Pilgrim 2000:1255). In California, similarly, research has shown that approximately 54% of jurors do not believe that life without parole is a literal sentence (DiCamillo and Field 2006).

Yet, in response to the Furman decision, and, somewhat ironically, the Supreme Court's criticism of 'unbridled jury discretion', several states incorporated the risk of future violence as a possible aggravating factor for jurors to consider regardless of the subjectivity that the factor can produce, and its gateway for potential bias. The prediction of an offender's future violence can never be exact, being only a prediction, and whilst prospective violence can be overestimated, prediction can just as easily underestimate that potential,

Billie does not represent a continuing threat to society and will not be involved in future acts of violence... He would be less likely to do something like this again than one of the members of the jury or one of us here (testimony of James Grigson, M.D. *State of Texas v Billie Wayne Coble*, 1990, cited in Cunningham and Reidy 1999:21)

Whilst the risk of under prediction must be noted, available literature on the predictions of future dangerousness submitted at capital trial, however, nearly unanimously state its over prediction and the persuasion of testimony that reinforces that claim (Reidy, Cunningham and Sorenson 2001:63).

He absolutely will, regardless of whether he's inside an institution type setting or whether he's outside. No matter where he is, he will kill again...he would be a danger in any type setting, and especially to guards or other inmates. No matter where he might be, he is a danger (testimony of James Grigson, M.D. *Rodriguez v Texas*, 1980, cited in Cunningham and Reidy 1999:21)

Such guarantees of future danger, of future lethal violence, can provide instrumental justification, if not need, for repressive death row conditions, if true. One effect of the Furman decision was the potential for the community study of death sentenced offenders. As a result of Furman, there was an immediate commutation, to prison terms, of the more than 600 male offenders and two female offenders that resided on death rows around the country at the time (the exact number of inmates on death row at the time of the Furman decision is not clear, Marquart and Sorenson 1988:677). Not all commuted offenders were subsequently granted parole, New York, Connecticut, Kansas, Maryland, and Nebraska paroled none of those offenders whose sentence was commuted (Vito, Koester, and Wilson 1991:93). The mass commutation of capital sentences, however, provided

several opportunities to research the reoffending rate once prisoners were removed from death row, with such studies finding that a death sentence was not in fact necessary to protect society from future offences (Vito, Wilson and Latessa 1991:110, Marquart and Sorenson 1988, Vito, Koester, and Wilson 1991).

In a study of thirty one offenders in Texas whose sentence was commuted after Furman and who were eventually paroled, the authors found that the majority did not reoffend. Only four of the group committed a further offence: two robberies, one rape, and one murder (Marquart and Sorenson 1988). Yet, at trial, the future dangerousness of the whole group had been prophesied and affirmed by their subsequent sentence. In a comparative group, in Kentucky, of seventeen offenders whose sentences were commuted and who were then paroled, 29% were returned to prison, the most serious offence committed, being armed robbery (Vito and Wilson 1988). Another study found that, out of a 26 state sample, for those offenders subsequently paroled as a result of the Furman decision, 158, (minus 8 who died whilst under supervision), the reincarceration rate was 19.7% (Vito, Koester, and Wilson 1991:92). Parole violation was the most common cause of an offender being returned to prison, 12 such offenders accounting for that cause, (34.3%). More serious offences were reported however, 3 instances of murder (8.6%), 3 of robbery (8.6%), 1 of rape (2.9%), and 1 of kidnapping (2.9%) (Vito, Koester, and Wilson 1991:94). What level of capital offender recidivism one system, or the capital system as a whole, is willing to tolerate is debateable, but after a sentence of death is imposed, subsequent parole is unlikely, and another Furman decision prompting a mass commutation even less so, in the immediate future at least. So, whilst studies of release behaviour are interesting to note, their relevance can only be partial to contemporary sentencing, more relevant to the need for institutional restriction and deprivation are the further acts of violence committed by death sentenced offenders in prison.

Those studies that have documented community behaviour of death sentenced offenders may have demonstrated a relatively low recidivism rate but, in an open setting. It can therefore be expected that under the restriction and supervision of the prison setting, reoffending rates, institutional misconduct, would be even lower.

Because the community represents a setting of substantially less supervision, control, and contingency management than a maximum security prison, behaviour patterns from the former may not be repeated in the latter. Studies sponsored by the U.S. Justice Department have concluded that neither past community violence, prior convictions, nor current severity of offense is strongly or consistently associated with prison violence (Reidy, Cunningham, and Sorenson 2001:64)

The risk that an offender poses a continuing risk to prison society has not been substantiated by research conducted within that setting. Several studies have found death sentenced offenders, whilst institutionalised, commit only a small fraction of rule violations and are in fact amongst the best behaved and manageable inmates within a prison (Marquart and Sorenson 1988, Sorenson and Wrinkle 1996). The logical counter argument is that good behaviour and offender manageability are the result of prisoner restriction. Yet, experiments with mainstreaming death row prisoners, as in Arkansas and Missouri, discredit that counter argument (discussed in chapter six).

Whilst the image and description of the offender as a monster is presented at trial in order to secure a sentence of death (Greer 2006:87, Hood III 1989, Paduano and Stafford Smith 1987) (substantiating the more widely held cultural view of the capital offender (Garland 2007a:444)), that characterisation is also based upon the asserted future danger he poses if not sentenced to death, if not sent to death row. Whilst some death sentenced offenders do indeed pose a threat to others, the majority, based on behavioural reports and studies conducted with the group whilst incarcerated, do not live up to their prophesised potential for future violence. There is little justification for current, punitive death row detention to be imposed on those grounds. Notwithstanding its often false prophesising however, the future dangerousness prediction remains a legally endorsed and mandated element of a death sentence. That prediction contributes to the legal image of the capital offender which, without any undermining by substantive legal intervention, combines to endorse the *need* and justification for the current treatment of, and austere restrictions imposed upon, death sentenced offenders (as discussed in chapter six). That treatment has a more retributive, punitive character than the detention of other offenders, even offenders convicted of similar offences, and offenders serving the only sentence that can be compared to a death sentence in severity, life without parole (ACLU 2008b, Kifner 1995, Hood 2008:397, Blow 2008, Fraser 2007, Marquis 2005:520, Bedau 1997, Appleton & Grover 2007), the subject of chapter five.

- ***Superficial not Substantive: Legal Regulation of How the Condemned Live***

Since 1976 the Supreme Court has upheld the constitutionality of capital punishment at least in part on the notion that the death penalty serves the useful social purpose of retribution (Haas 1994:127)

For some commentators the regulation of the death penalty by the Supreme Court has strayed, and has become the official approval of vengeance in punishment: the admissibility of victim impact



statements (*Payne v Tennessee* 1991), and the refusal to ever rule a method of execution unconstitutional, for example (Haas 1994). Whilst the Supreme Court has acknowledged and approved retribution as a legitimate purpose of the death penalty (*Furman v Georgia* 1972, *Gregg v Georgia* 1976), where the difference lies between retribution and revenge is a subjective assessment; both can certainly be read into the treatment of death row prisoners, detailed in chapter six. However, the approval of retribution by the Supreme Court can explain its inaction, its refusal to substantially intervene in the way prisoners are treated on death row. Whether by intent, or neglect, however, the imprisonment of capital offenders is an area of the capital system that the Supreme Court has left to operate without regulation.

Whilst there has been a great deal of Supreme Court attention paid to the final minutes of the condemned man's life, at his execution, and an equal, if not greater amount of attention and concern given to his trial, that level has not been matched in concern for the interim portion of the condemned's journey through the death penalty system; his incarceration on death row. To do so, it is asserted, to remedy the austere segregation, confinement, and restriction of the condemned would be to undermine its own jurisprudence that has created an image of the condemned as the most dangerous, 'worst of the worst' offenders who pose a continuing risk to those around them. Moreover, it could open the doorway to claims of mistreatment of capital offenders by prison authorities; treatment which the Supreme Court has historically left to prison authorities. Intentional, or not, death row prisoners are left to be treated in a punitive way that, in other parts of the capital system, the Supreme Court has prohibited.

There have been some instances, however marginal, in which lower courts, if not the Supreme Court, have sought to regulate individual aspects of death row confinement. For example, in *Sinclair v Henderson* (1971), the Federal District Court for Louisiana, ruled that confinement for long periods of time, without opportunity for regular outdoor exercise, was a violation of the Eighth Amendment (Yuzon 1996–1997:63). Yet, in *Hutto v Finney* (1978) the Court made clear that "great deference" had to be given to prison directors and officials and more than 'mere unpleasantness' was required to constitute an Eighth Amendment violation (Lyon & Cunningham 2005-2006:10).

The most significant ruling on prison conditions in the contemporary era is often held to be the judgement rendered in *Ruiz v Estelle* (1980) by the United States District Court for the Southern District of Texas. Before the ruling, suits filed against the Texas Department of Corrections challenging the conditions of detention in the state were frequently set aside, and all followed a similar pattern whereby the courts would, without much effort, dismiss the complaints of prisoners (Justice 1990:2). Yet, the ruling in *Ruiz* was substantial. In *Ruiz*, complaints fell into four main areas:

brutality, inadequate medical care, overcrowding, and summary discipline (Justice 1990). The Ruiz ruling overhauled conditions on death row for Texan inmates, as the state entered into a consent decree (a voluntary agreement made in return for an end to the litigation process) which liberalised the conditions of their confinement, as discussed in chapter six. Ultimately, however, the change for death sentenced offenders was short lived and Texas remains one of the most restrictive examples of death row confinement in the country. The *Ruiz* decision is notable however to suggest a legal recognition of inmate suffering, at a point in time, however slight, and however localised.

In *Rhodes v Chapman* (1981) the United States Supreme Court set a minimum standard for conditions of confinement for prisoners, holding that “conditions must not involve the wanton and unnecessary infliction of pain, nor may they may be grossly disproportionate to the severity of the crime warranting imprisonment” (Yuzon 1996-1997:64). Thus, the Supreme Court set a rather high limit, a high threshold, for successfully raising a claim under the Eighth Amendment for this aspect of the capital offenders’ journey through the system. Notably in all other areas of that system the legal threshold for successfully raising an Eighth Amendment claim is much lower, and lower than the non capital system generally (Steiker and Steiker 2008).

Conditions...alone or in combination, may deprive inmates of the minimal civilized measure of life’s necessities. Such conditions could be cruel and unusual under the contemporary standard of decency...But conditions that cannot be said to be cruel and unusual under contemporary standards are not unconstitutional. To the extent that such conditions are restrictive and even harsh, they are part of the penalty that criminal offenders pay for their offenses against society (*Rhodes v Chapman*, cited in Yuzon 1996-1997:64)

As the Supreme Court infers that retributive impulses may warrant harsh treatment of the condemned on death row, the Supreme Court has created a dichotomous standard which lower courts have had to decipher (Yuzon 1996–1997:65), as the Third Circuit Court had to do in the case of *Peterkin v Jeffes* (1988). In *Peterkin*, death row prisoners filed a class action suit contesting their conditions of confinement; specifically that their cell conditions, in cell time and prisoner activities, as well as restrictions on inmates’ opportunities for physical exercise, were in violation of the Eighth Amendment (Yuzon 1996–1997:65). The Court rejected all three elements of the petitioners’ claim, recognizing the harshness of death row but asserting that the claimants had established no more than a theory that the totality of death row confinement is a source of pain (Yuzon 1996–1997:67). Now, Courts refuse to look at objective conditions of detention, requiring instead that, “conditions actually impair the needs or rights of the prisoner”. Courts have rejected the notion that mere

“exposure” to a difficult environment abridges prisoners’ rights. Thus, the totality of circumstances alone does not warrant Eighth Amendment violations (Yuzon 1996–1997:67).

#### **- Prospect for Reform?**

As a glimpse of possible future reform, the Subcommittee on the Constitution, Civil Rights and Human Rights has begun the adjudication of the practice of solitary confinement, with testimony being given to the Committee by former, exonerated death row inmates (Graves 2012). Whilst the focus of the hearings is on solitary confinement generally, coinciding with class action law suits being filed on behalf of inmates at Pelican Bay State Prison in California, and at ADX, the federal ‘super-maximum’ security prison in Florence, Colorado (Goode 2012), there is perhaps a potential for reform that could, eventually, extend to death sentenced offenders. Some inmates, however, will always need to be isolated from others for the safety of themselves, other inmates, and correctional staff (as has already been heard by the Committee from Charles E. Samuels Jr., director of the Federal Bureau of Prisons (Goode 2012)). With that recognition, if and how change is mandated, how individual states and prisons respond, particularly in regard to death row inmates who, in some states are automatically classified as escape risks (Johnson 1981:49) is unclear. Thus the prospect for reform is most likely, at best, marginal. Death row detention as currently exists has become normalised and ingrained in prison culture over time. Meagre legal reforms have been appealed and brushed aside before and, nationally, death row has since taken a punitive turn (Babcock 2008). Any reforming legal mandate would have to be substantial and far reaching, and pivotally, acquiesced to by prison agents to overturn the current manner and culture of death row detention.

Conditions of detention, however, are only half of the equation. Equally, the length of time spent on death row, subject to those conditions, is an element of capital offender incarceration that has gone without significant American legal scrutiny and has never been reviewed by the United States Supreme Court.

#### **- *Supreme Court Reluctance to Review Death Row Wait***

Whilst the United States Supreme Court has heard and ruled upon Eighth Amendment challenges based on the offender, his culpability, and the propriety of inflicting execution upon him (*Kennedy v Louisiana* 2008, *Coker v Georgia* 1977, *Ford v Wainwright* 1986, *Pannetti v Quarterman* 2007) as well as the method by which he is put to death (*Re Kemmler* 1890, *Baze v Rees* 2008), the issue of how

long an offender should remain incarcerated until his sentence of execution is carried out, whilst litigated in other countries around the world, has gone without Supreme Court scrutiny or regulation.

Since 1986, the Court has upheld its holding in *Ford* (executing the insane violates the Eighth Amendment) while refusing to recognize any legal recourse for an inmate who spends a comparable amount of time on death row, endures similar psychological brutality, but somehow manages to stay sane...Why must a prisoner lose the torturous battle against insanity before the Court will hear his claim? Why is the Court willing to recognize the end result but not the means by which it may arise? (Hedges 2000–2001:613)

The issue of whether an inordinate time delay between sentencing and execution is a violation of the Eighth Amendment prohibition on cruel and unusual punishment, did not reach the United States Supreme Court, until 1995, *Lackey v Texas* (Hedges 2000–2001:578). Although the Court denied review of the issue, that denial, and the reasons for it are important in cataloguing the Supreme Court's refusal to intervene in, or regulate, in any substantive form, the incarceration of the condemned on death row. That refusal is in spite of Supreme Court recognition of the 'horrible feelings' associated with death row incarceration, over 100 years ago, at a time when the wait on death row was only four weeks (*re Medley* 1890). In *Medley*, the Supreme Court ruled that solitary confinement before execution was unconstitutional, not only because of the inherent severity in such isolated confinement, but because it comprised a second sanction, "an additional punishment of the most important and painful character" (Johnson 1998:84). Even though, now, the temporal element of a death sentence has expanded – the time a person spends on death row – the Supreme Court continues unaffected by its previous dicta in *Medley* and refuses to even hear a petitioner's claim on the issue.

The *Lackey* claim, as it has been dubbed, consists of two prongs: first, that an extended period spent confined to death row, with its attendant restrictions and regimes, constitutes "psychological torture" and is therefore, in and of itself, cruel and unusual punishment. The second claim, meanwhile, asserts that executing an offender who has spent an extended period of time on death row, retains no penological justification and is therefore unconstitutional (Hedges 2000–2001:596).

Justice Stevens, recognising the 'importance and novelty of the claim raised by Clarence Lackey, argued that the two principle penological purposes of capital punishment, recognised by the Supreme Court in *Gregg v Georgia* (1976), retribution and deterrence, fail to retain any force for

prisoners who have spent 17 years under a sentence of death. For Justice Stevens, the length of time negates the deterrent return of the penalty, whilst the state interest in retribution is arguably already satisfied “by the severe punishment already inflicted [whilst the prisoner is incarcerated on death row awaiting execution]” (a punishment inherent in what penal and medical experts agree to be the dehumanizing effects of a prolonged wait on death row, [which] will amount to “psychological torture” (Memorandum of Justice Stevens respecting the denial of certiorari, *Lackey v Texas* 1995)). Citing Justice White in *Furman v Georgia* (1972) that when the death penalty no longer fulfils the purposes of retribution or deterrence it would be unconstitutional under the Eighth Amendment (a position clarified and reiterated by the Supreme Court in several cases (*McKleskey v Kemp* (1987) and *Coker v Georgia* (1997), for example (Crocker 1997 -1998:559)) Justice Stevens inferred that an extensive delay between sentencing and execution could thus raise a valid claim of unconstitutionality, a point since echoed by several critics and commentators (Connolly 1997, Flynn 1997, Crocker 1997-1998, Feldman 1999-2000). Justice Stevens recommended that lower courts address the issue and that the Supreme Court should reconsider its position at a later point; to date the Supreme Court has failed to do so.

Lower courts have addressed the issue even before Clarence Lackey petitioned the Supreme Court. In 1959 the issue was first presented in *People v Chessman*. Caryl Chessman had spent eleven years on San Quentin’s death row in California awaiting execution in the state’s gas chamber, a length of time which the Court not only noted as unusual, but also confirmed there was little room in which to doubt the “mental suffering [that] attends such detention”. The Court, however, dismissed his claim (*People v Chessman* 1959). The following year, in 1960, Chessman renewed his claim in a federal habeas corpus proceeding, to which the Ninth Circuit Court of Appeals responded, in a particularly subjective fashion,

It may show a basic weakness in our government system that a case like this takes so long, but I do not see how we can offer life (under a death sentence) as a prize for one who can stall the processes for a given number of years, especially when in the end it appears the prisoner never really had any good points. If we did offer such a prize what would be the cut off date? I would think that the number of years would have to be objective and arbitrary.

But Counsel for petitioner suggest that we take a subjective approach on this man’s case. We are told of his agonies on death row. True, it would be hell for most people. But he is no ordinary man. In his appearances in court one sees an arrogant, truculent man, the same qualities that [his sexual assault victims] Regina and Mary met, spewing

vitriol on one person after another. We see an exhibitionist who never before had such opportunities for exhibition. (All this I get from the record). And, I think he has heckled his keepers long enough (Chessman v Dickson 275 F 2d 604 (1960))

There is, blatantly and unashamedly, no concern for the condemned in the Court's opinion. Whilst recognising the punishment of death row, as a 'hellish experience', the court infers that such incarceration, whilst retributive, is an inherent feature of a death penalty system or, at least, a system that honours the condemned's constitutional right to appeal. As has been noted,

Conspicuously absent is an Eighth Amendment standard, or even a rudimentary explanation of why Chessman's personality, as interpreted by the court, would reduce the level of his mental suffering below that which requires the application of the Eighth Amendment (unsigned note, Iowa Law Review 1972:820).

However, thirteen years after Caryl Chessman's first case was dismissed, in *People v Anderson*, the Supreme Court of California found merit in the claim that waiting on death row is an additional punishment to execution and, actually formed the basis of abolishing the death penalty in California at that time (Smith 2008:241).

The cruelty of capital punishment lies not only in the execution itself and the pain incident thereto, but also in the dehumanizing effects of the lengthy imprisonment prior to execution during which the judicial and administrative procedures essential to due process of law are carried out. Penologists and medical experts agree that the process of carrying out a verdict of death is often so degrading and brutalizing to the human spirit as to constitute psychological torture" (People v Anderson, 1972, cited in Yuzon 1996-1997:70, Feldman 1999-2000:201)

It is the Massachusetts Supreme Court case of *District Attorney V Watson*, 1980, however, that provides the most forceful legal acknowledgement of the "torture" of death row confinement, whilst simultaneously relating it to as an inherent feature of the modern death penalty system,

The raw terror and unabating stress that [the condemned prisoner] experienced was torture; torture in the guise of civilized business in an advanced and humane polity. This torture was not unique, but merely one degrading instance in a legacy of degradation. The ordeals of the condemned are inherent and inevitable in any system that informs the condemned person of his sentence and provides for a gap between sentence and execution. Whatever one believes about the cruelty of the death penalty itself, this violence done [to] the prisoner's mind must afflict the conscience of enlightened

government and give the civilized heart no rest (District Attorney for the Suffolk District  
v James Watson & others 381 Mass. 648 (1980))

These cases though, predate the substantial increase in death row waiting time, waiting time extended by the court systems' struggle to cope with the death penalty appeals procedure, discussed in the following chapter. In *McKenzie v Day* (1995) the Ninth Circuit refused to recognise the petitioner's Eighth Amendment claim after twenty years spent on death row. The dissent of Judge Norris, however, echoes the concerns of Justice Stevens in his dissent in *Lackey v Texas*, and, notably, highlights the reported harshness of death row confinement in a retributive vein: "This delay, coupled with allegedly harsh and punitive confinement conditions on death row, arguably satisfies the state's interest in exacting retribution" (Judge Norris, dissenting in *McKenzie v Day* 1995). Then in 1999, in *Knight v Florida*, the United States Supreme Court once again denied review of the petitioner's claim that excessive delay before execution was a violation of the Eighth Amendment. Justice Thomas declared that the claim had actually been tested by lower courts and found to be 'meritless' and therefore the experiment should be considered "concluded" (Justice Thomas, concurring in the denial of certiorari, *Knight v Florida*). Justice Breyer, however, disagreed, and in his dissent from denial of certiorari noted that when a delay before execution is measured in decades, "the claim that time has rendered the execution inhuman is a particularly strong one" (Justice Breyer, dissenting from denial of certiorari, *Knight V Florida*). Interesting, that Justice Breyer notes that the execution would be inhuman, not that death row incarceration itself is inhuman treatment. His denial does, however, cast into doubt the propriety of the current system that, barring voluntary executions, only generally executes offenders after a lengthy period of incarceration on death row which, as noted in chapter one, is currently at a record high, at an average of more than fourteen years (169 months) (Death Penalty Information Center 2012b).

Most recently in 2011, the United States Supreme Court, once more, rejected the opportunity to hear a claim of an Eighth Amendment violation owing to a lengthy delay between sentence and execution<sup>13</sup> (*Valle v Florida*). Noting the cruelty inherent in a long period of incarceration under a

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<sup>13</sup> The Florida Supreme Court had first rejected this claim, pointing to the Court's own lineage of cases: "Under this Court's clear precedent, Valle's claim is facially invalid, and the circuit court did not err in summarily denying relief. In *Tompkins*, this Court observed that "no federal or state court has accepted the argument that a prolonged stay on death row constitutes cruel and unusual punishment, especially where both parties bear responsibility for the long delay." (quoting *Booker v. State*, 969 So.2d 186, 200 (Fla.2007)). In line with *Tompkins*, this Court has repeatedly held this claim to be meritless (rejecting claim that twenty-three years on death row constituted cruel and unusual punishment); *Booker*, 969 So.2d at 200 (rejecting claim that almost thirty years on death row constituted cruel and unusual punishment); *Gore v. State*, 964 So.2d 1257, 1276 (Fla.2007) (rejecting claim that twenty-three years on death row constituted cruel and unusual punishment); *Rose v. State*, 787 So.2d 786, 805 (Fla.2001) (holding as without merit cruel and unusual punishment claim of

sentence of death, whilst also citing a number of 113 prisoners across the United States who have been under a sentence of death for more than 29 years, Justice Breyer dissented from the Court's refusal to hear the claim,

The commonly accepted justifications for the death penalty are close to nonexistent in a case such as this one. It is difficult to imagine how an execution following so long a period of incarceration could add significantly to that punishment's deterrent value. It seems yet more unlikely that the execution, coming after what is close to a lifetime of imprisonment, matters in respect to incapacitation. Thus, I would focus upon the "moral sensibility" of a community that finds in the death sentence an appropriate public reaction to a terrible crime ... And, I would ask how often the community's sense of retribution would forcefully insist upon a death that comes only several decades after the crime was committed (Justice Breyer, dissenting from refusal to grant certiorari, *Valle v Florida*, 2011)

More than fifteen years after the United States Supreme Court refused to hear the same claim advanced by Clarence Lackey, and more than fifty years since the claim was first raised in the lower courts by Caryl Chessman, the Supreme Court of the United States has still not heard the claim. Offender types have been regulated, as have capital offences, as well as trial procedures, then, at the end of the capital offender's journey through the process of death administration, so too has the site of his execution, both in method (*Baze v Rees* 2008) and in the mental condition of the offender (*Panetti v Quarterman* 2007). This level of regulation has drastically reduced the scope of the death penalty and, in fact, made it relatively difficult to carry out. Compared to a century ago, when death row waiting times were short, or even as recently as the twentieth century, when the time between sentencing and execution was an average of only four years (Crocker 1997-1998:560), crimes warranting the death penalty could be as relatively minor as sexual assault, and offenders could be put to death for offences committed as young as 16. Moreover, executions, far from regulated, bureaucratised, and sanitised, were crude, often public hangings<sup>14</sup>. The death penalty is now, comparatively, regulated beyond such recognition.

Concern for the death penalty, beginning for the Supreme Court in 1972 (*Furman v Georgia*) coincided with the marginalisation of the United States on the issue, particularly as compared to

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death row inmate under death sentence since 1977)" (*Manuel Valle V. State of Florida*, Appellee. No. SC11-1387 August 23, 2011)

<sup>14</sup> Public hangings did not end until far into the twentieth century, the last officially recorded example of which occurred in Owensboro, Kentucky in 1936



Europe, the rise and scope of nongovernmental groups such as Amnesty International and Human Rights Watch, and a wider public much more interested in issues of law and order. As scrutinised as the death penalty would become, the Supreme Court came to regulate those aspects on which the system could be readily seen, evaluated and judged; what happens on death row, its conditions, regimes as well as the length of time a condemned prisoner is liable to spend there, is much more easily considered intrinsic to the system itself; less susceptible to ready observation and comment. Pivotal, should the Supreme Court, in any substantive form, venture into the world of death row, be it the waiting times associated with a death sentence being carried out, or the conditions to which inmates are subjected, then the very future of the death penalty is suddenly cast into doubt, as discussed below; a future which the Supreme Court has previously taken pains to note that should be left to the legislature (*Gregg v Georgia* 1976).

The doubt would centre, perhaps not so much on the conditions of death row in isolation, important as that factor is in itself, but those conditions coupled with the length of time that a death sentenced prisoner is subjected to them. Increasingly, international tribunals and courts, as well as commentators, have come to criticise the United States on this point, and have offered a timetable or calculus by which claims should be judged (Privy Council (*Pratt v Attorney General of Jamaica, Henfield v Attorney General of Bahamas*, Feldman 1997). Those timetables to fulfil a death sentence, after which the sentence should be commuted, begin from as little as three and a half years, a time frame that the court system in the United States could not possibly cope with owing to the number of cases it is scheduled to hear. As such, with so little possibility in executing a defendant in anything less than a decade, on average, the vast majority of death sentences passed would be ruled unconstitutional and the system would surely collapse. Yet, surely, following the reasoning of the dissents of Justices Breyer and Thomas in *Lackey, Knight, and Valle*, and tracing the Court's death penalty jurisprudence back to *Gregg v Georgia* (1976), the conditions of death row more than exceed the state's interest in exacting retribution upon the offender, and the amount of time that is spent under that form of incarceration erodes the deterrent effect of the death penalty. When those two aims are unfulfilled by capital punishment it becomes unconstitutional (*Gregg v Georgia* 1976).

#### **- *America the Outlier: International Responses to Long Death Row Waiting Times***

The United States is an international outlier in its very retention of the death penalty. Amnesty international lists only 58 countries that actively retain, and use, the death penalty, whilst 139 countries are abolitionist either in law or in practice (96 countries abolitionist for all crimes, 9

countries abolitionist for ordinary crimes only, 34 countries abolitionist in practice (Amnesty International 2010:44).

For those retentionist countries, the length of time spent on death row whilst awaiting execution has been sporadically adjudicated; countries which have done so have most often ruled against the sort of waiting times that characterise death sentences in the United States. In South Africa, for example, where capital punishment has been ruled unconstitutional, in part, owing to the systemic delays between trial and execution (Crocker 1997-1998:570) the Supreme Court noted,

The difficulty of implementing a system of capital punishment which on the one hand avoids arbitrariness by insisting on a higher standard of procedural fairness, and on the other hand avoids delays that in themselves are the cause of cruelty and inhumanity, is apparent (State v. Makwanyane No. CCT/3/94 [1995] 1 LRC 269).

Similarly, the Supreme Court of Zimbabwe commuted the death sentences of offenders who had spent between four and six years on death row, stating that incarceration on death row for such an extended time constituted inhuman and degrading punishment (*Catholic Commission for Justice and Peace in Zimbabwe v Attorney General of Zimbabwe* 1993)<sup>15</sup>. The Court was quite specific about the conditions faced by prisoners on death row, noting, before setting aside their death sentences,

From the moment he enters the condemned cell, the prisoner is enmeshed in a dehumanizing environment of near hopelessness. He is in a place where the sole object is to preserve his life so that he may be executed. The condemned prisoner is the living dead (*Catholic Commission for Justice and Peace in Zimbabwe v Attorney General of Zimbabwe* 1993 (4) SA 239 (ZS))

In India too, the amount of time spent on death row before execution has come before the courts. In *Vathesswaran v State of Tamil Nadu* (1983) the India court substituted death sentences for life imprisonment after holding that a delay of eight years between sentence and execution was in violation of the Indian Constitution (Aarons 1998-1999:203). In another case, also in India, a death sentence was also commuted to one of life imprisonment after the Court ruled that the defendant's petition for mercy, that is clemency, had been pending before the President for more than eight years and was thus an amount of time which was unconstitutional (Aarons 1998-1999:203).

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<sup>15</sup> After the Court's decision the legislature immediately amended the Zimbabwean Constitution stating that death row delays will not constitute cruel punishment in future cases (Hudson, Patrick 2000:852)

Internationally, the most persuasive and authoritative ruling regarding the length of confinement prior to execution comes from the Privy Council case of *Pratt v Attorney General for Jamaica* (1993) (Shugrue 1995-1996:5). In *Pratt*, the Privy Council, the highest court of appeal for the Commonwealth nation of Jamaica, found that an extended delay before carrying out an execution was in violation of the Jamaican Constitution's prohibition on inhuman punishment or other treatment (Shugrue 1995-1996:6). The Court felt no compulsion to investigate the conditions of death row, however, and made its ruling solely on the basis of the length of confinement; arguing that a reasonable amount of time to execute a condemned person after imposing a death sentence should be that of five years (*Pratt v Attorney General for Jamaica* 1993).

- ***International Concern for American Death Row Detention***

For activists around Europe, saving the other from death row involves extending ideas of citizenship and belonging by adopting individuals on death row as 'honorary' Europeans...Through them Europe lives on death row (Girling 2006:77)

Particularly since the turn of the century, which was taken as an ideal symbolic platform on which to launch its attack (Girling 2006), Europe, its public, politicians, and lawmakers, have become increasingly concerned with 'America's' use of the death penalty (or more accurately, the use of the death penalty within America) and the plight of offenders incarcerated on its death rows. EU intervention and concern, in the form of political demarches, for example, has often met with scorn from American officials (Girling 2006:76) yet Europe has become increasingly concerned, and involved with what it regards as a global human rights issue (Girling 2006). From street demonstrations by European citizens, the reclamation and repatriation of executed bodies and the designation of them as honorary citizens of Europe (Girling 2006:77), to more practical intervention in the form of submitting *amicus curiae*, 'friends of the court', briefs on behalf of death sentenced offenders, European nations are taking note of, and interest in, what is happening to America's death row prisoners (Girling 2006). The most practical ramification of this concern, however, is to be found in the realm of extradition, a particular hindrance in an age of strengthened, multi lateral links in combating transnational crime and global terrorism.

Prior to the exponential rise of human rights agreements, and near universal recognition of the concept of human rights, nations surrendering fugitives to a requesting state often did not scrutinise the judicial or penal conditions of the state requesting extradition: the 'rule of non inquiry' (DeWitt 1997-1998:537). With the advent of human rights agreements the rule of non inquiry has been

steadily eroded and now, under those agreements, closer scrutiny of the requesting state is required in order to give substance to an individual's rights (DeWitt 1997-1998:540). To facilitate such inquiry, quasi judicial bodies have been set up through human rights agreements to provide individuals with an avenue by which to pursue review of human rights abuses, as such the United States has begun to experience difficulty in securing the extradition of criminal offenders on capital charges, particularly from European countries (DeWitt 1997-1998:540).

Historically, assurances, or an agreement on the part of the United States not to subject offenders to the death penalty was sufficient to secure an offender's extradition, that is until the case of *Soering v United Kingdom* (1989). The decision in *Soering* meant that European countries could not extradite offenders to the United States without seeking greater assurances that capital punishment would not be imposed. Reluctance to extradite was not because of execution, rather, specifically, because the confinement of the offender to death row would result in a suffering or treatment "beyond the threshold limit permitted by the European Convention" (DeWitt 1997-1998:550). That is, treatment of offenders on death row, its regimes and subsequent effect upon the offender would be in violation of Article 3 of the European Convention on Human Rights which prohibits inhuman or degrading treatment or punishment (*Soering v United Kingdom* 1989).

In 1985, Jans Soering, a German national, fled the United States with his girlfriend Elizabeth Haysom, after the murder of Haysom's parents in Virginia. In 1986 they were arrested on fraud charges in the United Kingdom and the United States subsequently requested their extradition on charges of capital murder. Soering challenged that extradition, ultimately appealing to the European Court of Human Rights<sup>16</sup> (after the European Commission found that extraditing Soering would not be a breach of the European Convention). When it reviewed the case, the European Court found that the conditions on death row in Virginia, combined with the length of detention prior to execution, would result in exposure to 'death row phenomenon' (described in chapter six) which would be a violation of Article 3 of the European Convention. Indeed, it departed from the general rule of blocking extradition for a completed violation under the Convention, and refused extradition for an anticipated violation. That decision was warranted, the Court felt, after an analysis of death row conditions in Virginia which, combined with a long period of incarceration, resulted in deleterious physical and psychological effects upon the individual; suffering of a 'serious and irreparable nature' that justified a departure from the general rule (Yuzon 1996-1997:58).

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<sup>16</sup> The United Kingdom surrendered Elizabeth Haysom to the United States where she pleaded guilty as an accessory to murder and was sentenced to ninety nine years in prison (Yuzon 1996-1997:50)

Europe could, and has, recognised the harshness of death row confinement within a human rights framework. In America that recognition appears to be ignored, as the humanity of the condemned is repeatedly denied. Whilst American death row conditions have been held by international courts to be physically and psychologically destructive, and held by some American courts to be, at least, a source of retributive punishment (*Chessman v Dickson* 1960, *People v Anderson* 1972) that confinement not only couples with the description of death sentenced offenders in wider culture, but if assertions of future dangerousness made at trial are correct, can be justified under institutional, security concerns and mitigate the lack of legal regulation of American death rows. Not only has the Supreme Court, tacitly at least, produced an image of the capital offender, as likely to reoffend that could substantiate claims of necessity for the current, punitive restrictions of death row but, through its regulation of lethal injection protocols, and the legal system's wider inability to cope with the capital appeals process, has extended the length of time offenders are subject to those conditions, the subject of the next chapter.

# Why Death Row is Different: Communicating Offender Status at a Time of Declining Executions

## - Death Row as the Death Penalty

American states are simply not able to quickly, and steadily, execute offenders. Lengthy and costly appeals procedures and constitutional uncertainty over execution protocols have slowed the execution pace of the country. As such, no longer able to announce and communicate an offender's threat and difference through his execution, the emphasis has shifted to death row, by proxy, and reports of it to communicate the same message: the affirmation and corroboration of the dominant cultural view of capital offenders as dangerous monsters (Lynch 2000a, Lynch 2002, Haney 1995:549, Garland 2007a:447).

The increasing reliance upon death row to form the punishing element of a death sentence has been forced by a confluence of factors that have reduced executions. From the present, even if temporary, relative unpopularity of the death penalty (in comparison to life without parole (Gallup 2009)), a public voice thus less demanding of executions, the legal system's inability to cope with the number and length of death penalty appeals, and a lack of the drugs necessary to put offenders to death; these factors have combined to expand the space, in time, between the legal utterance of a death sentence and execution. The concern with how the condemned dies, although not how he lives, and the attempt to deny the physical violence of execution, as much as possible, with the move to lethal injection has particularly impeded the executing pace of state death penalties in recent years; not only in authoring constitutionally sound lethal injection protocols but in creating a dependence on a dwindling drug supply. Moreover, the reliance on death row to form the punishing element of the death sentence must now continue for the foreseeable future, history dictates that, even if it were possible to locate supplies of 'approved' lethal drugs, American states will not tolerate a sudden reversal in execution output (Deparle 1991, Zimring & Hawkins 1986).

Even if the nature, role, and function of capital punishment, generally, were to suddenly undergo a radical transformation in the near future and there was a will, or need, from the point of view of an individual system, to substantially increase the number of executions performed, death rows would still expand, more offenders would be added than subtracted and, for those incarcerated there, the term of incarceration would continue to lengthen. Making a calculation from current death row populations, even with an execution every single day of the year, it would take nearly nine years to

empty America's death rows (Death Penalty Information Center), and that calculation is true only without any new death sentences being handed down by juries.

In recent years this slowdown in executions, an increased emphasis on death row to punish offenders and communicate the verification of retentionist attitudes, has been due to a number of factors. Whilst some readings may foretell the end of capital punishment in America (Zimring 2003, Harcourt 2009, Lifton & Mitchell 2002, Berger 2007), viewing impediments to execution as precursors of the institution's demise, that is not necessarily so. Although some states may indeed abolish capital punishment, as a handful have done in recent years, a national abandonment of the death penalty is certainly not guaranteed: a slowdown in executions does not mean the permanent end of capital punishment in the United States. Impediments to execution are in fact, of the time in which they occur and do not necessarily have any permanence: popularity can be regained, drug shortages overcome, for example. For now though, death row, and the preface of a capital trial, and all that that involves, statements of support, discussions, protests, even the signing of death warrants that go unfulfilled, suffice to sustain the institution, sustain until individual states should ever require and are able to produce a higher number of executed bodies. For some states this has been their version of the death penalty in the current era, in Kansas and Pennsylvania, for example. For executing states, however, that increasingly non-lethal disposal of the death sentenced offender is currently the result of several recent barriers to conducting executions.

- ***Relying on Death Row Communication: Impediments to Putting Offenders to Death***

Several factors have reached a point of confluence in the contemporary era to produce the current level of the death penalty's relative unpopularity (no matter how temporary it may be) unpopularity that has been cited as a factor in delaying executions (Hudson, Patrick 2000:835). Politicians are sensitive to public opinion and executions, during a period of unpopularity, can be troublesome. After substantial public support for an execution moratorium in California in 1997, for example, when the American Bar Association publicly called for a moratorium so capital schemes could be reviewed to ensure their fairness and minimise the risk of innocent convictions (Kirchmeier 2007:36), the state, chose to not pursue any executions and the Governor not to sign any further death warrants until the lull in public enthusiasm for executions had passed (Hudson, Patrick 2000:835). The current, relative, lack of appetite for executions, and thus a shift in emphasis to death row as the site of punishment, and a generator of images and descriptions, is the result of

pragmatic and symbolic concerns that have risen to prominence in recent years, particularly in the last decade.

- **Cost**

In comparison to pursuing, and fulfilling a life without parole verdict, in securing conviction and then funding direct appeals, the cost of a capital case can be over ten times greater. An analysis by the Legislative Services Agency for the General Assembly of Indiana, for example, found that the average death penalty case costs \$449,887 whilst the average cost of a life without parole case was \$45,658 (Callahan 2011). With such an outlay, taxes have been raised in some Indiana counties to meet the cost, but still only 30 out of 188 death penalty cases filed between 1990 and 2009 resulted in a death sentence (Wilson 2011). When seeking death sentences is publicised as an infringement on the provision of state services, popularity for the institution can wane. In a similar study conducted in Nevada, it was found that the additional cost of a capital murder case was between \$170,000 and \$212,000 and, of the 80 pending capital murder cases in Clark County, for example, the cost was estimated to be \$15 million more than if they were prosecuted without seeking the death penalty (Miethe 2012). In California, the last two executions carried out, Stanley Williams, and Clarence Ray Allen, cost more than \$1,760,000 (Mintz 2012). Additionally, cost is a factor in choosing whether a prosecutor decides to seek a capital verdict (Associated Press 2010, Coyne 2009) and how quickly that case will proceed through the court system (Rankin 2009).

At a time of substantial economic turmoil and difficulty, and an increased strain upon fiscal resources for state governments, the issue of cost is one which has come to underscore the seemingly unstable position of the death penalty in many states. Not only is cost a barrier to pursuing capital convictions, but also in maintaining a segregated death row (Mintz 2012). In California, for example, the maintenance of death row costs an additional \$114 million a year beyond the cost of imprisoning offenders for life in the general prison population (New York Times Editorial 2009). Indeed, in the 2011/2012 legislative session, Senator Lori Hancock introduced Bill #490, a proposal to hold a referendum on ending the California's death penalty, noting the extremely high cost of its maintenance. In November 2012, after more than 750,000 signatures had been collected, enough to place the issue before voters, Californians were asked to decide on the future of the death penalty in the state. Campaigning for Proposition 34, centred on the cost of the system that produces so few executions (Mintz and O'Brien 2012). Yet, even with death row acting as the punishment of death sentenced offenders, with no executions in the past five years, and currently without an approved execution method, voters still rejected abolition, if only by a



relatively small margin (Mintz and O'Brien 2012). Yet, the issue is not likely to resolve itself in the near future. Current forecasts estimate that maintaining the death penalty in its current state in California will cost \$9 billion by 2030 by which time, at the current slow pace of executions (thirteen since 1978), and static death sentencing rates, the population on San Quentin's death row will be in excess of 1,000 offenders (Williams 2011). The current focus on financial outlay, and with resources similarly scarce in other areas, has illuminated the high costs associated with the state's capital system and has forced the abandonment of plans to build a new death row in California,

At a time when children, the disabled and seniors face painful cuts to essential programs, the state of California cannot justify a massive expenditure of public dollars for the worst criminals in our state. California will have to find another way to address the housing needs of condemned inmates (Governor Jerry Brown, cited in Buchanan 2011)

The cost of maintaining a death penalty is a real threat to its continuation and was, in fact, one of the prominent causes of legislative abolitions of the death penalty in recent years in states such as New Jersey and New Mexico (Coyne 2009, Boston Globe Editorial 2009). Moreover, cost is cited as having been a leading cause in the reconsideration of the death penalty in states such as Maryland, Colorado, and Montana (Millhollon 2009).

Although cost is a very real issue which affects the support, political and public, of the death penalty as a whole, it would be a mistake to believe that an individual execution is expensive at all, let alone prohibitively so. Rather, the costs associated with the death penalty, prosecution and appeals, and the scrutiny of those costs (and the length of time over which those costs are outlayed, discussed below), only make executions currently undesirable raising, as they do, how much outlay was needed prior to the offender getting to the execution chamber. As Richard Dieter notes in the example of Maryland, the cost to taxpayers for the death penalty cases prosecuted between 1978 and 1999 was, according to a cost study by the Urban Institute, \$186 million (Dieter 2009:15). Based on the five executions conducted in Maryland, that figure translated to a cost of \$37 million per offender put to death (Dieter 2009:15). With such a negative spotlight brought about by an execution, reliance on death row as the punishing element of the punishment can be, at least temporarily, the preferable option for the state.

- ***Innocence and Death Row Exonerations***

At an intersection of practicality and morality, concerns over the possibility of executing an innocent person have come to underpin many debates over the future of the death penalty (Sarat 2002). Three quarters of Americans believe that an innocent person has been executed in the past five years, a belief that has been associated with lower levels of support for capital punishment (Unnever & Cullen 2005:3). Simultaneously, the number of people believing in the morality of the death penalty has decreased, down to 58% from 64% (Newport 2012). As noted by several scholars of the media, particularly as relates to the presentation of crime, the media operates a system of binaries; good and evil, innocent and guilty, right and wrong, just and unjust and, quite frequently, black and white (Greer 2006:85). Yet, in the wake of so many exonerations from death row and publicised concerns over the execution of the innocent those binaries have become increasingly blurred. Indeed, previous research has noted the emergence of a new frame with which capital punishment is analysed, or at least pictured, by the news media, a frame of innocence (Dardis et al 2006, Wardle and Gans-Boriskin 2004). Moreover, such framing has been found in several research projects to have at least the potential for influencing the formation of opinions on controversial issues, such as capital punishment (Dardis et al 2006).

“The Innocence Revolution” (Marshall 2004) has attracted state wide and national attention in recent years as the number of people released from death row has steadily increased. In Florida alone, more than twenty people have been exonerated and released from death row (Death Penalty Information Center 2012c). Nationally the figure of all exonerations has passed 130 since the resumption of death sentencing in the early 1970s. Consequently, fears of executing an innocent person have been at the forefront of the abolition of death penalties in recent years (Economist Editorial 2012, Altimari and Lender 2012) and have seemingly had an impact on public confidence in the efficacy of capital sentencing (Dieter 2007). As a consequence, anecdotal evidence has showed the possibility of applying the death penalty to an innocent person has caused many to rethink their stance on the *current* system. Austin Sarat, in his review of the 2000 repeal vote in the New Hampshire legislature, cites those concerns as being crucial to the endorsement of death penalty repeal in the state (Sarat 2002). Elsewhere, other scholars have made much of a public ‘crisis in confidence’ over the ability of capital sentencing systems to convict only the guilty (Dieter 2007), whilst others have heralded the arrival of a “revolution” (Marshall 2004). At the level of sentencing, juries are increasingly requiring DNA evidence before they are willing to impose a death sentence (Hogue 2007, Adams 2010), and prosecutorial behaviour has become more cautious in pressing for a

capital conviction, requiring a far greater probability of conviction based on convincing, infallible evidence (Coyne 2009, Millhollen 2009).

The publicity given to claims of death row innocence has been underway in America for some years now. Citing a broken system, and an intolerable risk of executing an innocent person, in 2003 Republican Governor of Illinois, George Ryan, notably granted clemency to the 167 people on the state's death row: after which Illinois would not execute another offender and would, 8 years later, abandon capital punishment. After only 12 executions but 13 exonerations in the state, Ryan decried the capital system as 'fundamentally flawed and unfair' (Wilgoren 2003). In the same year as that mass commutation a record number of people were released from death rows across the country, at an average of one per month (Death Penalty Information Center). In that year Gallup recorded public support for the death penalty at 64%, a lower rate had not been recorded by the polling firm since 1978 (Death Penalty Information Center).

Claims of an innocence revolution and assertions of an inherently flawed capital system are most often made on the basis of the list of innocent persons freed from death row, a national list published by the Death Penalty Information Center (available at [www.deathpenaltyinfo.org](http://www.deathpenaltyinfo.org)). In a report published by the Florida Commission on Capital Cases, for example, the Commission, in reviewing 24 Floridian cases which feature on the innocence list, found that in only four cases, might there be a valid claim of actual innocence; an 84% rate of error or, at least, misrepresentation. In New York, District Court Judge Ted Rakoff, the judge that ruled New York's death penalty as unconstitutional, remarked in 2004 that the number of truly innocent people that have been exonerated is closer to thirty than the Death Penalty Information Center's number of over 130 (Marquis 2005:520). Whilst the actual number of offenders released from death row owing to their actual innocence is vigorously disputed, the constant repetition of their existence and numbers by leading lawmakers and politicians, presenting death sentencing schemes as inherently flawed, is not without consequence upon public opinion and, by inference, upon executing behaviour. However, whilst important to note as a contemporary factor, 'innocents' exonerated from death row are only disruptions to the long-standing cultural caricature and image of the death sentenced offender (no matter how inaccurate that generalisation may be (Sarat 2001:11), the 'pantheon' of infamous names and the images they conjure up, Jeffrey Dahmer, and Timothy McVeigh, for example, generally form the greatest argument in the 'death penalty debate' (Sarat 2001:11). Infamous examples that, when they do occur, can immediately revitalise support, even amongst some who support death penalty abolitions (Howells, Flanagan, & Hagan 1995:413, Sarat 2001:11). In the absence of abolition, as a means of preserving the death penalty for the future, death row

incarceration, becomes the safety valve of the death penalty; a non lethal penalty that allows for the condemnation and punishment of offenders but does not involve the irrevocability of execution.

- **Life Without Parole**

Life without parole has gained increasing prominence in recent years as a severe but less costly, punishment than death. Although on the hope of abolitionists the prison term would have been a replacement for capital punishment it has, instead, predominantly found an accompanying role, as a death penalty addition. Yet, several recent public opinion polls have favoured the use of life without parole in place of capital prosecutions (when the general public are polled about specific offenders the results often favour death: Timothy McVeigh (Gallup News Service 2001), Ted Bundy (Elliot and Robinson, 1991 cited in Howells, Flanagan, and Hagan 1995:413), Joshua Komisarjevsky and Steven Hayes (the Connecticut home invaders that formed the basis of the decision of Connecticut Governor Jodi Rell to veto death penalty repeal (Daily Mail Reporter 2012, Rell 2009)). In the abstract, however, preference for the death penalty has dwindled in comparison to life without parole. In a 2006 Gallup poll support for the death penalty dropped to just 47% when life without parole was offered as an alternative sentence (Gallup 2009) and state polls have offered similar statistics (Egelko 2010). Although the preference has been abstract and modest, so not convincing evidence of a complete abandonment of capital punishment, it is undeniable evidence of a belief, and confidence, in life without parole, at least in theory. When that popularity combines with other factors, such as the number of exonerations from death row, and current concerns over the financial outlays necessitated by death penalty retention (indeed, life without parole involves both of those concerns being cheaper than pursuing a capital conviction and without the irrevocability that accompanies an execution), capital punishment experiences a decline in popularity. In that instance, in a time of unpopularity, with increased attention on a more feasible, less controversial punishment, executions become undesirable and the emphasis upon death row to punish is increased by default.

- ***Communicating Mixed Messages: The Use and Problems of Lethal Injection***

The move to lethal injection, now by all states, has itself caused a slowdown in executions, thus expanding death row; such a slowdown that never accompanied the other four execution methods used in the United States over the past thirty five years. It has only been within the past ten years

that lethal injection has finally become the primary method by which all offenders are put to death. The gas chamber, electric chair, hanging, and the firing squad, have now all been relegated to secondary and optional methods of execution, and are now used with an increasing rarity. Lethal injection accounts for more than 85% of executions conducted since the Supreme Court ruling in *Gregg v Georgia* in 1976 (Amnesty 2011:3). As each of those previous methods have been deemed by state legislatures to communicate the wrong message, a barbarity in American punishment incompatible with modern civilities (particularly as all have provided instances of particularly gruesome, botched executions (Radelet 2010)), lethal injection has been deemed less aesthetically contentious, and less susceptible to falling foul of the Supreme Court's 'evolving standards of decency test' (articulated as a barometer of judgement by the court in *Furman v Georgia* 1972, discussed in the previous chapter). Indeed, whilst the adoption of lethal injection has frequently been heralded as a change in execution method underpinned by causes of humanitarian concern (Jennings et al 2007:6), the reality is often a far more cynical move in order to ensure the future of the death penalty as violent execution aesthetics are deemed incompatible with the evolving standards of decency of American society. When Florida eventually adopted lethal injection as its primary mode of execution, for example, it did so due to a pending challenge to electrocution as a method of execution following three highly publicized, visually gruesome, executions in its electric chair during the 1990s (Greer 2006).

Not only in a legal sense, as noted in the previous chapter, but also in a political and social sense, the appearance of an execution is key. Visually painful aesthetics render it difficult for state officials to deny pain felt on the part of the condemned, and harder still to 'sell' the idea of a painless execution (that is, if they try to do so<sup>17</sup>). Generally, state officials will try to deny the pain felt on the behalf of the condemned to any execution (particularly if botched (Greer 2006)), in order to distinguish between two types of killing: lawful and unlawful. That distinction is sought to minimise the attention, public and scholarly (Koniaris et al 2005), domestic and international (Sarat 2001), given to the practice of judicial killing in an era of global abolition, an era in which the United States stands out, and is criticised for, its use of capital punishment (Girling 2004), criticism nuanced by the number of foreign nationals on American death rows, and a history of international dispute when executions of foreign nationals occur<sup>18</sup>.

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<sup>17</sup> "It all comes out the same way. I just don't have a problem with it any way it goes" (Floridian State Republican, commenting on the botched execution of Pedro Medina, cited in Greer 2006:92).

<sup>18</sup> When Arizona scheduled the lethal gas execution of Walter LaGrand in 1999, Germany appealed to the International Court of Justice which urged the United States Government to prevent the execution. Bill Clinton "turned a blind eye", whilst Arizona's Governor, Jane Dee Hull, rejected pleas from the German Chancellor,

The prohibition on violence, pain, and suffering, however, is not a general one: death row, over execution, is simply the 'better' place for it to occur given its less public, less legally regulated existence, and a lesser degree of scrutiny.

...because [those] pains are mental and emotional rather than physical, because they are corrosive over an extended period rather than immediate, because they are removed from public view, and because they are legally disguised as a simple 'loss of liberty', they do not greatly offend our sensibilities and they are permitted to form a part of public policy (Garland 1990:242)

The lethal injection execution is additionally problematised by a simple lack of the drugs necessary to put offenders to death. Beginning in late 2010, national supplies of sodium thiopental, used by most states in their lethal injection protocols (although slowly being substituted for pentobarbital by some states) became exhausted. By May 2011, Colorado, Connecticut, Delaware, Florida, Idaho, Indiana, Kansas, Maryland, Montana, Nevada, New Hampshire, North Carolina, Oregon, Utah, Washington, and Wyoming had no supplies of the drug. The manufacturer of the drug for the American market, Hospira Inc., produces the drug at a plant in Italy and exports it to the United States, but Italian officials, in line with a European rejection of capital punishment, have refused exportation of the substance for its use in executions (Eckholm and Zezima 2011).

Whilst some states have traded supplies of the drug to each other (Amnesty International 2011:3) other states have turned to international sources. Owing to a lack of the substance nationally, and any clear direction on the issue from the Attorney General other than a statement of optimism in sourcing new supplies of the drug (Amnesty International 2011:3), officials in Arizona chose to import supplies of the drug from the United Kingdom to carry out an execution in November 2010. That action though spurred a legal challenge from a British human rights group and motivated a ban on its further export (Jack 2011). Georgia too, used British imported sodium thiopental for an execution, carried out in January 2011, but has since had its supply of the drug seized by the Drug Enforcement Agency. Tennessee, and Kentucky, have since surrendered their supplies, also from Britain, to the Agency, and most recently the Department of Justice ruled that Arizona's importation of chemicals was illegal (De Vogue 2011). Meanwhile, Nebraska and South Dakota have imported their supplies from India, but being a foreign made drug, without domestic approval, will likely face the same obstacles posed by the Drug Enforcement Agency in attempting to use them.

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Gerhard Schroder, and the German Foreign Minister, based on the death penalty's popularity in her state (Christianson 2010:229).

Whilst some states have turned to pentobarbital (Alabama, Louisiana, Mississippi, Ohio, Oklahoma, Virginia, Arizona, and Washington (in Washington offenders are able to choose between the one or three drug protocol)), the Danish company that produces the drug, Lundbeck, has petitioned several prisons to refrain from using the drug for the purposes of execution. The head of Lundbeck, has even written directly to state Governors in reference to individual executions, expressing opposition to use of the drug, citing doctors, legal experts, and campaigners claims that the drug is untested and causes 'extreme suffering' to the condemned (Daily Mail Reporter 2011). As such, the manufacturer of pentobarbital has declared a move to begin using specialist wholesalers and impose end user clauses in an attempt to prevent the chemical being sold for use in executions (Jack 2011). Lundbeck has even threatened a complete end to American shipping of the drug which, according to company sources, will directly affect fourteen states (Jolly 2011). To surmount the resourcing difficulties involved with this drug, and existing difficulties in sourcing sodium thiopental, most recently in Missouri, the Department of Corrections announced its plan to switch to an untested one drug lethal injection protocol.

What this difficulty in sourcing and using drugs necessary to carry out lethal injections ultimately amounts to is yet a further slowdown in executions across the country, with no apparent future means of sourcing more drugs that comply with state lethal injection protocols. Even Texas, the nation's most prolific executioner has, according to reports, only enough chemical stocks left to complete a handful more executions (Pilkington 2012). Moreover, a federal judge has recently ruled in favour of a group of death row inmates from Arizona, Tennessee, and California, who sued the Food and Drug Administration for their approval of shipments of sodium thiopental: the judge ruled that federal law requires *all* drugs to be approved the FDA (*Beatty et al v Food and Drug Administration et al* 2012). Sodium Thiopental imported from foreign sources, and even when produced domestically, had never been approved by the administration and, so claimed the plaintiffs, its use exposed them to unnecessary pain and suffering. Executions will now have to rely upon the trade of drug stocks between states, for the immediate future. The long term effect of a difficulty in sourcing drugs to put offenders to death, however, means a further increase in the time spent on death row by an increasing number of offenders.

- ***Extending Death Row: Capital Appeals Procedures***

Bemoaned by capital punishment observers (Ledyard 2011), its supporters and critics, the appeals process has even been described by Supreme Court Justices as 'verging on chaotic' (a description

that, at the time, applied to only a seven or eight year wait between sentence and execution (Greenhouse 1990)). The waiting time between sentence and execution has continued to lengthen over recent years: an increasing period of death row incarceration which some have asserted, combined with the conditions of death row, as constitutionally undermining the entire death penalty system: "The entire capital punishment system violates the Eighth Amendment because the procedural requirements of meaningful appellate review cause death row inmates to endure unconstitutional torture" (Crocker 1997-1998:569). It is constitutional protections, however, that give rise to criminal appeals, the opportunity for defendants to challenge not only their conviction, but their sentence.

Death sentence appeals are often successful: approximately 75% of cases have their underlying conviction reversed on appeal (Chandler 1998:1904). Death sentenced offenders, generally, are able to appeal their sentence at three levels beginning, first, by challenging the court's findings in the state appellate court. Then, the second round of appeals consists of collateral challenge of the sentence and conviction in the state courts. Thirdly, a defendant may file habeas corpus petitions (a writ that alleges wrongful imprisonment) attacking federal constitutional violations (Feldman 1999-2000:190). Success at any stage means a conviction is 'unsafe' thus vacating the defendant's sentence.

In 1996 Congress passed the Antiterrorism and Effective Death Penalty Act (AEDPA) in an effort to reduce the length of appeal proceedings for capital sentenced offenders. Since its inception, habeas corpus has been the rights and means of testing the legality of custody, at the hands of the state, and has generally involved two principles. First, there were no time limits to test the legality of custody, and second, there was to be no limit on the number of attempts that could be made to challenge that custody (Liebman 2001-2002:415). The Supreme Court, before 1996, had, however, placed some limits on habeas review. Limits had been placed on successive federal challenges to custody, enforcing a procedural bar on evidence and claims not presented at trial, thus confining habeas appeals to "substantial federal questions" (Liebman 2001-2002:416). Although the AEDPA originally had little to do with capital punishment and nothing to do with terrorism, that changed when, in April 1995, Timothy McVeigh detonated a bomb that destroyed the Murrah Federal Building in Oklahoma City and killed 168 people (Liebman 2001-2002:412). When President Bill Clinton and Attorney General Janet Reno publicly called for the use of the death penalty (Sarat 2001:4) and the public overwhelmingly supported that position (Gallup 2001), the Effective Death Penalty Act was attached to a version of a Clinton administration proposal for an Anti-terrorism Act and was renamed (Liebman 2001-2002:412). At a Senate Judiciary Committee news conference, in



the presence of man who had been personally affected by the bombing, a major proponent of habeas corpus reform, Senator Orin Hatch claimed,

At long last, after more than a decade of effort, we're about to curb these endless, frivolous, costly appeals of death sentences and so as many of the people standing here with us today know, habeas corpus reform is the only substantive provision in this bill that will directly affect the Oklahoma City bombing case (quoted in Stahlkopf 1998:1116)

The Act was to make it more difficult for state prisoners to appeal against district court denials of habeas relief. Secondly, it made the Supreme Court's standard for filing second or successive challenges more restrictive, thirdly, it made it more difficult for prisoners to present facts in federal court that their lawyers had failed to present in state court. Fourthly, the Act also imposed a one year statute of limitations on filing federal habeas corpus (Liebman 2001-2002:416). Finally, section 2254(d)(1) provided that a federal judge with jurisdiction who finds that a state court imposed a verdict in violation of the constitution, cannot deprive that decision of its legal force unless the court concludes that the state court's decision was not just wrong, as a matter of federal law, but was unreasonably wrong (Liebman 2001-2002:418). In sum, the Act was intended to prevent litigation from spanning decades and to expedite executions. In effect, however, the passage of the AEDPA has done little to speed up the death penalty process and increase the number of offenders put to death. Courts are overstretched in their resources, and inmates are able to stall the system, therefore, simply by exercising their right to appeal. The biggest problem posed by the appeals procedure is of course the time it takes for the number of appeals to be ruled upon: defendants need competent attorneys to represent them and courts need space in their schedule to hear them: both resources are spread thinly and the legislative route to reform is problematic. Most recently in California, the Senate Public Safety Committee dismissed a two bill package that would have eliminated the automatic appeal of cases to the state Supreme Court (Gardner 2012) even though the court system of California is stretched to the point that has left the state with the largest death row and backlog of death sentenced offenders in the country (Death Penalty Information Center 2012d).

Efforts to limit appeals, to speed up executions have, as in the Californian example, often been doomed to frustration. A constitutional amendment made in Ohio in 1994, for example, which eliminated the district courts from the appeals process and required death sentences to be appealed directly to the Ohio Supreme Court only created more work for the court and has, reportedly, done little to make the process more efficient or quicker (Associated Press 2009). To remedy the problem of delay caused by appeals, generally, a calculus has sometimes been proposed that would call for a

reconsideration of the propriety of a death sentence after, for example, ten years spent on death row (Feldman 1999-2000:213) so as to ward off the potential for a constitutional claim on the part of the defendant relating to delay between sentence and execution (as discussed in the previous chapter). Although a time limit to conduct all appeals would seem currently unworkable in the United States with its nationally overstretched court system, the proposal has found some international endorsement.

In *Pratt v Attorney General of Jamaica* (1993) the Privy Council (the highest appellate tribunal for the former Commonwealth nation, based in London), in finding that an extended delay between the imposition of a death sentence and that sentence being carried out was a violation of the Jamaican Constitution, noted,

[a] state that wished to retain capital punishment had to accept the responsibility of ensuring that execution followed as swiftly as practicable after sentence, allowing a reasonable time for appeal and consideration of reprieve and, if the appellate procedure enabled the prisoner to prolong the appellate hearings over a period of years, the fault was to be attributed to the appellate system that permitted such delay and not to the prisoner who took advantage of it (*Pratt v. Attorney General for Jamaica* [1993] 2 LRC 349 (Jamaica PC))

Of course, the decision rendered by the Privy Council, much less its dicta, is not binding on American Courts, but the sentiment is key. Discounting any delay that was the sole cause of the defendant, escaping from custody for example, and without finding it necessary to conduct an investigation into death row confinement, or its psychological effects upon the prisoner, the Privy Council found reasonable grounds to believe that any delay in carrying out execution amounting to more than five years would be inhuman or degrading punishment.

There is an instinctive revulsion against the prospect of hanging a man after he has been held under sentence of death for many years. What gives rise to this instinctive revulsion? The answer can only be our humanity; we regard it as an inhuman act to keep a man facing the agony of execution over a long period of time (*Pratt v. Attorney General for Jamaica* [1993] 2 LRC 349 (Jamaica PC))

In a case following *Pratt*, *Henfield v Attorney General of Bahamas* (1996) the Privy Council went further; if no appeal to an international body is available, eighteen months should be deducted from the five year guideline set in *Pratt*. Although such time limits would be, currently, without substantial resources and a change of legal and general culture, near impossible to implement in the United

States, the claim has found recognition in some American Courts, even before its articulation by the Privy Council, albeit without an appendage of an appeal timetable. In *Commonwealth v O'Neal* 1975, and in *District Attorney for Suffolk District v Watson* 1980, for example, the Supreme Judicial Court of Massachusetts reasoned that, even though delay may have been caused by the prisoner pursuing his appeals,

...it does not mitigate the severity of the impact on the condemned individual, and the right to pursue due process of law must not be set off against the right to be free from inhuman treatment (*District Attorney for the Suffolk District v James Watson & others* 381 Mass. 648 (1980))

Severity incurred through the anxiety of appealing a death sentence notwithstanding, the American courts (as discussed in the previous chapter) have found no merit to the argument that pursuing constitutionally afforded appeals can, owing to the time involved, produce a valid claim of unconstitutionality. To pursue those appeals and then raise an Eighth Amendment claim because of the time it takes for them to be heard, according to Judge O'Scannlain, is "a mockery of justice" (*Andrews v Shulsen* 1984). It is however, part of human nature, and a legal right to pursue available appeals (Hudson, Patrick 2000:841) so the fault that can be attributed only to the prisoner is debateable (Connolly 1997). The legal system, however, has roundly rejected any Eighth Amendment claim of cruel and unusual punishment based on the length of time a person is confined to death row, as discussed in the previous chapter, but summed up here by the Ninth Circuit,

A defendant must not be penalized for pursuing his constitutional rights, but he also should not be able to benefit from the ultimately unsuccessful pursuit of those rights. It would indeed be a mockery of justice if the delay incurred during the prosecution of claims that fail on the merits could itself accrue into a substantive claim to the very relief that had been sought and properly denied in the first place. If that were the law, death row inmates would be able to avoid their sentences simply by delaying proceedings beyond some threshold amount of time, while other death row inmates – less successful in their attempts to delay – would be forced to face their sentences (*Richmond v Lewis*, 1991)

Wherever the fault is laid, however, the outcome has been yet another stumbling block to the expeditious enactment of death sentences. The appeals procedure is yet another reason why the execution rate has shown such a decline and the space of death row, and the treatment of offenders

in that space has expanded, becoming an increasing source of the retributive messages lost by so few offenders being put to death.

- ***Without Inhibition on Punishment: Preference for Death Row over Execution***

“The United States will not tolerate mass executions to reduce America’s enormous death row population” (Crocker 1997-1998:558)

There are social and political consequences to executions (Zimring & Hawkins 1986:126), demonstrations, protests, elections, for example, and they are only exacerbated by a contentious execution or a reversal of a low execution rate. Specifically, a change in execution output, a change from an abstract idea of the death penalty to a real death penalty, where executions are in the here and now can give rise to contention. For example, Deparle (1991) notes that after Louisiana executed eight men in an eleven week period in the summer of 1987, death sentences handed down by jurors plummeted from an average of 10 per year to just one. In noting the move from abstract to real, Deparle concluded that “Americans say they want executions more than they actually do” (Deparle 1991).

Zimring and Hawkins (1986) reach a similar conclusion; contention can similarly arise when the offender does not fit the capital offender stereotype, citing as evidence, the execution of a woman in North Carolina in 1984: Velma Barfield.

Velma Barfield, was convicted in 1977 for the murder of her fiancée, one of four killings she admitted perpetrating. Although the killings were allegedly a result of her addiction to prescription drugs, and petitions for a commutation of her sentence were coming from the general public, an execution date was set for her that coincided with a general election in the state: a U.S. Senate contest between the Democratic Governor and the Republican incumbent, both supporters of capital punishment (Zimring & Hawkins 1986:127). Zimring & Hawkins surmised the difficulty the Governor faced in presiding over Barfield’s execution,

The crux of Governor Hunt’s problem was that he was caught in the transition from the general to the specific, from the idea of capital punishment to the reality of execution. Enacting a statute does not necessitate a funeral. Pronouncing a sentence of death does not generate media circuses, midnight vigils, detailed description of the defendant’s last meal, final appeal, last words, and death agonies. Executions have consequences in the

society at large and on attitudes toward the death penalty that are different in kind from general policy statements (Zimring & Hawkins 1986:128).

Ultimately Governor Hunt denied clemency and the execution went ahead as scheduled (Death Penalty Information Center).

It is perhaps, at first glance, counterintuitive to express concern over executions when politicians pledge their allegiance to the death penalty, prosecutors seek it, juries impose it, the courts regulate it, and the majority of the public supports it. There are times, however, when the reality of execution becomes a contentious issue. In the case of Velma Barfield, a 52 year old grandmother, who thus contrasted the capital offender stereotype, whose burial would most likely have taken place on the eve of the election, the spectre of that death was considered to be detrimental to the campaign of the Governor (Zimring & Hawkins 1986:128). In changing executing behaviour generally, the same situation is presented: to take a state from a relatively low, infrequent rate of executions or from being an abstaining executioner, to a state with a higher execution rate arguably changes the nature of capital punishment that people support, impose, and seek. For instance, Pennsylvania has not imposed a non voluntary execution since 1976,. Death warrants still come from the Governor's office, prosecutors still seek the death penalty, juries still impose it, and voters still approve of it but that death penalty is not the death penalty of Texas, or even as aggressive as Montana, for example. Each state has its own version of the death penalty, a death penalty that does not have to be lethal and can rely instead upon death row to form the punitive, retributive and communicative, element of the punishment.

For the country as a whole, returning to even the executing high of the 1990s, particularly at the present juncture (Illinois, New York, New Mexico, New Jersey, and Connecticut all having recently abandoned capital punishment) has the potential to further deepen the current social conflict over the death penalty and, possibly, even hasten its demise. Support for capital punishment can often vary when executions are 'real' and when they are only an abstract threat (Bohm 1991:137). Executions en masse have the potential to bring about debate regarding the exercise of power. Indeed, as far back as Beccaria, writers have claimed a tendency to identify with the criminal when the state is seen as abusing its power (Zimring & Hawkins 1986:133, Beccaria 1764); a sudden increase in executions risks the possibility of achieving the same effect. If the execution pace should quicken dramatically so as to reduce death row backlogs, Zimring & Hawkins argue, a process of identification with the condemned could take place, coinciding with a broadening distrust of government authority which could affect a significant majority of Americans, on whom the future of the institution depends (Zimring & Hawkins 1986:134).

A process of identification, however, would not only undermine the system and current treatment and incarceration of the capital offender on death row, but also more than thirty five years of legal regulation of the death penalty that exists in America today. That legal system strives to ensure, amongst other things, that capital punishment is applied only to the very worst of offenders having committed the most heinous of intentional murders and who pose a continuing threat to society. Capital statutes, capital offences, capital offenders have all been regulated in the contemporary era to theoretically ensure that only the 'worst' murderers are sent to death row. With that theoretical framework in place, the punitive detention of the death sentenced offender, awaiting an execution, an execution that rarely happens, is, by inference, legally endorsed. Moreover, such is the hyper regulation of the death penalty, and the capital offender, that all other punishments, particularly life without parole, are downgraded in their severity. When offenders are sentenced to life without parole, even when convicted of identical offences to those who are sentenced to death, they are not stigmatised as the 'worst of the worst', or more colloquially, as a 'monster', stigmatising labels that form the basis of death row treatment. Indeed, even after committing particularly heinous forms of murder, murder types that can warrant the death penalty, without the label of a capital offender, the prison experience is not comparable to those on death row, the subject of the next chapter.

# Worst of the Worst Conditions: Worst of the Worst Offenders?

## - *The Importance of a Label: Leniency in Life Without Parole?*

Although presented as a death penalty replacement when first introduced in the United States in the 1970s, particularly in retentionist states with low execution rates, life without parole has not fulfilled that promise. Instead, life without parole has expanded into a sentence used alongside capital punishment, ensnaring those offenders that have been left behind by the shrinking scope of an increasingly regulated death penalty. Life without parole has even extended further, to offences which capital punishment was not applied. Despite some overlap, and a similarity between offences and offenders, with even some of the highest profile capital murderers being sentenced to life without parole in recent years (Johnson 2006, Dallas Morning News Editorial 2007, Dieter 2011) the treatment of life without parole prisoners is vastly different to the treatment of death sentenced offenders.

When compared to death sentenced offenders, life without parole prisoners, housed in the general prison population, are permitted greater access to work, visitation, recreation opportunities, and offender treatment and support programs (Hassine 1996, Paluch Jr 2004). Prison authorities have been tacitly instructed, at least permitted, by the courts, after a finding of future dangerousness and the imposition of a death sentence, that the death sentenced offender, (unlike those serving life without parole) are the worst of, most dangerous offenders, who pose the greatest threat. In reality, however, there is some overlap between those offenders sentenced to life without parole and those sentenced to death; offenders convicted of similar types of murder. That overlap exists not as a compromise, per se, but simply because prosecutors are now more cautious in pressing for a capital conviction without DNA evidence, because an offender accepts a plea bargain whereas another will not or, simply, because the county does not have the available funds to conduct a capital trial (Dieter 2011:25). In reflection of that, death row is not necessarily populated by the worst of offenders, having committed the worst offences, as there are comparable inmates serving a sentence of life without parole, with relaxed restrictions, in the general prison population. As Richard Dieter notes

Both our general prison population and death row contain dangerous individuals convicted of serious crimes. But it would be hard to predict whether an inmate ended up on death row or in the general prison population if you were to examine only the facts of the crime (Dieter 2011:10)

- ***The Rise of Life Without Parole***

The life without parole sentence, its creation, promotion, availability, and use, is the net result of competing forces in crime control and penal politics going back over thirty five years. A growing lack of deference to the decision making capabilities of parole boards and administrators by the general public, rising crime rates during the 1980s, the creation of ‘three strikes and you’re out’ sentencing, and the widespread abandonment of the principles of reformation and rehabilitation by politicians and public alike have all contributed (Nellis 2010:28). However, life without parole has recently been widely embraced, and publicised, because of its credibility as a death penalty ‘alternative’ (ACLU 2008b, Johnson 1984, Dallas Morning News Editorial 2007). With a promise that those subject to the sentence will indeed spend the rest of their lives in prison, the sentence incapacitates to the nearest level that can be achieved without an execution, and with that promise of lifelong incarceration the sentence can be compared to the death penalty in retributive value (inherently, just as with the death penalty, rehabilitation largely remains a relegated concern).

Over 41,000 persons are now serving life without parole<sup>19</sup>, more than one in ten incarcerated individuals in states such as Louisiana, and the number continues to climb. Between 2003 and 2008 the number of individuals serving life without parole increased by 22%, nearly four times the rate of growth of the parole eligible life sentenced population (Nellis & King 2009:3). Now, in six states – South Dakota, Maine, Iowa, Pennsylvania, Louisiana, and Illinois – as well as in the federal system, all life sentences are imposed without possibility of parole (Nellis & King 2009:4).

Life without parole is now a sentencing option in all death penalty states, an alternative to imposing a sentence of death upon a capital offender. When offered as an alternative to capital punishment the number of death sentences imposed by juries<sup>20</sup> has reduced. In Ohio, for example, the number of death sentences imposed by juries dropped by 32 percent in just three years, from 2004 to 2007. In North Carolina the same situation occurred, from 14 death sentences handed down in 2001 to only 3 in 2007 (Death Penalty Information Center). Nationally, death sentences are now at their lowest rate since the resumption of the death penalty in the 1970s, only 78 imposed in 2011 compared with 224 in 2000 (Death Penalty Information Center 2011). Whilst other factors are involved in the decline, juries becoming increasingly reluctant to impose a death sentence without DNA evidence (Hogue 2007, Adams 2010), cautious prosecutorial behaviour in pressing for a capital

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<sup>19</sup> See Appendix H: Life Without Parole Populations

<sup>20</sup> Since the United States Supreme Court ruling in *Ring v Arizona* (2002) all sentences of death must now be the decision of a jury and not a judge



conviction (Coyne 2009, Millhollen 2009), and highly publicised cases of death row exonerations (Dieter 2007), the availability of life without parole has still certainly played its part (Batheja 2009, Green 2009).

Although life without parole has failed to uniformly topple capital punishment outright in the United States, as abolitionists have hoped in recent years, the prison alternative has been used in place of the death penalty in a number of high profile cases, where other killers, comparable offenders, have been sentenced to death. Thus, in light of a varied sentencing approach, implied meanings are given to the death sentence and the death penalty, in some states as unjust or arbitrary, in others though as necessary to sentence the 'worst of the worst' offenders. Washington State gives the most prominent example in this respect, of the asserted arbitrary imposition of death sentences, and a failure of a capital system to capture the 'worst of the worst' offenders. Gary Ridgway, 'The Green River Killer', one of the most notorious serial killers in American history, was spared the death penalty and sentenced to life without parole: his sentence, a compromise after providing a detailed confession to the highly publicised, torture and murders of more than 40 women and the location of their remains (Johnson 2006). Following the Ridgway case, the Washington State Supreme Court came within one vote of declaring the state's death penalty unconstitutional when it ruled on the case of death row inmate Dayva Cross. Attorneys argued for sparing Cross, as killers who had committed worse crimes, specifically Gary Ridgway, had been spared the death penalty and sentenced to life without parole (Johnson 2006). That argument widely publicised the asserted arbitrariness of capital convictions and split the court on the utility, fairness, and reasoning in the continued use of the death penalty. Ultimately, however, Washington remained a retentionist state. The Ridgway case though, is not an isolated one, and other similar examples have been highlighted around the country, often being used to champion life without parole as a 'fairer', more certain alternative, more certain than the execution of an offender, whose conviction has been described by some as nothing more than an 'illusory' and feel good verdict (when weighed in the number of offenders whose sentences are converted and are eventually put to death) (News Tribune Editorial 2008). Examples of life without parole being used to sentence highly publicised murderers, such as Terry Nichols, accessory to the Oklahoma City bombing; Lee Boyd Malvo, the "D.C. sniper"; or Dennis Rader, the BTK serial killer are, however, generally surpassed by the more general, wide applicability of life without parole, its dilution in severity through its overuse. The sentence has been a blanket replacement of life sentences with parole eligibility in states such as South Dakota and Pennsylvania (Nellis & King 2009:4), and is increasingly used against offenders, juveniles and the mentally retarded, for example, against whom the death penalty can no longer be applied .

- ***Communicating a 'Need' for Death Sentences: The Wide Application of Life Without Parole***

...the death penalty cannot be unhooked from the penal system in which it functions – and functions not just as a symbolic pinnacle, but as a structuring element that has widespread effects...It sets a standard against which every other serious punishment is measured. Thus, for example, the availability of the death penalty downgrades every term of imprisonment, however severe, to the status of a secondary punishment – a lenient let off for an offender who might have faced the penalty of death (Garland 2002:475)

Although with what should be an inherent attraction to life without parole for those on the political right and those who support the death penalty for retributive reasons (as the majority now do (Gallup 2009)) the death penalty continues in spite of life without parole availability in thirty three states. Indeed, this concurrent state of the two sentences has been the opposite of what was intended as abolitionists began to embrace life without parole. Contemporarily the overuse of a wide scoped life without parole statute, to include offenders to whom the death penalty would not have been applied, to groups such as juveniles, has left capital punishment as arguably affirmed as an increasingly necessary punishment for the very 'worst of the worst' (Associated Press 2000, Rell 2009).

Twenty years of experience with life-without-parole statutes shows that although they have only a small effect on reducing executions, they have doubled and tripled the lengths of sentences for offenders who never would have been sentenced to death or even been eligible for the death penalty. Before death penalty abolitionists continue to push for the expansion of life without parole, they should recognize that their crusade has lifelong ramifications for thousands of noncapital prisoners (Harvard Law Review Unsigned Note 2006:1839)

The presence, and use, overuse, of life without parole, used as a death penalty accompaniment, rather than as a complete replacement, has the effect, no matter how unintentional, on the part of lawmakers and abolitionist pushing for its use, of inferring a meaning for the death sentence. Most pertinently, that those subject to a sentence of death are truly the worst of the worst, unfit to live, even if incarcerated in prison for the remainder of their natural lives (the promise that is offered by

life without parole legislation<sup>21</sup>). Such a meaning is not only rendered by the continued retention of the death penalty alongside the use of life without parole, but in life without parole's unquestionable severity in its own right (yet not severe enough for some offenders, as adjudicated implicitly, by continued death penalty retention, but also explicitly in refusal to repeal) (Rell 2009).

Whilst life without parole may have garnered recent publicity as a death penalty alternative (ACLU 2008b Johnson & McGunigall-Smith 2008) and has been used to sentence murderers eligible for the death penalty, the capital murderer is not the only classification of offender within its remit. Indeed, concerns about the 'overuse' of life without parole in sentencing so many offenders, caused the American Law Institute to call publicly for a restriction on the use of the sentence to cases "where this sanction is the sole alternative to a death sentence" (New York Times Editorial 2011b). However, that call has, to date, gone unheeded; the reach of life without parole is long, the acceptability of the sentence, helped by its endorsement from all along the political spectrum, liberals who support the sentence from an abolitionist perspective, and retributivists who support it owing to its inherent severity, has normalised a wider application. Offenders who have committed a non-lethal offence, the mentally retarded, and even juveniles, offenders as young as 13 or 14 years old, are responsible for driving this growing prison population, classifications of offence and offender that the death penalty no longer applies to. By way of an example, Texas, one of the last death penalty states to provide for life without parole, resisted its provision on the premise that it would negatively affect death sentencing rates. After the Supreme Court decision in *Roper v Simmons*, discussed in chapter three, life without parole was adopted on the basis that prosecutors could then increase the maximum punishment available for juvenile offenders (Steiker & Steiker 2008:176). The death penalty was restricted, and even arguably bolstered in its legitimacy, constrained to comport with the evolving standards of decency that cultivate its position and use, while, after much support from the abolitionist camp, life without parole was ushered in and untold numbers of juveniles who would likely never have been executed even before the decision in *Roper v Simmons* (the Governor of Texas denied that the state permitted such executions Steiker & Steiker 2009:117), are now exposed to the consequences.

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<sup>21</sup> The most restrictive definition of life without parole is given by the state of Washington (Appleton & Grover 2007):

A person sentenced to life imprisonment under this section shall not have that sentence suspended, deferred or commuted by any judicial officer and the board of prison terms and paroles or its successor may not parole any such prisoner nor reduce the period of confinement in any manner whatsoever including but not limited to any sort of good-time calculation. The department of social and health services or its successor or any executive official may not permit such prisoners to participate in any sort of release or furlough program

As discussed in chapter three, in recent years the scope of capital punishment has been steadily reduced by successive Supreme Court decisions, and the categories of eligible offenders considerably reduced. In 2002, in *Atkins v Virginia*, the Supreme Court exempted those suffering from mental retardation from the remit of the death penalty. In 2005, in *Roper v Simmons*, the Supreme Court went on to rule the execution of persons whose crimes were committed whilst under the age of eighteen would also be a violation of the Eighth Amendment. Then, in 2008, in *Kennedy v Louisiana*, the Supreme Court ruled that the death penalty could not be applied to crimes which do not involve the death of the victim, effectively ruling, with the possible exception of crimes committed against the state that the death penalty is applicable to homicide cases only. Although the majority of states had amended their practices to be ahead of those decisions, together, the categories of offender and offence that the death penalty can be applied to has not only been reduced, but modern capital punishment 'stream-lined'. The only comparable move towards regulation of life without parole has been the recent decisions of the United States Supreme Court which prohibited its imposition upon juveniles convicted of a non-lethal offence (*Graham v Florida* (2010) and prohibited the mandatory imposition of life without parole upon juveniles convicted of homicide (*Miller v Alabama* 2012)). With so little regulation, a paradox becomes apparent, life without parole is asserted by abolitionists as comparable enough to the death penalty to replace it, and is used by all non death penalty states except Alaska, but does not undergo anywhere near the same level of regulation or scrutiny, even when life without parole has extended far beyond the capital offender.

There were three elements to the case of *Graham v Florida*: age, offence, and sentence, and the debate continues about the influence each contributed to the outcome, and how this will affect future non capital litigation<sup>22</sup>. It is unclear, for example, whether the rule excluding juveniles from life without parole could be extended further to include life sentences with parole possibility. With only one full year since the decision, it is too early yet to determine the long term effect of the ruling, yet it seems most likely to be a response to the criticisms of life without parole specifically in relation to juveniles (Amnesty International & Human Rights Watch 2005, Equal Justice Initiative 2007), rather than an adjudication of the sentence itself. Most recently, the Supreme Court barred the mandatory imposition of the sentence upon juveniles convicted of first degree homicide (*Miller v Alabama* 2012) which, although prohibiting mandatory imposition, does not in fact bar the use of the sentence, so long as the sentencer has given consideration to the particular characteristics of the offence and offender. Indeed, there is a considerable amount of state support for juvenile life

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<sup>22</sup> For a full consideration of the decision and its consequences, by several authors, see Federal Sentencing Reporter, Vol.23 Issue 1

without parole: only Alaska (which prohibits the imposition of life without parole in all circumstances), Colorado, Kansas, New Mexico, and Oregon prohibit the sentence for juveniles (Nellis & King 2009:17). Although both decisions are a promising step towards regulation, what needs to be noted, in this departure from the 'hands off' doctrine that has so characterised the United States Supreme Court and non capital sentencing, is that regulation only extends to juveniles. The substance of regulation so far is not so significant as to ensure that even that group are categorically barred from being sentenced to life without parole: juveniles can still be sentenced for homicide, and can still spend the rest of their lives imprisoned for non homicide offences as long as parole is theoretically achievable. When juveniles are sentenced to life without parole, its applicability to capital offenders, its suitability to sentence the worst of the worst is cast into doubt and the death sentence, even if that sentence equates only to death row imprisonment, not execution, becomes appreciated as necessary.

Similarly, whilst the decision in *Kennedy v Louisiana* affirmed the death penalty as applicable to homicide offences only, like with juveniles, life without parole in this area has no such restriction. The imposition of 'three strikes and you're out' legislation in several states, particularly used and publicised in California (although Washington state was the originator) has led to an upsurge in life without parole populations. That increase is the result of some strikes being imposed for relatively trivial non-violent offences, theft, for example, which, nevertheless, have been upheld by the courts (Mauer et al 2004:2). In at least 37 states life without parole is available for non-homicide offences, for crimes ranging from as relatively little as battery to burglary (Nellis 2010:28). In California, which imprisons over three and a half thousand people who will never be released, those numbers are swelled by defendants sentenced for only the theft of cookies, slices of pizza, and cigarettes (Cullen & Newell 2003:29). In the current death penalty era, however, only two death sentences have been imposed for non-lethal offences, and no such executions have been carried out. Now, capital offences are limited to intentional murder with aggravating circumstances, a particularly refined scope compared to as recently as the 1950s when executions were still carried out for lesser offences such as sexual assault and robbery.

The widespread adoption of life without parole may have even graver consequences for some offenders. Whereas dedicated groups work to overturn death sentences, resources do not allow the same work on life without parole cases. Appointed in 2000, the Illinois Death Penalty Study Commission noted the hazards of life imprisonment, and the lack of case review, compared to the death penalty.

...Commission members were struck by the fact that particular cases received a much higher level of scrutiny because capital punishment was involved. Had those same defendants been sentenced to life imprisonment, a term of years, their cases might not have been reviewed as carefully and by so many different parties. As a result, some of the injustices with which the public has recently become acquainted might not have been corrected ... A defendant who is sentenced to life in prison without the possibility of parole, or for an extended term of years, does not benefit from the improvements to the criminal justice system brought about by the Capital Crimes Litigation Act or the new Supreme Court rules governing capital cases. Yet the punishment he or she receives is severe, and the possibility that innocent persons may suffer as a result exists, albeit to a different degree than in a case involving the death penalty (Illinois Governor's Commission on Capital Punishment 2002 Report, cited in Acker 2009:306)

As the use of life without parole increases, particularly in the sentencing of relatively minor crimes, minor compared to those crimes that warrant the imposition of a death sentence, and even juveniles, for example, that routine dispensation, even banality, encourages the 'need' for a more severe sentence that better reflects the more severe crimes. Most recently, in New Hampshire, a state in which the death penalty is rarely fulfilled, with no executions in the contemporary death penalty era, but with provision for life without parole, and juvenile life without parole, a state commission created to study capital punishment in the state, recommended no changes to be made (Keshen 2010). The state's capital punishment statute was, one year later, however, expanded to cover murder committed during a home invasion (Death Penalty Information Center). Governor Lynch signed the bill into law because, he felt, "there are some crimes so horrific that are not covered under our capital murder statute" (Love 2011). When New Hampshire's first death sentence of the current era was issued, in 2008, it was, Attorney General Kelly Ayotte said, because life imprisonment would have been insufficient, it would not serve "justice" (Zezima 2008), and an example of why the Governor, in 2000, vetoed a repeal bill, "There are some murders that are so brutal and heinous that the death penalty is the only appropriate penalty" (Associated Press 2000). In New Hampshire, Governor Lynch, when signing the capital murder statute expansion bill, cited the state's "judicious" and "cautious" use of its death penalty (no executions in the current era) (Love 2011). Like Connecticut, the prison, and life without parole, was to be used as punishment for 'mainstream offenders' but, reflecting that more general use of life without parole, the death penalty was to be retained and used against those designated as 'exceptional offenders' for whom general prison population incarceration, even under a sentence of life without parole, is deemed too lenient (Rell 2009, Associated Press 2000, Love 2011, Zezima 2008).

- ***Lifers in the Prison System: Comparing Treatment to Capital Offenders***

Life in the American prison system is, no doubt, a gruelling experience. Even the American Civil Liberties Union say as much, and in supportive terms, (as they try to sway death penalty supporters to support life without parole),

People sentenced to LWOP have been condemned to die in prison and that's what happens: they die in prison of natural causes...spending even a small amount of time in California's overcrowded, dangerous prisons is not pleasant. Spending thirty years there, growing sick and old, and dying there, is a horrible experience...[they] are not given any special treatment and, in fact, have less access to programs than other prisoners. They are housed in high security facilities with few privileges, far away from relatives, and in crowded group cells (ACLU 2008b)

Life without parole is downgraded in severity in comparison to the death penalty, in resources available to defendants from innocence projects and humanitarian organisations (Acker 2009:306), and in severity. When groups such as the American Civil Liberties Union urge support for life without parole it is with the intention to derail the death penalty not, necessarily, because life without parole is 'more' of a punishment than a death sentence,

True life prisoners remain physically alive and in the company of other convicts and guards; they are treated as human beings and remain members, however marginal, of the human community. They can forge a life of sorts behind bars, but one organized on existential lines and etched in suffering, for at a profoundly human level they experience a civil death, the death of freedom. The prison is their cemetery, a 6' by 9' cell their tomb (Johnson 1984:577)

Authors with less concern for replacing the death penalty with life without parole, however, paint a different picture of life in prison for those sentenced to life without parole. Whereas some authors seek to champion life without parole, others seek to discredit it not, however, on humanitarian grounds: "Read the testimony of abolitionists, and you'd conjure up perpetual misery in dungeons where the LWOPers never see the light of day. But then why does the prison commissary sell lifers suntan lotion with an SPF factor of thirty?" (Blecker 2010:9).

Here in the valley, suddenly yesterday, dark heavy clouds rolled in", recounted Sarah Mitchell to a friend and fellow murderer. "That lightning put on quite a show!" After

killing, dismembering, and lighting her sister on fire, Ms. Mitchell planned to impersonate her murdered sister and then withdraw money from trust accounts. Convicted of that aggravated murder and sentenced to LWOP, Mitchell candidly described her daily life in her new digs:

We are eating Good! Bananas, whole tomatoes, grapefruits, oranges, apples, pears – galore. For breakfast it alternates between bagels [and] cream cheese with boiled eggs, coffee, raisen bran, milk & juice – to two fried eggs, 3 link sausages, toast, jelly, oatmeal, coffee – to thick ~ thick French toast (3 slices) syrup, cream of wheat & milk, coffee – to Denver omelettes 3 pieces of crisp bacon, grits, a piece of fruit, coffee, milk or tea, toast etc.

The dinner menus are like restaurants – enchiladas, cheeseburgers, Stroganoff, chef's salad, ¼ chicken, tater tots, cheesecake, brownies, apple pie, cherry cobbler, ambrosia, spaghetti, greens, ice cream (cups & drumsticks!) pepsi, cr[eam] soda, grape ne[ctar], baked potatoes, fruitbars, burritos, roast beef with gravy, pepperoni, raviolis, good fish, sloppy Joes, corn dogs. The veggies, desserts, & side dishes are very good. We get relish packets and real mayonnaise!!! It just feels so much better eating this “real” healthy faire.

My video camera has recorded LWOPers playing softball – in uniforms, baseball uniforms – on baseball fields with chalked base paths, swinging for the fences (albeit with topped barbed wire), and rounding the bases to the cheers and high fives of teammates and buddies.

“Never see the light of day ... a fate worse than death”, abolitionists argue with straight faces... (Blecker 2010:10)

Prison researcher, and retributivist, Professor Robert Blecker, so dismayed at what he sees as the soft, easy, un-retributive prison life of people sentenced to life without parole, having committed potentially capital crimes (as with the crime of aggravated murder committed by Sarah Mitchell whom Professor Blecker quotes at length) that he proposes an alternative: permanent punitive segregation (PPS) (Blecker 2010). PPS would involve incarceration under the most punitive conditions that the United States Constitution could permit. For Blecker, for those convicted of the worst crimes, the ‘worst of the worst’ (those which capital statutes profess to weed out) “life should be a punishment beyond a permanent loss of liberty. Life should be painful and unpleasant, every day” (Blecker 2010:11),



Those condemned to PPS would be housed in a separate prison. They would be permanently subjected to the harshest conditions the Constitution allows. Specifically, their food would be *nutriloaf* – a tasteless patty, nutritious enough not to foreshorten their lives. Visits would be kept to the minimum and none would be contact visits, ever. These aggravated murderers would never touch another human being again. They would labor daily and purposelessly – digging holes to fill them up. Other exercise would be Spartan – running in circles. They would be provided no radios or TV and, of course, no internet. They would get one brief, lukewarm shower a week. Photos of their victims would adorn their cells – in their faces, but out of reach, reminding these condemned killers daily of their crimes (Blecker 2010:11)

What Professor Blecker describes, the hopelessness that would surely be produced by such a form of incarceration, a retributive regime, one that is designed to remind the offender that he is ‘monstrous’, one that shuts him off from any opportunities to socialise, touch, or to exercise his brain or body; is closer to how life is felt by condemned offenders on death row (as discussed in the next chapter) than it is to the description of life incarcerated in a general prison population (Blecker 2010). Indeed, Professor Blecker is not alone in dismissing life without parole as an inferior version of the death penalty, and of death row incarceration, owing to the comparable freedom permitted whilst incarcerated,

...if the aim is payback, LWOP does not in the end seem quite up to the task. Life goes on for LWOP inmates. They adapt to prison. They are able to acquire privileges through good behaviour. They enjoy recreational opportunities, a social life, and family visits ... That is not to say that prison life is preferable to life outside, but if severe, long term suffering is the goal, then LWOP is likely to disappoint (O’Hear 2010:5)

Prison conditions, of course, like death row conditions, vary across the states, and the regimes prisoners are subjected to, and the amenities available to them are similarly diverse. Some states, such as Arizona, Alabama, and Florida employ the use of chain gangs (Hallinan 2001:103, Bright 1996), other states, like Alabama force inmates to break rocks (Hallinan 2001:102, Bright 1996:848). It was only after the intervention of a federal judge, ruling the practice unconstitutional, that inmates in Alabama were no longer chained to a hitching post to be disciplined (Hallinan 2001:102). Whilst reports in the late 1980s and early 1990s, depicted prisons across America as “resorts”, rather than prisons (life sentenced prisoners in Massachusetts eating prime rib, aerobic facilities installed in Pennsylvania prisons, or New Mexico prisoners being allowed conjugal visits with their wives (Hallinan 2001:103)). Now, the regimes that prisoners are subjected to have become more punitive

and austere. In Mississippi, for example, legislators voted to bring back the black and white striped convict uniforms of the 1800s, in North Carolina, legislators voted to prohibit television sets, weight rooms and outdoor basketball courts in its prisons. In South Carolina, in his State of the State Address, in 1995, newly elected Governor David Beasley, officially pledged his intention to transform the state's prisons into places of punishment, places to which 'no person would ever want to return' (Hallinan 2001:103). Steadily, over recent years, prison regimes have been consciously made more retributive and austere as 'no frills' imprisonment has been embraced across the country (Nossiter 1994, Pratt et al 2005). Excessive force used by guards upon inmates has been documented in Connecticut, Arkansas, Texas, Pennsylvania, and California (Greene 2004:3). Whilst in Virginia, prisoners in Wallens Ridge State Prison are reported to have been routinely subjected to racial abuse by prison guards, unnecessarily placed in five point restraints, fired on with pellet guns, and abused with electro shock stun guns (Amnesty International 2001:1). In Pennsylvania, as well as in other states prisoners are routinely humiliated by being forced to strip in front of other inmates (Butterfield 2004). In Texas guards have been found to be allowing gang leaders to buy and sell other inmates as slaves for sex (Butterfield 2004), whilst reports have found evidence of guards abusing inmates with dogs, electric cattle prods, and stun guns (Davies 2005). So overwhelming is the evidence that abuse is endemic in its penal system that the United Nations has publicly rebuked the United States for the brutality found in its prisons; the use of chain gangs and the use of electro shock belts for restraining inmates (Kaban 2000).

However, despite the dangerous conditions, even deplorable in some instances, of American prisons it has been widely acknowledged that death row confinement involves the very worst conditions present in the American prison system (Johnson 1981, Johnson 1998, Von Drehle 1995). Whilst conditions for inmates in the general prison population may be gruelling, dangerous, and difficult to endure, they are worse for death sentenced offenders, whose incarceration is characterised by even less access to work opportunities, recreation activities, visitation, and amenities (Babcock 2008). Moreover, those restrictive and austere prison regimes are underpinned for the prisoner by the constant threat that an execution date may be set. Suffering though, on death row, is intentional; a setting characterised by punitive restriction that underscores, and contributes to, the dehumanisation of the condemned (as discussed in the following chapter). The contended severity of life without parole, over a sentence of death, and over a lesser term of imprisonment, lies in the complete denial of release, not in the prison conditions they are subjected to (Paluch Jr. 2004, Hassine 1996). Indeed, there is no evidence that offenders sentenced to life without parole, as a group, suffer in their conditions of detention in a comparable way to their death sentenced counterparts (Paluch Jr. 2004, Hassine 1996). All evidence is, in fact, to the contrary, that death

sentenced offenders suffer under their restrictive regimes and conditions more so than those sentenced to live in the general prison population (Hammer et al 2002, King 1994, Lynch 2000(b), Johnson 1981, Johnson 1998). Life without parole is a severe sentence; the removal of any hope for release from prison life. However, retaining the death penalty, and using life without parole simultaneously, makes the death sentence even more severe, applied to fewer, supposedly more dangerous offenders; severity which is reflected in the conditions of detention on death row. Indeed, no other inmate group is subjected to conditions as severe, punitive, and oppressive as those on death row; such conditions are entirely discriminatory (Johnson 1981, Johnson 1998, Hammer et al 2002).

- ***Nothing like Death Row? Punitive Detention for Non Capital Offenders***

Death row inmates are treated differently from the rest of the prison population. They are constantly in their cells. They have no work assignments around the prison and have the most minimal shower and recreation periods...None of the programs of education or rehabilitation available to others in even the strictest of prisons are available to death row inmates...This makes life on death row far more depressing and meaningless than life normally is in prison (Magee 1980:5)

The difference of treatment, though, between death sentenced offenders, and those offenders in the general prison population, even when there is an overlap between the types of offence committed but a divergence in the sentence imposed (as a result of plea bargaining or a reluctance to pursue a capital case on behalf of trial prosecutors, for example), is a difference that death sentenced inmates feel acutely. For many inmates it is the difference between being treated like an animal and still being treated as a person, as Robert Johnson captured in one interview with a death sentenced inmate in Alabama,

PRISONER: Well, you see, what hurts me is that I probably could put up with the bad food they give, but if they could just let a relative send me money so I could enjoy that little once – a – week (store) privilege anyway. And have access to my kids and my wife, more than just 45 minutes or an hour. Like the rest of the people here (regular prisoners), they all enjoy their friends and relatives (and they) can come and stay as long as six hours, you know.

INTERVIEWER: The regular prisoners, you mean?

PRISONER: Yeah. But even the ones that they say are locked up (in segregation) their visitors come and visit longer. I don't see no difference really. We're all prisoners. I mean, we're all in here. The same facilities for them should be available to us, but it's not. It's just the idea of being treated so differently, like you're less than the other prisoners. That's enough to just drive you up the wall ... we should be allowed more rights than we do (Johnson 1981:155)

Those offenders who can claim comparable treatment to that of death sentenced offenders are those offenders in secure housing units (SHUs): restrictive housing for those offenders who cannot be managed in a general prison population. Even though the isolation imposed upon offenders by such housing units has been historically experimented with, criticised, found to cause severe psychological harm (Colvin 1997:82, *Re Medley* 1890), and thus abandoned, in the modern era it has enjoyed a renaissance. That renaissance was embodied with the opening of the United States Penitentiary in Marion, Illinois, in 1963, which was to serve as a replacement for the recently closed Alcatraz prison in California. The prison was designed to house the most troublesome and difficult to manage offenders, a theory that has continued to today and the opening of USP Marion's replacement, The Administrative Maximum Facility in Florence, Colorado, "The Alcatraz of the Rockies" (Slack, Dewsbury, & Endoch 2012). The similarities between the confinement of non capital inmates in such facilities and the confinement of death sentenced counterparts is striking (indeed, as discussed in the following chapter, the design of death row in New York was from a blueprint of SHU housing). However, prisoners housed in such conditions, unlike death sentenced offenders, are only incarcerated in such a manner because of their behaviour within the prison system, not owing to the sentence they are serving,

Typically, prisoners in the SHU are housed in small cells (often 6 x 8 feet) with solid steel doors. Incarcerates are confined in this manner for 22 to 23 hours per day. They are usually allowed out of their cells for showers or solitary exercise for only a few hours per week. Their interactions with other convicts and with correctional staff are severely limited. Generally speaking, SHU prisoners are not permitted any contact visits, and they are often required to talk with visitors via closed circuit television. In addition, SHU prisoners do not benefit from any congregate activity, such as exercise, dining, or religious services. Access to personal belongings, including reading materials, is strictly limited. These convicts typically have no opportunity to work or participate in educational or therapeutic programming. Prisoners in control units are given insufficient room to exercise and often have no access to recreational or athletic

equipment. Most SHUs lack windows, so incarcerated are not exposed to natural light. The cells are often illuminated by artificial light 24 hours per day, and prisoners have no means of controlling the brightness or dimness in their units (Arrigo and Bullock 2008:624)

The conditions of confinement in the SHU are typically characterized by hostility and violence. Incarcerates are shackled and restrained whenever they are in the presence of others. They are accompanied to showers and exercise under heavy guard...The characterization of SHU convicts as being “the worst of the worst” contributes to an us against them mindset amongst correctional staff. This orientation serves only to heighten the potential for the abuse of prisoners. However, the primary purpose of SHUs is to exercise complete control and dominion over convicts...The public’s impression is that SHUs are reserved for the vilest and most despicable offenders in the U.S. penal system. Thus, the severe confinement conditions are justified and deemed necessary to maintain the security of the prison, the safety of correctional staff, and the welfare of other prisoners. However, in reality, most convicts in SHUs are not incorrigibly violent (Arrigo and Bullock 2008:626).

Some more modern death rows have been purposefully designed as supermax death rows, like that which exists in Arizona (Lynch 2005): architecture, and prisoner management that has at its core the idea of “complete control and dominion” (Arrigo and Bullock 2008:626). Inmates in both housing assignments are subject to isolation, confinement, and segregation. They are shackled, escorted when out of their cell, and constantly monitored. There are, however, three notable points of departure for the similarities between death row and SHU housing, between death sentenced offenders and non capital offenders. First, non capital offenders are afforded the opportunity to move out of such restrictive imprisonment by compliance with the rules of the institution. Secondly, as discussed in more detail in the next chapter, in reference to New York’s death row, non capital inmates sent to SHU housing are moved after proving themselves unmanageable in a general prison population; death sentenced offenders are placed in such restrictive conditions solely on the basis of their sentence. Finally, the experiential component of incarceration for a capital inmate, living under a constant threat of execution which exacerbates the conditions the prisoner has to endure, so destructive to a person that Albert Camus famously said of the death sentenced offender: he suffers two deaths, the execution, and the waiting for execution (Camus 1963). The conditions in which a death sentenced offender lives, whilst awaiting execution, can thus be differentiated from even the most austere and punitive housing assignment available to general prison population inmates. The

discrimination invoked by a death sentence, that label, in fact produces a prison environment far different from any other form of incarceration experienced by offenders within the American penal system, and uniformly applied because of that sentence: the subject of the next chapter.

# 'If These Walls Could Talk': Contemporary Death Row and the 'Life' of the Death Sentenced Offender

## - *A Visible Message: Death Row Appearances*

Death row is a prison within a prison, treated as a separate facility within the grounds of an already high security prison compound. Being, really, a separate prison it often has all the aesthetic markers of a high security facility so, by inference, making a statement about the prisoners housed within. Culture has dictated the offender as dangerous, prison authorities have received that message and constructed death row with that description as a foundation. The condemned offender is, quite literally, exiled into a wing within the prison characterised by repressive security measures and a physical appearance differentiated from other parts of the prison by additional symbols of security and segregation: barbed wire, additional security gates, closed circuit television, additional guard towers and extra guards.

Robert Johnson describes the entrance to death row at Holman Prison in Alabama,

The physical setting of death row is intimidating. To get there, one must pass through four locked gates: one marking the entrance to Holman Prison compound; another protecting the prison proper; yet another separating the outsider from the living, working, and feeding areas of the general prison; and a final gate separating the isolation unit, which houses hard-core disciplinary cases in one subdivision and condemned prisoners in another, from the main prison population. A fifth gate sets off death row within the isolation unit (Johnson 1981:43)

Whilst the death row at Holman Prison is a relatively old compound, new death row compounds are purposefully built with the same aesthetic harshness and isolation in their exterior design, just like the 'H Unit' in Oklahoma,

H Unit is an artificially earth-sheltered facility, which is to say that it was built as a free-standing unit on level ground and then all external walls were insulated and sheltered with imported earth sloping up from ground level to the top of the walls at an angle (judged by eye) of approximately 35 degrees... Above the entrance is a security tower manned by an armed guard who has visual oversight of all approaches to the unit (King 1994)

Even the name given to a death row, like its physical experience, has unique connotations. In Oklahoma, for example, death row is merely labeled 'H Unit', a "nondescript name – a letter in the alphabet, devoid of any intrinsic meaning – somehow seems fitting" (Johnson 1998:80). The physical layout inside the row is equally communicative: "...features of the design (lack of windows in cells and solid walls to exercise yards) provide a degree of security and protection in excess of reasonable penological need" (King 1994). The internal setting and design internally mirror the sentiment communicated by the exterior,

Death row has a number of distinctly unpleasant physical features, even when measured against the ascetic norms of prison. The cells are narrow, close and without amenities, even the toilets are small and cramped, little more than metal protuberances wedged in each cell floor (Johnson 1979:156).

The inmates feel that the physical features inside the row are purposeful: "...inmates experience the environment as a series of assaults. The physical setting is seen as punitively spartan; surveillance and security are viewed as ways to inflict pain" (Johnson 1981:50). Correctional personnel disagree; the physical setting of death row has been defended by correctional officials as a measure to make inmates and staff safer (Johnson 1979:161, Johnson 1998:110), maybe, but that 'need' says something about the regard death sentenced inmates are held in, dangerous, untrustworthy, likely to kill again and, or attempt escape: appearances reinforcing the status of the condemned.

- ***Offender Difference Produced and Affirmed by Death Row***

Confinement prior to an execution being carried out is necessary in the most primary sense, to detain the prisoner and ensure that the sentence can be carried out. Yet, the punitive conditions of that confinement whilst he awaits his execution, the subject of this chapter, are purposeful beyond secure detention of the offender. Death row conditions and treatment of the offender affirm the notions and labels of dangerousness, otherness, and difference, that propel support for the death penalty system. They affirm the legal mandate of the contemporary era previously identified, that death sentenced offenders are 'the worst of the worst'. The conditions, regimes, and treatment of death row designate offenders as different, different from other offenders, from those in the general prison population. Pivotal, death row imprisonment generates its own descriptions and labels of death sentenced offenders (Garland 1990:250) through accounts of death row incarceration, just as it implements those wider cultural descriptions of capital offenders (thus



forming a communicative loop). Capital offenders are deemed, and treated as, lethal, dangerous, violent, and subhuman on death row (Johnson 1981, Johnson 1998), just as they are in wider culture. They are segregated from others and placed under the most restrictive conditions. In this way death row communicates, and verifies those same labels used by wider culture.

In the modern era, if the system will not punish all offenders with death, by killing offenders physically then the current system, through death row, ensures that all are punished by the way they are incarcerated. Whilst some commentators have asserted that the punishment intended should be death, not “lengthy confinement under harsh and punitive conditions on death row and then death” (Feldman 1999-2000:211). In reality, often minus the physical death, in the contemporary era that is exactly what the majority of death sentenced offenders are subjected to.

Conditions of confinement for death sentenced offenders have long been more austere than for non capital prisoners. Although there were some instances of particularly draconian death rows prior to the contemporary era, such as that which existed in Arkansas before a brief period of reformation under Warden Tom Murton (Murton 1969), it is in this death penalty era that death row detention, generally, has taken a particularly retributive turn. As discussed below, even since the year 2000 many death row privileges and amenities have been curtailed and inmates spend an increased amount of time in idleness and isolation which, also discussed below, has a profound impact upon their mental health. Indeed, it has been claimed by some, those conditions actually drive up the number of prisoners who abandon their appeals and volunteer to be executed (McGunigall-Smith 2004:132, ACLU 2008a).

Whilst correctional precedent exists for the segregation of offenders subject to a death sentence, the regimes and custodial austerity they are now subject to is a hallmark of modern confinement. Pivotal, it is now an accompaniment to an increased, record waiting time on death row before an execution is carried out, if it ever is. Whilst more repressive custody through increased isolation and denial of basic amenities has been, in some instances, a conscious decision on behalf of policy makers, as in the cases of Texas and Virginia following escape attempts, discussed below, it is also somewhat of a natural evolution within a cultural framework. Imprisonment has evolved as the cultural and legal rhetoric used to described death sentenced offenders has changed and increasingly marked them as particularly dangerous people (Garland 2007a:447). Executions are no longer carried out for non lethal offences such as rape, robbery, or espionage, now offenders are, theoretically at least, the most dangerous and lethal, the most monstrous, and, according to their original sentence, likely to display future acts of violence, if permitted by relaxed forms of detention.

The general attitude towards all offenders in American society, capital and non-capital, has become more punitive as politicians and public alike have rejected rehabilitation and embraced the notion of 'no-frills imprisonment'. As Pratt et al (2005) note,

Decades of reform directed at ameliorating prison conditions have [meanwhile] been abandoned across a number of jurisdictions... Prisoners have had 'privileges' revoked while more austere and spartan prison regimes have been introduced (Pratt et al 2005:xii).

Death sentenced offenders, however, had far fewer privileges to begin with, indeed the design of modern death rows has been noted as the blueprint for the Supermax prisons now found across the United States (Pratt et al 2005:xiv). In this sense, the presence of the death penalty, as it has done with life without parole, has distorted other areas of the criminal justice system.

The regimes and treatment of death row not only communicates the worth of the offenders to themselves, but to the outside world. Reports of death row and its inhabitants are not only popular (Berry Dee & Brown 2003, Berry Dee 2007, Kuncl 1995, Berry Dee & Brown 2010, Wallace 2010), they are official, even if only to expose those conditions (King 1994), and they are academic (Johnson 1981, Johnson 1998). The conditions of confinement, by describing the inhabitants of death row as violent monsters who *need* to be confined and segregated, reinforce a need for the death penalty generally. Some offenders are so monstrous, so dangerous that they need to be eliminated, their incarceration in a prison within a prison (Johnson 1979:156) reflects that belief not only as a precursor to execution but, as a punishment itself. It reinforces the status of those offenders and, by inference, that of all other lesser punishments; life without parole, for example, where offenders so sentenced are housed in the general prison population with its perceived softness, privileges, and amenities (Blecker 2010). As noted in chapter five, life in prison is felt as 'too good' for those subject to a death sentence (Associated Press 2000, Rell 2009). Such offenders, thirty five years of legal rhetoric and wider cultural descriptions would seek to convince observers, are the very worst of the worst, beyond redemption. Thus, as demonstrated in their treatment on death row, they are denied any recognition of their humanity, a humanity similarly denied by those who support the institution of capital punishment (Haney 1995:549, Lynch 2002:224). With the current low execution rate, and the retributive messages lost by lethal injection hegemony (Lynch 2002, Lynch 2000a), this current treatment not only endorses those descriptions and thus support for the institution, it helps sustain the punishing element of the institution in a tangible, appreciable form.

- **Communicating the Difference: The Control of Death Row**

The functioning of death row is built on routine (Von Drehle 1995). On death row, movements are planned and carefully orchestrated: dispensation of possessions, exercise, and medical attention is planned and controlled to ensure the absolute segregation of offenders (Lombardi, Sluder, and Wallace 1996). Head counts, restrictions on groups in communal areas, if permitted at all, in cell food delivery, strict observance of procedures regarding personal belongings and clothing, restriction and monitoring of visits, even the monitoring of attorney visits, are all common to death row incarceration. Although loosely structured death rows existed far into the contemporary death penalty era, as in Virginia, discussed below, such examples have now been replaced with highly structured, organised, and controlled incarceration. In New York, for example, death sentenced inmates were constantly under surveillance: microphones and closed circuit television cameras were placed in each cell, cells were illuminated 24 hours a day, controls for all of which were operated by correctional staff, never the inmate, and when the inmate was out of cell he was constantly shackled and escorted by guards (Hammer et al 2002).

All death rows are run with military precision; every aspect of the inmates' lives is controlled; controlled for them by prison authorities whilst they spend up to twenty three hours a day in a cell that can measure as little as 6 x 9 x 9.5 feet (Florida Department of Corrections).

Inmates can barely see their keepers unless one of them enters the run, an activity which is minimized, again by design, due to the technical ability to control the cell doors, control lights and water, and, communicate verbally from a "Starship Enterprise" kind of control booth situated in the center of the 10 run "pod" which is separated from inmates by three sets of locked doors. The control booth officer can monitor all movement by inmates in the unit from this station, and a computer tracking system maintains an activity history clocking every single location the inmate spent time in during his entire stay (Lynch 2000b:16).

If the prison has evolved along the lines of stricter control and management (Pratt et al 2005), then death row is a magnification of general prison incarceration, of management and control. Even under the tightest security, prison authorities have sought to overturn more informal versions of death row, where out of cell time, guard inmate interaction, and availability of commissary items were more loosely structured (Jackson & Burke Jnr. 1999, McKelway 2009). The result is a transformation into efficiently, bureaucratically managed worlds. Each move made by the death sentenced offender, and those who interact with them through the delivery of food or medicines,

for example, is carefully managed, controlled, and logged. In Virginia, before a mass escape from death row in 1984, control over inmates in recreation was so permissive that after recreation inmates were not required to return to their cells immediately, and thus it was easy to create confusion if guards wanted to conduct a head count. Even the very design of death row allowed for several hiding places for inmates (McKelway 2009). Modern death rows, in their architectural design and in the regimes that govern them, are now vastly different, both allow guards to know exactly where prisoners are at all times and allow for their constant audio and visual monitoring of inmates. For the condemned, the bureaucracy and procedural restraint that characterise modern death row, its organisation and maintenance, overlays even the last moments and remaining ritualistic aspects of imposing death as punishment; the condemned's last meal, his last words, for example. Whilst final farewells to loved ones are afforded an inmate they are often non contact (Babcock 2008), whilst a last meal request is offered, it is often done so within either a geographical or financial limit (Lynch 2000b). The condemned are dehumanised by death row, from entry to exit.

On the reading of some analysts, the bureaucratization of imposing the death penalty, at the level of incarcerating death sentenced offenders, has not only been a new form of death row management, but a means of overcoming the moral and psychological problems that came to be associated with killing offenders. According to Johnson, in the modern era, as people came to sense a shared humanity and mortality, the effect was a recognition of the inherent violence of capital punishment (Johnson 1998:55). By bureaucratizing the death penalty, how it is carried out, and how inmates are controlled and managed, the violence of executing, for Johnson, can be hidden and the participants could be dehumanized. Even executioners, for Johnson, are so caught up in the procedure, following the minutiae of a killing schedule, that the violence that they do is "effectively hidden from their awareness" (Johnson 1998:54). Denying the violence aids the commission of executions, denying the condemned's humanity makes it easier to kill him and, similarly, allows the easier implementation and enforcement of punitive detention whilst the offender is imprisoned on death row.

So, whilst earlier death rows allowed for an individualised experience for the condemned, as executions became rarer, civilities were refined, and the penal mechanisms of the state all became bureaucratised, that experience became governed by a centralised, impersonal rationale and mechanism. The condemned were rendered monstrous 'units' to be processed; whether on a daily basis of moving, feeding, and organising, or in terms of preparing them for their execution (Lynch 2000b).

...housing the condemned in a place like Eyman's SMU II [Arizona's 'Supermax.' Death row]...for inmate and staff alike, the condemned person is necessarily stripped of his

humanity. He is literally made untouchable – a form of “toxic waste” which must be contained until it can be disposed of in the prescribed manner. This was the intentional design of the place, according to the Director of Corrections Terry Stewart, who said at the time of its opening, ‘the primary concept of SMU II is to minimize contact between officers and inmates’ (Lynch 2000b:15).

Such is the modern bureaucratisation of administering the death penalty that, no matter how close to a date of execution, the visitation of a condemned person, whilst permitted, remains strictly monitored, controlled and subject to bureaucratic restriction,

...I haven’t had a regular visit in six months. To have a visit you have to have people fill out some papers, a lot of papers. That takes about six weeks. Then they have to send their names to the FBI file and all that shit. The reason they denied my sister is because she forgot to sign the paper to let them search her. She could have done that over here. So it will be after August when she can come (death sentenced offender, Elvin Myles, cited in Magee 1980:123)

Rogilio Reyes Cannady, from Texas’ death row, in another example, notes that even the day before a fellow inmates’ execution, (that of Jorge “George” Cordova), his own mother was denied visitation on the grounds that she was not on ‘an approved list’ of visitors.

Today Captain Burse told George that his mom was not on his visiting list but he had tried to change it days ago...So George asked if he could please have permission to see her. The captain said “no” that she was not on the list. So then he went out and told George’s mother that George did not want to see her! (Reyes Cannady 2011).

Compassion does not give way to bureaucracy and the bureaucratic management style, like in the example of visitation with immediate family on the eve of an offender being out to death. It does not allow for individual treatment. On death row all men are equal, equal in disdain from correctional personnel and planners of their incarceration, an incarceration that acts as a process of dehumanisation of the offender.

- ***Message Received (and Communicated): Death Row Conditions Confirming the Dehumanisation of Offenders***

The term dehumanization has been used loosely...Dehumanization as I use the term is not solely or even primarily a symbolic experience...Rather dehumanization entails loss

– in whole or in part, situationally or generally – of one’s humanity. A dehumanized individual is in some sense dead as a person, either with respect to a segment of his behaviour or more generally, such that his existence is more that of an object or automaton than that of a rational, sentient human being” (Johnson 1998:204).

Whilst the above quotation is Robert Johnson’s specific definition of dehumanisation, a product of his extensive research on death row confinement (Johnson 1981, Johnson 1998), it captures the various, complete or partial ways that death row confinement subdues, silences, and relegates the individual self: “...the condemned suffer a “living death.” As Johnson notes, they are “literally dehumanized – alive as bodies but, in varying degrees, dead as persons – and curiously reminiscent of the dehumanized monsters that haunt our imagination” (Johnson 1984:575). However, it is not, as Johnson asserts, curious that they, death row incarcerates, are conditioned to resemble the ‘monsters that haunt our imagination’: monsters are easier to kill, monsters are easier to mistreat, monsters are the very reason that the death penalty continues to exist (Rell 2009, Associated Press 2000). Their death row detention confirms those wider cultural descriptions which are then repeated back to that culture in reports of that incarceration (Berry Dee & Brown 2003, Johnson 1981:23, Crawford 2008, Kuncl 1995, Wallace 2010).

The process of dehumanisation is drawn out over a period of time by conditions of confinement that are purposefully punitive, that offer only the most basic existence. Moreover, the attack upon the offender’s humanity, is an endless process. When an offender dies, and a body is unclaimed by relatives, prison authorities will either bury or cremate it, and place the remains in a generic plot within the prison grounds. In Texas, unclaimed bodies are buried with grave markers branded only with an ‘X’ and the inmate’s prison identification number (Death Penalty Information Center 2011), former names are not returned to death sentenced offenders.

Whilst alive, the condemned offender, who can at times, in some states, be confined to his cell up to 24 hours per day, is unique in his total dependence on others. His existence is subject to total organisation by guards; the inmate has, and feels he has, according to testimony, lost all control over his life,

A living death is what death row offers its inhabitants. It is a world purposefully divested of normal social functions and rewards. Condemned men are allowed only the barest existence – enough to sustain the physical organism while its emotional and spiritual counterparts wither and die. “The living dead is actually what it adds up to...What does a maggot do? A maggot eats and defecates. That’s what we do: eat and

defecate. Nothing else. They don't allow us to do nothing else (death row prisoner cited in Johnson 1981:116).

Death sentenced offenders in Alabama are, by virtue of their sentence, automatically classified as escape risks (Johnson 1981:49). That label, by extension, tacitly authorises the treatment and punitive detention of inmates, caged and treated as dangerous animals. Even the modest amount of exercise allowed for a death sentenced offender is but an extension of the extreme restriction that characterises his daily life and a reflection of that animalised description and feeling; only one prisoner is moved at any time, offenders exercise alone, in a small cage, all the while handcuffed, and closely watched by armed guards,

*"We get 30 minutes a day to go outside. But that's in isolation, too. You walk around. You got a little place they set aside for us, but it's a cage. And you walk around like an animal does. And you know you're no different. You just go out there in another cage and you walk around"* (death sentenced offender cited in Johnson 1981:50).

'A living death' is a common phrase used to describe death row incarceration (Johnson 1979, Johnson 1981, Chandler 1998:1919). Robert Johnson, after a series of interviews with inmates on Holman Penitentiary's death row in Alabama, explains the term: "Living death is here intended to convey the zombie-like, mechanical existence of an isolated physical organism – a fragile twilight creature that emerges when men are systematically denied their humanity" (Johnson 1979:154). Key to the definition offered by Johnson, and a point that repeatedly asserts itself in discussion of death row confinement is that denial, systematic denial, of a death sentenced offender's humanity a humanity similarly denied by wider culture (Haney 1995).

...today's condemned prisoners are often completely dehumanized. They are reduced to the status of objects – bodies and not persons...This dehumanization allows prison officials to function as impersonal agents of violence while remaining largely unaffected in their personal lives (Johnson 1998:8).

As visits from spouses and loved ones dwindle (Johnson 1981:4), and frustration mounts over the isolation and restriction imposed upon him, the death sentenced offender can start to assume his role of 'other' in a self fulfilling prophecy,

For some, the abandonment they suffer on death row leads to a conscious abandonment of society, to a decision to become the alienated, antisocial, and dangerous persons they are expected to be... "...It changes us, really from normal people into people who are no good and not fit for society (Johnson 1981:60)

The very conditions of death row create, or at least have the potential to create, the monsters that haunt our imagination (Johnson 1984:575); to make real the violent, angry, dehumanised caricature, the caricature that system supporters want to feel is in the execution chamber. So, the regimes of death row can be read, for those who are executed, as the preparatory phase for that event, “you know, after you’re treated like an animal for so long you’re going to start acting like an animal” (death sentenced offender, Keith Berry, cited in Magee 1980:136). Reports suggest that the regimes of death row condition the offender and, as such, death sentenced inmates can often play up to, or at least verify their label as animal or monster and, thus, encourage a retributive sentiment.

This Texas system is sick. They treat us less than the human beings that we are and it’s like instead of them trying to see us as being a human being, they look at us being an animal (death sentenced offender Danielle Simpson cited in McGreal 2009).

Inmates acutely feel the difference between their treatment and those of non-capital offenders, “I didn’t know that guards would feed me like a dog ... the food sometimes contained rat feces, broken glass, or the sweat of the inmate who cooked it” (Graves 2012). Indeed, perennial to death row discussions and arguments are the opposing concepts of human and animal (Hughes 2003). Whilst the system, as inmates perceive it, is geared towards dehumanisation, treating them as no better than animals, death sentenced offenders have to either submit to the process or, attempt to fight it. Yet, attempts to resist the process, attempts to retain their personality and autonomy are often few in opportunity, and often to their own detriment, being written up for disciplinary infractions or, as McGunigall–Smith notes, in an example, choosing a particular execution method “...I have chosen the firing squad – I’m not going out like an animal although lethal injection would be the easier way to go” (death sentenced offender quoted in McGunigall–Smith 2004:146). Many offenders, however, lose their fight for personality and autonomy and take on, inherit and internalise, the status and description they are given. Paradoxically, inspiring in inmates the feeling that they have nothing to lose by acting out, may even make them dangerous. In that regard, conditions and treatment on death row are self perpetuating, with an inherent justification for their existence,

PRISONER: Right. See like, for instance, the average man, since I’ve been on the row – before I came to the row, it’s certain things that I wouldn’t do to people as far as irritating them to make them do something to me, but now I say as if somebody just say the wrong anything to me, I feel like I aint got nothing to lose by retaliating.

INTERVIEWER: Uh, huh. I got you. So you feel more free to be angry at people and you’re less patient with people.



PRISONER: Yeah. It's like having a reason. You've got a reason for doing everything you do now. To be, not to be good. You don't want to be good. You know, you've got that inner feeling that you've got to be good because you were good before you got here, you're trying to fight yourself, you're trying to be good, but it's hard because ain't nobody being good to you (Johnson 1981:165).

Whilst selecting a method of execution is permitted, as in the example offered by McGunigall-Smith, any tangible, significant, or appreciable measure of a person whilst alive, 'living' on death row, is most often resisted by the prison officials charged with the management of death row offenders. Rehabilitation, individual progression, self fulfilment, personal growth, these are actions that frustrate the dominant description of a capital offender. Robert Johnson captures just such a situation in an interview with a death sentenced offender at Holman Prison in Alabama,

PRISONER: I really want a degree bad, you know. I really try to put forth all efforts to accomplish that mission.

INTERVIEWER: Have you had any support in your ambitions from anybody here on the staff?

PRISONER: Well, I spoke to everybody concerning this. I spoke to some of the guards, to the lieutenant, to general guards, to the warden, to the psychoanalytic counsellors, to the psychologists of the Alabama penal system, the death commissioner, and my parents, and to the director of Alabama prison population education institution. The only advance that I made was that I received a catalogue from the University of Alabama" (death sentenced offender cited in Johnson 1981:124)

Authorities, indeed death penalty supporters, do not want to see the death sentenced offender as an individual transformed, that can only frustrate the presentation of the execution. In 1983 Karla Faye Tucker and her then boyfriend, Daniel Garrett, murdered a couple during a home invasion; as Tucker killed Deborah Thornton with a pick axe she boasted of the sexual thrill it gave her (Laurence 1998). At their trial the jury recommended the death penalty. During her time on death row Tucker became a born again Christian and, with widespread support for a commutation of her sentence, and a flurry of television appearances reporting her religious conversion, Texans, including prominent right wing death penalty supporters, were divided on the propriety of putting her to death (Dawnay 1998). The presentation of her 'new self' undermined previous descriptions of her as a capital offender. Similarly the execution of Stanley "Tookie" Williams posed the problem of "the inmate as reformed citizen and a force for good" (Garland 2010:296), an offender who came to be

nominated for the Nobel Peace Prize. Ultimately, however, those disruptions to the dominant description of the capital offender were not enough to prevent either execution. Stanley “Tookie” Williams was executed by the state of California in 2005, after clemency was rejected by Governor Schwarzenegger. Similarly, under the Governorship of George Bush, Tucker was executed in February 1998. Her case, however, remained significant, one survey conducted after her execution showed a 20% drop in support of capital punishment in Texas (Ayres 1998). Support rationales rest on the ‘monster’ that committed the crimes which led him to death row, being punished, retributively (Lynch 2002). Disruptions to that characterisation are sought to be minimised by the conditions and regimes of death row. The regimes and custody of death row strive to ensure that the man comes to resemble that description of a dangerous monster, communications of and from death row verify and reinforce those labels.

- ***Implements of Communication: Guards on Death Row***

To manage death sentenced offenders takes more than regimes and custodial procedures, correctional personnel are the vital medium by which those regimes and procedures are implemented and enforced. Indeed, the reduction of death sentenced offenders to something less than human can be viewed not only as functional for the system as a whole but for actors within that system; specifically those who manage the condemned during their incarceration. Ideally conceived as impassive servants of the state, of the prison, of wider society, they are responsible, in the primary instance for how condemned offenders are treated. Yet, when death sentenced offenders are labelled as ‘the worst of the worst’, as monstrous, and subhuman, ‘wicked beyond redemption’ (Garland 2007b:444) as fundamentally different from other prisoners, it is difficult to suppose that their keepers are immune from such feelings and sentiment. Inmate accounts assert they are not, “I feel that it’s bad enough they’re going to kill me; they could at least treat me like a human being until that time. But the officials here, they don’t quite see it my way” (Alabama death row prisoner quoted in Johnson 1979:141). It is not coincidence that inmates view their treatment in this way, nor is it a sweeping statement to recognise the dehumanisation, even the ‘animalisation’ of the death sentenced offender generally. The commonly used three drug lethal injection ‘cocktail’, used to execute offenders, is not even used by veterinarians in euthanizing animals owing to fears of the distress that it can cause. In *Baze v Rees* (2008), discussed in chapter three, lawyers, rather than objecting to the treatment of their clients as animals, asked only that the court recognise them as good as animals, that the execution protocol be struck down, and the state treat the condemned in at least a similar manner (Alper 2008). The lethal injection protocol was upheld however, and the

difference in killing an animal and killing a death sentenced offender was permitted to remain: the protection of those viewing the event, the three drug protocol given more importance than the condemned and the ease of their suffering through the rejection of the protocol (Garland 2010:272).

When the system is geared towards the dehumanisation of capital offenders, individuals within that system become, thus, essentially, the enforcers of that message.

One suspects that the administration must be saying...‘You have handed over to us robbers and murderers because you thought of them as wild beasts; you asked us to make domesticated sheep of them on the other side of the bars that protect you; but there is no reason why we, the guards, the representatives of ‘law and order’, we, the instruments of your morality and prejudices, would not think of them as wild animals, just the same as you. We are identical with you; we are you; and, consequently, in this cage where you have put us with them, we build cages that re-establish them and us the relationship of exclusion and power that the large prison establishes between them and you. You signalled to us that they are wild beasts; we signal in turn to them (interview with Michel Foucault reproduced in Simon 1991:27).

Those who work on death row are not immune from the cultural descriptions of the capital offenders as subhuman and dangerous. Evidence attests to treatment of offenders according to those labels: assaults, rape and sexual assault, punitive rule enforcement, verbal abuse, and threats (Jackson and Burke Jr. 1999, Johnson 1981, Johnson 1998). Guards who try to usurp the normalized culture of death row, who attempt to treat the offenders as men, rather than dehumanized, dangerous monsters, are often ridiculed by colleagues and even transferred to other areas of the prison (Johnson 1981:65). Yet, examples of such guards are relatively scarce and many quickly adapt to death row work and the routinised punitive detention of its prisoners (Johnson 1981:65),

They got us one sorry motherfucker right here and that’s the only ways I know how to put it. One of the most sorriest motherfuckers right here that could be working in a penitentiary. Now he comes to work and sits his ass down right up there, and sits there and tries to figure out a way to fuck somebody back there on death row. And he’s the one that shows the others how to do us...It’s just like father teach son...Then it’s just a very short period of time until they have built up this attitude and they look at you the same way he does...It won’t be three days before he’s just as sorry as the next motherfucker (Johnson 1981:65)

In an example of adaptation to death row work, more than forty years ago, in 1971, a group of 'psychologically healthy, normal college students' participated in a psychological study that replicated prison life; The Stanford Prison Experiment. Divided into two groups, prisoners and guards, what was intended to be a two week experiment was discontinued after six days after "a string of mental breakdowns, an outbreak of sadism, and a hunger strike" (Leithead 2011). Those students who took on the role of prisoners suffered "acute psychological trauma and breakdowns" and either became passive and blindly obedient towards the authority of their captors or, "begged to be released from the pains of their imprisonment" (Haney & Zimbardo 1998:709). They did so in response to the corresponding group: those playing the role of prison guards who quickly internalized their status (and the status of prisoners),

Many of these seemingly gentle and caring young men, some of whom had described themselves as pacifists or Vietnam War "doves", soon began mistreating their peers and were indifferent to the obvious suffering that their actions produced. Several of them devised sadistically inventive ways to harass and degrade the prisoners, and none of the less actively cruel mock-guards ever intervened or complained about the abuses they witnessed. Most of the worst prisoner treatment came on the night shifts and other occasions when the guards thought they could avoid the surveillance and interference of the research team (Haney & Zimbardo 1998:709)

Zimbardo and Haney note that their experiment exactly replicated the guard, prisoner relationships found in the prison setting and the abuses that occur within that context (Haney & Zimbardo 1998:710). Moreover, within that area of psychology, numerous pieces of research have noted how, when placed in positions of authority (and it must be remembered that prison guards have complete authority over the small world of death sentenced prisoners who are completely reliant upon them), ordinary people can commit extraordinary, 'unspeakable acts' (Conroy 2001). Guard abuse though, it must be noted, is not solely a concern for the death sentenced offender and is a risk to any prisoner serving any sentence in any prison. However, reports of some death sentenced offenders claim guard abuse solely on the basis that they have been sentenced to death. In Johnson's study of death sentenced offenders in Alabama inmates complained of guards adulterating their food, adding dirt "and other containments" solely to communicate their disdain and contempt for those prisoners on death row (Johnson 1981:45).

Additionally, and again unique to the capital offender, those guards charged with caring for them, for maintaining their physical well being, will also be the people who execute them or, at least, will

aid the process of execution: from delivering their death warrant, escorting them to the death cell or, in some cases, actually performing the act of execution.

We know within ourselves that no matter how courteous a guard tries to be to us, we know what he will do in the end. And so that right there makes us guard against them. This is their domain, where they can come and have some say so, they can tell other people what to do and force people to do what they want. I feel that's why they are here. They just have that ability; they want to kill. They want to see people go through hardships. That's why I say they are mental (death sentenced offender quoted in Johnson 1979:163).

Inmates often believe guards are anxious to execute offenders and, in the interim period, viewing offenders as dehumanized animals, see custodians as looking to find outlets for violent tendencies, even if just to further reinforce the status of the death sentenced offender (Johnson 1981:66). Some inmates complain that guards seek to affirm their own dominant status and, consequently, the lower status of the capital inmates,

I sometimes wonder why a person do us like that, you know. You locked up, you know, you can't defend yourself. Like I got maced, you know? The dude squirted a whole can of mace on me cause I asked the dude for some matches. Asked one of the guards for some matches and he told me he wasn't a flunky for the state. And we exchanged words. He told me he wasn't gonna let me get out of hand like – he named somebody else on death row – that he wasn't gonna let me get out of hand. So he squirted a whole can of mace. At one time, all of it (death sentenced offender quoted in Johnson 1979:166).

Inmates complain that guards and correctional officials will not tolerate any act that could be interpreted as disobedience to their authority and the status of themselves as death sentenced offenders (Johnson 1979:167). Inmates often feel that they are no longer treated, or respected, as human beings but, in turn, guards demand that respect be given to them,

They're saying 'I've got you, you know, and I'm going to get my respect. And if I don't, I'll just write you up for insubordination or beat your ass, and anything I say is going to go'. So your morale is just shot, because you know that they've got you and there's not a whole lot you can do about it (death sentenced offender quoted in Johnson 1979:163).

Inmates in Alabama interpret the rules of their confinement as petty, unnecessary 'routine harassment', implemented with disdain by guards, as aggravating the already caged animal, as abuse, simply because they are on death row,

Every day is harassment. Problems with the mail, visiting, food. Since I've been here, roughly a year, they may have four or five visiting lists. They tell you who you can bring and who you can't. They've got a list now where you can only have a partial family visit. In other words, so many people, I think it's eight, that you can do. But some of these guys have like fifteen or twenty family members that, that they can't see. Or they can't receive money orders. Nobody that's not on your approved correspondence list is allowed to send you money orders. Money orders have been sent back. And they stop our packages from home containing not necessarily like food, but coffee, cookies, and stuff like this. Well, they stopped feeding us this stuff (from packages) because the guards didn't want to pass them out (Johnson 1981:55)

Whether observers extrinsic to life on death row would view such restriction and the observance, indeed the existence, of such rules as harassment is debateable (particularly as at the time Johnson conducted his research, Alabama's visiting arrangements were relatively liberal compared to visiting arrangements that typically characterise death row today (Babcock 2008). Yet, added to their existence in such a confined, regulated space, inmates viewed it as unnecessarily punitive and as confirmation of their transformation from person into caged animal,

We're treated like animals put in a cage. You know, like sometimes they come by with their sticks and they poke at you like you're an animal or something. That's the way they feel around here. And once you pick at an animal long enough, he starts fighting back. And we're not in a good place to fight back, and we can't fight back through anybody else (death sentenced offender cited in Johnson 1981:56).

The pains of imprisonment, loss of liberty, loss of autonomy and individuality, for example, (Sykes 1958) are more acutely felt by death sentenced offenders and the cause, they believe, is solely because of the treatment they receive being based on nothing more than their status as capital offenders (Johnson 1981:56). Death row inmates feel that oppressive custodial procedures serve to discriminate against the death sentenced offenders on Holman's death row; "It's just the idea of being treated so differently...like you're less than the other prisoners" (Johnson 1981:56). Moreover, inmates feel that, because of their status, complaints regarding their treatment, their discrimination, what they see as their abuse, will not be heard, and certainly not acted upon by authorities. Their

treatment has become normalised over time as complete deference has been given to those charged with guarding the inmates

I can sit here and talk about harassment all day but there's nothing going to be done about it. The guards, they know they got us beat. Because we're criminals. We could go down there to the courthouse and tell everybody all day long, you know, all 37 of us. We could say we're being harassed. One guard could get up there and say, "All those guys – they're criminals. They're going on griping about something. Don't pay no mind (death sentenced offender cited in Johnson 1981:57)

The regime of death row, the restrictions placed upon prisoners, the opportunities denied to them, their confinement, all exist to make that part of the prison, according to officials at Holman, a safer place; a safer way to confine prisoners, and a safer place for guards to work (Johnson 1981:60). Death sentenced offenders incarcerated on the prison's death row disagree,

There seems to be too much security. There seems to be an abnormal amount of fear in the guards simply because we have a death sentence and that makes it hard for us to have the same courtesies that we should – that other inmates have (death sentenced offender cited in Johnson 1981:60).

That culture of discrimination, the routine denial of opportunities, and the general treatment of the condemned, in their view, fosters and encourages, if not attracts, a certain type of prison guard; one prone to violence, eager to assert control over others. Indeed, inmates on Holman's death row do not see the dichotomous role of the guards as agents of custody, seeking to maintain life, and agents of execution, seeking to end it. Inmates see agents of violence, in both its overt and subtle forms; and report that even the few guards of death row who defy the dominant, normalised culture, who seek to treat the inmates humanely, are abused by their peers for showing weakness and, often, are subsequently reassigned to other areas of the prison (Johnson 1981:66).

Yet, what inmates regard as a 'might is right' philosophy amongst their keepers, and a punitive, oppressive custody regime, seemingly works well as a control strategy on death row at Holman which has some of the lowest disciplinary infraction rates of any prisoner group (Johnson 1981:99). Indeed, in that sense they are representative of death rows generally, where inmates are reported as being the best behaved, most manageable inmate group. Also, as a general representation, death row inmates in Alabama, as on death rows elsewhere, respond to the pressures of their environment with "depression and lifelessness" more than they do with violence (Johnson 1981:103). Despite the 'chronic anger' felt by the majority of death sentenced inmates in Alabama

this is expressed, mostly, in “little more than tantrums that expend energy and vitality in non-productive ways” (Johnson 1981:104). Inmates are so restricted in fighting against their custody, both physically and rhetorically, as a stigmatised group, that many inmates are reduced to ‘howling’ alone in their cells, unable to do anything else, and often unable to fight off the mental deterioration brought on by that impotent state (Johnson 1981:104). Alabama, in this way, is a prime example of how a culture of death row develops and becomes normalised, a culture, even if rooted in a fear of death row offenders, of dehumanisation, of animalisation and abuse based on their status as capital convicts.

Feelings of abuse, however, do not necessarily emanate from the guards charged with custodianship of the inmates; prisoners can feel as though they are abused by the very conditions they find themselves in, and more widely as a result of their treatment by the system as a whole,

...you can wake up in the middle of the night, even if it’s just to use the toilet, and this feeling of being abused is lingering, you can feel it. You say you’re tired of this because you know it’s in violation of every right you have as a human being (death sentenced offender, Johnny “Imani” Harris, cited in Magee 1980:111)

#### - ***One Death Row or 35?***

Death row is not managed like the rest of the prison...and condemned prisoners are not treated like regular inmates. Always, ‘the condemned live with the barest services, the minimum contact, the slightest concern...Death row is the extreme case of the pain and deprivation of imprisonment, the prison’s prison...These offenders, seen as unfit for life in even the prison community are relegated to this prison within a prison (Johnson 1998:70)

In general terms, there are two forms of death row incarceration in the United States: reformed and unreformed (Johnson 1998:84). Reformed death rows are characterised by greater out of cell time for inmates, and unreformed detention being characterised by long time solitary confinement. The latter is now the norm for most death sentenced offenders in the United States (Johnson 1998:84). Neither form of death row incarceration has met with much approval by researchers and critics, both still entail discrimination of the offender, and his housing assignment, made solely on the basis of his sentence,



In the solitary death row...the prisoner is in isolation, an outcast who feels himself buried alive. In the congregate death row, the prisoner is a kind of leper confined with his disease-mates to a steel and concrete colony (Johnson 1998:84).

Whilst there have been some differences, if only relatively slight, in the ways death rows have been run and managed in the past, such differences are less pronounced now, as death rows have near uniformly moved towards a stricter management model (Babcock 2008). Conditions across death rows now typically emphasise maximum security, limited movement, austere, and spartan conditions, and individual isolation (Lombardi, Sluder, and Wallace 1997, Cunningham, Reidy, and Sorenson 2005). Perhaps the most prominent example of death row management becoming more severe and restrictive, after a comparably looser means of detention, historically, is offered by Texas: the most frequent executing state in the Union and housing the third largest death row population in the country<sup>23</sup>. Out of the relatively modest legal regulation of prison overcrowding, discussed in chapter three, in a consent decree signed in conjunction with *Ruiz v Estelle* (1985), a voluntary agreement made in return for an end to the litigation process, the conditions of death row in Texas were overhauled. Before the decree, severe restriction on movement was the norm for death sentenced offenders: in-cell meals, more than 20 hours per day of cell confinement, and constant restriction in out of cell movement. After the decree those conditions were only applied to death 'segregation' offenders, death sentenced offenders designated as in *need* of additional security restrictions (Cunningham & Vigen 2002:205).

Following the decree, approximately one third of death sentenced offenders were classified as work capable, taking jobs in the garment factory, or as janitors, or orderlies. Offenders were placed in cells without wire mesh, permitted to eat 'buffet style' in a common area, not handcuffed during their out of cell time, able to shower in the general prison population washing facilities, and permitted to be out of their cells up to 14 hours per day (Cunningham & Vigen 2002:205). The consent decree expired and "serious misconduct" on behalf of some inmates and, notably, a failed escape attempt meant the termination of the programme. Death sentenced offenders were then moved to a new facility, and the return to dominance of the segregation, high security model of incarceration (Cunningham & Vigen 2002:205). Death row inmates in Texas now spend 23 hours a day in their cells, are denied group recreation, work opportunities, as well as educational and occupational training (Babcock 2008). Death row in Texas is now described as thus,

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<sup>23</sup> See Appendix C: Death Row Populations

At the Polunsky Unit, approximately 409 male death row inmates are isolated in 60 square foot, single-person, solid-front cells for 23 hours a day. One hour daily of solitary exercise is permitted. Meals are served through a locking metal flap in the cell door, an architectural feature that is also utilized in handcuffing the death row inmate behind his back before his cell door is opened. The work program and group recreation that had been extended to well-behaved Texas death row inmates in the older Ellis I facility were discontinued. Further, the verbal social interaction that had previously been afforded by gate-front cells (i.e. a wall of bars) is markedly curtailed by the newer solid front cells. Visitation with loved ones is non-contact. With good conduct, Texas death row inmates can now earn the privilege of a radio, but not a television. This latter restriction would appear totally arbitrary, as televisions are provided in most of the cells in the most secure prison in the United States – the federal Administrative Maximum facility in Florence, Colorado (Lyon & Cunningham 2005 – 2006:15).

So oppressive have inmates found conditions on the new death row at the Polunsky unit that prisoners have likened themselves to those abused inmates imprisoned at Abu Ghraib prison in Iraq<sup>24</sup>. They have embarked on hunger strikes to protest their treatment and conditions of confinement (Blumenthal 2006), with 94% of their lives, they are now kept isolated in their cells (Mann 2010).

...forced to live in an 8x12 cage...I would have to use a steel toilet, connected to my steel sink, in plain view of the male and female corrections officers who would walk the runs in front of my cell (Graves 2012).

Texas is not the only state which has further tightened the restrictions and freedom given to death sentenced offenders after an escape was planned by inmates. In Arizona, following an escape attempt by some death sentenced inmates, death row was relocated to a high security part of the Florence prison complex, in a striking parallel to modern death row confinement in Texas,

...the high security Eyman Special Management Unit (SMU II) inmates are kept in windowless cells 23 hours a day, are allowed to exercise in solitude three times a week on their cell run's small enclosed concrete yard which is covered at the rooftop with

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<sup>24</sup> The treatment of detainees at Abu Ghraib prison in Iraq by American occupying forces was revealed, initially, through photographs showing the humiliation and degradation of inmates by their military guards. Investigations into the abuses perpetrated at the prison, documents several examples of known mistreatment of detainees, including beatings, threats, sarcasm, sexual abuse, rape, and humiliation (Human Rights Watch 2005)

steel grating, and are denied ANY physical contact with other humans, except by authorized correctional personnel, while imprisoned there. This represents a fundamental change in the policy, which had allowed, under some circumstances, limited contact visits as well as work opportunities (albeit on a condemned row chain gang), and it has meant a major change in the quality of life for those on death row (Lynch 2000b:14).

Virginia, however, is the only state in which, in the contemporary era, an escape from death row has succeeded. In 1984 six male death sentenced inmates housed at the Mecklenburg Correctional Center escaped the prison, some of whom were at large for 19 days (McKelway 2009). If the escapees were trying to escape not only their execution, but also the conditions of their detention, their actions had the counterproductive effect of worsening those conditions as prison officials, as in Arizona and Texas, tightened up security arrangements for death sentenced offenders in the wake of the breakout.

The night of the escape from Virginia's death row, May 31, 1984, was a catalogue of deviations from policy, policy that in itself to begin with was lax and loosely enforced. The regime of death row was so loosely structured that an escape attempt was planned years in advance, and was actually known to some guards (although the information failed to reach the higher levels of management who could have thwarted the attempt (McKelway 2009)). The design of death row, and the management of death sentenced offenders, is now vastly different than existed at Mecklenburg at the time of the escape. Indeed, years later the breakout 'continued to haunt Mecklenburg', although the topic is rarely discussed amongst guards (Gearan 1994) (death row was relocated from the facility in 1997). Before the escape, inmates on Mecklenburg's death row reported a world of "bribed guards, marijuana plants, homebrew alcohol, weapon stashes, unlocked cell doors, and jailhouse sex" (Jackson & Burke Jr. 1999:cover). After the escape, in an understandable response, isolation and restriction became the hallmarks of death row confinement at the Mecklenburg Correctional Center.

[Mecklenburg] was meant to be a tough antidote to a porous prison system embarrassed for years by escapes...Mecklenburg would erase the failures of a state correctional system that had fallen short in its most elemental role: ironclad security. Mecklenburg...would be a firm and lasting and unbreakable connection between crime and punishment (McKelway 2009)

Despite the promise of Mecklenburg, the escape was planned for years and revealed a prison that was "dominated by a band of convicts, not their keepers" (McKelway 2009). In hindsight,

correctional officials were dismayed by what they saw as overly liberal incarceration policies for Virginia's condemned men prior to the breakout but, prison officials at the time were sensitive to the wider culture of rehabilitation and prisoners' rights, sentiments that have since been fully reversed (Lynch 2005).

It was unbelievable to me that we were in a position of having to allow death row inmates to congregate with one another up until 10, 11 p.m. at night in the day room... Advocates were gaining ground with arguments that prisoners needed to be treated more humanely and given more freedom and educational opportunities. That's how the Brileys [the principle escapees] were able to operate, to gain control of what was going on (Harold Catron, then head of security operations at Mecklenburg, quoted in McKelway 2009).

The diary entries of death row inmate, Dennis Stockton, who was incarcerated on death row at the time of the escape, but was not one of the six escapees, published in excerpts and then forming the basis of a book written by two Virginian journalists offers an insight into the world of Virginia's death row before the escape. Although Stockton's account is shaped by journalistic philosophy, which sometimes has a tendency to labour the more lurid aspects of inmate accounts for mass market consumption, his account is one of a death row dominated by fear, violence, and corruption (Jackson & Burke Jnr. 1999). Virginia's death row was self contained, a closed world that differed from the general prison population by the restrictions imposed upon inmates, "[as] the state believed the condemned were beyond redemption there were no classes, no entry into the prison job market, no mixing with other prisoners in any but the most fleeting of ways" (Jackson & Burke Jnr. 1999:10). Still, regulations and their enforcement were lax,

The Brileys grew marijuana in their cells and had an information supply network that stretched throughout the prison and elsewhere. They preyed on sympathetic guards who could be bribed or threatened. From cigarettes to sex to cell-made wine, even the simplest items carried levels of cooperation and compromise. Death row was a den of sexual indulgence, brimful of homemade weaponry and hiding places. A filed hole in a table leg – hidden by plaster made from chewed paper and paint chips – was full of crude, razor-sharp knives (McKelway 2009).

The indifference of guards and the relative freedom given to inmates on death row soon changed after the escape of six inmates: aside from a general climate of austerity, restriction and resentment that developed (Jackson & Burke Jnr. 1999), group recreation ceased, out of cell time was limited, as

was the number of personal possessions allowed by each inmate. Since the escape, and at the new facility in Greenville, inmates spend 23 hours per day in their cells, there are no occupational or work opportunities available, and group recreation is prohibited (Babcock 2008). Additionally, a new guard force was hired, daily checks of cells were implemented and a new wall with a locked door was installed to the three cell blocks that comprised death row (Gearan 1994). Such was the change to Virginia's death row, and the lives of its inhabitants, that the particular conditions at the Mecklenburg Correctional Center, reformed after the escape, formed the basis of the decision of the European Court of Human Rights to block the extradition of German national, Jans Soering, on the basis that conditions there meant he would likely face exposure to 'death row phenomenon', discussed below. In these examples of relaxed detention, keepers, guards, and prison authorities have found justification for the punitive treatment of the condemned. Such failures have provided instrumental justification for establishing strict regimes of detention. From there, however, strict controls rendered the prisoners as powerless, unable to even garner support for better treatment. Thus, discrimination by guards, abuse, processes of dehumanisation are more easily implemented, left unchecked, cultures of hatred and mistreatment have grown and become normalised, all of which can be traced back to an institutional need based on the risk posed by offenders.

Modern death rows are architecturally designed, and managed by staff, to minimise the risk of escape: a justification for some states to incarcerate death sentenced offenders in the most punitive manner, a source of contention for inmates in those states (Hammer et al 2002:6). The restrictions imposed upon inmates on New York's death row, for example, before the death penalty was judicially abolished, were done so upon that basis. Although no escape was ever attempted in New York, officials were further able to defend death row conditions on the basis of preventing inmate violence.

Although not currently a death penalty state, in 1995 New York reinstituted capital punishment legislation for certain types of murder and, until the statute was ruled unconstitutional by the State Supreme Court in 2004 (*People v. Stephen LaValle*) a death row for male offenders was created at the Clinton Correctional Facility in Dannemora, New York. Four years after the Unit for Condemned Persons (UCP) opened at the prison, two committees of the Association of the Bar of the City of New York, the Committee on Corrections and the Committee on Capital Punishment, formed a subcommittee to "study, assess, and report on the conditions under which death row prisoners await their execution" (Hammer et al 2002:1). That report revealed a seminal point in the organisation of New York's death row; its design and organisation was modelled on the punitive segregation units that existed to house those inmates who had been so disruptive, violent, and/or

disorderly that they could no longer be safely housed in the general prison population (Hammer et al 2002:1). Those units that were used as a means of punishment for disruptive prisoners were then imposed on death sentenced offenders as a matter of policy, even when no prison rules had been broken and no institutional behaviour demanded it (Hammer et al 2002:1).

When death row was created at Clinton prison it was not done so in accordance with any state law that mandated death sentenced offenders be segregated whilst they await their execution. Indeed, Corrections Law §652(2) stated that a condemned prisoner, 'may, in the commissioner's discretion, either be kept isolated from the general prison population in a designated institution or confined as otherwise provided by law. The commissioner, in his discretion, may determine that the safety and security of the facility, or of the inmate population, or of the staff, or of the inmate, would not be jeopardized by the inmate's confinement within the general prison population'.

Whilst this section can, and has been, read as authorising, if not mandating an investigation into each death sentenced offender's personal characteristics, the result of which forming the basis of his housing assignment (Hammer et al 2002:2), all death sentenced offenders in New York were, automatically, housed in the Unit for Condemned Persons. Notably, they were left to spend their term of incarceration under that housing assignment even though the Department of Correctional Services Directive #0054 stated that death sentenced offenders should have only been housed in the Unit for Condemned Persons in the first instance. Following that initial housing assignment, as the Directive instructed, the commissioner was permitted discretion to allow an offender to join the general prison population; in practice, however, no such evaluation was made and death sentenced offenders were all left in the Unit for Condemned Persons for the duration of their incarceration under a sentence of death (Hammer et al 2002:3).

Whilst the design for death row was based upon the punitive segregation units of the prison there are, as briefly noted in the previous chapter, three stark differences between an offender sentenced to death, incarcerated on death row, and a non-capital offender housed in those units. Firstly, general prison population inmates that are sent to punitive segregation have proven themselves to be disruptive, having usually engaged in serious violence, directed gangs, and/or demonstrated a serious risk to correctional staff and other inmates whereas those under a sentence of death are detained in such conditions purely based on their sentence (Lyon & Cunningham 2005 – 2006:16). Secondly, a prisoner under a sentence of death is typically likely to spend more time under those conditions, never able to graduate out of them by exhibiting compliance with institutional rules and, thirdly, unlike inmates transferred from the general prison population, death sentenced offenders endure those conditions whilst being under the threat of execution.

The design of death row, modelled on the punitive segregation unit was never hidden, and was a most visible marker of the way death sentenced offenders were regarded, as the report of Hammer et al notes,

The hallmarks of punitive segregation – constant surveillance, nearly complete isolation of inmates from each other and from outsiders, and severe limitations on the privileges normally accorded inmates within the prison system – all are present in the UCP. [addendum: The SHUs (Special Housing Units) themselves have been regularly criticised as unduly harsh, and accused of producing the defiant, anti – social behaviour they seek to punish and deter] (Hammer et al 2002:2).

If the regime and management of death row in Alabama has been described as a ‘barrage of assault upon the condemned’ (Johnson 1981), then the regime and management of the Unit for Condemned Persons in New York could perhaps be described as even more of an assault. Despite protestations by inmates on the Unit for Condemned Persons, complaining of disturbed sleep, cells were illuminated 24 hours a day, allowing staff to keep a constant surveillance of the inmate,

...the point that the lights in the cells remain on makes no sense. If a person wanted to cause physical harm to himself or others the act would be done regardless... Also it is very, very hard to sleep... I’ve not had a decent night’s sleep since the new lights were installed. It’s uncomfortable sleeping with a towel over my head or sleeping with the light shining in my eyes (death sentenced inmates cited in Hammer et al 2002:6).

Surveillance of the inmates included continual observation by closed circuit television, and audio monitoring through the installation of in cell microphones (Hammer et al 2002:3). Visitation, by family members, only immediate family members, was limited to once per week, that visit was audio and visually monitored by correctional staff and, unlike prisoners in the general prison population who were allowed visits with non – immediate family members, they were restricted to non contact visitation, conducted through a sheet of plexi glass (Hammer et al 2002:4). Legal visitation, similarly, was always non contact and, compromising confidentiality, was visually monitored, as were telephone calls made to defence counsel by inmates (Hammer et al 2002:4). Whenever an offender was allowed to leave his cell, including for exercise, he was “mechanically restrained”, either handcuffed to the front with a waist chain, or behind the back with or without a waist chain, and with leg irons (Hammer et al 2002:5).

After assessing the conditions of death row in New York, the subcommittee recommended the protection of privacy for inmates in meetings with their defence counsel, allowing inmates to control

their in-cell lighting, and the expansion of the list of permitted visitors. Notably, they recommended equality in commissary privileges between death sentenced offenders and those prisoners in the general population (the report noted that certain items were denied, without just cause, to death sentenced offenders who were only given a \$15 allowance compared to other prisoners who were allowed \$55 per month), and to ease the isolation of the unit and allow death sentenced offenders to congregate together, to exercise in groups and enjoy communal recreational activities (Hammer et al 2002:9). For the subcommittee, the conditions, as they found them, amounted to extra judicial punishment: “harshness without purpose, a fair definition of cruelty” (Hammer et al 2002:12).

Before the subcommittee’s recommendations could be acted upon, New York’s death penalty was judicially abolished and death row was obsolete as inmates’ sentences were vacated. Similar recommendations have been made in Oklahoma, however; another newly built death row. Whilst many prisons, and by extension the death rows located there, are ageing buildings (in Mississippi for example, the age of the building that houses death row inmates leaves the prisoners without any air conditioning in the summer months (Hughes 2003)), death row in Oklahoma, the H Unit of the Oklahoma State Penitentiary, offers an example of state of the art design, purposely built as ‘a thoroughly modern penal establishment’. Opened in 1991, the design was such that the unit promised to maximize security and control, “while providing inmates and staff with a safe, modern environment in which to live and work” (undated internal Department of Corrections document cited in King 1994).

Despite its theoretical purpose, if anything, death row in Oklahoma, the H Unit, offers a more acute version of the pains of imprisonment suffered on older death rows: “solitary and sterile; a cold, oppressive human wasteland in which prisoners are interred – confined underground – in utterly self contained cell blocks replete with dimly lit and sparsely furnished concrete cages” (Johnson 1998:80). Such was the concern regarding the conditions on death row in Oklahoma that Amnesty International commissioned a report of H Unit which cast a less than favorable light upon the ‘modern improvements’ in confining death sentenced offenders (King 1994). Indeed, the report concluded

...the design of H Unit has...failed to provide a proper and reasonable balance between the needs of security and safety on the one hand and considerations of constructive activity, humanity and justice on the other (King 1994).

The report went so far as to equate the totality of conditions (23 or 24 hour a day cell confinement, lack of natural light, lack of staff contact, lack of recreational and work programs, and the poor



exercise environment) as amounting to “inhuman and degrading treatment” (King 1994). Indeed, the transition to a modern death row, in Oklahoma’s example, has been roundly met with much criticism for its effects upon condemned offenders (as was the case with a review of Arizona’s death row (Lynch 2000b)), which, like in many prisons that house death rows, immediately assigns its inmates to a restrictive housing assignment without any reference to their behavior whilst in custody (King 1994).

Physical containment, social isolation, and impersonal control are central objectives of all death row regimes. On Oklahoma’s H Unit, these functions reach absurd and even tragic extremes. The setting, in a nightmare version of a futuristic world, features remote control of convicts caged nearly – and in some case, totally – around the clock, under the dominion of officers who issue commands that emanate from distant control centers by way of intercoms. The very regime itself bespeaks dehumanization in all its essentials (Johnson 1998:82)

For a relatively new death row, inmates have only minimal space, furnishings, and privacy, any concerns for prisoner rights were neglected in the building of newer facilities: this, however, was intended by the design of death row in Oklahoma (King 1994). Death sentenced offenders are double celled, meaning two offenders to a cell, that cell, which is without a window, has only a small plexi glass sheet on part of the solid metal door to the cell (which covers bars), consists of two poured concrete beds, the space between which is only three feet, with a poured concrete table (26 inches wide) and a steel combination sink and water closet. Meals are served through a ‘bean hole’, a flap at the bottom of the door (King 1994). Inmates typically spend 23 hours a day in their cell, during the week, and 24 hours at the weekend. One hour per weekday is given for exercise (but is dependent on weather, staffing, and security concerns). The exercise yard though is similarly restrictive as the cells, 23ft long, 22ft wide, surrounded by 18ft high concrete walls meaning that, aside from the mesh covering the steel girders that comprises the roof to the enclosure, the space would give the effect of being simply another room to the unit (King 1994). Moreover, now that inmates are double celled, so reducing their isolation, inmates feel the enforced companionship in a confined space negatively, they often choose to alternate exercise days to be able to spend some time in private; even the three times a week inmates are allowed to shower is done with cellmates (King 1994).

The H Unit was always intended to be a non contact facility (King 1994) (even though cells were designed for dual occupancy). Visits are therefore non contact and the inmate must remain in leg irons for their duration (King 1994). Non contact, however, is most readily applied to staff prisoner

relations: when an inmate leaves his cell, for showering, visitation, or recreation, the cell is opened electronically from a central control, and guards supervise prisoners from the other side of the walkway, separated by bars (King 1994). When staff need to communicate with prisoners, they use the intercom system (theoretically a two way system, also permitting prisoners to communicate with guards, reports from prisoners, however, claim that guards often ignore those attempts or switch the intercom system off) (King 1994). Contact with guards, physical contact, is generally limited to being placed in handcuffs and leg irons when inmates are escorted to attorney visits or the law library, or when food is delivered through the slot at the bottom of the cell door, the result being that inmates feel isolated from staff; as King notes, “the non – contact philosophy can hardly give out any other message than that staff – prisoner contact is undesirable” (King 1994). Such isolation, in conjunction with the physical environment of the H Unit, combine to produce symptoms of mental illness amongst the prisoners: “We were told of prisoners who cried or moaned incessantly, or who heard voices or saw ghosts and who threatened injury to themselves or others” (King 1994). For Johnson, this is a consequence of a death row built around isolation and solitary confinement,

Prisoners on solitary-confinement death rows routinely see themselves as ‘the living dead’, their death row worlds as settings that impose ‘a living death’. Modern high security facilities – sterile, empty, marked by a suffocating routine – do nothing to dispel these sentiments (Johnson 1998:82).

Although the warden, after being presented with the facts outlined above, and after hearing complaints from inmates regarding food, and access to medical, dental, and psychiatric services (Johnson 1998:81) gave assurances that moving death sentenced offenders into the general prison population was being actively considered (or at least the implications of such a move were being considered) death sentenced offenders currently remain isolated in the H Unit. Although relatively new, that manner of incarceration has been heralded as a step back in both the design and management of death rows in the United States:

Oklahoma’s death row gives us a glimpse of solitary confinement in the modern penal dungeon that may well be the death row of the future. One cannot help but note that the chilling human environment this death row offers brings to mind the regimen of solitary confinement ruled unconstitutional in the *Medley* case<sup>25</sup> a century ago (Johnson 1998:84).

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<sup>25</sup> In *re Medley* (1890), the defendant was held in solitary confinement in a Colorado prison whilst awaiting his execution, the United States Supreme Court, in ruling such solitary confinement as unconstitutional, owing not

Although there may exist subtle differences between death rows, different architectural design and age, varying institutional histories, for example, nationally, death row confinement has become more punitive over time. Making a comparison between the two national portraits of death row amenities and facilities compiled in recent years (Hudson 2000, Babcock 2008) more than ten states have removed work and educational opportunities from death sentenced offenders<sup>26</sup>, even if they were only theoretically available before, and that calculation is made after discounting at least 12 different states for which no such conclusion can be reached owing to absent or partial responses in either or both sources. Generally, however, restrictions on death row inmates have increased and available programmes, have been curtailed.

	Hudson (2000)		Babcock (last updated 2008)		
	Work Programmes	Education programmes	Occupational training	Work opportunities	Educational training
Alabama	No	Unavailable	No	No	No
Arizona	No	Correspondence; institutional TV	No	No	No
Arkansas	2 hour shifts (if approved)	Available upon request and approval	No	No	No
California	No	Correspondence; outside college courses offered by satellite	No	No	No
Colorado	May apply as barbers or janitors, in their pods	Regular classes; individual tutoring; GED preparation; ESL; post high school classes	Unknown	Unknown	Unknown
Connecticut	Cleaning details; barbers	Correspondence or via assigned teacher	No	Limited	No
Delaware	No	None			
Florida	No	None			

only to its inherent severity but because it comprised an additional sanction, noted that such confinement had been used as “a further terror and mark of infamy” and comprised “an additional punishment of the most important and painful character” (Johnson 1998:84).

<sup>26</sup> Those states identified as increasing restrictions on both work and educational opportunities available to death sentenced offenders are: Arizona, Arkansas, California, Idaho, Indiana, Kansas, Louisiana, Mississippi, Nevada, North Carolina, Oklahoma, and Wyoming.

Georgia	No response	No response	No	No	No
Idaho	No	TV programming	No	No	No
Indiana	For a limited number	Correspondence	No	No	No
Kansas	No	Individual tutoring; GED preparation	No	No	No
Kentucky	Yes, but no jobs that interact with the general population	Correspondence			
Louisiana	No	Correspondence; literacy course with staff supervision	No	No	No
Maryland	Barbers and sanitation	Correspondence			
Mississippi	No	Correspondence	No	No	No
Missouri	Yes	Regular classes; correspondence; individual tutoring	No	Limited	No
Montana	In the school	Self study			
Nebraska	Porters	Correspondence; individual tutoring			
Nevada	No	Correspondence	No	No	No
New Hampshire	Sewing project	Regular classes			
North Carolina	No	Correspondence, at inmate's expense	No	No	No
Ohio	May apply for unit jobs on 6 month rotation	Correspondence; individual tutoring		Some jobs within housing units	Basic adult literacy education, pre GED classes offered
Oklahoma	No	Correspondence; material provided for self study; GED preparation	No	No	No access to traditional and/or vocational classes
Oregon	Custodial on tier	Materials for self study if requested	"shall be provided in accordance with security requirements as approved by the Assistant Superintendent"		Self study
Pennsylvania	Restricted to special	Basic literacy; post	Yes	Yes	"made

	housing unit	secondary opportunities at inmate’s expense; ABE; GED preparation; self study programme			available in certain circumstances”
South Carolina	No	Unavailable	No	Limited opportunities	No
South Dakota	No	None	No	No	Access to prison library materials
Tennessee	Level A inmates have first choice; 20 assigned to prison industries performing data entry	Maximum security level would require individual tutoring	No	No	Self study, correspondence
Texas	All jobs currently suspended	None	No	No	No
Utah	Pending	Correspondence			
Virginia	Unavailable	Unavailable	No	No	Correspondence, facility video programming
Washington	Stamping address on envelopes	Correspondence		Limited	No
Wyoming	No	Regular classes; correspondence	No	No	No

- ***Different Death Rows: Variations on the Same Message***

Previous research has asserted that there is little difference between one death row and another in another state (Johnson 1998:71). Yet, the conditions and regimes of death rows in different states, hold differences for the condemned or, perhaps more accurately, variation on the forms of degradation, restriction, and neglect they suffer. Although each death row is run on a similar basis, as listed by both Hudson (2000) and Babcock (2008) there are some subtle differences between death rows: from the vermin infestation of Parchman's death row in Mississippi, to the 24 hour audio and visual surveillance of death sentenced offenders in New York, or the complete reversal of the liberalisation policy that previously characterised conditions on death row in Texas. Each death

row is unique to the state and prison it is housed in. Although detailed appraisals, even descriptions, of many death rows are sparse, whether the numbers of death sentenced offenders deter investigation (7 states house five or fewer death row inmates<sup>27</sup>) or because prison authorities block such investigation, there are, from a variety of sources, several investigations of various death rows that illuminate how life has been constructed for a death sentenced offender in various states. The divergent experiences of different death rows and their descriptions are, however, invariably underpinned by a singular sentiment,

Death row is barren and uninviting. The death row inmate must contend with a segregated environment marked by immobility, reduced stimulation, and the prospect of harassment by staff. There is also the risk that visits from loved ones will become increasingly rare, for the man who is “civilly dead” is often abandoned by the living. The condemned prisoner’s ordeal is usually a lonely one and must be met largely through his own resources. The uncertainties of his case – pending appeals, unanswered bids for commutation, possible changes in the law – may aggravate adjustment problems. A continuing and pressing concern is whether one will join the substantial majority who obtain a reprieve or will be counted among the to-be- dead (Johnson 1981:4)

For Robert Johnson, even more so than the method by which the condemned are put to death, death row incarceration, is “a separate and painful punishment” which captures all that is “truly degrading about the modern death penalty” (Johnson 1998:84). Whether incarcerated on a modern death row, like Oklahoma, or incarcerated in an older facility like Parchman Penitentiary in Mississippi, the suffering of men under a sentence of death is uniform and little has been done over time to ease that suffering. Additionally, as the testimonies of prisoners attest, that suffering is compounded by the rules of the institution and their enforcement by prison guards: choices made by individual actors within the prison system are geared towards ensuring the most spartan, indeed punitive, incarceration for death sentenced offenders, as seen in the case of New York.

Reports and assessments of life on various death rows demonstrate the incarceration of the condemned as additional suffering beyond mere imprisonment. Compared to inmates housed in the general population, inmates on death row are subject to additional security measures and restrictions that are often taken to extreme lengths. Staff contact is minimized, death sentenced offenders viewed as dangerous animals, the very fact that they are viewed as such, hinders reform of older death rows like that which exists in Mississippi. Even though the imposition of extreme

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<sup>27</sup> See Appendix C: Death Row Populations

isolation has been recognized as a cause of psychological breakdown and mental illness (Zimbardo and Haney 1998, Haney and Lynch 1997), a point even recognized by the courts (Re Medley 1890), that isolation is imposed as a matter of course and only in reference to the sentence the inmate is subject to, not in reference to their institutional behavior. Whilst inmates in the general prison population are allowed freer access to amenities and privileges to make their incarceration more bearable, those ‘crutches’ are routinely denied to their death sentenced counterparts. It is striking though how far the denial of services for condemned men goes, as in Mississippi where the denial of even basic psychological and mental health care has a particularly detrimental effect upon the prisoners. There is thus an underlying sentiment in all cases of death row incarceration: the condemned are beyond redemption and therefore undeserving of adequate care or facilities, as summed up by one prisoner: “the doctors think that an aspirin is too good for prisoners sentenced to die” (Johnson 1979:182). Such is this nature of death row confinement that a possible link has been asserted between the conditions of that imprisonment and the voluntary execution rate (McGunigall–Smith 2004:132, ACLU 2008a); with some offenders preferring death over their death row confinement, discussed below.

- ***Communicative Casualties: Voluntary Executions and Death Row Conditions***

I saw guys who dropped their appeals because of the intolerable conditions. Before his execution, one inmate told me he would rather die than continue existing under these inhumane conditions. I saw guys come to prison sane, and leave this world insane, talking nonsense on the execution gurney. One guy suffered some of his last days smearing feces, lying naked in the recreation yard, and urinating on himself (Graves 2012)

The oppression of death row and the denial of human contact, privileges, and even relatively basic facilities, including adequate psychological care, have been cited by some death sentenced prisoners as reasons for abandoning their appeals and volunteering to be executed (ACLU 2008a). As of November 2012, 139 death sentenced offenders had waived their appeals and volunteered to be executed, comprising more than 10 and a half percent of the 1,312 offenders put to death across the United States since 1976. One possible cause cited for the number of inmates volunteering for execution is the nationwide adoption of lethal injection and the relegation of the electric chair and gas chamber to secondary, alternative methods, a lethal injection execution not bearing the outward aesthetics of a painful death (McGunigall–Smith 2004:132). Another noteworthy factor, which

invites future investigation, is the race of the offender: more than 85% of inmates who have volunteered for execution have been white even though white defendants account for only 44% of people on death row (Death Penalty Information Center). Conversely, whilst black offenders constitute 42% of inmates with a death sentence they account for only 4% of voluntary executions (for Latino and Hispanic offenders the ratio remains relatively balanced, accounting for approximately 1 in 10 death sentenced offenders and slightly over 8% of all voluntary executions (Death Penalty Information Center)).

However, a number of lawyers handling death penalty appeals have noted the conditions of confinement for death sentenced offenders as being the 'primary reason' for more than 10% of offenders volunteering to be put to death (McGunigall-Smith 2004:132).

Danielle Simpson's scrawled note to the appeal court left the judges in no doubt. "If I can't be free – Kill Me!!" the Texas death row prisoner demanded in a rambling and sometimes incoherent handwritten plea earlier this year. "I'm tired of being in a[n] institution that's unjust, degrading, and corrupted... I'm tired of struggling to survive in a system that's highly injustices[sic]. I'm ready to die!!" Simpson underlined "Kill Me" twice. The court granted the convicted murderer his wish. It ruled that he was quite reasoned in deciding that life on death row was worse than death itself (McGreal 2009).

Danielle Simpson was put to death by the state of Texas on November 18<sup>th</sup>, 2009. Simpson's lawyer argued that he was severely mentally troubled, delusional, and despite years on anti-psychotic medication he had "no grasp of reality" (McGreal 2009). That contention, however, was not recognised by the legal system that declared him competent to take his own life; to waive his appeals and volunteer for execution: despite eight years under death row conditions: "his desire to forego further litigation is knowing and voluntary" (Simpson v Quarterman 2009).

Whether the prospect of death is welcomed because of mental deterioration brought about by conditions of confinement for death sentenced prisoners is debateable: studies have documented that, as a prisoner group, death sentenced offenders are more likely to suffer from mental illness before they are incarcerated (Lynch 2005:69). Yet no longitudinal studies exist that have documented deterioration over a period of death row confinement, much less factually attributed that deterioration to the manner of confinement. That, however, does not disbar the possibility.

Suicide can be a means of escape for any prisoner. Of course, prison authorities, theoretically at least, try to prevent any prisoner, on death row or in the general prison population, from taking their own life. However, on death row the preserving of the body for execution is of paramount concern,



indeed, that preservation, Robert Johnson asserts, “reaches an extreme in suicide prevention efforts that amount to treating the person like a piece of meat” (Johnson 1998:94). In Texas, for example, a suicidal prisoner on death row was restrained particularly severely to prevent him from acting on his suicidal impulses, just so he could be executed as per his punishment, at a time that the state decided, at a time when friends and family of his victims could participate, as observers.

[he was] placed in a straightjacket that was left open at the back to secure him to a bare mattress on the bunk. In addition, handcuffs were placed on his wrists. A crash helmet much like a motorcyclist would wear, was placed on his head and there he lay for weeks, helpless, alone, and drugged (Johnson 1998:94).

It is indeed a contradiction that the guards of death row seek to protect the body only so they can later kill it. In Texas, inmates have been forcibly medicated to ensure their competence for execution (Associated Press 2012(c)): ‘healing’ the body to execute it later. In 1995, at the Oklahoma State Penitentiary, death sentenced offender Robert Breechen took an overdose on the day of his execution. Upon discovering him, prison officials rushed him to a local hospital where doctors were able to save his life by pumping the medication from his stomach. He was then returned to the prison and put to death, only a few hours behind schedule (Peterson 2012). The state, was to decide when Robert Breechen would die, he would not be permitted to cheat that system, to deny the executioner, and the message that the state sought to convey at, and by, his lethal injection.

Unique to the capital offender, however, is the option to drop his appeals and volunteer to be executed, to end his period of incarceration through death. The degree of autonomy that can be exhibited by a death sentenced offender after being subjected to death row confinement is a point of contention, a waiver of appeals may be more a reflection of ‘environmental coercion’ than an independent stance of the prisoner (Cunningham, Sorenson, and Reidy 2005:318).

In her interviews with death sentenced inmates at Utah State Prison, McGunigall-Smith (2004) has documented at least one instance in which a prisoner, owing to the regimes of his confinement, waived his appeals and volunteered for execution (McGunigall-Smith 2004). Some inmates interviewed felt that volunteering for execution, as opposed to a personal suicide attempt such as hanging themselves, had more of an “impact”, forcing the state to assist them, forcing others to take notice and, most importantly for them, taking control of the time they would die (McGunigall-Smith 2004:122). The offender who ultimately waived his appeals, stressed the pressures of his death row confinement,

I may not be here next summer – don't be surprised if I'm gone. I still need something to live for – I still need that certain something. If you put a person in a box and leave them in that box for ten years that person will think about killing himself. We all need something to live for. The little things to look forward to like comissionary items, mail, TV, football on TV are enough for some – not for me. I have to have more human contact. It gets to you. How do you act when it does happen [human contact] – you'll be like a scared little animal (death sentenced offender quoted in McGunigall–Smith 2004:122)

The inmate made those comments in the summer of 1998, and despite some modest changes in the management of death row, including a relaxation of the isolation imposed on inmates (increased recreation and out of cell time, for example), "his trust was gone" as prison authorities had relaxed custodial rules before, only to tighten them once again (McGunigall–Smith 2004:135). The following April he formally gave up his appeals, and in October 1999 he was put to death by lethal injection (McGunigall–Smith 2004). It was the visit to a hospital that McGunigall–Smith cites as pivotal in his decision to waive his appeals,

It was pretty cool [being in hospital] because [following the surgery] I had to walk around and I couldn't be handcuffed. There were two members of the SWAT team there all the time. 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... I got to drink apple juice, which I hadn't had in a long time. 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 had more physical contact than I had in years. The bed was comfortable. I felt like I had woke up from a nightmare and I was back where I was supposed to be, back in reality. Now I'm back in the nightmare. 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! (McGunigall–Smith 2004:135).

Similarly, Robert Lee Massie convicted in California of first degree murder for a 1965 shooting, waived his appeals and volunteered to be executed. In prison Robert Massie was raped and stabbed, he attempted suicide and, by waiving his appeals on five separate occasions, found himself in the

waiting room adjoining the gas chamber at San Quentin Prison before, each time, reversing his decision (Chandler 1998:1898). That experience, however, was Massie's first experience with death row. After the United States Supreme Court ruling in *Furman v Georgia* (1972) ruling capital sentencing schemes unconstitutional, Massie was released on parole in 1978. Within eight months of his release, Massie killed again, during the robbery of a Californian liquor store. Massie asserted that he did not object to spending his life in prison but did object to a lengthy period spent on death row: "death is much easier to take than continuing the barren and hopeless existence of so-called life in prison" (Robert Lee Massie quoted in Chandler 1998:1898). Robert Massie then embarked on a series of legal challenges to end his life, trying to determine his competency to waive appeals and be put to death. Eventually he succeeded and Massie was executed March 27<sup>th</sup>, 2001: "he was ready to leave death row by the only route available" (Saunders 2001).

Although those inmates gave up their appeals, each decision to be put to death is a subjective experience. That decision is undoubtedly influenced, or at least has the potential to be influenced, by more than the conditions of death row confinement. Reaction to those conditions can only be individual and dependent upon personal characteristics. It must be noted, in that regard, that there are thousands of other offenders on death rows across the United States who continue to fight their convictions, overcoming, at least dealing with the pressures of their death row incarceration and refusing to waive their appeals and volunteer for execution.

In Mississippi, according to prosecuting attorneys, in a 2004 case brought against the Department of Corrections in relation to conditions on death row at Parchman State Penitentiary, it was a policy of "official indifference [which] brought the men on death row to the brink of physical and mental breakdown" (ACLU 2004a). After touring the death row at Parchman in 2002, psychiatrist Terry A. Kupers reported,

The presence of severely psychotic prisoners who foul their cells, stop up their toilets, flood the tiers with their excrement, and keep other prisoners awake all night with their incessant screams and shouts are virtually certain to cause medical illness and destruction of mental stability and functioning (Kupers 2002:6).

Specifically Dr Kupers found a high percentage of death sentenced inmates suffering from severe mental illness: six suffered from "obvious psychosis with current signs including auditory hallucinations and delusions", a further six suffered from severe depression and other mood disorders, and several cases were reported of severe anxiety, panic disorder, stress disorder, and "other significant mental illness" (Kupers 2002:6). Dr Kupers attributes psychological decline, not

only to idleness and isolation alone but in conjunction with the particular conditions on Parchman's death row, "including but not limited to the extremes of heat and humidity, the grossly unsanitary environment, the vermin, the arbitrary and punitive disciplinary policies, and inadequate health and mental health care" (Kupers 2002:31).

The heat of the Mississippi summer has been documented as a particular health risk for the offenders on death row. When Dr Kupers toured the facility in August 2002 he noted temperatures as high as 97° Fahrenheit (Kupers 2002:23). At the time the report was made, inmates were liable to have fans confiscated from them as arbitrary punishment by correctional personnel. It was a conclusion of a sister report made by Vincent Nathan that fans should be given to all inmates and should not be confiscated for any reason whatsoever (Nathan 2002:1).

It was the reported conditions of Mississippi's death row, conditions that caused a mass hunger strike amongst death sentenced offenders, which prompted the American Civil Liberties Union (ACLU) to commission reports into the psychiatric services, security, sanitation, and well being of inmates on the state's death row. The findings of those reports formed the basis of a lawsuit that the ACLU subsequently brought against the Department of Corrections in 2002.

Of particular concern to investigators and the ACLU were the effects of the austere confinement, and what they perceived as arbitrary rule enforcement, and their subsequent impact upon the mental health of the inmates,

A certain modicum of dignity and self respect is a requirement for the maintenance of sound mental health. Most of the prisoners I spoke to were very upset by what they consider arbitrary rules that inflict unnecessary pain and deprivations. For example, policy prohibits prisoners from moving their mattresses from the concrete slabs underneath the window, but there are several reasons why prisoners urgently want to move from under their windows. When state prisoners in cells above flood their toilets, or when rainwater pours in along the outer cell wall onto the bed, yet the prisoner is not allowed to move his bed...away from the water. In many cells, the afternoon sun shines through the windows directly onto the prisoners bunks, yet policy prohibits the prisoners from covering their windows to avoid the sun's glare. Several inmates spoke of their attempts to lie on the floor in order to gain relief from the excruciating heat, only to be told by officers that they will be given a disciplinary write – up if they lie on the floor (Kupers 2002:25).

Dr Kupers' report into psychiatric services was a damning indictment of inadequate care and concern for the psychiatric needs of mentally ill death row inmates in Mississippi and, by consequence, through cell rotation the effect upon all death sentenced inmates.

The problem with their not being adequately cared for and treated is twofold: First, the seriously disturbed prisoners are left to deteriorate even further because of the severe idleness and isolation on Death Row...and as a result their psychiatric disturbances become more severe, chronic and unresponsive to future treatment, and therefore their prognoses become much worse. Second, prisoners in the neighbouring cells suffer immense pain, discomfort and psychiatric breakdown because of the presence among them of prisoners who cannot control themselves and foul the cell block, flood the tiers, throw excrement and keep the others up day and night with their loud noises and hollering (Kupers 2002:16).

To manage death row prisoners who correctional personnel deem as 'high security risks' the strategy in Mississippi is to move them from cell to cell, on average, once per week. As well as the obvious disruption to all inmates, owing to the high prevalence of psychiatric disorder and the behaviour of mentally ill prisoners, who smear their cells with excrement and block up their cell toilets, the effect is even more profound, even dangerous for other inmates who take up occupancy in those cells, as Dr Kupers notes, "This technique for managing security risks constitutes a kind of physical and psychological punishment that can drive men stark raving mad, or to suicide" (Kupers 2002:19). The effect of that management technique upon other, non mentally ill, incarcerates is documented by a personal letter from a death row inmate,

They moved me into Cell #13, which had been Ronnie C's cell. Cell #13 has no electrical outlet or TV hook up. I couldn't use any of my electrical appliances. My fan was sorely missed! The cell was full of mosquitoes, as the window was open and the screen has a huge gash in it. There was feces and dried urine all over the floor and walls, as well as the bars and the bed. I asked officers for a broom and mop for 5 hours, but all they gave me was a piece of towel and a little disinfectant, which I used on the bars as my food had to pass through them. The heat and mosquitoes were too bad to sleep, so I spent most of that night (the 24<sup>th</sup>) scrubbing the cell. You may recall that I weigh 320lbs. The only way I could scrub the floor with that piece of towel was to get down on my hands and knees. I tried to lie on the bed and clean a spot on the floor to begin on my hands and knees. I wanted to keep from getting the feces and urine all over me, but I failed miserably! When I had the cell as clean as I could get it, I washed myself, and then my

boxers. A sergeant came along and told me to take the clothesline down or get written up. It just seemed that everything was working on me as punishment (death sentenced inmate cited in Kupers 2002:19).

A report by James Balsamo on the sanitation, environmental health and general safety conditions of death row in Mississippi, similarly commissioned by the American Civil Liberties Union (Balsamo 2002) is as damning as the investigation into psychiatric services. The report documents several aspects of what it calls 'deplorable detention' and recommended conditions on Parchman's death row to be immediately remedied, including the: inadequate sewage disposal system, water supply, inadequate insect and pest control, response to heat and ventilation issues, cell sanitation, access to showering facilities and personal hygiene, cell lighting and cell furnishings, preventative maintenance and system monitoring, food sanitation and hygiene, as well as unsanitary bedding and clothing, excessive noise levels, lack of access to prescribed medical diets, and a non functional fire and emergency system (Balsamo 2002). The report painted a picture of filthy cells, poor access to personal hygiene and sanitation, exposure, and staff indifference to a number of environmental problems including heat stroke, heat death, and West Nile Virus (Balsamo 2002:3).

Conditions on death row at Parchman were, according to the adjoining report of Susi Vassallo, again conducted for the American Civil Liberties Union (Vassallo 2002), 'shocking' and "will result in illness, permanent disabilities, and premature death of prisoners incarcerated there" (Vassallo September 2002:1). Indeed, researchers were clear about what they saw as the deleterious effects of incarceration on death row in Mississippi,

Parchman's Death Row rivals any prison I have seen for cruel, harsh and inhumane conditions of confinement, even compared with super – maximum facilities. These conditions are not warranted on penological grounds, and they cause Death Row prisoners at Parchman intense and needless pain and suffering ... It is probable that as a result of these conditions, a significant proportion of the prisoners have developed or will develop psychiatric conditions that interfere with their ability to cope with life in prison and in the community<sup>28</sup>, and that many have suffered or will suffer breakdowns that become chronic and chronically disabling (Kupers 2002:4).

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<sup>28</sup> Researchers made reference to a possible future in the community by noting the low execution rate of Mississippi: of the 183 death sentences imposed in Mississippi between 1976 and 2002, five people were executed, four had their convictions reversed, and another five were resentenced to life imprisonment. In 41% of the 166 direct appeals it ruled upon, the Mississippi Supreme Court reversed the death penalty; relief was

Although the evidence collected on behalf of the American Civil Liberties Union was presented to a federal judge who found that the conditions on Mississippi's death row were a violation of the Eighth Amendment prohibition on cruel and unusual punishment, and thus an extra punishment in addition to their future execution, the Department of Corrections chose to appeal that initial ruling on a legal technicality (Hughes 2003). The judge had ordered the department to make 10 immediate improvements to Parchman's death row including better plumbing, lighting, and insect control, as well as providing amenities and facilities to tackle heat related illnesses: fans were to be provided to inmates as well as ice water and showers when the temperature exceeded 90 degrees. Additionally, correctional officials had pledged to improve psychiatric services offered to death sentenced offenders and install window screens to protect inmates from insects and vermin and diseases such as West Nile River Virus as identified in James Balsamo's report. Although improvements were promised by July 2003, the American Civil Liberties Union has maintained that "no real or lasting changes have been made" (Hughes 2003): the attitude towards death sentenced offenders, and the treatment and conditions borne of that attitude, remain largely unaffected.

However, of the 18 offenders put to death in Mississippi in the current death penalty era, all men, none has volunteered for execution (Death Penalty Information Center) even though representatives for the American Civil Liberties Union who, after touring death row at Parchman, testified that it displays some of the most "cruel, harsh, and inhumane conditions" of any death row in the country (Kupers 2002:sec 4). If conditions were enough, in themselves, to solely account for an offender who waives his appeals and volunteer for execution, Mississippi would logically own one of the highest voluntary execution rates of the country; the rate is zero (Death Penalty Information Center). Similarly, New York's death row, what was one of the most austere in the country, its conditions described as the imposition of cruelty, and an additional punishment to the inmates' death sentence (Hammer et al 2002) did not spur any of the men to waive their appeals; like Mississippi, New York's voluntary execution tally was zero (Death Penalty Information Center).

Rates of psychological disorder amongst death row inmates are often disproportionately high when compared to other inmate groups, with conditions of confinement having been reported to exacerbate, if not necessarily to have caused, those disorders (Cunningham & Vigen 2002:191). Upon their entry into the prison system, death sentenced offenders already exhibit a higher rate of mental illness and disorder such as psychoses, major depression, and post traumatic stress disorder (Lynch 2005:69). Moreover, once inhabiting death row psychological care, as well as medical care

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granted in federal habeas or following federal habeas court remand in 21 cases and, at the time of his report, sixty seven sentences were still under review (Kupers 2002:5)

and spiritual care, is relegated behind the 'impersonal requirements of custody' and such personal needs are often discounted entirely. Mona Lynch, in her research into Arizona's death row, a modern, 'super max' death row, asserts that the conditions of confinement for death sentenced offenders may be working to 'prime' the condemned for death (Lynch 2000b). Noting that living conditions on death row can be a motivation for a prisoner to abandon his appeals, Lynch argues that "those waiting to be executed may well be readied for the process by the absence of a life experience in their final months, making them less resistant to the final step, and prompting some to simply give up and give in" (Lynch 2005:69).

In a legal challenge to one inmate's competency to waive his future appeals, his confinement and its effect was described in court,

Mr. Comer describes the conditions of his confinement in nothing short of Orwellian terms. He tells us that he is in 'sensory deprivation', has no access to legal materials, is permitted nothing in his cell, and must walk continuously for fear of becoming a 'veggie'. Mr. Comer's choice between execution at the State's hands and remaining in the particular conditions of his confinement may be the type of 'Hobson's choice' that renders his supposed decision to withdraw his appeal involuntary... The issue is whether Mr. Comer's conditions of confinement constitute punishment so harsh that he has been forced to abandon a natural desire to live (Comer v. Stewart 2000:918)

In Comer the federal district court for Arizona had to rule on two issues: whether he was in fact mentally competent to waive his appeals and, if so proven, whether that waiver was voluntarily made, whether in fact the conditions of confinement on Arizona's death row had compelled his decision. The presiding judge, Judge Roslyn Silver, in addition to reading a wider array of personal materials written by Comer himself, visited death row and Comer's cell to evaluate his conditions of confinement, ultimately ruling that Comer was competent to waive his appeals and, pivotally, that he had done so voluntarily (Lynch 2005:72).

Long term incarceration, whether in a general prison population or whether confined to a death row, can be a psychologically destructive experience; some prisoners can cope and others cannot. The decision to die, to end one's life is a hugely subjective one and it would be misplaced to assert that 137 offenders had all chosen to waive their appeals owing to their conditions of confinement and the manner of treatment they received whilst incarcerated on death row. Conversely it would be equally misplaced to assert that none of those 137 individuals waived their appeals solely



because of those conditions or that manner of treatment particularly given the increasing recognition of 'death row syndrome'.

- ***Death Row Syndrome and Death Row Phenomenon***

Death constrains death row; death row constrains those condemned to die. Condemned captives—cum corpses suffer an existence rather than a way of life – they are the living dead until the execution team can 'get them dead'. That such an existence brings psychological devastation in its wake hardly requires elaboration (Johnson 1998:93)

Psychological devastation, however, does require elaboration, particularly as regards the onset or presence of death row syndrome; a psychological condition unique to death sentenced offenders who are incarcerated awaiting their execution. Although research data has demonstrated the deleterious effect of prolonged death row incarceration (Lyon & Cunningham 2005–2006:4) death row syndrome refers to a precise psychological state, despite it not being currently recognised by the American Psychiatric Association or the American Psychological Association (Smith 2008:4, Harrison and Tamony 2010:2, Blank 2006:752). Death row syndrome is thus a legal not a clinical term, although vaguely defined, in its most common usage it refers to “the dehumanizing effects of living for a prolonged period on death row” (Wallace-Wells 2005).

Death row syndrome and death row phenomenon are frequently used interchangeably (Smith 2008:4) but are, in fact, two distinct concepts. Death row phenomenon, comprising of three components, refers to the conditions of confinement on death row whilst death row syndrome describes the resulting psychological effects of that confinement (Smith 2008, Harrison and Tamony 2010). The three components that are theorised to constitute death row phenomenon consist of the temporal (the amount of time spent on death row between sentencing and execution), the physical (the conditions in which the prisoner is held), and the experiential (the meaning of living under a sentence of death) (Smith 2008).

Death row syndrome can occur when a significant length of detention, whilst awaiting execution, is coupled with isolation and poor conditions of detention such as those conditions previously described. Psychological responses to such confinement have been documented to include lethargy, a subjective experience of marked distress, anxiety, mood disorders, appetite disturbance, and a sense of impending emotional breakdown, paranoid hallucinations, suicide, and self-mutilation

(Lyon & Cunningham 2005–2006:20). As noted in chapter three, the United States Supreme Court has never recognised death row syndrome as a condition, although it has been recognised by foreign courts. Yet, it is by no means an unknown phenomenon in the United States, particularly after the much publicised execution of Michael Ross.

The execution of Michael Ross in Connecticut in 2005 drew widespread attention to the condition as several commentators asserted that he gave up his appeals, and volunteered to be put to death, because he was in fact suffering from death row syndrome (Christoffersen 2005). His execution was certainly a media focus but, it must be noted, although central to Ross's execution were the claims that he was suffering from death row syndrome, his was also the first execution to occur in New England in 45 years, and so, in itself, an execution of newsworthiness (Associated Press 2005b).

Reports of the conditions on death row in Connecticut, from prisoners, correctional workers, and Ross himself motivated attorneys to raise death row conditions, the isolation of being confined to his cell for 23 hours a day and the despair it brought upon him, as a factor in his decision to waive his appeals. Former Deputy Warden at the Northern Correctional Institution, which houses Connecticut's death row, described it as a cave, and noted that on numerous occasions it had been suggested that staff assigned to Northern should be rotated every two years because of the effect it could have on *their* mental health (Christoffersen 2005). Such a recommendation demonstrates a knowledge of the deleterious effects of those conditions and, at best, an indifference to the suffering of the condemned. However, Ross was examined by an experienced forensic psychologist, Dr. Norko, who found no major psychiatric illness (other than sexual sadism) and so claimed he was competent to waive his future appeals, as did the Connecticut Supreme Court who set a date for his execution. Ross's former public defenders attempted to intervene, but without success. On the day of Ross's first scheduled execution his attorney, T. R. Paulding, who had supported his client's right to volunteer for execution, called a halt to the execution after a telephone discussion with Chief U.S. District Judge Robert N. Chatigny who, keen to deter the execution and the spotlight of execution, not only berated him for his conduct, his support of Ross, but also threatened his law license (Schwartz 2005:153). Thus, in court the following Monday, Ross's attorney moved for a stay of execution explicitly citing death row syndrome, and using two letters written by Ross himself where he stated an understanding of why so many death sentenced offenders volunteered for execution and that he was driven by a desire to end his own life (even though Ross was claiming that he was volunteering for execution to put an end to the suffering of his victims' families (Christoffersen 2005, Associated Press 2005)). Ultimately, however, the court refrained from addressing the issue of death row syndrome, and whilst acknowledging that Ross exhibited some symptoms of depression that

were possibly caused by the conditions of his confinement on death row (Blank 2006:749), found Ross competent to waive his appeals. Such competency was claimed even though Dr Norko stated that if the new evidence of letters written by Ross had been available to him he would have questioned him about them and Ross's answers to those questions would have influenced his assessment (Schwartz 2005:153). On Friday, May 14, 2005 Michael Ross was put to death by lethal injection.

The Ross case is pivotal not in highlighting the condition of death row syndrome, but in highlighting official ignorance of it. Recognition would be the catalyst for change, a change in living conditions and offender treatment, a change incompatible with the dominant feeling towards the condemned by the public and correctional officials alike. To overhaul prison conditions for the condemned would be to remove a marker of their difference, their asserted, apparent difference being a force behind death penalty retention.

Acknowledgment of the presence of the syndrome, and any subsequent finding that it could be the cause of volunteering for execution has the plausible effect of raising constitutional concerns regarding the coercion of an offender to give up his or her constitutional rights to appeal their sentence (Smith 2008:8). Moreover, the concepts of death row phenomenon and death row syndrome, upon their recognition by the American legal system, could be used as concepts to undermine the legitimacy of the entire capital punishment system owing to the inability of the system to expedite death sentence appeals (Harrison and Tamony 2010:14). That factor could explain the lack of recognition thus far by the American legal academy, a factor that does not impede recognition by European courts (*Soering v United Kingdom* 1989). Whilst the possibility of their future recognition by either the medical or legal academies is unclear, to date, they are only assertions and so presently offer little in prospect of altering the regimes of death row confinement currently in existence.

- ***The Dominant Message: Death Sentenced Offenders and a 'Need' for Segregation***

Life in here is not really life at all. People survive in here because of instinct, I guess. I'm sure if I was off death row, out in population, I'd think about escape. See, there's no hope for it in here. If I was out there, that's all that would be on my mind, getting out. Hopefully, legally. If not legally, I would try to escape. I don't intend to spend my life here (death sentenced offender, Keith Berry, cited in Magee 1980:138)

Cunningham and Lyon assert, through films and literature, the creation and capture of a mythology associated with death row incarceration (Lyon & Cunningham 2005–2006:2). For them it is a mythology that has its origins in the “depravity of the offenses committed by death row inmates and in our mixed fascination and revulsion toward those who have perpetrated such misdeeds”. Moreover, they assert, “it is a mythology enhanced by expectations of the certain malevolence of persons under a sentence of death” (Lyon & Cunningham 2005–2006:2). Pivotal missing in Cunningham and Lyon’s assertion though is the more than quarter of a century’s legal regulation of capital offence and offender that has had, as its *raison d’être*, the purpose of linking capital punishment to the most ‘malevolent’ persons having committed the very worst of offences. As previously noted, the assertions of future violence are central to securing a capital conviction and from that assertion, that prophecy of future conduct, correctional policy can be claimed and defended as geared towards the safety of correctional personnel and other inmates. Regimes can legitimately be designed and implemented under the belief that death sentenced offenders are dangerous and have ‘nothing to lose’ (Lyon & Cunningham 2005–2006:2, Glaberson 2002).

The risk that an offender poses a continuing risk, however, has not been borne out by behavioural studies conducted in a prison setting. In fact, the majority of studies show that long term sentenced offenders, life sentenced, life without parole sentenced, and death sentenced prisoners are often the most manageable prisoners, with an inverse relationship often found between time served and disciplinary infractions recorded (Sorenson and Pilgrim 2000:1256). Several studies have found death sentenced offenders particularly, whilst institutionalised, commit only a small fraction of rule violations (Marquart and Sorenson 1988, Sorenson and Wrinkle 1996). In a sample of 155 inmates of former and continuing death sentenced offenders in Texas (Texas being a state in which the prospect of future dangerousness is an aggravating factor juries have to find before imposing a capital conviction) the prophecy was rarely fulfilled. Indeed, only 5% of the sample perpetrated an assault on a member of staff or another inmate that necessitated more than first aid treatment (Texas Defender Service 2004). Yet, still, many correctional officials defend the conditions and austerity of death rows on the basis that death sentenced offenders pose a consistent threat whilst institutionalised: “These are people who have been convicted of especially heinous murders and who have nothing to lose by attacking each other, themselves or, worse, our staff” (Glaberson 2002). Other correctional guards agree, “You can’t take nothing for granted. The only reason you walk out of here every day is because the inmates let you walk out... I’m very aware of that” (Gearan 1994).

In a review of the behaviour of death sentenced offenders in Arizona, to contrast the conclusions reached by other researchers who have documented a low violence rate amongst capital

punishment inmates (Texas Defender Service 2004, Sorenson and Wrinkle 1996, Reidy et al 2001) it was reported that, more than other inmates housed by the Arizona Department of Corrections, death sentenced offenders were more likely to exhibit major institutional conduct (DeLisi and Munoz 2003). That study is in the minority, however, and has been criticised as suffering from 'numerous methodological and data analysis errors' (Cunningham, Sorenson, and Reidy 2004, Cunningham, Sorenson, and Reidy 2005). Indeed, when the data of the Arizona Department of Correction was revisited by a subsequent research endeavour (Cunningham, Sorenson, and Reidy 2004) 82% of death sentenced offenders were found to have recorded no serious violent misconduct and 87% were in fact rated by the Department at the lowest risk of committing institutional violence. Undermining the conclusions of Delisi and Munoz (2003), Cunningham, Sorenson, and Reidy noted that the rate of inmate and staff assaults with or without a weapon among prison inmates in Arizona, as a whole, during 2003 was 3.26 per 100 inmates whilst the equivalent rate for death sentenced offenders, for the previous year, was only 0.78 per 100 inmates (Cunningham, Sorenson, and Reidy 2004:310).

The restrictions on death row, and their enforcement by prison guards can, and do, provoke an anger and resentment amongst inmates which in themselves, can cause bouts of violence and assault, and sometimes even murder (Von Drehle 1995:182). So, just as death row can protect guards and inmates, it can cause a will, if not the opportunity, to act against restriction and its imposition, "after you're treated like an animal for so long you're going to start acting like an animal" (death sentenced offender, Keith Berry, cited in Magee 1980:136).

...all we have in here is our emotions and these emotions are played on and instead of instilling in a man certain morals, it actually makes him more rebellious to the point that he becomes angry and if he wasn't dangerous before he came here, he becomes dangerous after he gets here because he develops these hatreds... so actually the way I see it, we are being forced to act like animals (death sentenced offender cited in Johnson 1981:154)

As hatreds develop because of what inmates see as petty annoyances and harassment, the manner of their confinement, paradoxically, is supported, creating a self-fulfilling prophecy. Haney agrees; that rage is a reaction against conditions of confinement and, as such, cannot be a justification for their existence and imposition (Haney 1993:5). Similarly, King noted in his examination of the conditions of death row in Oklahoma, "The more restrictive an environment and the more distant are the staff, the more likely is it that frustrated and angry prisoners will contrive to use such brief

and occasional opportunities for contact as they get to express their frustration and anger” (King 1994).

Johnson’s research of Alabama’s death row, despite the potential for violence, and the frustration of inmates aimed towards guards that he uncovered (Johnson 1981:58) concluded that death sentenced inmates need not be housed in oppressive custodial conditions “reminiscent of a battle garrison” (Johnson 1981:58). Johnson claims that housing death sentenced offenders in such conditions may in fact be counterintuitive, making prisoners “meaner and more vindictive”, more dangerous, and dwelling on hatred (Johnson 1981:58). In some instances prisoners held in solitary confinement have told of planning attacks on guards to ‘feel alive’, as such, some researchers have asserted that solitary confinement can make a prisoner more dangerous, more so than if he were housed in a general prison population (Harrison and Tamony 2010:4).

The logical assertion is that death sentenced offenders are manageable because of the very restrictions placed on their movement, and the limitation of opportunities for interaction with others by virtue of the physical design of death row and the regimes that govern it.

The design of death row – with each inmate locked in a solitary confinement cell and few occasions when prisoners were gathered in groups – increased the relative safety [of working on death row]. Many guards found work among the prison’s general population far more threatening than work on death row. General population at the state prison was the end of the line for Florida’s bad guys. To get there, inmates had to prove themselves too mean, too crafty, too crazy for lesser prisons, they slashed and killed one another with near impunity. Compared to that, death row was an oasis (Von Drehle 1995:181).

Inmates, however, believe that the relative safety of death row is in spite of its design and restrictions not because of them. In reference to the twenty four hour surveillance of inmates in the Unit for Condemned Persons in New York, one prisoner complained,

For six years the UCP has been open [and] not once has there been a problem of violence or threat to the safety and security of the facility and it has nothing to do with the structure of how the UCP is run. The men of the UCP are just that, men who want the chance to show that we are not animals (death sentenced offender cited in Hammer et al 2002:6).

An independent report into the conditions of death row in New York confirm the inmate’s account: there was not a single reported instance of violence, nor a single escape attempt or serious security

violation in the six years it was operational (Hammer et al 2002:8). Moreover, the Superintendent of the Clinton Prison, in which the Unit for Condemned Persons was located, noted that prisoners under a sentence of death were amongst the most obedient within the system (Hammer et al 2002:8). It is not just the manner of their incarceration that produces compliance though: when death row defenders assert that inmates have nothing to lose they are, perhaps conveniently, forgetting the executive clemency mechanism that can spare offenders from execution and mean the commutation of their sentence; and institutional behaviour can have a bearing on that decision (Bluestein 2012).

The vast majority of death sentenced offenders adjust; succumb even, to the dominant pressures of their environment (Johnson 1981:8). Death sentenced offenders have committed some of the worst crimes that can be committed - this is indeed the purpose of the aggravating statutes that were validated by the Supreme Court in *Gregg v Georgia*, to discern and single out the worst offenders, worst behaviours, and later (*Coker v Georgia*, *Kennedy v Louisiana*) the worst forms of intentional murder – and have proven, at least once, their capability to commit acts of lethal violence. Moreover, the potential to act violently again has been made by prosecutors at trial, and accepted by the trial jury. On that basis, the restrictions of death row can be read as precautionary measures; each rule, and restriction acting as a prohibition on the prophecy of that deadly violence. Those restrictions and prohibition can in turn explain the low rate of rule infractions committed by death sentenced offenders. If the assertions of future dangerousness made at trial are true, and there is stock in the argument that death sentenced offenders have ‘nothing to lose’ then it could be expected that once those restrictions were eased, and death sentenced inmates allowed more opportunities to be out of their cells, to mix more freely with other inmates, and even guards, then the re-offending, rule infraction rate, would increase or escape attempts would be made, as in Texas or Arizona, or actually succeed, as in Virginia. However, if the state of Missouri is taken to be the modern test of that hypothesis then the results seem to show that death sentenced offenders are not, by virtue of their sentence, a continuing violent risk, a risk that requires the special segregation measures that characterise death row confinement.

- ***No ‘Need’ to Segregate? The Modern Missouri Anomaly***

Staff [are] fully committed to the concept [mainstreaming capital punishment inmates] and would not want to return to the old ways (Potosi Correctional Center Administrators, cited in Hudson 2000:75)

Missouri is not the first state in the Union to have experimented with mainstreaming death sentenced offenders but is the first in the modern death penalty era. The first example of such a move occurred in Arkansas in 1968 at the Tucker Prison Farm. Over a ten month period restrictions on death sentenced offenders were steadily eased; inmates were given work opportunities, recreation and visitation privileges were expanded, death row inmates began to eat with offenders in the general prison population until, apart from separate housing, death sentenced offenders were mainstreamed into the general population. Although largely considered a success (Murton 1969), without explicit reasoning, the programme was dismantled by the Board of Corrections and death row now resembles others around the country, in terms of segregation and restriction upon offenders (Lombardi, et al 1996).

The difference in the treatment between those on death row and those in the general prison population, including those convicted of similar offences, as discussed in the previous chapter, is not only an irritant to death sentenced offenders (Johnson 1981:155) but was also a point of concern for impartial investigations of death row regimes as here, in the case of New York,

...no restriction should be imposed on UCP inmates that is not imposed on the general prison population without a specific and persuasive justification for distinguishing between the two groups. It is because we can see no important distinction between convicted murderers who have been sentenced to death, and are therefore lodged in the UCP, and convicted murderers who have been sentenced to terms of life without parole, and are therefore lodged in [the] general population, that we have strongly recommended abandoning the special restrictions imposed on the UCP (Hammer et al 2002:12)

In its conclusion, the report of the subcommittee examining New York's death row contended that,

Death should be a sufficient punishment in itself. While they await execution, condemned persons who have obeyed prison rules should enjoy the same rights and privileges accorded inmates (including a number of convicted murderers) within Clinton's general prison population. To the extent the punishments and restrictions imposed at the UCP serve no legitimate purpose, they should be lifted. This seems to us both simple justice and wise policy. Justice because it requires good reasons for the imposition of hardship, even on the condemned. Wise policy because it seeks to preserve the sanity of these men and, with it, their capacity to function in society



should their present sentences of death be reserved or commuted (Hammer et al 2002:1).

Before any recommendations could be implemented, New York's death penalty statute was ruled unconstitutional and so death row housing was disbanded. The blueprint for modern mainstreaming of death row prisoners already exists, however, in Missouri.

In the state of Missouri all male death sentenced offenders are housed in the Potosi Correctional Center. Those offenders, however, are not incarcerated on a traditional, segregated death row; instead those prisoners are mainstreamed into the general prison population and have been since 1991. Prior to mainstreaming death-sentenced inmates, the Potosi Correctional Center had two distinct and separate operations, those for non death-sentenced offenders and those with a capital conviction. The time schedule of the institution was thus divided between the two sets of prisoners (Hudson 2000:74). Death sentenced offenders were only moved by guard escort, and when out of their cell they were in restraints; there were no common areas between general population prisoners and those under a sentence of death and job opportunities for death sentenced offenders were limited to their own housing unit (Hudson 2000:75).

Whilst housed at the previous death row facility at the Jefferson City Correctional Center, in 1986 death sentenced offenders filed a class action suit which alleged several constitutional deprivations relating to their conditions of confinement (Lombardi, Sluder, & Wallace 1996). Death row at Jefferson was described by inmates and critics as 'a dungeon', one of the worst death rows in the United States (Associated Press 1986). In January of the following year, without an admission of fault, the Missouri Department of Corrections entered into a consent decree (making concessions to the inmates, without an admission of fault, to end the litigation process) which brought about several changes to the management of death row: telephone access was increased, inmates were permitted to attend religious services, recreational activities were expanded, and additional staff with 'specialized training' were assigned to the unit (Lombardi, Sluder, & Wallace 1996). The decree also brought about an inmate classification scheme for death sentenced offenders: regular custody, close custody, and no-contact custody: privileges available to inmates henceforth were contingent upon classification level, thus providing a system of behavioural incentives (Lombardi, Sluder, & Wallace 1996). Then, in 1989, when population levels were rising, all death sentenced offenders were moved to the 500 bed facility of the Potosi Correctional Center which, at the time, housed 200 inmates; the total number of death sentenced offenders was 70 (Lombardi, Sluder, & Wallace 1996).

Upon their transfer, inmates subject to a sentence of death were housed in a two winged unit with a capacity for 92 inmates. The death sentenced offender classification system in place at the Jefferson City Correctional Center was revised and a fourth classification level added; at the Potosi Correctional Center all death sentenced offenders were classified as minimum custody, medium custody, close custody, or as in administration segregation. Minimum custody classified inmates were housed in one wing of the unit; the remaining prisoners were housed in the other (Lombardi, Sluder, & Wallace 1996). Whilst death sentenced inmates continued to be segregated from the general population, increased privileges and amenities were available according to classification, allowing inmates the opportunity to accrue additional privileges in reward for good behaviour. However, within months of the move to the new institution, inmates once again challenged their conditions of confinement and, as such, officials deliberated the prospect of mainstreaming those inmates into the general prison population (particularly after several employees noted the contradictions of an institution divided according to sentence but housing offenders of a generally similar nature). At the time, the vast majority of inmates housed in the general prison population at the Potosi Correctional Center were serving long sentences: life without parole, or a fifty year term before parole could even be considered. As Lombardi, Sluder, and Wallace note, "In essence, although capital and non-capital inmates had been convicted for the same offense, the only difference between the two groups was their sentences" (Lombardi, Sluder, & Wallace 1996). Ultimately, given the overlap of offenders serving different sentences, and to try to prevent further litigation, prison officials decided to experiment with mainstreaming the two prisoner groups.

The dismantling of death row began with the abandonment of that "commonly used, negative term" to describe both inmates and their housing status: death row offenders came to be called capital punishment inmates (Lombardi, Sluder, & Wallace 1996). That semantic distinction prefaced their desegregation and was intended to energise a change in attitudes towards inmates, a redesignation of character, a change in name to bring about a change in attitudes. The move to mainstreaming began with 'an experiment' involving minimum custody capital punishment inmates who were first allowed to leave their housing assignment for meals: three times daily they were escorted to eat in the main dining room. After no serious incidents with the new eating arrangements, those same inmates were allowed to use the gym and visit the law library, capital punishment inmates were then allowed to take jobs in the prison laundry. Based upon the success of the trial, in January 1991, capital punishment inmates, as a whole, were mainstreamed into the general prison population (Lombardi, Sluder, & Wallace 1996). A death sentenced offender is now only separated from the general prison population when an execution date is set, whilst that separation is handled on a case

by case basis, it can sometimes be as brief as three days before his scheduled execution (Hudson 2000:75).

The decision to end a dichotomous facility at the Potosi Correctional Center, a facility split only because death sentenced offenders were housed there, has been heralded as an advantage for the prison, its staff, and all its incarcerated prisoners. Staffing assignments could be targeted more effectively, additional services were available to all, such as medical and dental services, and the security of the institution was heightened as a result of more equal guard distribution throughout the prison. As Hudson surmises,

- Canteen hours were expanded
- Psychological services were available for the entire population on a more informal basis with more services available to all inmates
- Joint recreation and hobby craft periods made more time available for all
- Capital punishment inmates were no longer escorted or in restraints while in movement
- There was a 'big gain' in health care services for the entire population. Capital punishment inmates no longer had to wait to be escorted to a medical call. Physicians were no longer required to go to the capital punishment unit. More physician time was then available to all inmates.
- Visitation privileges were enhanced. All prisoners based on their security classification have full or limited contact visits.
- Staff services were more equitably distributed.
- Posts were reassigned to enhance total security.
- All institutional jobs were available to the entire inmate population (Hudson 2000:75)

For the prison itself, the mainstreaming of death sentenced offenders brought with it considerable savings in cost. The move itself required only minimal capital outlays and once made, savings were found in eliminating the now redundant posts and functions necessary to operate a segregated death row. Before mainstreaming, capital punishment inmates required an escort to leave their housing assignment; by moving inmates into the general prison population such a high level of targeted staffing assignments became unnecessary. After mainstreaming there were incentives for inmates to conform to the rules of the institution, indeed, after the move to the general prison population, disciplinary actions, grievances, and inmate on inmate violence decreased (Lombardi, Sluder, & Wallace 1996). Non capital offenders also benefitted from the mainstreaming of death sentenced offenders, when staffing assignments were not diverted to ensuring segregation, both

staff and inmates became more free to move around the prison whereas before the prison had to virtually shut down to move a capital offender (Lombardi, Sluder, & Wallace 1996).

The debilitating psychological, personal, and even physical effects specific to living on death row were alleviated, if not completely resolved by mainstreaming inmates (the threat of execution still exists, and general prison population incarceration is, if not to the same degree, still a demanding physical and psychological experience). Capital punishment inmates were given increased access to recreational opportunities, eight hours each day, as well as hobby-craft activities, available for six hours a day. Death sentenced offenders were now able to compete for jobs throughout the prison working in the prison laundry, law library, food services, and the tailor shop. Opportunities for visitation were expanded, owing to the lower levels of staffing required, providing more visiting days for death sentenced offenders.

Lombardi Sluder and Wallace, however, succinctly summarise the less tangible, more subtle ways that mainstreaming has benefitted death sentenced offenders,

Short of abolition of the death penalty, there is probably little that can be done to ameliorate the stigmatization of a capital sentence and all that surrounds it for capital punishment inmates. If the routinized prisonization process can be smoothed for capital punishment inmates, it is probably best accomplished in an integrated environment where capital offenders have at least the same opportunities provided to other maximum security prisoners. The mainstreaming programme has provided capital punishment inmates with [a] web of incentives to conform with regulations. In the process, the environment has been “humanized” for capital offenders – probably as much as possible given prevailing public and political sentiments (Lombardi, Sluder, & Wallace 1996).

Nearly fifteen years after death sentenced offenders were mainstreamed in Missouri, Cunningham, Reidy, and Sorenson published a report detailing, and comparing the rates of misconduct for all those offenders now housed in the general population of the Potosi Correctional Center: life without parole inmates, parole eligible inmates, and capital punishment inmates (Cunningham, Reidy, and Sorenson 2005). For the eleven year period between January 1991 and January 2002, more than three thousand inmates were housed at Potosi, 149 of whom were subject to a death sentence, 1,054 had been sentenced to life without parole for first degree murder, and 2,199 inmates were subject to parole eligible terms. The report found that, like life without parole sentenced inmates, death sentenced inmates were less troublesome than parole eligible inmates (Cunningham,

Sorenson, and Reidy 2005:313). Specifically, the study noted that no inmate under a sentence of death committed a murder of a staff member or inmate, and no attempted murders were reported (Cunningham, Sorenson, and Reidy 2005:316). In finding that the Missouri mainstreaming experiment had indeed been a successful one, in terms of the incarcerated behaviour of death sentenced offenders in a general prison setting, the maintenance of traditional death sentenced offender housing in other states and 'the traditional death row' has consequently been criticised.

Humane sensibilities, fiscal responsibility, and correctional efficiency support the replication of the Missouri model by other states" (Cunningham, Sorenson, and Reidy 2005:319). Moreover, given the similarities, from Missouri to other states in terms of the educational level of death sentenced offenders, and their marital status, as well as the architectural design of other maximum security correctional centers built in the modern era, there is, at face value, good reason to believe that the Missouri method of incarcerating death sentenced offenders can be replicated elsewhere (Lyon & Cunningham 2005 – 2006:7).

It is telling, however, in an era with increased strain on correctional budgets Missouri has remained an outlier in its form of incarcerating the condemned. Perhaps a partial explanation, at least, can be found in the difference between the executing behaviour of states. Whereas for a number of states, death row is, in reality, a storage facility, where few executions are performed, thus giving a death sentence a new meaning of life without parole; Missouri is different. Recent abolitionist states that failed to conduct a non voluntary execution, still maintain a death row, Connecticut and New Mexico, for example, whilst Kansas, New Hampshire, Pennsylvania, Idaho, South Dakota, and Oregon, similarly, operate a death penalty with no non-voluntary executions. The non voluntary execution rate for Missouri, however, is high, death sentenced offender confinement in Missouri is only a temporary step and execution is far more probable than in other states. Indeed, Missouri is the most prolific executing state outside the south and, outpaces several southern executing states including North and South Carolina, Alabama, and Georgia (Death Penalty Information Center). Only Texas, Virginia, Oklahoma, and Florida (the latter of which is only five executions ahead) have put more people to death in the contemporary death penalty era than Missouri (Death Penalty Information Center).

After mainstreaming in Missouri, not one of the executions it conducted in the 1990s, from 1991 onwards, was of an offender who volunteered for execution. When volunteers are discounted from the execution total, calculating from the executions of the 1990s (chronicled by the Death Penalty Information Center), Missouri accounted for over 9% of all executions in the decade. Additionally,

that will to execute did not dissipate in the following years: in 2001, using the same execution data compiled by the Death Penalty Information Center, Missouri accounted for more than one in ten of all executions that year, and more than 8% the following year. Whilst the rate appeared to reassert itself after no executions were conducted by Missouri in 2004, and its contribution to the national execution total in 2003 was less than 4%, in 2005 again, the state accounted for nearly one in ten of all offenders put to death in the country (9.43% of all executions in the year). With such executing behaviour, no recent history of escape or escape attempts, death row has not been required in Missouri to communicate the status and regard of the condemned.

When a segregated death row is maintained, it acts as an additional punishment. Offenders quite logically need to be securely held before their execution can be carried out but there is no correctional justification, from the behavioural studies of inmates, and as demonstrated in the Missouri experiment with mainstreaming, to keep those offenders in such extreme levels of custody. That is not to say, however, that modern death row confinement, and its severity, is not functional or purposeful, as the final chapter details. Robert Johnson argues that the destructive impact of death row confinement upon death sentenced offenders provides a basis for an argument against the death penalty (Johnson 1981:131). Perhaps, but simultaneously, that confinement affirms the perceived need for capital punishment. Through the processes of death row the offender is dehumanised; the row, its routines, architecture, management, and rule enforcement, are part of a process, a process that denies the humanity of the individual thereby moving him closer to his dominant cultural description and, if ever put to death, making him easier to execute, both for the public and executioners alike. The Benetton campaign, 'We on Death Row', discussed in the following chapter, sought to re-humanise the offender, whereby he was able to share his story in magazine interviews, and express his residual humanity through pictures: that attempt was rejected by both system actors and the wider public (Simon 2000, Kraidy and Goeddertz 2003, Girling 2004). As an attempt to assert the inherent humanity of the condemned was "intolerable" and was met by system supporters with "contempt" (Lynch 2002:223). Moreover, if these offenders are seen as still men, not an 'other', a 'monster' then it is more likely to be questioned why the death penalty is still needed in future when life without parole has gained such widespread acknowledgment and historic use against similar offenders, with far less cost, less criticism, and less constitutional objection. Death row is thus a motivating force for death penalty retention; affirming the cultural view of the offender and thus a need for a 'different' punishment: the death penalty.

Additionally, death row, unlike lethal injection or general population imprisonment, still allows for a retributive sentiment to be expressed the 'animating force behind much contemporary death

penalty support' (Amnesty International 2011:6). The incarceration of death sentenced offenders reflect the regard they are held in by wide society and in almost a self fulfilling prophecy speaks of why people feel they 'need' the death penalty. Even if they are not, in reality, the very worst murderers, beyond understanding, they are treated as such, believed to be as such (thus explaining the lack of judicial remedy or social concern in this area), and their incarceration, its reports and portrayals confirms them as such (Berry Dee 2007, Crawford 2008, Kuncl 1995, Berry Dee & Brown 2003, Weinstein and Bessent 1996, Jarvis 2006, Gixti 1995); in a self fulfilling loop the death penalty becomes justified.

## Conclusion

### - ***Executions not Required: Popularity and Persistence of the Death Penalty, without Death***

Previous chapters have referenced the decline in executions across the country and, as such, death row confinement as increasingly *the* punishment for an increasing number of condemned offenders. Added to the decline in executions are the recent abolitions of capital punishment in New York, Illinois, New Mexico, New Jersey, and Connecticut, which could be used as evidence to support the assertion of several theorists that capital punishment in America is an institution on the verge of disappearance (Zimring 2003, Harcourt 2009, Lifton & Mitchell 2002, Berger 2007). Yet, in those analyses, frequently, death penalties are weighed in terms of their execution numbers. Too often the instrumentality of capital punishment, and the social, and political uses to which it can be put, is dismissed on the reading of a low execution rate. Moreover, such analyses typically overlook the shifting, transitory nature of attitudes that support retention, and previous state experiments with abolition.

Historically, death penalty abolition on the part of individual states has often been short-lived, just as lulls in its popularity have been transient. Before the decision of the Supreme Court in *Furman v Georgia* (1972), for example, enthusiasm for the death penalty, public and political, had waned, just as executions had declined. Following the decision, however, there was a massive resurgence in the popularity of the institution (Banner 2002:268, Garland 2010:248). Death penalty abolition, and its support, is often shallow, in the twentieth century alone several states across the country; Washington, Delaware, South Dakota, Oregon, Kansas, and Colorado, all of which currently have capital punishment legislation in place, abolished the penalty, some more than once, only to go on to restore it at a later date (Denno 2002). Economic circumstances, political leanings, and the intensity of public pressure are subject to change, and a change in policy can often be particularly susceptible to those changes. In Illinois, New Mexico, New Jersey, New York, and even in the most recent abolitionist state of Connecticut, there have been calls made to ‘repeal the repeal’ (Associated Press 2012c). Yet, in recent repeal states, few were ever executed in the current death penalty era, still though, the death penalty remains popular and, as other states have demonstrated over the past century, under different political, economic, or social circumstances those states could once again enact capital punishment statutes. Whilst reinstatement may be an undercurrent in social and political life in many abolitionist countries, the prevalence of the punishment in the United States, the simultaneous retention of the punishment in other, neighbouring states cause the debate on retention and abolition to be particularly prominent. In the 2012 legislative session in five



abolitionist states, restoration bills were authored that sought to reinstate the death penalty<sup>29</sup> (Death Penalty Information Center).

Additionally, although executions are rarer now, and for the majority the death penalty is increasingly a de facto sentence of life without parole, albeit served on death row, for some states this is not a new phenomenon. In some states prosecutors seek a death sentence, and juries impose a death sentence, but that sentence is not converted into an execution. Such a death penalty, kept in place by voters, does not seemingly require executions and, it can be argued, after many years those death penalties, in states such as Kansas or New Hampshire, are recognised by supporters as something other than a system that imposes physical death. Some states seemingly only require a unique condemnation of the worst offenders, marked by the imposition of the death sentence, the abstract threat of execution and, pivotally, a means of imposing retributive punishment through death row confinement. That imposition of extra judicial punishment ensures an offender is punished, more so than offenders serving any other prison term, and can therefore act as a basis of death penalty support particularly as execution may never occur and, even if it does, will certainly be delayed by the lengthy appeals process.

The effect of imposing death sentences then, in some states, can still have a recognised and appreciated effect even if they do not translate into regular or indeed any executions. That is, it can be assumed that effects other than execution are indeed acknowledged and intended, citizens vote for those officials that, in the very least, do not propose abolishing the death penalty in their state, prosecutors seek capital verdicts, juries impose death sentences, and in some states, such as Pennsylvania, the Governor even signs a high number of death warrants (which go unfulfilled); all actions that, simply, do not lead to executions. Recently, in 2011, in New Hampshire, despite no execution having taken place in the state for over fifty years, the legislature recently approved expansion of its death penalty statute to include murder committed during a home invasion, whilst a commission appointed by the legislature to study the death penalty in Kansas recommended retention, also despite no executions in the current era (Death Penalty Information Center). Although the death penalty in some states may be derided as only symbolic, as in Garland's view, the symbolic can still be instrumental,

In their eagerness to criticize an institution that is deeply controversial, commentators may be too quick to reduce a complex network of actors and system of practices to a

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<sup>29</sup> Those five states are: Illinois, Iowa, Minnesota, New Mexico, and Rhode Island (Death Penalty Information Center 2012c).

singular 'symbolic' dimension; too ready to ignore the instrumental uses to which capital punishment laws can be put, whether or not anyone is actually executed; too one-dimensional and unempirical in their discussion of symbolic communication and too casual in their use of the term 'symbolic' to effectively address what is at stake in this description (Garland 2007a:112).

Beneath the symbolic instrumental debate, however, lies the punishment of all death sentenced offenders. Whether or not executions occur, and there is a significant variance in the execution rate amongst retentionist states, the commonality across the death penalty systems of America is the nature of death row confinement. Aside from the exception of Missouri, from Texas to Kansas the hallmarks of pre-execution detention are the same: the segregation, dehumanisation, and punitive treatment of the condemned: a punishment endorsed even by relatives of capital murder victims (Altimari 2011).

- ***The Abuses and Uses of Death Row Incarceration: Communicating the Value of the Condemned and a Need for Punishment***

Whatever the real or imagined merits of capital punishment, no rationale for the death penalty demands warehousing of prisoners under sentence of death. The punishment is death. There is neither a mandate nor a justification for inhumane confinement prior to imposition of sentence (Johnson 1981:ix)

The utility of death row goes beyond incarceration; its use extends to communication, communicating descriptions of offenders that support the need for capital punishment generally (pivotal when executions are not or cannot be conducted, as discussed in chapter four). Although there are perhaps some subtle differences in death row confinement, such difference is limited to variations on the themes of degradation and dehumanisation of offenders, their abuse, their neglect, and the withholding of services, and amenities, based on their status as capital convicts (Johnson 1981, Johnson 1998, Hammer et al 2002). Although such confinement may have the capacity to offend onlookers, observers, and analysts such as Robert Johnson who fail to see a rationale for current forms of death row confinement (Johnson 1981:ix), to assert that there is neither mandate nor justification for such incarceration is to oversimplify the status of capital punishment and capital offenders. Moreover, such an assertion is undoubtedly predicated on the belief that executions can, and will, be uniformly applied to all offenders; that executions will punish and convey the status and regard of capital prisoners that death row currently communicates.

Wider culture has created a mythology of the death sentenced offender and his detention (Lyon & Cunningham 2005-2006:2). The death sentenced offender is the worst of the worst, according to legal mandate and wider culture; he is regarded as a monster, having committed the worst of offences, and in prison, or wider society “there is no middle ground with monsters” (Johnson 1984:571). That construction and description of the condemned has been received by the planners of the condemned’s incarceration (Hammer et al 2002, Lynch 2000b) then borne out in his detention. Regarded as dangerous, sub-human, the offender is punished by the restrictions and deprivations of his imprisonment. Reports of this are then fed back to wider culture, through mass market books (Berry Dee & Brown 2003), offenders’ personal accounts (Chessman 2006), death row analyses (Johnson 1980, Johnson 1998), reports by and for non-governmental organisations such as Amnesty International (King 1994), and fictional accounts of ‘life on the row’ (just as powerful, if not more so, than factual accounts (Wardle and Gans-Boriskin 2004)). From these accounts of death row, and its inhabitants, the dominant cultural attitude towards capital offenders, their stereotype, is verified and corroborated; death sentenced offenders are so different, so dangerous, they require special measures of detention. The self affirming communicative loop helps ensure the continuation of support for the penalty: some offenders are so monstrous and dangerous that not only is the manner of death row detention justified, but so is the ‘need’ for the death penalty.

There is, additionally, a mandate for current forms of death row incarceration: that issued, tacitly at least, by the legal system, itself part of wider culture. Before the current era of the death penalty, death row was loosely structured and at a time when the scope of the penalty was far less refined. In the twentieth century, as recently as the 1960s, offenders were put to death for offences as comparatively minor as robbery or arson. As discussed in chapter two, at that time, and historically, death row was not configured and managed in a way that communicated the offender’s monstrosity, or difference. Its loose structure interpreted the relative lack of danger posed by such inmates, relative to the aggravated murder that wholly accounts for modern capital offences. The capital offender is now so monstrous by his description and the refined list of capital offences, he *needs* to be securely contained, and he deserves retributive punishment. The cultural appreciation of him, and his character, means he *needs* to be expunged (Garland 2007b:447). His imagined contemporary character and stereotype warrants his removal from society (and general prison incarceration is recognised as a society *Lawrence v Texas* 2003): removed from an environment, like a general prison population where some manner of life can be created with opportunities for social intercourse and even work and educational opportunities (Sykes 1958).

The American legal community, like the international community, has recognised the punitive nature of death row confinement (*People v Anderson* 1972, *McKenzie v Day* 1995, *Chessman v Dickson* 1960), the “mental suffering that attends such detention” (*People v Chessman* 1959) yet no substantive changes have been made. Death row incarceration is acknowledged as retributive, destructive even, but regarded as simply a requisite element of death penalty retention (*District Attorney v Watson* 1980). That attitude has been the foundation for, and typical of, the dominant legal stance toward death row confinement in the contemporary era, and an additional barrier to change,

The mental, physical, and emotional status of individuals, whether in or out of custody, do deteriorate and there is no power on earth to prevent it. We decline to enter this uncharted bog... The Constitution does not require that prisoners, as individuals or as a group, be provided with any and every amenity which some person may think is needed to avoid mental, physical, and emotional deterioration (*Newman v Alabama* 1977).

If the legal establishment, specifically the Supreme Court, were to venture, substantively, into the “unchartered bog”, to make any significant, multilateral changes to death row confinement, it would have the effect of undermining its own contemporary regulation. Legal regulation of the death penalty has sought to reduce capital offenders to the ‘worst of the worst’, the most dangerous prisoners, those who pose a continuing risk to both free and prison society. Indeed, as it has been the modern purpose of the Supreme Court to reduce capital offenders to that exact offender type, it is reasonable to see that the Supreme Court’s refusal to intervene in forms of death row imprisonment as, at least, a corollary effect of that mission. Under the current legal regulation of capital punishment, if not capital offender imprisonment, all states are able to defend the repressive, punitive conditions of death row under a legally endorsed ‘prophecy of future dangerousness, therefore under the guise of safety and security concerns (Yardley 2000).

Whilst immediate reform of death row may be unlikely as a result of legal intervention, death row researcher Robert Johnson, can “readily envision” a different form of death row than commonly exists today: a ‘humane death row’ (Johnson 1998:213). Such a death row, he asserts, would be very different to the conditions that currently characterise death row confinement,

Such a setting would be staffed by mature, service-orientated correctional officers able to relate to condemned prisoners as persons in the process of dying at the hands of the state, a class of individuals analogous to and as deserving of humane care as terminally

ill patients... Visits would be encouraged, as would recreational activities and programs of work or study that can take place in cells or in small groups. Also encouraged would be self help programs, preferably developed by and for the prisoners, which would be promoted as collective adaptations to the stresses of death row confinement and impending execution (Johnson 1998:213).

Johnson, however, in this imagining of humane death row confinement reminiscent of hospice, palliative care, simultaneously, even if unwittingly, points out a fundamental flaw impeding its realisation. The presumption underlying the implementation of such death row confinement would be the recognition of the humanity of the condemned, that even the worst offenders deserve respect and an acknowledgment of the person, of their humanity (Johnson 1998:214). Aside from the difficulties this would engender for prison officials in conducting any executions, relating to and caring for the person in life and then playing a part in taking that life, it also undermines the construction of the condemned in wider culture. As death penalty support is increasingly based on retribution (Amnesty International 2011:6) and with fewer executions (and in light of the use of lethal injection and the denial of retribution caused by its medical impression, when executions do occur (Sarat 2004:29, Merrill 2008–2009:189, Denno 2002:65, Amnesty International 2011:12)), more so death row confinement is required and welcomed as a means of imposing retributive punishment upon the offender (Altimari 2011): a sense of punishment in direct opposition to that death row which Johnson imagines.

As an alternative, Johnson also cites the possibility of alleviating the suffering of the condemned through the complete abolition of death row and the wholesale mainstreaming of death sentenced offenders into general prison populations (Johnson 1998:216). Whilst his citation of the condemned as typically having a lesser criminal history than prisoners in general populations may be correct, those capitally convicted less likely to have previous violent histories (Johnson 1998:216), as already noted, a death row function is to maintain the distinction of the death penalty and the offender through its treatment of condemned prisoners. That distinction, moreover, is increasingly all the vital for some states, those that were previously executing but are currently unable to do so (owing to a shortage of lethal drugs, for example, discussed in chapter four). The movement of death sentenced offenders into general prison populations in states with no executions or few executions, particularly when these only occur as a result of an offender waiving his appeals and volunteering to be executed, means that the death penalty, along with all its associated costs, would be no different from a sentence of life without parole. Whilst Missouri has mainstreamed its death row, that move was made more than twenty years ago in a climate more hospitable to the use of the death penalty

and, in a state with a regular execution rate. Contemporarily, a distinction between offenders, communicated less and less through execution, increasingly needs to be found in other ways by many states and, crucially, different forms of imprisonment are a means by which to communicate that distinction.

Not only does current treatment and segregation of the condemned on death row reinforce the status and depiction of death sentenced offenders in wider society but, by implication, of the capital punishment alternative: life without parole. Some offenders are designated as so dangerous, with nothing to lose, that they 'require' punitive confinement, an extra judicial punishment brought about by the imposition of a death sentence, not a sentence of imprisonment.

A tour of the cells on death row [however] is much worse than that of a regular prison compound. Men...look bloated in puny cells, pressed in by living continuously in spaces not much more substantial or inviting than attic closets. The effect is of a staged presentation of a new and dangerous species, held secure for clinical scrutiny (Johnson 1981:46).

General prison incarceration for death sentenced offenders is neither secure nor retributive enough (Blecker 2010, Altimari 2011). As examined in chapter five, the message communicated by its comparative privileges, compared to death row, is not punitive enough, permits too much freedom, allows the description of the condemned to be undermined by relaxed forms of detention that do not incorporate and corroborate the danger posed by the condemned. Life without parole, a sentence served in the general prison population, is not a suitable punishment for the 'worst of the worst' (Glaberson 2010, Rell 2009), exacerbated by the fact that life without parole is used to sentence juveniles, and for much lesser offences than aggravated murder. An offender convicted of a capital crime is stigmatised with a label, a label affirmed and communicated by the conditions of his incarceration. The legal system, and wider society, has not declared the offender in the general prison population, even when serving life without parole, to be the worst of the worst, in retentionist states the most dangerous, the most monstrous would, theoretically, be sentenced to death, he therefore does not face the worst of the worst conditions of detention.

As noted, Missouri bucked the national trend by relaxing restrictions imposed upon death sentenced offenders but, pivotally, over time, particularly in the period after mainstreaming, the death penalty in Missouri became more stable; death row was not needed to punish, or needed to communicate the status of the condemned when executions were common. Indeed, during the 1990s, except in 1994 without any offenders being put to death in Missouri, no other non-southern state executed

more offenders than Missouri. Missouri was, in fact, in several years following mainstreaming, numerically speaking, putting to death the second or third largest number of prisoners in the country; often only eclipsed by Texas or Virginia<sup>30</sup> (Death Penalty Information Center), both of which imposed greater restrictions upon death row inmates as a result of break out attempts. Even now, such is the desire to ensure the death penalty is a lethal penalty in Missouri, one that produces executions, the Attorney General for the state recently pledged to switch to an untested one drug lethal injection protocol, in attempt to solve the problem of drug shortages that currently affect the nation. Additionally, despite the relatively unfavourable national climate to executions, as discussed in chapter four, as well as the attention likely to be brought by the change to the state's lethal injection protocol, the Attorney General of Missouri has requested the State Supreme Court to set execution dates for up to 19 men whose appeals have run out (Associated Press 2012a). Missouri, in short, does not need or seek to rely upon death row to communicate the regard and status of its condemned offenders. Other states, however, increasingly need to do so.

- ***Cultural Appetite for Punishment: Making Death Row Communicative***

David Garland is indeed correct when he asserts that punishment is not merely a practice that repeats or reflects cultural patterns “established elsewhere” but instead generates images, relations, and sensibilities (Garland 2010:250). Death row assimilates and puts into practice regimes, procedures, and a treatment of offenders that interprets the legal and wider cultural descriptions of them as dangerous monsters and deserving of retributive punishment. Yet, death row also generates complementary images and descriptions of offenders that are then communicated back into wider culture through those mediums that describe and depict death row. Those descriptions of death row inhabitants, and death row, as requiring, as having, additional measures of security, additional guards and gates, minimized or no contact between prisoner and guards, for security reasons (Lynch 2000b, King 1994), construct the death offender as dangerous, and different. Those messages of the offender's ‘unworthiness for consideration of their human rights’ (Lynch 2002:224), medical care, spiritual care, human contact, all denied, are images received by wider culture that confirms the dominant description and ‘difference’ of the capital offender that perpetuates death penalty support.

Of course, those images can be read, received, and acted upon in different ways, as Garland notes, penalty is,

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<sup>30</sup> See Appendix I: Missouri in the 1990s: Executing Behaviour During the Decade of Mainstreaming

...a cultural text – or perhaps better, a cultural performance – which communicates with a variety of social audiences and conveys an extended range of meanings. No doubt it is ‘read’ and understood in very different ways by different social groups (Garland 1990:253).

To some audiences, death row confinement can communicate the brutality of the American penal system, out of step with other first world democracies. For others, the message is perhaps the lack of progress in human rights recognition. Yet, as the death penalty, even without executions and only death row to punish, is still supported by the majority of Americans (Gallup 2009) the primary reading is one that surely comports with the dominant cultural construction of the capital offender. Moreover, a reading that aligns with retribution, the dominant supportive rationale for capital punishment (Amnesty International 2011:6, Gallup 2009) provides a barrier to change, the punishment of offenders, in that vein, being an engine behind death penalty retention.

As executions, when they occur, have been relegated in their newsworthiness by lethal injection, as ‘too easy’, as ‘non-events’ (Sarat 2004:29) ‘like being put to sleep’ (Lynch 2000b:9) reports and accounts of a death sentenced offender being given his ‘just deserts’, his retributive punishment, are displaced and come from death row. As an appetite for pictures of a blood stained corpse in the electric chair indicate (Denno 2000:667) lurid, graphic descriptions of death row, and its inhabitants, are welcomed and often serve as popular entertainment.

Such mass market accounts typically focus on the most sensational cases of capital murder yet, when a death sentenced offender is described in such accounts, so too is the custodial setting which now separates him from wider society. That imprisonment is the means which prevents his reoffending. Indeed, when death row is described as housing such offenders, punitive detention becomes expected,

After a long walk through the main prison, and the climbing of many stairs, I finally arrived at a brown-painted, steel door. In white was stencilled ‘Death Row’. It was opened and I was immediately struck by the smell of cheap disinfectant, the stale odour of human sweat, urine and fried food. The smell permeated every brick and the tier was deathly quiet...It was a dreadful place, devoid of sunlight and fresh air. It was worse than the row depicted in *The Silence of the Lambs*... [but] the monsters of death row are not normal human beings. They have carried out serial murder, mass murder, spree killing, necrophilia, dismemberment of bodies... (Berry Dee & Brown 2003:viii)



Through the use of pre-existing cultural references, the cell block in the film, *Silence of the Lambs*, the reader is supplied with an image of death row, its inhabitants, and the *need* for restrictive, punitive security. Through such accounts, that confinement (and support of it) becomes both expected and justified: these offenders have committed such extreme offences that they are different from all other offenders and their confinement, their incarceration on death row, underscores and communicates that difference.

As such material indicates, there is a market for accounts of death row, its inhabitants, and their offences, an audience receptive to accounts of death sentenced offender incarceration. Owing to their difference, there exists a vicarious pleasure in an offender receiving his just deserts, of knowing, believing at least, that the worst offences receive the worst punishment (Garland 2010:300). Death row imprisonment, with its imagined, and real, symbols of punitiveness, its classification of the condemned as sub-human, reinforces and organises beliefs in and of offenders and their appropriate punishment. Death row thus communicates the propriety of the death penalty itself,

Penal signs and symbols are one part of an authoritative, institutional discourse which seeks to organize our moral and political understanding and to educate our sentiments and sensibilities. They provide a continuous, repetitive set of instructions as to how we should think about good and evil, normal and pathological, legitimate and illegitimate, order and disorder. Through their judgements, condemnations, and classifications they teach us (and persuade us) how to judge, what to condemn, and how to classify, and they supply a set of languages, idioms, and vocabularies with which to do so (Garland 1990:252).

Any report of death row that documents, lists, describes, or repeats the measures of restriction and confinement are affirming that some offenders are, and have been, designated as so different that a manner of imprisonment exists that accommodates and informs that difference. In wider culture, in legal culture, death sentenced offenders are monstrously different (Lynch 2000a, Lynch 2002, Haney 1995:549, Garland 2007a:447) so too they are treated as such, within a prison setting. One informs the other thus making a communicative loop. Without the designation of the offender as different, dangerous, and monstrous, then the regimes, deprivations, and restrictions of death row would not be necessary, being as they are implemented, or conditions neglected or worsened, according to those labels (Johnson 1981, Johnson 1998, King 1994, Hammer et al 2002). In turn, without reports of those 'necessary', punitive conditions, particularly without an execution to express condemnation and difference, the monstrous offender caricature is undermined and with it, the need for capital

punishment. Death row detention is thus not only expressive, it is communicative, a two way process, a reception and communication of descriptions of the capital offender as dangerous and different: the underpinning of death penalty retention (Rell 2009, Blecker 2010).

- ***Miscommunication: The Benetton Advertising Campaign 'We on Death Row'***

The enormity of hundreds of persons languishing on death rows across the nation eludes an easy, conscious grasp. Society fails to comprehend this, because the despair of the death row prisoner is hidden behind prison walls. More fundamentally, the private despair of hundreds of persons is difficult to acknowledge. The very size of the group renders anonymous the private lives whose pain might otherwise result in a movement for reform (Johnson 1979:187).

The 2000 Benetton advertising campaign, revealed a face, a human face of the capital offender, a group of people, not a collection of monsters. The campaign sought to undermine the denial of their humanity, bridging a chasm between 'them and us', physically and psychologically. When that chasm was bridged by the advertising campaign of the clothing company, when the anonymity of death sentenced offenders, as a group, was dismantled, given a human face and story to counteract the infamy of a select few offenders or a select few crimes, the backlash was swift and decisive.

The Benetton advertising campaign, 'We on Death Row' was launched in January 2000 and was seen across Europe and the United States; appearing in several high profile, widely circulated magazines including *Rolling Stone*, *Vanity Fair*, and the *New Yorker*, as well as featuring on several advertising billboards in major metropolitan areas (Kraidy and Goeddertz 2003:149). Whilst the sensibilities of the average consumer have been reported as hardened and increasingly unmoved and indifferent to suffering (Cohen 2001) the advertising campaign was the continuation of a similar tactic used by the company over several years with previous advertising campaigns having focused on topics including poverty, AIDS, race, and war. It would be a mistake, however, to assume Benetton as a social reformer, Benetton is, after all, a company that seeks to make a profit, as noted by others, Benetton is a successful post-Fordist company that is likely to be engaged in business practices that actually undermine social justice: "Benetton's primary goal is to sell sweaters rather than raise consciousness" (Kraidy and Goeddertz 2003:148).

Yet, the campaign about (arguably for) those on death row, a campaign which included not only photographs of the condemned but interviews with the men which featured in *US Talk Magazine*,

provoked such outrage that the company was ultimately sued by the state of Missouri<sup>31</sup>, consumers across the United States boycotted the company, and its lucrative contract with the department store Sears was cancelled. The attention given to the advertising campaign, overwhelmingly negative (Kraidy and Goeddertz 2003, Girling 2004), was, in fact, inextricably linked to that lucrative contract and the Sears department store. Although insistent that they were not taking a stand on capital punishment, the Sears company did object to the advertising strategy, and were unable to ignore the number of complaints from its customers, and public demonstrations against the campaigns at the Houston Sears location and the Benetton office in New York; ultimately leading to a public abandonment of Benetton by the Sears company.

Ultimately Benetton was forced to abandon the campaign, a campaign that was not only condemned by conservative America, but by even the traditionally more liberal quarters of the American news media (Girling 2004, Kraidy and Goeddertz 2003). The backlash against Benetton's advertising campaign was underpinned with widespread feeling that the campaign was an attack upon victims' rights, for many: "the Benetton project exploits the fates of murderers and ignores the suffering of victims – all in the name of selling sweaters" (Chandler 2000:1). Executive director of the US based National Organization of Parents of Murdered Children is quoted as condemning the campaign, referring to it as "a slap in the face to survivors, to the police who investigated these crimes, to prosecutors who prosecuted these crimes, and to the jurors...." (quoted in Kraidy and Goeddertz 2003:157). Such concerns were echoed across the media, which ran 'elaborate accounts' of family and friends of murder victims being forced to come 'face to face' with the murderers of their loved ones (Girling 2004:274).

The Death Row ads say nothing about victims. They are simple, stark portraits of condemned American inmates looking right into the lens, serious and often sad... In its interviews with inmates, Benetton asked questions such as 'Were you ever in love?', 'Did you ever love an animal?'; 'Who are your favourite boxers?' and 'How's your appetite in here?'... The answers depict human experience: 'One inmate is shown reading a Bible. Many speak of long lost pleasures (Kraidy and Goeddertz 2003:153)

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<sup>31</sup> Officials in Missouri claimed that the company had misrepresented their intentions in seeking interviews with condemned men in the state. Ultimately Benetton settled the case before going to court, although continued to deny any wrongdoing, letters of apology were sent to the families of the victims of inmates featured in the advertising campaign and a donation of \$50,000 was made to the Missouri Crime Victims Compensation Fund (Girling 2004:274).

Whilst scholars found a space in which to analyse the ideological differences between the United States and Europe, for supporters of victims, not even necessarily of the death penalty itself, the campaign was an affront to the 'victim culture' that had gained such prominence in recent years (Lynch 2000a). What was seen in the poster was not enough, not an accurate capture of the condemned (Girling 2004), what was seen, human experience, was a misrepresentation, regarded as inappropriate.

Nowhere are the names of victims or the way in which their lives were taken. Look at this picture: This is Jeremy Sheets. Young, isn't he? Cute, isn't he? Innocent, doesn't he look? What this picture doesn't tell you is how this man raped, beat and slashed the throat of a black, young woman named Kenyatta Bush (Valle 2000, cited in Girling 2004:280)

For Austin Sarat, Benetton's hope, or at least the hope of those who supported the campaign on abolitionist grounds, to force an American rethink of capital punishment by giving the condemned a human face (Sarat 2001:250) was a step backward for the abolitionist cause. The campaign asked readers to identify or sympathise with the offenders, to see their humanity, a prospect with little hope, the central failure of the old abolitionist strategy (Girling 2004:277).

At the dawn of the new millennium, Benetton reveals the real faces of the prisoners on death row; the present of those without a future. Whether they are young or not so young, white or black, arrogant or anguished, fat or thin, remorseful or unrepentant, smiling or sad, healthy or ill, they are all guilty in the eyes of the human law. Many have their arms folded, one is reading the Bible and some are wearing eyeglasses. Almost all of them are looking straight at the camera, claiming, despite everything, their rights as human beings (Benetton Press Release 2000 cited in Girling 2004:271)

The old abolitionist strategy was a failure. Asking the public to reconfigure the capital offender as a fellow human instead of someone, apparently, radically, fundamentally different, inhuman. America did not want to recognise their rights as human beings; capital punishment is based on a view of capital offenders as less than human beings (Garland 2007b:444, Lynch 2000a), without humanity (Haney 1995:549, Lynch 2002:224) a view that characterises their treatment on death row.

The rhetoric surrounding the practice of capital punishment justifies it in terms of retribution for victims and their families. An eye for an eye attitude, implying an image of convicted killers as inhuman, a burden on American society and a blow to American civility, is entrenched as hegemonic 'common sense'. The consensus is such that these

killers cannot contribute any good to society, and therefore have no place within it. It then becomes logical to rid society of such useless life, 'for it is easier to kill a beast than a man' (Kraidy and Goeddertz 2003:160)

The 'We on Death Row' campaign was not the first time that the Italian clothing company had used capital punishment as an advertising strategy. In 1992 Benetton ran a campaign entitled 'The Omega Suite': the central image of which was a solitary electric chair from the Greenhaven Correctional Facility in New York (Girling 2004:278). The Omega Suite campaign, however, failed to stimulate any public discourse, and did not cause any controversy in the United States or, indeed, anywhere. There is, however, good reason why the 'We on Death Row' campaign caused such outrage whilst the Omega Suite campaign stirred none, even though, for some (Girling 2004:279) it is the electric chair that holds the horror,

The chair invites you with its clinical, almost surgical, theatre to imagine horrors past and horrors to come... we also may know that pain should not be far away; enough people have sat on the chair for them to have worn out the footrests, one can imagine the twisting and kicking of the limbs against the leather of the footstool, the repetitive movement that must have produced the traces of usage on the chair... We are left to imagine the writhing of bodies, the opening of mouths, the bowed forever head after execution, we imagine horrible imaginings (Girling 2004:279).

The Omega Suite campaign did not cause an outcry or controversy because we are only prompted to imagine the death of a condemned offender, not his life. The electric chair might, as Girling suggests, provoke our imagination to construct images of execution but it is the execution of what is regarded to be a monster, anything but the human that the 'We on Death Row' campaign sought to convey. Imagining his pain, his death, is not just easier to imagine, but can even be revelled in, triggering emotional responses of 'retribution and just-deserts' "which lie just below the surface" in the average American (Garland 2010:295). Imagining that the offender is still human, however, despite his caricature, despite the heinous acts, the murders he has committed, is shown by reaction to the 'We on Death Row' campaign, to be intolerable. Indeed, many of the objections to the latter campaign were centred on the offender's 'humanization' (Girling 2004:280), critics complained that "they looked too normal" (Girling 2004:280).

The Omega Suite campaign thus possibly reinforced support for capital punishment, asking viewers to imagine the deaths of capital offenders, reminding viewers of who are typically presented to them as capital offenders. In a satirical aside, death sentenced offender Caryl Chessman sums up the

decades old dominant construction of death row incarcerates in media discourse<sup>32</sup>, descriptions that are reinforced in repressive and punitive treatment on death row,

On the Row at the present time we have, according to no less an authority than the newspapers:

Two “fiends” and three “monsters”

One “moon–mad killer”

One “cold–eyed, cold–blooded” leader of a “Mountain Murder Mob”; his alleged triggerman, “The Weasel”

One “sex–crazed psychopathic beast”

Me

An assortment of “vicious,” “sneering,” “leering,” “brutal” and “kill–crazy” murderers, plus a former private eye turned “diabolical” kidnapper.

As the papers and “true” detective magazines tell it, we’re creatures on the lam from hell. Satan, in one of his most satanic moments, blew life into the figures on display in some sinister waxworks of horrors and presto! there we were. Here we are, an inhuman assemblage. Or so you are led to believe (death sentenced offender, Caryl Chessman, cited in Johnson 1981:23)

When death row residents are described and constructed in this way, and when that construction is reinforced by the legal system, through a refined scope of capital punishment, punitive death row incarceration is not only easier to implement but it can be welcomed and, as the ‘We on Death Row’ campaign highlighted, is dependent upon denying the humanity of the condemned. As such that humanity is purposefully and continually denied during residence on death row, a denial aligning with, and communicating to, wider culture and its configuration of the capital offender.

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<sup>32</sup> Although, as discussed in chapter three, an innocence framework is increasingly used in media discussions and analyses of capital punishment, specifically capital sentencing schemes (Dardis et al 2006, Wardle and Gans-Boriskin 2004), the portrayal of capital offenders still relies on monstrous caricatures and depictions of the offender as something less than human which has long been the dominant account (Garland 2007b:444, Lynch 2000a)

- **Death Row as Communicative: Benefitting the Institution**

In the most traditional conception of punishment as a communicative practice, the offender is central: the punishment communicates to the offender a response appropriate to the offence committed. That conception requires “the person to whom the communication is directed [being] an active participant in the process...receive[ing] and respond[ing] to the communication” (Banks 2008:111). The communication process identified in this research deviates from that conception by its relegation of the offender, the censure of his actions, his rehabilitation and acceptance of punishment, to a secondary position. The offender is, in fact, the basis upon which communication occurs rather than an active participant in the process. The rehabilitation of the offender is rendered inconsequential, undesirable even with the potential to problematise executions when they do occur. Just as executing juveniles and the mentally ill were practices with an increasing rarity until their constitutional prohibition, those factors mitigating the capital offender stereotype, executing a rehabilitated, remorseful offender, the opposite to the monstrous caricatures that sustain death penalty support, can expose capital punishment to criticisms of relative barbarity. Indeed, the caricature of the monstrous offender is asserted as key in maintaining death penalty support. As Supreme Court Justice Marshall noted in *Furman v Georgia*, discussed in chapter three, if the public knew how the system worked, those who were, in reality, the recipients of death sentences, those unable to afford the best representation at trial, those ethnic minorities who have killed a white person, for example, support would likely diminish: a hypothesis tested and supported by several studies (Cochran and Chamlin 2005).

As noted in the previous chapter, when the caricature of the capital offender is undermined in any way, executions can become problematic. Even in the death penalty stronghold of Texas, debate over the propriety of executing Karla Faye Tucker, a born again Christian, precipitated a 20% decline in approval for capital punishment (Ayres 1998). In California, similarly, the execution of Stanley “Tookie” Williams raised debate as to the appropriateness of executing a man who had been nominated for a Nobel Prize in literature four times, and once for the Nobel Peace Prize (Love 2005).

In this research, however, the offender, and any reformation of character, is incidental to the communication process. The offender is not sought as a participant within the communication. Rather than seeking to rehabilitate the offender through his inclusion in the communication process, the process here is for the benefit of the institution, the institution that punishes the offender and, through death row confinement, reduces all such offenders to the same basic caricature and stereotype. Similarly, unlike in a traditional conception of punishment as communication, any message of deterrence, general or individual, is not found in the communication process depicted in

this research. The low execution rate and the amount of offenders that the death penalty can be, and is applied to, generally discounts deterrence as a modern aim of capital punishment, or a primary reason for its public support (Radelet & Lacroix 2009, Gallup 2009). The pretext for communication here is retribution, not deterrence, retribution being the basis for majority capital punishment support (Gallup 2009).

This is an entirely new approach: the communication process benefits a system, not a specific person or small group; it is on this analysis for the benefit of the institution itself. Through the communication process in which wider culture transmits its depiction of the condemned, and actors within a death penalty system put it into practice, normalise, and do not overturn the manner of imprisonment for, and regimes and treatment of, those offenders, action and inaction communicated back to culture, the death penalty system, its need and justification, is reinforced. That communication affirms some offenders as so different, so monstrous, and so dangerous that a different and unique punishment, capital punishment, should be retained.



## Appendix A: Death penalty and Non Death Penalty States

Death Penalty States	Non Death Penalty States
Alabama	Alaska
Arizona	Connecticut
Arkansas	Hawaii
California	Illinois
Colorado	Iowa
Delaware	Maine
Florida	Massachusetts
Georgia	Michigan
Idaho	Minnesota
Indiana	New Jersey
Kansas	New Mexico
Kentucky	New York
Louisiana	North Dakota
Maryland	Rhode Island
Mississippi	Vermont
Missouri	West Virginia
Montana	Wisconsin
Nebraska	
Nevada	
New Hampshire	
North Carolina	
Ohio	
Oklahoma	
Oregon	
Pennsylvania	
South Carolina	
South Dakota	
Tennessee	
Texas	
Utah	
Virginia	
Washington	
Wyoming	

## Appendix B: Female Death Row Populations

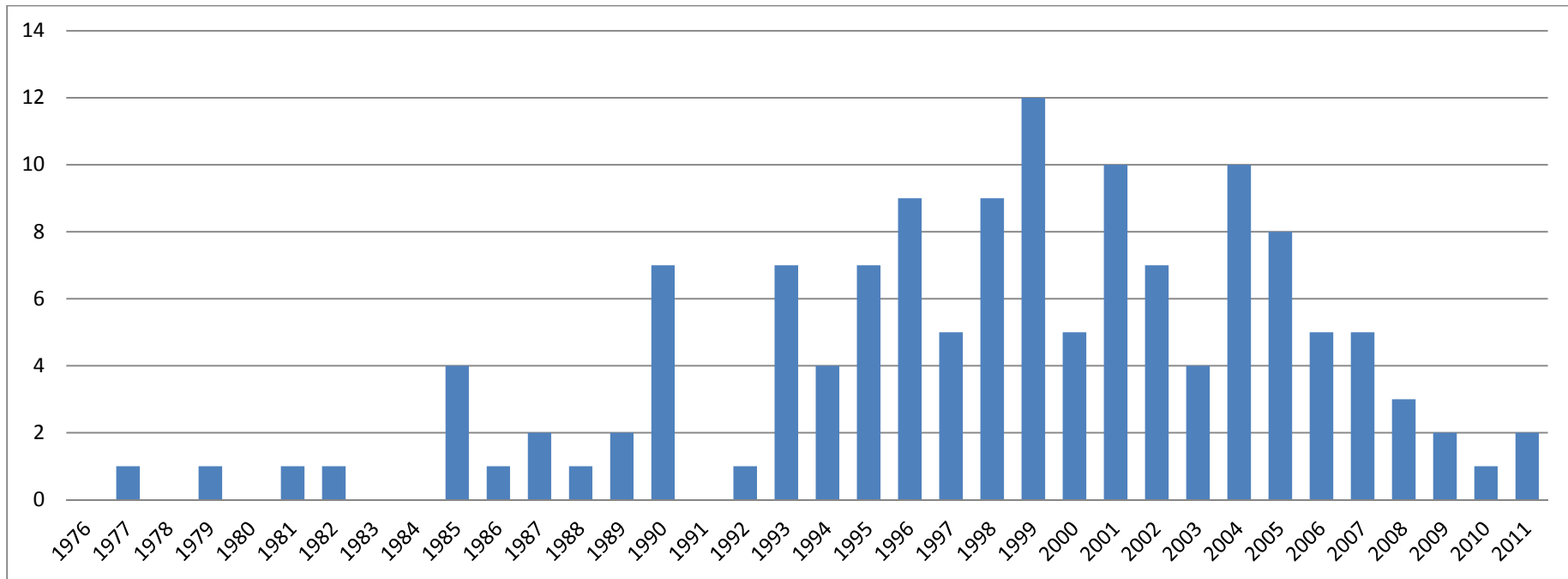
State	Women on death row
Alabama	5
Arizona	2
Arkansas	0
California	16
Colorado	0
Connecticut	0
Delaware	0
Florida	1
Georgia	1
Idaho	1
Indiana	1
Illinois	0
Kansas	0
Kentucky	1
Louisiana	2
Maryland	0
Mississippi	3
Missouri	0
Montana	0
Nebraska	0
Nevada	0
New Hampshire	0
North Carolina	4
Ohio	1
Oklahoma	1
Oregon	0
Pennsylvania	5
South Carolina	0
South Dakota	0
Tennessee	2
Texas	10
Utah	0
Virginia	1
Washington	0
Wyoming	0
Federal	2
US Military	0
<i>Total</i>	<i>59</i>

## Appendix C: Death Row Populations

State	Death row population (Jan 1 <sup>st</sup> , 2010)
California	697
Florida	398
Texas	337
Pennsylvania	222
Alabama	201
Ohio	168
N. Carolina	167
Arizona	135
Georgia	106
Tennessee	90
Louisiana	85
Oklahoma	84
Nevada	78
S. Carolina	63
Mississippi	61
Missouri	61
<i>U.S. Government</i>	59
Arkansas	42
Kentucky	35
Oregon	32
Delaware	19
Idaho	17
Indiana	15
Virginia	15
Illinois	15
Nebraska	11
Connecticut*	10
Kansas	10
Utah	10
Washington	9
U.S. Military	8
Maryland	5
Colorado	3
S. Dakota	3
Montana	2
New Mexico*	2
New Hampshire	1
Wyoming	1
*New Mexico's abolition of the death penalty in 2009 was not retroactive leaving 2 inmates still on death row, Connecticut, similarly still has 10 men on death row	

Source: Death Penalty Information Center

## Appendix D: Voluntary Executions



Alabama	6	Idaho	1	North Carolina	4	South Dakota	1
Arkansas	4	Illinois	2	Nevada	11	Tennessee	1
Arizona	4	Indiana	5	New Mexico	1	Texas	28
California	2	Kentucky	2	Ohio	7	Utah	4
Connecticut	1	Louisiana	1	Oklahoma	7	Virginia	8
Delaware	4	Maryland	1	Oregon	2	Washington	3
Federal Govt.	1	Missouri	4	Pennsylvania	3		
Florida	9	Montana	1	South Carolina	9		

## Appendix E: Death Sentence/Execution Conversions\*

State	Cumulative Death Sentences 1977 - 2007	Cumulative Executions 1977 - 2007	Executions per Death Sentence
1. Virginia	148	98	0.662
2. Texas	907	405	0.447
3. Missouri	185	66	0.357
4. Utah	18	6	0.333
5. Delaware	43	14	0.326
6. Montana	10	3	0.300
7. Oklahoma	296	86	0.291
8. Arkansas	113	27	0.239
9. Indiana	94	19	0.202
10. South Carolina	186	37	0.199
11. Louisiana	147	27	0.184
12. Georgia	225	40	0.178
13. South Dakota	6	1	0.167
14. Wyoming	7	1	0.143
15. Nebraska	26	3	0.115
16. Washington	37	4	0.108
17. North Carolina	436	43	0.099
18. Maryland	53	5	0.094
19. Alabama	412	38	0.092
20. Arizona	261	23	0.088
21. Nevada	140	12	0.086
22. Ohio	310	26	0.084
23. Connecticut**	13	1	0.077
24. Colorado	13	1	0.077
25. Florida	845	64	0.076
26. New Mexico**	14	1	0.071
27. Mississippi	163	8	0.049
28. Illinois**	299	12	0.040
29. Oregon	69	2	0.029
30. Idaho	40	1	0.025
31. Kentucky	82	2	0.024
32. Tennessee	166	4	0.024
33. California	802	13	0.016

<b>State</b>	<b>Cumulative Death Sentences 1977 - 2007</b>	<b>Cumulative Executions 1977 - 2007</b>	<b>Executions per Death Sentence</b>
34. Pennsylvania	345	3	0.009
35. New Jersey**	57	0	0.000
36. Kansas** *	8	0	0.000
37. New York*†	8	0	0.000
38. New Hampshire	0	0	0.000

\* Reproduced from the Death Penalty Information Center

\*\* States that have abolished the Death Penalty

\*\*\* Kansas reinstated Death Penalty in 1994

† New York reinstated Death Penalty in 1995

## Appendix F: First Non-Voluntary Execution after Death Penalty Re-Enactment

State	Date of death penalty re- enactment	Date of first non-voluntary execution	Time elapsed (in years)
Alabama	03/05/1976	22/04/1983	6.87
Arizona	08/08/1973	06/04/1992	18.67
Arkansas	23/03/1973	18/06/1990	17.24
California	01/01/1974	21/04/1992	18.30
Colorado	01/01/1975	13/10/1997	22.77
Connecticut	01/10/1973	VOLUNTARY EXECUTION ONLY	--
Delaware*	29/03/1974	31/08/1993	19.42
Florida	12/08/1972	25/05/1979	6.78
Georgia	28/03/1973	15/12/1983	10.71
Idaho	01/07/1973	VOLUNTARY EXECUTION ONLY	--
Indiana*	01/05/1973	08/12/1994	21.60
Illinois*	01/07/1974	10/05/1994	20.85
Kansas	22/04/1994	NO EXECUTIONS	--
Kentucky	01/01/1975	01/07/1997	22.49
Louisiana	02/07/1973	14/12/1983	10.45
Maryland*	01/07/1975	07/02/1997	21.60
Mississippi	23/04/1974	02/09/1983	9.36
Missouri	28/09/1975	06/01/1989	13.27
Montana	01/03/1974	10/05/1995	21.19
Nebraska	20/04/1973	02/09/1994	21.34
Nevada*	01/07/1973	30/03/1996	22.74
New Hampshire	01/01/1991	NO EXECUTIONS	--
North Carolina	01/06/1977	16/03/1984	6.79
Ohio*	01/01/1974	14/06/2001	27.45
Oklahoma	17/05/1973	10/09/1990	17.31
Oregon	07/12/1978	VOLUNTARY EXECUTIONS ONLY	--
Pennsylvania	26/03/1974	VOLUNTARY EXECUTIONS ONLY	--
South Carolina	--/--/1976^	11/01/1985	9.03
South Dakota	01/01/1979	VOLUNTARY EXECUTION ONLY	--
Tennessee	27/02/1974	19/04/2000	26.14
Texas	01/01/1974	07/12/1982	8.93
Utah*	01/07/1973	28/08/1987	14.16
Virginia*	01/10/1973	12/10/1984	11.03
Washington*	04/11/1975	27/05/1994	18.53
Wyoming	28/02/1977	22/01/1992	14.81
Federal*	01/01/1988	19/06/2001	13.46
US Military	01/01/1984	NO EXECUTIONS	--
*indicates a jurisdiction that carried out voluntary executions prior to that date. ^precise date not given by Department of Corrections. Calculation is based on enactment at 01/01/1976			

## Appendix G: Enactment of Death Penalty Statutes after Furman v Georgia

State	Date of death penalty re-enactment
<i>Furman v Georgia</i>	<i>Decided on 29/06/1972</i>
Florida	12/08/1972
Arkansas	23/03/1973
Georgia	28/03/1973
Nebraska	20/04/1973
Indiana	01/05/1973
Oklahoma	17/05/1973
Idaho	01/07/1973
Nevada	01/07/1973
Utah	01/07/1973
Louisiana	02/07/1973
Arizona	08/08/1973
Connecticut	01/10/1973
California	01/01/1974
Ohio	01/01/1974
Texas	01/01/1974
Tennessee	27/02/1974
Montana	01/03/1974
Pennsylvania	26/03/1974
Delaware	29/03/1974
Mississippi	23/04/1974
Illinois	01/07/1974
Colorado	01/01/1975
Kentucky	01/01/1975
Maryland	01/07/1975
Missouri	28/09/1975
Virginia	01/10/1975
Washington	04/11/1975
South Carolina	--/--/1976
Alabama	03/05/1976
<i>Gregg v Georgia</i>	<i>Decided on 02/07/1976</i>
Wyoming	28/02/1977
North Carolina	01/06/1977
Oregon	07/12/1978
South Dakota	01/01/1979
US Military	01/01/1984
Federal	01/01/1988
New Hampshire	01/01/1991
Kansas	22/04/1994



## Appendix H: Life without Parole Populations±

State	LWOP Population (July 2009)
Florida	6,424
<i>U.S. Government</i>	4,514
Pennsylvania	4,343
Louisiana	4,161
California	3,679
Michigan*	3,384
Alabama	1,413
Mississippi	1,230
N. Carolina	1,215
Missouri	938
Massachusetts*	902
S. Carolina	777
Virginia	774
Oklahoma	623
Iowa*	616
Washington	542
Arkansas	541
Georgia	486
Colorado	464
Nevada	450
Connecticut*	334
Maryland	321
Delaware	318
Tennessee	260
West Virginia*	251
Ohio	216
Nebraska	213
Arizona	208
New York*	190
Wisconsin*	171
S. Dakota	169
Oregon	143
Illinois*	103
Idaho	102
Indiana	96
Texas	71
Kentucky	66
New Hampshire	63
Maine*	54
Montana*	51
Minnesota*	48
Hawaii*	47
New Jersey*	46
Rhode Island*	32
Wyoming	20
Vermont*	13
N. Dakota*	11
Kansas	2
New Mexico*	0
Utah: Unknown	
Alaska: no LWOP provision	

± Data Reproduced from Sentencing Project, 2009, \*Non Death Penalty States

## Appendix I: Missouri in the 1990s: Executing Behaviour During the Decade of Mainstreaming\*

(Discounting Volunteers)

Year	Execution Ranking	State	Executions
1990	3 =	Florida	4
		Virginia	3
		Missouri	2
1991	3 =	Texas	5
		Florida & Virginia	2
		Missouri	1
1992	4 =	Texas	12
		Virginia	4
		Arkansas, Oklahoma, Florida, Alabama	2
		Missouri	1
1993	2 =	Texas	16
		Missouri	4
		Virginia	4
1994	No Missouri Executions		
1995	2	Texas	18
		Missouri	6
1996	2	Virginia	8
		Missouri	6
1997	3	Texas	35
		Virginia	9
		Missouri	6
1998	5 =	Texas	19
		Virginia	13
		South Carolina	7
		Florida	4
		Missouri	3
1999	3	Texas	35
		Virginia	14
		Missouri	9

\*Information reproduced from Death Penalty Information Center

## Cases Cited

Gregg v Georgia 428 U.S. 153 (1976)

People v Stephen LaValle 3 N.Y.3d 88 (2004)

Furman v Georgia 408 U.S. 584 (1972)

Lawrence v Texas 539 U.S. 558 (2003)

Jones v North Carolina Prisoners' Labor Union 433 U.S. 119 (1977)

Brown v Board of Education 347 U.S. 483 (1954)

Jones v Alfred H. Mayer Co. 392 U.S. 409 (1968)

Griggs v Duke Power Co. 401 U.S. 424 (1971)

Valle V Florida 564 U. S. \_\_\_\_ (2011)

Thompson v Oklahoma, 487 U.S. 815 (1988)

Soering v United Kingdom 11 Eur. Ct. H.R. (ser. A) (1989)

Morales v Hickman, 438 F. 3d 926 931 (2006)

Baze v Rees 2008 553 U.S. 35 (2008)

Beaty et al v Food and Drug Administration (2012) Civil Case No. 11-289 (RJL)

Pratt v. Attorney General for Jamaica [1993] 2 LRC 349 (Jamaica PC)

Henfield v. Attorney General [1997] 1 LRC 506 (The Bahamas PC)

Commonwealth v O'Neal 367 Mass. 440 (1975)

District Attorney for the Suffolk District v James Watson & others 381 Mass. 648 (1980)

Andrews v Shulsen 485 U.S. 919 (1988)

Richmond v Lewis 506 U.S. 40 (1992)

McGautha v California 402 U.S. 183 (1971)

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

Roberts v Louisiana 428 U.S. 325 (1976)

Proffitt v Florida, 428 U.S. 242 (1976)

Jurek v Texas 428 U.S. 262 (1976)

Thompson v Oklahoma, 487 U.S. 815 (1988)

Spaziano v Florida 454 U.S. 1037 (1981)

Lockett v Ohio 438 U.S. 586 (1978)

Wainwright v Witt 469 U.S. 412 (1985)

Atkins v Virginia 536 U. S. 304 (2002)

Ring v Arizona 536 U.S. 584 (2002)

Coker v Georgia 433 U.S. 584 (1977)

Enmund v Florida 458 U.S. 782 (1982)

Tison v Arizona 481 U.S. 137 (1987)

Penry v Lynaugh 492 U. S. 302 (1989)

Roper v Simmons 543 U.S. 551 (2005)

Stanford v Kentucky 492 U.S. 361 (1989)

Kennedy v Louisiana 554 U.S. 407 (2008)

Panetti v Quarterman 551 U.S. 930 (2007),

Ford v Wainwright 477 U.S. 399 (1986)

Fierro v Gomez 77 F.3d 301, 309 (9th Cir. 1996)

Campbell v Wood 18 F.3d 662 (9th Cir. 1994)

Hutto v Finney 437 U.S. 678 (1978)

Sinclair v Henderson 331 F. Supp. 1123, 1131 (E.D. La. 1971)

Ruiz v Estelle 503 F. Supp. 1265 (S.D. Tex. 1980)

Rhodes v Chapman 452 U.S. 337 (1981)

Peterkin v Jeffes, 855 F.2d 1021, 1041 n. 25 (3d Cir.1988)

Re Kemmler 136 U.S. 436 (1890)

Lackey v Texas 514 U.S. 1045 (1995)

Re Medley 134 U.S. 160 (1890)

McCleskey v Kemp 481 U.S. 279 (1987)

People v Chessman 52 Cal. 2d 467 (1959)

Chessman v Dickson 275 F 2d 604 (1960)

People v Anderson 6 Cal. 3d 628 (1972)

McKenzie v Day 57 F.3d 1461 (9th Cir. 1995).

Knight v Florida 528 U.S. 990 (1999)

Booker v. State, 969 So.2d 186, 200 (Fla.2007)

Gore v. State, 964 So.2d 1257, 1276 (Fla.2007)

Rose v. State, 787 So.2d 786, 805 (Fla.2001)

Catholic Commission for Justice and Peace in Zimbabwe v Attorney General of Zimbabwe 1993 (4) SA 239 (ZS)

Vaitheeswaran v State of Tamil Nadu [1983] 2 SCR 348

State v. Makwanyane No. CCT/3/94 [1995] 1 LRC 269

Skipper v South Carolina 476 U.S. 1 (1986)

Graham v Florida 130 S.Ct. 2011 (2010)

Miller v Alabama 567 U.S. \_\_ (2012)

Comer v Stewart 215 F.3d 910 (9th Cir.2000)

Payne v Tennessee 501 U.S. 808 (1991)

Newman v Alabama 559 F.2d 283 (CA5 1977)

## References

"Death Penalty Information Center" at [www.deathpenaltyinfo.org](http://www.deathpenaltyinfo.org).

"Florida Department of Corrections" at <http://www.dc.state.fl.us/oth/deathrow/index.html>.

Aarons, D. (1998 - 1999). "Can Inordinate Delay Between a Sentence of Death and Execution Constitute Cruel and Unusual Punishment?" Seton Hall Law Review **29**(1): 147 - 212.

Abramson, J. (2004). "Death is Different Jurisprudence and the Role of the Capital Jury." Ohio State Journal of Criminal Law **2**(1): 117 - 164.

Abu - Jamal, M. (1995). Live from Death Row. Cambridge, Massachusetts, Da Capo Press.

ACLU. (2003). "New ACLU Report Finds Virginia Death Penalty System Riddled with Flaws, Recommends Sweeping Changes." from [www.ACLU.org](http://www.ACLU.org).

ACLU (2004(a)). The Forgotten Population: A look at Death Row in the United States Through the Experiences of Women. From [www.ACLU.org](http://www.ACLU.org)

ACLU. (2004 (b)). "Appeals Court Affirms that Mississippi Death Row Conditions are Unconstitutional." from [www.ACLU.org](http://www.ACLU.org).

ACLU. (2008(a)). "ACLU Investigation Reveals Grossly Inadequate Conditions on Federal Death Row." from [www.ACLU.org](http://www.ACLU.org).

ACLU. (2008(b)). "The Truth About Life Without Parole: Condemned to Die in Prison." from [www.ACLU.org](http://www.ACLU.org).

ACLU. (2012). "Lady Justice Rolls the Dice: The Death Penalty is "Random Horror." from [www.ACLU.org](http://www.ACLU.org)

Acker, J. (2009). "Is Death Different?". Behavioural Sciences and the Law **27**(3): 297 - 311

Adams, P. (2010). Is the Death Penalty on Death Row? BBC News. March 30

Alper, T. (2008). "Anesthetizing the Public Conscience: Lethal Injection and Animal Euthanasia." Fordham Urban Law Journal **35**(4): 817 - 855.

Altimari, D. (2011). Death Penalty Debated at Capitol. The Hartford Courant. March 30

Altimari, D. & Lender, J. (2012). Death Penalty Repeal Clears Biggest Hurdle. The Hartford Courant. April 05

Amnesty International (2001). Abuses Continue Unabated? Cruel and Inhumane Treatment at Virginia Supermaximum Security Prisons. Amnesty International.

Amnesty International (2003). United States of America: Death by Discrimination – The Continuing Role of Race in Capital Cases. Amnesty International

Amnesty International (2006). United States of America: The Execution of Mentally Ill Offenders. Amnesty International

Amnesty International (2010). Death Sentences and Executions 2010. Amnesty International.

Amnesty International (2011). USA, An Embarrassment of Hitches: Reflections on the Death Penalty, 35 Years after *Gregg v Georgia*, as States Scramble for Lethal Injection Drugs. Amnesty International

Amnesty International & Human Rights Watch. (2005). The Rest of their Lives: Life Without Parole for Child Offenders in the United States. Amnesty International.

Anderson, D. C. (1995). Crime & the Politics of Hysteria. New York, Random House.

Appleton, C. G., Bent (2007). "The Pros and Cons of Life Without Parole." British Journal of Criminology **47**(4): 597 - 615.

Arriens, J. (1992). Welcome to Hell: Letters and Other Writings by Prisoners on Death Row in the United States. Cambridge, Ian Faulkner Publishing Ltd.

Arrigo, B. A. & Bullock, J. L. (2008). "The Psychological Effects of Solitary Confinement on Prisoners in Supermax Units: Reviewing What we Know and Recommending What Should Change." International Journal of Offender Therapy and Comparative Criminology **52**(6): 622 - 640.

Associated Press. (1986). Death Row 'Dungeon' to be Fixed up. New York Times. May 19

Associated Press. (2000). N.H. Governor Vetoes Bill to Repeal Death Penalty. Tri City Herald. May 20

Associated Press. (2004). Convicted Sniper Lee Boyd Malvo Sentenced to Death. USA Today. March 10

Associated Press. (2005a). BTK Killer gets Maximum Life Sentence. NBC News. August 18

Associated Press. (2005b). Connecticut Serial Killer Executed. Fox News. May 13

Associated Press. (2009). Cordray: Death Appeals too Long. Youngstown News. April 2

Associated Press. (2010). Death Penalty Days Numbered? Fox59 News. January 18

Associated Press. (2012(a)). Missouri to Use Same Drug Involved in Michael Jackson's Death for Executions. Fox News. May 24

Associated Press. (2012(b)). Malloy Criticized for Supporting the Repeal of Connecticut's Death Penalty. The New Haven Register. April 22

Associated Press. (2012(c)). Texas Death Row Inmate's Mental Health Questioned. CBS News. May 13

Ayres, D. B. (1998). Political Briefing; Death Penalty Support Declines after Execution. New York Times. March 23

Babcock, S. (2008). Death Row Conditions: State by State Comparison. Death Penalty Information

Center.

Bailey, F. Y. & Chermak, S. (2007). Series Forward. Public Executions: The Death Penalty and the Media. C. Kudlac. London, Praeger

Balsamo, J. (2002). Report on Sanitation, Environmental Health and General Safety Conditions Provided to Death Row Inmates at the Mississippi State Penitentiary, Parchman, Mississippi. American Civil Liberties Union.

Banks, C. (2008). Criminal Justice Ethics: Theory and Practice (2<sup>nd</sup> edition). London: Sage Publications

Banner, S. (2002). The Death Penalty: An American History. London, Harvard University Press.

Barry, R. V. (1979). "Furman to Gregg: The Judicial and Legislative History." Howard Law Journal **22**: 53 - 117.

Batheja, A. (2009). Death Sentences have Dropped Sharply after Life Without Parole became Possible. Fort Worth Star Telegram. November 15

Beccaria, C. (1764 ). On Crimes and Punishments (1986 reprinted edition). Indianapolis, Hackett Publishing Company.

Bedau, H. A. (1997). The Death Penalty in America: Current Controversies. Oxford, Oxford University Press.

Berger, V. (2007). "Abolition of the Death Penalty: Prospects Brighten." National Law Journal. January 29

Berger, V. (2007). "Abolition of the Death Penalty: Prospects Brighten." The National Law Journal

Berry-Dee, C. (2007). Face to Face with Serial Killers. London: John Blake Publishing Ltd.

Berry-Dee, C. & Brown, T. (2003). Monsters of Death Row. London: Virgin Books.

Berry-Dee, C. & Brown, T. (2010) Dead Men Walking. London: John Blake Publishing Ltd

Bessette, J. M., Kendell, G. H., Steiker, C., Bright, S. B., Kunkle, W. J. Jr., & Steiker, J. (1997). "Reflections on a Quarter Century of Constitutional Regulation of Capital Punishment." The John Marshall Law Review **30**(2): 399 - 462.

Blank, S. (2006). "Killing Time: The Process of Waiving Appeal: The Michael Ross Death Penalty Cases." Journal of Law and Policy **14**: 735 - 777.

Blecker, R. (2010). "Less Than we Might: Meditations on Life in Prison Without Parole." Federal Sentencing Reporter **23**(1): 10 - 20.

Blow, S. (2008). Time for Texas to Try a Death Penalty Without Executions. Dallas Morning News. January 24

Bluestein, G. (2012). Petition Outlines Taylor County Killer Daniel Greene's Clemency Appeal. The Ledger - Enquirer. April 18



- Blumenthal, R. (2006). Texas Inmates Protest Conditions with Hunger Strikes. New York Times. November 8
- Blumenthal, R. (2008). After Hiatus, States Set Wave of Executions. New York Times. May 3
- Bohm, R. M., Ed. (1991). The Death Penalty in America: Current Research. Cincinnati, Anderson Publishing Co.
- Boston Globe Editorial (2009). The Cost of Capital Punishment. The Boston Globe. April 15
- Bright, S. (1996). "The Electric Chair and the Chain Gang." Notre Dame Law Review **71**(5): 845 - 860.
- Buchanan, W. (2011). Gov. Brown Cancels Plans to Build New Death Row. San Francisco Chronicle. , April 29
- Butterfield, F. (2004). Mistreatment of Prisoners is Called Routine in U.S. New York Times. May 8
- Callahan, D. G. (2011). Cost to Taxpayers High in Death Penalty Cases. Middletown Journal. October 17
- Camus, A. (1963). Resistance, Rebellion, and Death. New York, Vintage Books.
- Chandler, C. (1998). "Voluntary Executions." Stanford Law Review **50**(6): 1897 - 1927.
- Chessman, C. (2006). Death Row: A Condemned Man's Story. Cambridge, Massachusetts, Da Capo Press.
- Christianson, S. (2010). The Last Gasp: The Rise and Fall of the American Gas Chamber. London, University of California Press.
- Christoffersen, J. (2005). Pending Connecticut Execution puts Spotlight on 'Death Row Syndrome'. Associated Press. February 1
- Cochran, J. K. Chamlin, M. B. (2005) "Can Information Change Public Opinion? Another Test of the Marshall Hypothesis" Journal of Criminal Justice **33** 573 - 584
- Cohen, S. (2001). States of Denial: Knowing about Atrocities and Suffering. Oxford, Blackwell - Synergy.
- Colvin, M. (1997). Penitentiaries, Reformatories, and Chain Gangs: Social Theory and the History of Punishment in Nineteenth Century America. New York: St Martin's Press
- Connolly, M. P. (1997). "Better Never than Late: Prolonged Stays on Death Row Violate the Eighth Amendment." New England Journal on Criminal and Civil Confinement **23**(1): 101 - 138.
- Conroy, J. (2001). Unspeakable Acts, Ordinary People: The Dynamics of Torture. Berkeley, California, University of California Press.
- Coyne, T. (2009). Indiana Executions at Slowest Pace in 15 Years. Chicago Tribune. June 14

- Crawford, B. (2008). Texas Death Row: Last Words. Last Meals. Last Rites. London. Penguin Books
- Crocker, D. (1997 - 1998). "Extended Stays: Does Lengthy Imprisonment on Death Row Undermine the Goals of Capital Punishment?" The Journal of Gender, Race & Justice **1**: 555 - 574.
- Cullen, E. & Newell, T. (2003). Murderers and Life Imprisonment. Winchester, Waterside Press.
- Cunningham, M. D., Reidy, T. J. & Sorenson, J. R. (2008 ). "Assertions of "Future Dangerousness" at Federal Capital Sentencing: Rates and Correlates of Subsequent Prison Misconduct and Violence." Law and Human Behaviour **32**(1): 46 - 63.
- Cunningham, M. D., & Reidy, T. J. (1999). "Don't Confuse me with the Facts: Common Errors in Violence Risk Assessment at Capital Sentencing." Criminal Justice and Behaviour **26**(1): 20 - 43.
- Cunningham, M. D., Reidy, T. J. & Sorenson, J. R. (2005). "Is Death Row Obsolete? A Decade of Mainstreaming Death Sentenced Inmates in Missouri." Behavioural Sciences and the Law **23**(3): 307 - 320.
- Cunningham, M. D., Sorenson, J. R., & Reidy, T. J. (2004). "Revisiting Future Dangerousness Revisited: Response to DeLisi and Munoz." Criminal Justice Policy Review **15**(3): 365 - 376.
- Cunningham, M. D. Sorenson, J. R. Reidy, T. J. (2005). "An Actuarial Model for Assessment of Prison Violence Among Maximum Security Inmates." Assessment **12**(1): 40 - 9
- Cunningham, M. D. & Vigen, M. P. (2002). "Death Row Inmate Characteristics, Adjustment, and Confinement: A Critical Review of the Literature." Behavioural Sciences and the Law **20**(1-2): 191 - 210.
- Daily Mail Reporter. (2011). Drug Maker Urges Florida NOT to use its Product in Execution Scheduled for 3pm Today. The Daily Mail. September 28
- Daily Mail Reporter. (2012). Home Invasion Massacre Murderers to STAY on Death row... Even as Connecticut Voters Decide to Abolish the Death Penalty. The Daily Mail. April 12
- Dallas Morning News Editorial (2000). Defense Called Lacking for Death Row Indigents but System Supporters Say Most Attorneys Effective. Dallas Morning News. September 10
- Dallas Morning News Editorial (2007). Death no More: Life without Parole Should be the New Standard. Dallas Morning News. April 16
- Dardis, F. E., Baumgartner, F. R., Boydston, A. E., De Boef, S. & Shen, F. (2006). "Media Framing of Capital Punishment and it's Impact on Individual's Cognitive Responses." Mass Communication and Society **11**(2): 115 - 140.
- Davies, D. (2005). Torture Inc. America's Brutal Prisons. BBC. Documentary. March 28
- Dawnay, I. (1998). Texans Shrink from Taking a Woman's Life. Daily Telegraph. January 11
- De Vogue, A. (2011). DOJ Tells Arizona it Illegally Obtained Death Penalty Drug. ABC News. May 25
- Death Penalty Information Center (2011). "Death Row" Podcast. From

<http://www.deathpenaltyinfo.org>

Death Penalty Information Center (2012a). "Mental Disability". From <http://www.deathpenaltyinfo.org/mental-disability>

Death Penalty Information Center (2012b). "Length of Time on Death Row". From <http://www.deathpenaltyinfo.org/time-death-row>

Death Penalty Information Center (2012c). "Innocence and the Death Penalty". From <http://www.deathpenaltyinfo.org/innocence-and-death-penalty>

Death Penalty Information Center (2012d) "Death Row Populations". From <http://www.deathpenaltyinfo.org/death-row-inmates-state-and-size-death-row-year>

Del Carmen, R. V., Ritter, S. E., & Witt, B. A. (2008). Briefs of Leading Cases in Corrections. Newark, Anderson Publishing.

DeLisi, M. & Munoz, E. A. (2003). "Future Dangerousness Revisited." Criminal Justice Policy Review **14**(3): 287 - 305.

Denno, D. W. (1992). "Death is Different and Other Twists of Fate". The Journal of Criminal Law and Criminology **83** 437 - 467

Denno, D. W. (1994). "Is Electrocution an Unconstitutional Method of Execution? The Engineering of Death over the Century." William and Mary Law Review **35**(2): 551 - 692.

Denno, D. W. (1997). "Getting to Death: Are Executions Unconstitutional?" Iowa Law Review **82**(2): 319 - 403.

Denno, D. W. (2000). "Adieu to Electrocution." Ohio Northern University Law Review **26**(3): 665 - 679.

Denno, D. W. (2002). "When Legislatures Delegate Death: The Troubling Paradox Behind State Uses of Electrocution and Lethal Injection and What it Says About Us." Ohio State Law Journal **63**(1): 63 - 260.

Denno, D. W. (2007). "The Lethal Injection Quandry: How Medicine has Dismantled the Death Penalty." Fordham Law Review **76**(1): 49 - 128.

Deparle, J. (1991). The Nation; Abstract Death Penalty Meets Real Execution. New York Times. June 30

DeWitt, M. E. (1997 - 1998). "Extradition Enigma: Italy and Human Rights vs. America and the Death Penalty." Catholic University Law Review **47**(2): 535 - 601.

DiCamillo, M. & Field, M. (2006). While Still Strongly Supporting the Death Penalty, Californians have Mixed Views on Some Aspects of Capital Punishment, Majority Opposes the Delay in the Morales Execution, The Field Poll.

Dieter, R. C. (2007). A Crisis of Confidence: Americans' Doubts about the Death Penalty. Death Penalty Information Center. <http://www.deathpenaltyinfo.org>

Dieter, R. C. (2009). Smart on Crime: Reconsidering the Death Penalty in a Time of Economic Crisis. Death Penalty Information Center. <http://www.deathpenaltyinfo.org>

Dieter, R. C. (2011). Struck by Lightning: The Continuing Arbitrariness of the Death Penalty Thirty-Five Years after its Re-instatement in 1976. Death Penalty Information Center. <http://www.deathpenaltyinfo.org>

Duff, R. A. (1996). "Penal Communications: Recent Work in the Philosophy of Punishment." Crime & Justice **20**(1): 1 - 97

Eckholm, E. & Zezima, K. (2011). Drug Used in Executions Dropped by U.S. Supplier. New York Times. January 22

Economist Editorial (2012). Another Reprieve: Connecticut is to Repeal Capital Punishment, Part of a Growing Trend? The Economist. April 21

Edens, J. F., Buffington - Vollum, J. K., Keilen, A., Roskamp, P. & Anthony, C. (2005). "Predictions of Future Dangerousness in Capital Murder Trials: Is it Time to "Disinvent the Wheel?"" Law and Human Behaviour **29**(1): 55 - 86.

Egelko, B. (2010). Field Poll Finds 70% Support Death Penalty. San Francisco Chronicle. July 22

Elias, P. (2007). Death Row Suicides Surpass Executions. Oakland Tribune. June 13

Elsner, A. (2002). Inmates Say Texas Death Row is a Living Hell. Reuters News Service. January 7

Equal Justice Initiative (2007). Cruel and Unusual: Sentencing 13 and 14 Year-Old Children to Die in Prison. Equal Justice Initiative.

Feldman, J. (1999 - 2000). "A Death Row Incarceration Calculus: When Prolonged Death Row Imprisonment becomes Unconstitutional." Santa Clara Law Review **40**(1): 187 - 219.

Flynn, K. M. (1997). "The "Agony of Suspense": How Protracted Death Row Confinement Gives Rise to an Eighth Amendment Claim of Cruel and Unusual Punishment." Washington and Lee Law Review **54**(1): 291 - 333.

Foley, M. A. (2003). Arbitrary and Capricious: The Supreme Court, the Constitution, and the Death Penalty. London, Praeger.

Foucault, M. (1977). Discipline and Punish. London, Penguin Books.

Fraser, C. (2007). Italy Inmates Seek Death Penalty. BBC News. May 31

Gallup. (2009). "The Death Penalty." from [www.gallup.com/poll/1606/Death-Penalty.aspx](http://www.gallup.com/poll/1606/Death-Penalty.aspx).

Gallup News Service. (2001). The McVeigh Execution: American Public Opinion. Gallup.

Gardner, M. (2012). Death Penalty Appeals Package Dismissed. The San Diego Union Tribune. April 17

Garland, D. (1990). Punishment and Modern Society: A Study in Social Theory. Oxford, Clarendon Press

Garland, D. (2002). "The Cultural Uses of Capital Punishment." Punishment & Society 4(4): 459 - 487.

Garland, D. (2007(a)). Rethinking the Symbolic - Instrumental Distinction: Meanings and Motives in American Capital Punishment. Governance and Regulation in Social Life: Essays in Honour of W. G. Carson. A. Brannigan. London, Routledge.

Garland, D. (2007(b)). "The Peculiar Forms of American Capital Punishment." Social Research 74(2): 435 - 464.

Garland, D. (2008). Death, Denial, Discourse: On the Forms and Functions of American Capital Punishment. Crime, Social Control, and Human Rights: From Moral Panic to States of Denial, Essays in Honour of Stanley Cohen. N. Chomsky. London, Willan Publishing.

Garland, D. (2010). Peculiar Institution: America's Death Penalty in an Age of Abolition. Oxford, Oxford University Press.

Gatrell, V. (1996). The Hanging Tree: Execution and the English People 1770 - 1868. Oxford, Oxford University Press.

Gearan, A. (1994). Wounds Deep 10 Years After Nation's Largest Death Row Escape. Associated Press. July 3

Girling, E. (2004 ). "Looking Death in the Face: The Benetton Death Penalty Campaign." Punishment & Society 6(3): 271 - 287.

Girling, E. (2006). European Identity, Penal Sensibilities, and Communities of Sentiment. Perspectives on Punishment: The Contours of Control. Armstrong, S. & McAra, L. Oxford Oxford University Press.

Glaberson, W. (2002). On a Reinvented Death Row, The Prisoners Can Only Wait. New York Times. June 4

Glaberson, W. (2010). Reliving Horror in a Test for the Death Penalty. New York Times. January 19

Godoy, J. (2007). Death Penalty Better, Say Some, Than Slow Execution. Inter Press Service News Agency. January 22

Goode, E. (2012). Senators Start a Review of Solitary Confinement. New York Times June 19

Graves, A. (2012). An Innocent Man's Tortured Days on Texas's Death Row. American Civil Liberties Union

Green, F. (2009). Va. goes 20 Months Without a Death Verdict from a Jury. Richmond Times Dispatch. November 14

Greene, J. (2004). "Examining our Harsh Prison Culture." Open Society Institute Occasional Paper Series 4(1): 2 - 4.

Greenhouse, L. (1990). Rehnquist Urges Curb on Appeals of Death Penalty. New York Times. May 16

Greer, C. (2006). Delivering Death: Capital Punishment, Botched Executions and the American News Media. Captured by the Media: Prison Discourse in Popular Culture. P. Mason. Devon, Willan Publishing.

Grivet, S. (2005). Waiting to Die: The Shaping of San Quentin's Death Row. Social Sciences & History Association Annual Convention. Portland, Oregon, Social Sciences & History Association (SSHA).

Grixti, J. (1995). "Consuming Cannibals: Psychopathic Killers as Archetypes and Cultural Icons" Journal of American Culture **18**(1): 87 - 96

Gross, S. R. (1998). "Update: American Public Opinion on the Death Penalty - it's Getting Personal." Cornell Law Review **83**: 1448 - 1475.

Haas, K. C. (1994) "Triumph of Vengeance over Retribution: The United States Supreme Court and the Death Penalty." Crime, Law, and Social Change **21**(2) 127 - 154

Haines, H. H. (1996). Against Capital Punishment: The Anti - Death Penalty Movement in America 1972 - 1994. Oxford, Oxford University Press.

Hallinan, J. T. (2001). Going up the River: Travels in a Prison Nation. New York, Random House.

Hammer, D., Cody, A. C., Gerson, R. Greene, N. L., Mushlin, M. B. & Wolf, R. T. (2002). "Dying Twice: Conditions on New York's Death Row." Pace Law Review **22**(2): 1 - 18.

Haney, C. (1993). ""Infamous Punishment": The Psychological Consequences of Isolation." National Prison Project Journal **8**(2): 3 - 7.

Haney, C. (1995). "The Social Context of Capital Murder: Social Histories and the Logic of Mitigation." Santa Clara Law Review **35**(2): 547 - 609.

Haney, C. (2003). "Mental Health Issues in Long-Term Solitary and "Supermax" Confinement." Crime & Delinquency **49**(1): 124 - 156.

Haney, C. & Lynch, M. (1997). "Regulating Prisons of the Future: A Psychological Analysis of Supermax and Solitary Confinement " New York University Review of Law and Social Change **23**(4): 477 - 570.

Haney, C. & Zimbardo, P. (1998). "The Past and Future of U.S. Prison Policy: Twenty-Five Years After the Stanford Prison Experiment." American Psychologist **53**(7): 709 - 727.

Harcourt, B. E. (2009). Abolition in the United States by 2050: On Political Capital and Ordinary Acts of Resistance. The Road to Abolition? The Future of Capital Punishment in the United States. Sarat, A. & Ogletree, C. J. Jr. London, New York University Press.

Harrison, K. & Tamony, A. (2010). "Death Row Phenomenon, Death Row Syndrome and their Affect on Capital Cases in the US." Internet Journal of Criminology: 1 - 16. November

Harvard Law Review Unsigned Notes (2006). "A Matter of Life and Death: The Effect of Life Without Parole Statutes on Capital Punishment." Harvard Law Review **119**(6): 1838 - 1854.

- Hassine, V. (1996). Life Without Parole: Living in Prison Today. Los Angeles, Roxbury.
- Hedges, R. S. (2000 - 2001). "Justices Blind: How the Rehnquist Court's Refusal to Hear a Claim for Inordinate Delay of Execution Undermines its Death Penalty Jurisprudence". Southern California Law Review **74**(2): 577 - 615.
- Hogue, M. (2007). A Death Penalty Slowdown but Not in Texas. Dallas Morning News. April 15
- Hood, R. (2008). The Death Penalty: A Worldwide Perspective. Oxford, Oxford University Press.
- Hood III, W. W. (1989). "The Meaning of "Life" for Virginia Jurors and its Effect on Reliability in Capital Sentencing". Virginia Law Review **75**(8): 1605 - 1638
- Howells, G. N., Flanagan, K. A. & Hagan, V. (1995). "Does Viewing a Televised Execution Affect Attitudes Toward Capital Punishment?" Criminal Justice and Behaviour **22**(4): 411 - 424.
- Hudson, D. M. (2000). Managing Death - Sentenced Inmates: A Survey of Practices. Lanham, Maryland, American Correctional Association.
- Hudson, P. (2000). "Does the Death Row Phenomenon Violate a Prisoner's Human Rights under International Law?" European Journal of International Law **11**(4): 833 - 856.
- Hughes, D. J. (2003). Cruel as Usual. In These Times. December 30
- Human Rights Watch. (2005). Getting away with Torture? Command Responsibility for the U.S. Abuse of Detainees. Human Rights Watch
- Human Rights Watch. (2006). So Long as they Die: Lethal Injections in the United States. Human Rights Watch.
- Hyde, A. (1997). Bodies of Law. Chichester, Princeton University Press.
- Ingebretsen, E. J. (2001). At Stake: Monsters and the Rhetoric of Fear in Public Culture. Chicago: University of Chicago Press
- Iowa Law Review Unsigned Note (1972). "Mental Suffering under Sentence of Death: A Cruel and Unusual Punishment." Iowa Law Review **57**(3): 814 - 833.
- Jack, A. (2011). Danes try to Block use of Drug in Executions. Financial Times. June 7
- Jackson, J. & Burke, W. F. (1999). Dead Run: The Untold Story of Dennis Stockton and America's Only Mass Escape from Death Row. New York, Random House.
- Jarvis, B. (2006). The Violence of Images: Inside the Prison TV Drama Oz. Captured by the Media: Prison Discourse in Popular Culture. P. Mason. Devon, Willan Publishing.
- Jennings, J. W., Crist, V., Doss, R., Lappin, H., Morris, S., Morris, S., Ross, D., Singletary, H. K., Springer, P., Snurkowski, C. & Varlotta, D. (2007). The Governor's Commission on Administration of Lethal Injection: Final Report with Findings and Recommendations. From [www.law.berkeley.edu](http://www.law.berkeley.edu)
- Johnson, R. (1979). "Under Sentence of Death: The Psychology of Death Row Confinement." Law &

Psychology Review **5**(2): 141 - 192.

Johnson, R. (1980). "Warehousing for Death: Observations on the Human Environment of Death Row." Crime & Delinquency **26**(4): 545 - 562.

Johnson, R. (1981). Condemned to Die: Life Under Sentence of Death. New York, Elsevier.

Johnson, R. (1984). "A Life for a Life?" Justice Quarterly **1**(4): 569 - 580.

Johnson, R. (1998). Death Work: A Study of the Modern Execution Process. Belmont, California, Wadsworth.

Johnson, R. & McGunigall – Smith, S. (2008). "Life Without Parole, America's Other Death Penalty: Notes on Life Under Sentence of Death by Incarceration." The Prison Journal **88**(2): 328 - 346.

Johnson, T. (2006). Death Sentence Affirmed for Davya Cross. Seattle PI. March 31

Jolly, D. (2011). Danish Company Blocks Sale of Drug for U.S. Executions. New York Times. July 1

Justice, W. W. (1990). "The Origins of Ruiz v Estelle." Stanford Law Review **43**(1): 1 - 12.

Kaban, E. (2010). UN Rebukes US over Brutality in Jails. Asheville Global Report. May 18

Kaufman-Osborn, T. V. (2009). Perfect Execution: Abolitionism and the Paradox of Lethal Injection. The Road to Abolition? The Future of Capital Punishment in the United States. Sarat, A. & Ogletree, C. J. Jr. London, New York University Press.

Keshen, B. (2010). On Death Penalty, State Bucks Trend. Concord Monitor. December 31

Kifner, J. (1995). Grasso's Farewell: 'Life Without Parole' Worse than Death. New York Times. March 21

King, R. D. (1994). Conditions for Death Row Prisoners in H-Unit, Oklahoma State Penitentiary, USA: Report on a Visit 3-4 March 1994, for Amnesty International, International Secretariat, Amnesty International.

Kirchmeier, J. L. (2007). "Casting a Wider Net: Another Decade of Legislative Expansion of the Death Penalty in the United States." Pepperdine Law Review **34**(1): 1 - 40.

Koniaris, L., G., Zimmers, T. A. Lubarsky, D. A. & Sheldon, J. P. (2005). "Inadequate Anaesthesia in Lethal Injection for Execution." The Lancet **365**(16): 1412 - 1414.

Kozinski, A. & Gallagher, S. (1995). "Death: The Ultimate Run on Sentence." Case Western Law Review **46**(1): 1 - 32.

Kraidy, M. M. & Goeddertz, T. (2003). "Transational Advertising and International Relations: US Press Discourses on the Benetton 'We on Death Row' Campaign." Media, Culture, & Society **25**(2): 147 - 165.

Kuncl, T. (1995). Femme Fatales: True Stories of the Most Vicious Women on Death Row. London, True Crime



Kupers, T. A. (2002). A Report of General Conditions Among Emotionally Disturbed Inmates Housed on Unit 32 of the Mississippi State Penitentiary, Parchman, Mississippi. American Civil Liberties Union.

Landau, N. (2002). Law, Crime and English Society, 1660 – 1830. Cambridge, Cambridge University Press

Lane, C. (2010). Stay of Execution: Saving the Death Penalty from Itself. Plymouth, Rowman & Littlefield Publishers Inc.

Laurence, C. (1998). A Crime that Shocked America. BBC News. January 30

Ledyard, D. B. (2011). Death Penalty Appeals Process far too Long. The Day. March 20

Leithead, A. (2011). Stanford Prison Experiment Continues to Shock. BBC News. 17 August

Leo, R. A. (2005). "Rethinking the Miscarriages of Justice: Developing a Criminology of Wrongful Conviction." Journal of Contemporary Criminal Justice **21**(3): 201 - 223.

Liebman, J. S. (2001 - 2002). "An "Effective Death Penalty"? AEDPA and Error Detection in Capital Cases." Brooklyn Law Review **67**(2): 411 - 428.

Lifton, R. J. & Mitchell, G. (2002). Who Owns Death? Capital Punishment, the American Conscience and the End of Executions. New York, USA: Perennial

Lin, J. Phillips, S. (2012). "Coverage of Capital Murder: Exceptions Sustain the Rule". Justice Quarterly (forthcoming)

Liptak, A. (2005). Serving Life, With no Chance of Redemption. New York Times. October 5

Liptak, A. (2010). Justices Limit Life Sentences for Juveniles. New York Times. May 17

Lofland, J. (1977). The Dramaturgy of State Executions. State Executions Viewed Historically and Sociologically: The Hangmen of England and the Dramaturgy of State Executions. Bleackley, H. & Lofland, J. Montclair, New Jersey, Patterson Smith.

Lombardi, G., Sluder, R. D. & Wallace, D. (1996). The Management of Death-Sentenced Inmates: Issues, Realities, and Innovative Strategies. Annual Meeting of the Academy of Criminal Justice Sciences. Las Vegas, Nevada.

Lombardi, G., Sluder, R. D. & Wallace, D. (1997). "Mainstreaming Death Sentenced Inmates: The Missouri Experience and its Legal Significance." Federal Probation **61**(2): 3 - 11.

Longo, C. (2011). Giving Life After Death Row. New York Times. March 5

Love, D. A. (2005). Tookie Williams Case Reveals Death Penalty Flaws. The Progressive December 7

Love, N. (2011). N.H. Expands Death Penalty after Brutal Attack on Family. Boston Globe June 29

Lynch, M. (2000(a)). "On-line Executions: The Symbolic Use of the Electric Chair in Cyberspace."

Political and Legal Anthropology **23**(2): 1 - 20.

Lynch, M. (2000(b)). "The Disposal of Inmate #85271: Notes on a Routine Execution." Studies in Law, Politics, and Society **20**: 3 - 34.

Lynch, M. (2002). "Capital Punishment as Moral Imperative: Pro - Death Penalty Discourse on the Internet." Punishment & Society **4**(2): 213 - 236.

Lynch, M. (2005). Supermax Meets Death Row: Legal Struggles Around the New Punitiveness in the US. The New Punitiveness: Trends, Theories, Perspectives. Pratt, J., Brown, D., Brown, M., Hallsworth, S. & Morrison, W. Devon, Willan Publishing.

Lyon, A. D. & Cunningham, M. D. (2005 - 2006). ""Reason Not the Need": Does the Lack of Compelling State Interest in Maintaining a Seperate Death Row Make it Unlawful?" American Journal of Criminal Law **33**(1): 1 - 30.

Magee, D. (1980). Slow Coming Dark: Interviews on Death Row. New York, The Pilgrim Press.

Mann, D. (2010). Solitary Men: Does Prolonged Isolation Drive Death Row Prisoners Insane? The Texas Observer. November 10

Marquart, J. W. & Sorenson, J. R. (1988). "Institutional and Posrelease Behaviour of Furman - Commuted Inmates in Texas." Criminology **26**(4): 677 - 693.

Marquis, J. (2005). "The Myth of Innocence." The Journal of Criminal Law & Criminology **95**(2): 501 - 521.

Marshall, L. C. (2004). "The Innocence Revolution and the Death Penalty." Ohio State Journal of Criminal Law **1**(2): 573 - 584.

Mauer, M. King, R. S. & Young, M. C. (2004). The Meaning of "Life": Long Prison Sentences in Context. The Sentencing Project.

McGreal, C. (2009). Texas Death Row Man Claims Inmates' Numbered Days are Form of Torture. The Guardian. November 15

McGunigall - Smith, S. (2004). Men of a Thousand Days: Death-sentenced Inmates at Utah State Prison (unpublished doctoral dissertation), University of Bangor. Wales

McKelway, B. (2009). Jailbreak: Briley Brothers Busted out of Death Row. Richmond Times-Dispatch. May 31

Meltsner, M. (1973). Cruel and Unusual: The Supreme Court and Capital Punishment. New York, Random House.

Merrill, J. (2008 - 2009). "The Past, Present, & Future of Lethal Injection: Baze v Rees' Effect on the Death Penalty." University of Missouri - Kansas City Law Review **77**(1): 161 - 195

Michael Rossi, R. (2004). Waiting to Die: Life on Death Row. London, Vision.

Michaud, S. G. Aynesworth, H. (2000). Ted Bundy: Conversations with a Killer. New York: Authorlink

Miethe, T. D. (2012). Estimates of Time Spent in Capital and Non-Capital Murder Cases: A Statistical Analysis of Survey Data from Clark County Defense Attorneys. Department of Criminal Justice, University of Las Vegas, Nevada.

Millhollon, M. (2009). Economics of Executions. Advocate Capital News. March 8

Mintz, H. (2012). The Cost of California's Death Penalty. Mercury News. May 5

Mintz, H. O'Brien, M. (2012) Proposition 34: Death Penalty Repeal Fails. Mercury News November 6

Mumola, C. J. (2005). Suicide and Homicide in State Prisons and Local Jails. Bureau of Justice Statistics.

Murton, T. (1969). "Treatment of Condemned Prisoners." Crime & Delinquency **15**(94 - 111).

Nathan, V. M. (2002). Correctional Expert's Report on August , 2002 Tour of Death Row, Mississippi State Penitentiary, Parchman, Mississippi. American Civil Liberties Union.

Nellis, A. (2010). "Throwing Away the Key: The Expansion of Life Without Parole in the United States." Federal Sentencing Reporter **23**(1): 27 - 36.

Nellis, A. & King, R. S. (2009). No Exit: The Expanding use of Life Sentences in America. The Sentencing Project.

New York Times Editorial (2009). High Cost of Death Row. New York Times. September 28

New York Times Editorial (2011(a)). Lethal Injection and the F.D.A. New York Times. January 27

New York Times Editorial (2011(b)). The Misuse of Life Without Parole. New York Times. September 12

New York Times Editorial (2012). The "Random Horror" of the Death Penalty. New York Times. January 8

Newport, F. (2012). Americans, Including Catholics, Say Birth Control is Morally OK, Gallup.

News Tribune Editorial. (2008). Life Without Parole vs. Unlikely Execution. News Tribune. February 15

Nossiter, A. (1994). Making Hard Time Harder, States Cut Jail TV and Sports. New York Times. September 17

O'Hear, M. M. (2010). "The Beginning of the End for Life Without Parole?" Federal Sentencing Reporter **23**(1): 1 - 9.

Paduano, A. & Stafford Smith, C. A. (1987). "Deathly Errors: Juror Misperceptions Concerning Parole in the Imposition of the Death Penalty". Columbia Human Rights Law Review **18**: 211 - 257

Paluch, J. A. Jr. (2004). A Life for a Life: Life Imprisonment: America's Other Death Penalty. Los Angeles, Roxbury.

Peterson, R. (2012). Okla. Death Row Inmate Gary Welch has been Executed - First in U.S. in 2012. McAlester News Capital. January 5

Pilkington, E. (2012). Texas Executions Threatened as Stocks of Death Penalty Drug Run Low. The Guardian. February 14

Pratt, J. Brown, D. Brown, M. Hallsworth, S. & Morrison, W. Ed. (2005). The New Punitiveness: Trends, Theories, Perspectives. Devon, Willan Publishing.

Radelet, M. & Lacock, T. L. (2009). "Recent Developments: Do Executions Lower Homicide Rates?: The Views of Leading Criminologists." The Journal of Criminal Law & Criminology **99**(2): 489 - 508.

Radelet, M. (2005). Thirty Years after Gregg. Death Penalty Information Center.

Radelet, M. (2010). Some Examples of Post - Furman Botched Executions. Death Penalty Information Center.

Radelet, M. Vandiver, M. & Berardo, F. M. (1983). "Families, Prisons, and Men with Death Sentences." Journal of Family Issues **4**(4): 593 - 612.

Rankin, B. (2009). 'Crisis' in Death Penalty System. The Atlanta Journal - Constitution. April 19

Reidy, T. J. Cunningham, M. D. & Sorenson, J. R. (2001). "From Death to Life: Prison Behaviour of Former Death Row Inmates in Indiana." Criminal Justice and Behaviour **28**(1): 62 - 82.

Rell, J. (2009). Statement of Connecticut Governor Jodi Rell: *HB6578 An Act Concerning the Penalty for a Capital Felony*. Connecticut Legislative Chambers

Rev. Jackson, J. J., Jackson, J. L. Jr. & Shapiro, B. (2003). Legal Lynching: The Death Penalty and America's Future. New York, Anchor Books.

Reyes Cannaday, R. (2011). "An American Chronicle - One Man's View." Canadian Coalition Against the Death Penalty

Sarat, A. (2001). When the State Kills: Capital Punishment and the American Condition. Princeton, New Jersey, Princeton University Press.

Sarat, A. (2002). "The "New Abolitionism" and the Possibilities of Legislative Action: The New Hampshire Experience." Ohio State Law Journal **63**(1): 343 - 369.

Sarat, A. (2004). Killing me Softly: Capital Punishment and the Technologies for Taking Life. Pain, Death, and the Law. A. Sarat. Michigan, University of Michigan Press.

Saunders, D. J. (2001). Robert Lee Massie Exercises his Death Wish. San Francisco Chronicle. March 28

Schiffrin, N. (1998). "Jamaica Withdraws the Right of Individual Petition Under the International Covenant on Civil and Political Rights." The American Journal of International Law **92**(3): 563 - 568.

Schildkraut, J. Donley, A. M. (2012). "Murder in Black: A Media Distortion analysis of Homicides in

Baltimore 2010." Homicide Studies **16**(2): 175 - 196

Schultz, T. (2011). Europe Fights the Death Penalty - with Drugs. Global Post. May 13

Schwartz, H. I. (2005). "Death Row Syndrome and Demoralization: Psychiatric Means to Social Policy Ends." Journal of the American Academy of Psychiatry and the Law **33**(2): 153 - 155.

Schwartz, J. (2010). In 3rd Trial, Conviction in Murders from 1985 New York Times. April 8

Sheehan, W. J. (1977). Finding Solace in Eighteenth Century Newgate. Crime in England 1550 - 1800. J. S. Cockburn. London, Methuen & co. Ltd.

Shugrue, R. E. (1995 - 1996). "'A Fate Worse Than Death" - An Essay on Whether Long Times on Death Row are Cruel Times." Creighton Law Review **29**(1): 1 - 24.

Simon, J. K. (1991). "Michel Foucault on Attica: An Interview." Social Justice **18**(3): 26 - 34.

Simon, J. & Spaulding, C. (1999). Tokens of Our Esteem: Aggravating Factors in the Era of Deregulated Death Penalties. The Killing States: Capital Punishment in Law, Politics, and Culture. A. Sarat. Oxford, Oxford University Press.

Simon, S. (2000). Benetton Sued over Death Row Visits. Los Angeles Times February 24

Slack, J., Dewsbury, R. & Enoch, N. (2012). 'Alcatraz of the Rockies' that could be Hate Preacher Abu Hamza's New Home for Next 50 Years. Daily Mail. April 9

Smith, A. (2008). "Not "Waiving" but Drowning: The Anatomy of Death Row Syndrome and Volunteering for Execution." Boston University Public International Law Journal **17**(1): 237 - 254.

Snell, T. L. (2010). "Capital Punishment 2010 – Statistical Tables". Bureau of Justice Statistics

Solotaroff, I. (2001). The Last Face You'll Ever See. New York, Perennial.

Sorenson, J. R. & Pilgrim, R. L. (2000). "An Actuarial Risk Assessment of Violence Posed by Capital Murder Defendants." The Journal of Criminal Law & Criminology **90**(4): 1251 - 1270.

Sorenson, J. Wrinkle, R. D. (1996). "No Hope for Parole: Disciplinary Infractions among Death-Sentenced and Life-Without-Parole Inmates." Criminal Justice and Behaviour **23**(4): 542 - 551.

Stahlkopf, D. L. (1998). "A Dark Day for Habeas Corpus: Successive Petitions Under the Anti - Terrorism and Effective Death Penalty Act of 1996." Arizona Law Review **40**(3): 1115 - 1135.

Steiker, C. (2005). Capital Punishment and American Exceptionalism. American Exceptionalism and Human Rights. M. Ignatieff. Princeton, Princeton University Press

Steiker, C. S. & Steiker, J. M. (1995). "Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment." Harvard Law Review **109**(2): 355 - 438.

Steiker, C. S. & Steiker, J. M. (2005 - 2006). "A Tale of Two Nations: Implementation of the Death Penalty in "Executing" Versus "Symbolic" States in the United States." Texas Law Review **84**(7): 1869 - 1927.

Steiker, C. S. & Steiker, J. M. (2008). "Opening a Window or Building a Wall? The Effect of Eighth Amendment Death Penalty Law and Advocacy on Criminal Justice More Broadly." Journal of Constitutional Law **11**(1): 155 - 205.

Steiker, C. S. & Steiker, J. M. (2009). The Beginning of the End? The Road to Abolition? The Future of Capital Punishment in the United States. Sarat, A. & Ogletree, C. J. Jr. London, New York University Press.

Surette, R. (1992) Media, Crime, and Criminal Justice: Images and Realities. Wadworth: Belmont, California

Sykes, G. M. (1958). The Society of Captives: A Study of a Maximum Security Prison. Oxford, Princeton University Press.

Texas Defender Service. (2004). Deadly Speculation: Misleading Texas Capital Juries with False Predictions of Future Dangerousness. Texas Defender Service

Unnever, J. D. & Cullen, F. T. (2005). "Executing the Innocent and Support for Capital Punishment: Implications for Public Policy." Criminology & Public Policy **4**(1): 3 - 38.

Vito, G. F. Koester, P. & Wilson, D. G. (1991). Return of the Dead: An Update on the Status of *Furman* - Commuted Death Row Inmates. The Death Penalty in America: Current Research. R. M. Bohm. Cincinnati, Anderson Publishing Co.

Vito, G. F. & Wilson, D. G. (1988). "Back from the Dead: Tracking the Progress of Kentucky's *Furman* - Commuted Death Row Population." Justice Quarterly **5**(1): 101 - 111.

Vito, G. F. Wilson, D. G. & Latessa, E. J. (1991). Comparison of the Dead: Attributes and Outcomes of *Furman* - Commuted Death Row Inmates in Kentucky and Ohio. The Death Penalty in America: Current Research. R. M. Bohm. Cincinnati, Anderson Publishing Co.

Von Drehle, D. (1995). Among the Lowest of the Dead: The Culture of Death Row. New York, Random House.

Wallace, B. (2010). Dead Men Walking: Life on Death Row. London: Canary Press

Wallace - Wells, D. (2005). What is Death Row Syndrome? And who came up with it? Slate. February 1

Warden, R. (2005). "Illinois Death Penalty Reform: How it Happened, What it Promises." The Journal of Criminal Law & Criminology **95**(2): 381 - 426.

Wardle, C. & Gans - Boriskin, R. (2004). "Who Deserves to Die? Discussions of the Death Penalty on Primetime Television." Journal for Crime, Conflict and the Media **1**(3): 68 - 88.

Weinstein, B. & Bessent, J. (1996). Death Row Confidential. New York. Harper Collins

Wilgoren, J. (2003). Citing Issue of Fairness, Governor Clears Out Death Row in Illinois. New York Times. January 12

Williams, C. J. (2011). Death Penalty Costs California \$184 Million a Year, Study Says. Los Angeles Times. June 20

Wilson, M. (2011). Seeking Death Penalty in Indiana is Expensive, Often Unsuccessful. Courier Press. August 6

Wright, J. H. J. (1991). "Life Without Parole: The View from Death Row." Criminal Law Bulletin **27**: 334 - 357.

Yardley, W. (2000). Contact Rule Blamed for Death Row Hunger Strike. St. Petersburg Times. April 4

Yuzon, F. J. (1996 - 1997). "Conditions and Circumstances of Living on Death Row - Violative of Individual Rights and Fundamental Freedoms?: Divergent Trends of Judicial Review in Evaluating the "Death Row Phenomenon"." George Washington Journal of International Law and Economics **30**(1): 39 - 73.

Zezima, K. (2008). Jury Issues First Death Sentence in New Hampshire since the 1950s. New York Times December 18

Zimring, F. E. & Hawkins, G. (1986). Capital Punishment and the American Agenda. London, Cambridge University Press.

Zimring, F. E. (2003). The Contradictions of American Capital Punishment. Oxford, Oxford University Press