University of Michigan Journal of Law Reform

Volume 49 | Issue 4

2016

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Recommended Citation
Michael L. Radelet, *The Incremental Retributive Impact of a Death Sentence Over Life Without Parole*, 49 U. Mich. J. L. Reform 795 (2016).
Available at: http://repository.law.umich.edu/mjlr/vol49/iss4/2

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THE INCREMENTAL RETRIBUTIVE IMPACT OF A DEATH SENTENCE OVER LIFE WITHOUT PAROLE

Michael L. Radelet*

Abstract

In this paper, I take a closer look at retribution, which is the primary justification for the death penalty today in the United States and the main component of the additional punishment imposed by the death penalty over and above life imprisonment without parole (LWOP). While all criminal punishments, to varying degrees, punish both the inmate and his or her family, I argue that the death penalty's added punishment over LWOP often punishes the family just as much as the inmate, and after the execution the full brunt of the punishment falls on the family. This added impact disproportionately punishes women and children. My data come from work with scores of death row inmates and their families over the past thirty-five years, including sharing "last visits" with approximately fifty of the inmates.[1] *The family members have not been convicted of any capital offense, so in this sense the death penalty punishes the innocent just as much as it punishes the guilty.*

Introduction

Over the past four decades, there have been dramatic changes in how the death penalty in the United States is justified in public discourse. Religious justifications,[2] incapacitation of the prisoner,[3] cost

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1. I visited the inmates at the request of their defense attorneys, and as such, all conventional norms governing attorney-client interactions, such as confidentiality, apply to my work. (Where it is possible to make assertions based on my general observations resulting from my years of experience working with death row inmates, I have indicated this in the text below.)

2. For information on religious perspectives on the death penalty, see *Religion and the Death Penalty*, Death Penalty Info. Center, http://www.deathpenaltyinfo.org/article.php%3Fdid%3D2249 (last visited Apr. 8, 2016).

3. "Incapacitation" refers to the control of convicted offenders so they cannot commit future crimes. When one claims that we must execute offenders to prevent them from killing again, that person is invoking the incapacitation argument. *See generally* Jack P. Gibbs, *Preventative Effects of Capital Punishment Other than Deterrence*, *in* The Death Penalty in America 103, 106–08 (Hugo Adam Bedau ed., 3rd ed. 1982). In the forty years since *Gregg v. Georgia*, 428 U.S. 153 (1976), constituting the "modern era" of the death penalty, all states that use the death penalty have also adopted statutes that allow for sentences of life imprisonment without parole, thereby effectively eliminating the argument that we need the death penalty to protect our communities from repeat criminality. *See Year that States Adopted Life without Parole*

savings,[4] and deterrence have fallen in importance in pro-death penalty arguments, and increasingly the principal, if not the sole, argument in favor of the death penalty is retribution or "just deserts."[5] Proponents of the death penalty, however, overlook that a death row inmate's innocent family and friends are the ones who bear the brunt of the death penalty's retributive impact. In this Article, I compare the retributive effects of the death penalty with the retributive effects of life imprisonment without parole (LWOP) and argue that the incremental (added) retributive effects of the death penalty often punish a greater number of innocent people than life imprisonment. Death penalty proponents who base their support on retribution need to recognize that retribution affects both the guilty and the innocent.

Retribution is not a manifest goal of most criminal penalties, although it is still present in varying intensity as an unintended side effect. In my experience, the more severe the punishment, the more its justification rests on retributive principles.[6] No criminal punishment, however, is more rooted in retributive ideology than the death penalty. This Article discusses the retributive effects of life imprisonment without parole (LWOP) and compares them to the retributive effects of executions, focusing on the incremental (or added) retributive effects that the death penalty brings to the table.

My observations and conclusions rest primarily on data from my own experiences. Over the past thirty-five years I have met, worked with, and corresponded with hundreds of death row inmates, potential death row inmates, and former death row inmates from across the United States. In approximately fifty Florida cases, I went through "last visits" with the inmate, his family, one or two of the inmate's friends, his spiritual advisor, and his legal team, on the eves of the executions.[7] In approximately ten of these cases, family

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(LWOP) Sentencing, DEATH PENALTY INFO. CENTER, http://www.deathpenaltyinfo.org/year-states-adopted-life-without-parole-lwop-sentencing (last visited Apr. 8, 2016).

4. With many studies indicating that there is no longer any empirical support for the assertion that executions are less expensive than long-term imprisonment, justifications based on relative expense have fallen away over the past two decades. For information on the financial costs of the death penalty, see *Costs of the Death Penalty*, DEATH PENALTY INFO. CENTER, http://www.deathpenaltyinfo.org/costs-death-penalty (last visited Apr. 8, 2016).

5. By "retribution" I mean a goal of punishment that involves making the guilty prisoner suffer for the sake of suffering. For definitions and a general discussion of retribution, see, for example, Hugo Adam Bedau, *Retribution and the Theory of Punishment*, 75 J. PHIL. 601 (1978).

6. For a discussion of the death penalty's retributive justifications, see, for example, JAMES R. ACKER, QUESTIONING CAPITAL PUNISHMENT: LAW, POLICY, AND PRACTICE 1–29 (2014).

7. As of April 1, 2015, there were 3,002 prisoners on American death rows, 98 percent of whom are male. DEBORAH FINS, CRIMINAL JUSTICE PROJECT OF THE NAACP LEGAL DEFENSE

members of the condemned inmate stayed at my home, thirty-five miles from the site of executions, Florida State Prison in Starke, in the days preceding the execution. I have worked with approximately ten suspects facing death penalty trials, primarily in Florida and Colorado, in which my role was to urge the defendant to seek or accept a plea bargain and sentence of life imprisonment rather than risk a death sentence. I have worked at length with several men already on death row who were considering dropping their appeals and volunteering for execution, and for the past thirty-five years I have exchanged regular letters with numerous inmates living under a death sentence or whose death sentences were commuted to prison terms by appellate courts.

Part I of this Article explains how, over the past forty years, pro-death penalty arguments in the United States have become increasingly based on a general theory of retribution. In Part II, I compare the retributive effects of the death penalty to the retributive effects of LWOP, arguing that the incremental retributive effects of the death penalty often punish a greater number of innocent people, who feel the effects more intensely, and for a longer period of time, than the retributive impacts of life imprisonment. Part III discusses how the retributive impact of the death penalty on the families of death row inmates, and on the inmates' friends, spiritual advisor, attorneys, and others close to him, undermines the principle that the criminal justice system punishes only the guilty and never the innocent. The death penalty affects everyone who knows, cares for, or works with the death row inmate. In Part IV, I conclude that the retributive effects of the death penalty affect larger and larger concentric circles of loved ones centered around the inmate. This not only ultimately takes the life of the offender, but also negatively impacts or even permanently damages the lives of many more people.[8] To supporters of the death penalty, the retributive power of the punishment on these innocent victims can only be viewed as "collateral damage." Because these secondarily punished people are not only innocent but usually impoverished, stigmatized, and powerless, the death penalty causes suffering that is usually hidden and not publicized.

AND EDUCATIONAL FUND, INC., DEATH ROW U.S.A. 1 (Spring 2015), http://www.naacpldf.org/files/publications/DRUSA_Spring_2015.pdf. Given this gender maldistribution, I will use masculine pronouns in this essay to refer to death row inmates.

8. *See generally,* ROBERT M. BOHM, CAPITAL PUNISHMENT'S COLLATERAL DAMAGE (2013).

I. THE GROWTH OF RETRIBUTION AS THE PRIMARY (OR SOLE) JUSTIFICATION FOR THE DEATH PENALTY

In June 1972, the Supreme Court, in effect, abolished all existing death penalty statutes in the U.S.,[9] forcing the states and the federal government to go back to their legislative drawing boards to write new death penalty laws. Florida led this effort and enacted the first "post-*Furman*" death penalty law in late 1972.[10] In 1976, the Supreme Court upheld three of the new state statutes,[11] and in January 1977, Utah put to death the first inmate in the so-called "modern" era of the death penalty, Gary Gilmore, by firing squad.[12]

Since that time, justifications for the death penalty have changed considerably. In a crude poll administered in 1991, Gallup found that fifty percent of the death penalty supporters in the sample justified their position with "An eye for an eye, They took a life, Fits the crime."[13] Nineteen percent of advocates cited incapacitation, "They will repeat crime/Keep them from repeating it," as justification for their position.[14] Deterrence and "Save taxpayers money" were each given as death penalty justifications by thirteen percent.[15] Though not explicitly measured in the poll, at the time, significant numbers of death penalty supporters based their position on biblical or religious sources, particularly with Old Testament principles such as "*lex talionis*" or "eye for an eye."[16]

Many of those arguments have not stood up well over the past thirty years. Theological discussions, changes in sentencing laws, and empirical research have all played a role in undermining many of the most common death penalty arguments from the 1970s and

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9. *See* Furman v. Georgia, 408 U.S. 238 (1972) (per curiam). For a discussion of the aftermath of *Furman*, see, for example, Carol S. Steiker & Jordan M. Steiker, *Judicial Developments in Capital Punishment Law*, *in* AMERICA'S EXPERIMENT WITH CAPITAL PUNISHMENT: REFLECTIONS ON THE PAST, PRESENT, AND FUTURE OF THE ULTIMATE PENAL SANCTION 77 (James R. Acker et al. eds., 3rd ed. 2014).

10. Charles W. Ehrhardt & L. Harold Levinson, *Florida's Legislative Response to* Furman: *An Exercise in Futility*? 64 J. CRIM. L. & CRIMINOLOGY 10, 10 (1973).

11. *See* Jurek v. Texas, 428 U.S. 262 (1976); Proffitt v. Florida, 428 U.S. 242 (1976); Gregg v. Georgia, 428 US 153 (1976).

12. For an overview of the life and death of Gilmore, see NORMAN MAILER, THE EXECUTIONER'S SONG (1979).

13. Art Swift, *Americans: "Eye for an Eye" Top Reason for Death Penalty*, GALLUP: SOCIAL ISSUES (Oct. 23, 2014), http://www.gallup.com/poll/178799/americans-eye-eye-top-reason-death-penalty.aspx. Multiple responses were permitted to this question.

14. *Id.*

15. *Id.*

16. For example, in 1985, thirty percent of those who favored the death penalty in a Gallup Poll justified their position with "Revenge: an 'eye for an eye.'" THE GALLUP POLL, GALLUP REPORT 232 & 233, 3 (Jan./Feb. 1985).

1980s. Religious justifications provide an example.[17] In the early 1980s, public debates on the death penalty often found ministers (usually from more fundamentalist denominations) supporting its use, and it was not at all uncommon for both clergy and members of the public to cite scriptures that seemingly justified the punishment.[18] By 1991, the late Father Robert Drinan, a Jesuit priest and former member of Congress from Massachusetts, was able to claim that "[t]he amazing convergence of opinion on the death penalty among America's religious organizations is probably stronger, deeper, and broader than the consensus on any other topic in the religious community in America."[19] Today, the leadership of almost all major religions in the United States stands opposed to the death penalty, with more of the exceptions silent on the issue rather than explicitly in favor of executions.[20]

Because of changes in sentencing laws over the past thirty years, today anyone who is convicted of a capital offense and *not* sentenced to death will nonetheless die in prison with an LWOP sentence. This substantially undermines the incapacitation argument. Thirty years ago, the usual sentence for such offenders was a relatively lenient dozen years.[21] Now, at the end of 2015, all thirty-one states that authorize the imposition of death sentences also authorize sentences of LWOP, as do eighteen of the nineteen non-death penalty states.[22] These statutory changes have undermined the incapacitation justification for the death penalty: the argument that convicted murderers will be free after relatively short prison sentences and will thereby become threats to community safety is untenable.

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17. *See, e.g.*, JAMES J. MEGIVERN, THE DEATH PENALTY: AN HISTORICAL AND THEOLOGICAL SURVEY 337, 373, 380 (1997).

18. For examples of the use of scriptures and other religious sources as justifications for the death penalty, see E.L. (Stacey) Hebden Taylor, *Retribution, Responsibility and Freedom: The Fallacy of Modern Criminal Law from a Biblical-Christian Perspective*, 44 L. & CONTEMP. PROBS. 51 (1981); *see also* Jacob J. Vellenga, *Christianity and the Death Penalty*, *in* THE DEATH PENALTY IN AMERICA 123, 123–30 (Hugo Adam Bedau ed., Aldine Publishing Company 1964).

19. ROBERT R. DRINAN, THE FRACTURED DREAM: AMERICA'S DECISIVE MORAL CHOICES 107 (1991).

20. *See Official Religious Statements on the Death Penalty*, DEATH PENALTY INFO. CENTER, http://www.deathpenaltyinfo.org/article.php%3Fdid%3D2249#state (last visited Apr. 8, 2016).

21. "In California, prior to 1985 and changes in sentencing laws and the rise of a punitive national movement, persons sentenced for first degree murder served an average of 12 years." JOHN IRWIN, LIFERS: SEEKING REDEMPTION IN PRISON 7 (2009).

22. *See* Ashley Nellis, *Throwing Away the Key: The Expansion of Life without Parole Sentences in the United States*, 23 FED. SENT'G REP. 27, 28 (2010–2011). The exception is Alaska. *See Life without Parole*, DEATH PENALTY INFO. CENTER, http://www.deathpenaltyinfo.org/life-without-parole (last visited on Apr. 8, 2016).

A third pro-death penalty argument from the 1970s and 1980s was that it allegedly cost less money than long imprisonment,[23] but over the past three decades the cost issue has changed from a pro-death penalty argument to a strong anti-death penalty one. Virtually all contemporary studies on the death penalty, whether completed by legislative bodies, state supreme courts, journalists or academics, have found that the costs of the death penalty far exceed the costs of LWOP.[24] To be sure, some Americans still ask why their tax money is used to support the expenses of keeping murderers alive. These questions become increasingly rare when people inform themselves (even casually) about the cost data. The enormous costs involved in today's death penalty cases also raise issues about whether the funds used to seek executions can be more effectively spent to achieve some of the goals that the death penalty allegedly seeks, such as providing help for families of homicide victims or implementing more effective ways to reduce rates of criminal violence.

Finally, dozens of empirical research studies over the past thirty years focus on general deterrence: whether the homicide rate declines with increases in death sentences and/or executions.[25] Most, although not all, of these studies have found that the death penalty and homicide rates are basically uncorrelated.[26] Unfortunately, the data and statistical manipulations required to address the question are exceedingly complex,[27] leaving well-intentioned advocates on both sides of the issue free to find studies that support their points of view regardless of whether they have any understanding of the statistical methods or limitations of the data used by the researcher.

The opinions of criminology experts can resolve this debate. Surveys conducted in the mid-1990s and a dozen years later found that more than ninety percent of the nation's leading criminologists have concluded that, based on their reading of the extant research, the death penalty fails to deter homicides any more than

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23. In the 1985 Gallup Poll, eleven percent of those who supported the death penalty justified their position by saying it was "costly to keep them in prison." THE GALLUP POLL, *supra* note 16, at 3.

24. For a review of recent studies, see DEATH PENALTY INFO. CENTER, *supra* note 4; *see generally* Richard C. Dieter, *The Issue of Costs in the Death Penalty Debate*, *in* AMERICA'S EXPERIMENT WITH CAPITAL PUNISHMENT, *supra* note 9.

25. *See generally* Ruth D. Peterson & William C. Bailey, *Is Capital Punishment an Effective Deterrent for Murder? An Examination of Social Science Research*, *in* AMERICA'S EXPERIMENT WITH CAPITAL PUNISHMENT, *supra* note 9; Robert Apel et al., *Is Capital Punishment an Effective Deterrent for Murder? An Updated Review of Research and Theory*, *in* AMERICA'S EXPERIMENT WITH CAPITAL PUNISHMENT, *supra* note 9.

26. *See generally* Peterson & Bailey, *supra* note 25; Apel et al., *supra* note 25.

27. *See generally* Peterson & Bailey, *supra* note 25; Apel et al., *supra* note 25.

long imprisonment does.[28] The latest (and perhaps last) word on the issue came in 2012, when a seminal comprehensive report on the deterrent effect of the death penalty was released by the National Research Council.[29] The Study Panel, composed of some of the most respected criminologists in the United States, found that the research "is not informative about whether capital punishment decreases, increases, or has no effect on homicide rates."[30] This is not to claim that no one today argues that we need more executions in order to reduce the homicide rate, but it does indicate that those who make such arguments base their opinions on discredited studies.

In place of the above arguments, advocates for the death penalty are arguing today, more than ever, that executions should be justified on retributive grounds.[31] By "retribution," I mean that offenders convicted of the most heinous crimes, because of the enormous suffering that they have caused to the victim, the victim's family, and the larger community, should suffer in return, and a life sentence is not sufficient to adequately punish those who commit the worst murders. According to the late British legal philosopher H.L.A. Hart, a retributive theory of punishment contains three elements: 1) a person may be punished if and only if he has voluntarily done something wrong; 2) the punishment must match, or be equivalent to, the wickedness of the offense; and 3) the justification for punishing persons is that the return of suffering for suffering for moral evil voluntarily done is itself just or morally good.[32] Retribution is a justification based on "just desserts," or the idea that offenders need to be punished simply because "they deserve it."[33] As George Braucher often said while prosecuting the gunman who killed twelve people in a movie theater in Aurora, Colorado in 2012, "For James Eagan Holmes, justice is death."[34]

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28. *See* Michael L. Radelet & Traci L. Lacock, *Do Executions Lower Homicide Rates?: The Views of Leading Criminologists*, 99 J. CRIM. L. & CRIMINOLOGY 489, 507 (2009); *see also* Michael L. Radelet & Ronald L. Akers, *Deterrence and the Death Penalty: The Views of the Experts*, 87 J. CRIM. L. & CRIMINOLOGY 1, 8–9, 14 (1996).

29. DANIEL S. NAGIN & JOHN V. PEPPER, DETERRENCE AND THE DEATH PENALTY 2 (2012).

30. *Id.* For a comprehensive review of these studies, see Apel et al., *supra* note 25.

31. Michael L. Radelet & Marian J. Borg, *The Changing Nature of Death Penalty Debates*, 26 ANN. REVIEWS OF SOC. 43, 52–54 (2000).

32. H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 231 (1968).

33. *See id.* For additional discussion of the concept of retribution and the difficulty of precisely defining it, see Hugo Adam Bedau, *Retribution and the Theory of Punishment*, 75 J. PHIL. 601 (1978).

34. Jack Healy, *Death Penalty is Sought in Shooting at Theater*, N.Y. TIMES, Apr. 2, 2013, at A13.

Retribution is clearly the most important justification for the death penalty for the American public. In its 2014 survey, the Gallup Organization found that "An eye for an eye" was by far the most cited justification by death penalty proponents, with thirty-five percent of death penalty supporters citing this rationale and fourteen percent citing a closely related reason, "They deserve it."[35] Four percent simply cited "justice," and another four percent said that it was a "fair punishment."[36] Gallup's categories are poorly worded and overlap, but the retributive attitudes of the respondents shine through.

With the decline of other pro-death penalty arguments (i.e., religion, cost, incapacitation, and deterrence) in the 1980s and 1990s, retribution slowly became the main justification for capital punishment. At first, the retributive arguments were crude and bordered on unadulterated hatred. Death row inmates were depicted as rabid dogs, "often referred to as savages, beasts, subhuman, beyond redemption, animals."[37] In May 1990, I sat on my living room couch with Kay Tafero as her son, Jesse, literally burned to death in Florida's electric chair. No state official even acknowledged that the method of death was regrettable, and no state official expressed any regret or apology. As recently as 1997, Florida Attorney General Bob Butterworth appeared to condone another botched execution when Pedro Medina caught on fire in the electric chair, essentially argued that the additional suffering added to the death penalty's deterrent value: "[p]eople who wish to commit murder [ ] better not do it in the state of Florida because we may have a problem with our electric chair."[38]

Of course, it is virtually impossible to specify exactly what any person "deserves," whether it be reward or punishment.[39] While the Social Security Administration estimates the average annual salary of American workers is roughly $45,000,[40] the average salary of major league baseball players in 2015 topped $4 million, and politician

35. Swift, *supra* note 13, at 1.

36. *Id.*

37. Colin Turnbull, *Death by Decree*, 87 NAT. HIST. 51, 51 (1978).

38. *Condemned Man's Mask Bursts Into Flame During Execution*, N.Y. TIMES (Mar. 26, 1997), http://www.nytimes.com/1997/03/26/us/condemned-man-s-mask-bursts-into-flame-during-execution.html.

39. Although retribution theory includes an element of proportionality—the maximum punishment for the maximum crimes—I have never been able to identify a discussion by retributivists on what rules should be used to determine what the "maximum" should be. If one murder might (under some circumstances) be used to justify execution, might the same principles justify torture for those convicted of multiple murders?

40. The exact figure is $46,481.52. U.S. SOC. SECURITY ADMIN., *National Average Wage Index*, OFFICIAL SOCIAL SECURITY WEBSITE, http://www.ssa.gov/oact/cola/AWI.html (last visited Apr. 8, 2016).

Donald Trump brags that his net worth is in excess of ten billion dollars.[41] Can one really justify these differences on the basis of "dessert"? Baseball players work hard, but not necessarily any harder than a single mother who works two low-salary jobs to support herself and her family. In the case of punishment, it is similarly impossible to calculate precisely what a given offender "deserves," especially since so many inmates have mental health issues or backgrounds of physical, mental, emotional, or sexual abuse. Determining what someone "deserves" is ultimately not amenable to precise calculation or measurement, and even if it were, there is a very high risk of error in the measurement. We are not able to precisely measure the intensity of criminal punishments, just like we cannot measure with precision the harm that the inmate inflicted on the innocent victim when the capital crime was being committed. There is no need to do either calculation. Pain is pain, suffering is suffering, and precise measurement is ultimately impossible and unnecessary. The goal should be for informed citizens and their representatives to understand the punishments we impose, acknowledge their severity, and recognize who that punishment affects.

Even if we could determine what a given person "deserves," that does not obligate us to give or provide it. A boss may agree that her workers "deserve" a raise, but that does not mean the workers will get it. A group might agree that Osama bin Laden "deserves" to be drawn and quartered, but the group would also agree that wise public policy would not allow us to actually do it. Timothy McVeigh may "deserve" to be executed, but that does not mean that we as a society "deserve" to decide who shall or shall not die. It most certainly does not mean that giving McVeigh what he deserves, while not giving tens of millions of other Americans what they "deserve" in terms of a just living wage, is where we should invest our resources.

As demonstrated, retributive justifications for the death penalty can easily become ugly. Because of this crude nastiness, a relatively new utilitarian justification for retribution has emerged in the past twenty years to diminish the ugliness: we need executions not because of hatred or pure retribution, but instead to help families of

41. Ted Berg, *The Average MLB Salary is over $4 Million and the Players Still Get $100 a Day in Meal Money*, USA TODAY: FOR THE WIN (Apr. 1, 2015, 1:06 PM), http://ftw.usatoday.com/2015/04/major-league-baseball-average-salary-meal-money-2015-mlb; Gerry Mullany, *Donald Trump Claims His Wealth Exceeds 'TEN BILLION DOLLARS'*, N.Y. TIMES: FIRST DRAFT (July 15, 2015, 3:15 PM), http://www.nytimes.com/politics/first-draft/2015/07/15/donald-trump-says-hes-worth-more-than-10-billion/.

homicide victims.[42] This makes the retribution argument more polite and easier to discuss in light chit-chat at cocktail parties. Although death penalty debates have never totally ignored the families of victims, newspaper accounts of capital trials and executions before 1972 rarely gave these co-victims a voice. During the 1970s and 1980s, however, there was a growing recognition that communities and the criminal justice system were not being responsive to the needs of victims' families.[43] Prosecutors began to see themselves as champions of victims' rights and lawyers for the individual victim rather than for the state, who strove to win death penalty cases as a way to honor the deceased.[44] As noted criminologist and legal scholar Franklin Zimring remarked, the death penalty has been symbolically transformed into a "victim-service program," and its supporters falsely depict opposition of it as opposing families of homicide victims.[45] According to Zimring, empirical studies of the effects of the death penalty on the families of the victims are not needed because it is a justification based not on data, but solely on faith.[46]

Despite the prominence today of retributive justifications for the death penalty, American society has rejected the idea that criminal punishments should cause unnecessary or extreme physical pain. Every death penalty abolitionist involved in death penalty debates has been asked some variant of the question, "How would you feel if someone close to you was murdered?"[47] There are many ways to respond to this question. For example, one might feel, albeit momentarily, that she would wish that the offender could be covered with honey and eaten by ants, or perhaps slowly boiled to death. Executions where the suspected offender was burned at the stake or sawed in half are not difficult to find.[48] But no serious proponent of retributive justice today would call for such extreme punishments,

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42. FRANKLIN E. ZIMRING, THE CONTRADICTIONS OF AMERICAN CAPITAL PUNISHMENT 56–63 (2003).

43. By far the best collection of essays that examine the death penalty from the eyes of families of homicide victims is WOUNDS THAT DO NOT BIND: VICTIM-BASED PERSPECTIVES ON THE DEATH PENALTY (James R. Acker & David R. Karp eds., 2006).

44. ZIMRING, *supra* note 42, at 62–63.

45. *Id.*

46. *Id.* at 63.

47. The most memorable posing of this question came in the 1988 presidential race, when, in the second debate between Michael Dukakis (a foe of the death penalty) and George H.W. Bush, the former was asked, "Governor, if Kitty Dukakis [his wife] were raped and murdered, would you favor an irrevocable death penalty for the killer?" JACK W. GERMOND & JULES WITCOVER, WHOSE BROAD STRIPES AND BRIGHT STARS? THE TRIVIAL PURSUIT OF THE PRESIDENCY 1988, 5 (1989).

48. *See generally* GEOFFREY ABBOTT, THE BOOK OF EXECUTION: AN ENCYCLOPEDIA OF METHODS OF JUDICIAL EXECUTION 67, 326–27 (1995).

even for mass murderers. When the theory of punishment is "he deserves it," the justification for such punishments' acceptability quickly becomes difficult to articulate. What does someone like Ted Bundy "really" deserve?[49]

Similarly, while the death penalty has been increasingly justified on retributive grounds, in the past two decades the United States has moved away from several methods of execution (e.g., electrocution, hanging, shooting) over the past two decades because these methods offend evolving standards of decency. Beginning with the first use of lethal injection in 1982 and for the remainder of the twentieth century, Americans saw a rapid movement away from the electric chair, gas chamber, gallows, and firing squad as methods of execution. Of the 478 executions that occurred in the 11 years between January 1, 2005 and December 31, 2015, only six were by electrocution, one by firing squad, and none by asphyxiation (cyanide gas) or hanging.[50] Lethal injection thus accounts for 98.5% of the executions in the U.S. in the recent past.[51] This is because most observers see lethal injection as relatively painless, similar to being put to sleep before a surgical procedure. The contrast between wanting the inmate to suffer, but with "humane" execution methods, is a major contradiction: if the goal of the death penalty is to make the offender suffer, should we really care if he catches on fire in the electric chair or slowly suffocates while dangling on the gallows?

II. RETRIBUTION AND LWOP SENTENCES

In all of the thirty-one states that authorized the imposition of new death sentences in December 2015, any inmate convicted of a capital crime who is not sentenced to death will still die in prison. The alternative to the death penalty is LWOP.[52] Once the inmate sentenced to LWOP has exhausted his judicial appeals, the only

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49. Bundy was convicted of three murders in Florida and confessed to committing 30 others in the 1970s (in seven states) before his death in Florida's electric chair in 1989. For more information, see for example, STEPHEN G. MICHAUD & HUGO AYNESWORTH, TED BUNDY: CONVERSATIONS WITH A KILLER (1989). I worked with Bundy for the last ten years of his life, went through last visits with him, kept his ashes in my closet for several months after his execution, and hosted his parents while they visited him in prison. I found his parents to be wonderful people and totally undeserving of the misery that the death penalty inflicted on their family.

50. These tallies were calculated from *Searchable Execution Database*, DEATH PENALTY INFO. CENTER, http://www.deathpenaltyinfo.org/views-executions (last visited on Apr. 8, 2016).

51. *Id.*

52. *See* THE SENTENCING PROJECT, LIFE GOES ON: THE HISTORIC RISE IN LIFE SENTENCES IN AMERICA 1–7 (2013), http://sentencingproject.org/doc/publications/inc_Life%20Goes%20

exit from prison is through the slim chance of some sort of executive clemency or previously unanticipated exoneration.

Even though many people outside of prison may not realize it,[53] the vast majority of prisoners who receive LWOP sentences lead miserable lives.[54] In general, the younger the prisoner, the longer he can expect to serve in prison with an LWOP sentence, and the retributive impact of a sentence usually increases with its length. Longer sentences are usually more retributive and more painful because the punishment is administered for a longer period of time. The median age of those admitted to death row in the United States in 2013 was thirty-eight years.[55] In 2011, the life expectancy of a thirty-nine year old male in the United States was an additional 39.4 years.[56] In other words, the average LWOP sentence is roughly forty years, but this grows by nearly a year for each year under age forty the inmate is at the time of initial sentence. Consequently, LWOP sentences are usually more retributive for a twenty-year-old defendant newly admitted to prison than for an eighty-year-old, since the former can expect to live many more years of misery in prison than the latter.

While death row inmates and their families have some reason to hope for positive news in their cases right up to the day of execution—judicial relief or even a sentence reduction to LWOP through executive clemency—those serving LWOP sentences recognize that, at least in today's political climate, they have little

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On%202013.pdf. In 2012, there were approximately 160,000 prisoners in American jurisdictions serving life terms. *Id.* at 1.

53. Those who believe that LWOP is not a harsh sentence are simply misinformed. At a talk that I presented to a Denver Rotary Club in June 2015, one well-intentioned person in the audience insisted that prisoners, regardless of sentence, had easy access to drugs, sexual relationships with non-prisoners, and excellent food and medical care.

54. For an excellent discussion of the miseries experienced by those who are serving LWOP sentences, see generally Robert Johnson & Sandra McGunigall Smith, *Life Without Parole, America's Other Death Penalty*, 88 THE PRISON J. 328 (2008), which argues that the suffering experienced by those sentenced to "death by incarceration . . . can be equally as painful as the death penalty, albeit in different ways." *Id.* at 328, 332–36.

55. TRACY L. SNELL, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, CAPITAL PUNISHMENT, 2013—STATISTICAL TABLES 10 (revised Dec. 19, 2014), http://www.bjs.gov/content/pub/pdf/cp13st.pdf.

56. U.S. SOC. SECURITY ADMIN., *Actuarial Life Table*, OFFICIAL SOCIAL SECURITY WEBSITE, http://www.ssa.gov/oact/STATS/table4c6.html (last visited Apr. 8, 2016). These life expectancies have wide variation, so that a twenty-year-old male can expect to live fifty-seven additional years, and a sixty-five-year-old male can expect to live 17.7 years. These life expectancies are generous, since the typical prisoner has a lower life expectancy than non-prisoners. "It is generally accepted that life in prison, with its stressors, violence and disease in and of itself significantly shortens one's life expectancy." THE CAMPAIGN FOR THE FAIR SENTENCING OF YOUTH, MICHIGAN LIFE EXPECTANCY DATA FOR YOUTH SERVING NATURAL LIFE SENTENCES 1 (2010), http://fairsentencingofyouth.org/wp-content/uploads/2010/02/Michigan-Life-Expectancy-Data-Youth-Serving-Life.pdf (citations omitted).

reason for hope that their current sentences will be changed.[57] LWOP sentences can also be seen as "LWOH" sentences: "life without hope." In my experience, unlike most death row inmates, very few inmates serving LWOP sentences have attorneys. Even if they did have these resources, few prisoners serving LWOP or even life sentences with parole eligibility ever get out today, absent compelling evidence of innocence, even if the prisoner is on his or her death bed.[58]

III. RETRIBUTION AND DEATH SENTENCES: DEATH IS DIFFERENT

In the words of former Supreme Court Justice Potter Stewart, "death is a punishment different from all other sanctions in kind rather than degree,"[59] and "the penalty of death is different in kind from any other punishment imposed under our system of criminal justice."[60] In this Part, I discuss the retributive impact of the death penalty versus the retributive impact of LWOP, and differentiate the added retributive impacts of the death penalty the inmate feels versus those his family feels. My intent is not to provide a complete laundry list of what the inmate and his family experience by the added retributive power of the death penalty, but instead to simply provide some examples.[61] Given the diversity of death row inmates and their families, these impacts will vary in their intensity, duration, and the number of people they touch.

Whatever can be said about the miseries experienced by the life-sentenced inmate and his family, a death sentence significantly adds to the retributive power of the criminal sanction. In fact, that is precisely its goal. In my observation, for supporters of the death penalty, an LWOP sentence, while causing a lifetime of misery, is simply not punitive enough to satisfy the goals of an amorphous definition of "justice."

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57. Catherine Appleton & Brent Grøver, *The Pros and Cons of Life Without Parole*, 47 BRIT. J. CRIMINOLOGY 597, 609–11 (2007).

58. For example, Susan Atkins, one of the so-called followers of Charles Manson, died in September 2009, just three weeks after being wheeled into a meeting with the parole board on her death bed. Despite her excellent behavior in prison, the parole board unanimously requested her request for release. When she died she was the longest serving woman in California prisons. Elaine Woo, *Susan Atkins Dies at 61; Imprisoned Charles Manson Follower*, L.A. TIMES, (Sept. 26, 2009) http://www.latimes.com/local/obituaries/la-me-susan-atkins26-2009sep26-story.html.

59. Woodson v. North Carolina, 428 U.S. 280, 303–04 (1976).

60. Gregg v. Georgia, 428 U.S. 153, 188 (1976).

61. For elaboration, see Margaret Vandiver, *The Impact of the Death Penalty on the Families of Homicide Victims and of Condemned Prisoners, in* AMERICA'S EXPERIMENT WITH CAPITAL PUNISHMENT, *supra* note 9.

Some supporters of the death penalty would reject any concern for the families of the inmate by taking the position that the suffering experienced by the family is caused solely by the inmate and his criminality. Such an attitude misses the point: the citizens and their elected officials make the decision to sentence someone to death. No state is obligated to execute people.[62] There is clearly a need to acknowledge that the pain the death penalty inflicts is an option chosen by the state, and citizens need to take responsibility for it.

Given the inevitability of eventual death in prison, either at the hands of the state or by other means, it is not uncommon for death row inmates to forfeit their appeals, dismiss their attorneys, and ask to be executed. Between January 1977 and December 31, 2015, there were 1422 executions in the U.S., and 143 of these inmates (ten percent) are classified as "volunteers" because they gave up their appeals.[63] Countless other death row inmates have, at one time or another, considered dropping their appeals, only to change their minds; family, ministers, attorneys, and fellow inmates often convince them not to drop these appeals. Some family members go so far as to file "next of kin" motions in the courts to stop consensual executions. I have never met any relative of a death row inmate who would prefer that his relative be executed rather than live a life in prison.[64] This is a sobering point: not only do a significant number of prisoners on death row prefer death to LWOP, but ten percent of those executed have the stamina to resist pleas from others in their close social circles to avoid going through with it.

Prior to trial, a significant number—perhaps half—of death row inmates today were either offered a plea deal that would have spared them from the death penalty, or could have been offered a plea deal had they instructed or permitted their trial attorney to pursue one with prosecutors.[65] In the vast majority of these situations, the deal would have resulted in a sentence of LWOP; the severity of this sentence leads many defendants in such situations to

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62. In fact, by the end of 2014 there were 140 countries from around the world that had abolished the death penalty in law or in practice. Just 58 countries remain today that actively employ executioners. *See* AMNESTY INTERNATIONAL, DEATH SENTENCES AND EXECUTIONS 2014 64–65 (2015), http://www.amnestyusa.org/pdfs/DeathSentencesAndExecutions2014_EN.pdf.

63. DEATH PENALTY INFO. CENTER, *supra* note 50.

64. No doubt there are examples of relatives who want the inmate executed, particularly in cases of inter-familial murders. However, the pro-death penalty family members do not visit the prison, so in my own prison visits I have interacted with a "biased sample" of relatives.

65. Since 1979, following all new death sentences in Florida, I have sent the defense attorney a questionnaire and obtained from him or her a copy of the judge's "sentencing order" in which the judge specifies the formal findings of aggravating and mitigating circumstances. I now have over 1100 responses in my files. My estimate of "half" derives from the

decide to gamble and risk a death sentence at trial, with the hope that they will receive an outcome that would permit the possibility of ultimate freedom.

LWOP is a horrible sentence that not only punishes the inmate, but removes any possibility of hope for redemption, much less hope for freedom. Nonetheless, in my experience, even life in prison offers some very real opportunities for growth and fulfillment. When they anticipate execution, all inmates invariably think at times of the small pleasures they will miss, even if they know they will still die in prison. While these vary with the individual, common positive experiences of prison—even for those serving LWOP—include interactions with family and other loved ones (perhaps even with friends who are also in prison), the Sunday football game, a good book, an adequate meal, perhaps the peace of finding redemption and forgiveness from self and others.

On the other hand, in most of the last visits I have gone through, perhaps ninety percent of the inmates say something to the effect of "Thank God that I am getting out of here." Again, this does not mean that he welcomes execution, but it does show some silver lining in the cloud. Of course, in some cases the inmate undoubtedly says this to convince himself that it is true, or says it as one way of trying to comfort his grieving family.

When facing a death sentence and the gradual realization that successful appeals are impossible, the inmate's family is usually sitting on a roller coaster of emotions alongside the inmate, experiencing similar fears, uncertainties, and disappointments as their loved one.[66] Additionally, "[m]any family members experience an almost unbearable sense of helplessness or powerlessness to do anything about the sentence or the impending execution."[67] One need only reflect a bit on how he or she would react if a family member were arrested, even for the most horrific crimes possible. There are exceptions, but for most families I have worked with, facing the death penalty for a loved one, family is family and love for family members is unconditional. Based on what I have learned from my visits with death row inmates and their families in the years

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attorneys' responses to my question about whether a plea bargain was offered by the prosecutor. My estimate is purposely imprecise because there are many cases in which the defendant instructed the attorney not to vigorously seek a prison sentence as part of a plea bargain.

66. *See generally* Rachel King, *How the Death Penalty Violates the Constitutional Rights of the Family Members of Death Row Inmates,*16 B.U. PUB. INT. L. J. 195 (2007).

67. BOHM, *supra* note 8, at 110.

and months and hours before the execution, in many cases the family hurts and agonizes and suffers just as much as the inmate.[68]

Within an inmate's family, the retributive impact of the death penalty generally falls more heavily on women (mothers, wives, and girlfriends) and children than on adult males. I have rarely seen biological fathers or stepfathers among death row visitors. As two colleagues and I wrote over thirty years ago, "[t]he visitors to death row are a diverse group. Few fathers visit, although it is unknown if this fact reflects an absence of fathers prior to incarceration or a lower willingness or ability for fathers to visit. Mothers are the most frequent visitors . . . ."[69]

Children have been called the death penalty's "hidden victims," and several commentators have called the impact of having their parents executed "the death penalty's dirty little secret."[70] In the words of three researchers who have studied the families of death row inmates, "[t]he death penalty is designed to punish offenders who commit heinous crimes, but the reality is that much of the burden of this punishment is shouldered by the offender's children or siblings and the actual execution may increase the likelihood of negative outcomes in their lives."[71]

In one sense, the families of death row inmates are *not* diverse: in my experience they are all impoverished. Those who had savings typically depleted them during the trial, occasionally retaining private attorneys who took every cent they could get and stopped working on the case when the money was gone. Few have college degrees, and since 57.2 percent of death row inmates today are racial or ethnic minorities,[72] it follows that their families, too, are disproportionately minorities.

Like patients struggling with a terminal illness, the death row inmate can anticipate and even fear his death, and in this journey he is usually accompanied by family members who struggle with the same emotions. However, after his execution and unlike the family,

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68. I hasten to add that I know little about families (or individual family members) who have abandoned the inmate and have little or nothing to do with him in his years on death row (and often in the years preceding the crime).

69. Michael L. Radelet et al., *Families, Prisons, and Men with Death Sentences: The Human Impact of Structured Uncertainty*, 4 J. OF FAM. ISSUES 593, 603 (1983).

70. *See generally* SUSAN F. SHARP, HIDDEN VICTIMS: THE EFFECTS OF THE DEATH PENALTY ON FAMILIES OF THE ACCUSED (2005); ELIZABETH BECK ET AL., IN THE SHADOW OF DEATH: RESTORATIVE JUSTICE AND DEATH ROW FAMILIES 112 (2007).

71. BECK ET AL., *supra* note 70, at 112.

72. FINS, *supra* note 7, at 1 (noting that 42.77 percent of those sentenced to death in the U.S. as of April 1, 2015 were white).

the inmate cannot reflect on it. All his agony ends when the executioner does his work, but as will be discussed in the next Part, the family continues to ache.

IV. WHO SUFFERS AFTER THE EXECUTION?

Once the inmate is executed, he is dead. Whatever the retributive impact of imprisonment and execution is on the inmate, it is over. The inmate's family, however, continues to suffer. All of us can think about our inevitable deaths, but we can never reflect back on them. Our survivors will and do, and in cases where the death is as traumatic and stigmatized as state executions, living with the aftermath quite often brings special miseries that differ both qualitatively and quantitatively from those experienced by family members of those serving LWOP sentences.

The impact of the execution on the inmate's family can go on and on for many years, even until the family members' own deaths.[73] While families vary in size and in their relationships with the now-deceased prisoner, below are three examples I have observed of how their pain and suffering can often go on after the inmate has died:

1. *Guilt.* It is not uncommon for families to second-guess their own past decisions and behavior that may have contributed to the loved one's criminality. Again and again, the life-histories of death row inmates show histories of childhood abuse: mental, physical, emotional, or sexual.[74] Family members may regret their role in this, or regret that they did not intervene to stop other family members or friends from inflicting the damage. Family members may also regret that they did not more aggressively seek mental health counseling for their loved one when the first signs of abnormalities began to surface.

Family members may also regret decisions that they made after the loved one's arrest. Could they have done more to help the loved one negotiate a plea bargain that would have avoided the death sentence? Were they fully cooperative with attorneys and investigators? If they testified at the penalty phase of the trial, could

73. I knew several mothers and wives of executed inmates at the time of their deaths and the pain lasted their whole lives.

74. *See* Mark D. Cunningham & Mark P. Vigen, *Death Row Inmate Characteristics, Adjustment, and Confinement: A Critical Review of the Literature,* 20 BEHAV. SCI. AND THE L. 191 (2002); David Lisak & Sara Beszterczey, *The Cycle of Violence: The Life Histories of 43 Death Row Inmates,* 8 PSYCHOL. OF MEN & MASCULINITY 118 (2007).

they have done a better job convincing the jury to spare their loved one's life?

2. *Anger.* It is not uncommon for family members to continue to be angry with their loved one and the criminal justice system after his execution. Anger, justified or not, is often very painful for those who are angry and must learn to deal with it. There may be lingering anger at the executed loved one: "How could he have committed this crime and caused such damage to our family?" Or they may feel angry with other family members: "How could his biological father have treated him (and us) so badly?"

Family members may also direct anger at others involved in the crime or trial. Family members may feel another person was the true culprit or the more responsible party, or blame another person for getting their loved one involved with the crime. They may feel the criminal homicide was an accident, done in self-defense or because of mental illness; they may think it was not a capital offense but instead a manslaughter or second-degree murder. They may have continued anger at witnesses, the trial judge, and prosecutors for painting what they feel is a distorted picture of the crime and their loved one's role in it. They may feel continued anger toward the family of the victims for so actively calling for the death penalty and celebrating its imposition, affirmance in the courts, the denial of clemency, and the ultimate execution. They may believe that one or more defense attorneys did a lousy job. The executed inmate does not know about any crowds outside the prison or persons quoted in newspapers who celebrate his death, but his family members do. I have yet to meet any death row inmate or any of his family members who feel that the inmate had a fair trial with competent defense and an ethical prosecutor and judge.

3. *Isolation, Shame, and Stigma.* Inmates usually face their impending executions with social supports not available to the family: his fellow inmates, a spiritual advisor, and his legal team. The inmate often has a better understanding than their family members of the complexity of the litigation and case law that limit his options in appellate courts.

Family members, however, tend to be more isolated. They "continue to be nearly invisible. No politicians mention their names in their campaigns, very few advocacy groups are concerned with their needs, and there is little public recognition or concern for their situation."[75] The shame they may feel about their loved one's crime may lead them to not even tell neighbors and coworkers what they are going through (impossible if they live in the community where

75. *See* Vandiver, *supra* note 61, at 628.

the crime occurred; very possible if the family member has a different surname or lives out of state). Even friends who know about the crime and the death sentence may drift away, or not know what to say and therefore say nothing.

V. SUMMARY AND CONCLUSIONS

Criminal punishments are supposed to be directed at the guilty, not the innocent. Invariably, all criminal punishments affect innocent parties, such as when a father is sentenced to a prison term and thereby deprives his child of the love, mentorship and financial support he might otherwise provide. But "death is different."[76] No other criminal punishment can compare with the severity of its retributive effects. As Camus wrote, relatives of death row inmates "experience a misery that punishes them far beyond the bounds of all justice."[77]

The observations in this Article lead to six main conclusions:

1. The primary justification for seeking and imposing a death sentence, as opposed to LWOP, is to increase the prisoner's suffering (retribution).[78] The goal is to make the prisoner suffer for the sake of suffering, rather than to achieve any other end.[79]

2. In general, a principle of proportionality governs criminal punishments, with maximum punishments reserved for those who knowingly commit the worst crimes. That principle, however, does not tell us what the maximum punishment should be, although in my experience there is widespread agreement that retributive punishments should have limits and not involve torture. To say that "justice" demands a death sentence does not tell us what "justice" is or what the limits to just punishment should be.

3. To be justifiable, the retributive power of a punishment should affect only the guilty, and not the innocent.[80]

4. When the state seeks, imposes, or carries out a death sentence, virtually all friends and foes of the death penalty who I have met all acknowledge that the inmate's family often suffers, to varying degrees. But many do not appreciate or acknowledge that the family can often suffer as much or more than the prisoner himself,

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76. Woodson v. North Carolina, 428 U.S. 280, 322 (1976); Gregg v. Georgia, 428 U.S. 153, 188 (1976).

77. ALBERT CAMUS, REFLECTIONS ON THE GUILLOTINE 30 (Richard Howard trans., Fridtjof-Karla Publications 1959) (1957).

78. *See supra* Part I.

79. *See supra* note 5 and accompanying text.

80. *See* Hart, *supra* note 32, at 231.

and that this suffering disproportionately affects women and children. A crucial difference between the inmate and his family is that the family is not being punished in the aftermath of a conviction for the violation of criminal law. We usually think about erroneous convictions when we think about how the death penalty can punish the innocent. The suffering of the inmate's family is another example of how the criminal justice system punishes people despite their innocence. The executioner certainly and inevitably catches the guilty with his net, but he also catches innocent bystanders.

The inmate's family often suffers just as much as the inmate himself when dealing with retributive impacts of the death penalty. As the execution approaches, the inmate and family will do anything they can do to try to stop it, but the inmate has limited options and the family may very well feel that they cannot leave any stone unturned and become more frantic with their efforts to stop the process. Both the inmate and his family may feel helpless. But just like in situations that many families experience when facing an impending death from natural causes, the inmate or patient and his or her family are in the struggle together. In my work with death row inmates and their families over the past thirty-five years, I have come to believe that the retributive impact of the death penalty is often felt just as much by the family as it is by the inmate. The full brunt of the retributive impact falls on the family after the execution, and the pain, stigma, and anger can last a lifetime. As with the families of homicide victims, life is never quite the same.

5. Even when a prisoner "deserves" to be punished, it is impossible to precisely calculate how much punishment anyone "deserves" for any behavior; such calculations are necessarily filled with error. And just because someone deserves something does not mean we are obligated to give it.

6. The decision to sentence someone to death is a decision made by citizens and their elected representatives, and no state is obligated to impose a death sentence. As a society, we need to acknowledge that the decision to impose the death penalty and the suffering for the sake of suffering it brings to the inmate and his family is an option chosen by the state; we need to take responsibility for the harm it causes to secondary victims, whether intended or not it.

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In my experiences working with death row inmates and their families, the added retributive power of a death sentence over and above LWOP usually impacts his family, and other innocent people

with whom the inmate interacts, as much as or more than, it impacts the inmate himself. Unlike the inmate, most family members and others in the inmate's social circle have not been convicted of any criminal offense, and certainly not for the capital offense for which the inmate is being punished. The death penalty operates more like a shotgun—affecting many targets—than a rifle, which has an impact on only one target. It creates an "ever widening circle of tragedy."[81]

The above conclusions support several reforms in death penalty law and procedures. The collateral damage that the death penalty does to the defendant's family during their loved one's trial, confinement, and execution is a significant liability of capital punishment, and therefore should be included in any comprehensive cost-benefit assessment of it. Some observers, for example, may see the harm done to families of the offender as counterbalancing any alleged benefits that the death penalty might provide for the family of the victim.

Alternatively, recognition of what the family of defendants and inmates facing the death penalty go through may lead some funding sources to expand the services of "victim advocates" so they can assist not only the victim's family, but the family of the offender as well. Prisons might also consider expanding the assistance they provide to the families of inmates, especially death row inmates, which today are seldom and inconsistently available (often only through the prison chaplain). Finally, we should think about whether the alleged benefits of the death penalty are really worth the pain that the punishment inflicts on the family members who are inevitably impacted both by the many years that their loved one struggles on death row, and their lifelong memories of those struggles, which stretch on after their loved one is executed.

81. Turnbull, *supra* note 37, at 54.